

The Growing Role of the Courts and the New Functions of Judicial Process — Fact or Flummery?¹

Per Henrik Lindblom

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1 Translation: Rosemary Nordström (“rosemary.nordstrom@telia.com”). An earlier version of the paper was published (in Swedish) in *Svensk Juristtidning* 2004 p. 229 ff. I have on several occasions explored some of the issues dealt with below in somewhat greater depth; see e.g., the anthology *Studier i processrätt*, 1993 (cited as *Studier*), p. 7–136 and *Progressiv process*, 2000 (cited as *Progressiv process*), p. 19–188. See also my papers in *JFT* 1993 p. 3 ff., *Lakimies* 2002 p. 531 ff., *Retfærd* 2001 p. 22 ff., *Svensk Juristtidning* 2002 p. 1 ff., *Festskrift till Hans Gammeltoft-Hansen*, 2004, p. 411 ff. and *The American Journal of Comparative Law* 1997 p. 805 ff. Please see these works for references and elucidation of certain opinions.

Social developments — and in particular endeavours towards privatization, deregulation and decentralization — have nurtured the growth of the social role of the judiciary in Eastern Europe while attempts to curb litigation have been made in the United States. The judiciary has played a modest role in Sweden compared to the situation in many other countries, but the foundation for cautious expansion has been laid in recent years. This has occurred primarily through privatization of public supervision and control (“citizens’ enforcement”), the legislative approach (“vague law”) and membership in the European Union (“the juridification of politics”). If one breaks down the role of the judiciary to the social purposes of judicial process — its functions — one lays bare a shift of power from the legislative and executive powers to the judiciary by means of increasing judicial review in a broad sense (that is, including review against EC law and the European Convention on Human Rights), administrative review and judicial lawmaking. The preventive and reparative functions may also take on greater importance if efforts towards equal “access to justice” continue. These functional changes are accompanied by certain new tasks that involve the “integration function” and the opportunities of citizens to utilize the courts — sometimes in altruistic litigation — as an arena of legal policy reform and a forum for moral discourse. In some areas, greater demands are being expressed that judges should be guided by prevailing social values and be activist, creative and cognizant of behavioural science (“therapeutic”) both when presiding over trials and when handing down rulings.

1 Flummery

“We are living in a transitional era! Rapid internationalization is creating a globalized globe! Sweden is moving closer to Europe! Law is being made in an entirely new environment! The courts are playing a dramatically growing role in society! The functions of litigation have changed radically in both criminal and civil cases! The pace of development is speeding up all the time!”

We all recognize these types of statements as flummery, bombastic clichés, sometimes spewed forth as linguistic monstrosities. Even though they are empty, hackneyed truisms, they have delusions of grandeur in terms of content and newsworthiness: “We are living in a transitional era!” Well, sure, but that is always true, in one respect or another. Globalization, yes thank you very much, but the globe can hardly become more global than it was to start with. And Sweden has always been a part — and not that insignificant a part — of Europe, has it not?

Can all theses of this type then be put in the cliché file? I intend to show that at least the statements implied by the title of this paper are not flummery, but rather expressions of fact. Granted, these developments have been decades in the making and it is probably banal to claim that the pace is getting faster or that we are in a particularly intense phase right now. Here in Sweden, a country extremely averse to extremes, most things go slowly. Very slowly.

But some things have happened and others are on the way.

2 The Growing Role of the Courts in Society

2.1 *The Role of the Judiciary and Privatization, East and West*

2.1.1 Exaggeration?

As far back as the late 1980s, predicting that the courts would be given an increasing role in Swedish society seemed like a fairly sure bet. Even before then, the foremost researcher in comparative procedural law, Mauro Cappelletti, had foreseen “a profound, worldwide metamorphosis of the judicial process ... a judicial process revolution,” which had begun to manifest itself in the “hugely” increasing “lawmaking power of the judge.” Other key words in the context were the “constitutionalization” (judicial review), “internationalization” and “socialization” (“access to justice”) of the courts.² Although it perhaps could be termed overblown, Cappelletti’s stirring account nevertheless seemed an adequate manifestation of the truth that a development had occurred and that it started several decades ago.

And so the courts were confronted in the 1980s with rising ambitions towards privatization, decentralization and deregulation (the dream of an entirely free market, which paradoxically enough seems to require particularly detailed regulation). These trends, whose expression had been growing increasingly strong in large parts of the western world for some time, also made substantial inroads in political parties on the left of the political playing field. A corresponding development had begun to make an impact in a spectacularly disintegrating Eastern Europe. These evolutions (in some areas one could even, and rightfully so for once, talk about a paradigm shift or something even more subversive) may very well lead to an increase in the social role of the courts. But the consequence may also be a contraction.

2.1.2 Eastern Europe and the Former Soviet Union

The disintegration of the state socialist system in the former Soviet Union and Eastern Europe exposed the need for strong and independent courts. I daresay development has (slowly) gone towards achieving that end and is still moving in that direction. The principle of the rule of law is predicated on effective and independent courts. The task of criminal procedure may then be to provide citizens protection against injustice at the hands of the state, at least equally to that of being a repressive tool in combating crime (section 3.2 *infra*). And the role of the courts as a forum for private, peaceful dispute resolution within the framework of civil procedure is growing as more state property is transferred to private ownership, bureaucracies are dismantled and the free market is given greater latitude.

The starting point of the disintegration of Eastern Europe – a remarkable antithesis to the accelerating, simultaneous integration of Western Europe – was certainly not such that existing courts were capable of meeting these types of needs. The rule of law, privatization and deregulation were not spoken of (nor even whispers permitted) in the communist states. The dissolution of the Soviet

2 See *Studier* (supra note 1) p. 63 ff.

Union and the Eastern Bloc led to strong pressure to expand the power and social role of the judiciary in both criminal and civil procedure.

2.1.3 The United States

Privatization, liberalization and decentralization thus strengthened the position of the judiciary in the east. But developments in the United States in the 1980s may serve as an example of how such elements can also lead to the opposite, a shrinking role for the courts. And of course, to be guilty of an understatement, the starting position “over there” was utterly different. Seeing the courts as protection against abuse and injustice committed not only by other citizens but also by the state certainly enjoys a long and honourable tradition in Anglo-American law. Constitutionally, the U.S. courts have always stood strong against the legislative and executive powers. They still do.

One can hardly claim there has been any significant change with regard to criminal cases beyond heightened interest in the status and rights of crime victims. Criminal procedure is not amenable to privatization back to the level of pistols at dawn, although quite a bit can be done, and has been, to take cases out of the courtroom. Things were different in civil procedure. Privatization in American society had already gone so far by the 1980s that it would seem there was not much left undone.

One would think an encouraging attitude towards private process as a market regulator would be highly consistent with the international currents of privatization. Nevertheless, the “New Dealers,” the Roosevelt Era and “the Spirit of 1938” (when the Federal Rules of Civil Procedure were introduced, along with a positive, expansive view on civil litigation) are usually contrasted with “the Spirit of the 80s,” whose hallmarks were “privatization and the new formalism.” These catchphrases were connected to demands for deregulation and decentralization and attempts to *constrict* the role of the judiciary, especially with regard to the number of civil trials in general court. This played out against the following backdrop.

A new type of process, “public law litigation” (PLL) and “public interest litigation” had grown progressively stronger in the 60s and 70s. The courts were used as forums for often altruistic attempts to seek justice and legal development on behalf of entire groups of citizens in new fields such as consumer and environmental law, as well as in the area of human rights (various forms of discrimination, prisoners’ rights, etc). The litigants were private citizens and private organizations, but occasionally government agencies as well, who acted in the public interest; the intent was not always even to win the case, but perhaps equally as much to bring social problems to light and sway opinion in order to effect change by judicial or legislative means.

Political sentiments in American society during and after the Vietnam war, which were also reflected in appointments of litigation-friendly judges all the way up to the United States Supreme Court, contributed to the trial being used and regarded as a means of achieving individual redress and reparation. In PLL, this primarily involved bringing about behaviour modification, prevention and future-oriented changes for citizens, at times in the form of representative actions, of which class action suits are the most well-known example. A similar prospective trial in court was seen in some areas as a more accessible road than

the legislative process (although according to some a less successful and more time-consuming one) towards attaining certain social goals, especially when it came to providing for new types of group claims of the type that surfaced in the wake of the post-industrial mass-production and service society. But the classical individualistic and retrospective civil procedure (directed only at the parties and whose primary purpose was to restore the plaintiff to his pristine condition before it was besmirched by the alleged violation of rights) seemed also to be expanding. Civil litigation went forth and multiplied – and trials got bigger. Rumbblings of a crisis in the courts began.

The causes of legendary American litigiousness are many. The negative experiences of trust in the powers that be handed down from generation to generation among immigrants (a dictatorial state, the church, powerful guilds and corporations, etc), the costly liberation from European colonial powers and the Civil War, as well as the consequent lofty expectations of local and personal independence and anti-federalism: all may be seen as explanations of a basic attitude that prioritizes systems in which individuals assert their personal rights – and tolerate no injustice – without resorting to asking Big Brother or Big Sister for help. It was up to individuals to fight for themselves. Once society had developed, the Gunfight at the OK Corral moved into the courts with adversarial proceedings and strong lay influence, which also applied to civil cases. It is the parties who act and the jury that rules, not only in the matter of guilt in criminal cases, but also with regard to the damages awarded in civil cases.

American litigiousness and the design of plaintiff-friendly civil procedure and related regulations should be understood against this historical backdrop. This applies for instance to rules on responsibility for trial costs (the American no-fee rule), the lack of alternative means of achieving reparation and prevention and the extreme law of torts that permits juries to award sky-high damages. The surfeit of lawyers and the entrepreneurial spirit of some members of that profession (“ambulance chasers”) are equally significant, as well as the system by which the plaintiff’s counsel assumes the running costs of litigation and is paid only if he or she wins the case (but the rewards are then all the juicier) in the form of “contingent fees” in the neighbourhood of one third of the often enormous awards. The requirements for bringing an action are also low and are connected to generous options to amend the suit and extraordinary opportunities to demand information from the opposing party in pretrial discovery. It has always been comparatively easy and risk-free for Americans to go to court to demand their rights.

As we move ahead to the 1980s, claims were made, especially from business, that the country was experiencing a “litigation explosion” that entailed huge financial outlays and risks of significant goodwill losses for the defendants. Plaintiffs faced no costs, even if they lost, while the lawyers could (and still can) earn their annual income, or more, on one victorious trial. The system could, according to some, be used for frivolous lawsuits and “legal blackmail.” Only a fraction of the vast number of civil actions led to a ruling (which is however normal in all countries); most ended with fat settlements, perhaps at times agreed to with the primary purpose of avoiding bad publicity.

There is not now nor has there ever been consensus as to whether “the litigation explosion” and “legal blackmail” actually exist. Many believed these phe-

nomena were myths and that the increase in civil litigation was a natural consequence of social development.³ But some parts of the business community and Republican politicians described the plaintiff-friendly civil procedure as a serious and increasingly threatening “competitive disadvantage” in the market, both at home and abroad. Presidents Nixon, Reagan and Bush Sr. and their administrations, in the latter case often represented by Vice President Quayle, declared firm ambitions to put a lid on litigation by means of repeated attempted murder of public legal aid and reduced support for “public law litigation” (in part by means of judicial appointments) in the areas of consumer, environmental and discrimination law, as well as through curtailed public initiatives for civil litigation in the areas of law mentioned. Long term, they also managed a corresponding change in attitudes all the way up to the Supreme Court by means of judicial appointments.

The eagerness to tone down the plaintiff-friendly and thus litigation-facilitating elements of civil procedure were also manifest in suggestions for changes to the rules on trial costs (responsibility for the opposing party’s costs, attorney liability for frivolous lawsuits, etc) and to the proceedings themselves: a stop to excessive discovery and curtailed usage of expert witnesses, higher standards for precision when complaints are filed, reduced opportunities to amend the suit during the course of litigation, minor adjustments of the class action rules, etc In parallel, increasingly energetic expansions of the use of alternative dispute resolution (ADR) outside the courts were advocated, despite cogent protests on the parts of some.⁴ Federal civil procedure was depicted as something harmful (to business) that should be avoided. ADR became a mantra that is still being far too uncritically chanted all over the world.⁵

Not much came of the proposed changes to the law regarding civil procedure; the pace of reform is often much more modest than the demands for it, even in the United States.⁶ The cries of “litigation explosion” and “crisis” seem to have waned somewhat. Endeavours to develop alternative (privatized) dispute resolution, on the other hand, have been successful; as in Sweden, ADR is a profitable business and market forces seem to be working effectively here. The eradication of public legal aid and the reduction of state-initiated public interest litigation seem occasionally to have put a damper on litigiousness. Nevertheless, I daresay the central importance of the courts in the United States seems essentially unshaken. One certainly cannot speak of a growing role; perhaps a cau-

3 See my essay *The Privatization of Justice*, in *Law and Reality, Essays on National and International Procedural Law in Honour of Cornelis Carel Albert Voskuil*, Dordrecht 1992, p. 201 ff.

4 See in particular Fiss, O, *Against Settlement*, 93 *Yale Law Journal* (1973) p. 1073 ff.

5 See my paper *ADR – The opiate of the legal system?* (to be published in V. Varano & N. Trocker, ed., *Access to Justice: Efficiency, Quality and ADR*, Torino 2006 or 2007). The article is also published in Swedish in *Svensk Juristtidning* 2006 p. 101–130.

6 See *Studier* (supra note 1) p. 86 ff. and most recently Chase, O. G., *Reflections on Civil Procedure Reform in the United States: What Has Been Learned?, What Has Been Accomplished?* in N. Trocker & V. Varano, eds., *The reforms of civil procedure in comparative perspective*, Torino 2005, p. 163 ff.

tious shrinking in the wake of the trend towards privatization would be more accurate. This should however be considered in light of the extraordinarily strong status of the judiciary at the outset. But it is interesting that the role of the courts has been called into question, primarily by right-wing politicians and market advocates who, oddly enough, seem to view civil procedure more as a threat to reputable business and the free market than as privatized protection of the same.

Privatization, liberalization and decentralization are thus leading to demands for greater judiciary power in the former socialist states; the “turn to the right” in Eastern Europe and the former Soviet Union will probably result in stronger courts and we can expect the trend to continue.⁷ In extreme free-market economies like the United States, however, corresponding trends seem to be having an opposite, but more limited, curbing effect on the role of the judiciary in society.⁸

2.2 *The Role of the Judiciary and Privatization in Sweden*

How then should one describe Swedish developments? Has the role of the courts grown or shrunk and what can we expect in future? Are there any discernable connections with political trends?

Following several decades of an essentially unbroken hold on power by the Social Democratic party it became apparent with the non-socialist victory in the 1991 general election and as the wave of privatization approached Swedish shores that the starting point was entirely different than in the United States. By the time the shift in power took place, the social role of the judiciary in Sweden was almost stunted. As far as can be judged, this was entirely consistent with Social Democratic policy to that point. A melange of arguments for the democratic division of power, political principles of equality, strong belief in state supervision and control and in large organizations as the primary means of influence and compensation, an initially justified distrust of the penchant of courts and judges to get involved in the reshaping of society once so ardently desired by the Social Democrats: all of this and a great deal else contributed to a decades-long situation in which the judiciary exercised considerably less influence in our society than in many other countries, despite the high number of judges by international comparison.⁹

One can say that while the American electorate has been disinclined to confer an entirely dominant position on the legislative and executive powers and therefore put their trust in the courts, the Swedish government has been disinclined to give the courts a growing role and instead has put its trust in legislation, public administration in the form of state supervision and control and in large organizations. The direction indicated by Minister of Justice Lennart Geijer as far back as

7 *But see* Jonsson, A, *Judicial Review and Individual Legal Activism: The Case of Russia in Theoretical Perspective*”, diss. Uppsala 2005.

8 The claim is however predicated on allowing oneself to brutishly put an equal sign between the left and Democrats and the right and Republicans. The reality is of course not that two-dimensional.

9 And so e.g. the defendant-friendly, nearly process-deterrent civil procedure (high trial costs borne by the losing party, high requirements to bring an action/apply for summons, limited opportunities to amend the suit, etc).

November 1975 is characteristic: the goal was to limit the number of trials in both criminal and civil cases. According to Geijer, this was desirable for both human and budgetary reasons, as well as the need to alleviate stress on the courts.¹⁰

It is easy to scoff at this ministerial initiative and one may wonder that it was proposed at all. From an international perspective, the situation already appeared conducive to keeping litigation on a short rein, at least in civil cases. Nearly all of the factors listed supra as explanations for American litigiousness (history, lack of alternatives, lay influence, rules on trial costs, the plaintiff-friendly design of civil procedure, the role of lawyers, etc) were conspicuous by their absence in Sweden, or rather by the presence of their opposites. Certainly, the legal aid system was still in the build-up phase and had already exceeded the opportunities afforded citizens of most other countries. But this upwards curve would soon take a nosedive, so much so that the Swedish legal aid system today has become a disgrace rather than a model. The extensive, social insurance-like litigation support system that Minister Geijer helped create has – by nearly total political consensus – been largely shifted to miserly private legal insurance policies, perhaps as an unconscious pilot project in the incipient march away from the social insurance systems and the Swedish Model.

In other respects, one can also see a still ongoing slow transition from a purely liberal, individualistic view of litigation towards more “social” civil procedure. But these changes took place overwhelmingly outside of the liberal and individualistic Code of Judicial Procedure (1948), for instance through the establishment of special courts and other trial bodies with (excessively?) strong representation of group interests, the recently mentioned expansion – nowadays unfortunately turned in the other direction – of public legal aid, and the law enacted a few years ago that opened the door to class actions in general courts and environmental courts.¹¹

In short, by the end of the 1980s, the social role of general courts after decades of Social Democratic power could best be described as stunted. Despite our position on the bottom rung, or perhaps because of it, there was good reason a bit more than a decade ago to predict that that judiciary would play a growing social role for the rest of the last millennium and that the expansion would continue at least some distance into the present one. The prediction was based not only on the recent governmental shift and the seemingly greater openness of non-socialist parties to judicial process (including judicial review), nor on the undeniable fact that if you are at the bottom the only way you can go is up. This was accompanied by the accelerating pace of legislation and perhaps even more to the point, the legislative approach of enacting framework laws and general statutes (“vague law”) and the stronger emphasis of rules on human rights in the Swedish Constitution and international conventions; all of these are elements predicated upon judicial trial to be concretized. When the legislature delegates to

¹⁰ See *Studier* (supra note 1) p. 50.

¹¹ See *Studier* (supra note 1) p. 90. Re the question of whether the Swedish Code of Judicial Procedure is liberal or social, see Lindblom, P. H. in *Svensk Juristtidning* 2002 p. 531 ff. Re the Swedish law on class actions, see the same in *Svensk Juristtidning* 2005 p. 129 ff.

the courts the right to flesh out laws, and sometimes even to make law, it necessarily gives the courts a growing “political” role.

In contrast to the United States, the rising tide of privatization, liberalization and decentralization in Sweden could be expected to contribute to the expansion of the role of the judiciary in two ways. The dismantling of state and municipal ownership entails a transfer of disputes from public administrative agencies to the general courts. A reduction, or at least deceleration, of public supervision and control in areas like environmental and consumer law leads to a transfer of responsibility to market actors. Trust is put in the self-control of business and greater elements of “citizens’ enforcement.” When their rights are infringed, “vigilant individuals” are told to go to court rather than seek help from government agencies and ombudsmen or the organizations to which the individuals belong.

But the factor that seemed most significant to predicting a growing judiciary role was the so-called “move towards Europe.” The incorporation of the ECHR into Swedish law in 1994, cooperation with the EC and later membership in the EU entailed, as expected, a growing role for the law and the courts. Swedes began taking the European Court of Human Rights in Strasbourg seriously even within the Social Democratic party, which regained power and with brief interruptions remained the party of government. Issues of human rights and judicial review were brought to the fore in both the Constitution and the everyday business of the courts. The legislature was compelled to craft greater opportunities for judicial review of public administration (e.g., by means of the Act on Judicial Review of Certain Administrative Decisions). This was joined by the expanding direct and superordinate impact of EC law, which was channelled not only via the European Court of Justice in Luxembourg, but also through the national court organization, and then essentially lacking application of the principle of manifest error that applies to judicial review according to the Swedish Constitution. In this sense, one may say that these days all Swedish courts are EC courts.¹²

On a more general level, one could also predict that “Europeanization” would lead to an expanded role for the courts because law and judicial decision-making in general and trials in particular have traditionally enjoyed a stronger position in (most) EU member states than had been so up to that point in Sweden. There was talk of the juridification of politics and the politicization of the law, which are of course about the same thing. Certain politicians were grateful, those in other camps simply forced, to clothe or disguise burgeoning problems of evaluation and balancing of interests in the costume of the law and to hand over uncomfortable decisions (such as to close the Barsebäck nuclear power plant, build the Öresund Bridge and build motorways and thoroughfares in Stockholm) to the courts. When the courts later filled these orders with outcomes other than those expected, delight was not always universal, even among politicians who had long advocated greater judiciary power. A rise in power in one direction usually means a decline in another and few are happy to let power slip out of their hands.

¹² See *Studier* (supra note 1) p. 436.

There were thus many factors indicating that the social role of the Swedish judiciary would increase. But there were also some that made such a development less likely or that would at least potentially entail a moderation of the increase and new elements of this nature have come into being. I refer, for instance, to the less obdurate but still durable Social Democratic resistance to judicial trial, the rising interest in alternative dispute resolution, the privatization of public legal aid, the superior position of the ECHR and EC courts and greater distance to the courts consequent upon the successive reorganization of the court system, including the closure of a number of district courts. The growth-promoting elements are clearly dominant, however, and I do not believe that fewer and stronger courts of original jurisdiction need entail any weakening of the social role of the judiciary, but rather the opposite.

2.3 *Separation of Powers — an Olympic Zero Sum Game?*

That the social role of the Swedish judiciary would grow through the end of the millennium could thus be forecast by the late 1980s. The predictions have essentially come to pass. It is certainly possible that litigation may have been curtailed in a few areas of law (large business disputes, family law cases and traffic cases, perhaps) within the framework of very modest growth overall, if one can even speak of a quantitative increase. More important is the qualitative growth in the form of larger, more complex and new types of cases. The shift of power to the courts is clear, not least as a consequence of the mass media's more intense coverage of trials. Internationally, we have already begun hearing sharp warnings of continued development in the same court-dominated direction (see section 5 *infra*). Still, there have so far been no dramatic changes in our country.

The powers of government are traditionally divided into three branches. Most would probably agree that two of the parts are the legislative and the executive powers – in a narrower sense the Riksdag (Swedish parliament) and the Government. On the other hand, one still gets different responses if one asks people, law students for instance, what the third branch of power is. Some (abroad, almost all), say the judicial branch, while in Sweden most say the press, the mass media. A sign of the slowly growing role of the judiciary is that increasing numbers in Sweden are also referring to the courts. But that does not mean that the influence of the mass media has declined. On the contrary, much of the increasing news coverage of courts and trials is probably not only an effect of the development but also a cause. Unquestionably, the media also have even greater importance in society now than they did a half century ago. Clearly, the judiciary has not gained power by dipping into the fourth estate's well.

At the expense of who or what then do shifts of power of this kind take place? In constitutional contexts one speaks often of division of powers. Laymen ask whether the Swedish word for “division of powers” [“maktdelning”] actually means *separating* power into watertight bulkheads or *sharing* power, with the holders of power dealing it out to each other. The term division of powers seems in Sweden to be used in both ways. But one must reasonably first divide something before one can share with another the portion one has been allotted. The Swedish Constitution is based on the principle of government by the people (“All public power in Sweden proceeds from the people”) and we have never had any strict Montesquieuan “separation of powers” in our country. But one can

nevertheless see a shift towards something called a “balance of powers,” a post-Montesquieuan system based on “reciprocal checks and balances.” The increasing political role of the judiciary, the growing “political tasks” of balancing – controlling – the legislative and the executive powers, may be seen as examples of how the territories of power overlap and of how the courts, albeit themselves controlled by the other powers, are being given new controlling functions despite the principle of “government by the people” that imbues the Instrument of Government. Similar overlaps exist not only between the three traditional branches of government, but also between other strong repositories of power in society like the mass media, the market, business and large non-governmental organizations.¹³ An image of a number of interlocking Olympic rings appears. The rings cannot be separated; they encircle their own unimpinged fields, but they also overlap, weave in and out of, one another.

As long as total governmental power stays the same – or lessens – in relation to private centres of power in society, the division or sharing of power among the three governmental powers may be understood as a zero sum game. If the social role of the judiciary increases, it does so at the expense of the legislative and/or executive powers. One of the rings of power – its colour I will leave unspecified – is the judiciary. These days, it both overlaps and is overlapped by the rings of the legislative and executive powers. This is apparent as soon as the courts fulfil their traditional social tasks, as indicated in the preceding discussion. If one breaks down the growing and complex social role of the judiciary into such concrete duties, into the functions (purposes) of judicial process in general courts and administrative courts in various types of cases, one assembles a better basis for assessing whether and how the judiciary’s role has grown more important. One can then also see whether any new tasks have been assigned. In the following sections, I will attempt such a deconstructivist concretization of functions.

3 The Traditional Functions of Procedure¹⁴

3.1 *Civil Procedure*

The primary and overarching function of civil procedure is to contribute, on the general and individual level, to maximum *realization* of the values – the purposes – behind the substantive law at issue in the process. Procedure is an annex to the legislation. Substantive law is predicated on procedural law and vice versa.

On the *general* level, realization is effected through *behaviour modification*, that is, *prevention*, which in turn is achieved through “external compulsion” in the form of cost internalization and/or voluntarily by means of the shaping of

13 Re the role of NGOs in the international arena, see Lindblom, Anna-Karin *Non-Governmental Organisations in International Law*, Cambridge 2005.

14 Re the search for truth, security, legal protection, etc, as the goals of trial, see *Progressiv process* (supra note 1) p. 58 ff. and 198 ff.

morals (“internal compulsion”).¹⁵ The trial is then oriented towards the defendant and, first and foremost, his peers (that is, all of us). The goal is to encourage citizens to act in accordance with the purposes of the law. The trial is thus prospective and proactive; it is aimed more at identifying sanctions that will have the intended impact than at deciding to the penny the amount of damages that most closely corresponds to the violation of rights suffered by the plaintiff.

As I see it, behaviour modification is brought about more through awareness that an effective sanction mechanism attached to the law exists and is maintained than through the spread of knowledge about individual trials and rulings. Prevention refers thus not only, or even primarily, to the purposes behind the specific substantive rules of law at issue in the individual trial. Behaviour modification refers to the entire body of legislation: “it is just as well (for the sake of comfort and profit) to obey the law.” In a utopian phase of development, the courts need not actually fulfil their functions in individual trials. An effective defence does not have to go to war to fill its function; quite to the contrary, it has done its job superbly if it never has to be used. The same functional paradox applies to civil litigation with respect to behaviour modification.

On the *individual* level, the purpose of civil procedure is *reparation*, that is, *redress* and *conflict resolution* between the parties to the legal action. The process is then retrospective, reactive and oriented towards the plaintiff. The point is to go back and determine exactly the compensation that corresponds to the alleged violation of rights. But the process is proactive to the extent that conflict resolution in the case at issue may facilitate and influence the future relationship between the parties.

The function of civil procedure is a disputed issue that has formerly been seen as a struggle between these two perspectives: behaviour modification *or* conflict resolution. One should however note that the models are not polar; each is rather predicated on the other. It is impossible – until we have reached Utopia – to achieve behaviour modification absent realistic opportunities for citizens to sue to demand compensation. And general behaviour modification happens through conflict resolution in individual cases. It is a matter of an interaction of functions, a cross-fertilization between behaviour modification and conflict resolution. The design and application of the regulatory system is however sometimes strongly influenced by the function to which one wishes to award priority.

Current literature brings to the fore a couple of civil procedural functions in addition to the two just mentioned. Both are political in a certain sense. These are the control functions of judicial trial and judicial lawmaking. Neither can be easily categorized under the aforementioned overarching function of civil procedure, as they have nothing to do with effecting realization of the purposes behind the substantive law at issue in the particular case, but rather with acceptance of norms of higher (or ancillary) value and with the making of new law.

The *control function* can be divided into two forms and refers to judicial review in the broad sense and administrative review, that is, judicial control of the *legislative* and the *executive* powers. Control of the executive power is actualized in civil litigation in general court only in exceptional cases; that task rests

15 Re penal procedure, *see infra* section 3.2.

with the special administrative courts, where it is performed for instance through application of the Act on Judicial Review of Certain Administrative Decisions and administrative review within the framework of municipal law.

The national legislature (the Riksdag as a body and individual members of parliament) is controlled by judicial review in the narrow sense in general court; that is, when the court tries whether the substantive law at issue in the case is compatible with superordinate norms such as the Constitution. The same essentially applies when a rule is overturned because it conflicts with EC law or certain international conventions, especially the ECHR, which can be described as both superior and ancillary to priority law. The original national rule is then set aside as a consequence of vertical subordination in relation to EC law or the ECHR or, if you will, when there is a horizontal collision with such rules. When I use the expression judicial review in a broad sense, I am including that type of normative control.

A common feature of the types of norms upon which judicial control is based is that they are usually not concrete and precisely drafted, but instead vague and written in broad terms, thus providing considerable latitude to courts in their application. Certainly the goal in these cases as well is to facilitate maximum realization of the values behind the applicable rule system. But as mentioned, this does not apply to the relevant national substantive rule of law (in the narrow sense) as in behaviour modification and conflict resolution; on the contrary, the result is rejection of the law and thus of the national legislature's work to the extent that the rule is not applied in the matter at issue. In the narrow sense of the national rule of law I am excluding EC rules of law and the provisions of the ECHR, even though they are now incorporated into Swedish law.

Administrative review (review of administrative decisions by the Swedish Supreme Administrative Court) takes place in the overlapping area between two of the Olympic rings, in the segment of the circle that joins the judicial and the executive powers. Likewise, judicial review of laws against the Constitution, EC law and the ECHR occurs in the overlap between the legislative and judicial powers. *Judicial lawmaking* also falls within the same shared segment of the circle. In none of these cases is there a crossing of territorial borders without a passport: the boundaries are crossed at the delegation of and sometimes the request of the legislature (at the national or EU level) and the court is obliged to perform the task *ex officio*.

Delegation of judicial lawmaking is often made through the legislative approach when the legislature has chosen the "vague law" method in national law (including the Constitution) or EC/ECHR law. Judicial lawmaking is sometimes expressed through the establishment of precedent, but not always. Judicial lawmaking is sometimes compelled in lower courts that cannot refer a case to a higher court because the situation has not been foreseen by the legislature or resolved in earlier case law. And the building of precedent is not always an expression of judicial lawmaking; it usually involves clarification or expansion of the law that does not constitute new "judge-made law," but primarily facilitates behaviour modification and conflict resolution. The building of precedent by the Supreme Court thus does not constitute an independent procedural function, but can in civil litigation rather be categorized under one of the four traditional functions discussed above: behaviour modification, conflict resolution, judicial re-

view and judicial lawmaking. I will discuss in section 4 *supra* the questions of whether these four traditional tasks have grown or declined in importance and whether any additional civil procedural functions have come into being.

3.2 *Criminal Procedure*

Criminal procedure may also be understood as having been designed according to two different models, which include a couple of additional functions. The social tasks of criminal procedure are largely, but not entirely, the same four as those of civil procedure.

The purpose of criminalization is to prevent people from taking certain actions. The main method is general deterrence, which is supposedly achieved by threatening to inflict discomfort and branding the action as socially reprehensible. Criminalization is indirectly associated with internalization of social norms; it is one of the factors that shape social customs and thus hopefully also induces citizens to behave according to accepted morals, voluntarily and as a matter of course. But criminalization *per se* cannot be justified with individual deterrence, atonement, redress for the victim of crime, etc (but perhaps criminal procedure and pronouncing and execution of sentence can).¹⁶

If criminal procedure is supposed to ensure fulfilment of the purpose of criminalization, its social function is thus behaviour modification through reinforcement of the deterrence and morality that criminalization is thought to bring about. Professor Ekelöf and others believe - or rather hope - ardently in the shaping of morals and volition (internal compulsion) that are believed to lead people to automatically refrain from committing crimes.¹⁷ Others dismiss this as quasi-psychological wishful thinking and rely more or solely on deterrence by means of threats of coercion or costs (external compulsion). We all know that both deterrence and the shaping of morals have their weaknesses; the control effects are not particularly impressive. But criminalization can hardly be entirely dispensed with and criminal procedure, like the passing of sentence and the subsequent execution of punishment, are prerequisites if criminalization is to be worth the paper it is written on. I am not saying that the crime control model is the only task or purpose of criminal procedure or even its chief function (although that has been the most common view in for instance the Continental, Canadian and former Swedish traditions).

Especially in Anglo-American doctrine, but to a rising extent in Sweden as well, criminal procedure is sometimes primarily understood as a shield against misuse of power and repression by the state. The judge is meant to preside over the trial and, if the conditions are present, convict the defendant and hold him accountable for his crime. But the judge's most important task is to ensure that the suspect is not subjected to unwarranted coercion and to critically evaluate the evidence so that innocent persons are not convicted and punished. Proceedings in criminal cases must be designed so that this can be guaranteed. This perspec-

16 Jareborg, N., in *Skuld och ansvar. Straffrättsliga studier tillägnade Alvar Nelson*, 1985, p. 2 f. och 28 (opinion in parentheses added here). Re the shaping of morals, see Träskman, P. O. in *JFT* 1998 p. 353.

17 See *Studier* (*supra* note 1) p. 121 f. with note 40.

tive on the function of criminal procedure is sometimes called “the due process model.”

In grossly simplified terms, one can say that the crime control model and inquisitorial process have dominated Continental and Eastern European criminal procedure for a long time, while the due process model and adversarial process have been upheld as the model in Anglo-American countries. In practice however the differences are not great, even though the crime control and due process models are to a great extent polar: that afforded the one must be subtracted from the other (for instance regarding the prerequisites for means of coercion according to criminal procedure). Those who subscribe to either system both must minimize the number of erroneous rulings: the wrongly *acquitting* according to the crime control model and the wrongly *convicting* according to the due process model. This antagonism is not however always present. Clearly, rules that facilitate careful presentation and evaluation of evidence are compatible with both models. And upholding the interests of due process facilitates public trust in the courts and thus also the crime control function.

Proponents of the due process model believe the notion of crime control prior to conviction is putting the cart before the horse: until convicted, the defendant has a legal right according to the “presumption of innocence” to be regarded as innocent (article 6.2 ECHR); the trial can therefore not be a means of controlling crime. Furthermore, it is the police investigation and preliminary inquiries that serve to determine whether a crime has been committed and if so by whom; the court is not a “truth commission.” That is not a matter of dispute. With the recently mentioned chronological perspective there is risk – as with critique of the behaviour modification model within civil procedure – of inordinately narrow focus on the individual trial. Criminal procedure may very well function (also) as an instrument of crime control if one looks at the procedure as a whole, as a social institution. And all rulings need not be convictions for the trial per se to act as a deterrent – to control crime – on the general level. It is enough that some are and that public trust in the courts is maintained.

I believe article 6 of the ECHR sends a double message, at least in countries that accept the appearance of the alleged victim as a party in criminal proceedings. The presumption of innocence in article 6.2, the maxim in dubio pro reo and other generally accepted expressions of the principle of favor defensionis may seem to the alleged victim (and possibly to the prosecutor) incompatible with the demand for an impartial court made in article 6.1 of the ECHR and chapter 1, article 9 of the Swedish Constitution. That the defendant shall be presumed innocent until proven guilty (usually) means that the judge shall presume that the prosecutor is wrong and that the alleged injured party is not a crime victim at all, and may even be a bold-faced liar. I find it difficult to see this as impartial. The hypocrisy that the guarantee of impartiality thus entails when set against the presumption of innocence (etc) becomes increasingly actualized the more the alleged victim is allowed back into criminal processes. This has been a distinct trend all over the world for some time, when for instance the alleged victim is used not only as a witness but is also given the right to join the proceedings and become a party, be represented by counsel, question witnesses, plead, petition for damages, submit evidence, etc, all of which are already possible under Swedish law. It would in this situation be more compatible with the demand

for impartiality if the defendant was presumed neither guilty nor innocent during the trial and if a favor defensionis were allowed only if it does not affect the alleged victim as a party to the action. Naturally, this need not preclude maintaining the same high standards of proof for a conviction.

Thus far we have discussed the crime control and the due process models. As with civil procedure, one may argue that criminal procedure also has a (political) *control function*: serving through judicial review (in the broad sense) as a guarantee that national penal law is not designed and applied in contravention of the superior and ancillary norms imposed by the Constitution, EC law and the ECHR.¹⁸ The judicial review function can sometimes be incorporated in the due process model.

The functions of criminal procedure thus coincide with some of the functions of civil procedure but not others. Behaviour modification and judicial review are common, but the due process model lacks an equivalent in civil procedure and conflict resolution is generally not considered a function in criminal cases.¹⁹ Another difference is that the maxim “*nullum crimen, nulla poena sine praevia lege poenali*” thought to apply to a certain extent within penal law means that the *lawmaking* function of the procedure is less apparent in criminal cases than in civil cases.

I will address the questions of which criminal procedural functions have become more important and whether any additional functions have come into being in section 4.

3.3 *Administrative Procedure*

The social function of administrative procedure is dealt with extremely charily in Swedish drafting history and documentation. If one indulges in free speculation and compares the presumed social functions of administrative proceedings to those of civil and criminal proceedings in general courts, one finds certain points of agreement. I believe that the parallels with criminal trials are the most salient, at least in tax cases, driving licence cases and cases involving involuntary care orders. This may be seen in light of the fact that the parties to the trial are not, as in civil litigation, two private legal subjects. As in ordinary criminal cases, the state or another public body is opposing the individual. The introduction of two-party proceedings in Swedish administrative courts does not fundamentally change this circumstance; we also have two-party proceedings in criminal cases.

Administrative trials can never become civil (private) trials in any reasonable interpretation of the word. Consequently, it often feels alien to speak of conflict resolution, redress and reparation as the purpose of proceedings in administrative court, although cases pertaining to matters such as public economic assistance and other benefits may have such elements; the benefit may involve compensa-

¹⁸ Re penal law, see Asp, P., *EU & straffrätten*, 2002.

¹⁹ See however infra in section 4.2. Re “polyfunctional penal procedure and a deconstructed functional control,” i.e., that the functional deliberation may vary, e.g., during different phases of the civil and criminal process in courts of original jurisdiction, courts of appeal and the Supreme Court. see *Progressiv process* (supra note 1) p. 210 and 217, and my essay in *Festskrift till Hans Gammeltoft-Hansen* (supra note 1) p. 418 ff.

tion for a social disability. Here as well, one can refer to realization of the values underlying substantive (administrative) law, in part in relation to public policy-makers who are given incentive to obey the law, and in part (and at least equally so) in relation to realization that benefits citizens on the individual level. In tax cases, for instance, the primary purpose of administrative proceedings is behaviour modification vis-à-vis individuals through the shaping of morals and deterrence on the general level, at least in those cases where the trial does not result in a reduction of tax liability.

The *overarching* function of the proceedings may, as in trials in general court, thus be said to contribute to maximum *realization* of the values behind the substantive law (in this case administrative law) and in both an onerous and favourable direction. As in criminal trials, in administrative trials this is mainly a matter of striking a balance between *effectiveness* and *due process* (compare to the crime control model), as in tax proceedings and cases involving involuntary care orders. It is the court's job to contribute to effective tax collection and to put at-risk children into care. But the administrative court is also tasked with safeguarding due process and the legal rights of individuals versus the state so that citizens are protected from unwarranted interventions into their financial affairs, rights of disposal and freedom, and so that their social rights are provided for. The administrative courts are "(f)or ordinary people...the guarantor that they will be given that which the Parliament has granted them in its laws and that they will not be compelled to or prevented from doing anything other than that which the Parliament has decided."²⁰

In addition to the tasks of promoting effectiveness and due process – and to a certain extent redress – administrative courts, like the general courts, have a (political) *control function*, or more accurately, two such: control of the legislative power and control of the executive power. In the first case, the court exercises *judicial review* in a broad sense with regard to the administrative rules at issue in the case vis-à-vis the Constitution, EC law and Sweden's obligations according to international conventions, especially the ECHR. In this context there is reason to remember that EC law is predominantly public law and is consequently tried much more often by administrative courts than by general courts. The second cross-territorial control is exercised vis-à-vis the executive power in the form of *administrative review* of various nature. This control function is also actualized considerably more often in administrative court than in general court. The court does have the capacity to set aside the executive power's decisions, even if they were taken by the Government, and extensive judicial review takes place pursuant to chapter 10 of the Swedish Local Government Act.

One may also look at appeals of administrative decisions to administrative courts (and not only judicial review pursuant to the Local Government Act) as a form of judicial control of the executive power, in this case public administrations. The control exercised in this case is more far-reaching as it does not only apply to the legality of the decision, but also to its "appropriateness." In this sense, some of the work of administrative courts may be characterized as judicial

20 Ragnemalm, H. and Anclow, P. in *Svenska Dagbladet, Brännpunkt*, 28 September 2003, translated to English here.

control of public administration and therewith understood as an expression of one of the control functions of administrative trial. But one may also in these cases look at the other side of the coin and regard the administrative courts as part (albeit an independent part) of the executive branch.

The administrative courts presumably also perform *lawmaking* tasks to about the same extent as in civil trials. "Vague law," which compels not only interpretation and expansion but also judicial lawmaking, is after all no less common within administrative law than within civil law. As in criminal trials, however, the scope for judge-made law should be greatest when it is to the advantage of the individual.

In section 4, I discuss whether there has been any increase or revitalization of functions in administrative procedure.

The matter of the functions and compatibility of administrative procedure with the tasks of general courts in these respects may be brought to a head if the administrative and general courts are merged. Plans of that nature have been aired off and on over the years, but have also been strongly opposed, including by some influential administrative judges. The question is once again a hot topic. There has already been a cautious drawing together over the old court boundaries in terms of premises and organization, for instance between certain district courts and county administrative courts with a joint manager and judge duty. By all that can be judged, experiences have so far been good.

Cohabiting relationships often develop into a permanent life together in forms similar to marriage that involve more than just a shared home and finances. Abolishing all differences between procedure in general courts and in administrative courts is obviously a major and complex reform project, but then again it is unnecessary. We already have different types of cases and matters and therewith procedure in both court organizations. The differences in procedure have lessened in recent years, in part due to greater elements of orality in administrative courts and the ongoing softening of the principles of orality, immediacy and concentration in general courts. Process forms are getting closer to each other from both directions and the new Act on Administration of Judicial Matters ["Ärendelagen"] shows that the gap can be bridged in a single court. Continued efforts towards flexibility and opportunities to choose among different forms of administration seem to be the most likely development. Conspiracy theorists may simply suspect that the reduction of the number of Supreme Court Justices of recent years was made in part deliberately to make room for a number of Supreme Administrative Court Justices and thus create a joint national Supreme Court.²¹ Further efficiency measures also seem possible with regard to courts of original jurisdiction and courts of first appeal in the ongoing reorganization of the judicial system.

²¹ See my paper in *Svensk Juristtidning* 2004 p. 22 f.

4 Functional Expansion and Renewal

4.1 *Functional Expansion*

I have found that the traditional functions of civil procedure, criminal procedure and administrative procedure can be grouped in four main categories: 1. Realization of the purposes of substantive law on the general level (behaviour modification, *prevention*, crime control and effectiveness), 2. Realization on the individual level (conflict resolution, *reparation* and due process in the form of protection against abuse by the government²²), 3. *Control* of the legislative and executive powers (judicial review in a broad sense and administrative review) and 4. *Judicial lawmaking*. Certain functional models are (partially) polar, others interact. As long as the courts have reasonable resources, reinforcement of one function need not always occur at the expense of another. And even if the number of trials does not increase, the judicial role may grow qualitatively in that more trials than before are significant. Several functions may also be actualized more often in the same case, and new and important types of cases may replace old ones that are less important.

Which of these four traditional functions have increased and which have decreased in importance in recent years? Are there any new ones?

The question of whether *behaviour modification* can be exercised through the courts at all is largely a question of faith. My assessment is that faith in the preventive function of civil litigation and damages has recently been somewhat strengthened after many years of strong doubt, perhaps especially in Sweden. It is more difficult to find enthusiastic preachers of prevention via crime control; the sceptics have long dominated the state pulpit and still do. The only question is which one believes most futile: achieving individual or general prevention.

The possibilities of achieving realization of the values underlying substantive law on the individual level, that is, reparation and private *conflict resolution* in court, have not increased in any obvious way. On the contrary, the shredding of public legal aid has most likely pushed more people seeking redress for a violation of their rights to approach bodies like the National Board for Consumer Complaints or to employ various forms of private alternative dispute resolution – or quite simply to relinquish their claims. The new law on class action suits, on the other hand, is an important step of principle towards improved access to justice. That applies both with regard to greater opportunities to achieve reparative impact and with regard to the judicial function of promoting preventive behaviour modification in areas including consumer law and environmental law. Even though there will probably be only a few class action trials, that does not mean the new process opportunities cannot fill important functions.

The important thing now is that efforts towards better access to justice in general courts continue. The privatization of state supervision and control that began several decades ago (see “citizens’ enforcement,” *supra* section 2.2 and *infra* section 4.2) takes on the appearance of legal hypocrisy if the road to court is blocked when citizens are directed to it. Real and equal access to justice is

22 The functions sometimes overlap, such as the due process function and the control functions.

crucial to the individual, but also to the behaviour modification function of legal process: “there is no self-start to civil litigation.”

The reparative and conflict-resolving function of judicial process may also have increased somewhat in the criminal area as a result of increasing interest in the injured party, and not only in financial respects. I will return to the reparative aspects in a broad sense in section 4.2.

Indisputably, the *control functions* of judicial process have become more important in both civil and criminal cases and in administrative court. In earlier editions of Ekelöf’s major work *Rättegång*, they were not even mentioned in the discussion of the social functions of trial. They can no longer be ignored. Even if the number of cases involving judicial review in a broad sense has thus far been limited in general courts, judicial review is a procedural reality. The importance of the control functions will probably keep growing in the future. It is interesting in this context that the differences between judicial review according to the Constitution and control against EC law seem to be flattening out, so to speak, from both directions. At times, it seems adherence to the principle of manifest error in the Constitution is less strict – it has even happened that manifest error was not even mentioned in connection with what appears to be judicial review in the Swedish Supreme Court – while a prerequisite of manifest error seems to be slipping into European Court of Justice case law (or was perhaps there from the start), even though there is no support in law for such a condition before a national rule can be set aside. Particularly with regard to the already significant control function of the administrative court, there is reason to predict an expansion; it must suffice here to once again mention EC law and note that the question of whether the Act on Judicial Review of Certain Administrative Decisions meets the demands imposed on us by our international agreements is still debatable.

Whether a continued increase of the *judicial lawmaking* function can be predicted is less certain. Capelletti’s grand vision in that respect seems unlikely to become a reality in Sweden, even though there has been some expansion consequent upon the legislative technique and the vagueness that often characterizes the declarations of rights actualized in the Constitution and international conventions.²³ The criticism (including that based on democratic principles) that can be aimed at the increasing shift of legal development to the courts is significant in the context. I will return to that in sections 4.2 and 5.

Hence, as I understand it, the four traditional functions of procedure have become more important in recent decades. This confirms the assertion that the judiciary is playing a growing role in society. That which remains to be explored is whether any new functions have arisen that are further contributing to the expansion of the judicial role and to answer the question of whether the growing position of the judiciary in the power structure is understood as positive or negative from the societal standpoint.

23 See supra in section 4.2.

4.2 *Functional Renewal*

A number of purposes or “values” judicial process is meant to fulfil in general and administrative court, such as meeting the democratic and psychological needs of citizens to participate in decisions that affect them personally, may be added to the four functional categories discussed. Such a “*participation perspective*” has been on the scene in Sweden for a long time and it seems to be becoming increasingly apparent, as in the discussion on the choice of process form, the principle of orality or written proceedings, and in connection to the demands for “access to court” imposed by the ECHR. The same perspective was dealt with early on in American doctrine, where in addition to participation, the mandate to protect certain “dignity values” was put forth in the debate. In that context, perhaps especially in criminal cases, people have emphasized opportunities for the innocent person on trial as well as the alleged victim to gain *justice* through the trial (these days no one dares to mention the word “revenge” in the context), and that judicial process can fulfil the function of facilitating *reconciliation* between the parties, sometimes by means of various forms of conflict resolution in connection with the trial (including settlement and mediation).

Whether this is a matter of entirely new functions in these contexts is an open question. It has rather to do with functional renewal in the sense that one brings to the fore and isolates certain elements and side-effects of the traditional functions such as conflict resolution (the reparative function). Nor is the function of the courts as a forum for *privatized supervision and control* (“citizens’ enforcement”) anything new; it is intended to partially replace public administration outside the judicial system. That the courts are taking over some tasks formerly performed by state and municipal regulatory agencies does not entail any new or different tasks or effects other than the conventional ones. This is a question of quantitative growth, primarily of the preventive and reparative functions, and perhaps to a certain extent the control functions and judicial lawmaking as well.

A new function has come onto the scene consequent upon Sweden’s membership in the European Union, however. We can call it the *integration function*. The mandate of the European Court of Justice is to facilitate European integration and the development of the inner market. Through the subordinate status (as manifest in the rules on preliminary rulings in article 234) of the national courts in relation to the ECJ and EC law, our judges - especially in administrative court - are tasked with facilitating the development of a free and effective market in the EU. Those who wish to deny that this is an expression of a new function can however object that the function is fulfilled within the framework of the control function and judicial lawmaking function and may thus be described as a component or effect of those.

Another judicial role that is not new per se but which seems to have such vigour and potential for development that it seems justified to bring up under the heading of functional revitalization is the *legal-political function*. The courts are being used, as far as I can see more so than in the past, as an arena for fundamentally legal-political, and sometimes party-political, discussions of the *raison d’être* of current legal regulations and their purposefulness *de lege ferenda*. The plaintiff who files a lawsuit does so to spark debate, garner publicity and sway opinion towards a change in the law as much or more so than to win the actual case. To the extent not precluded by penal provisions in chapter 9 of the Swedish

Code of Judicial Procedure, one can go to court even when applicable law does not seem to offer a clear path, in hopes of effecting change regardless. This reform may come immediately in the case as an expression of judicial lawmaking or through legislative lawmaking in the form of amendments to the law later on. The legal-political function of the court frequently does not appear until the post-trial phase; the media and politicians latch onto the ruling in a celebrated legal case and use it as a springboard to debate and demands for reform. In the United States, it is clear that “the legal system and the increasingly bizarre tort trials have become a way to influence...policies outside the ballot boxes and the lobbyist-controlled politicians.”²⁴

The choice between legal-political action within or outside the trial setting, that is, aimed at *judicial or legislative lawmaking* thus does not necessarily reflect the plaintiff’s views on his opportunities to achieve success immediately when the ruling is handed down. Winning a suit need not be synonymous with success from a strictly legal-political standpoint. A victory in the case at issue may suppress debate and render the legislature passive, thus delaying more effective legislative reforms with a wider aim (“the paradox of victory”).²⁵ There have been claims that the battle against discrimination in the United States may have suffered by having been fought mainly in the courtroom. Naturally, successful litigation need not always have such disheartening results. A widely publicized defeat in court may also lead to indignant publicity and political activity that increases the pressure to bring about real and lasting change by legislative means, something I would like to call “the paradox of defeat.” As mentioned, one may in some cases even suspect that the plaintiff went to court intending to lose from the short-term perspective.

Legal-political litigation can be non-utilitarian in the sense that parties, counsel and financial backers are not out for personal gain; litigation is pursued to protect or further develop a public interest or (also) private interests other than the party’s own. In this sense, *altruistic* litigation can have a legal-political nature of the type mentioned, but also be oriented purely towards the situation *de lege lata*; the litigant’s objective is more perfect realization of the values underlying the law, not only for his own sake, but for the sake of others.

Public interest litigation (*supra* section 2.1.3) can in both of these cases be funded and facilitated through the provision of legal and expert counsel by public agencies and bodies, but also by private idealists who are prepared to take on the burdens and risks involved. Through the enactment (2003) of the Swedish law on class action suits, non-profit organizations, and not only such legal subjects, can act without requiring someone else to step up to the plate as the plaintiff. Non-profit associations oriented towards consumer or environmental law have the right to plead before the court in class action trials in their watchdog areas; the right to plead is predicated on the organization’s lack of financial interest in the matter at issue. Altruistic public interest litigation can also be pursued by other types of associations even when there is no class action. In that case, an appropriate person must be found who is prepared to act as the plaintiff, while

24 Lindblad, H., in *Dagens Nyheter*, 5 March 2004.

25 See Bogart, W.A. *Courts and Country*, Toronto 1994, p. 37 ff.

the organization provides the funding and the expertise. Trials of this kind have occurred in the area of environmental law in Sweden for a long time. When it comes to the position of individual citizens or groups vis-à-vis the state and government agencies, similar processes have been initiated in recent years by a new foundation, the *Centrum för rättvisa* [Centre for Justice].

The capacity of the law and the courts to constitute a “forum for moral discourse” has been discussed in the postmodern debate as a further expression of the *communicative* function of legal process – but also as a means of promoting solutions *de lege lata*.²⁶ From the Finnish perspective, Professor Wilhelmsson asks whether lawsuits pertaining to the harmful effects of tobacco should be seen as attempts to create regulation where public regulation has proven inadequate and whether suits against the banks regarding lending policies, etc, were a means of engaging in necessary moral discourse surrounding the causes of the banking crisis. Perhaps, he writes, tort law and civil litigation are in the process of evolving into tools for movements and organizations (and other micropolitical actors) seeking space on the agenda controlled by the mass media. In such case, the intent is not always to achieve conflict resolution and prevention, but to articulate the problem and lay bare the moral arguments.

There is no lack of parallels in today’s Sweden. The legitimate business community has for instance suffered an unprecedented loss of public trust in the last decade: the banking crisis, the property crisis, cartels and other threats to free competition, golden parachutes of grotesque proportions, bonus agreements, shady real estate deals, disloyal transactions between parent companies and subsidiaries, alleged insider crime, bribery, tax evasion, gross breach of trust, etc Evils of similar ilk, bribery and alleged corruption have also been discovered within state and municipal organizations. The legal and moral issues have thus far been exposed more by way of the mass media and litigation than in political discourse. I will confine myself to a single example. The formation of the non-profit association *Grupptalan mot Skandia* (*Class Action Against Skandia Insurgence*) and the suit for damages against the parent company is most assuredly not only a means of getting the legal issues tried for the purpose of getting an award for damages to the alleged victims. To a great extent, it is also a matter of meeting a need to communicate ethical issues. Gaining the capacity through a trial and the mass media to channel moral indignation over corruption and financial shenanigans in the multimillion-dollar class may mean more than the relatively limited damages that may be awarded to the individual.

Have the law and legal process had to play the role of stand-in for public policy and the legislative assembly even outside the sphere of judicial review and judicial lawmaking? A long quotation from Wilhelmsson’s work is appropriate here:

“A trial may constitute a forum for a moral discourse regarding questions that exist on several different social levels. It may be a matter of the personal morality we expect of ourselves and others in everyday behaviour. It may however – and this is more pertinent – also involve judgments of the morality of decisions with a

²⁶ See Wilhelmsson, T., *Senmodern ansvars rätt*, Uppsala 2001, p. 111 ff.

broader social significance. One may debate the morality of decisions taken by private or public organizations that have social consequences.

The judgment of the morality of decisions of the latter kind is naturally primarily a political issue. Accordingly, one should not necessarily consider it a good thing that this discourse is judicialized. The courts as such do not have the same democratic legitimacy as elected bodies, even if one has chosen from a discursive/communicative perspective to see judicial process as a democratic decision model. To the extent one believes that the law and judicial process offer new opportunities in this area, it is thus more a matter of making a virtue out of the necessity. When the relevant moral issues are no longer dealt with in the political discourse where they primarily belong – which is unfortunately often the case in many societies in the consensus-oriented political atmosphere that has put politics under the yoke of “market forces” – the legal discourse can and should step in. To some degree one can say that this is a crisis of legitimacy for politics that, for good or ill, is broadening the scope of the law; politics can hardly increase its legitimacy unless politicians once again begin discussing relevant social and moral questions.”²⁷

Thus, according to Wilhelmsson political shortcuts and the lack of binding force of ethics systems are causing greater reliance on the law and judicial process as fora for moral discourse. A trial may act as a catalyst for good moral argumentation and a precedent may provide advice to people in search of moral guidance, even if the outcome is not the desired one. Current law may prove to be inadequate to achieve the attitude this morality seems to require.

But in the new, fragmented environment, as Wilhelmsson puts it, judges and lawyers may lose their traditional refuge – the legal system – and stand naked in a debate that applies equally to systems of ethics and the law. A conventional positivist method in applying the law does not allow, as far as I understand it, the moral aspects floating adrift in legal sources to follow along through the entire trial and even influence the positions taken in the ruling. And that is probably all to the best. But it does not preclude that the path towards the ruling may offer welcome opportunities for moral communication, passed on to the public via mass media. It seems clear that courts may sometimes function as a kind of Speaker’s Corner in Hyde Park.

There are also recurring demands, particularly among non-lawyers, that moral arguments and general ethical deliberations should characterize judicial rulings to a higher degree than “customary” positivist legal source doctrine allows.²⁸ People also want “*creative judges*,” activist and sometimes paternalistic, authoritarian judges on the bench. These are people who do not hesitate to overstep the traditional bounds of formal and substantive trial management, even in actions amenable to out of court settlement. They are prepared to manage and in-

27 Wilhelmsson, op. cit., p. 112, footnotes excluded; translated from Swedish to English here.

28 With regard to the claimed indifference of Swedish judges to the moral roots of the law, see Zaremba M. in *Moderna Tider*, December–January 1995/96 p. 26 ff. Re the difference between “the little justice” as the goal of legal activity □ when law, practice and the instructions of the legal source doctrine must be observed □ and “the great justice” that is freely judged when developing a moral theory, see Zahle, H., in *Svensk Juristtidning* 2002 p. 868, see the same in *Omsorg for retfærdighet*, 2003 p. 162 ff.

tervene to streamline and hasten the proceedings. They may also mediate and act creatively to arrange a voluntary settlement or recommend a pragmatic solution in the ruling and a rational way, for instance, to calculate and allocate damages after gargantuan trials of the class action type (“*managerial judges*”). Naturally, certain American judges experienced with class actions and other complex litigation (such as Judge Jack B. Weinstein in New York) come first to mind in this context. But a new, more active judicial role is also evolving in British civil procedure. A major reform of civil procedure was implemented some years ago (Civil Procedure Rules 1999) with particular emphasis on judicial case management. The “sporting theory” is no longer the dogma of the day. Similar proposed bills (in this respect) are under consideration in other countries.

Judges of this kind have certainly always been scattered about here and there, but they seem to have garnered greater attention and legitimacy in recent years, in no small part due to legislation urging developments in this direction. The creativity has, as shown, primarily applied to trial management and new, effective and manageable sanctions. To a lesser extent, this has been a matter of a curative attitude on the part of the judge during the trial and the use of judicial opinions of a new kind: arguments characterized by moral and/or empirical knowledge harvested from sociology, psychology and other behavioural sciences. Such elements during and post-trial are sought in the new direction of legal practice known as *therapeutic jurisprudence* (TJ).²⁹ In my opinion, the direction contains both appealing and worrying elements and should not be ignored in discussions of the new and future functions of judicial process.

TJ is based on the opinion that application of the law, in courts for instance, is a means of resolving human conflicts, a form of conflict resolution. This is not a new idea per se, but strong emphasis on the notion that conflict resolution is predicated on knowledge of the social and emotional effects of the conflict on the parties involved *is* new.³⁰ Dispute resolution can according to those principles concentrate on discovering which resolution is better or worse from the reparative and rehabilitative angle, and on how one can accomplish a resolution that can serve to prevent continued or new conflicts between the parties. As far as I understand it, the therapeutic element can also, sometimes mainly, show up in how the parties and others involved in the proceedings are treated during the trial. According to proponents of TJ, alternative dispute resolution (ADR) methods are a tool that can often be recommended. The preventive function of procedure seems to fade into the background.

It is no surprise that the views represented by TJ were first used in the context of applying social law in a humane manner. But the perspective has now been expanded to criminal cases (in criminal law, along with the notion of “restorative justice”), corrections, family law, the law of torts, contract law, etc. It thus has to

29 See Diesen, C., in *Juridisk Tidsskrift* 2001–02 p. 15 ff. Several of the formulations in the following are borrowed from Diesen’s paper. □ Diesen prefers to speak of “reparative law,” but that term I believe looks backwards and does not reflect the prospective, future-oriented characteristics as well.

30 See supra section 3.1. Re penal procedure and “conflict as property,” see Christie, N., in *Tidsskrift for Rettsvitenskap* 1977 p. 113 ff.

do with trial in administrative court as well as criminal and civil litigation in general court.³¹ Emphasis is on the application of the law, the procedure and the resolutions de lege lata, but the legal-political perspective may of course also be actualized. TJ should not, they say, replace traditional legal norms, but rather complement them and thus influence decisions (“create a carefully balanced policy for the type of matter at issue and a liberal strategy for the resolution in the individual case”).³²

When it comes to procedural law, advocates of TJ are interested in bringing to the fore how the trial and the ruling affect people socially and psychologically. They believe that “the law becomes mechanical” if this dimension is disregarded in judicial process.³³ This no doubt makes some of us a bit nervous. Perhaps our fears might be allayed by the claim that TJ is not a matter of quasi-scientific ideas, poorly supported assumptions about reality and personal opinion; the socio-psychological deliberations must be based on verified scientific findings.³⁴

There has been no dearth of criticism directed at TJ. The ideology is said to be surreptitiously paternalistic and the terminology has euphemistic features; people say well-being when they mean power and care when they mean punishment.³⁵ Of course it is also difficult to achieve the therapeutic effect intended and to find well-supported and unambiguous empirical material that may be useful. TJ has been called a form of “banal, proclamatory, feel-good law,” the hippie generation’s contribution to jurisprudence.³⁶ Still, it is hard to deny that TJ – and “restorative justice” – are unfinished but nevertheless not entirely new legal ideologies with sometimes clearly warranted demands on judges and other jurists to more extensively adopt a consequential perspective by familiarizing themselves with and applying a cross-disciplinary view of the law, both in procedure and in connection with the decisions the trial is intended to result in.³⁷

Can the average judge manage all of this? Certainly we all know a few creative and therapeutically gifted judges with sound cross-disciplinary knowledge coupled with a sure sense of morality and particularly good judgment (that is,

31 With regard to the status of crime victims in criminal procedure, Sweden has already implemented most of the suggestions put forth in the American TJ discussion (party role in the trial, victim’s counsel, ability to petition for damages, compensation from the victims of crime fund, etc).

32 Diesen p. 17.

33 Diesen p. 29.

34 There is said to be no antagonism between TJ and legal dogmatic method or between TJ and e.g., polycentrism or feminist law theory. Nor does the “consequentialist” nature of TJ (Diesen p. 30) preclude a positivist view (that also applies to the teleological method of application of the law).

35 Re TJ and therapeutic ideologies in penal law, *see* Diesen p. 31. Re “care” and “legal care” in a broader sense, *see*, Zahle, H. in *Svensk Juristtidning* 2002 p. 857 ff., with regard to power, p. 866 f. and the same in *Omsorg om retfærdighet*, 2003, p. 120 ff.

36 C. Slobogin according to Diesen p. 31.

37 *See* Diesen p. 33.

judges whose values and opinions coincide with our own). But dare we trust all the others? I believe there is risk that non-legal factors may penetrate court opinions and that the ends which many believe are the main function of judicial process – realization of the values underlying the substantive system of rules on the general and individual levels – will be relegated to the background.

5 Facts, Fears and Forecasts

By this time it is surely evident that there is abundant flummery lying in wait when one discusses the role of the judiciary and the changed functions of judicial process. I would still like to assert that the expression “the growing role of the judiciary in society” is not a cliché; the words reflect a fact. Supporters of the opinion that such an expansion of judicial power has taken place are found not only among lawyers, but in a much wider circle that also encompasses politicians all the way up to the Government level. There are frequent observations in the mass media of the following kind:

“It is an event that resembles an idea that the future of the EU stability pact will be determined in a legal process, while the current President of the United States took office upon a Supreme Court ruling. When democratic processes cannot handle political (and moral) tensions, one is relegated to the law (and thus the courtroom) ...”³⁸

If one sees the division of power among the three branches of government as a zero sum game, the expansion of the judiciary role seems in part to have taken place at the expense of the executive power, which in turn seems busily engaged in appropriating greater power from the national legislature. The elected legislators will also be obliged to yield power to the courts, primarily through judicial review in the broad sense and judicial lawmaking. The judicial power is taking from both directions and members of parliament seem to be the losers of the game.

There has been no lack of supporters or critics of this development and some have expressed fears of continued evolution in the same direction. I will only remind here of the Social Democratic party’s traditional, now somewhat milder, scepticism of greater judicial power in the form of far-reaching judicial review, constitutional courts and international courts, the weighty, scholarly, democratic critique of the increasing right of the courts to engage in judicial review, and of the longstanding discussion of the drawbacks of judicial lawmaking.

Even if one confines oneself to studying opinion pieces printed in the largest daily newspaper in Sweden over the last years, it is easy to find well-known pundits who want to slow down the triumphal march of the judiciary. I will limit myself here to mentioning two.³⁹ Ralf Dahrendorf claims, with references to

38 Ekdal, N., in *Dagens Nyheter*, 18 January 2004, translated to English here, my additions in parentheses.

39 See also Ekdal *supra* at note 38.

both the United States and Europe, that from having been without comparison the weakest branch of government the courts are no longer taking that retiring position.⁴⁰ One explanation may be a longing to find “independent” opinions and “truth,” concepts that people (perhaps somewhat rashly) are inclined to associate with jurists and courts. It is, according to Dahrendorf, obvious that politicians dislike this shift in favour of the judicial power. He seems personally to believe that the “juridification” of the “political process” has gone too far and believes the development is relevant to the debate on reform in many democratic countries: “...it can be asserted that the stronger the power of the courts in a country, the slower is the pace of reform.”

In Sweden, somewhat similar criticisms and fears have been expressed by the political scientist and publicist Svante Nycander in several contexts, most recently in an essay titled “Law but not right.”⁴¹ His scepticism is however directed, as evident above, not only at reforms via judicial lawmaking but also specifically at legislative measures connected to judicial trial, as the courts may undermine or even sabotage such attempts at reform. Based on conditions in the United States, he points at the failures that followed attempts to help minorities advance through legislation, and believes that the problem has been and remains inordinate faith in the capacity of the courts. According to Nycander, there is if anything reason to feel distrust. The American legal system allows the judge’s personal opinions to have a strong influence and this is heavily utilized in the courts. As far back as the 19th century, the federal courts obstructed voting rights for African Americans and the Supreme Court overturned the federal ban on racial discrimination of 1883. For about forty years and in nearly every case, the high court opposed the demands of African Americans for justice. The court did not merely reflect prevailing values, it controlled them.⁴²

Citing a more recent example, Nycander claims that affirmative action has yielded good results in the United States but that the Supreme Court under Chief Justice Rehnquist made the conditions for affirmative action stricter: “the law meant to create justice between the races was turned against African Americans.” Nycander concludes by pointing out that American law with its civil rights approach is the source of inspiration for all of the prohibitions against discrimination implemented in Sweden in recent years, as well as of the barriers to affirmative action that have arrived via the EU, and he takes exception to the influence:

“We should watch out for this influx of American civil rights policies that so easily collide with our own systems for protecting the individual. Who in the long

40 Member of the British House of Lords, former director of the London School of Economics and warden of Saint Antony’s College at Oxford University, here cited after a column published in *Dagens Nyheter*, 19 August 2003.

41 Nycander in *Dagens Nyheter*, 18 December 2003.

42 It should be noted that the three chief justices of the Supreme Court who were the most progressive with regard to civil rights and “the race issue” (Hughes, Warren and Burger) were all Republicans; *see* Nycander, *ibid.*, translated to English here.

run has benefited most from the American legal system? The lawyers, that's who."⁴³

But the social role of the judiciary has increased. That is a fact. If in an attempt to achieve greater concretization one breaks down this observation in a study of the functions of judicial trial in various types of cases, the change becomes apparent. I have argued that of the four traditional functions, the control functions and judicial lawmaking in particular have contributed to the shift of power between the branches of government. But factors including privatization have meant that the reparative (conflict resolution) and preventive (behaviour modification) tasks have also grown in importance. We can expect this expansion to continue although, as usual, things are developing remarkably slowly. But those who are fond of the typical Swedish slow march – or even prefer standing still – can no longer feel safe. As a Member State of the EU, in Sweden we must accept that certain unsatisfactory states of affairs (as in the agricultural policy) seem to be cast in stone for the foreseeable future. But it does actually happen that major changes, even paradigm shifts, occur surprisingly swiftly on the EU level, some of them brought about by the ECJ. Or as some American academics are wont to say these days:

“You know what they say about paradigms: shift happens!”⁴⁴

The so far modest functional increases are complemented by the occurrence of what one may possibly call a functional renewal in certain respects. Desires for more morally guided and “creative” judges and elements of “therapeutic jurisprudence” may lead to an alarming trend, especially if non-legal factors are permitted to have a greater influence on judicial rulings. But it is of course a good thing if courts act with vigour and empathy in the trial and if rulings can to a greater extent be based on a sounder empirical basis with respect to social and psychological aspects. Otherwise, the “novelty” of therapeutic jurisprudence within procedural law is in many respects a brew of elements of conflict resolution in the broad sense that already have a place in Swedish procedure, in the form of the court's settlement and mediation efforts in civil processes, the alleged victim's stronger status in criminal cases and various forms of alternative dispute resolution outside the courtroom.

The increasingly prominent status of the courts in society also means that the courts can, in interaction with the powerful mass media, be used more for altruistic litigation and as arenas of legal-political reform. When this happens, the status of the courts is further enhanced and a wealth of opportunities arise in these and other contexts to use trial as a forum for moral discourse. I believe these “new” communicative functions and the constitutional shifts of power are the most interesting elements of the development. The changes are imposing high demands on court organization and procedure and entail a challenge — not

43 Nycander, *ibid.*.

44 The author of the quotation is unknown, *see* Rowe, T., D., Jr in 13 *Duke Journal of Comparative & International Law*, 2003, p. 127 re trial costs rules in class actions.

pleast an educational one — for those who play a role in judicial process: judges, parties, lawyers, prosecutors, witnesses, and so on. The stories told in and of the trial must be clear to the participants. It must also be possible to tell the stories fairly and cogently to spectators and the mass media and thus to the public. That does not apply only to the ruling: the medium – the process itself – is a vital part of the message.