

**Public values in a legal context**  
From a state governed by law to a market or milieu state

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## 1. Preface

When describing the public ethos jurists often do that on the base of the special values that are attached to the democracy and the constitutional state. Concepts of a tradition that dates more than 150 years back in history. If the description of the democratic and constitutional elements of the state is limited to its historical basis that originates from the middle of the last century, this will not be without implications – the description will suffer from the risk of losing important nuances in the set of values that characterize the contemporary public ethos. The public ethos is not consistent, it is on the contrary – as other sets of values – subdue to the ravages of time.

The purpose of this report is to show how certain parts of the public universe of values gradually change throughout the time; in concreto the notions of values that are affiliated with the constitutional state and the democracy. As shown in chapter 3 it can ensue as a movement where the new values either force out or mount the old ones. It can also happen due to a change in the conception of values, a change of circumstances, which will ultimately cause a necessity for a new interpretation of the old values. The study of these conditions is embracing the entire period from the middle of the last century on to present day, as the changing notions of value hereby becomes analyzed in the light of the legal development, as a relatively firm basis for the identification and limitation of the principal values. To which extent these notions of value de facto are being followed is beyond the field of examination of this report.

Therefore the basis for the report is the fundamental legal values that serve to light up the character of the public ethos in a perspective of development and alteration. This very perspective has come into prominence in the present period where the public sector, as described in chapter 1, is subject to massive and fast changes. Especially the idea of applying market mechanisms in the form of privatization, inviting tenders and contract management etc. attracts attention, because these mechanisms in particular seems fit to challenge the traditional notions of value concerning the government and the public works.

## 2. Democracy, state governed by law and community founded on the rule of law

*a. Fundamental democratic values:* The starting point of any speaks of public values in the community of today concern the character of the community as a political democracy. The decisive factor that determines which values the public should respect and encourage is the democracy as form of government. The community develops the laws that are necessary to promote these values through the democracy. Thus the law and the democracy are narrowly connected: Democracy – the democratic form of government – Can in reality only be implemented on the basis of a set of legal norms that determine how the community is governed – normally expressed in a constitution that binds the governmental agencies. It is characteristic of these rules, that the power originate from the *will of all* and that the power is exercised for the people to serve the *general will* in the broadest sense, or – with a contemporary expression – to handle general considerations of the community.

However democracy is more than a certain form of government. It also has a substantial component by virtue of the values that the democratic idea is founded upon. These values are connected to the conception of the human as a independent being with the ability to obligate itself legally (the individual as subject to the law). Thereby the individual human being assumes a central position in the democratic system. The human has a value of its own, a value that it must have the opportunity

to maintain and develop in the community in question. This opportunity exacts respect for values such as freedom and equality – values that can be seen as manifestations of one and the same fundamental value, namely the consideration for the *dignity* of the human. In order to protect these values, laws in the form of freedom, human or fundamental rights are required. This is normally secured by making an entry of these rights in the constitution.

The protection of the former fundamental rights may clash with the handling of general considerations of the community. As the right to possess private property is damaging or hindering other legitimate interests of the community. The protection of the fundamental rights is not absolute; limitations are made in order to look after the general considerations of the community. The protection of the rights of the individual is based on the fundamental idea that the individual, as a part of the community, must tolerate the limitations in his freedom of action that is considered necessary, in order to make the community work – under the premise that the independence of the individual is preserved. This fundamental idea is valid as of today, even though the fulcrum between the considerations towards the individual on the one hand and the community on the other is not definite – it varies as time goes due to changes in the notions of value. The classic example is the access to expropriate private property for compensation.<sup>1</sup>

*b. Legal protection & law and order:* The law also qualifies – in a value-like sense – the society and the community as organizational units of a certain type, as a community founded on the rule of law and as a state governed by law. The community founded on the rule of law is characterized by a set of legal norms that define the legal status of the individuals under the different conditions of the life in a society. In this legal system the individual is ensured a certain scope of freedom – everything is allowed unless it is directly prohibited or commanded. The essential fundamental value in this is the legal protection of the citizens. In practice it is guaranteed by the courts and other legal institutions.

The existence of a legal system together with law enforcing authorities is the essential characteristic of the community founded on the rule of law – Hereby excluding assertions about the creation or substance of the laws as well as the structure and position of the law enforcing authorities in the society. As far as it goes the characteristic of the community founded on the rule of law is consistent with both the concentration of power in the absolute monarchy and the diversion of power in the constitutional democracy. By means of the state governed by law the community founded on the rule of law is supplied with the special qualities that characterize the contemporary governing of a state. These special qualities enable the expansion of the legal protection of the citizens with the procedural guarantees of *law and order*. The state governed by law is ideologically rooted in the Age of Enlightenment as a leading element in the liberal democracy. The radical innovation to the liberal concept of the state governed by law is that the official public regulatory interventions are subdue to legal control, meanwhile it also aspire to grant fundamental rights to the citizens by the use of procedural rules and substantial limits to the power of the state<sup>2</sup>.

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<sup>1</sup> This fundamental idea is often expressed through the establishment of (society-)duties, cf. the rules that uphold the maintenance duty, the duty to attend classes and conscription that derive from the (Danish) constitution.

<sup>2</sup> The state governed by law must be considered a “superstructure” to the community founded on the rule of law in countries with a democratic government. The state governed by law and the community founded on the rule of law can appear secluded without such a government. The (Danish) enlightened despotism is a historical example of a community founded on the rule of law without the “superstructures” of the state governed by law. The European totalitarian regimes in the 1930’s and 40’s, on the other hand, illustrates that the form of government can contain traits from the state governed by law without the existence of the characteristics from the community founded on the rule of law.

In this context law and order means the stability and security of the social community that the legal standards also aim at. This stability and security is first and foremost important in the correlation between the state and its citizens. In this common sense law and order means “distinct rules, that can be trusted” (Axberger, 1988: 165), i.e. rules that promote the use of uniform solutions to diverse problems. The crucial element in this context is the possibility for the individual to predict the legal consequences of its actions and in that connection to predetermine the decision arising from the public authorities. The *predictability* of the public interference with the private matters – also known as the “regulatory intervention” – hereby becomes the essential criteria in establishing law and order for the citizens – at least according to the classical understanding of the ideal of law and order that originate from the establishment of the state governed by law in the middle of the 19<sup>th</sup> century.<sup>3</sup>

*c. Constitutional guarantees for law and order:* The state governed by law has never had explicit roots in the Danish constitution – contrary to for example the German constitution where the state explicitly is described as a “democratic and social state governed by law” (GG art. 20). The concept “state governed by law” has its origin in the German jurisprudence, where it traditionally has been used as a collective name for the fundamental guarantees for law and order, established in the legal system in order to protect the life, freedom and property of the citizens. In spite of that the Danish constitution and the legal system in general still contain many essential elements of these constitutional guarantees. Therefore the Danish state undoubtedly can be characterized as a state governed by law.

The guarantees for law and order are tied to the existence of a constitution, that lay down the specific rules for the governing of the state. It is required that these rules institute the principle of the separation of state powers as a organizational guarantee against abuse of power. Finally the rules must protect the civil independence against legislative interference by granting certain material guarantees. These guarantees basically ensure that the constitution can secure a certain stability in the governing of the state. This is partly due to the written form of the constitution and partly due to the special procedure by which constitutional amendments can be made. The reality in these guarantees is illustrated by the fact that the Danish constitution only has been changed four times since its passing in 1849, latest in 1953. On the same time this statement must not be over-emphasized. Other countries, that without a doubt must be characterized as democratic states governed by law, do well without a written constitution because their constitutional rules are based on the legal tradition.<sup>4</sup> On the other hand the complicated procedure of moving amendments can be a argument for either adopting a liberal interpretation or to construe widely on the parts of the constitution that are outdated. As a consequence of this the constitution will be left as a historical document without any real significance. From a ideal point of view these legal principles institute the state governed by law as a *constitutional state*.

The constitutional guarantees are also linked to a number of – partly derived – fundamental principles for the governing of a state. This pertain to the *legality* of the government, the fact that public interference into the civil matters demand authority of a legal act as well as a need for coherence with the present legal standards. With this so-called principle of legality, that can be derived from the before mentioned principle of the separation of powers, a limitation to the power

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<sup>3</sup> The ideal of law and order enter into a historical perspective as a replacement for the consideration of *equity* – originating from Roman Law - that used to play a prominent part (Jørgensen, 1970: 81)

<sup>4</sup> Like England, that does not have a written constitution but was one of the first European nations to introduce a parliamentary government (in the late 17<sup>th</sup> century).

of the state is instituted. The power of the state is limited because the state – due to the general character of the laws – is bound by its own laws. This also applies to the organizational presumption that the top always can be held responsible for the legality of its governance – whether it be the highest political organ, the government – or as in Denmark – the minister, the so-called rule of ministers. Finally it applies to a number of material demands that supplement the principle of legality. These demands exist to guarantee a generally impartial application of the law during normal state activity. (cf. among other things the non-statutory legal doctrines about the misuse of power, equality and the principle of proportionality). Combined with these principles the constitutional state appears as a *state based on law*.

The constitutional guarantees are not completely utilized by this. On the procedural level a number of fundamental principles are instituted. This is relevant concerning the placement of the courts – and later the Parliamentary Commissioner for Administration – as independent organs that control the activity of the government. With legal authority as a steering element, specialization of the apparatus in different areas of law and a hierarchic structure with superior and inferior levels of decision, the principles furthermore apply to the bureaucratic structure of the state apparatus. To this bureaucracy comes a neutral corps of officials educated in the legal profession. It results in an extensive formalization of the procedure that guarantees the citizen a “just” treatment. Because of this it also guarantees the legality and correctness of the decision of the administration. In this sense the state governed by law can be characterized as a *procedural state*. For that reason it is possible to divide the state governed by law up into a *constitutional state*, a *state based on law* and as a *procedural state*. As mentioned above these elements are all realized in the present legal order. The transformation has not happened concurrently because a great deal of relevant legislation only has been passed recently.<sup>5</sup> It is almost as if the division is a idealistic picture and as if this picture is without any association to the actual state administration. The latter is especially relevant in the organizational relations where the principle of the separation of state powers and the principle of minister responsibility has lost some of its importance. This has happened as a consequence of the recognition of the principle of Cabinet responsibility and the establishment of a number of councils and commissions. As a corresponding progress the rise of the welfare state has resulted in a development of the administrative structures that gradually has moved the administrative apparatus away from the premise of the bureaucratic ideal type.

Because possible deviations from the formulation of the state governed by law are conceived as errors the classical formulation still gives fairly correct picture of what the jurists *traditionally* associate with the construction, despite the statements above.

### **3. From a liberal state governed by law to a social state governed by law**

#### *a. Changed perspectives on the state and the administration:*

Following the development of the classical liberal state governed by law to the social state governed by law that has been developed through the 20<sup>th</sup> century; with the main emphasis on the formal aspects of the state activities, there has been a radical change in the conception of the state as a regulating element in the society among jurists. The classical conception of law was to protect the citizens *against* the State. With the rise of the welfare state this conception has changed toward the

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<sup>5</sup> Cf. Ombudsmandsloven (1954), Ministeransvarlighedsloven (1964) and Partsoffentlighedsloven (1964), where the latter has been replaced and supplemented by Forvaltningsloven (1985) and Offentlighedsloven (1985)

protection of the citizens *by* the state, ensured by public regulations and institutions that protect the welfare of the citizens in every possible way (Dalberg-Larsen, 1984).

This alternation of the conception is a result of the changes that the state governed by and the community founded on law has undergone in the past century. The central element in the present development of the community founded on law has been the designation of the formal legal norms that ensure private property, freedom of agreement?, freedom of nourishment and the conventional freedom rights. These rights has been characterizing the community founded on law in the past and the purpose of the rights have been to put the citizens in a position where they can take care of themselves.

While the *self-liability* of the citizens has been dominant in the original form of the community founded on law, the right of *self-determination* has become the core of the modern form of the community founded on law due to the increasing public assumption of the welfare functions. In order to ensure the welfare of the citizens the public intend to put the individual in a position where it is possible to make decisions concerning their own conditions, not limited by unemployment, sickness, accidents, age or the lack of basic necessities of life etc. (Henrichsen 2000).

A change in the conceptions of equality that lay this foundation is occurring correspondingly. Equality has originally been a formal question, whether everyone had “equal rights” in the sense rights and duties were determined by general rules that apply to everyone, these rules should on the other hand be synonymous with a prohibition against subjective discrimination and arbitrary treatment of the citizens. The ideal of equality is gradually getting a material substance along with the forthcoming of the welfare state. The substance becomes a question of “*equal access*” to all the public (free)benefits and transfers of income. In practice this is ensured by granting the citizens a legal claim for the benefits in question, instead of granting the benefits as charity or on the basis of a more or less random judgement.

The historical background for this development is the ascension of the industrialism in the end of the 19<sup>th</sup> century. During this period the parts of the population that were occupied in the new industries suffered from social problems and a widespread poverty because of their exposed social position. The gradual democratization of the state creates a political basis for giving the social welfare objectives a (higher) priority. These tasks are initiated privately but as their span increase they gradually slide under public management. The rights of the individual are consequentially accompanied by a set of (material) social rights, of which some are ensured by the constitution. These rights find expression in provisions to undertake public initiatives that are not politically binding. The improvements consist of the implementation of these policy statements – right to education, work and public unemployment subsidy – which enable the individuals to control their own life. These improvements are carried out by a number of public regulations and institutional measures (such as social benefits and transfer income).

*b. Fundamental values in the social state governed by law:* In a corresponding manner the same applies to the superstructure of the state, in historiography described as a development from a state governed by law to its contrast, the social or welfare state.<sup>6</sup> This description can lead to the belief that law and order – as a bearing value in the state governed by law – is a concept that belongs to the past and that is has been surpassed by the consideration to the efficiency of the public activities,

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<sup>6</sup> The two expressions are used synonymous in this case, cfr. Dalberg-Larsen (1984) who uses the phrase “social state” about the governmental involvement in “social matters” in 19<sup>th</sup> century Europe, while the phrase “welfare state” is connected to the governmental promotion of all sorts of welfare matters in the postwar period.

which obviously must be of increased importance because of the expansion of the general public activities throughout the postwar period.

This development has left its mark on the theory of administrative law of the 20<sup>th</sup> century and the considerations mentioned above concerning the efficiency were increasingly seen as opposites that inaugurated a demand for weighing and prioritization. *Law & order and efficiency* is simply the basic values that characterize the debate of politico-legal issues of today.<sup>7</sup> The debate is characterized by the defensive position the jurists are put in to by the influential groups in the politico-legal debate of present-day, such as economists and political scientists. A position as defenders of a ideal of law and order that is considered to be obsolete, or at least considered to slow the rational improvements of the public administration, cf. the discussion in chapter 1.

At first the growing clash of interests between law and order and efficiency leads to a concretization of the ideal of a state governed by law and of the consideration for law and order. In this concretization the importance is attached to the formal demands to the public activities (by a formalization of the procedural rules) and to the control with the procedure (by rules that grant right of access to documents, the establishment of a Parliament Commissioner for Administration and the establishment of numerous appeals bodies). From a traditional politico-legal perspective these arrangements have provided a (necessary) compensation for the loss of procedural guarantees that the increasing use of framework laws, that cause extensive delegations to the administration, has led to recently (especially in the area of services).<sup>8</sup>

However a considerable amount of the service activities are resolved by assessment in order to find solutions to definite and individual problems. The solutions are based on standards regarding the amount of professional assistance required and the sought after objectives. Appropriateness and in a wider sense *thoughtfulness* – meaning consideration for the special conditions of a particular case – becomes the key-elements in the assessment of law and order in these particular areas. The concern for lawfulness and predictability that traditionally has relevance when exercising public authority is in contrast hereto. Formalized ways of making decisions and extensive control arrangements are in a corresponding manner not necessarily the best guarantees for a appropriate administration. The degree of precision in the description of the public objectives on the other hand has great practical relevance. The same applies to the professional standard of the welfare officers and especially the possibilities of holding persons and/or authorities responsible for mistakes and negligence, whether it is officially or as compensation.

The designation of the objectives of the public activities has been on the agenda as a – legally inspired – instrument for managing the public activities. These objectives also tend to play a growing part due to the increased application of object clauses in the legislation. Today the professionalization of the public activities is a fact in a number of the areas in the service sector. It implicates formalized educational and in-service training courses and a demand for a upgrade of the technical qualifications of the public employees. The possibilities of holding persons or authorities responsible for mistakes and negligence correspond with this, because of the tendency to let the

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<sup>7</sup> The classic in this "genre" is Bent Christensen (1972). And more recently Gammeltoft-Hansen (1989), Hartlev (1993), Henrichsen (1982), Nordskov Nielsen (1991), Revsbech (1992) and Rønsholdt (1993).

<sup>8</sup> In a traditional terminology this phenomena can be describes as a way of replacing the *material* ideal of law and order, that is lost when the authority to regulate and assess is given to the public administration by law, with *formal* procedural guarantees. Critique of this notion, Henrichsen, 1997: 223 ff (Kap. 5. Den retsstatslige fejlslutning).

special liability of professionals embrace certain groups of public employees. Consistently carried out with the implementation of the complaint and compensation arrangements, that apply to the health services sector.<sup>9</sup>

The fundamental clash of interests between law and order and efficiency as benchmarks of the public activities, is in reality equalized by implicating the object clauses of the legislation, the norms and ethics of the professions and the possibility of making someone responsible for mistakes and negligence. Efficiency – in a wide sense – is therefore just a matter of fulfillment of the given objectives. In practice this fulfillment requires a contribution of economic, personnel and organizational resources together with the establishment of mechanisms that prevent mistakes and negligence.

On the other hand it is obvious that the weight on both the objectives and the resources must be modified to the circumstances at any given time. Seen from a viewpoint of law and order limitations of a certain activity is not problematic, as long as there is a reasonable correlation between the desirable (the objectives) and the obtainable (with the given resources). On the other hand problems might arise if for example cutbacks force through the abandonment of objectives that otherwise would remain unaltered. In that case both law and order and the efficiency of the institutional activity would be damaged. However it does not hinder savings to be obtained from a given activity – due to restructuring and technological improvements – without entering into a compromise with law and order. The possibilities of generating a better productivity through a better exploitation of the resources should on the contrary always be considered in a establishment that moreover demands many resources.

The paradigm of law and order arising from the social state that has been brought up as a alternative to the traditional conception of law and order from the constitutional state, is especially aimed at the public *service activities*. The paradigm of law and order arising from the constitutional state will still dominate the classical area of public *regulatory intervention*. In practice however, the lines between the two paradigms cannot be drawn this sharp. The limits between regulatory intervention and service activities fluctuate – parts of the service activities contain elements of regulatory intervention, in which the legal status of the citizens are determined solely by the authorities and where traditional considerations regarding law and order has continuous importance.<sup>10</sup> On the other hand it must be expected that the values reflected by the paradigm of the social state somehow influence the demands of law and order that apply to the traditional regulatory intervention. The administrative act for example contains elements that only can be explained using a standard of law and order that also attach importance to a considerate treatment of the citizens.<sup>11</sup>

*c. The technocratization of the public activities:* The organizational contrast to the bureaucracy of the constitutional state can in this case be characterized as a *technocracy* that evolves on all levels of the public sector – at first in connection with the public benefits created by the different professions and secondly regarding the superior management of the state. This management is

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<sup>9</sup> However there is also opposite tendencies especially on the *municipal* area, where the consideration for the municipal autonomy has been used as argument against governmental dictation of the norms and standards of the municipal activities. Considerations regarding the municipal economy have on the other hand been a important part of the reasons for the reintroduction of the rule of law in the social sector in the 1980's (Henrichsen, 1997: 141).

<sup>10</sup> E.g. the access to use constraint as a part of psychiatric treatments and in connection with removal of children from their home because of neglect.

<sup>11</sup> E.g. the demands of a justification simultaneously with the decision form the administration under the authority of the administration act. Whereas the traditional benchmark for law and order only would demand a *subsequent* justification.

transferred to “generalists” (economists and social scientists) to a extent that increasingly force out the governmental monopoly of the legal profession.

At the same time this development is connected to the shift in the norms of value of the administrative staff. The *neutrality* of the official is replaced by the professional *involvement* that the employee get through his work – a professionally accentuated involvement that consequently leads to a certain personal distance between the citizen as a person and the employee. *Loyalty* towards the politicians in power correspondingly becomes turned into a loyalty towards the values and ethical standards of “good conduct” arising from the profession. However the claim for loyalty toward the politicians in power that are addressed to the administrative employees has a tendency to intensify the demand for personal *identification* with the values of the management.

These tendencies of development are to some degree reflected in the legal realities, despite the fact that conditions regarding staff and organization rarely result in statutory initiatives. The vigorous limitations to the creation of positions as civil servants that has occurred recently show traces of this development in the contemporary legal system. Rules that grant the possibility of participation in decision making moreover ensure a situation where the employees are considered as more than obedient instruments to the decisions of the management. The ethical norms of the profession also limit the claim to comply with the (subjective) political dictations that the loyalty substantiates. The development on the level of the political leadership substantiates the tendency to accept an expansion of the administrative activities; although a change of political leadership rarely leads to a change in the administrative leadership. The expansion of the administrative activities entail guidance on political-tactical matters, employment of personal advisors, altogether a quite comprehensive “consumption” of leading civil servants in both state and municipality.

The public ethos has especially been influenced through these changes of the governmental institutions. The technocratization and professionalization of the public (service) activities are synonymous with the accession of new sets of value in the public sector. It is – expressed in a simple manner – the picture of the authorities and institutions of the *good will* that is promoted here – authorities and institutions that certainly possess great power – by virtue of the wide limits of the service activities in the legislation and the monopoly of knowledge of the professions regarding the solution to practical social problems – but according to their self-concept the power is always exercised in favor of the citizens. However this model is becoming a thorn in the side of the conventional “constitutional jurists”. The good intentions are met with doubt and the interests of the citizens are promoted through a conversion of framework laws and enabling legislation to definite laws that grant specific rights and real legal claims for social benefits.<sup>12</sup> This backlash must be seen in the light of the underlying development of the government during the 20<sup>th</sup> century. A development that gradually raises doubt regarding the legitimacy of the entire “project” of the social state, as described in the following.<sup>13</sup>

#### **4. From social state to market state**

*a. the closed organization society:* The development of the modern welfare state can – with Jürgen Habermas (1981) – be characterized as a repression (“colonization”) of the civil society because the public gradually take over the functions of the civil society. As a effect hereof the members of the

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<sup>12</sup> For a more detailed description see Henrichsen, 1997: 141 ff, with examples from danish and norwegian jurisprudence.

<sup>13</sup> The relationship between the values of the state governed by law and those of the social state can be summarized as shown in figure 1 (the two first “pillars”) in the final section.

society are tied into a legal net of social rights and obligations, while the local “independent” networks (family and institutions in the local community) lose their importance as social cohesions. With Niklas Luhmann (1981) it is possible to notice a corresponding development of the superstructure of the state governed by law, in which the regulation changes character from being a matter of distinction between legal and illegal into becoming a tool that can solve all sorts of social problems in the society.

The analyses of these two German sociologists uncover new problems and conflicts of value in the development of the society. It applies to the accentuation of the increased difficulties that arise with the justification of the public efforts on areas where the citizens have a growing feeling of being declared legally incompetent and alienated by the public institutions (Habermas). It furthermore applies to the accentuation of the growing problems concerning the management of the societal relations in a situation where the legal system becomes more complex and open to exterior political, economical and other non-legal influences (Luhmann). Both sociologists agree that such a combination of the problems regarding legitimation and management inevitably leads to democratic problems on the superior governmental level. This way the fundamental democratic values are at stake which supposedly corresponds with the common conception of the political systems of the 1970's and 1980's.

The fact that the citizens experience a loss of influence on the development of the society – at a time where the political democracy has been implemented with rules of eligibility and suffrage, that allow the citizens to influence the government more than ever – is a paradox. This paradox must however be seen in the light of immense expansion that the public activities has undergone in the same period. This expansion has exempted a number of matters from the close relations of the civil society; matters in which the individual usually has had greater possibilities of influence. At the same time the expansion has created a complicated and highly specialized network of public administrative regulations and institutions that scarcely can be influenced by secluded initiatives.

The complications, that arise while governing a society moreover becomes intensified by the tendency to involve local authorities and organized groups in the political-administrative decision-making processes. As a consequence hereof the efforts are results of a number of different interests and considerations that lead to opaque compromise solutions.<sup>14</sup> The increasing use of framework and enabling acts has made the administrative organizations and their personal active partners in the political decision-making process, which enable them to pursue their own administrative interests.

The overall result of this development process can be characterized as a thoroughly specialized *organizational society*. The problems regarding management created by this development do not only affect the individual as citizen but also the representatives that are elected by the people, whom gradually are put in a position as spectators of a development they hardly influence. The development leads to the “self-isolation” of the political-administrative system as a whole as well as the connected sub-systems (public authorities and institutions) as they become impenetrable to outside influences.

*b. The modernization of the public sector:* It is in this light the increasing demand for *citizen-influence* must be seen. The demand currently affects a number of areas, including especially the municipal area, with rules about planning democracy, neighborhood council democracy and

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<sup>14</sup> In political theory there is some talk of a “corporative-pluralistic channel of organization” that breaks with the constitutional presumption of a parliamentary chain of command (Grønnegaard Christensen, 1980: 308)

institutional user democracy. Secondly it is attempted to make the public activities more transparent and susceptible to the demands from the citizens regarding rules of the evaluation of the public efforts, comparative user-information and the possibilities of choosing the form of benefits themselves.

The purpose is the promotion the administrative and institutional *openness* and *response* to changing wishes and demands of the citizens broadly speaking. However these considerations are not new in any way. It is traditional to involve organized interest groups (and local organizations) in the political-administrative management. The novelty is the intensification of the direct involvement of the citizen; on the assumption that the interests of the citizen not always are looked after by the interest organizations (and municipal home rule organs) that represent the citizen.

The stated purpose is furthermore pursued by a number of varied initiatives that ought to (re-)create the *political possibilities of managing* a public sector that has become increasingly unmanageable. It applies to the struggle against the “overregulated” society and the corresponding tendency to promote “over scrupulous justice” at any cost (cf. the simplification of rules, deregulation and decentralization). It applies to the confrontation with the free public benefits and the underlying demand for public guarantees for “total welfare” of the individual (cf. the acquiescence to private pensions, the introduction of user charge and the division of the public benefits in “core benefits” and “supplementing benefits”). It applies to the containment of the influence of the organized groups as well as their possibilities of blocking the “necessary” policies (cf. the reduction and phasing out of the arrangements of consultation and representation). And it finally applies to the confrontation of the narrow administrative self-interest (cf. the intensification of the economic management, the introduction of salary systems that promote productivity, the application of result contracts and finally making the leading elements in the management of the public institutions visible).

These initiatives all aim at what could be characterized as a revitalization of the traditional parliamentary chain of command. A central idea in this connection is the incorporation of the *structures of incentive* in the administrative and institutional sectors with the aim to promote adaptation and development of the public benefits. The introduction of result contracts, Ny Løn (“new salary”), and so-called value based management must be seen in this perspective. Other more “system encouraging” elements also belong to the continuous work for modernization, elements that ought to increase the incentive to renew the public activities. It concerns public *formation of companies*, *invitation of tenders* and *privatization* of areas of public efforts; perhaps in combination with public participation in private companies and support of “self-bearing networks” such as private aid organizations etc.

These initiatives portend a new course of the modernization; a course that tendentiously leads the development away from a traditional – politically determined – regulation of the public activities to a system based on a – *market determined* – self-regulation. This self-regulation is not intended to be subject to a political detailed regulation, but it will of course be politically controlled on a superior level. On the contrary the endeavor leads toward a *de-politicization* of the public granting of benefits, in which the political management is replaced by a direct – market determined – relation between the (public and private) producers and users of the benefits. The intention is to reshape the public sector into being “supplier of the social benefits that the citizens need *at the prize the citizens are willing to pay*” (Ministry of finance, 1991). By this the individual also tend towards changing

character from being a *citizen*, who makes demands (of increased welfare) to the political rulers, into being a *consumer* that exert their influence on a free market of social benefits.

The development can be formulated (theoretically) as the (future) ways of organizing discussed by Guy Peters in chapter 1. Peters distinguish between 1) market management, 2) self-management/participation, 3) adhocracy and 4) deregulated management. These ways of management are all – to a varying extend – part of the commencing work on the modernizing of the public sector.

*c. Towards a market or minimal state:* The entire philosophy of management that the initiative mentioned above reflects is founded on the fundamental *liberal* idea that the individual itself can estimate its options and make rational decisions in order to realize its own needs and wishes in life. In the international – economic and political – theoretical world this idea finds expression as “Public Choice” and “New Public Management”. This philosophy of management is apparently also supported by the fact that social rights increasingly are conceived as a matter of course. By this additional space for the realization of individual wishes and needs has been made. This way the consideration for the individual possibilities of self-realization or *self-development* can be said to be the fundamental value that characterize the development of the post industrial society of present day. At the same time this consideration characterize the expansion of the concept of liberty that oppose the before mentioned elements of autonomy and self-liability.

The prospects of this development could be the *market or minimal state* that also – inspired by parts of the modern (Anglo-American) political philosophy (Nozick, 1974) – has been formulated as a vision for the future in the political debate.<sup>15</sup> In the following I will deal with the market state in a few words. According to this supposition the responsibility of the state for the welfare of the citizens will be limited to securing a certain supply of welfare benefits under a private – or mixed public-privately – administration and otherwise to manage the most basic functions of society. The consequence of such a reduction of the government would – in the last resort – be a relinquishment of the fellowship of values that the fellowship of the state and the society represent (Lundquist, 1998; Henrichsen, 2002). With a production of more or less individualized welfare benefits based on a market that allows the individual to choose freely between the benefits according to solvency and need, there will be no room for requiring that the social problems are solved on a collective basis by the public. Such problems must instead be solved through the market mechanism and the rules that apply to the management of the market; perhaps supported by a legal system that determine the specific ground rules for production and exchange of welfare benefits.

In lack of clear rules that grant the citizens rights in relation to the public, the citizens will be forced to seek their privilege by means of legal actions against the producers of the benefits; and the citizens will have to argue for their case by means of market principles and elementary fundamental rights. Hereby the law and the legal system become instruments for solving the conflicts that are caused by the development of the society. A development that also has been seen in other countries, where the market economy has greater presence; for example USA where the tendency to handle all

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<sup>15</sup> For some jurists the market state is already a reality, cf. for instance Graver (2002: 147 ff). In this context the concept *market state* is used in a narrow sense expressing that the public operations are executed under market conditions either privately (by inviting for tenders or by privatization) or publicly (by relinquishing the state monopoly of the activity). The introduction of market-like mechanisms (such as those that are elements in the set of ideas that constitute New Public Management) into the management of the activities of the public sector apart from this falls outside the concept of market state. These stated limitations to the concept of the market state can lead to the impression that the *minimal state* is a form of state where the majority of the public activities has been entrusted to management that is based solely on market conditions.

sorts of problems as a matter of rights, that are subject to legal proceedings – A phenomenon labeled as “*rights talk*” in this context (Potsdam, 2002). Such a development will rely on an increased amount of judicial activism, a phenomena that traditionally has been very limited in this country where the courts normally refuse to deal with “political” issues. However this tradition has been put under pressure by the law enforcement institute of the European Union – a institute that stands for a active integration of the legal systems of the member states (Graver, 2000).<sup>16</sup>

## 5. From social state to milieu state

*a. the problems of the risk society:* The development from a social state to a market state is a possible consequence of the continuous work of modernization. Another possibility is that the social state is moving towards what in theory has been characterized as a *network or milieu state* (Sand, 1996; Henrichsen 1997) – in the following I will use the latter expression.<sup>17</sup> The development is related to the part of the work of modernization that especially aims at democratizing the public structures of payment (strengthening the political possibilities of managing and possibilities of giving influence to the citizens).

Both the market state and the milieu state indicate a reaction against the organized social state and the organizational society in a whole. However there are further perspectives to the milieu state in so far as the idea of it is narrowly connected to another feature of the development of the society that has attracted political attention increasingly throughout a generation. It is a matter of the development that has been characterized as *risk society* (Beck, 1986). The expression refers to the increasing difficulties that are connected with managing and controlling a development of the society that is characterized by a industrial over-exploitation of the natural resources. The development also generates material wealth and as a result of that the production, the products and the total social effects of the production cause a number of specific risks for the individual. At the same time the problems that are being strengthened by the tendencies of internationalization and globalization of the production, the trade and the economy that characterize the contemporary development.

The idea of a milieu state came into existence as a reaction to these problems, but now it increasingly appears as a counterpart of the liberal version of a market state (Leyland & Woods, 1997: 446). This new supposition questions the conception of the consideration for self-development of the individual as a fundamental value – A fundamental value that can fit into a pure liberal project of phasing out or “marketizing” public efforts of any kind. It is stressed that the real societal circumstances at least must be reflected on as possible limits or barriers to a realization of this consideration; and in that case collective efforts will be necessary to prevent risks regarding health and alike arising from the production of the material goods. At the same time it must be stressed that public efforts still are required in order to equalize social, cultural and ethnical differences that can affect the possibilities of development of the individual. Finally if must be

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<sup>16</sup> Blume (2002) thinks that the legal system has undergone a “politicization” already, in the sense that the law enforcing authorities increasingly are being entrusted with the normative choice.

<sup>17</sup> The two expressions relate to each other as form and content: The expression “network state” refers to changing – non-hierarchic – forms of interaction between the authority and the citizen in connection with solving definite social problems; whereas the expression “milieu state” reflect a administrative practice with emphasis on solving the social problems where they are arising, namely “in the milieu”; cf. the text below about prevention as a alternative to the amending efforts that characterize vast parts of the public activities.

stressed that the premises of the market economy about fair competition and complete information limits the complexity of the benefits that can be supplied solely by the market.

The development towards a market state implies a *reactive* solution to the societal conflicts by means of a more or less politic legal system. The present alternative to this is a regulation of the conditions of the society which imply that the problems are handled *proactively* in interaction with the affected interests. The point in such a interaction is to create a balance between *short-term* economical (commercial) interests and *long-term* considerations for health, environment and society (Henrichsen, 1997: 397). As far as the challenge of the management consists of creating equal possibilities of development of the individual, including securing against unintended consequences of the societal production, it means that the traditional symptom-treating “reparative” activities of the welfare state must be expanded in order to engage – and thereby *prevent*<sup>18</sup> – the problems where they arise, namely “in the milieu” – hence the name “milieu state”. If the political attempts of management are expanded from biased attention to certain societal interests to a effort that seeks to unite short-term consideration for the production with long-term societal considerations, it will implicate that the authorities assume the active role as *mediators* between the conflicting considerations and the interests. The idea of the milieu state is developed for such purposes.

*b. The milieu state as problem solver:* The milieu state is not a pure “model of thought”; it represents ideas that are rooted in a development of the legal regulation that already has been commencing for years within the areas of planning and protection of the environment. This regulation has increasingly been based on ideas of prevention of the societal problems with *viability* as a normative pivotal point of the managerial initiatives. A characteristic of this is the tries to unite the conflicting societal interests in a *dialog* that emphasizes the concrete possibilities of reaching a solution through the establishment of special procedural demands for the public decisions. This kind of governance has been known for a long time within the area of work environment and practical planning. The practical planning has been carried out consequently within the area of protection of the environment by means of the so-called VVM-procedure (for evaluating the environmental effects of projects).<sup>19</sup>

With processes of dialogue as a pivotal point for the solution of the societal problems the stage is set for a *politicization* of the public activities that tend to oppose the professionalization of the public activities of the welfare state – let alone the judicialization of the administrative routines of decision of the state governed by law. At this point the model is inspired by the thoughts of the *reflexive* – procedurally determined – legal forms that has been debated in continental and Nordic jurisprudence since the 1980’s, legal forms that can be seen as a counterpart of the material legal form of the social state and the formal ditto of the state governed by law (Teubner, 1988). The perspective in such a procedurally determined arrangement of the relations between state and citizen has a tendency to be a revival of the state with separated powers in a new sense – Namely as

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<sup>18</sup> OECD has emphasized this consideration in the speak of “Ethnical Infrastructure” where *the weighting is changed from control to prevention*” (Bertok, 2000).

<sup>19</sup> The means of influence of the milieu state has a wide span of means, starting with traditional legal regulation to plans of entering into contracts with private agents. The societal regulation can however also include shapes of the market state, thus the idea of *transferable permissions for pollution*.

a division of the power on the “near” level where the interests of the citizens are affected by the societal development in particular.<sup>20</sup>

A administrative equivalent to the reflexive theory is the *ad hoc* model of organization. It has flat multi-disciplinary/project organizational structures that are especially suitable for promoting creativity and innovation in the work and decision-making processes (Mintzberg, 1979). The adhocratical model is securing a foothold in parts of the public administration. In this context the placement of the individual employee is – expressed simplistic – determined by a loyalty towards the *task*, towards the project that the authority or institution currently works on, since neither the political-administrative management or the acquired professional norms can be expected to solve the problems that the work with new altering tasks present. Hereby the officials are supposed to meet reality openly with a acknowledgement of the differences in the cases they encounter.

The perspective with efforts characterized by prevention, dialogue and project organization can naturally be expanded to include other sectors of the society that differ from public planning and environmental efforts. For a long time there have been efforts to secure a higher degree of prevention within the health sector, and the multifarious problems that are connected with the “social inheritance” also gets a increasing amount of political attention. The dialogue procedures explicitly gain a footing in the institutional work with societal problems. Examples of this are the demands of “differentiation of education” in the school legislation (where the goals and means of the education are determined in collaboration with the individual pupil), the demands of “informed consent” of the health legislation (where the goals and means of the treatment are determined in agreement with the patient) and the insertion of a “principle of dialogue” in the social legislation (whereupon the citizen must have the possibility of participating in the case).

The introduction of user boards and the like correspondingly mark a polarization of the activities on these areas in so far as the users and affected citizens are involved directly in the institutional decision-making process. As well as the increase in the use of multi-disciplinary and project organizational forms of activity in connection with the work of development and conversion that are commencing in the individual institutions.

*c. Fundamental values in the milieu state:* The prevention of the societal problems, work forms characterized by dialogue and politicization of the public decision-making processes reflect a number of fundamental values that more or less differ from the values that can be fulfilled in a market state. Still the benchmark of values remains the same: The consideration for securing the self-development of the individual in accordance with the wishes and needs of the individual. However the concretization of this ideal of liberty differ in the two models: The market state gives the individual options when choosing the welfare benefits. The range of the options is limited by the market. The welfare benefits are only presented as long as there is a market for them. The milieu state is rather arranged to increase the liberty of the individual when it comes to choosing the possible ways of self-development in so far as the degree of freedom is limited by political management in a narrow – dialogically induced – interaction with affected citizens and users of the public benefits.

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<sup>20</sup> The concept “*governance*” that has been used in modern political theory as a expression for a structure of management with participation of private agents and as a counterpart of the organs of the state and the municipality that are elected by the people (“*governments*”). The expression originate from the world of private industries (“Corporate Governance”) but is has spread to the public sector, first at the local level (“Local Governance”) and afterwards onto higher levels of decision-making (“Good Governance”).

Partly as a consequence hereof the ideal of equality is differently utilized in the two models: In the model of the market state via rules that secure equal rights to the benefits that the individual can and will pay for and so that the rights are connected to concrete welfare benefits. As for the milieu state the ideal of equality is concretized as a matter of securing “equal possibilities” for developing in accordance with the personal abilities and wishes of the citizens. Rights and obligations are connected to the possibilities of influencing the – social and health related – conditions of life that might appear as hindrance for these possibilities.<sup>21</sup> In this connection the concretization of the ideal of equality must be seen as an expansion of the before mentioned standards of equality that has been predominant in the liberal state governed by law (“equal right”) and the social state governed by law (“equal access”).

From a perspective that emphasizes legal protection the model of the market state makes the security of a transparent market for production and distribution of welfare benefits crucial – Benefits that comply with all needs and wishes as far as possible. In a context of the milieu state the ideal of legal protection must be defined as a demand of a *equal* treatment when solving societal problems for the citizens (Henrichsen, 1997: 339). It is a consideration that especially connects to the before mentioned dialogue-based organization of the relationship between authorities and citizens. The consideration furthermore designates an expansion of the ideal of legal protection in relation to the before mentioned considerations for predictability and thoughtfulness in the handling of the legal matters concerning civil issues.

The notions of value of the milieu state are not distinctly articulated in the current work of changing and renewing the public sector, even though they in some respects are a continuation of the trail in the work of modernization that concern the democratization of the public decision-making processes. On the other hand the notions are rooted in the long-term development within certain parts of the legal order especially within public planning and protection of environment but gradually also in other areas. As for the notions of value of the market state the opposite seems to be the case. These notions do not have a long history but they have had a great effect on the political debate of the future possibilities of the government.

## **6. Conclusion**

The preceding analyses cover a number of elements in the public activities that puts it in a historical context of the state governed by law and as an essential factor of the solidarity in the modern legal community. For that reason it is particularly just to speak of a “public ethos” as a token of the special values that the public must take care of. However the elements of the state governed by law are not unchangeable, as well as the public contributions to the maintenance of the legal community are not static. Hereby the question is not so much whether the new values gain a footing in the development of the organization and management of the state, but rather whether the established fundamental values gradually attain new wider meanings. Meanings that reflect the common development of the values in the society cf. the overview of the four mentioned models of state given below.

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<sup>21</sup> In 1992 a provision (§ 110b) about “rett til natur- og livsmiljø” was inserted in the Norwegian constitution. This provision states certain normative principles for the legislation including the principle of right to a certain environmental quality, solidarity with future generations and the civil right to information regarding environmental matters. In a corresponding manner the Finnish constitution of 1999 (20 §) states, that the commonalty must promote a healthy environment, and that everyone has possibility to influence decisions regarding matters, that concern their personal environment.

	<b>State governed by law</b>	<b>Social state</b>	<b>Milieu state</b>	<b>Market state</b>
<b>Fundamental democratic values</b>	Self-responsibility /equal right	Self-determination /equal access	Self-development /equal possibilities	Self-development /own possibilities
<b>Fundamental Constitutionalist values</b>	Protection against abuse of power	Protection by use of power	Protection by separation of power	Protection by renouncement of power
<b>Law and order – considerations</b>	Formal form of law /predictability	Material form of law /thoughtfulness	Reflective form of law/equality	Responsive form of law/dissimilarity
<b>Law and order – guarantees</b>	Rule management/ Judicialization	Goal management/ Professionalization	Value management/ politicization	Market management/ De-politicization

*Figure 1. The fundamental values of the government in a perspective of history and future*

From a legal point of view the historical legacy comes from the constitutional state of the 19<sup>th</sup> century and the social state of the 20<sup>th</sup> century. From the end of last century two tendencies emerged that each in their own way breaks with the historical legacy. As a result hereof four different “layers” or dimensions in the legal development of the public sector are isolated; respectively a dimension of the state governed by law, a dimension of the social state, a dimension of the milieu state and a dimension of the market state. It is certain that both the values of the state governed by law and the social state persistently will be essential in some of the areas in the public sector. The values originally have a certain meaning within the areas of the public service activities and regulations, but it is characteristic that the values of the social state convey a number of (new) demands to the execution of public authority.

The new values of the milieu state have their core area within the societal regulation concerning the distribution of collective goods. But a the tendency of a spreading of values can also be traced here, especially within the service activities where the conditions for arranging the activities in accordance with dialogue processes are good. Parts of these service activities has in particular been subject to a market regulation that to a certain degree change the notion of value concerning the activities, and similar tendencies have been seen in relation to the regulation of the health area where the contract form also has made its intrusion.

It is unknown with which intensity these new tendencies has been established and whether the one has taken over the other. Certainly the market state is the top item on the political agenda, but it is impossible to determine whether the public sector actually has developed in that direction on basis of the available information. The question however is vital because the choice of the direction of the development has clear normative implications on the public ethos. In different ways the following chapters will try to elucidate the public ethos in all its nuances covering the entire public sector. The last chapter will return to the matter of the course of the development and where is can be expected to go in the years to come.

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