

The role of the rule of law in protecting democracy

– a talk on legal perspectives on the Growing Threats for Democracy Around the World, Berlin 15–18 February 2023

1 *Different kinds of threats to democracy*

What are the most important threats to democracy today? My talk is about that, and about the role of *the rule of law* in protecting democracy against them.

These are the most important threats today:

1. Criminal groups take over. Some examples are Mexico, Haiti and – at least earlier – Colombia. Let's call this *the mafia threat*.
2. Military coups, civil wars etc. This is another type of violent internal take over than by criminal groups. Recent examples are Myanmar, Afghanistan and Egypt. And we could also mention the attempt in Germany in 2022. We can call this threat *the coup threat*.
3. States fall apart, clans etc. take power. A recent example is Libya and before that Somalia. We can call this *the dissolution threat*.
4. Attacks from other countries. Some recent examples (including possible attacks) are Ukraine, Taiwan and Kosovo. We can call this *the external threat*.
5. A development within a country towards more limits to freedom and/or more oppression. Some examples of today are Russia, Iran, Turkey, Venezuela and Eritrea. We can call this *the oppression threat*.
6. Non acceptance of electoral results by those in power and their followers. Some recent examples are the USA and Brazil. We can call this *the cheating threat*.

And let me also mention a threat which is not so much a threat to democracy as a threat to peace and stability. I mention it because it is very topical in my country Sweden right now, with the burnings of the Koran outside the Turkish embassy in January, the fierce opposition and protests in the muslim world afterwards and the threat of terrorism as a reaction. We can call this *the hate speech threat*. This is very important but I will leave it outside my speech from now on as it is not so much a matter of protecting democracy as a matter of protecting world peace.

2 *To what extent can the rule of law protect democracy against these different threats?*

2.1 *The mafia threat*

When it comes to protecting democracy against mafia and other criminal groups, a strong rule of law can be of utmost importance. The fact that such a threat at all arises does

probably often have to do with the rule of law being too weak in the country. The recent experiences of the three mentioned countries clearly show that there is a need for *something* to protect democracy. And I believe that strong legal institutions is a key factor: laws against criminality and corruption, a strong police and trustworthy prosecutors, courts and prisons.

Most countries have the laws in place. But they don't have a strong and efficient enough police force or good prosecutors, courts and prisons. Often the limited strength and efficiency of the Police – which is probably the most important rule of law factor of all – has to do with corruption. The criminal groups are able to buy some freedom from interference by the Police, and often also from the rest of the justice system.

2.2 The coup threat

Regarding the threat of a coup or an unwanted outcome of a civil war, the national rule of law can hardly do anything. There are some exceptions, as in the case of Germany where the threat of a coup was detected by the intelligence service. Intelligence and information could be seen as a part of the rule of law, but it is in the outskirts. Let's leave it outside for now. And let's leave these violent take overs outside the responsibility for the rule of law. To protect democracy from these you basically need a strong military which is loyal to the Government of the country.

2.3 The dissolution threat

Here, the rule of law can play a role in that the Constitution contains an effective defence of democracy and democratic institutions. Parliament and government should be strongly supported by the laws and authorities, so that it will not be possible for clans and the like to take over. The fact that this threat to democracy arises is probably usually due precisely to the fact that the rule of law is too weak. This again shows that the countries need to have strong legal institutions to protect themselves against this type of disintegration.

It should be said, however, that the disintegrated societies have not always (or ever) gone to that kind of a situation *from democracy*. Instead, they were often undemocratic in another sense before the chaos. In Libya, for example, Moammar Khaddaffi ruled over the country as a dictator.

In these cases, it is very difficult to build the rule of law needed to (not preserve but) *establish* democracy. I will come back a little to that.

2.4 The external threat

The national rule of law can hardly do anything to protect the country from being attacked by military force. Defending democracy in a country against external threats is a matter for the country's defense, the military and the civilian. In the long run, however, the rule of law can have an impact by, for example, prosecuting war crimes. Ukraine is the most recent and most topical example.

2.5 The oppression threat

A development towards less freedom and more oppression is something that has happened and happens in many countries. Those mentioned (Russia, Iran, Turkey, Venezuela and Eritrea) are just some of the examples. When it comes to protecting democracy against such a development, the rule of law can play an important role. The key factor is that the Constitution must contain warranties for democracy and for the freedoms aligned with democracy. Constitutions can be changed, though, and this can be more or less difficult.

To work as an efficient protection for democracy the constitution needs to

- rule on democracy and democratic freedoms,
- be very difficult to change in short time.

2.6 The cheating threat

It is obvious that a strong rule of law in a country can play a very important role to protect democracy against threats of this kind. A strong constitution, efficient laws and well-functioning courts and authorities are totally decisive. That seems to have worked in both the US and Brazil, but the system was clearly challenged.

3 *Is there a need for a more effective international rule of law?*

3.1 The mafia threat

What when things happen like in Colombia some years ago and in Mexico and Haiti today? What when democracy has not been efficiently protected by the country's rule of law? Could the international community step in and put things right? In my opinion, this should be a possibility. And it's not far-fetched if the weak government *asks for* outside help. Then forces from outside – military or other – could very well be engaged in helping the weak government get back in control.

It is probably not a practical option today that the international community would step in *without* such a wish being expressed. This should, though, I believe, be possible in the long term. Because if all democratic institutions of a country have fallen, then that is what is needed and it's the only possibility to make things right for the people of that country. So, perhaps an attempt should be made to create an international convention to allow for the international community, in some form, to intervene and restore order and eventually democracy.

Could it happen in Haiti or Mexico today that the international community comes to help? Probably only if the US would decide unilaterally that it does not want a criminal gang ruling over a state in its neighborhood.

3.2 The coup threat

We said before that we would leave these violent take overs outside the responsibility for the rule of law. So, what about the international rule of law? Could the international community step in, in some form, and restore democracy in cases such as in Myanmar for example, or Afghanistan or Egypt? Could we, for example, have an international convention to protect people from developments as those that have happened in these countries?

It is very difficult to see this happen, at least in the next 20 or 30 years, if maybe in 50 or 100. The international community will most probably continue to work through economic sanctions, isolation etc.

But how *would we like it* to be? If things were reasonable, should then the international community be able to prevent for example the Myanmar military from doing what they have done? *Would we want* a legal mechanism that enables the international community (or individual states) to intervene in support of democracy? I believe that in the long run there should be such a mechanism provided for by international law. But that certainly lies in a distant future.

3.3 *The dissolution threat*

What when states fall apart, for example by clans or informal local “governments” taking over their part of the country? We have said that there is a risk for this happening when the rule of law is too weak. But we have also said that often this kind of disintegration comes from a former status of dictatorship. In both cases, the country needs some mechanism to build a better system.

Is it possible that the international community would provide a mechanism for this? Could we help in building a democratic Libya for example?

We can punish states like this through economic sanctions, exclusion from international cooperation, etc. But that doesn't help a weak government, like the one in Libya. In my opinion, the international community *should* be able to step in and provide support at least if the weak government *asks for outside help*. And that is of course possible today already, although we don't see or hear much of that happening.

It is probably too far-fetched that the international community would step in *without such a wish* being expressed by the weak government. But in the long term it should not be excluded, I think, that we provide for such a possibility by creating a convention that will allow for it. That's probably not very realistic today, because it is very intrusive. But maybe in a distant future.

3.4 *The external threat*

We have said that the national rule of law can hardly do anything to protect a country from external threats such as in the case of Ukraine for example. Defending democracy in a country against external threats is a matter for the country's defense. Sometimes there is help to get from the outside, like in the case of Ukraine. But international law can't do anything to stop the aggression from happening.

However, it is considered contrary to international law to start a war. This applies without any formal agreements and the principle can even not be derogated from. This kind of an international rule is called *jus cogens* (peremptory norms, compelling law). Other examples of what is prohibited according to *jus cogens* are genocide, maritime piracy, enslaving and torture. It is not clear precisely which norms are *jus cogens*, nor how a norm reaches that status, but it is generally accepted that wars of aggression are covered by the prohibition.

But this does not prevent the aggressor from actually starting the war, such as Russia has done in Ukraine. And the question could be asked: Should we have an international rule of

law in the future which will expressly let the international community step in and put things right in cases such as Ukraine, or which will even say that the international community, or individual states, *should* step in?

The international community can obviously do its share through sanctions, isolation etc., such as has happened as opposed to Russia. And if it would step in and stop the aggression, it would not be contrary to international law, but allowed and even applauded. So there is no need to create a legal mechanism for this. But to make it an *obligation* for states? No, that is probably not realistic even in the far future.

We have organisations such as NATO that act according to their rules and politics. But that is something different.

3.5 *The oppression threat*

We have said that when it comes to protecting democracy against decreasing freedom and increasing oppression, the rule of law can and should play an important role. The Constitution should rule on democracy and democratic freedoms. And it should be very difficult to change these rules in short time.

But if this fails, if there is such a development in a country? Can it then be imagined that the international community would step in and put things right? Think about Russia, Iran, Turkey, Venezuela and Eritrea for example. It is difficult to imagine the international community stepping in, and it's difficult to imagine that happening through some legal means. So, protecting the state from such an undemocratic development must be a case for the internal rule of law. The strong constitution is what is needed.

3.6 *The cheating threat*

If the national rule of law does not work as an efficient protection of the country's democratic system when the old leader does not accept the electoral results, what then? Is it possible that the international community in such a situation could intervene to put things in order? Well, that is probably rather far-fetched. In the long run it may be possible to have an international convention to protect democracy by allowing the international community to intervene in support of it. But that seems not very practical, at least not today. Who would have intervened in the US or Brazil if Trump or Bolsonaro had succeeded in changing the election results in their favor? No one. So, *the domestic system* needs to be strong enough to protect the country's democracy against such a development.

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I wish to say that there may be measures in problematic countries that I am not aware of and that there may also be democracy-protecting legal mechanisms that I don't know of. I have not been able to look into the situations in the different countries in any detail. I have really only been able to observe the problems and give them some thought and analysis.

4 *So, what should be done?*

One fundamental question is, of course, whether or not the international community has a *responsibility* towards the people of the countries of the world. Should the international

community take it upon itself to protect people from oppression and unfreedom, from violent takeovers, from criminal groups, from disintegration?

I believe there is such a responsibility. We should at least go through these issues diligently and formally, probably in the framework of the United Nations. It's not going to happen soon, but hopefully eventually.

What is the most pressing? I think it is doing something to help the people of countries like Haiti and Mexico. Criminals should not be allowed to rule countries according to their own wishes and gains.

But we should also do what we can to strengthen the rule of law in those countries of the world that need assistance. This is basically a matter for the UN. And we should strengthen the international rule of law, also a matter primarily for the UN.

5 *Summary*

We can talk about six different threats to democracy:

- the mafia threat (1)
- the coup threat (2)
- the dissolution threat (3)
- the external threat (4)
- the oppression threat (5) and
- the cheating threat (6)

The rule of law is very important in protecting democracy against nr 1, 3, 5 and 6 but can't do much about nr 2 and 4.

The international rule of law should be strengthened to protect democracy against nr 1, 3, 5 and 6, and possibly in the long run also against nr 2 and 4.

The international community should also do more to strengthen the rule of law in those countries of the world which need assistance.