"PUBLIC" RULE-MAKING, AND "PRIVATE": THE SWEDISH EXPERIENCE

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1. INTRODUCTION

1.1. The title of this article could be interpreted as a condensed declaration of ideas, even indeed as a war cry announcing a vigorous attack upon established jurisprudential principles. If the expression "rules", in a legal context, is to have any meaning, it must refer to something which can be called "the law", or more precisely "the law actually in force" (Swedish: "gällande rätt"); and it would seem to be generally accepted in Scandinavian and Anglo-American jurisprudential writing that when defining the "law", as opposed to other norms or established patterns of behaviour, you must proceed—failing other methods and other criteria embodying higher degrees of philosophical ambition—in one of two ways. You can have recourse either to a definition (which may be, and generally is, entirely conventional) of the *sources of law* or to an equally formal definition of those public officers or agencies, usually the ordinary courts, whose decisions are to be considered as an authentic *application of the law*. The latter method has been advocated, in modern Scandinavian jurisprudence, above all by Professor Alf Ross.[1] It is equally well known from the tenets of early "American realism". The former method —in numerous variants, the essential identity of which is frequently obscured by disagreement over the question what are the authentic or at least admissible "sources" of law—is by far the older; it may be said, with some simplification, that it first became clearly prevalent with the decline of the doctrine of "natural law" during the period 1780–1830. In Continental Europe, there was, amidst much controversy on other points, general agreement that statutory law was the principal, if not the only, "source of law". I do not intend to continue the debate on the definition of "legal rules" or "the law". Basically, I accept the

The present article is based on a paper in Swedish submitted to the twenty-fifth Meeting of Scandinavian Lawyers, Oslo 1969.

[1] See Ross, *On Law and Justice*, London 1958, pp. 34 ff.; cf. pp. 59 ff.

analysis made by Professor Ross.[2] The purpose of this paper is to describe, and discuss, the creation and administration in a modern community—Sweden serving as an example—of a vast, complex and heterogeneous body of rules, which are characterized by at least one common denominator: they do not owe their existence to legislation. One distinct group is the body of rules created by *courts*; these—like at least some principles adopted by other public authorities—are undoubtedly "legal". It seems equally certain that some other "rules" to be discussed below cannot claim the status of "*legal* rules" according to either of the two methods of definition just referred to. A third group is composed of such rules as could possibly have claimed to be "legal rules" even in the heyday of 19th-century positivism, inasmuch as they may be acceptable to the courts as expressions of "custom". Others, finally, whether customary or not, could perhaps satisfy Professor Ross's criterion inasmuch as, whatever their origin, they may eventually be put to use in judicial decisions.

The fact that little attention will be given to the drawing of clear-cut lines between "legal" and "non-legal" elements in the rules now envisaged does not mean that the difference should be forgotten. A question arising from the creation of general patterns of conduct by, e.g., non-official bodies, trade organizations or even individual companies is whether "legal rules" are insufficient, or are inadequate tools of "social engineering", in modern industrialized societies. The role played by judge-made rules must be considered in that context. Another question of major importance is what attitude those responsible for the "legal system" should take with regard to such unofficial rules. Can any rational principles be found?

If the terminological question—What should be understood by "rules" for the purposes of jurisprudential writing?—is thus deliberately left without an answer, it is in the interests of clarity that it should at least be raised by way of introduction. Let it only be remembered that any definition of such a term as "rule"—or even "legal rule"—can be either descriptive or normative, and that whereas normative definitions formulated for practical use within the framework of any given legal system require a high degree of precision, considerably greater freedom can be claimed by writers setting out to give purely descriptive definitions. In

[2] See Strömholm, "Till definitionen av begreppet rättsregel", *Sv.J.T.* 1969, pp. 186 ff.

principle, any reasonable characterization of the phenomena that are to be described will do, provided it is used consistently. "Legal problems" in a normative sense will not arise until the phenomena thus described are measured by the standard of "the law as actually in force", i.e. the set of rules characterized as "legal" according to a normative definition.

I intend to make use of the freedom to delimit my subject independently of the notion of "legal rules actually in force". The criteria adopted for defining the "non-legislative" rules considered in this paper may be described as follows. On the one hand I propose to examine the deliberate creation of such norms for human behaviour as claim some kind of "validity", at least within a limited area, and are of a general scope either because they apply to an indefinite number of parties or because they govern a specific kind of relations for an indefinite future—individual, *ad hoc* contracts are consequently not considered. On the other hand, I shall trace the development, either of legal rules in the strict sense or of the "rules" just referred to, through their application by special agencies appointed by contract or otherwise. It follows from what has been said that one important topic which has to be covered is the development by the courts of already existing statutory or otherwise applicable legal rules. Another topic is the creation and development, through application, of what may be called "private" rules by "private" organizations. The terms "public" and "private" rules, and rule-making, will occasionally be used for the sake of convenience. The discussion relates essentially to Swedish material. Emphasis is laid on contracts, tort, and the law of property—the principal fields of application of the freedom of contract, without which "private" rule-making is possible only to a very limited extent. The law of labour relations, which presents several peculiar features and which has been extensively discussed in Swedish and foreign legal writing, will not be dealt with in this article.

1.2.1. When Continental jurists put forward the thesis that the legal system is basically identical with statutory law, interpreted as an expression of the state's supreme will—customary law being recognized as a kind of safety valve which, within strict limits, admitted some regard to surviving or emerging social conditions—their sociological environment was the liberal state, as it existed (in Sweden) for a few decades before and after 1900. Some characteristic features of that community, now vanished, may be recalled here. First, the law-giving and law-administering state met

an unorganized mass of citizens, each surrounded, as it were, by his sphere of legal rights and obligations. The field of activity of the state was strictly limited. It is true that organizations were coming into existence—nonconformist denominations, popular movements like the temperance movement, labour and trade organizations—but they had not yet crossed the frontiers into the realm of law to any considerable extent. They could not assume the function of rule-creators in those fields where the state developed its activity. The state, within the narrow limits which—for traditional or urgent practical reasons—were of interest to it, had no competitor. Although economic and social development was rapid when compared with earlier periods, the industrial revolution (which did not exercise a decisive influence upon Sweden until after 1870) did not confront *private law* with problems which law-givers and courts could not master. It seems likely that the emphasis which the prevailing ideology put upon the freedom of contract, the general philosophy of *laisser-faire,* and the limited area of public intervention helped to maintain the idea that public justice—and recognized customs—offered the body of rules necessary for society to function well. On many points, this idea was probably correct: vast areas of the community's life were not yet affected by the industrial revolution, and even where its effects were making themselves felt, far from all of the potential consequences were visible. It would still be a long time before the revolution taking place in some branches of production, and in the structure of industry, would reach out to set time-honoured methods and structures aside in other branches; and the distribution function was to wait even longer for its revolution.

1.2.2. On all the points now referred to, modern Swedish society is radically different from that which jurists had reason to study when preparing reform in those essential fields of private law—the sale of goods (Act of 1905), the law of contract (Act of 1915), and the law of agents and commercial travellers (Act of 1914)—which are still governed by legislation passed in the era of liberalism.

If we consider, first, the organization and structure of business, the most salient feature is the process of concentration which has been going on since the early days of the industrial revolution but which has been particularly rapid in the last decades owing to rationalization and the increased demands for capital. The process covers distribution as much as production. In many cases, all these links of the chain have been integrated within the same

enterprise. Competition between those very large companies which manage to survive on the market is keen; pressed between competition and increased costs, the margin of profit is often very narrow. This development would seem to emphasize two demands which business makes upon the law and its administration. The large size of companies and the consequent importance of the economic repercussions of all measures they take mean that detailed planning in advance is called for, and such planning requires, in its turn, a precise knowledge of the state of the law in the fields concerned. If public rules are not predictable in every particular, there is a strong need for a clarification—where it is legally possible—by means of the creation of private rules which, according to the structure of the market and the strength of the parties, may take the form of general agreements for a particular sector or of unilaterally drafted forms of contract. If, on the other hand, it is impossible to make the legal position secure in advance, or if measures taken to that effect fail, it is vital that clear answers from the public rules should be obtainable without delay, so that the ponderous machinery of business can be set on the right course as quickly as possible. Big business would also seem to make specific demands upon the quality of decisions: a decision which does not lay down clear principles capable of serving as the basis of planning can obviously paralyse economic activity as effectively as a lack of rules.

Finally, the keenness of competition, the capital-devouring long-range investments in technological development and the increasing importance of expensive and sophisticated methods for marketing —features which all make secrecy more important than it was before—emphasize the interest in settling litigation in such a manner that as little information as possible about internal organization, policies and planning leaks out to competitors. A concern for a good name and good public relations is also characteristic of modern big business and makes the publicity of court procedure highly undesirable. Incidentally, this attitude also makes it possible to influence the behaviour of business firms by subtler means than the heavy instruments of public rules of private and criminal law enforced by courts and other public authorities.

In short, completeness and clarity of legal rules (whether statutory or judge-made), swiftness in their application, and a possibility of keeping valuable information secret would seem to be the principal demands made by modern big business upon the legal system. Where these qualities are lacking, there is a

strong incentive to complement and, wherever possible, to supplant that system by a network of private rules.

It should be added, even though it may be a truism, that with the rise of groups and firms which dominate the market more or less completely the private rules by means of which such constellations try—and in itself the attempt is legitimate—to create a clear basis for their activities may often prove unfair to others. Even where competition is keen, there are many points where the competitors have an obvious interest in maintaining a common line of action. Where such groups are opposed to unorganized individual parties, private rules may develop, under the protection of the freedom of contract, in a way which gives rise to serious concern from the point of view of social or, more generally, of distributive justice.

1.2.3. The concentration of economic power in big business is not the only phenomenon which exercises an influence upon private rule-making.

Prevailing notions about the legitimate sphere of activity of the state and other public bodies have changed profoundly under the pressure of new ideas and recurrent crises. *Laisser-faire* has given place to intervention in almost every field of human activity. There are two elements in that development which would seem to deserve attention here.

In the first place, the freedom of contract has been subjected to ever-increasing restrictions both directly—through rules which make it possible for courts to modify or disregard unfair contract clauses[3] or through mandatory rules settling questions previously left for the parties to solve by contract (e.g. in rent legislation, in the law of conditional sales or of paid holidays)—and indirectly, by means of statutes and ordinances which require the granting of permits for, or establish administrative control over, important branches of economic activity (building regulations, forestry and agriculture supervision). The possibility of creating private rules in these fields has decreased correspondingly. An important check upon potential abuses, particularly in standard contract forms, was introduced in Sweden in 1970 with new legislation on marketing in general (see 2.3 *infra*).

[3] E.g., Insurance Contracts Act (1927), sec. 34; Negotiable Instruments Act (1936), sec. 8; Conditional Sales Act (1915 with later amendments), sec. 8; Copyright Act (1960), sec. 29. It is subject to doubt whether the introduction of such rules in a great number of important statutes implies that a *general* principle allowing courts to modify contracts has become part of Swedish law. See N.J.A. II 1936, p. 51, and Professor H. Hessler in *Sv.J.T.* 1954, p. 421.

Secondly, it is equally obvious that the ever-increasing activity of the state in numerous new areas has made the 19th-century idea of an essentially passive state, devoted to national defence, education, and the administration of justice, utterly unrealistic. In its capacity of large-scale enterprise, e.g. as employer and as buyer of goods, the state has interests which coincide with those of many branches of business. In many fields, state intervention shuns the traditional forms of administrative control and tries new methods of a less formalized character, such as cooperation in semi-public and semi-voluntary committees and boards. Both public enterprise and public control of business give rise to new rules and to the creation of agencies entrusted with their application.

1.2.4. The third and last feature of modern society which makes it differ radically from that of 19th- and early 20th-century liberalism is the rise and establishment of powerful organizations.[4] In this analysis of some characteristics of modern corporativism which seem to influence the creation of rules, religious, temperance and educational movements can be left aside; they have little influence on the development of rules in the fields of economic activity.

If we call a branch of production, or an area of economic life, "fully organized" only where the interests of all reasonably well-defined groups concerned are taken care of by organizations which maintain permanent relations with other bodies, covering with equal efficiency other groups with opposed interests, the best—perhaps the only—"fully organized" area of economic life is the labour market. Outside that area, organizational cooperation (or conflict) capable of regulating almost entirely a large market by means of private rules is practically impossible, either because the parties concerned cannot be defined and organized in opposing groups as clearly as can employers and employees or because the interests at stake are too heterogeneous or are not sufficiently permanent to serve as the basis of organization. It is only natural that the most complete creation and administration of private rules is found in the labour market. It is true that organizations covering the main part of important groups with common interests—industry, trade, and their various branches, and agriculture—also operate outside the labour market, but then their activity assumes a somewhat different character. Besides acting

[4] See, for Sweden, Elvander, *Intresseorganisationerna i dagens Sverige*, Lund 1966, and Foyer in *S.O.U.* 1961: 21.

as pressure groups—regularly stating their opinions on proposed enactments in the course of the legislative procedure[5]—they engage in two kinds of activity which are of interest in the present context. Where the interests of two organizations clash, a creation of rules essentially similar to that which takes place in the labour market may be the result of negotiations or permanent cooperation. Where an organization, in safeguarding its members' interests, is not confronted by opponents of at least comparable strength and structure, it may create, unilaterally, rules which are subsequently more or less successfully imposed upon the individual parties doing business with the members. Generally speaking, it seems reasonable to submit that for reasons of concentration and economic resources, producers' and distributors' interests have a capacity to create rules in their favour which the consumers do not possess. In many cases, however, the situation is likely to be more complex, since strong groups are not only vendors but also buyers (department stores, large companies operating chains of retail shops, industry in relation to raw-material producers), but the difficulty of finding forms of organization able to represent the last link in the chain of the process—the individual consumer—is obvious. The "economic man" of the modern organization society is a full-time producer or salesman, and he puts all his work and capital into that activity; he is less than a part-time buyer, and each individual transaction engages a small fraction of his resources and interest. Certain "typical consumer positions"—that of tenants or even that of motor-car owners—may be permanent and important enough to serve as the basis of organizations, but associations of private buyers of capital goods or of food consumers are lacking. Attempts to take care of consumers' interests within the framework of corporativism are in fact made, but the forms adopted—cooperative associations, the creation of "buying centres" or discount agreements in favour of, e.g., the members of professional or trade organizations—are of minor interest for present purposes; they do not contribute actively to the creation of private rules, although the cooperative movement may well exercise, by its very existence and business methods, a certain influence upon competing private business. It is symptomatic that when the opinion of organizations is taken on draft enactments in the main fields of private law, consumers' interests are usually represented by the labour market organizations of employees.

[5] See Strömholm in 10 *Sc.St.L.*, p. 193 (1966).

The establishment of the office of a "Consumer Ombudsman" (see 2.3 *infra*) obviously constitutes an attempt to counteract the difficulty of protecting such interests by means of organizations.

To sum up, modern corporativism is fertile soil both for the growth of private rule-making—in the form of agreements, of unilateral rules in favour of the members of organizations and finally also in the form of internal rules regulating the relations, co-operation and competition of members—and for the establishment of private bodies appointed to settle litigation under public or private rules.

1.3. Against the background thus outlined, I will now discuss the function and possibilities of *legislation* (sec. 2), for without an analysis of the main source of public rules a realistic appraisal of private rule-making cannot be undertaken. We shall then proceed to study the administration of justice by *courts* and other public *authorities,* the principal object of our attention being the continued creation of rules by precedents (sections 3 and 4).

It will have appeared from the foregoing remarks what kinds of private rules will be given particular consideration. In the first place, *contract bargaining* as a rule-creating mechanism will be examined (section 5); by contract, we understand, in this context, agreements that have been formulated by both of the bargaining parties—public bodies, organizations or private firms—and are intended to be applied by the parties (or their members) in the future. Next, we shall deal with certain kinds of *unilaterally formulated norms,* usually issued by organizations for the use of their members (section 6). A particular category worthy of special attention consists of those standard contracts that are *unilaterally formulated* and are intended to be put into effect by individual parties adhering to them without modifying their terms (section 7). *The creation of private rules by specially appointed bodies* is another special category (section 8). Finally, we shall suggest some conclusions (section 9).

2. THE PROVINCE OF THE LEGISLATORS

2.1. If we set out from the hypothesis that private rule-making is widespread and is increasing in volume, our discussion of the legislative machinery should, in the first place, provide an answer

to the questions to what extent and for what reasons the structure, methods and results of the legislative machinery contribute to this state of affairs. Is legislation insufficient, in quantity or quality, in general or in special areas? Does the way in which the machinery works imply that—independently of its capacity to produce acceptable and sufficient material—it cannot be adapted quickly enough to emerging needs? Are there reasons of principle for the legislator's refraining from entering areas where private justice is important?

2.2.1. As for the *volume* of legislative activity, complaints about the scarcity of statutes and ordinances are seldom heard. The total yearly output of public enactments, as appearing in the Swedish official gazette (*Svensk författningssamling*) has remained roughly the same, between 600 and 1,000 items a year, for a relatively long time.[6] Such a purely quantitative indication is of small interest, however. A closer survey of the five-year period 1963–67 justifies the conclusion that a very great number of enactments are of immediate concern to economic activities of various kinds; there are rules on public loans, grants, administrative permits, restrictions, conditions for various activities or acquisitions, obligations to provide information to the authorities; many enactments, of indirect importance for business, lay down formal and procedural rules for public authorities. However, the number of statutes, ordinances and decrees dealing with the organization and activity of business as elements of *private* law is insignificant in the five-year period concerned. We could name some ten items, mostly either of small importance or highly specialized, that occurred in the five years examined.

Observations of this kind are obviously not very conclusive; at most, they may be considered as symptomatic. It is a well-established tradition in Swedish legislation that reforms of any importance in the central fields of private law shall be prepared for many years and submitted to the Riksdag *en bloc*. A five-year period is too short to give a true picture of legislative activity. To complete the evidence, it is necessary to consider the activity of *law reform commissions* during the period.

The annual survey of commissions that was presented to the

[6] The following figures may be quoted. In 1907, the official gazette contained 154 new enactments. The war year 1917 saw 991 new texts; in 1927 there were 501; in 1937, 1,040; in 1947, 1,016; in 1957, 713; in 1958, 676; in 1959, 622; in 1960, 745; in 1961, 676; in 1962, 709; in 1963, 699; in 1964, 902; in 1965, 932; in 1966, 770; in 1967, 950.

Riksdag in 1967 lists a total of more than 360 such bodies, appointed by the King in Council or, with the King's authorization, by the various Ministers.[7] Out of these, 77 had submitted their final reports in 1966; in the same year, 62 new commissions had been appointed. The annual survey also allows some conclusions as to the time spent by legislative commissions on their work. Among the ten commissions working in the domain of the Ministry of Justice (which has the main responsibility for the legislation likely to interest us here) which submitted their reports in 1966, one had been appointed in 1949, but had been reorganized in 1960; one dated from 1955, but its terms of reference had been enlarged in 1959 and 1960; and one had started its work in 1959. The remaining seven were appointed in the years 1961–65. Of the commissions under the Ministry of Justice continuing their work in 1967, one had been appointed in 1949 but had been reorganized in 1960; one had been set up in 1951, but its work was of a permanent character; two dated from 1956; and the rest, some 40 commissions, are fairly evenly divided among the years 1960–65. It should be added that much important reform work, especially in the fields of private and procedural law, is entrusted to a permanent Law Reform Commission (*lagberedningen*), and that an increasing proportion of legislative preparations falls upon the ministries themselves. Their legislation departments have always revised commission reports and prepared the actual Government bills, but there is at present a strong trend—which may, in the long run, modify the whole procedure of legislative work—towards entrusting the whole preparatory work to ministry officials or informal working parties of such officials, who are easier to supervise and to steer towards politically desired goals, in the course of the work, than are independent commissions. In the last few years, this development has shown an alarming acceleration. What especially gives rise to misgiving is the fact that legislative preparation tends to be done in a great hurry and that—for this reason, or possibly others—the ambition to discuss in detail the merits and disadvantages of different solutions is often sacrificed. Frequently, only the merits of a politically opportune solution are set out; the demerits are deliberately forgotten.

[7] The largest number—69—worked for the Ministry of Justice; next came the Ministry of Education with 56, the Ministry of Communications with 46, the Ministry of Social Welfare with 41 and the Ministry of Finance with 36. The lowest number for any ministry is 6, working for the Ministry of Foreign Affairs. On the Swedish commission system in general, see Strömholm, 10 *Sc.St.L.*, pp. 191 ff. and 199 ff. (1966).

An examination of the tasks of those commissions whose work seems, *prima facie,* to be of interest for business and for economic activities in general produces the same impression as a study of the chosen five-year period's harvest of promulgated enactments. We need not go into details. Few reports submitted in the years 1961–66 concern topics in the fields of contract, tort and property, although there are, among the dozen reports which have a direct or indirect bearing upon these fields of law, at least two or three which contain proposals of considerable importance, such as a voluminous revised report on land law (*S.O.U.* 1963: 55) and a report proposing a new (and subsequently adopted) form of mortgage on stocks, equipment and machinery. Finally, among the commissions under the Ministry of Justice which were continuing their work in 1967, one was preparing reforms in the law of trade names, one was examining maritime law (in consequence of certain international conventions), one was preparing modifications of the law of limited companies, and one was studying possible amendments in the law of sales.

2.2.2. Against the background of the foregoing survey of legislative activity, it does not seem justifiable to state that the legislator's passivity or lack of interest is an essential reason for the existence of an important body of private rules. The state obviously follows the development of all branches of economic activities very closely. However, the *results* of this continuous watch-keeping are to be found essentially in enactments within the field of public law which limit, directly or indirectly, the area within which the creation of rules of private justice is possible.[8] The legislative contributions to those legal tools—in the form of optional rules—with which contracting parties most frequently work are much more modest.

Another observation seems justified on the strength of the material now discussed. So far, complaints about the *quality* of enactments in the field of private law are rare (although not completely lacking: the trend to base new enactments on insufficient investigations of sometimes doubtful intellectual honesty, already mentioned above, the tendency to formulate the actual statutory texts so broadly that they are incomprehensible without consulting the preparatory works, and certain linguistic innova-

[8] On the increased use of mandatory rules of private law, see Grönfors in *Festskrift till Håkan Nial,* Stockholm 1966, pp. 204 ff.

tions purporting to "modernize" statutory language, presumably in a "democratic" spirit, are the main targets of criticism). But the *slowness* of the legislative machinery is a serious drawback from the point of view of business. If all reform drafts actually under consideration and all preparatory work actually performed are put together, one may easily get an impression of a continuous large-scale revision over the whole field. But this revision can hardly keep abreast with a development conditioned by technical and economic factors of change, which frequently have an immediate effect and which create new needs and new interests—at least if legislation is to provide those reasonably precise and detailed rules which alone are able to make private rule-making superfluous. There is, as some recent developments tend to show, a considerable risk that rash and badly prepared initiatives by opportunist or anxious holders of political power will occur *side by side* with the normal and acknowledged process of legislation.

2.2.3. Even if it were technically possible to attain such a rhythm of legislation that the legislator would be in a position to meet the needs of economic life, it may be asked whether such an achievement is desirable.

The legislators have to pay regard to many aspects which may counterbalance the desire to provide business and economic activities in general with such "public services" as the swift production of legal rules adequate to meet rapidly emerging needs. Public rules—as defined above—constitute a vast system interfering with many fields of life. The ordinary citizen's needs for legal security and the still largely prevailing opinion that the legal system should be of some permanence require a minimum measure of coordination and harmony with established principles in neighbouring fields of law. Rapid changes within one limited area may jeopardize that harmony.

It also seems obvious that the demand for rapid adaptation of rules within the field of private law to new needs raises the question of legislative technique, and more precisely the degree to which statutory rules should be made abstract and general in scope or concrete and narrow. It is true—a truth today recognized in all quarters—that rules which seem perfectly clear may turn out to be ambiguous or vague when put to application. Nevertheless a relatively high degree of precision can be attained, e.g. by using well-defined technical terms. As already pointed out, there is a tendency in modern Swedish legislation in the field of private law to use language that is more abstract and general

than that used earlier.[1] The relationship between the level of abstraction in legal language and the need for precision on the one hand and for swiftness of change on the other could perhaps be defined as follows. The more detailed and precise legal rules are made, the more quickly they grow obsolete and the more urgent is the need for continuous revision. Rules laid down in broad language are less satisfactory from the point of view of security and predictability, but are likely to have a longer life. What is decisive for the actual functioning of rules couched in general terms is the way in which they are applied by courts. It should be recalled in this context that the actual statute is by no means the only channel of communication between legislators and courts. Dicta by legislative committees and ministries in the legislative material (explanatory memoranda) may add precision to the intended construction of the text, and such dicta are extensively resorted to by the courts. As for the lawmaking role of the judiciary, it may be stated that if there is a high frequency of decisions in the highest instance and if the courts are conscious of, and willing to accept, the role of lawmakers by means of precedents, it is possible to develop within the framework of a statutory text in an abstract language, without too much delay, a body of more refined and well-nuanced rules which works, at least in principle, more flexibly and implies better possibilities of adaptation than a body of more precise statutory rules. If these conditions for judicial lawmaking are not fulfilled—e.g. because large bodies of important litigation are regularly settled out of court—a legislative technique using general language may easily result in an insecurity which the use of explanatory dicta in the course of legislative history cannot completely remove. Obviously, these facts may create an endless circle: the reluctance of parties to have their litigation judged under rules the precise implications of which they cannot foresee strengthens the tendency to avoid the courts and consequently reduces the number of precedents by which alone the general formulae of statutory language can acquire a more precise meaning. Another consequence of a broad style of statutory language is that the more general rules are made, the vaster will be their potential field of application, and they may therefore interfere not only in areas where the need for rapid change is strong but also in fields where the interest in permanence is stronger.

[1] See, *inter alia,* Hult in *Festskrift till Stjernberg,* Stockholm 1940, pp. 128 ff., and Persson in *Festskrift till Olivecrona,* Stockholm 1964, pp. 508 ff.

There are other considerations to keep in mind with regard to legal systems where public rules of private law apply indiscriminately to such highly differing milieux as modern business and what may be called the field of "non-professional" economic activities. Requirements for formalities to be observed in order to secure the validity of legal transactions may be desirable or at least possible in the realm of big business but unduly burdensome in the "non-professional" area; on the other hand—and this would seem to be the usual argument put forward in legal writing—such requirements may offer a protection against premature transactions by "non-professionals" which is unnecessary in the world of business. Finally, it should be remembered that the opinion according to which precise and detailed rules offer legal security is valid only up to a certain point. The continuous changes necessitated by such a drafting technique are a negative factor from the point of view of security. The splitting up of general principles into a large number of rules, many of them containing derogations from the principles, also entails serious inconveniences, among them unpredictability and insecurity.

Another question of principle should be raised. However carefully statutory texts are drafted, it is impossible to escape from the dilemma caused by the fact that legal rules are expected to fulfil two different functions. From the lawyer's point of view, they are *tools*, instruments which should be as precise and efficient as possible for the settling—or, whenever possible, prevention—of litigation, i.e. the abnormal cases of social intercourse. Viewed in a broader sociological perspective, however, legal rules are also something else: they have the function of instructing the citizens in general about the way in which a socially normal life should be led; to fulfil that function, they ought to be easily comprehensible, but need not meet too severe demands in respect of precision and technical perfection. Now, there can be little doubt that the *ordinary readers* of statutory texts are the lawyers, and that the framing of such texts is in fact determined by those readers. Most enactments cover a more or less pragmatic selection of possible conflict situations of practical importance. They use a technical language which is often almost incomprehensible to laymen. There are strong reasons of linguistic economy for that technique. And it seems more honest to maintain it and to provide the citizens at large—by other means than the promulgation of laws—with adequate information, in plain language, about the basic rules of the legal system than to indulge in loose language

and vague formulae purporting to bring the law "closer to the people". The latter solution, which is not unknown in modern Swedish legislation, would seem to deprive the lawyer of his instrument of precision at the same time as it deceives the layman into believing that he understands.

To some extent, the problems we have raised are certainly insoluble. A certain measure of abstraction must be taken into the bargain, if the ambition to lay down "rules" is not to be abandoned: the very concept of rule implies a minimum of generalization. And no style of language can attain absolute precision. Nevertheless, some constructive proposals could presumably be made.

If we adopt the hypothesis that the existence of a growing body of rules is due, at least to some extent, to the fact that legislation does not provide all the rules which are deemed necessary for the pursuit of economic activity, particularly in the form of big business—we shall return to the inevitable additional question of the part played by the courts—then the first thing to do before putting forward proposals for amending this state of affairs is to discuss whether there are any reasons for deploring it. What has to be considered is not only whether organizations and individual companies can manage at all to fill the lacunae left by legislation but also, of course, whether the form and substance of private rules are in essential harmony with the values and qualities which legislation stands for. It will have appeared from our discussion of the part played by various organizations that in this context an essential question must be to what extent branches and interests are in fact organized. A fully organized market implies guarantees for a reasonable balancing of interests which cannot be expected if the degree of organization prevailing among the opposed parties concerned is not equal.

The problem whether private rules are acceptable in quality is manifestly, in the last resort, a question of political evaluations, but the minimum requirements about which general agreement can be reached would seem to be that elementary standards of fairness and expediency should be fulfilled and that there should not be too blatant a difference between the general conditions obtained by favoured, organized groups and those imposed upon disfavoured, unorganized ones. If, as seems inevitable up to a certain point in a free market, it is found desirable or necessary that, e.g., social considerations should be taken into account or that the use of superior economic skill and power should be sub-

mitted to more severe control, then the legislator can hardly escape from interfering more actively either by means of peremptory rules in fields of law considered to be particularly important from a social point of view (e.g. by rent and conditional sales laws) or by means of administrative control (cartel and monopoly supervision, price and rent control). It would seem, however, that much or most of the private rule-making found in Sweden operates upon ground which may be called *neutral* from the point of view of political evaluations. It is essentially a method for improving and refining the legal rules considered as technical tools in the service of economic planning and acting.

If it is true that the function of private rule-making may be regarded as being essentially that of a technical instrument but that, for ideological or other reasons, the legislator nevertheless feels bound to interfere, it seems hard to avoid at least the question whether the Swedish—and Scandinavian—tradition favouring a unitarian concept of private law, identical for business and "non-professional" purposes, can be maintained. The Swedish Sale of Goods Act, 1905, makes distinctions, on a few points, between mercantile and other contracts of sales. In the Continental legal systems, the difference between mercantile and "civil" law is well established. The question will not be discussed more fully here, but it certainly merits consideration.

The area within which an independent commercial law would fulfil a useful function would seem to cover—to judge from Continental patterns—essentially those topics which have been described here as "technical" or "neutral" from the point of view of social or political evaluations. It would be a regulation of "the market" in a strict sense.

If we leave aside, or give a negative reply to, the question whether it is desirable that the legislator should assume the responsibility for a reasonably complete body of rules of the kind now referred to—with all the requirements for detailed regulation and continuous change that this implies—and if we return to the general question whether a more intense legislative activity may be desirable in order to put into effect essential evaluations within at least some of those branches of law which are today characterized by an extensive creation and administration of private rules, there are three distinct points which merit special attention.

First, it seems reasonable to state that the legislation which does exist serves to a great extent as *a model* even outside its field of application and even if there is disagreement over fundamental

political questions between the legislators and, e.g., business. The lawyers who frame private rules have been influenced, in the course of their legal training, by the same basic evaluations as, e.g., the judiciary feels bound to express in their decisions. It is, further, not without importance that the terminology of private rules is borrowed, as it were, from public rule-making. In highly specialized branches it is at least plausible that legal scholars—who play some part in the creation of both public and private rules—may constitute uniting links. Finally, it is hardly possible to create a body of private rules which is "waterproof" against the administration of public rules. It is always necessary to envisage the possibility that such rules will be considered by courts of justice for one reason or another. In sum, it seems probable that at least such private rules as are created on a reasonably high level are to a considerable extent in harmony with the spirit and basic values of legislation.

Secondly, in contemporary society, legislation in the field of private law is only one—and not necessarily the most efficient—method of bringing about, in a given field, that state of affairs which is deemed desirable by the powers that be. In a realistic analysis, which purports to assess *the total effect of public measures*, it may even be considered to be both inefficient and heavy. In Sweden, the state is by far the largest economic enterprise in the country, its activity extending over a wide range of different sectors. Add to this the influence upon economic life that administrative authorities, various boards and committees are able to exercise, and it seems clear that the representatives of the state have far-reaching possibilities of influencing the framing of rules in greater freedom than if legislation were resorted to: such influence can be exercised by participation, in various functions, in the work of organizations, by agreements with the parties concerned, by government contract rules, by conditions imposed in connection with the granting of loans and grants. Indeed, it may even be claimed that the use of all these means, combined with some legislative measures in special areas, creates a much more influential position for the state than it would enjoy if it shouldered the heavy responsibility of maintaining a complete and continuously modernized legislation. Playing with subtler and lighter tools than legislation, and achieving real influence by such tools must indeed be a strong temptation to any group of holders of political power.

Thirdly, it must be granted that the machinery of legislation

is heavy; its efficiency depends very largely upon the citizens' willingness to follow loyally the commandments of the state; the capital of law obedience and real veneration for the law which is still likely to exist may easily deteriorate if the machinery is put to work without real need; frequent changes are irritating. As has often been pointed out in the discussion concerning the possibilities of empirical research into the actual function and effects of legislation in the community, the experimental method is practically excluded, for legislative experiments are possible only in exceptional cases. Elsewhere,[2] the present writer has expressed the view that private rules may be regarded as *tentative* in relation to public rule-making. Citizens and groups of citizens may be said to regulate their internal relations on a proving ground with the legislators as observer. When a solution has proved technically acceptable, when it has turned out that the parties concerned are satisfied with it and when the questions dealt with have proved to be of a reasonably permanent character, then the heavy legislative machinery can be put to work under far more favourable auspices than before the position was made clear. What then takes place is a *codification* of a selection of customs, subject to certain amendments and adjustments.

It should be added, finally, that one particular aspect of private rule-making has not been considered in this survey. Swedish industry and big business are today to an increasing extent engaged in international transactions. To many of the largest industrial companies, the home market is really only a part, and by no means the most important one, of their field of activity. Many private rules are undoubtedly due less to the lacunae or shortcomings of internal legislation than to the absence of an international legal system and to the presence of extremely difficult questions whenever the rules of conflict of laws have to be applied.

2.3. The present article was originally written in 1968. In some fields touched upon in our survey, the subsequent development has been so rapid that the author has had to face the question whether and to what extent his attempts to characterize the general situation of Swedish law on some points remain valid. This applies in particular to the remarks on the relative passivity of the legislature in the field of contract. Two recent measures should be mentioned here. The first is the adoption, in 1970, of a Marketing Act, which contains a series of prohibitions against

[2] Strömholm in *Sv.J.T.* 1969, pp. 197 f.

various marketing practices deemed to be harmful to consumers and which institutes a Consumer Ombudsman and a Marketing Council with powers to enforce these prohibitions by means of injunctions. However, the enforcement of injunctions by means of pecuniary fines is entrusted to the courts. Although the Council has thus at least to some extent judicial functions, only its chairman and its vice chairman need to have a legal training.[3] The second measure which deserves mention is a proposal, prepared in the Ministry of Justice, for a statute which will make it possible for the Marketing Council to issue injunctions, at the request of the Consumer Ombudsman or certain organizations, against contract clauses judged to be unfair. This rather sensational proposal, which lifts a considerable body of contract litigation from the jurisdiction of the courts and thus enables an administrative authority to interfere with contracts—in the first place, standard contracts—has been severely criticized, but at present (October 1970), it seems likely that it will be endorsed by the Government, which has at the same time drawn up terms of reference for a revision of the private-law rules enabling the courts to set aside unfair conditions.[4]

3. THE COURTS

3.1. In the foregoing we have frequently touched upon a number of questions—which, by way of summing up, may be said to concern the problem of the total actual impact of legislation—that we have been able to answer only by loosely founded hypotheses. That judgment will be true also of our answer to the question how, and to what extent, the courts contribute to the development of legal rules. The published material offers only a very incomplete picture of the part played by courts in the community, although it is likely that this particular material represents that part of judicial activity which is of special interest for present purposes: the judicial development of rules on a national level. For it is only the decisions of the Supreme Court which are reported completely. Among these cases, only a selection (picked

[3] On the new legislation, see Bernitz, Modig and Mallmén, *Otillbörlig marknadsföring*, Stockholm 1970.

[4] See *Sv.J.T.* 1970, p. 412.

out by members of the Court) are reported in full in the semi-official publication *Nytt Juridiskt Arkiv,* part one; the remaining cases are reported so laconically that no conclusion about the case can be drawn without consulting the files of the Court. Only a very small selection of cases from the courts of appeal is published.

In the present survey, we shall consider neither the theoretical question whether the courts can and do in fact "create law" nor the nice distinction between the "construction" of statutes and the filling of statutory lacunae. Referring to what has been said about modern Swedish legislative technique we adopt, for present purposes, the hypothesis that courts have considerable possibilities of developing legal rules, *inter alia,* by giving a more precise meaning to the general language in which statutory provisions are frequently laid down.

There are then two main questions to be considered. The opportunity for courts to develop rules within a given field obviously depends upon the extent to which they are called upon to apply these rules. Within the practical limits thus drawn, another question arises, namely whether and to what extent the courts are prepared to contribute to the development of statutory and other legal rules by giving their decisions such a form that they can serve as precedents, i.e. express with reasonable clarity those elements which determine the scope and contents of the more specialized rule elaborated within the framework of an existing statutory rule—or, as the case may be, by extending its field of application. As far as the fully reported decisions of the Supreme Court are concerned, it is relatively easy to obtain material for answering the second question. The first question, on the other hand, involves difficult problems of documentation. An analysis of the *Nytt Juridiskt Arkiv,* part one, provides a safe basis, in so far as the Supreme Court is concerned, but such a survey does not allow any conclusions as to the nature of the conflicts regularly or frequently submitted to the courts. It is by no means certain, or even probable, that the distribution among different kinds of actions in the highest instance represents the average of all actions tried by the courts. It is not even certain that it is those problems which require, more than others, active "rule-creating" that are brought before the highest instance, although there is at least some probability for the hypothesis that the proportion of such problems is higher in those cases which pass through all three instances than in those which are finally decided by the courts of first instance.

Thus it is far from impossible that parties to such litigation in the field of private law as is otherwise frequently settled by arbitration without any possibility of appeal put up, with or without previous agreement, with the decision of a particularly well qualified lower court, e.g. a specialized division in one of the largest city courts.

These reservations to the following survey—which is, for practical reasons, entirely based upon the fully reported decisions from the Supreme Court (as opposed to those which are mentioned only in short notes in the *Nytt Juridiskt Arkiv*)—are all the more important inasmuch as the percentage of civil actions brought before that court is small in relation to the total number of such cases decided in the first instance.[5]

3.2. A survey of the branches of law dealt with by the Supreme Court in fully reported decisions from the five-year period 1962–66 seems to justify the following comments.

The cases may be divided into four groups: (i) family law (15, 9, 14, 11 and 19 decisions respectively in the five years examined), (ii) real property law—where the elements of administrative law and public law in general are often important—(23, 23, 20, 20 and 19 cases respectively), (iii) public law, including penal and procedural law (45, 64, 48, 47, 58 cases in the five years) and (iv) branches of private law other than family law and real-property law (31, 28, 28, 17 and 24 cases). The cases falling within group (i) are such where the parties are to a very great extent bound to go to court to have their disputes settled, and the same is even more true of category (iii). Group (ii) includes an important element of cases where the same situation prevails. Put together, these three categories, in which the parties are to a great extent practically or formally prevented from resorting to private rules, would seem to make a substantial majority of the total. In 1966, the ratio be-

[5] The official statistics (*Sveriges officiella statistik* 1968. Part: *Domstolarna* 1966) provide the following figures. In 1966 the ordinary courts of first instance rendered final decisions in 35,708 civil actions, of which 26,820 concerned family law in a broad sense, 5,814 dealt with real property, sale of goods, contracts of employment, and bankruptcy. Among the remaining 3,074 civil actions, tort cases held an important place. In the same year, the six courts of appeal decided 641 family-law cases and 574 other civil actions. The percentage of appeals in civil actions was 2.2 for family-law cases and 6.2 for other civil actions decided by rural district courts, 1.9 and 4.2 respectively for cases judged by city courts. The total of civil cases decided by the Supreme Court upon appeal was 67; out of these 23 were family-law cases. The rapidly decreasing proportion of family-law cases in the higher instances is obvious, but the material allows no other safe conclusions.

tween the first three groups and the fourth was 96 : 24, i.e. 4 : 1; in earlier years, the proportion of "pure" private law cases was slightly greater, but the figures do not allow any safe conclusions as to possible tendencies. It should further be pointed out that, within category (iv), actions sounding in tort comprised roughly one third of the total number of cases. Although, as will be shown below, an extensive private activity is carried out by various boards and advisory committees in the field of torts, or more particularly of insurance, this group of cases—like those pertaining to maritime law and bankruptcy, where many questions cannot be settled out of court—exhibits some particular characteristics as compared with private-law litigation in general. The chances of settling conflicts by private rules or the administration of public rules by private bodies would seem to be reasonably great in respect of such questions as assessment of damages, whereas the question whether liability has been incurred at all will less frequently be settled out of court; it is in the nature of things that previous agreements about arbitration or recourse to other forms of private justice are practically out of the question, and in many of those cases where liability is controversial, there is also a criminal action—which must obviously be tried in court—where the public prosecutor sees to it that the question of liability is settled in principle. Apart from the tort actions, the remaining private-law cases in the narrow sense adopted here have the character of a random harvest. That opinion is supported by the fact that the subject matter of these decisions varies considerably from one year to another. The group of cases concerning sales, contracts in general, and guarantee contained a maximum of 8 actions in 1964; in 1963 there were only 3 decisions.

It is difficult to escape from the conclusion that the insignificant number of private-law cases in a narrow sense—torts apart—which are heard by the highest instance each year must reduce the Court's ability to contribute efficiently to the development of legal rules in this field by the continuous production of precedents evenly distributed over the whole area.

3.3.1. Before looking for evidence about the judicial attitude—only the Supreme Court will be considered—with regard to the "lawmaking" function of courts, it should be recalled that at least some provisions of the Swedish Code of Procedure are clearly based upon the idea that such a function is fulfilled by the highest instance. Under ch. 54, sec. 10, of the Code, appeals to the Supreme Court are to be admitted to hearing by that court in three

groups of cases: (i) where it is of particular importance for the uniformity of statutory construction or of the administration of justice in general that a case be tried by the Supreme Court (admission on this ground is generally called "precedent admission"); (ii) where the party concerned can show that the decision would also be of particular importance for cases other than that actually at bar; and (iii) where there are grounds for reversing the decision of the court below or special circumstances attending the action make it desirable that it be tried, provided, in civil cases, that the interest at stake is of a value exceeding the—actually very low—amount of 1,500 kronor.

Another provision of the Procedural Code also seems based upon the idea that the Supreme Court "creates law" to some extent. Under ch. 3, sec. 4, of the Code a division of the Court (which is divided into three divisions) may call for a plenary deliberation, all the three divisions sitting *en banc,* in any case where it finds that its majority adheres to a principle incompatible with those previously adopted by the Court. Plenary deliberations occur very rarely. If a new rule is adopted by the court *in pleno,* it has to be noted in a special record book; in the years 1962–66, such entries were made only twice.

3.3.2. It is normally not indicated in the Supreme Court reports upon which of the three grounds enumerated above a petition for hearing has been granted or refused. In some cases, however, there are statements in this respect. Thus, where the conditions for admission on the third ground are not fulfilled but a petition has been granted on either of the other two grounds, this fact is mentioned. Such statements are found in 18 reported cases from the years 1962–66; in one case, where the petition was refused, it was remarked that it could only have been granted on one of the first two grounds. Obviously, these statements say no more than that the interest at stake was less than 1,500 kronor and thus furnish meagre information about the precedent-making of the court. There is reason to believe, however, that in the majority of cases the ground for admitting an action is to be found in category (iii). Occasionally, there are special elements in a report which support at least some conclusions about the ground for admission, but the use of such elements, which are seldom perfectly reliable, requires a detailed study of each case. Such studies, covering the nature of cases, the wording of *ratio decidendi* and *obiter dicta*—in particular of the wording of the formula with which the decision of the court below is affirmed

or reversed and the frequently recurring references to "the facts of the case", which imply restrictions of varying scope to the field of application of such rules as are invoked—could undoubtedly provide more precise information about the importance of judicial precedent-making.[6]

If we keep in mind both the limited total of Supreme Court decisions and in particular the insignificant number of private-law cases from the period examined, and the difficulty of ascertaining without detailed studies whether the Court has in fact laid down a new legal rule or modified an old one, it seems justifiable to state that the "law-making" function is feebly developed in relation to the task of surveying the uniform and correct application of rules already in existence. It should be added, however, that a five-year period is likely to be too short for conveying an entirely reliable impression of the Supreme Court's activity. "Law-making" by precedents is likely to be intensified within a given branch in the years following upon the introduction of new statutory rules in that field. This fact has been obvious since the coming into effect of the new Penal Code in 1965. It is also known that the Supreme Court sometimes prefers to "try" a new solution without making it explicit in a number of cases before it is found acceptable and overtly adopted in a clear leading case.[7] These remarks do not alter our general conclusion, however. It is beyond doubt that the Supreme Court acts with great caution when introducing new or modified rules, and it follows from this cautious attitude that a certain number of similar cases must be tried before certainty about the scope and contents of the new rules can be achieved. If actions are few and far between, no rule-making by precedents is materially possible.

3.3.3. The Supreme Court would seem to reject the idea that it should be its task radically to alter existing rules—or, to be more precise, the current construction of existing rules, at least where that construction is founded upon unequivocal opinions in the legislative material or upon a series of decisions. On some occasions, that attitude has been clearly expressed. In the case 1957 N.J.A. 279, which concerned the binding effect, after the termina-

[6] On the technique of interpreting Swedish precedents, see Mr Justice Welamson in Eek *et al., Juridikens källmaterial,* 6th ed. Stockholm 1970, and Hjerner, *Om rättsfallstolkning* (mimeographed, Stockholm 1966). Cf. also Wetter, *The Style of Appellate Judicial Opinions,* Leyden 1960.

[7] See Mr Justice Beckman, former President of the Supreme Court, in *T.S.A.* 1962, p. 167, and Professor F. Schmidt in *Festskrift till Nils Herlitz,* Stockholm 1955, pp. 268 f.

tion of a contract of employment, of a non-competition clause in that contract, the majority of the Court stated that the limitation of the freedom of contract introduced in 1915 by sec. 38 of the Contracts Act, which imposes some restrictions upon the validity of such clauses,

> cannot be brought beyond the limits set out in sec. 38. Should considerations of the national economy or social reasons make it desirable to give that limitation a wider scope, this is a matter for legislation, not for the courts; modifications can obviously also be effected by agreements between the parties on the labour market.

The limits that the Supreme Court thus imposes upon its own freedom to modify existing rules are in fact stricter than appears from the wording of this dictum, for the provision of sec. 38 is expressed in very broad language, which allows considerable freedom of construction. It was not the precise wording of the statutory rule that prevented the court from applying it in the case at bar, but rather its character of an exception from the well-established principle of freedom of contract together with certain comments in the *travaux préparatoires.*

In 1965 N.J.A. 33 a minority of two Justices found that the special and favourable tariff for assessing death duties which is applicable to bequests to personal servants who have been attached to the testator's household for more than ten years could not be applied to a housekeeper who had cohabited with the deceased as his concubine. The dissenting Justices referred to the term "employee" used in the Act regarding Succession and Gift Taxes (1941), and stated that a "free union" between a man and a woman could not be covered by that concept, the defining criteria of which had been made clear in the field of labour law. In their opinions, the two dissenting Justices state that it must be a matter for legislation to amend the rule under consideration if that be considered desirable. The majority, on the other hand, considered itself free—having regard to "the facts of the case"—to apply the tariff claimed by the applicant. Against the background of earlier decisions, this must be regarded as a departure from a fairly well-established construction of the controversial provision in the Succession and Gift Taxes Act. The report does not indicate upon what ground the petition for trial by the Supreme Court had been granted, but the interest at stake exceeded 1,500 kronor.

It should be pointed out that in spite of the small number of

leading decisions and the relative difficulty of analysing their scope, the decisions of the Supreme Court certainly have considerable importance both for the construction of statutes and for the drafting of contracts and other economic activities in the fields concerned. It can even be claimed that modern Scandinavian jurisprudence has come to a clearer and deeper insight into the law-making functions of courts and that precedents are used and studied more intensely than before. More refined methods for interpreting decisions have been developed by legal writers. On the other hand, references to its own earlier decisions are very rare in the Supreme Court's judgments (such references are found in four rather special cases from the period examined), whereas references to legislative history are somewhat more frequent (12 cases from the five-year period considered), and it could possibly be inferred from this that the small number of precedents produced increases the importance of other "secondary sources of law", in particular *travaux préparatoires*. However, the brevity of Supreme Court decisions makes any conclusion doubtful; precedents may have been taken into account even though they are not mentioned.

Those Supreme Court decisions which are reported in full are preceded, in the *Nytt Juridiskt Arkiv,* part one, by a heading, formulated by one of the editors (invariably a Supreme Court Justice) and setting out in brief the gist of the action. Under this heading are frequently found references to earlier cases dealing with identical or similar questions. It is not, however, possible to make any inferences from these references, for it is far from certain that the cases thus referred to express the same rule as the decision with which the reference appears. However, the number of such references—and the age of the decision referred to—can at least give some indications about the lasting practical importance of precedents in the field concerned. Among the total of 24 decisions from the period 1962–66 which concern private-law litigation in the narrow sense defined under 3.2 *supra* (i.e. the cases listed under (iv) with the exception of actions in tort), only 9 cases are provided with such editorial references to earlier decisions. The total number of cases referred to is 29; of these, 15 date from 1930 or earlier years, 2 from the period 1931–40, 6 from 1941–50, 5 from 1951–60 and 1 from after 1960.

Again, it must be remembered that purely quantitative information of this kind is only of symptomatic interest. The frequency of case references under the heading of reports is not very great

in any field of private law, including family law; among the 8 reports of matrimonial cases 1962–66, only 3 are provided with references (to 9 older cases, most of which date from before 1941).

When trying to pass judgments upon the scope and efficiency of precedent-making or, more generally, judicial rule-creation, it is necessary to take into account the relations between legislative technique and judicial decisions. As already pointed out, a statutory drafting which favours broad language and generalizing expressions demands special particularizing and creative efforts by the courts if security and economic planning are not to suffer.

3.3.4. Before ending this survey of judicial law-making, we shall consider the question whether and to what extent the Supreme Court has been given the opportunity to pronounce upon private rules and rule-making. There are three points which merit special attention. In the first place, it would be of interest to ascertain with what frequency private rules, e.g. from standard contracts, have been examined by the courts and with what result. For that question provides a rough test both of the success attending one aim of the private administration (and making) of rules, viz. to keep litigation out of court, and also of the importance of public rules as a model for private ones: if the likelihood that such rules will ultimately be examined by courts is not negligible, it seems reasonable to expect that they shall be framed in a way acceptable to the representatives of the public administration of law. Secondly, given the widespread use of arbitration—a form of private administration of rules which will not be discussed here in so far as it is performed by *ad hoc* tribunals—it would be valuable to get at least a notion of the extent to which awards are challenged or otherwise brought under judicial consideration. Finally, it is of some interest to ascertain what importance the Supreme Court has attributed to opinions expressed by private or semi-official boards or similar bodies which may have been consulted by the parties before an action is brought.

3.3.4.1. Two opposed judicial attitudes are possible with regard to such contracts as either have been framed by two or more companies or organizations, upon negotiation, in order to regulate wholly or partially future relations between the parties or their members or have been made unilaterally by an organization or a company for use in future relations with individual parties who have to accept the contract as it stands. On the one hand, it may be held that by virtue of general application, such contracts and their clauses can claim particular respect; the contract may be

considered either as an expression of custom, or at least as a tentative creation of customary rules. On the other hand, standard contracts may be viewed with distrust as one-sided expressions of the stronger party's interests. Where litigation turns upon the construction of standard contracts, the attitude adopted by the court may be decisive. A favourable attitude may have the result that the clauses of the contract are interpreted more or less like statutory texts; where distrust prevails, ambiguities are interpreted against the party who drew up the contract, and clauses difficult to construe or even to find—such as important conditions in small print on the back of printed contract forms—may even be disregarded. The question whether manifestly unfair clauses should be set aside may be considered with particular severity in respect of standard contracts. It is characteristic that the proposal for a general power of issuing injunctions against unfair contract clauses granted to the Marketing Council (see 2.3 *supra*) chiefly concerns standard contract forms.

It seems obvious and reasonable that the favourable attitude should be most natural with regard to contracts made by two equal parties after prior negotiation, whereas distrust is most justified in respect of unilaterally made contracts, drawn up by a strong and experienced party to be used in transactions with individuals.

Finally, the fact that standard contracts are intended for general application may also be taken into consideration, for construction purposes, by a method of interpreting them which pays less regard to individual intentions and expectations—expressed orally or manifest from proven circumstances attending the conclusion of the contract—than when examining individual contracts: there are strong reasons for sticking to the text itself and disregarding possible non-explicit intentions or expectations of the parties, since the ideas of those who originally drew up the text can but rarely be presumed to refer to the facts of individual cases emerging a long time after the contract was framed.

In the period 1962–66 there are some ten fully reported cases in the Supreme Court reports.[8] It is impossible to draw from that material any precise conclusions as to the attitude of the Supreme Court to such contracts in general.[9]

[8] A more detailed discussion of the cases is to be found in the Swedish version of the present article.

[9] For earlier cases, see Grönfors in *Juridikens källmaterial*, 6th ed. Stockholm 1970, ch. 7, and Karlgren in *F.J.F.T.* 1967, pp. 427 ff.

3.3.4.2. The widespread use of arbitration clauses in commercial contracts is too well known to need comment, although there is little precise knowledge about the questions to what extent such clauses are in fact used and to what extent it is justifiable to consider arbitration awards as a "rule-creating" activity.[1] Generally speaking, important aspects of this institution have not yet been examined. Legal writers have usually found the answer to the question *why* arbitration is so frequently resorted to in the slowness of court proceedings, in the publicity attending them, in the possibly inadequate remedies administered by courts and in reluctance to have one's case treated by judges unacquainted with trade customs. It may be added that once the *habit* has been created, it certainly strengthens the rational motives or even replaces them; contracts are very largely drawn up according to established models, and if these contain arbitration clauses, later contracts will follow them even if those special reasons which may have prompted the adoption of such clauses in the model are not present in the later case.

A condition for the effectiveness of arbitration clauses—i.e. for litigation being withdrawn from the courts and, possibly, for the "creation" of private justice by arbitral awards—is obviously that the award is not challenged in court. It should be pointed out that in Swedish law awards are in principle final and sufficient to obtain execution, and thus replace adjudication by courts. It follows that the trial, in those exceptional cases where awards are challenged, will only deal with *form,* not with substance, but a considerable frequency of challenges is likely to have at least an indirect impact both upon the use of the institution and upon the acting of arbitrators, even on points of substantive law.

Among the fully reported Supreme Court decisions from the period 1962–66 there are only two cases dealing with challenged awards (1963 N.J.A. 658 and 1965 N.J.A. 389); in one of these cases, the award was invalidated. Even in relation to the scanty total of contracts cases, this is a small number, given the probable frequency of arbitral awards. In one case, the courts have tried the question whether an arbitration clause was a bar to the case being tried (1964 N.J.A. 2). In another case, finally, the question was

[1] This form of settling commercial disputes is discussed extensively in Bolding, *Skiljeförfarande och rättegång,* Stockholm 1956, pp. 15 ff. See also same author, *Skiljedom,* Stockholm 1962, where questions concerning the invalidity of awards are analysed. A large-scale investigation into the disposition of business firms to make use of arbitration is now being conducted under the auspices of the Bank of Sweden Tercentenary Fund.

raised whether an injunction restraining a party from selling certain shares could be granted pending arbitral proceedings (1964 N.J.A. 422). The question was answered in the affirmative, and the decision must be considered as a significant strengthening of the effectiveness of arbitration clauses.

3.3.4.3. It has been suggested above that administration of rules in the form of opinions given by private boards, tribunals and similar institutions may exercise an influence upon the public administration of justice. However, in the period examined here (1962–66), there are but few cases where it seems clear beyond doubt that the Supreme Court has in fact taken account of opinions of this kind; moreover, these cases fall almost exclusively within two particular fields: copyright and insurance. Thus in 1962 N.J.A. 750, a permanent board of experts appointed by the Swedish Association of Applied Arts had declared that a bookcase must be considered as a work of art under the Copyright Act. This opinion was criticized both by the Stockholm City Court and the Court of Appeal. The Supreme Court stated, in general terms, that importance must be attached, in a case of that kind, to the judgment of "eminent experts"; the Court shared the view of the board of experts. It is, of course, impossible to conclude what would have been the issue of the case, had the board's opinion not been produced, but it seems safe to state that the views prevailing among specialists would hardly have had the same chance of being considered if there had not been a reasoned opinion formulated very much according to the technique used by the courts themselves. The same board has been consulted in a similar case, 1964 N.J.A. 532.

In three insurance cases from the five-year period examined, the superior courts themselves took action to ask for an advisory opinion from a board established by the insurance branch (1963 N.J.A. 155; 1966 N.J.A. 314; 1966 N.J.A. 210, where the Court of Appeal acted upon a request by one of the parties) and in one case a court of first instance referred, in the *ratio decidendi,* to published opinions from a personal injury claims advisory board in the field of insurance.

Occasionally, it appears from the reports that a party has referred to opinions delivered by trade organizations (1963 N.J.A. 313 and 1964 N.J.A. 380).

It is impossible to draw safe conclusions from this material as to the total influence which advisory boards and similar bodies exercise upon court decisions, *inter alia,* by published opinions

or general statements of principles in published material, since the use possibly made by courts of such material never completely emerges from the reports. It seems justifiable to put forward some hypotheses, however. In the first place, it is reasonable to assume that private bodies of the kind now referred to are particularly influential in highly specialized fields of law, such as copyright or insurance. Secondly, the very modest number of cases in which it appears from the reports that a board has previously delivered an opinion upon a case which is eventually brought before a court would seem to indicate that private administration of justice —which certainly occurs in a considerable number of disputes— is successful, in the vast majority of cases, in keeping cases out of court.

3.4. Upon each of those points which have been discussed above, we have had to enter more or less far-reaching reservations as to the significance of the available material and the certainty of the conclusions reached upon the material. If all these conclusions are put together, however, it seems possible to affirm with somewhat less hesitation that there is a clear tendency. The proportion of cases from "business" in a broad sense is small among those which are brought before the courts; in the highest instance, the number of such cases is almost insignificant. The production of precedents is consequently very small in quantity; its precise extent cannot be ascertained without a closer study of cases. The number of cases where private administration of justice "fails", i.e. where litigation intended to be settled by private bodies or arbitral boards is eventually brought before the courts, is even smaller.

When evaluating this state of affairs—an evaluation based upon the assumption that whatever may be said of private administration of justice, the standard of impartiality, competence, and conformity with prevailing legislative attitudes represented by courts (or other public bodies entrusted with the administration of justice) is fully acceptable and represents the desired level of quality in these respects—it should first be recalled that the courts may function indirectly, without being actually called upon to interfere, as models recognized by the bodies creating and administering private justice. It should be added that judges (with the exception of Supreme Court Justices) are permitted to accept and, to an extent impossible to ascertain but possibly quite considerable, actually do accept appointments as members of arbitration boards.

The basic condition which must be fulfilled if courts are to be considered as models and thus exercise an indirect effect upon the creation and administration of private justice is that they should enjoy general confidence as being impartial and competent. It would also seem to be important—especially in the fields of law interesting business—that judicial reasoning (the judicial "technique of argumentation", as it is frequently called in Scandinavia) should be reasonably homogeneous and uniform and thus easy to predict and to adopt. The latter requirement speaks in favour of a certain formalism in judicial reasoning. Open and active judicial law-making by the side of, or even against, statutory law means by definition that courts solve emerging conflicts between private parties upon the basis of their own evaluations, which may easily be or become controversial. The machinery of justice is then more likely to be drawn into the currents of political debate, to be regarded as politically influenced and to forfeit the confidence of the one or the other group of citizens. In the situation actually prevailing, such a development can be feared also in those relatively technical and politically "neutral" areas where private rule-making and rule-administration are particularly active. It seems far from certain that a more active and more openly announced law-making activity by the judiciary would cause the courts to recover those opportunities for creative contributions which fall today upon private bodies. The "flight from the courts" which can be observed in the field of private law would probably continue, albeit for other reasons than now, and it also seems likely that the indirect, passive influence which is certainly exercised by courts would be lost. It may be argued—justly, in the present writer's view—that great caution and some formalism are guarantees for the survival of a judicial influence upon legal developments which is still considerable, if we consider its total impact not only through the channels of law-making and administration of existing rules but also by judicial participation in the legislative process, by the influence of court decisions upon legal writing—which in its turn may, with greater freedom, carry it on into private justice—and finally by collaboration by members of the judiciary in various forms of private rule-making and administration of justice. In a political climate less clement, less disposed to compromise and conciliation than that which has prevailed in Sweden for the last thirty-five years—and the approach of such a harsher climate is heralded by many signs—a fund of public confidence, which is all too easily dissipated by a too free

and too energetic law-making activity, is certainly necessary. Already the freedom of choice which generalizing and vague legislative language grants—and imposes upon—the courts is not devoid of risks, as appears not least from the way in which some sections of the press nowadays discuss and comment on judicial decisions in cases which have caught the public eye. To put it very crudely, there may be periods—and it is submitted that we are actually living in such a period—where the courts have to choose between being laughed at as over-anxious formalists and being hated and distrusted as tools of political power, with extremely small chances of finding a satisfactory intermediate position. In my view, there can be little hesitation about the choice, unpalatable as it is. This applies, it should be added, to the present Swedish situation. I am well aware of the possible objection that this is indeed a pusillanimous appreciation of the role of courts in a changing society. It is certainly true that where hard clashes are inevitable, it is preferable that they be settled in court rather than in the street, even if this means that the judge must sacrifice his position of exalted passivity. Many sociological factors, which cannot be discussed here, determine the proper course of action in such crises, however. My conclusion refers to Swedish society here and now, given the present training, attitudes, and position of the judiciary and the prevailing habits of settling major conflicts in the community at large.

To sum up, the task of providing a "service" for commerce and industry by quickly finding rational solutions for rapidly emerging new needs is only one of the tasks incumbent upon the courts, and not the most important one. Under the circumstances prevailing in Sweden today—which I do not claim to be ideal—it seems to me to be a far more essential responsibility resting upon the shoulders of the judiciary to ensure the survival of the judicial decision-making model, and the underlying idea of finally settling litigation by the objective and authoritative application of pre-existing general rules to individual cases. That may be called a pessimistic minimum requirement, but there are occasions when even minimum requirements are hard enough to fulfil.

Thus, if instead of deploring the relative passivity of courts in the role of lawmakers, we find that attitude—like the cautious approach of the legislature—judicious under the circumstances, it must be concluded, on the other hand, that private rule-making and private administration of justice fulfil a necessary public function, that they are not to be treated as more or less suspect

and deplorable passing phenomena, and that there is every reason not only to study them, with a clear awareness of their importance and their reasonable claim to recognition, within the boundaries of legal science but also to survey them continuously and try to find minimum standards which they should attain.

4. RULE-MAKING BY AUTHORITIES OTHER THAN THE ORDINARY COURTS

4.1. It is evident that administrative authorities, administrative tribunals and special courts, each within its jurisdiction, are or may be law-makers, principally through the laying down of precedents, in very much the same way as the ordinary courts. However, in those fields of law which are the chief object of the present paper, this law-making is of minor interest and may be left aside.

4.2. It is more interesting to examine the kind of activity which is pursued, partly within the same fields where *litigation* is settled by the ordinary courts of justice, by some administrative agencies with supervising functions.[2] The Parliamentary ombudsmen and the King's Chancellor of Justice are special cases. It has been occasionally argued, in recent years, that parties who are unwilling to accept the final decisions of courts or authorities have shown an inclination to use the ombudsmen as a kind of "last instance", before whom the dissatisfied party tries to prove that the unfavourable decision has faults which call for the intervention of the ombudsmen. Apart from such extreme cases—certainly not frequent in the fields of law now considered—it is obvious that clear *dicta* by the ombudsmen and the Chancellor of Justice, who are invariably judges of the highest standing, frequently carry the same weight as other judicial *dicta*. Other sources from which opinions of considerable weight may be taken, although hardly ever in the domain of private law, are the decisions of the Chief Prosecutor and the senior prosecutors in cases where a party challenges a district prosecutor's decision not to institute an action.

Similar functions are fulfilled by the Ombudsman for Restric-

[2] To some extent, the following remarks are based upon information kindly supplied to the author by Professor Jan Hellner, Stockholm.

tive Practices, to whom we shall revert below; as opposed to the Parliamentary ombudsmen, this official has a duty to give answers in advance to questions from private parties as to how he regards planned or actual trade practices in the light of the legislation on restrictive practices. Similarly, the Private Insurance Inspectorate exercises control, e.g., over the contents of general insurance terms.[3]

As has been pointed out by Professor Hellner, the supervision exercised by some authorities is different from that of the courts, *inter alia* because their control is or at least can be effected in advance, before actual litigation calls for an intervention. Statements by, e.g. an ombudsman may refer to a concrete case, too, and then may have the effect of putting an end to the conflict. In both cases, the function of the authority is of a *preventive* character—and thus helps to reduce the number of actions brought before the courts. To the extent that decisions and statements by controlling authorities are made generally known or at least available, rules may come into existence which must obviously be taken into account for the purposes of a description of the legal position (although, in a *normative* analysis, their status should rather be described as "tentative"). If the observance of such rules is almost total, as will frequently be the case, e.g., where one of the Parliamentary ombudsmen has stated his opinion on a question of statutory interpretation, one of the practical effects of the activity of these authorities is that no "definite" rule—in the sense of "rule applied by the courts"—will ever be laid down; another effect is that the rule proposed by the authority will rapidly acquire such a position that it fulfils the conditions required for its recognition as a "customary rule" (actual observance and *opinio necessitatis* among interested parties).

4.3. So far, we have spoken only about the creation of rules by *public authorities,* exercising control within their jurisdiction. The borderline between this kind of "lawmaking" and that which is effected by official or semi-official boards, trade organizations, etc., is not very distinct. It seems justifiable, however, to consider public authorities separately, since the independence of such supervising agencies in relation to the parties concerned, their competence and the special criminal responsibility to which their officials are subject would seem to offer guarantees for the

[3] See U. Persson in "Bör försäkringsavtalsrätten reformeras?" (*Uppsatser utg. med anl. av Allmänna Brands 125-årsjubileum 1968,* Jönköping 1968), pp. 36 f.

impartiality of their lawmaking activity and for its harmony with the rules applied by courts.

The actual *extent* of controlling and "litigation-preventing" activities by public authorities is difficult to determine with precision. Apart from the Parliamentary ombudsmen and the King's Chancellor of Justice, who have a general competence to bring actions against courts and public servants (including, for the ombudsmen, local government authorities), such activities concern specialized sectors. It seems likely that, in terms of quantity, the creation and administration of justice by private organizations and boards cover larger areas; another justifiable hypothesis is that lawmaking by public officials keeps closer to the law applied by courts—and therefore has less of a creative character—and also results in more precise rules. The scope for discretion or expedients is far narrower than in the case of "private" justice in the proper sense.

A question which, in this context, should be put but cannot be discussed at length (although it would certainly repay a closer study) is whether and to what extent public authorities, when granting such permits, loans or similar benefits as are not granted automatically upon the mere fulfilment of formal conditions, have and use the possibility of laying down conditions which, from the point of view of the private parties concerned, assume the character of general norms. It seems obvious, given the scope of public intervention in such forms, e.g. on the building market, that it is within the powers of several public agencies to contribute in this way to the creation of rules which may even produce an effect in the field of private-law contracts. Some of the examples of rule-making by contract that are discussed below would seem to illustrate this point.[4]

5. CONTRACTS AS RULE-MAKING MECHANISMS

5.1. Both in an historical perspective and in a functional analysis, there is no absolutely clear boundary between agreements concluded by individual parties and general rules laid down in stat-

[4] See Foyer in *S.O.U.* 1961: 21, at pp. 69 ff.

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utes,[5] although it is easy enough to draw such a boundary with the help of formal criteria. As mentioned above (at 1.3), we shall deal in this section with such agreements as are made by public agencies, organizations or companies and are intended to be directly applicable as between the bargaining parties or, where these are organizations, their members. Such contracts are thus kept separate from forms drafted by one party and subsequently submitted to individual opposite parties for approval in each case, the latter type of contracts being considered in section 6 *infra*.

It seems appropriate to draw a distinction between three kinds of agreements: first, those where the state—represented by its head or by a public agency—acts alone and concludes an agreement with a company or an organization; next, those where the state is one of several parties on the same side; and, finally, those which are concluded between organizations or companies.

5.2.1. In a few cases, the state has chosen to conclude a contract instead of passing an enactment. A couple of these contracts seem worthy of mention.

The Broadcasting Contract,[6] concluded between the Crown and the Swedish Broadcasting Corporation (the contract now in force was signed on June 30, 1967) is remarkable from several points of view. Sec. 6 of the Broadcasting Act of December 30, 1966, contains a general rule about the way in which the broadcasting monopoly conferred, under sec. 5 of the same Act, upon the corporation appointed by the King is to be exercised and refers to the general principles to be laid down in a contract between the Crown and that corporation. In form, the latter is an ordinary limited company, but, in reality, the distribution both of shares and of seats on the board of directors is decided by the Crown. The Broadcasting Contract contains a number of technical provisions and a set of clauses concerning the contents of programmes. It has an arbitration clause. It is difficult to suggest with any confidence why the form of a contract was chosen. The fact that broadcasting is conducted exclusively by one enterprise may be a reason. Another explanation may be that the Broadcasting Con-

[5] See Sundberg in *Sv.J.T.* 1961, pp. 13 ff., and Strömholm in 10 *Sc.St.L.*, p. 177, note 4 (1966). In legal systems with no established doctrine of officially recognized "sources" of law, a reception of foreign rules can take place by the adoption of technically superior contract forms. A clear example of such a development was the spreading of Greek law in the Mediterranean area in classical and hellenistic times. See Pringsheim in *Sitzungsberichte der Heidelberger Ak. der Wiss., phil.-hist. Klasse,* 1952, 1, pp. 9 ff.

[6] See Strömholm in 10 *Sc.St.L.*, pp. 220 ff. (1966).

tract—the observance of which is under the surveillance of the Broadcasting Supervision Board—is intended as a tentative means of regulating a rapidly expanding and changing activity.

In some cases, *public authorities have concluded contracts with trade organizations with a view to promoting specific aims of economic policy*. This would seem to be the case with the agreement signed in 1952 (subsequently renewed and amended) by the National Bank of Sweden and the private banks on the liquidity ratios to be observed by the latter, and also with the so-called currency agreement concluded between the same parties in 1940. Nowadays, the form of a written contract is replaced by oral recommendations by the Governor of the National Bank, which are regularly followed; the parties meet for deliberations every month.[7] Similar contracts and deliberations have been resorted to as between the National Bank on the one hand and the Swedish Association of Insurance Companies and the savings banks on the other hand.[8]

The relation between the contracts now referred to and legislative intervention is clear. The agreements have been made against the background of threats of a more severe statutory regulation; the greater flexibility of contracts has caused this form to be preferred by the parties. A basic condition for the choice of this form was obviously that the trade organizations controlled their members effectively and could be expected to cooperate loyally.[9]

An agreement which also pursues clearly defined aims in the field of economic policy and which, like those now referred to, replaced legislation, is the agreement concluded in 1959 between the Crown, represented by the Royal Board of Commerce, and the Swedish Motor Dealers' Association on the minimum initial cash payment to be stipulated in conditional sales contracts concerning motor cars. The agreement is supplemented by instructions issued by the Association after consultation with the Board of Commerce. Compliance with the clauses of the agreement, which within the Association was secured by written undertakings by the individual members, was guaranteed by a clause providing for pecuniary fines in case of violation. Under art. 6 of the agreement,

[7] Elvander, *op. cit.*, pp. 188 ff.; Foyer in *S.O.U.* 1961: 21, pp. 36 ff.
[8] Elvander, *loc. cit.*
[9] Elvander, *loc. cit.* Criticism of this kind of "voluntary" agreements is voiced, *inter alia*, by Holmberg in *Arbetsgivaren* 1956, no. 21, and by Fürst in *Ekonomen* 1958, no. 18.

the imposition of fines is entrusted to a board of three persons, the chairman being appointed by the King and the other two members by the Association and the Swedish Motor Manufacturers' Association respectively. The conclusion that this agreement had the function and took the place of a formal enactment is confirmed, *inter alia,* by the fact that on December 11, 1959, the King in Council issued an ordinance with the same contents as the agreement, which provided for pecuniary fines in case of violation and was applicable only to dealers *not* bound by the agreement.[1] Other similar agreements with organizations of dealers frequently using conditional sales contracts were concluded before 1959.[2] It should be added that one of these agreements, under which the organizations of the motor trade undertook to work for the collection of individual promises of compliance from non-organized car dealers, gave rise to violent criticism in the Riksdag.[3]

"Voluntary" agreements have been resorted to in the *housing market.* They have also been concluded between the state and the *agricultural organizations.* A system of agreements complementing statutory regulations in the housing market worked for only a short period.[4]

Among those contracts which have been concluded by the state alone on one side and trade organizations on the other, there are some which do not pursue aims of economic policy but are intended to give the very large purchases of public authorities a more "businesslike" character. An examination of three important agreements of this kind, dating from the beginning of the 1960s, shows that they are largely modelled upon the standard terms of delivery used in the branches of activity concerned for similar transactions but that, generally speaking, they imply differences in relation to these terms which give the state, as buyer, a somewhat stronger position than would follow from the standard terms.[5]

It should, finally, be mentioned that since 1965 important questions concerning the *conditions of employment and work of public servants* have largely been governed by collective agreements concluded between the state and the organizations concerned. Subject

[1] See Foyer, *op. cit.,* pp. 38 ff.
[2] *Loc. cit.* and *S.O.U.* 1966: 42, pp. 136 ff., 164 ff.
[3] Foyer, *loc. cit.*
[4] Foyer, *op. cit.,* pp. 42 ff.; Elvander, *op. cit.,* pp. 189 f.
[5] See Vahlén in *Festskrift till Håkan Nial,* 1966, pp. 531 ff.

to a few exceptions, the same system as has for a long time prevailed on the private labour market is applied.[6]

Criticism may be—and has been—directed against using contracts for regulating the questions now considered. With regard to the credit market and to conditional sales, the reasons for adopting this form instead of legislative intervention would seem to be relatively strong; the need for flexibility is obvious. We shall refrain from discussing the problem of the status of public servants.

5.2.2. In some fields—usually of a technical character—the *state* appears, in its role of an entrepreneurial corporation, as *one among several parties to agreements concluded between organizations.* Only a few remarks need be made about this activity, which is of considerable scope.

In 1966, "General Rules for Consultants in Engineering and Architecture" were laid down as the result of negotiations between the organizations of architects and engineers on the one hand, and a number of large "buyers" of their services on the other; among the latter were several state agencies. The rules contain an extensive body of detailed clauses governing consultants' contracts and are complemented by comments and a standard contract form. It is recommended that an arbitration clause be inserted in the individual contracts.

5.3. Contracts of this kind, as being different from the "voluntary" agreements intended to promote specific aims within the framework of a general economic policy, represent what may be called a "normal" kind of private rule-making, where the state acts as one among several interested parties. Generally speaking, it seems reasonable that with the ever-increasing role of the state as a body carrying on business activities, in various forms, the state should follow the patterns for solving legal problems which were adopted a long time ago by private corporations and organizations. To use the legislative machinery in fields where state-managed economic activities complement or compete with private business could result both in too vast a body of economic legislation and in rules tending unduly to favour the state to the detriment of its competitors. Agreements of the kind referred to under 5.2.2 do not cause the same misgivings as those which have the obvious function of substitutes for legislative intervention or have even been concluded under threats of such intervention.

[6] See Elvander, *op. cit.*, pp. 118 ff., 180 f.

On the other hand, it is at least justifiable to ask whether it is proper that public agencies (as opposed to state-owned companies working wholly under the rules of private law), when framing general agreements of the kind illustrated by the rules for technical and architectural consultants, should act together with private organizations whose economic interests coincide very largely with those of the public agencies concerned. The fact that a state agency has contributed to the creation of a certain solution may produce the impression that this solution has been, as it were, officially approved, and the acting of state agencies on one of the sides in the preceding negotiations is likely to strengthen considerably the position of that side. The question is, in other words, whether public bodies, by virtue of their special position and the corresponding responsibility, should contribute not only to obtaining as favourable conditions as possible but also to creating solutions which are equitable and, more generally, acceptable from points of view which private organizations cannot be expected to consider.

5.4.1. The most important category of agreements of the kind here discussed is that which is concluded between *private organizations*. The phenomenon is too well known to call for much comment. What seems important, for the present purpose, is to consider the relationship between this central area of private justice and legislation and to discuss "lawmaking" contracts from the point of view of legal security and justice.

As already pointed out, the *degree of organization*—in other words, the acting organizations' claims to represent adequately the interests concerned—must be a fact of decisive importance when appreciating this field of private justice. We cannot undertake, in this context, a complete analysis of the representativity, the internal "power game" situation, the negotiation habits and other activities of organizations; such an analysis would require, *inter alia*, an examination of the political contacts of organizations—e.g., their possibilities of exercising political pressure—and of their economy and general resources. We can only adopt, without further discussion, the basic assumption that since the creation and administration of rules observed and applied very much in the same way as legal rules is to a very large extent in the hands of private bodies, their power and influence is on many points decisive for the framing of such rules.[7] The question which, from

[7] Dr Elvander (*op. cit.*, pp. 59 ff.) tries to analyse the "power structure" of some Swedish organizations but points out, at the same time, that this is

the lawyer's point of view, must be given particular attention is whether the system as such gives the individual a fair chance, whether it is organized in such a way that all interests concerned are adequately represented. It would certainly be an illusion to believe that lawyers could solve social or political questions, or even influence the methods and issue of social conflict, by referring to "justice" or what is "right"; but, on the other hand, unless a lawyer is prepared to accept the role of a mere "social technician", who obediently translates the will of power into formally correct solutions and texts, a critical analysis of questions such as these must be part of his tasks.

5.4.2. The field of law where it is undoubtedly justifiable to state that an extensive body of contractual rules has more or less completely taken the place of statutory provisions is *labour law.* The state has provided what may be called a spacious and open framework: the Collective Agreements Act and the Labour Court Act, both from 1928, the 1936 Act on the rights to organize and to bargain collectively, the legislation of 1965 on the legal position of public servants, and the legislation on paid holidays and on mediation in labour disputes. Within that framework, the organizations of management and those of labour (including salaried employees) have concluded several agreements that are of general scope and for a long period.[8]

5.4.3. Outside the field of labour law, agreements having a general scope are found particularly in those cases where two strong and more or less equal organizations confront each other.[9] As examples may be mentioned the—partly international—charter-parties for various kinds of affreightment. The problem is, in respect of a large segment of economic activities, that the opposing parties are manufacturers or sellers on the one hand and individual consumers on the other, and that the latter cannot easily be

very largely *terra incognita.* Examples of the impact of power structures upon individual litigation are given, *inter alia,* in Edlund, *Tvisteförhandlingar på arbetsmarknaden,* 1967. The prevailing opinion among experts would seem to be that real power is concentrated in the leading groups to a very great extent, particularly in the labour market organizations. See Elvander, *op. cit.,* pp. 69 ff.

[8] See Schmidt, *The Law of Labour Relations in Sweden,* Cambridge, Mass., 1962, where the texts then applicable and examples of collective agreements are reproduced. See also Elvander, *op. cit.,* pp. 69 ff.

[9] On standard contracts in general, see Grönfors in *Juridikens källmaterial,* 6th ed. Stockholm 1970, ch. 7; Olsson in *Förhandlingarna vid det 21 nordiska juristmötet 1957;* Rodhe in *F.J.F.T.* 1957, pp. 6 ff.; Nial in *Minnesskrift utg. av Juridiska fakulteten i Stockholm,* Stockholm 1957, pp. 190 ff., and Karlgren in *F.J.F.T.* 1967, pp. 415 ff.

organized. Even on such markets as the housing or motor-car markets, where the organizations of landlords and car dealers are confronted by powerful organizations representing tenants and motorists, it is far from common that the standard contract forms have been framed by both parties; they are usually made by the "selling" party. Copyright is a field where several commonly used standard contracts are the result of negotiations between the organizations of authors on the one hand and publishers and broadcasting corporations on the other.[1] A standard contract of this kind was extensively used by the drafters of the Swedish Copyright Act, 1960.

An instructive study of a vast complex of standard clauses is to be found in Professor Selmer's analysis of the Norwegian maritime insurance plans of 1964 and 1967, which were the outcome of lengthy deliberations between the insurance companies and the organizations of the shipping trade.[2] Professor Selmer raises the question whether legislation can really be held to have any useful function besides the "lawmaking" of the parties concerned in a field of this kind.

It is hardly possible to give a general answer to this question. Arguments *against* legislative intervention would seem to be the high degree of organization and the wide representativity of existing organizations, the more or less technical character of the field concerned and the relative inconstancy of basic economic and technical conditions. Arguments *for* legislation are the existence of legitimate social or similar interests, which cannot be adequately represented in the organizational framework, and disharmony between the private justice prevailing in the area concerned and principles of "public justice" in general or in neighbouring fields. As for the effects of a private regulation which may in itself be a reasonable compromise as between the parties, they cannot be appreciated without a closer study of the economic consequences of such regulation for other groups, e.g. non-organized or non-represented categories which are at least indirectly concerned. The possibility of "shifting" the economic consequences of agreements onto the shoulders of such groups as well as of the existence of monopolistic tendencies in the leading organizations must be taken into consideration. It should be observed, however, that

[1] On the standard form for contracts between authors and publishers, see Saxén, *Förlagsavtalet*, Åbo 1955, pp. 5 ff.

[2] Selmer in "Bör försäkringsavtalsrätten reformeras?" (publ. by Allmänna Brand, Jönköping 1968), pp. 144 ff.

mandatory legislation is not the only way of correcting possible biases in bilateral agreements between organizations. The creation of boards or supervising authorities with representatives of public interests may be an equally efficient method; by such means, unorganized or feebly organized groups can also be given some influence. The legislation of 1970 (see 2.3 *supra*) does in fact imply a solution along these lines.

5.5. Among the previously mentioned forms of private rule-making rather large differences exist. The actions of the state in bringing about "voluntary" agreements can be seen as a direct alternative to coercive legislation. In the other cases, a development within the framework of non-mandatory rules has taken place which is partly creative and partly explanatory. If the former can raise doubts from different constitutional points of view, the latter is problematical primarily because of the risks for unrepresented or weakly represented interests which the procedure entails. The legal situation may also become deadlocked to a certain degree—perhaps as much as when the sluggish legislative machinery is used—in those cases where the interests of powerful organizations come into direct conflict with one another.

6. UNILATERALLY CREATED INTERNAL NORMS

6.1. The "justice of associations" (*föreningsjustis*) is an expression which has several different connotations, not all of which are very favourable. The more comprehensive is the network of organization which extends over a society, the more significant, obviously, is the individual's relationship to it or to those organizations to which he belongs, and the more important are the norms for his actions which have possibly been created by the organizations. Contracts of the type which have been discussed under 5 above also have an "inner" side: they consistently oblige the organization's members to follow the contract's guidelines in every case where a member of their own or of another contract-concluding organization is the second party. Particularly in the labour market, the system of contracts is complemented by internal rules within organizations which oblige them to act in accordance with contracts they have concluded, possibly under risk of fines or other

sanctions.[3] However, associations and other organizations can also promulgate other internal norms for their members, which can be regarded as truly lawmaking within the field in which the organization is involved. The usual sanction for neglecting to abide by the association's by-laws or decisions would be expulsion. In many cases, this is an excessively stringent measure. Seen from the points of view which are of interest here, the internal lawmaking of the organizations presents certain fairly diverse problems. First of all, there is the general question whether it is desirable that individual interest groups, intent upon pursuing more or less unilateral economic or other goals, should attain a position which *de facto* gives them the power to force their members to act in a way which, from a public point of view, may be undesirable. A second question is how the legal security of the individual member can be assured; the problem clearly concerns both his participation in the decision-making process and his adherence to internal norms. A third question, finally, concerns the methods which a public authority can use in order to intervene against improper lawmaking and improper legal administration within the organizations.

All these questions have been discussed earlier by jurists. In the field of labour law, the courts have adjudged themselves competent to review the expulsion of members.[4] Especially intense discussion has revolved around the question of the extent to which associations may, through arbitration clauses contained in their by-laws, prevent disputes between a member and an association from reaching the courts. Questions connected with this were discussed at the 14th Nordic meeting of jurists in Copenhagen in 1928,[5] as well as at the 18th meeting in the same city in 1948.[6] On neither occasion, however, could agreement be reached on clear guidelines *de lege ferenda* or even on a reasonably precise delineation of the problem. Even legislators have tried without success to answer these questions.[7] In Swedish legal writing, a distinction has been drawn between settling association-member disputes through "arbitration", which should be accepted as definite, and through "self-decided verdicts", i.e. unilateral deci-

[3] Schmidt, *op. cit.*, pp. 81 ff.
[4] *Op. cit.*, pp. 82 ff.
[5] Reporter Supreme Court Attorney K. Meyer, Copenhagen.
[6] Reporter Professor Kristen Andersen, Oslo.
[7] See, *inter alia*, Ministry of Justice Memorandum no. 1, 1938, which summarizes earlier proposals on this topic.

sions of a board of another body, which should be subject to judicial review. Courts and writers tend to draw a distinction between economically-orientated associations, particularly if they have a monopoly position, and associations motivated by purely social or non-economic aims.[8]

No position can be taken here on these problems, which have only been hinted at. It is sufficient to note that internal rule-making by associations, like the other forms of private lawmaking with which we have come into contact, above all poses for those who are responsible for a legal order the problem whether they can rely on a type of rule-making which is essentially the product of organized private interests to pay heed to individual legal rights in the same way as legislation can still be said to do so.

6.2. We shall here consider such examples of types of internal rule-making occurring within organizations as are different from the generally known and discussed cases of labour-market and industrial organizations.

A significant regulating procedure of this type is to be found in the rules of publication of the Swedish Press Club. These rules, in their most recent form, as adopted after revision on June 1, 1967, contain principles for ethical press standards and are specifically intended to complement the legislation devoted to freedom of the press. They include rules on, for example, mentioning the names of suspects in criminal cases, publication of an individual's photograph, etc. Sanctions, which would seem to be of debatable effect, consist of statements of the Press Fair Practices Commission (founded in 1916 by the association of newspaper publishers, the journalists' union and the Press Club) published in the daily press. These statements usually contain no direct reference to the rules of publication, but only indicate whether or not a certain incriminated procedure is considered to be contrary to good journalistic practice. In 1969, the three cooperating press organizations agreed to appoint a *Press Ombudsman for the public,* who was to act as a kind of "prosecutor" before the Commission and work for the spreading of information in matters of press ethics.[9]

General rules of professional ethics are contained in the *Codex*

[8] See H. Berglund in *Sv.J.T.* 1942, pp. 193 ff., and Schmidt, *The Law of Labour Relations in Sweden,* Cambridge, Mass., 1962, pp. 83 f. See also Svennegård in *Sv.J.T.* 1950, pp. 10 ff., 88 ff., as well as Jägerskiöld in *Sv.J.T.* 1959, pp. 157 ff., and Malmberg in *Sv.J.T.* 1962, pp. 449 ff.

[9] A comprehensive survey of the system of private administration of justice in press matters is found in F. Sterzel, *God publicistisk sed,* Stockholm 1970.

ethicus adopted in 1951 by the Swedish Medical Association. No sanctions are included. On the other hand, physicians are subject to public legal disciplinary jurisdiction by a special committee of the Royal Board of Social Welfare, which may, as an ultimate sanction, revoke the authorization to practise. Attorneys at law are in the same position. The Bar Association has disciplinary authority, the administration of which is, however, subject to review by the Supreme Court upon appeal.

A fairly comprehensive creation of norms with a professional-ethics orientation is pursued by organizations which grant authorization for certain types of professional practice. Thus the Stockholm Chamber of Commerce authorizes accountants and auditors who fulfil certain conditions and undertake to act in accordance with certain norms. The authorizing body can issue warnings and revoke authorizations.[1] In the same manner, the various Swedish chambers of commerce authorize and maintain controlling oversight of forwarding and commission agents,[2] estate agents (the latters' activities are also regulated in the Royal Proclamation of June 30, 1947, *S.F.S.* no. 336) and advertising consultants.[3] The regulations which concern those who practise these professions are, however, often so general that the lawmaking activities of the authorizing bodies ought perhaps to be referred to under 8 below. Significantly more detailed are the rules of professional ethics promulgated by the Swedish Association of Psychologists, which so far as I know is the only professional organization which itself issues authorizations to practise a scientific profession.[4]

Lastly, it should be added that when a single enterprise gains a monopoly position in the market, comparable to that of the large interest groups, it may then be stated that the internal rules of the enterprise assume the characteristics of rule-making in the area in which the enterprise is active. Such is the case of the Swedish Broadcasting Corporation (*Sveriges Radio*), which partly in cooperation with other Nordic broadcasting companies, has drawn up internal publication rules for its employees that are similar to those of the Press Club. (The latter rules are, incident-

[1] The Stockholm Chamber of Commerce regulations concerning chartered accountants and approved examiners (adopted in 1930 and later revised, most recently in 1965).

[2] Standard regulations prescribed in 1963 by the board of chambers of commerce.

[3] Regulations of the board of authorization for advertisement consultants of the board of chambers of commerce, 1965.

[4] *Sveriges Psykologförbund* 1968, Stockholm 1968, pp. 102 ff., 106 ff.

ally, specifically reproduced in the internal regulations of the Broadcasting Corporation.)

6.3. The few examples which have been mentioned above seem to indicate that along with the introductory questions which the "justice of associations" poses for jurists, another type of problem warrants attention to examination of the internal norms unilaterally promulgated by organizations. Is it possible in general to rely on rule-making bodies to give due consideration to the interests of third parties, especially when these bodies issue rules which are determinative for the member's actions as a result of the *de facto* monopoly position and influence which the bodies exercise over their members? Normally there are grounds for assuming that the interest in maintaining the organization's reputation—and also occasionally in avoiding public intervention—will mean that the activities of the organization will induce a genuine "house cleaning". The question, however, is to how great an extent the interests of the organization coincide with those which a legislator must take into consideration if the area in question becomes the object of regulation.

7. UNILATERAL STANDARDIZED CONTRACTS AND UNILATERAL GENERAL PROVISIONS FOR A TRADE

7.1. The discussion on the "law of forms",[5] which to an increasing degree has replaced the individual contract, will be dealt with summarily.[6] The problem has already been widely discussed in legal writing. The frequent occurrence of standardized contracts is well known; it seems impossible at this point to attempt even an incomplete examination of the immense variety of forms which occur in the market and of the different types of contents and formal characteristics which they have. In the interests of clarity, however, a few examples will be given below.

Seen from the point of view of "dangerousness", if such a term can be used without leading to misinterpretation, it would seem reasonable to divide standardized contracts into three groups.

[5] Nial, *Minnesskrift utg. av Juridiska fakulteten i Stockholm,* Stockholm 1957, pp. 195 ff.

[6] With respect to contemporary Swedish writing in this area, see footnote 9 at 5.4.3. *supra.*

The contracts which are most satisfactory as far as the rights of the unorganized second party are concerned would seem to be those which have to some degree been approved of or examined by the authorities. It is difficult to state to what extent such contracts actually occur. In the insurance field it happens that changes in general insurance provisions are informally submitted to the National Private Insurance Inspectorate before they are published. The Insurance Inspectorate may also ask questions about future changes. Similar activities are occasionally carried out by government bank inspectors. A partial examination can be said to have occurred in those instances where the authorities—as is the case with respect to conditional sales contracts within the motor trade—have exercised influence on certain provisions by means of an agreement with a trade organization. In a similar manner, the authorities have, at the very least, been involved in, for example, the general conditions of delivery of the Swedish Association for Metal Transforming, Mechanical and Electromechanical Engineering Industries as applicable to the delivery of machines together with other mechanical and electrical equipment in the Scandinavian markets. These last-mentioned provisions, which were, of course, drawn up by the seller, were used in negotiating a standard contract intended for use by public authorities when buying technical equipment. On the other hand, it is illuminating that the provisions of the Association are regarded as more "seller-orientated" than is the form accepted by the state.[7] The international conditions of delivery, drawn up by the United Nations Economic Commission for Europe, occupy a special position; they have been directly drafted by the representatives of the participating nations. However, it has been pointed out in international debate that these conditions have been drafted by representatives of industrialized countries, which favour their own export industries, thereby leaving much to be desired as far as the typical importing nations are concerned (primarily developing countries). In return, the latter countries can be expected to exert strong pressure within the newly created United Nations body for, among other things, the creation of similar rules, UNCITRAL.

Contractual forms and general contractual provisions drawn up by internationally-, nationally- or locally-active organizations make a second group of standardized contracts. A great number of forms used, for example, in retail trade in capital goods and in such

[7] Vahlén in *Festskrift till Håkan Nial*, Stockholm 1966, p. 540.

sectors as the engineering industries (cf. *supra*) are of this type. It may be generally stated that certain circumstances will probably make such contracts less hazardous from the point of view of the individual second party. Experts are generally likely to have drawn them up; concepts of business ethics, sensitivity to criticism and reactions of the general public and possibly of the authorities, as well as pressure from the law actually in force, can be assumed to play a greater role than when an individual enterprise draws up its contracts. On the other hand, one factor is missing which can influence the contract policies of an enterprise: competition. If, in addition, a strong organization is lacking which could be regarded as representing the interests of the other party, then the interests of the organization which has made the draft may, of course, still be promoted in a somewhat one-sided manner.

Guarantees for "decent" provisions seem generally to be found least in standardized contracts drafted by individual enterprises. To make this statement right across the board about all enterprises is, of course, unreasonable. The enterprise's policy, general standard and ethics, competitive situation, the occurrence of regulatory authorities, vigilant consumer and trade organizations, the intended opposite party's normal character or interest manifested in the press and public debate—all of these naturally influence the actions of the enterprise. Special provisions and standardized contracts (in more or less complete accordance with trade agreements, principles worked out by organizations, etc.) will usually apply to an enterprise within the insurance field, in the credit market, in certain manufacturing sectors where capital goods are also sold retail, and in the transport sector.

7.2. Standardized contracts display typologically significant variations. If we here attempt to rank them according to the risks which they entail for the other party, we can place at one end of the scale those which set out all relevant provisions in a uniform manner and contain free space to be filled in for each individual case—contract forms which are intended to be presented to the other party in approximately the same way as an agreement arrived at after negotiations in an individual case. At the other end of the scale can be placed those contracts whose formal main body only allows room for certain particularized specifications, while the majority of the provisions are set out in a more out-of-the-way place in the text. References to comprehensive provisions contained in extra-contractual documents ("the general conditions of delivery" of the enterprise or organization, etc.) may also occur.

No general survey of substantive variations in standard forms can be undertaken. There are many cases which lie between the extremes represented by extensive stipulations of the conditions of delivery of the Swedish Association for Metal Transforming, Mechanical and Electromechanical Engineering Industries and the rather scanty provisions of certain standardized instalment-payment contracts. Among those provisions which we have noticed earlier as having negative features in unilateral standardized contracts, different types of exemption clauses (regarding liability, delay, the condition of the goods) play an especially prominent role in favour of the party who drew up the contract, while such provisions as severe maturity, forfeit and complaint clauses have a disadvantageous effect on the other party.[8] Whether public criticism, self-rectification and coercive legislation have made such provisions less frequent than in earlier days is a difficult question to answer. An examination of a number of contemporary contract forms used in the field in which the unsatisfactory state of affairs has probably been most flagrant, viz. instalment payments, leads one to the finding that there are practically no provisions which, to any great degree, are disadvantageous to the buyer. The only possible exceptions are exoneration clauses whose reasonableness can be debated and some payment arrangements which, perhaps not without sound reasons based upon previous experience, give the retail seller additional securities upon loss (the bill of exchange system in the motor business) and provide him with significant interest income. However, the contracts which I have been able to examine have been placed at my disposal by large and well-established national organizations. It would probably be very hazardous to try to map out the occurrence of a substratum of more suspect forms outside their field of activity. A survey of actions presided over by debt-recovery judges and executory authorities would seem to be the surest way to get an idea of the frequency and contents of such contracts.

8. STATEMENTS OF BOARDS AND SIMILAR BODIES

8.1. The last type of private rule-making and private administration of justice which we shall consider here is that which takes

[8] Hole, *Ansvarsfriskrivelse i massekontrakter*, Norsk forsikringsjuridisk forenings publ., no. 40, Oslo.

place in boards, committees and similar bodies. They are created, exclusively or in conjunction with other purposes, either to express opinions about the compatibility of certain procedures with public or private rules of law or to apply their own more or less precise norms by meting out such sanctions as the parties, by means of a contract or of membership of an organization, have subjected themselves to. One category of similar bodies, i.e. *ad hoc*-appointed arbitrators, will not be described in further detail. Although arbitrators probably account for a quantitatively significant part of the settlements of disputes in the field of contract and property, one can obviously only speak of "lawmaking" within such bodies when they function with a certain continuity, openly announce the principles which they have applied, and see to it that their decisions are at least accessible to a wider circle than the parties. Since these prerequisites occur only in exceptional cases, it seems that private arbitration, touched upon to some extent in the foregoing discussion on the activities of the courts, should here be left aside.

Several boards and bodies of the type we are concerned with have already been alluded to above: the Broadcasting Supervision Board, which consists of seven members appointed by the King in Council and which in accordance with its instructions inquires into radio programmes which have been the subject of objections, while at the same time trying to ensure that the Swedish Broadcasting Corporation exercises its sole right impartially and objectively according to the Broadcasting Act;[9] the Press Fair Practices Commission, which at the request of the injured party expresses its views as to whether a certain newspaper publication has followed professional press ethics; the board of experts of the Swedish Association of Applied Arts, which expresses its views on whether a copyright (or other sole right) infringement has taken place; the board of the Bar Association, which in its maintenance of professional legal standards may issue warnings and decisions concerning the expulsion of an attorney from the association; the chambers of commerce, which may revoke authorization for persons engaged in certain trades; certain boards within the insurance field, which state opinions about reasonable compensation and other groups of questions. In addition, there is, however, a great variety of bodies for the application of public or private norms.

[9] See, for a more explicit account, 12 *Sc.St.L.*, pp. 218 ff. (1968).

A "typological" division of these bodies can be made according to different principles. One point of differentiation, which is concerned with the *effectiveness* of this unique type of rule-making, is clearly the kind of sanctions which the bodies may apply. There is obviously a significant difference between expulsion from the Bar Association and a statement of disapproval issued by the Press Fair Practices Commission. When it is a question of sanctions which lie between the extreme cases (fines, etc.) the effectiveness of the measures taken will, however, obviously depend upon the unique circumstances of the specific area under consideration. A statement of disapproval can, for instance, be just as disastrous as a powerful economic sanction. In certain cases, a latent threat of legislation can ensure complete effectiveness for condemnation founded purely on principle. It thus seems that the type of sanction is not the most suitable principle of division. Nor would the question *which rules* a specifically created body may apply seem to be an appropriate criterion of classification. Several of the above-mentioned bodies have to apply a special, more or less developed code and it could thus be stated that it is precisely in these cases that one can speak of a truly independent type of lawmaking. However, it should not be forgotten that sometimes boards of this kind can sit in order to inquire into the compatibility of certain actions with statutory law. Their view of legal matters can actually determine how these rules of law should be applied, provided that the disputes, either by agreement or otherwise, are effectively kept out of court. Even if judicial review is possible afterwards, the decisions of a competent board can exert an influence on the court. In both of these last-mentioned situations, legal development as a whole—including "public" rules—can, of course, also be influenced.

If we now primarily regard these special decision-making bodies as instruments of extra-legislative lawmaking and thus, to a certain extent, as substitutes for both legislators and courts, it would seem appropriate to group them according to the degree of their "public character". In one category are found such bodies as have been created by the state; in another group those which have been authorized (through public enactment or rules, etc.) or contain representatives of the state. Among the others we can distinguish between those bodies which state opinions in disputes regardless of whether the parties belong to an organization and —in a fourth and final group—those which deal with purely internal administration of justice.

8.2.1. Among the boards which have been publicly created is the *Broadcasting Supervision Board.* Its members are appointed by the King in Council, although they can be said to represent very different points of view on questions of public interest.[1] After notification or upon personal initiative, the Board can examine a programme and proceed primarily in a judicial manner. The only sanction is a statement of opinion about the programme which has been reviewed. The Board has, however, the additional power and responsibility of proposing suitable courses of action to the King in Council.

A unique structure characterized the composition and activities of the Restrictive Practices Board.[2] This body, which was established by the Act on the prevention of certain types of restrictions on competition within industry and commerce, 1953, and replaced in 1970 by the Marketing Council (see 2.3, pp. 239 f., *supra*), consisted of nine members, of whom three (including the chairman) were impartial, three were the representatives of manufacturing interests and three were the representatives of consumer interests. The members were appointed by the King in Council. The duties of the Board, which were taken over integrally, in addition to other tasks, by the new Marketing Council, were on the one hand, to issue exemptions from certain specific prohibitions against acts which restrict competition and, on the other, upon the request of the Ombudsman for Restrictive Practices (or, if he did not act, the interested private party) "to remove, through deliberations, harmful effects" of competition-restricting measures which were not specifically forbidden. The Board expressed itself in a manner which closely resembled traditional judicial opinions but usually did not have other sanctions at its command than notification to the King in Council if deliberations did not lead to a removal of restrictions on competition which it considered to be harmful. However, in cases of refusal to deliver goods an injunction could be issued. The real sanction was the threat of legislation. As Professor Grönfors has stated, it is difficult to re-

[1] In regard to representation of points of view and organizations on boards in general, see Foyer, *op. cit.*, p. 50; Elvander, *op. cit.*, p. 223. Foyer's presentation contains a fairly complete account of the type of public bodies considered here.

[2] See, for a fuller exposé, Grönfors, *Lagstiftningen mot konkurrensbegränsning* (Publications of the Handelshögskolan in Gothenburg), 1962: 4, pp. 15 f.; Martenius, *Lagstiftningen om konkurrensbegränsning*, Stockholm 1965, *passim*. Regarding the previous history of the legislation, see also Foyer, *op. cit.*, pp. 44 ff., and Elvander, *op. cit.*, pp. 187 f.

gard the Board's decisions, published in the magazine *Pris- och kartellfrågor* ("Price and Cartel Questions"), as sources of law. From the point of view under consideration here, it does seem clear, however, that we are dealing with a type of legal development. The same could probably be said about the reasoned decisions and the advance instructions of the Ombudsman for Restrictive Practices, whose duty it was to appear before the Board as a kind of prosecutor and who retains his functions under the 1970 Marketing Act. According to oral information from the Ombudsman's office and the Board's secretariat, the overwhelming majority of cases were usually decided by the actions of the Ombudsman in the sense that the parties involved yielded to his point of view.[3]

During the last decade there have come into existence several public bodies which have consultative, investigatory and informational functions. Within one of these—the State Consumer Council—a *board of complaints* was set up in 1967 which has general competence. (Certain business spheres in which such special boards have previously been set up are, however, exempted.) The board of complaints is selected by the Consumer Council and consists of a chairman and 28 members; 23 of these members are selected upon recommendation of certain commercial, consumer and employee organizations. The board is divided into five sections for different business spheres. Its task is to examine the consumer's claims with a view to determining whether there exists justification for censuring a product or service which is available in the market. Price disputes as such lie outside the board's competence. A precondition for examination of the claim is that the consumer's complaint shall have been rejected by the person who furnished the product or service. No judgment norms are mentioned in the board's statutes or rules of procedure; it can be assumed that general rules of law and accepted business standards are followed. Among the board's members only the chairman is required to have judicial competence.[4]

As has already been mentioned, certain national associations

[3] See also Grönfors, *op. cit.*, pp. 16 ff.

[4] *Stadgar för allmänna reklamationsnämnden* (Statutes for the National Complaints Board) drawn up by the State Consumer Council on December 13, 1967 (mimeographed); *Förslag till arbetsordning* (Proposal for rules of procedure for the National Complaints Board, mimeographed February 20, 1968). Documents and information have been made available by Mr G. Hedelius, head of the Board's chancellery. Opinions are published in the magazine *Råd och rön* (Counsel and Experience).

of industrialists and similar organizations have established their own boards of complaints; specialized boards now deal with cleaning, footwear, furs, automobile rubber, furniture and prefabricated wooden houses. What the overall effect of these currently active boards of complaints will be is uncertain. So far the national board of complaints of the Consumer Council has been active for only a few years. Regardless of whether the interested business enterprises are convinced of the legality of these measures, it is probable that they will be forced by threat of negative publicity to liberalize their attitude towards consumer complaints.

8.2.2. Those bodies which have been "authorized" in the above-mentioned sense or approved in some other way (through ratification of by-laws, etc.) can at this point be considered together with bodies which have been established by more significant organizations.

The following boards would seem to warrant some mention: the Swedish Council on Business Practice (and a few related bodies), the Board of Experts of the Swedish Association of Applied Arts, together with the boards active within the insurance field.

The Swedish Council on Business Practice (established in 1957) at present consists of a chairman, two vice-chairmen and 39 members; these are selected by the organizations sponsoring the board, among which are found, in addition to a series of industrial associations, the Cooperative Association, and, since 1963, the Confederation of Trade Unions, the Central Organization of Salaried Employees, the Confederation of Professional Organizations, the Swedish National Association of Housewives, and the State Consumer Council. The Council's task is, upon request, to state opinions as to whether advertising and other competitive measures used in industry and commerce can be considered to violate accepted business standards. The norms applied in this respect primarily make up the basic advertising rules of the International Chamber of Commerce. In principle, the Council's opinions are public and collections have been published under its aegis.[5] Without doubt the Council enjoys great authority. It would be hazardous to predict what influence the new rules on marketing and competion (see 2.3, pp. 239 f., *supra*) can have on the Council's

[5] Under the heading *Otillbörlig konkurrens och god affärssed* (Unfair Competition and Accepted Business Standards). Further documents and oral information have been furnished by Mr Sten Tengelin, Stockholm, the Council's managing director.

position. Other organizations of a similar nature can be no more than mentioned at this point.[6] The Board for the Surveillance of Proprietary Medicine Advertisements, established in 1941 (as a foundation for the inspection of advertisements for such proprietary medicaments, etc., as were on sale other than at pharmacies), consists of principals who come partly from the newspaper and advertising fields and partly from the pharmaceutical industry and professional medical associations. Its task is to watch over such advertisements and also upon request to examine them in advance.[7] Identical functions are fulfilled by the board for the inspection of intoxicating liquor advertisements, established in 1962 by the Stockholm Chamber of Commerce.[8] Through its board on trade-mark matters, the Chamber of Commerce expresses opinions on trade-mark questions at the request both of interested parties and of authorities.[9]

The Board of Experts of the Swedish Association of Applied Arts was founded in 1953. It consists of a chairman with judicial experience and four members with artistic and business competence who express opinions on disputes on copyright infringements in the general area of functional design and in addition on accepted business standards and the artistic code of ethics. The Board acts in a judicial manner and its opinions are worded in a way which resembles those of a court. In principle, however, the deliberations as well as the opinions are confidential. On the other hand, the Board has, with the permission of the parties concerned, published its opinion in the 60 cases which it decided during the first ten years of its activities. In all of those cases concerning unlawful reproduction in which disputes have been decided by the Board and later reviewed by a court, the final result has been in accordance with the Board's opinion.[1]

A richly developed variety of specialized boards is found in the field of insurance law.[2] As has been pointed out by Professor

[6] See a paper entitled *Rättskipning utan rättegång* (Administration of the Law without Trial), published by the Stockholm Chamber of Commerce, 1968.

[7] See a paper entitled *Reklamen för fria läkemedel. En orientering rörande Stiftelsen Reklamgranskningen för fria läkemedel och dess verksamhet* (Advertisements for Patent Medicines. A Survey of the Foundation for the Scrutiny of Patent Medicine Advertisements and its Activities), Stockholm 1956.

[8] *Supra*, footnote 5.

[9] *Supra*, footnote 5.

[1] See *Upphovsrättsligt skydd för brukskonst. Svenska slöjdföreningens opinionsnämnds yttranden 1954–1963* (Copyright Protection for Functional Design. Opinions 1954–1963), Stockholm 1965.

[2] See, generally, Hellner, *Försäkringsrätt*, 2nd ed. Stockholm 1965, pp. 21 f., 43, 111, 486.

Hellner, these boards make statements which are not published but are sent to insurance companies in mimeographed form. These boards do not necessarily apply the same legal principles as a court would have applied in parallel cases. Nevertheless, it is clear that to a very great extent the companies acquiesce in the board's opinions. As we have seen, judicial decisions are conspicuously meagre in relation to the wide scope of insurance activities. According to information from the Personal Injury Board of Liability Insurance it is only exceptionally that a case reviewed by that body reaches the courts; during 1967, 350 cases were reviewed.[3] The Board acts in accordance with rules that were drawn up in 1947 by all those companies that were members of the National Swedish Liability Insurance Association and who issued liability insurance. It consists of from eight to ten persons selected by the executive committee of the National Association. These persons have insurance experience, in addition to which the chairman and vice chairman have legal training. At the request of companies or courts, the Board will state opinions in certain cases concerning personal injury indemnification. The Board of Traffic Insurance Institutions[4] is worth special attention. This Board has a more official character, possibly because the maintenance of a traffic insurance policy is a legal duty upon car owners. The rules of the board were submitted in 1936 to the King in Council for approval; they have subsequently been revised. The Board is made up of insurance institutions involved in traffic insurance activities and the traffic insurance association. Upon request by its principals and the courts, it expresses opinions in regard to certain indemnification questions. The Board consists of a chairman appointed by the King in Council and, in addition, from seven to thirteen members elected by the executive committee of the Traffic Insurance Association and approved by the Insurance Inspectorate. The chairman and from one to three other members must have a legal training and may not be employed by any of the principals. The remaining members are experts and all are currently employed in an insurance company or the Association. The number of cases decided was 1,179 in 1961, 1,342 in 1962, 1,317 in 1963, 1,373 in 1964, 1,476 in 1965, 1,687 in 1966 and 1,871 in 1967. During this whole period 48 opinions were given in cases which were brought before a court. In the overwhelming

[3] Information supplied by the Board's secretary, Mrs L. Perttu, Stockholm.
[4] Information supplied by the head of the Board's office, Mr J. Land, Stockholm.

majority of cases the Board's opinions were accepted by both parties. Of the 1,738 cases brought before the Board in 1966, 1,644 were so accepted. Of the 1,966 cases concluded in November 1967, the percentage of non-accepted cases was approximately 1.4. In earlier years the corresponding percentage was even lower.

Other boards could be enumerated, but the overall picture would probably not be changed thereby.

8.3. However incomplete the summary may be, it may nevertheless serve as a basis for certain conclusions. The boards which we have been considering here are consistently characterized by a high standard of quality. Another typical characteristic is the representation of different interest groups and a more general connection with certain organizations. In certain instances, for example boards in the field of insurance, the dominant characteristic is expertise; an element of impartiality is provided by the presence of legal representatives and eminent judges, while the other members come from the business sphere in question. In regard to the public boards and the Council on Business Practice, the demand for impartiality is satisfied by having typically opposing interest groups represented. It is the characteristic situation of all the boards discussed here that in the final analysis they have very few concrete sanctions at their command. It can be said that they exert influence either through the weight of the arguments they put forward or, negatively, through the interested parties' fear of reactions from business opinion or general public opinion. In the case of the Council on Restrictive Practices, the threat of legislation could be discerned in the background; in the new Marketing Act, 1970, this threat has materialized to a considerable extent. Although the procedural forms vary, as do also the opinions with respect to wording and suitability as precedent, it may nevertheless be stated with justification that in general the qualified bodies which have been examined here are fully aware of their role as "rule-makers". Both of the tendencies which this awareness seems to create in judges—the desire to formulate general rules and the fear of being bound by them—seem to be represented on the boards. The consistently high quality of these undoubtedly serves to ensure a competent administration of the law. This judgment, however, should be made with certain reservations in mind.

It may at first seem as if the boards, with their comprehensive representation of different interests, must provide the best possible guarantee of impartiality. However, there exists a general risk that

uncommon interests which are not directly connected with the sphere of activities of the participating organizations may receive only grudging attention. There also exists a danger that internal conflicts within one of the interest groups may have consequences as far as the final decisions are concerned. Thus it may be assumed that an unorganized or antagonistic industrialist may find himself in an unfavourable position because not only the consumer representatives but also those who in principle defend his interests may dislike his methods. Furthermore, the most important sanction, practically speaking—large-scale disapproval—will probably have rather unpredictable effects. In a dispute involving the interests of a producer and a consumer, this sanction is incomparably more dangerous for the producer, who may even sacrifice an objectively well-founded point of view in order to avoid proceedings which carry with them the risk of such a sanction. The question may be raised whether boards having a strongly impartial legal character but otherwise composed of technical experts from a specific business sphere do not offer as good a guarantee of a truly objective inquiry as do bodies representing various interest groups.

9. CONCLUSIONS

9.1. In the preceding sections we have undertaken a detailed critical discussion of the advantages and disadvantages of the legal development under consideration. It would thus seem sufficient at this point to summarize briefly the conclusions which have been formulated in the different sections and finally to consider whether certain general conclusions are justified.

We have seen that legislation can hardly be considered to satisfy the needs of commerce and industry for a detailed as well as an easily modifiable set of regulations. We have, furthermore, noted that the ability of the courts to make law does not satisfy this need either. On the other hand, sound reasons have been given for restraint on the part of the state and the authorities concerned with the administration of justice. If, as we believe, legislative and judicial restraint is on the whole well grounded, we must then arrive at the conclusion that private (or semi-official) rule-making and private administration of justice are not to be regarded as an unwelcome or in principle a suspect intrusion into

public duties but should rather be viewed, from a functional perspective, as an inescapable social function.

Our examination of the different types of non-legislative rule-making—mutual agreements, unilateral norms, unilateral standardized contracts, the justice administered by boards and committees—seems to point to one and the same problem. The "voluntary" agreements between the state and organizations assume a special position. In this manner a loophole is created for state intervention which can occur without the debate and critical investigation which would precede legislative intervention. If we disregard these cases, the most serious question concerns the overshadowing role which *organizations* play in regard to the creation and execution of non-legislative rule-making. The villain of the piece, if such an expression may be used, is today hardly the callous corporate giant which forces its divided opponents to accept unreasonable conditions in unilaterally drawn up contracts. That such things may happen and that they may well demand attention cannot be ruled out. The dominating position of organizations presents more and, at the same time, less obvious dangers. The drawing up and application of private rules of law can easily be caught up in the whirlpools which the external and internal power struggles of influential organizations represent. On the other hand, it may be pointed out that legislation has political motives; that organizations play an exceptionally important role as pressure groups and as participants in legislative preparations; and that therefore no real difference exists between public and private rule-making seen from this point of view. There are, however, three substantial differences. The first has already been alluded to: public rule-making takes place in continuous open debate. The participation of politically disengaged jurists in legislation is not always eulogized, but nevertheless it represents important guarantees from a point of view of legal security. Proposed enactments are at least examined at some point in the legislative process by representatives of the judicial tradition. These cannot, of course, ride roughshod over the will of the powers that be, but their presence can induce debate. Put quite simply, it is still not possible to write a law in any way one pleases. The third factor is that the "public rules" are applied by courts and other authorities. Private administration of justice is not characterized by a division of powers which places the application of rules in the hands of independent bodies. On the contrary, legislators and judges are very often the same persons.

9.2. It is hazardous to formulate concrete proposals based upon the foundation which has been established here. Two points may nevertheless be noted.

First of all, it seems clear that private rule-making—like the question discussed above on the use of special courts—calls for more profound and more comprehensive study. A thorough examination, enlisting jurists, political scientists and sociologists, would be a most suitable research project. As things stand it is impossible to form a clear picture of the complex network now existing, with its many ramifications, and there is a risk of non-uniform development, even within the sector which comprises the public or semi-official boards. It would be superfluous to describe in detail the disadvantages of a situation where, for example, a public board of complaints rules favourably on a claim which would be dismissed by the ordinary courts. At least within this sector it can be argued that commerce, industry and individual parties, even if they cannot lay claim to "social service" in the form of comprehensive legislation, are justified in demanding that public bodies shall apply uniform rules.

If we regard private rule-making as a "delegated" social functoin, we may go one step further to expand the above-mentioned demands, and assert that state authorities should at least be responsible for a certain amount of coordination and for a minimum of guarantees for legal security within the field of private justice.

It is difficult to say how such a coordinated system could be brought about without a study of the matter in depth. It is certain that any form of intervention can be expected to meet energetic opposition from organizations which consider themselves perfectly able to solve their own problems. Generally to break the different arrangements which have been made in order to make private rule-making autonomous and to keep cases out of the courts would raise serious technical and substantive misgivings. A solution which I wish to put forward for discussion is that there should be established a public body at the highest level, consisting of judges, which would be responsible for keeping watch over and upon request reviewing private rule-making and administration of justice from those points of view which are of special interest for private law. A duty of notification could be required, at the risk of invalidating the arrangements made, for agreements involving a minimum number of parties, for standardized contracts drawn up by enterprises of a certain size, and for instructions relating to boards which possess a general compe-

tence to settle disputes or to express opinions on them. It is not possible to go into detail at this point. To do so would require exact knowledge about the actual scope of private rule-making and administration of justice, about any existing foreign solutions, and about the technical feasability of creating an examining body of the type which has been outlined here. It should be emphasized, however, that the rapid growth of private rule-making and private administration of justice is a new and unique phenomenon which the traditional legal and administrative machinery would have difficulty in keeping up with.

This proposal, formulated in 1968 and put forward in 1969, was perhaps regarded as utopian at that not very distant time. The legislative powers have clearly preferred a different solution, announced in the 1970 Marketing Act and expressed even more clearly in the proposal for rules enabling the Marketing Council to issue injunctions against specific contract clauses. In my view, this solution has serious drawbacks. It gives a representative body a right, which would traditionally belong to the courts, to settle a range of questions which will certainly interest the public at large and which may easily be solved in a way which has more to do with political evaluations of the day than with that equitable balancing of interests which alone deserves the name of justice. Further, the solution adopted by the legislature may protect the consumer—may possibly over-protect him at the expense of the opposite party, more exposed to the risks of public debate and criticism—but will not protect the individual against organizations. It may well turn out to imply a sacrifice of legal security without solving the major problems raised by the growth of "private" lawmaking and administration of justice.