

Chapter 1

Poverty and the Law*

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There are principles of governance that should be treated as undisputed premises for the way society is to be led in a modern, democratically organised state.

The first principle is the rule of law: a legal system is put in place and all members of society must respect the laws produced by this system and are subjected to them. This encompasses not only the individual citizens, including kings and cardinals, but also the institution of the state, including the legislative and executive powers themselves. In the context of this chapter we only mention in passing the theoretical problem of the legislative power that is required to combine its compliance with existing laws with the task and responsibility to add, change and abolish laws.

To assure the compliance of powerful governmental and other institutions with laws, a subtle system of checks and balances has gradually been developed. To ensure that these delicate elements are sustained in a modern democratic state there must be a civic awareness of the fragility of the all-inclusive societal subjection to the rule of law and the equal fragility of its controlling systems with respect to all responsible actors.

There is a second principle of absolute and equivalent authority that must be respected as much as the rule of law and also be regarded as 'supra-political' by any democratic political movement. It is the principle that might be called 'the rule of fundamental human rights'. While the rule of law is an obvious necessity for any system of law that has integrity, the rule of fundamental human rights is a requirement of civility in the recognition of the rule of law and its subordination to the requirement of maintaining fundamental human rights: cruel and unfair laws will not be tolerated. Indeed modern conceptions of the rule of law have expanded it in this direction.

The classic fundamental human rights are: freedom of speech; freedom of religion; freedom of assembly; and the right to life. The next set of rights is called social human rights. These are corollary rights to fundamental human rights, especially the right to life, including the right to food, clothing and housing; and the rights to education and the means and opportunity to earn a living.

Finally, the right to a fair trial under law should also be included in this second inviolable category, also as a corollary to the right to life. Thus, this right to access to justice has been anchored for good reason in the European Convention on Human Rights. Such access requires not only proper legislation but also a system that guarantees the safety of the rule of law through the equally proper application of given laws in any individual and like cases. This goal can only be effected by: having a well-organised, properly educated, independent, and sufficiently empowered and staffed judiciary; by having the availability of competent and independent lawyers; and by having the means of recognition and enforcement so that individuals can reap the fruits of this system.

All laws must be compatible with these fundamental human rights. A legislator, respecting the instructions to be derived from the rule of law and the related rule of fundamental human rights, should refrain from pursuing legislation in contradiction of these overriding supra-political principles.

The GFC crisis has put a heavy and new kind of responsibility on governments, requiring them to find new solutions using new ways.

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The moral and ethical discipline that ensures obedience to fundamental human rights, no matter what societal changes for the worse we must face, should prevent the executive and legislative powers from allowing any erosion of these absolute values. In the area of social human rights, where the diminution of existing, protective rules is at stake, there is, at minimum, a necessity to address scrupulously why and how various economic measures are introduced and what justifies subordinating these fundamental human rights to the new economic constraints.

Of course, governments are free to reconsider legislation in areas that touch upon the human rights that we have identified above. Such reconsideration may lead to the deterioration of the position of individuals in areas such as housing, work, income security, education and access to justice. But deterioration is not by definition a legislative breach of fundamental human rights. It only becomes such an infringement if the 'inviolable layer' above the inalienable basic human rights is taken away as well as part of the very fundament, the very core of such rights. Indeed, what is free and what is fundamental will be the subject of argument and debate. With the words 'inviolable layer' we aim to conceptualise a first layer that is inviolable, that in no way can be touched upon by executive or legislative powers; above that layer there is a more flexible area that is also related to basic human conditions, but to be freely shaped according to governmental or political insights.

We will now describe how the GFC influenced society, especially in the Netherlands, the country we observe most closely.

As in other countries, various institutions concerned with social human rights are at risk. For example, austerity programmes diminish citizens' income and the services for those who are unable to take care of themselves. Educational programmes become less well-funded and students have fewer opportunities to complete their education or, if they can proceed, it is only at barely affordable costs. Subsidies for cultural programmes are withdrawn; programmes to ameliorate the environment receive less money. Without a well cared-for environment, the human right to health is undermined.

Further, if pension rights are diminished, the circumstances of elderly people, who depend to a large extent on a pension they thought they were entitled to, might become problematic. If labour and employment rights are weakened by removing protective systems that make it easier for employers to lay off long-service employees, people are left adrift. Again, for elderly people whose employment possibilities are diminished due to age, the circumstances might become particularly problematic.

Often, politicians think it is necessary to act rapidly and show strength without hesitation. Take for example the issue of pension rights in the Netherlands: within a couple of months parliament decided that, starting in 2014, the right to a state pension, which is important as a substantial means of support for a majority of retired people, will be delayed: 2014 by one month, and in 2015, by two months, and so on. Although the erosion of the pension is minimal to begin with, in a few years it is substantial – and for many people, there is no alternative source of income. We argue that in cases like this, since these measures touch upon social human rights, the justification and timing of these measures are important issues with significant political responsibilities in themselves. Justification for the reduction of individual rights and the timing of such measures should meet the highest standards and the most demanding criteria.

At the same time, we realise that in other countries, such as Greece, Spain and Ireland, where the financial burden is much heavier than in a country like the Netherlands, measures like these influence the life of many people in a much more dramatic way.

Does this mean that social human rights are in jeopardy?

Earlier, we defined social human rights as rights of a supra-political nature. Taking this position, we aim to withdraw these kinds of economic measures from the political realm: human rights are of a higher nature than political positions. In other words, regardless of the political views one may have, human rights must be preserved. A supra-political human right is inviolable and must not be varied, no matter what the political interest is.

Keeping this in mind we nevertheless think that, although a lot of these austerity measures are tough, especially for those who are adversely affected by them, the core of the fundamental human rights are not directly at stake. Everybody will, at least in the Netherlands, continue to be fed, clothed,

housed and educated, although not as well as before. However, the growing differences and gap between the rich and poor, which some think is a course society should not take, is regarded by many as a political/economic matter, and not one that possesses a supra-political character, and therefore not one that comes within the ambit of human rights.

In times of financial crisis, those with governmental responsibilities are seeking measures to make governing more efficient. Of course, politicians also look at it from this point of view: let measures be both more efficient and cheaper, while achieving the same or even better results. Many such measures are sensible, but some of them need a closer look: when moral principles are sacrificed on the altar of efficiency, the basic values of our society are threatened. We are then in danger of losing the delicate balance that is the very fundament of the rule of law, of the rule of fundamental rights and of a society that protects all its citizens at a minimum civilised level.

Making court proceedings inaccessible for a considerable part of society by increasing court fees to a level that many individuals cannot afford may well be an unacceptable sacrifice. This was an idea launched as a legislative proposal by the Dutch Government. It was defeated after massive opposition from both within and beyond the political arena.

Similarly, the Irish plans to economise upon the operations of the court system by bringing the law profession under direct state control might be another example.

A proposal to change the law regulating the legal profession in the Netherlands also contains some infringements on the guarantees for citizens to enjoy independent and confidential support from lawyers. One could question whether this stems directly from cost-cutting motivations. The same is true for initiatives to optimise the efficiency of various parts of the judicial system: examples include swift criminal proceedings with settlement between prosecution and the suspect without any judicial check and selective systems to obtain leave to appeal and access to the Constitutional Court. Such initiatives clearly have a better chance to become law in times of economic threat than when times are good.

Earlier, we mentioned that measures taken in the Netherlands are less dramatic than those taken in other countries, Greece being the most prominent example of a country within the EU that has taken drastic measures. Wages, pensions and employment rights have been diminished in a very significant and fundamental way. No matter their political stripe, many of these measures have been forced upon the Greek Government and summoned to do so by the so-called 'troika': the EU, the European Central Bank and the International Monetary Fund (IMF) – the very institutions that advise the EU countries on whether they should provide supporting loans. If its government does not accept and implement such measures, Greece cannot remain within the European Monetary Union. These measures are, in fact, not proposed and passed by a democratically elected government and parliament; they are, as we said, forced upon the country by international organisations that are not themselves democratic in nature. Here we see how the GFC influences even the core elements of democratic countries.

There is one further topic to discuss, not apparently directly connected to the GFC. When resources become scarce, differences between people are emphasised. Discrimination and repression frequently rise. And so in the Netherlands there are proposals by some political parties to diminish the right of freedom of religion for Muslims, for example, by proposing the taxing of wearing a headscarf; forbidding the Koran; prohibiting the building of mosques within a city; and so on. Measures like these are not proposed with respect to those who practise other religions. They are unequal and unfair and contrary to fundamental principles and flow from the fears raised by the economic pressures that grow as a result of failing to observe the enforcement of fundamental human rights during and following a financial crisis.

In all these developments, lawyers and political organisations alike should be permanently attentive and should develop a well-considered opinion as to the compatibility of proposed legislation with the basic values we described. For countries without a constitutional court, such as the Netherlands has, this is an even greater necessity.