A SOCIAL LAW OF CONTRACT?

BY

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1. STARTING POINTS FOR A SOCIAL LAW OF CONTRACT

1.1 Introduction

A legal-scientific discussion has been going on for fifteen years in an attempt to find forms and models for the renewal of our traditional law of contract. The discussion has centred upon the view that contract law has got out of step with social development. Many of the traditional characteristics of contract law – individualism, the focus on form, norm-orientation, party opposition etc – are being viewed as ill adapted to features that characterise society today, such as standardisation and collectivisation. In addition, the prevailing ideology of contract law is considered to be irreconcilable with the values of the welfare state. The discussion has so far hardly led to any unequivocal results, but is an attempt worthy of respect to lay a partly new theoretical foundation for contract law as for other areas of civil law.

1.2 The arguments

1.2.1 The pluralism of the law

Regarding the view of law, the first thing to note is the opinion that civil law, particularly contract law, does not accord with the *values of the welfare state* that have long prevailed. In more concrete terms, it is now felt that the economic and social position of the legal subject should be accorded greater weight in contractual and other private-law contexts.

Still regarding the view of law there is reason to refer to the body of theory that stresses the *openness and pluralism* of the law, particularly perhaps the doctrine of the sources of law.[1] Here is meant the view that law cannot be seen as a harmonious connected system but is marked by

[1] The theories on the pluralism of the law started to develop during the 1960s. An early example is Pospisil, who studied "the multiplicity of legal levels and systems" and stressed that "any human society ... does not possess a single consistent legal system, but as many such systems as there are functioning subgroups..." (Pospisil p.3). Ehrmann maintained among other things the constant risk that every system of law runs that the gap between the living law and the official law leads to "the disintegration of the legal culture and its processes" (Ehrmann p.53).

differentiation in many respects. Law is not produced by a "law-producer" but by many different persons and groups following their own procedures and their norm-forming technique. Application of the law, too, is not uniform, and legal culture varies greatly in other ways also. The various sources of law have different ranges and destinations.[2] The pluralism of law leads to us not really having a homogeneous body of rules, applied uniformly within a hierarchic structure; hence, among other things, the system is open, possibilities of interpretation are many and the decision-maker's freedom of action great. Hence also there is great freedom of action for those who wish to use the system for their own purposes.

1.2.2 Legal strategies

To the two points just mentioned regarding the view of law are linked the attempts to formulate effective "legal strategies".[3] The purpose of these strategies, sometimes termed an alternative jurisprudence,[4] is to find means to use the legal order in the service of those who are worst off. This also means that the discourse has political overtones.

1.2.3 Regulation of the law

Moving now to the regulation of the law, the reader is here briefly reminded of the now-established analysis which, with Weber, concen-

[2] Pluralism of law has since aroused interest in the Nordic countries too where especially "the polycenters of the sources of law" have become a concept. Among other things, the tendencies towards a more authority-specific doctrine of the sources of law is being studied in a fairly large Danish research project, see Zahle 1986 and Zahle 1988, the latter contribution also being available in *Reglering och styring.*

[3] "Eriksson expresses the matter like this: "...on the one hand we have the principle of private autonomy the form of expression of which at the legal level (just) is formal rationality, and on the other hand we have the principle of social justice, the legal form of expression of which is material rationality" (Eriksson 1986 p.282)

[4] The theory of single "reflexive rationality "is connected chiefly with the name of Teubner and his essay of 1983, but also with other germans such as Wiethölter and Schmidt have been considering similar ideas. Wiethölter for his part speaks of a "procedural rationality". Teubner's essay was in its turn a most directly prompted by the analysis by the two legal sociologists Nonet and Selznick of the development of law. These two authors considered that over time law had lost more and more of its closed nature and its independence in relation to the political environment had been changed to a "responsive law", i.e. a law of adaptation forming a means of social control. regarding Nonet's and Selznick's ideas; see Mathiesen 1986 p.467 f.

trates on the different forms of rationality possessed by law.

Alongside the traditional rule-oriented form, viewed as an expression of a "formal rationality", there has developed a goal-oriented model in the form of general clauses and other elastic forms of regulation.[5] In other words, the subsumption-logical model of argumentation of the legal state has been obliged to a certain extent to give place to the goal-oriented model of the welfare state. Against the latter material rationality have once again been placed other ideals that reflect what is termed reflexive rationality.

1.2.4 Legal science

A further central element in the picture of ideas sketched here is the view of legal science and its role. Here, a "critical legal science" is being advocated which is antipodal to the traditional. Traditional legal science is viewed as closed, uncritical and serving to legitimate the prevailing order. The core of the alternative (critical) legal science is not altogether easy to capture, but a few headline words may hint at the contents of these thoughts: emancipatory, the jurisprudence of the progressive element, general doctrines, deformalisation and deobjectivisation of law, a normative doctrine of the sources of law, a relativisation of the doctrine of juridical method, ideology criticism, "an offensive strategy" and other legal strategies etc, etc. Naturally enough, alternative legal science has foreign models and parallels. Habermas and Luhmann are inspirers, which shows that there is a link with the "critical theory" in Germany. Similar lines of thought are Critical Legal Studies (USA) and *Kritische Justiz* (Germany).

1.3. Some comments

The picture emerging in the previous section is an attempt to piece together fragments of the debate to form a whole. To conclude from this that a coherent critical legal theory or critical theory of legal science had been formed would be a hasty conclusion indeed. The very view of the possibilities of reflexive law – to take a clear example – is exceedingly varied.[6] But even at a more basic level, consensus is lacking. There are

[5] See e.g. Eriksson 1979.
[6] See Graver 1991.

legal scientists who designate themselves "critical" but reject both the goal-oriented and the reflexive views in favour of a strictly norm-bound (traditional) technique of regulation.[7]

For many reasons, the discussion may appear elusive and abstract. One is that the lines of thought are based upon an unclear view – or at least an unclearly presented view – of the economic system. An undercurrent of criticism of the market economy as such runs through the contributions but readers are not told what is to be put in its stead.

Another reason for the unclarity is an almost programmatic reluctance to keep separate description of the law in force and normative reasoning about the desired state of things. These critical remarks should not obscure the fruitful elements that can be further developed. One of these is that the discussion indicates the importance of uncovering the value judgements that support the legislation in different fields of law. Here belongs also the analysis of the possibilities and restrictions of legal regulation.[8] Clearly, deeper insights into the different "rationalities" of regulation are needed, not least regarding how these can act together. And here belongs without doubt the need to analyse the interplay between private law and social development in general.

1.4 The relationship with contract law

The starting points raised in the foregoing (under 1.2) are all relevant to the law of contract. This applies not least to *the values of the welfare state* (1.2.1), which will be central to this presentation.

However there are a few further lines in the discussion, which particularly concern contract law. One of these relates to the view of the form and the content of contract law: that it should not – as has traditionally been the case – chiefly regulate "questions of form", i.e. particularly the ways in which a contract comes about. It should focus more on contractual contents. The first point then becomes to establish norms of reasonableness or similar standards. Tendencies towards such a *materially oriented contract law* have started to make themselves felt.

Another line in the debate concerns the view of *the relationship between the parties*. In the polemics against the idea that the parties have opposing interests, the contract is stressed as a form of cooperation, meaning that

[7] Mathiesen 1986.

[8] It may be mentioned that in Denmark a broadly-based, interdisciplinary project on legal regulation and control is being run, see Regulering och styring.

such factors are stressed as loyal fulfilment of contract, readiness to revise a contract that has become exceptionally burdensome for the other party, etc.[9] This view has points of contact with the criticism of traditional contract law that note that the latter works with stereotypes such as the creditor, the purchaser, the insured, etc, thus creating a presumption that social and other personal circumstances will not be permitted to affect the judgement of what is to be considered to be performance according to contract.

1.5 A social law of contract – determination of a concept

As is known, we already have in Swedish law (as in the legal systems of other industrialised countries) a well-established phenomenon that could be designated social contract law. Here belong sections of labour law, landlord and tenent law, consumer law, etc. The social elements are indeed central in these legal areas in that it is the purpose of protecting the weaker party to a contractual relationship that very largely gives these areas their legal-political stamp.

In the current debate, however, something rather different and rather more is meant. Advocates of a social law of contract are inspired by an attempt to make welfare-state values pervade the whole of contract law.

Wilhelmsson puts the following question, which indicates the scope of the "project":

> "how far can the traditional autonomy of the law of contract be replaced by the *solidarity* of social law when general doctrines of contract law are being developed?"[10]

A social law of contract in this ambitious form is aligned against traditional contract law. It purposes as far as possible to consider the economic and social status of a party and his needs as legal facts in contract law.

One concrete expression of such a social law of contract is the doctrine of "social obstacles to performance" – sometimes termed "social force majeure".[11]

[9] Taxell 1972 is an early example of such a basic view. See also Taxell 1987 p. 12, 60 and 109. Cf. also Schmidt p. 157 ff.

[10] Wilhelmsson 1987 p. 46.

[11] The expression "social force majeure" is also used in the *travaux préparatoires* to the Consumer Insurance Act (*SOU* 1977:84 p. 219) and to the Act on Interest (*SOU* 1985:11 p. 119 and 181). Taxell 1988 is critical of the terminology (p. 530), since he considers that the concept force majeure may be misleading.

The main components – on one side legal fact and on the other legal consequence – of such a doctrine are as follows:

1. Since the debtor through no fault of his own is affected by unforeseen problems – such as illness, unemployment, divorce or the like – he cannot pay his debts or fulfil some other obligation.

2. The consequences of breach of contract are mitigated wholly or partly or the debtor is afforded the right to withdraw from the contract that would otherwise apply.[12]

2 TRADITIONAL LAW OF CONTRACT

2.1 Characteristic features

A social law of contract intends a break – at least at certain points – with traditional contract law. One wonders, therefore, what traditional contract law *is*. Anyone who consults the standard literature of contract law for a systematic account of the principles of traditional contract law will be but poorly repaid. These, like for example the fundamental legal tenets of the market economy, are considered so fixed and well known that there is no need to waste words on them.[13]

a) Private autonomy

Freedom of contract is the foundation. This freedom in its turn is a part of private autonomy, which is thus the superior concept. This autonomy also includes the right of association, the freedom of trade and the freedom of property and other rights.

b) The binding nature of contracts

Contracts are to be kept. This is contractual freedom's opposite pole. The binding force of a contract – which is based upon the parties' consent or reliance – means that the contract must be fulfilled according to its contents. This gives an element of predictability within private law that corresponds to the predictability that in a *Rechtsstaat* should characterise the relationship of the individual to the public.

c) The relationship between the parties

The relationship between the parties is marked by formal equality in that

[12] A summary of the doctrine is to be found in Wilhelmsson 1990 p. 7 f., and in Wilhelmsson 1988 p. 588. See also Bärlund p. 6 ff. and 79 ff. and section 4.9 below.

[13] But there is much to be found in German law. What follows relates partly to Wolf 1974. Also, Taxell 1972 and 1987, and Strömholm too, touch upon these issues.

the parties to a contract are treated alike; but also in that they are viewed as abstract figures – the purchaser, the wage-earner, the guarantor etc – whose economic and social status and other characteristics lack relevance.

d) Stress upon form
Contract law in the narrow sense emphasises form to the extent that it notes whether there exists a binding contract (or a binding unilateral declaration of intent). The issue of whether an obligation exists is typically determined by the manner in which the legal instrument came about, not by its contents.

e) Systematic approach
There is a flora of exceptions to the principles just described. The obligation to contract, peremptory safety rules, rules on prior stipulations and requirements as to form are examples of techniques employed. On the whole, however, these exceptions are fully compatible with the prevailing system in the sense that they have been added to it step-by-step without its basic elements being disturbed.

2.2 The relation to the market economy

A far-reaching private autonomy is a prerequisite of the market economy, whose decentralised forms for deciding about prices, resources, etc (in contrast to those of the planned economy with its central decisions in administrative order) are based upon such autonomy. Since it has proved possible to generate the economic infrastructure necessary for a well-developed welfare state only in market economies, private autonomy is in practice – if not in theory – a precondition of the welfare state.

Moreover, this view tallies well with the results of economic-historical and technical-historical research demonstrating the decisive importance of the legal framework and other institutional factors in economic progress.[14]

Freedom of contract and other forms of private autonomy are, in the

[14] Central figures in this research are e.g. Douglass C. North and Nathan Rosenberg.

light of this research, indispensable parts of the institutional structure. The research confirms the importance of predictability, stability, impartiality and similar values traditionally close to the hearts of jurists.[15]

3. SOCIAL CONTRACT LAW IN THE LITERATURE

3.1 Reifner

The theses of social contract law have been pursued with particular emphasis in the Nordic countries. There are however on the Continent a number of early examples of this approach. First may be mentioned the German Udo Reifner, who concentrates particularly on consumer credit law. He has attempted to generate understanding for the need of a "social interpretation" of the BGB and has also presented proposals for a general definition of "social obstacles to performance".[16]

3.2 Eriksson

Lars D.Eriksson may be seen as a precursor in this connection, even though he has not concentrated specially upon the law of contract. In an essay in 1979 he drew up guidelines for Marxist legal jurisprudence, in which he started chiefly from the legal-theoretical debate then going on in the socialist countries and in Italy.[17] The essay analysed different models of legal argumentation (p. 42 ff.) and indicated that a goal-rational model for argumentation can be governed by, among other things, "the requirement of satisfaction of concrete social needs (concrete justice)" (p.47). The argumentation was coupled to legal-strategic reasoning:

> "Marxist jurisprudence intending to represent a systematic alternative to bourgeois jurisprudence can develop a functioning alternative first by influencing the direction of legal decision-making and secondly by influencing the content of our standards for decision-making on the basis of need-oriented goal rationality."[18]

In conformity with this Eriksson stated that "Marxist legal science is not

[15] When jurists use the somewhat unclear term "interest of turnover", it is values of this kind that are here meant.

[16] Reifner 1979, particularly p. 291-317. See Wilhelmsson 1987 p. 183.

[20] Eriksson 1982 p. 108.

[17] Eriksson 1979 p. 40.

only investigating *law as ideology* but also as *an instrument for action*". (p.52). In a later work in *Retfaerd* Eriksson deepened his argument using women's law as his expository example.[19] In another context, he perceives that "the task of alternative jurisprudence, on the basis of its own hegemonical principle (the liberation of the working class i.e. the whole of society, from capitalist exploitation) – here: realisation of material justice and concrete satisfaction of needs and a need-oriented model of rationality based thereon – in individual details is both to disarticulate and to rearticulate bourgeois jurisprudence".[20]

Eriksson's 1979 essay was criticised by *Anna Christensen*, who sees no possibility of introducing "collective needs" to the argument. One must make up one's mind, she thinks; either to carry on ideological criticism and adopt an outsider's perspective on the legal order, or to argue legally-dogmatically i.e. from inside the system with the perception of the reality and the more or less fixed value premises that are accepted within the system. Eriksson is attempting to do both at the same time, which is untenable.[21]

3.3 Wilhelmsson

Thomas Wilhelmsson is the legal scientist who in the most articulate, concrete and theoretically developed manner has argued for a social civil law including particularly, of course, a social contract law. The statement quoted in section 1.5 above indicates his fundamental view.

Wilhelmsson's *Social civilrätt* (Social Civil Law) of 1987 is without doubt a pioneering work. His doctrine of social obstacles to performance implies, as already mentioned, that a debtor's "needs" can constitute a reason for mitigation of consequences even outside the scope of the special statutes that grant such mitigation. In concrete terms this means that a debtor can be freed from his obligations by reason of his personal circumstances. The main motivation for the doctrine is to admit the notion that companies and other institutions should bear a social responsibility. Wilhelmsson develops and qualifies his doctrine in detail.[22]

Wilhelmsson has developed his views in a number of works.[23] Differ-

[18] Op. cit. p.48. The argument was then developed in Eriksson's thesis the following year.
[19] Eriksson in *Retfærd* 1986.
[21] Christensen p. 61 and 67.
[22] Wilhelmsson 1987 p. 177-213.
[23] See bibliography.

ences of nuance can be seen between them but the basic view is consistently maintained. His 1989 work presents for a foreign public the import of a need-oriented civil law, and that of 1990 the doctrine of social obstacles to performance.

3.4 Graver

Hans Petter Graver has in several works made himself the spokesman for a body of socially-oriented private law. His chief work in the area (Graver 1990) bears the subtitle "a handbook of debt counselling". Of special interest in the present context are Chapter 3 treating the "ideology of contract law" and Chapter 11 on the need for reform.

Chapter 3 stresses the contractual partners' social responsibility, viewed as a principle competing with the one that contracts are to be kept. Graver believes that a development can be discerned whereby "welfare-state social law is struggling to replace the freedom of contract of the legal state as the leading principle".[24] If we consider the content of the rules being adopted, welfare-policy lines emerge more clearly than does pure concern for what is reasonable and for protection of weaker parties. A clearly articulated ideology of contract law based on the social responsibility of the contractual partners and the significance of basic welfare needs is important among other things for the possibilities and limitations of legislation as an instrument for controlling consumer policy, Graver considers.

Graver counters the view that a socially-oriented contract law involves the economy in costs that should be borne by the public sector: "one task for modern contract law must be to contribute to such external costs being internalised in the individual operation and in the economic sector".[25]

His chapter on the need for reform reflects a strongly negative view of the finance market: "The finance market contributes to an erosion of the employee's and the union movement's solidarity in that the individual becomes bound to the career hunt for continually increasing revenue. The finance market creates poverty".[26] Against this background Graver considers it urgent to weaken the power position of the suppliers of credit.

[24] Graver 1990 p.38.
[25] Op. cit. p. 44.
[26] Op. cit. p. 111.

To this end he proposes a number of legislative measures, including a ban on "social discrimination". Under this ban banks and other suppliers of credit would not be paid for their services per transaction, since this afflicts those who are worst off. Base services should be "free". If charges are made, the amount of the transaction should govern the size of the charge even if the costs of the transaction do not originate from this. Graver also considers it unacceptable that the weakest suffer the highest loan costs as a consequence of the fact that "the risk groups" obtain the worst credit conditions.[27]

In his work of 1988 Graver indicates the importance of how legal rules are systematised and categorised. By altering the systematic divisions and categorising legal matter on the basis of alternative concepts and principles, it is possible to "produce new contours in the legal matter. New systematic divisions of the subject areas can contribute to laying bare the state of the law for new groups".[28] The categorisation of the rules in one area is an aid to argumentation and affects the ways in which the rules are applied.[29] But apart from this importance from the aspect of sources of law, categorisation is also of even more importance: "More important is its ideological and political relevance and importance and its pedagogical aspects. The right categorisation at the right time can contribute to influencing the direction taken by legal development".[30]

3.5 Pöyhönen[31]

Pöyhönen starts from various "contractual paradigms" in Western, including Finnish, law. Here he sets the legal-state volitional and reliance models against a welfare-state contract model based on "the paradigm of just social practice".[32] In this model the basis of the binding effect of a contract is just practice, i.e. material justice. Only such practice and such institutions as are just can generate the binding effect in a contract. As we see, in a model of this kind the binding nature of a contract is based on criteria that relate to its contents. Hence we can speak of a material

[27] *Op. cit.*, p. 117.

[28] Graver 1988 p. 63.

[29] Cf. Hellner's reasoning that the placing of the "burden of argumentation" is determined by how one views rules and exceptions (Hellner 1986 p. 345).

[30] Graver 1988 p. 67.

[31] The account is based on the English summary of Pöyhönen's dissertation and the report of his results given in Wilhelmsson 1991 p. 451 f.

[32] Pöyhönen 1988 p. 382.

contractual paradigm.[33] Such a paradigm stands in direct contrast to the traditional paradigm based on the will or the reliance of the parties and according to which obligation is determined chiefly by events when the contract was concluded.

Pöyhönen's contract model has also been summarised as follows: "the model is infused by four legal principles, namely reasonableness, freedom of contract, interest in turnover and the satisfaction of the weaker party. For Pöyhönen the principle of reasonableness is the leading one".[34]

Pöyhönen's reason for giving precedence to the principle of reasonableness is evidently that this is the one that is best compatible with the welfare state. That it has since been raised to a superordinate value norm presumably also explains why Pöyhönen has not attempted to conduct a balanced weighing together of the various principles.

3.6 Bärlund

Bärlund's study, commissioned by the Nordic Council of Ministers, contains a full survey of legislation, conditions of contract and consumer authority practice regarding social obstacles to performance.

Bärlund starts with the idea that for the welfare society it is possible to establish a general standard, namely that "*it is not acceptable to gain an economic advantage in a situation where others are afflicted by accidents.* Here on the contrary it is particularly important for the afflicted to be helped and supported. An important part of this help is naturally that the legal system also contains rules and principles that support such aims in the welfare state. The doctrine of social obstacles to performance represents a not entirely unimportant part of this support".[35]

Bärlund summarises his result thus:

> "On the basis of this material it can already be maintained that, at least for Finnish, Norwegian and Swedish law, there exists a general principle of social obstacles to performance within consumer law.".[36]

In connection with the material Bärlund processed he proposes by way of conclusion certain modifications to the doctrine of social obstacles to

[33] Cf. Wilhelmsson 1991 p. 446.
[34] Bärlund 1990 p. 78.
[35] Bärlund p. 78.
[36] *Op. cit.* p. v.

performance. Among other things, he prescribes an extension such that illness, accident, death should be accorded relevance even in certain cases where the event has not caused the creditor's payment difficulties.[37]

3.7 Stridbeck

In his thesis of 1992 Stridbeck presents a broad analysis of the relationship between distributors of electricity and their subscribers. He treats this from the points of view of administrative, penal and tort law, even though it is contract law that is central.[38]

In the present connection it is the concluding chapter that attracts special interest. In the chapter, headed "Electricity a Social Right!" Stridbeck gives an account of his main thesis, which, moreover, is foreshadowed in the title of the thesis "Från kontrakt till social rättighet" (From Contract to Social Right).

Stridbeck takes the position that a subscriber to the electricity supply is subjected to double compulsion; compulsion to enter a contract for electricity to cover his needs and compulsion to conclude a contract with a certain distributor. The double compulsion is caused by the fact that electricity is a necessary commodity and that the market for it is monopolised (at local level). Stridbeck states "...that electricity is a social necessity and hence that electricity should be a social right".[39] "Access to electricity is part of welfare, of the same dignity as the right to a dwelling".[40]

Stridbeck's thesis concludes with the following words:

> "Since the electricity distribution system is characterised by this double compulsion the cure does not lie in introducing diverse rights taken from classical civil law. The electricity distribution system is a status system. In a status system there are really no "parties" and even if there were they could never be "equal". The goal must instead be to guarantee that all with a certain status (resident in Sweden) have access to the central necessity of life that household electricity is, and to attempt to ensure that all with this status contribute to the costs. It is thus wrong in this area to apply consequences taken from contract law, e.g. exclusion in the event of payment default."[41]

[37] P. 80.
[38] The thesis was reviewed by Wilhelmsson in 1992.
[39] Stridbeck, p. 20
[40] *Op. cit.* p. 304.
[41] P. 336.

3.8 Some summarising views

As has emerged the view and the material underlying the theses on social contract law constitute an unruly multiplicity. Some threads are of Marxist provenance, others of simpler stuff and origin. Before we continue, in section 4, to scrutinise in more detail the tenability of the argumentation, it may be useful to try and characterise the leading trains of thought. Three positions, that partly overlap, can now be said to form the kernel of social contract law (3.8.1 to 3.8.3).

3.8.1 Legal strategy

Social contract law is closely bound up with the attempt to find forms for using the law for a politically determined purpose, viz. to promote the interests of the least well-off. The advocates of social contract law are not content to analyse the law in force and discuss how dissimilar values, determined at political level, can most suitably be realised via the law. They combine political commitment with legal-scientific analysis by pursuing a political view and demonstrating its legal prerequisites and consequences.

3.8.2 The welfare state

The starting point for social contract law is that welfare-state values should infuse contract law. Thus far social contract law accords with the ambitions to protect the weaker party which mark consumer law and certain other parts of civil law. But social contract law has a wider purpose. It wishes to place a general social responsibility upon enterprises with the result that they should also bear a responsibility, and hereby the costs, for the consequences of social circumstances that have no clear connection with their operations and that thus also lie outside their control. Consequences outside the party relationship and linked to the person of the debtor are hence brought into the relationship. Such circumstances – termed social obstacles to performance – can be illness, substance abuse, alcohol problems, accidents, unemployment, marital problems and other similar personal circumstances. Social contract law implies that such person-related circumstances should be granted legal significance. A concrete expression of social contract law is what is termed the doctrine of social obstacles to performance, which may be

summarised thus: An individual debtor who through no fault of his own is beset by unforeseen problems – such as sickness, unemployment, divorce or similar afflictions, and hence cannot fulfil an obligation, is freed entirely or partly from consequences of default (or gains the right to withdraw from the contract).[42]

3.8.3 Switch of principle

Swedish law, like many other legal systems, contains elements of a social law of contract in the sense outlined above. These elements, however, appear as exceptions from the prevailing principle that everybody is responsible for his or her own ability to pay. Social contract law represents an opposite view: if there is a "social obstacle to performance", the debtor's responsibility is limited or disappears entirely. It appears that we are here faced with a "switch of principle". The main principle is no longer that contractual obligations must be fulfilled, but that it is mainly the debtor's social situation that determines the scope of his responsibility.

4. A SOCIAL LAW OF CONTRACT?

4.1 Introduction

The "project" of fashioning a social law of contract has broad implications. Theoretically it can be described as an attempt to break with fundamental principles of contract law ("traditional contract law"). From a practical point of view social contract law leads to a substantial change in the relation between individuals and businesses.

The far-reaching ambitions of the project prompt closer scrutiny of the

[42] On the doctrine see also 1.5 above. At certain points the doctrine would benefit from clarification. Such clarification relates to the group of obstacles to performance that is to be relevant. Can it be the intention that old age (Wilhelmsson 1987 p. 35) together with changed circumstances as to fortune (ibid p. 196) should be grounds for exemption under the doctrine? Nor are the grounds for exemption homelessness or strike entirely easy to understand (Wilhelmsson 1990 p. 7). Another unclarity concerns the delimitation of the debts covered by the doctrine. It appears that tax debts and other debts to the community are left outside the area of application of the doctrine but this is not entirely clear (cf. Wilhelmsson 1987 p. 188). If the basis is the debtor's social responsibility it is unclear why public institutions are to be kept outside this. (One explanation – actually quite logical – can be that the doctrine rests on the value judgement that companies should bear a greater social responsibility).

tenability of the arguments for a social law of contract.

The critical tendency in what follows should not cloud the indisputable advantages of the project. It forces upon us a reappraisal of ingrained contract-law views and principles. Since welfare-state values enjoy very broad acceptance in the community, extension of the project also subsumes the question of how best the legal system can give full effect to these values. The concluding section (5.) contains views on this that move outside the framework of contract law.

4.2 The legal strategy

The representatives of social contract law, at least their majority, wish to place law at the service of the underprivileged. This strategy appears, however, faulty unless the distributive consequences of such a legal-political programme are favourable. The whole project will misfire unless there are good reasons for believing that the worse-off will be favoured by a social law of contract. A legal strategy based on the notion that it is automatically an advantage in distribution policy that a trader's clientele must bear the cost of certain customers' social problems is hardly convincing.

One may perhaps also wonder over the visionary or, if one wishes, unidimensional view underlying the legal strategy, namely its goal of protecting the interests of a definite social group.

The legal strategist of the welfare state is controlled by a conflict perspective.[43] His starting point is that there exist conflicting interests that cannot be reconciled and that require a stand to be made. The traditionalist is probably rather more inclined to seek harmony, i.e. wishes to incorporate a measure of welfare-stateliness into his conceptual model, which should also contain other interests such as private autonomy.[44]

4.3 The motives for a social law of contract

Social contract law is based, as we have seen, upon the notion that contract law should be infused with welfare-state value judgements: it is an outcrop of the welfare state in about the same way as social law is. But

[43] For a discussion of the principles regarding this theme, reference is made to Christensen's essay.

why should a contract-law concept such as this characterise the law of contract?

If the welfare state is chosen as superordinate value norm, closer analysis of the concept is required. The very breadth of the scope of welfare policy underlines the need for conceptual precision (grants; social insurance; utilities such as health and other forms of care, work and housing subsidies etc.). A recent work characterises as welfare policy "arrangements for publicly-regulated, but not necessarily state-organised, human reproduction".[45] The definition seems both well grounded and in agreement with the prevailing sociological view but is scarcely enlightening for a social law of contract.[46] It illustrates the need of a sophisticated analysis of the dimensions of the welfare state[47] that will result in a frame of reference of use in the specific context that private law constitutes.

The motives for such an approach are but scantily reported. In his 1987 book Wilhelmsson does not tackle the question more closely until well into the presentation. He then refers chiefly to enterprises' "social

[44] Cf. the following passage from Stridbeck (present author's translation): "Grönfors and Wilhelmsson have both pointed to the incongruence between legal rules and reality. Grönfors' intralegal solution is to redefine the legal figures. Grönfors calls into question the established doctrine on contractual interpretation., He seeks a flexible instrument that can act as a lubricant. Hence he reads the legal text 'from the outside' as far as possible freed from his obsolete dogmatic background and 'neat' in the light of current circumstances" (Grönfors, 1989 p. 11). Giving the will of the parties priority becomes merely an obstacle, inertia in the system. Grönfors' society-oriented doctrine of interpretation is the market's doctrine. In this way Grönfors appears as a market-oriented legal strategist. Wilhelmsson, on the other hand, has also indicated the incongruence between law and reality. Established contract law is not sufficiently socially concerned. Wilhelmsson expresses this as follows:

> how far can the **autonomy** of traditional contract law be replaced by the **solidarity** of social law when the general doctrines of contract law are being developed? (Wilhelmsson 1987 p. 46).

Both Grönfors and Wilhelmsson react against the rigidity of legal dogmatics. Social changes require flexibility at legal level. For Grönfors the solution is intra-legal to the benefit of the market. Wilhelmsson chooses a solution that benefits the citizen (Stridbeck 1992, p. 324 f.).

[45] Svallfors, p. 38.

[46] If, like Esping-Andersen e.g. p. 21 ff., 28, one sees the goal of liberating citizens from dependence upon the market for their upkeep as characteristic of the welfare state – at least the desirable welfare state – it is hard to see that private law has any essential role in the context. Such a determination is also so generally couched as to be of little help in a private-law context.

[47] Svallfors discusses in an interesting manner welfare policy and its dimensions (p. 36-46 with numerous references to the literature). Among dimensions of possible relevance to social contract law are noted effects of distribution and other effects; institutions and procedure; costs and financing; and possible negative consequences such as cheating and sponging.

responsibility"[48] and points out that the businessman's costs "(can) be channelled via the price mechanism so as to be borne by his entire clientele".[49]

Even if one shares the judgement that commercial enterprises carry a social responsibility, one cannot take it for granted that the reasoning is tenable. The premise is debatable. It seems to be: how do we make the law of contract as welfare-stately as possible? A more unconditional point of departure would be: what instruments are best suited for fulfilling the goals of the welfare state? Have the customary instruments: the social services, medical care, labour market policy, taxation, etc., proved to have shortcomings? If so, is contract law best suited to cure the shortcomings? Such an analysis would perhaps indicate that contract law *is* a suitable means. But none appears to have been carried out.

4.4 Enterprises' liability for "external costs" of their operations

It is now commonly held that a company should bear the liability, and hence the costs, for negative external effects brought about by its operations or products. The principle has gained a certain acceptance both in tort e.g. environmental law and contract e.g. sales law. Even though shot through with diverse exceptions, it must be seen as the expression of a mode of thought that is gaining ground. One example is that the earlier doctrine that a vendor was liable for damaging effects only on the basis of guarantee or *culpa*[50] has been replaced by strict product liability. The tendency to expand the area for strict liability also fits into this pattern. Another example is the new Sickness Benefit Act. One of its purposes is to prevent an employer being relieved of the costs of absence through illness caused by a poor working environment.[51] The reasons for observing this principle are all the stronger since it is considered relevant to all means of control (legislation, administrative regulations, charges and other economic means of control).[52]

It is therefore bound to make an impression when Graver, Stridbeck and Bärlund all refer to the principle in support of a social law of contract. Graver writes as follows:

"When the individual is caused a loss of welfare or the authorities have to

[48] Wilhelmsson 1987 p. 151 and 188.
[49] *Ibid.* p.151.
[50] NJA 1918 p. 156.
[51] Government Bill 1991:181 p. 27.
[52] Graver 1990 p. 44.

> intervene with support because of the manner in which goods and services are sold or produced, this means that the economy is not bearing the full social costs of its operations. A task for modern contract law must be to contribute to *the internalisation of such external costs* in the individual operation and sector" (present author's italics).[52]

Stridbeck, who quotes Graver among others, follows a similar line of argument. He considers that "it is reasonable for companies to meet the costs incurred by their operations, both direct and indirect. Among indirect costs may be mentioned social costs such as those of the environment".[53] Bärlund again expresses himself as follows: "Whoever gains the economic profit from an operation should in principle take into consideration and cover all the costs of his operation".

As long as the argument refers to e.g. environmental damage, it is convincing. The external costs caused by the environmentally damaging operation of a certain company should be borne by that particular company, but when we move to the social problems addressed by social contract law, the argument immediately becomes harder to follow. If an electricity subscriber, to confine ourselves to Stridbeck' area, cannot pay his electricity bills because of illness, it is hard to see that the electricity distributor's operation should be charged. There are grounds for such an "internalisation" only if the electricity distributor's operation has caused the illness, in the same way that industrial plant causes the environmental damage for which it must be liable. In actual fact a central element in social contract law is that the cause of the debtor's payment difficulties is linked with the debtor's person. This is one of the things that distinguish social contract law from traditional consumer and other protective legislation.

4.5 The relationship between the parties

The arguments for a social law of contract bear upon the relation between the debtor who is afflicted by an unforeseen event and his creditor. The argument is locked to the relationship at a certain point in time, in other words it is static and largely omits a gallery of affected persons, chiefly various interested parties on the creditor's side.[54]

When the relationship between the parties is made into the unit of analysis, the needs and other circumstances of other persons are not

[52] Graver 1990 p. 44.
[53] Stridbeck, 1992 p. 237.
[54] Bärlund p. 4.

taken into account, e.g. those of the creditor's employees, if any, and the debtor's family. Why merely the needs of the debtor's contractual party are treated specially remains unexplained. This fixation upon parties is particularly difficult to explain since in social contract law one circumstance lying outside the contractual relationship, e.g. substance abuse, is, so to speak, dragged into the relationship by being made legally relevant to the debtor's obligation. What, then, would be more natural than also to consider persons who, although outside the contractual relationship, have needs of precisely the kind that social contract law wishes to protect?

Wilhelmsson is aware of this problem area but deals with it fairly cursorily. He writes that decisions regarding small companies also affect the needs of the labour force. He considers it very uncertain whether the needs of the labour force are met by

> "tort-law solutions that favour the small companies in question. From the perspective of the welfare state such solutions must appear as secondary in relation to the endeavours to support vulnerable citizens directly. The principle of party obligation under tort law also makes it harder to legitimise decisions grounded upon the needs of a third party".[55]

The argument is debatable for two reasons. One is that the notion of the welfare state cannot legitimise a group of citizens, who share an obligation vis-a-vis a company, being given precedence over another group e.g. that company's employees. It is the character and the gravity of the needs the people have that should be decisive. Reference to "the perspective of the welfare state" cannot justify the groups not being given the same weight. It is possible that they may be treated differently for some other reason, e.g. legislative difficulties in observing both groups' interests to the fullest extent, but this is another matter. But not even the reference to "the principle of party obligation under tort law" is convincing. This "party obligation" has nothing to do with the present problem, which is to find a suitable balance between the interests of the affected persons. There is nothing to prevent the formulation of a piece of tort legislation from taking into account the interests of third parties.[56]

The party fixation also comes out in the way the welfare gains of the majority of borrowers, hire-purchasers, tenants, and so on are excluded from the argument. Nor is account taken of the welfare losses inflicted on potential consumers because they are refused credit, hire purchase facilities, etc, even though their finances would manage increased indebtedness. Making it harder for e.g. banks and building societies to

[55] Wilhelmsson 1987 p. 149.
[56] Thus Taxell 1987, p. 23 f.

give credit leads to reduced welfare for the majority of borrowers. The effect is the same if borrowing is made more expensive because lenders are made liable for the personal problems of certain borrowers. This reduction in welfare should be weighed up against the gain represented by a group of borrowers avoiding overindebtedness.

4.6 Views on the legal system

In a short and elegant essay Taxell treats "social features in the law of contract". He does not directly criticise social contract law even though this is the basis for his reflections. However, the essay can be read as an indirect reply on the basis of mainly legal-systematic considerations:

> "If one wishes to give place to social factors in contract-law considerations, one should fit them into the system of contract law in relation to leading principles in the contract field. This is not a matter of "ideology" or "social policy" but of legal method with its relatively open possibilities of taking life's realities into account."[57]

Taxell's own view is well summarised in the following passage:

> "Social factors and their consequences should be fitted into the contract-law pattern without being locked into a rigid model.Thus for example one should not formulate a general rule on the basis of the special provisions of laws that expressly recognise the relevance of social factors. Should one wish to extend such provisions, one can hardly proceed further than to the observation that social factors may be of value as arguments in decision-making situations, a view that does not necessarily need to be linked to law. To go further would entail greatly weakening the ground – freedom of contract and the binding nature of contract – upon which the law of contract ultimately rests."[58]

One can also be seized by doubt of the excellence of social contract law from another, narrower legal-systematic viewpoint, that the sanctions system of contract law is ill adapted to the social factors. Social law has a broad register of consequences ranging from family counselling and economic assistance to rehabilitation and compulsory care. This justifies a thorough elucidation of the client's circumstances, which is sensitive from the point of view of integrity, so that suitable measures can be applied; yet the sanctions system of contract law does not correspond with the social factors. The assessment of certain such factors, e.g. marriage problems, that arise within the framework of the contract rela-

[57] Taxell 1988, p. 526.
[58] Ibid. p. 530.

tionship appears foreign to the property-law system.

Turning to the importance due to considerations of system, one should insist that "a functionally well-articulated system of rules"[59] is worth striving for. On this view, consumer protection legislation with its character of property law meets fairly high standards. It labours with the accepted figures, which are given partly new contents (the concept of fault, the obligation to investigate, the obligation to inform, etc). It is also characteristic that the abstract role concepts of private law are used (purchaser, vendor, lender, etc).[60] But consumer law also gives examples of how traditional systems thinking has been broken up to achieve a gain in efficiency without disorder. The plaiting together of private-law and public-law regulation is an example of this.

4.7 Pacta sunt servanda: a switch of principles?

As we have seen, the notion of a switch of principles is central to social contract law (see above 3.8.3). The advocates of social civil law consider both that such a switch is actually taking place and that it is desirable. As far as Swedish law goes, we have already rejected the idea that available legal material expresses a "newly emerging general principle"[61]

Yet the question remains whether such a switch of principles is desirable. The principle that contracts shall be kept is fundamental to the stability and predictability that form the basis of a dynamic market economy. It is primarily social interest that dictates the primacy of the principle, not concern for the interest of one or the other party.[62]

And as mentioned in 2.2 above, legal-economic research has shown convincingly that this is how things are – which cannot come as a surprise to jurists. With this in mind it appears remarkable that Wilhelmsson intentionally builds a measure of uncertainty into contract law. To ensure that the "financing" party (the company) will not avoid making contracts with persons who may fall back on the social contract rules, the rules delimiting this group must be unclear and the introduction of the special legal consequences unpredictable (!)[63]

[59] The expression is Grönfors' (1988 p. 195).

[60] On the role concept, see Wilhelmsson 1987 p. 51 ff.

[61] The expression is used by Wilhelmsson (1987 p. 185).

[62] Cf. Taxell 1972, p. 20.

[63] "The more unclear the delimitation of the group is and the more unpredictable the introduction of the special legal consequences, the harder it is for the "financing party" to avoid contract relations involving need-oriented legal application" (Wilhelmsson 1987, p. 159).

The desire to construct a new general material contract doctrine also appears debatable if judged in the light of the values that stability and predictability represent. Such a doctrine would – in Pöyhönen's version – imply a switch of principles so that "the basis for the binding effect of a contract (would be) fair practice".[64] "Only practice and institutions that are just can create binding effect in a contract".[65] It is hard to understand this otherwise than as creating uncertainty in contract law.

4.8 Impedinents beyond a party's control

The principle of allocation of responsibility underlying notion of an impedinent beyond a party's control can be adduced as an argument against the desirability of social contract law in the present sense.

The idea behind this notion is that one party bears the risk for circumstances within his "sphere of control". Hence it is natural that a company is given liability for circumstances within its control using the means available to it (money, information, product development, insurance, etc.)[66] That the debtor cannot in principle do anything about the social obstacles to his performance does not alter the fact that the obstacles are linked to his person and far outside the creditor's sphere.

4.9 Neutrality in competition

Contract law works within the framework of the market. Can the solidarity thinking of the welfare state nevertheless be introduced into contract law without competition being distorted? As long as companies are burdened in a uniform way by the costs accompanying a social contract law, there is no cause to harbour any doubts.

However, if we consider the relationships between different creditors, the uniformity is threatened unless the debtor's creditors are treated alike. One can naturally maintain, as Graver appears to do, that certain creditors, e.g. banks, bear a particularly great social responsibility and that social obstacles to performance, therefore, should be granted

[64] Wilhelmsson 1991, p. 451.

[65] Pöyhönen 1988, p. 168 ff., after Wilhelmsson 1991 p. 452.

[66] Note that we are here speaking of a concretisation of the idea underlying the responsibility to check the facts. This need not necessarily coincide with the meaning this responsibility will assume in legal practice. The meaning of impedinents beyond a party's control is treated in detail in Hellner 1991 and in Hellner-Ramberg 1991 (especially p. 144 ff.).

special significance in mitigating the consequences of default to a debtor so hampered. An arrangement of this kind would entail certain creditors being unfairly treated in favour of others on grounds that lie outside the law of insolvency. This would compel the creditor category indicated to take special steps to protect themselves against this differentiation.

One of Graver's proposals, however, also illustrates how a distortion of market competition can arise. Graver advocates "prohibition of *social discrimination* on the credit market.[67] As mentioned this means that all financial services that everyone needs should be "free"; that charges should not be made per transaction (i.e. to cover the actual cost) but in relation to the amounts the transaction involves; and that the risk a certain borrower represents should not be permitted to affect the size of the interest or other costs of the credit.

Implementation of the proposal would lead to credit institutions with many small customers having their competitive position undermined. Hence the investors in these institutions would receive worse terms than savers in institutions with a larger proportion of companies among their customers. The losses of efficiency caused by the price mechanism – according to the proposal – being put out of play render the proposal even more dubious.

4.10 The consequences of a social contract law for distribution policy

Social contract law implies increased costs for businesses through payment default by debtors with personal problems. As e.g. Wilhelmsson points out, the cost "can be channelled via the price mechanism to be borne by all a firm's customers".[68] Graver writes as follows about the social safety-net: "Regardless of whether it is financed via taxes and charges or whether some of the responsibility devolves upon industry, it burdens the value-creating parts of society. Hence it all boils down to a question of *cost distribution*"[69] (present author's italics).

These views are certainly correct. Enterprises spread their costs over

[67] Graver 1990 p. 117 f.
[68] Wilhelmsson 1987 p. 151. See also Hastad p. 276 f.
[69] Graver 1990, p. 44.

their whole clientele.[70] Surprisingly enough one searches in vain for an explanation of why such a distribution of the costs for social problems is more desirable for the welfare state than the traditional distribution, i.e. via the social budget, which after all is financed by everyone. Even if tax policy has its shortcomings regarding efficiency, it does have a profile for equalising incomes and wealth. It is hard to see why the arbitrary burdening of citizens in contractual relationships with a certain commercial enterprise, e.g. a bank, should represent an advantage in distribution policy.

4.11 The consequences of a social law of contract for commercial life

The privatisation of the costs of social problems to which social contract law leads, has several consequences for the actions of commercial enterprises.[71]

A first consequence is that they are forced to check more carefully on the purchaser, borrower, tenant, etc requiring credit. The check must as far as possible include a prognosis regarding the risk of future problems such as illness, unemployment and marital problems.

We may assume that companies will take steps to reduce the costs of future socially conditioned problems. They may refuse contracts with persons who appear to be conceivable future "social risks". They may elect to take out a general risk policy in the form of a raised price on all transactions, but they may also attempt to discriminate against high-risk persons by offering them unfavourable terms. If these presumptions are correct, the consequences are twofold. One group of consumers are refused contracts even though they would benefit, with the consequence

[70] This may possibly vary in extent among sectors and types of company. Large firms, banks, commercially active authorities and companies in dominating positions can pass costs on. It is harder for companies heavily exposed to competition to do so unless their competitors in turn are correspondingly affected by their customers' social costs. Compare with this the following statement by the consumer purchase committee: "A right for the purchaser to cancel a purchase would mean a departure from the principle that contracts must be kept. This can naturally raise certain doubts and it seems to be ruled out that the purchaser should be given a general right of this nature, without a duty to compensate the vendor economically for the latter's loss caused by the cancellation. An arrangement of this nature would lead to the necessity for cancellation costs to be distributed among the whole clientele, which can hardly be reasonable". *SOU* 1984:25 p. 206 f.).

[71] This privatisation has features that are related with the privatisation of costs of and checking of absence from work because of sickness, according to the new Sickness Benefit Act (1991-1047). Cf. Govt Bill 1990/91:181 and 1991/92:SfU5.

that they suffer a loss in welfare. Secondly, a higher price is inflicted upon the whole clientele.

As we can see social contract law is dogged continually by the risk of discrimination. The effectiveness of the customary means of counteracting discrimination – prohibition of discriminatory terms and the duty to contract – becomes especially important if social contract law is to have the intended result. Social contract law demonstrates a disadvantage in this respect, which does not exist when social problems are attacked in the customary manner by the social authorities.

A further consequence is that commercial enterprises incur a transaction cost. This applies specially in areas with a very large number of contracts, such as water, electricity and telephones.[72] Companies must normally assess the credibility of a debtor who claims that his personal problems are the cause of his payment default. They must also assess the causal connection: is it the sickness, unemployment, marriage problems, etc that are the cause of the failure to pay? The latter assessment appears particularly difficult to make. One wonders if it is possible without examining the debtor's total economic situation.[73]

4.12 Consequences of social contract law for the least well-off

Although is not easy without empirical material to make an overall assessment of the consequences for the least well-off, a few conclusions can be drawn.

Social contract law leads to a large group of debtors who run into unforeseen personal difficulties being wholly or partly exempted from consequences of their payment defaults. Their net gain depends among other things on how far they would have been covered by the social authorities for their debt. The individual's right to assistance under the Social

[72] As a means for counteracting companies' avoiding to make contracts with high-risk persons Wilhelmsson indicates chiefly a realisation of need-orientation using "unpredictable" regulations (Wilhelmsson 1987, p. 157 and 159 ff). But Wilhelmsson also points out that "compulsory relations" may be necessary if the need-orientation of contract law is to be possible: "Only insofar as contract law departs from the basis of everyone's right to decide whether and with whom he with enter a contract, and limits the effect of the market mechanism with *duty-to-contract* rules, does contract law assume the aspects of compulsion that, as stated above, would permit a more far-reaching need orientation." (Wilhelmsson 1987 p. 156 f.).

[73] Might it be possible to design burden-of-proof rules that reduce the difficulties? For a one-off transaction where the debtor's ability to pay does not need to be brought into the assessment – such as in the cancellation of a journey or similar service because of illness, the problem is normally uncomplicated.

Services Act is relatively extensive. It has been considered that accumulated rent debt, debts relating to a house property and other debts may, under certain conditions, be paid via social assistance.[74]

The positive consequence mentioned has, however, a reverse side. Debtors who wish to benefit from a mitigation of consequences are compelled to report personal problems to the creditor company, with the result that they may be forced to disclose matters of a highly personal nature to a private legal subject.

4.13 Consequences for the social authorities

For the social authorities a social law of contract leads to a lightening of charges upon the social budget. It also means that the type of case falling within these authorities' sphere of operation will also be dealt with by private companies. It is conceivable that the latter processing will be so small that there will be neither duplication nor other coordination problems. One effect of social contract law can be a general elucidation of the causes of a debtor's payment difficulties. But fragmentation of the responsibility among debtor companies and the social authorities can also hamper overall assessment.

5. SOCIAL PRIVATE AUTONOMY

5.1 Contract law – social needs

Reasonable though objections to the notion of setting the welfare state as superordinate value norm for the contract ideology of private law may be, one could wish that contract law were more able to cater for social needs. What legal solutions are available for this?

Several ways seem open. One is to build upon the protective legislation of consumer law, landlord and tenant law, labour law, etc. It is true that this legislation is not intended to protect those who have got into particular trouble (the sick, the unemployed, the divorced, etc). Each member of the collective the legislation protects has theoretically the same position regardless of his social needs and problems. This does not exclude

[74] See *SOU* 1990:74 p. 100 ff. which refers to e.g. RÅ ref 1986:9, from which case it emerges that the individual is also entitled to wide assistance regarding economic counselling. Stridbeck points out on p. 310 that the social authorities are responsible for unpaid electricity bills.

the least well-off being able to benefit from the legislation. This may be seen as a form of general welfare policy.

Another possibility is to continue along the road the legislator has chosen, identifying specific needs and problems which are dealt by means of a special rule. Special solutions of this nature, taking into account benefit-like circumstances, have the advantage that they can be given very strong differentiation. One such solution can relate to the needs to be met – housing may be one[75] and the group to be favoured (e.g. the seriously ill). It may also relate to the type(s) of contract comprised. But differentiation on the sanctions side is also conceivable, e.g. granting mitigation in certain cases only in the form of postponement of the fulfilment of an obligation. There already exist several samples of this type of "selective welfare policy".

One further way would be a development of practice. It would be fully possible for the Supreme Court to identify single cases where social obstacles to performance are granted relevance outside the area regulated by law.

A fourth possibility, which affects not only claims based upon contract, is to focus on the debt stage. The recovery (Chapter 5, UB) can naturally be expanded, if it is considered desirable that a certain need be better met. Other exemption rules also contain exceptions that resemble this. Section 42 point 2 of the Tax Collection Act (compare with UB 15:6 a) allows that tax on tax arrears is not deducted where the deduction affects what is termed the reserve amount. The Social Insurance Act has similar rules. It is naturally also possible to decide to treat the execution of other types of claim specially for social reasons.

5.2 The societal functions of contract law

We have now seen that there are ways of increasing the weight the social factors are given within contract law. The restrictions, then, do not lie on the legal plane. It is instead the social functions of contract law that limit the accessibility of the ways. Isolating these functions, we find that contract law on the one hand must observe views that relate to how the market functions, the need for stability and predictability and similar values. On the other hand there emerges the need to find solutions that favour reasonableness, protection, "justice" and similar values.

[75] Cf. the rule in JB 12:31, para 1, which gives a residential tenant who has been declared bankrupt special dismissal protection against the bankruptcy estate. Cf. Möller p. 43 f.

Expressed somewhat as a slogan, economic *efficiency* is set against legal *reasonableness*. In the field of tension between them lies the balance centre we are seeking for contract law.

The economic view rests upon a well-worked-out theoretical foundation. As we have seen, economic-historical research demonstrates the importance of the creation by the legal framework of stability and predictability. Only the State can guarantee that the framework is upheld and respected, and substantial state interventionism can be necessary. Its purpose, however, is then primarily – regarding contracts – to maintain the autonomy of the parties and the binding effect of contracts. The Law & Economics School argues that the legal instruments should conform as closely as possible to the market, even though few of its representatives go as far as Posner, who appears to see every deviation from this as an unacceptable disturbance.[76] A common denominator is that market interventions are theoretically defensible only if they lead to reductions in transaction costs. In other cases they cause losses of efficiency.

Against the economic view is set the legal one, which defends regulation not only as a means of removing market imperfections but also as a means of protecting certain values as good in themselves ("reasonableness"). This view does not consider law as instrumental in the sense that its purpose is only to promote goals that lie outside the legal system, e.g. economic efficiency. It sees reasonableness as a value in itself; one concrete manifestation is that the legal order protects vulnerable groups (e.g. minorities, be they original inhabitants or shareholders!).

The legal view has a less solid theoretical grounding. It cannot fall back upon a coherent school formation[77] but is based on value judgements – on a collective wisdom if one wishes – that has waxed strong in the fold of the legal order. These are values that can be designated humanistic and social, in some degree welfare-stately. One weakness is that this tradition stands for values whose content is not given and which cannot be translated into operatively useable concepts in the same simple and effective way that the concept of efficiency can be made operational. The concept of efficiency is actually no less relativistic: it, too, rests upon value judgements. But in contrast to the concept of reasonableness it has gained a fixed and widely accepted significance which lends it an apparent objectivism.

[76] Posner, passim, e.g. pp. 11 and 271.

[77] Section 1 above includes arguments for this view, but the section also illustrates the disparate nature of the arguments. Martin's essay treating tendencies in Anglo-American legal theory, illustrates that the Law & Economics school is a far clearer case of the formation of a school than its pole, "Critical Legal Studies".

Now this does not mean in practice that considerations of reasonableness will lose out over considerations of efficiency. Possibly, legal decision-making leads to the opposite. The efficiency interest is normally represented by a stronger party who needs success in the dispute. The reasonableness interest, in other words, takes on a concrete character. It exists, so to say, on the micro plane. It has been impossible to find that this asymmetry has been noticed, much less that its effect on judicial decision-making has been analysed. It is, however, by no means a bold assumption that it creates a risk that the courts may underestimate the importance of safeguarding the efficiency interest.

Setting, as we have now done, the two views, economic and legal, against each other, we obtain a structure for analysing the possibilities of observing the social factors in the framework of contract law. We cannot, however, in a mechanical manner deduce any criteria from this which clarify how the borders are to be drawn. It already follows that drawing the borders is affected to no mean extent by values that cannot be pinned down with any unambiguous criteria.

5.3 Social private autonomy

Balancing, within the framework of contract law, the economic view against the juridical concerns how far party autonomy and the principle of the binding effect of contracts are to be limited in favour of social factors. The issue is complex, to say the least of it. As already hinted, it is hardly possible to find a criterion that gives a clear result. We shall here merely give some theoretical supporting points (5.3.1 to 5.3.4) that indicate the direction an analysis should attempt.

5.4.1 The task of private law

To begin with it should be remembered that the public sector can promote *social factors*, or, if one wishes, welfare-state goals,[7881] in many

[78] It is not significant for this discussion that no definition is given of what the social factors comprise, nor what is meant by welfare-stately goals. But it may be useful to bear in mind chap 1, sec 2, para 2 of the Instrument of Government: "The personal, economic and cultural welfare of the individual shall be fundamental objectives for public activity. It shall particularly be incumbent upon the public sector to safeguard the right to work, to dwelling and to education and to act for social care and security and a good living environment".

ways. Economic means, e.g. grants, are one; legislated public rights, e.g. to care and education, are another. Measures directed towards private law e.g. mandatory rules entitling a debtor to release from a burdensome contract, are another.

For the decisions and transactions that form a *market-driven economy*, however, only one category of means is available, namely the instruments of private law. Well-functioning private-law instruments are a prerequisite for a well-functioning market economy. Public control, either with economic means or legal, is by definition of no use here.

The above indicates a suitable division of labour between the public-law instruments and the private-law instruments: the latter should not be allocated tasks that can to advantage be completed with public-law instruments which moreover can jeopardise the market-economic functionality of the private-law instruments. In terms of systems theory, the private-law system should not be over-exerted. If this happens, complexity increases and the structure can start to rock.[79]

To uphold the welfare-creating task of private law as just indicated is not to deny its welfare-distributive task but perhaps to underline the restrictions it has in fulfilling the latter.[80]

5.3.2 The contrast is not absolute

There is no absolute contradiction between the economic view (efficiency) and the juridical (reasonableness).[81]

If a regulation with a protective purpose improves the way the market

[79] Luhmann, p. 121 f.

[80] In the USA, legal discussion has centred upon the desirability of legally established minimum wages and other mechanisms for achieving a more even distribution of wealth. The debate which has been strongly influenced of leading neo-liberal and liberal philosophers, particularly Nozick and Rawls, has been dominated by the view that the distribution of wealth that is compelled through regulation of contract law ("redistribution contract regulation") is unacceptable. For a positive view on the use of contract-law rules, see Kronman, who promotes the thesis that "rules of contract law should be used to implement distributional goals whenever alternative ways of doing so are likely to be more costly or intrusive" (p. 474). The discussion is marked, as indicated, by modern North American philosophy. It is not directly relevant to Northern European conditions, partly because the social insurance systems play a subordinate role and the redistribution goals of tax policy are marginal. But it offers a fruitful analysis of legal-philosophical arguments and their applicability to contractual relations.

[81] In a narrow utilitarian perspective, too, efficiency and reasonableness appear as reconcilable, namely if both are viewed as means for maximising welfare in society. This view, however, cannot be immediately put to use in a concrete contract-law connection and is therefore omitted from the present account.

functions or at least does not worsen it, it is hard to have any objections to it. It is debatable how far this can be the case. But mandatory rules on giving information are examples of rules which, depending on how they are constructed, can be attractive from this point of view.[82]

Another aspect of the contrast concerns the importance of reasonableness for confidence in the market as an instrument for reallocating resources. This aspect does not appear to have been treated with any penetration in the literature.[83] Restrictions on the manufacture and marketing of dangerous products are easy to defend, even if losses in efficiency arise through the regulation;[84] safeguarding people's health must be a superordinate interest. This is the way prohibitions to this effect are normally justified.[85] But what is more, confidence in the market mechanism as such is strengthened if consumers can rely on the products and services offered. We seem here faced with a paradox of contract law: party autonomy must be partly set aside so that it may be maintained. Note that the requirement of reasonableness is raised in this connection not – as it normally is – to defend reasonableness as a value in itself ("the juridical view") but as a means of strengthening the market mechanism in consequence of the increased legitimacy reasonableness lends it.

In the end the transaction costs of this are reduced in the same way as what follows from requiring reasonableness as a necessary condition of a binding contract (even if reasonableness as a term is not used in this context): if a large measure of loyalty is required of a contractual party – e.g. in the form of clarifying information – the other party, in reliance upon the correctness of the information, need not bother about detailed investigations. The obligation to inform may even have the effect that a contract advantageous to both parties is concluded, which otherwise would not have come about.

5.3.3 Institutional competitiveness

One further point for the design of the rule system must be the importance of upholding institutional competitiveness vis-a-vis the world around. A well-functioning institutional infrastructure involves at least

[82] The literature is very comprehensive. A noted work is Akerlof's essay. Posner, not unexpectedly, has a different opinion.

[83] Regarding insurance terms, however, reference is made to Wilhelmsson 1977.

[84] It is not certain that the net effect is negative. It is possible that the losses in efficiency are balanced by the avoidance of costs through people not being injured.

[85] See e.g. *SOU* 1987:24.

one system of contract-law rules that well fulfils its market-economic function. While international endeavours to harmonise – particularly those emanating from Brussels – are reducing the scope for competition among states regarding rule systems and other institutional factors, in the present area such scope still exists and will probably continue to do so.

If the framework is viewed not as a given structure within which commercial enterprises compete, but rather as a factor decisive for economic progress, it follows that adaptation and improvement of the framework are an important factor in competition. One may wonder what characterises a competitive framework in the sphere of contract law. One hypothesis could be that the demands for efficiency and reasonableness dealt with in the foregoing are well balanced against each other. Add to this such matters as the efficiency of the dispute-settling mechanisms (speed, cost, expert competence, honesty) and a series of other institutional factors. But note that it cannot be predicted once and for all what institutional solution is the optimal one. No more than other competitive factors, such as new technology, new goods, the system of education etc, can the competitiveness of a state's framework, be assessed without testing it in competition with other frameworks.[86]

5.3.4 Other solutions than those of contract law

Finally, the possibilities of giving the social factors an adequate place improve if the analysis is not confined to contract law. We can expand the field of view in a number of directions, of which some will be indicated here. Other parts of private autonomy are of interest. Socially conditioned restrictions of property law and freedom of trade can be less inhibiting of efficiency than interventions with freedom of contract. Secondly, the social factors, as already touched upon, can be given relevance at the execution stage. One can then include claims other than contract-based, through which debtors of different kinds can be treated in a uniform manner. Thirdly, inspiration may be sought in the dissolution of the fron-

[86] Siebert's & Koop's essay contains an interesting analysis of the EC's integration process in an institutional perspective. These authors consider that the collapse of the Eastern European systems is a consequence of the fact that the systems could not manage institutional competition with the market economies and that the EC is now facing a power struggle with the USA and the Pacific region. The authors propose "a set of rules for the competition of EC Governments" so that the conditions are created for "the competitive process among national regulations", through which better institutional arrangements can be developed (p. 440).

tier between obligatory and extra-obligatory claims. It is natural for the law of contract to be placed in focus if one wishes to increase the importance of social factors, since the contractual relationship creates a basis for the observance of social factors. But there is no theoretical obstacle to assessing claims that lack a clear contractual basis increasingly in the light of social needs considered worthy of protection. Even in current law, moreover, the law of torts contains social elements. Lastly, for the record, remember that insurance solutions are of course available. Losses in efficiency caused by interventions in private autonomy can largely be avoided by social needs being met through insurance.