

The Law of Obligations and the Structure of Swedish Statute Law

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1 The Background

The law of obligations is a concept that is traditionally associated with civil law.¹ In the German Civil Code of 1896, the Law of Obligations (*Schuldrecht*) constitutes the second of the five Books, while the first Book contains the General Part (*Allgemeiner Teil*) and the third Book deals with the Law of Property (*Sachenrecht*). The systematics is derived from the treatises of the *Pandektenrecht* of the 19th century.² It still plays an important part not only in legislation but also in German legal literature and in the teaching of law. For a foreigner, it seems a bit surprising that there are numerous treatises on the general and the special law of obligations (*Schuldrecht, Allgemeiner Teil* and *Schuldrecht, Besonderer Teil*) but comparatively few books on contracts or torts. Both a law of contract and a law of tort can be discerned in German law, but to find them it is often necessary to consult several parts of the Code and of the treatises that deal with the law of obligations.

The notion of a law of obligations is on the whole foreign to the common law, and an attempt to state English law in its terms appears not to have had any considerable influence.³ For Sweden the present situation cannot be understood unless the historical development is realized, and the following survey will therefore be disposed chronologically.

In Sweden, like the other Nordic countries, the original situation was hardly more favourable than in England for establishing a law of obligations. Sweden has its Code of 1734, which at least as far as appears on the surface retains the structure of the medieval Codes. It is still nominally in force, in spite of the fact that practically all important parts have been replaced by new legislation. It was remarked by a legal scientist at the beginning of the 20th century that the

¹ See for a historical survey Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Cape Town 1990.

² See, e.g., F. Wieacker, *Privatrechtsgeschichte der Neuzeit*, Göttingen 1967, pp. 373 ff.

³ Philip Cooke, *The Common Law of Obligations*, London 1989.

systematics of the Code of 1734 is deplorable (“*ett oting*”).⁴ Even a strict division between private and public law is foreign to the Code of 1734. However, the lack of systematics operated to some extent in favour of accepting the German systematics. Unlike England, Sweden has not had any highly developed legal system on which to build. Furthermore, traditionally Swedish lawyers, like other Nordic lawyers, look abroad for inspiration in legal matters.

During the first part of the 19th century, an effort was made to reform the central parts of Swedish legislation by enacting new Codes that would comprise both private law, criminal law and the law of procedure. A Civil Code which included a Book on Commerce was proposed in 1826.⁵ The main influence on private law, in particular those parts that deal with contracts, came from the French Civil Code of 1804.⁶ However, the proposals failed on the whole, mainly because of the resistance of conservative politicians and lawyers, who were influenced by the *Historische Schule* in Germany.⁷ Not until the end of the 19th century was work on legislation on contracts resumed.

It is somewhat curious that the German system, in which the law of obligations plays an important role, was fairly soon accepted in Nordic legal literature but did not have the same influence on legislation.⁸ The proposed Civil Code of 1826 retained the main structure of the Code of 1734, with the important exception that it did not mix private and public law. The distinction between the law of obligations and the law of property was not observed. The law of tort received comparatively little attention in the proposed new Code, and the general principles of tort liability emerged largely from rules that were intended primarily for contractual liability.⁹

Later legislation has not attempted to bring about a general code but has been confined to special subjects. There has therefore not been any need to introduce any strict systematics. However, on the basis of an examination of present statute law, it can be maintained that the distinction between the law of obligations and the law of property has mostly been observed. It lies at the base of statutes dealing with special topics. The dividing line can at least roughly be drawn by a criterion that the law of obligations deals with relations between two parties based on contracts, torts and other similar facts, while relations to third parties, in particular the creditors of the contracting parties and those that have rivalling claims to the subject of the contract, are considered to belong to the law

⁴ See C.A. Reuterskiöld, *Om det systematiska värdet av balkindelningen i 1734 års lag*, *Nytt Juridiskt arkiv II* 1900, No.7 p. 3.

⁵ Lagkommittén. *Förslag till Allmän civililag*. Stockholm 1826.

⁶ See E. Marks von Würtemberg, *Blick på den svenska lagstiftningen alltifrån adertonhundratalets början*. In: *Minnesskrift ägnad 1934 års lag*. Vol. 1. Stockholm 1934, pp. 143 ff. (pp. 163 f.).

⁷ See S. Jägerskiöld, *Den historiska skolan i Sverige*. In: *Den historiska skolan och Lund*. Lund 1982, pp. 53 ff.

⁸ See L. Björne, *Nordische Rechtssysteme*, Ebelsbach 1987, pp. 236 ff. The outstanding work on the law of obligations in Nordic Law is Julius Lassen, *Haandbog i obligationsretten*. 1st ed. Copenhagen 1892, 3rd ed. Copenhagen 1917–20.

⁹ Chapter 15 of the proposed Code on Commerce contained rules on liability for damages, common to contractual and delictual liability.

of property.¹⁰ Swedish statutes relating to contracts generally deal only with the relation between the contracting parties, and when exceptionally there are rules relating to third parties, these are recognized as belonging to another field than the main one.¹¹ In the same way, private law and public law have long been kept apart, although at present their interaction in, e.g., consumer protection has been recognized also in legislation.

The following study is based on the notion of the law of obligations that has been mentioned now. Although this term is not used explicitly in statutory texts, it can be used when discussing the main features of the law of contracts and the law of torts. Other branches of the law of obligations are either the subject of special statutes with limited scope or are not dealt with at all in Swedish legislation.

2 The Influence of the Code of 1734

As mentioned before, the Code of 1734 is still nominally in force. In the Book on Commerce (*Handelsbalken*), in which contracts for chattels and choses in action are dealt with, there are some few of the original provisions that still retain some practical importance. For example, Chapter 9 Sec. 5 prescribes on which debt a payment shall be imputed when the debtor owes several debts to the same creditor. A provision of dubious value is one that prescribes a time limit of one year for claims against an agent, starting from the time when he gave an account of his charge to his principal (Chapter 18 Sec. 9). Since, e.g., the client of a practising lawyer (who is considered to be an agent for his client who is the principal) often has not even had the opportunity to discover that an account is unsatisfactory, or that the lawyer has been negligent, before the year has passed, the rule has been criticized as a remnant of the Code of 1734 that should be repealed.¹²

However, the chief legal importance of the Code of 1734 lies at present in the fact that it contains different rules for land on the one hand and for chattels, services and choses in action on the other hand. There is a new “Land Law Code” (*Jordabalk*), dating from 1970, which consolidates a number of earlier statutes and also introduces important new rules. It contains rules on sales, easements, leases, mortgages, etc., pertaining to land. The Book on Commerce has not been replaced by any consolidated piece of legislation, but most of it has, as already indicated, been succeeded by statutes with a limited scope. As a result the contractual rules relating to land are separate from those relating to chattels. Sales of land are governed by Chapter 4 of the Land Law Code, whereas sales of other property of all kinds are subject to the Sale of Goods Act of 1990. There is a certain affinity, but not more than that, between the two sets of rules. This

¹⁰ This distinction is the basis of Art. 4 (b) in The United Nations Convention for Contracts on the International Sales of Goods (CISG), which states that the Convention is not concerned with “the effect which the contract may have on the property in the goods sold”.

¹¹ However, the first draft of a Swedish Sale of Goods Act of 1894 contained provisions on the passing of property. These were criticized, and neither the Nordic drafts nor the Sales Acts contain any such provisions.

¹² See J. Hellner, *Preskription enligt HB 18:9*, Juridisk tidskrift 1991–92 pp. 667 ff.

affinity is mostly due to the fact that the earlier Sale of Goods Act of 1905 has influenced Chapter 4 of the Land Law Code of 1970. The difference between the law relating to land and the law relating to chattels is strongly apparent in the rules that concern leases. The rules dealing with leases of land (Chapters 7–13) are detailed and make differences particularly between agricultural leases and leases of houses. The chapter on leases of chattels (Book on Commerce Chapter 13) of the Code of 1734 is still in force. It contained originally four sections, only one of which has any practical significance at present. As a result, the law of leases of chattels is almost entirely case law, based partly on the analogy to sales law or even to leases of houses.

From the practical point of view of Swedish lawyers, the main importance of the Code of 1734 consists at present in the fact that the semiofficial edition of Swedish statutes, a copy of which virtually every Swedish lawyer keeps within reach at all times, is systematized according to the Code of 1734. All statutes that by stretching the imagination to the utmost can be said to replace provisions of the 1734 Code are inserted at the corresponding place in this edition. The rest are published in an “appendix”, which is about twice as thick as the part that corresponds to the original Code. This arrangement may seem somewhat curious, but since Swedish lawyers are used to it, it works.

3 General Principles and Special Rules

It is a characteristic feature of the Swedish law of obligations, and in special of the law of contracts, that it contains few provisions that can be described as statements of general principles.¹³ It differs in this way entirely from, e.g., the German Civil Code. A provision stating that a contract aiming at a performance that is impossible is void, such as is found in Sec. 306 of the German Code, is almost unthinkable in a Swedish statute. This is true in spite of the fact that the notion of impossibility was at one time accepted (although with some modifications) in an important provision of the Sale of Goods Act of 1905, Sec. 24.¹⁴ Nor is it possible to imagine in a Swedish statute a provision like Sec. 812 para. 1 of the German Civil Code, which prescribes in general terms that an unjustified enrichment must be returned.

There are a number of reasons for this attitude in Swedish (and other Nordic) law. One is that Swedish law, and in particular Swedish legislation, has never to any considerable extent been influenced by natural law. The idea of having a code expressing general principles based on reason, such as Franz von Zeiller once stated for Austria, has never had any appeal to the unphilosophical Swedish lawyers.¹⁵ Another reason is the lack of a hierarchic system of norms that

¹³ There are two provisions in the Contracts Act of 1915 that may be described as expressing general principles. Sec. 33 prescribes invalidity for certain contracts that violate good faith at the formation of contracts. Regarding Sec. 36 see *infra*.

¹⁴ See J. Hellner, *The Influence of the German Doctrine of Impossibility on Swedish Sales Law*. In: Festschrift für Max Rheinstein. Tübingen 1969, pp. 705 ff.

¹⁵ See F. von Zeiller, *Grundsätze der Gesetzgebung* (1806/09). Reprinted: Quellenbuch zur Geschichte der deutschen Rechtswissenschaft (E. Wolf ed.). Frankfurt am Main 1949, pp. 234 ff.

characterizes German law, in particular the German Civil Code. Such a system of course promotes the expression of general principles. A third reason, connected with the other ones, is the pragmatic character of Swedish legislation in general.

One looks in vain in the *travaux préparatoires* of Swedish statutes for statements explaining the reasons for the legislative technique. It is not customary to express such general ideas in either commission reports or government proposals to the Swedish Parliament. However, some expressions of the general aims can be found in the writings of legal scientists who have taken part in the preparation of legislation.

An interesting statement can be found in a lecture in 1918 by the Danish legal scientist Julius Lassen, who had played an important part in the preparation of the Nordic statutes on sales, commission agency, instalment sales and contracts, which were enacted at the beginning of the 20th century.¹⁶ He points to two main types of legislation. One is found in Germany, whose Civil Code aims in principle at covering all possible cases. He finds the opposite pole in England, where the statutes are in principle regarded as exceptions from the general rules which constitute the common law and are based on precedents. He considers the Nordic system, consisting of statutes that are not supposed to be peremptory, as an appropriate medium between these two poles. The scarcity of precedents is in Lassen's opinion a main reason for introducing legislation. The statutes should leave the judges sufficient liberty to take account of the aims of the legislation. A certain caution is therefore indicated. One should not codify a rule unless one has sufficient experience for deciding its contents. On the other hand, it is not necessary to introduce a statutory provision if it is certain what the law is. The general reason for introducing a rule by legislation is thus that the law is uncertain but that it is possible to create certainty by introducing a statutory rule. Similar ideas have been expressed by the Norwegian legal scientist Fredrik Stang, who also has played an important part in the work of preparing the legislation to which Lassen refers.¹⁷

It is somewhat dubious to what extent Lassen's statements are true even with regard to the statutes that he had in mind. On the one hand, he seems to underestimate the novelty of the legislation to which he refers, particularly with regard to the creation of a conceptual scheme, of which more will be said later. On the other hand, Lassen's description does not convey the fact that important parts of the Nordic legislation are in fact closely copied from German rules. It is even more uncertain how much of Lassen's description is true for Nordic legislation that has been enacted later. On the whole, I believe that Lassen's view still holds good, and anyhow Lassen has given an interesting picture of the possible aims of legislation in legal systems like the Nordic ones.

4 Legislation on Contracts after 1900

¹⁶ The lecture is printed in J. Lassen, *Udvalgte afhandlinger* (F. Dahl ed.). Copenhagen 1924, pp. 36 ff.

¹⁷ F. Stang, *Nogen fremskridtslinjer i den nordiske fælleslovgivning paa formuerettens omraade*. In: Nordiska juriststämman 1926. Stockholm 1926, pp. 291 ff.

From what has been said now concerning the attempts at modernizing legislation during the 19th century, it can be concluded that there are few statutes dating from earlier centuries that play an important role at present. In surveying the statutory framework it is therefore sufficient to start with this century.

One aspect of Sweden's lack of general legislation on the law of obligations is the separation, as far as statutory law is concerned, between contracts and torts. Until 1970 legislation with a wide scope was almost entirely devoted to contracts.

The most important work on legislation was undertaken in cooperation with the other Nordic states (Denmark and Norway, later also Finland). Since each of these states has a legal system of its own, both the choice of subjects and the principles had to be chosen in a way which would not lead to serious collisions with existing law. Fortunately, there were few obstacles of this kind in the law on the contracts that were the subjects of the joint efforts. The result has been a considerable harmony between important parts of the law of contracts among the Nordic States. Probably an attempt to harmonize either the law of contracts dealing with land or the law of property would have encountered greater problems, and indeed there are still important differences between the Nordic states.

In the year 1893 a commission dealing with the reform of private law was charged with the task of revising the Book on Commerce of the Code of 1734. The commission presented a draft of a Sale of Goods Act in 1894.¹⁸ Before further steps were taken, in 1900, the Danish legal scientist Julius Lassen (who has been mentioned before) proposed that this draft should be reworked into a common Nordic Sales Act.¹⁹ Work then began anew in Nordic cooperation. In 1905 the Swedish Sale of Goods Act was enacted, and the Danish and Norwegian Acts followed shortly later.

This was the beginning of a period of cooperation among the Nordic states, which produced a number of statutes dealing with contract law. The same group of persons, which was gradually renewed, worked with the preparation. The Swedish statutes are, in chronological order, the Sale of Goods Act 1905, the Commission Agency Act of 1914, the Instalment Sales Act of 1915, the Contracts Act of 1915, the Insurance Contracts Act of 1927 and the Instruments of Debt Act (*Skuldebrevslagen*, sometimes translated into in English as the "Promissory Notes Act") in 1936.²⁰ Lassen's statement, which was cited earlier, refers to the first four of these statutes. From an international point of view, the Sale of Goods Act must be said to be the most original with regard to its systematics and its scheme of concepts. The Commission Agency Act is less

¹⁸ It was published, together with the remarks of the Supreme Court on the draft, in *Nytt Juridiskt Arkiv II* 1901 No. 1.

¹⁹ "Privatrettens kodifikation." See *Udvalgte afhandlinger* (F. Dahl ed.). Copenhagen 1924, pp. 11 ff.

²⁰ The official Swedish titles are *Lag (1905:38 s. 1) om köp och byte av lös egendom*, *Lag (1914:45) om kommission, handelsagentur och handelsresande*, *Lag (1915:217) om avbetalningsköp*, *Lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område*, *Lag (1927:77) om försäkringsavtal*, *Lag (1936:81) om skuldebrev*.

original since it follows in its main parts fairly closely the corresponding provisions in the German Commercial Code (*Handelsgesetzbuch* Secs. 383–406). The Instalment Sales Act is chiefly based on an earlier German statute ("*Gesetz über Abzahlungsgeschäfte*" of 1894). It is perhaps a little surprising that the Insurance Contract Act – which deals with a somewhat special type of contract – is mentioned here, but it was prepared by the same group of persons as the earlier statutes. The Instrument of Debts Act 1936 is an original piece of legislation, which has no clear model in other legal systems. It has a connection with the Contracts Act that appears in some provisions, notably those that refer to the debtor's defenses to claims based on negotiable instruments. It mixes rules that according to traditional systematics belong to the law of obligations with such as belong to the law of property.

5 Modern Development in Contract Law

Most of the statutes mentioned now remained in force for a comparatively long time without any great changes. Only fairly recently have some statutes been replaced, as a result of various influences, among which the movement for consumer protection and the influence of the EEC are the most important. At present the reforms come swiftly and, even if they do not affect the fundamentals, change many details.

A number of statutes protecting consumer interests can be labelled as belonging to contract law and thus to the law of obligations. A Consumer Sales Act was enacted in 1973, a Consumer Credit Act in 1977, a Consumer Insurance Act in 1980 and a Consumer Services Act in 1985.²¹ A common feature is that they apply only to contracts between enterprises (*näringsidkare*) and consumers. All of these statutes contain mandatory rules, i.e. rules that prevail over contractual provisions. Some of them have been replaced by later statutes that go further in consumer protection. There is a new Consumer Sales Act dating from 1990 and a new Consumer Credit Act dating from 1992.²² The Consumer Insurance Act will probably be replaced in the near future by a chapter in a new Insurance Contract Act, which will also replace the parts of insurance contract law that are at present governed by the Insurance Contracts Act of 1927. A statutory change of wider scope was the introduction of a new provision, Art. 36, in the Contracts Act of 1915, empowering courts to set aside unfair contract terms not only in enterprise–consumer relations but in other contractual relations as well. This provision can be said to constitute the Swedish counterpart to the Civil Code Sec. 242 and the *AGB-Gesetz* 1976 in Germany and to the Unfair Contract Terms Act 1977 in Great Britain, although the differences are considerable and cannot be treated here.

As for contracts of the same types between others than an enterprise and a consumer, the situation varies. There is a Sale of Goods Act that applies to sales in general (*Köplag* 1990:931). There is an Act for Instalment Sales between

²¹ Official Swedish titles are *Konsumentköplag* (1973:877), *Konsumentkreditlag* (1977:981), *Konsumentförsäkringslag* (1980:38), *Konsumenttjänstlag* (1985:716).

²² *Konsumentköplag* (1990:932), *Konsumentkreditlag* (1992:830).

Enterprises of 1978 (*Lag 1978:599 om avbetalningsköp mellan näringsidkare m.fl.*) but no statute dealing with questions corresponding to those that for consumer transactions are covered by the Consumer Credit Act. Services in the commercial field are not subject to any statutory regulation. Insurance contracts have been mentioned already. Sec. 36 of the Contracts Act makes no exception for commercial contracts, although it is to be applied with caution in this field.

A characteristic feature of the new consumer protection legislation appears in the close coordination between contract law and law which entrusts government bodies with consumer protection. The distinction between public and private law has thus been blurred. The Contract Terms Act of 1971 empowered the Consumer Ombudsman with a control of contract terms, in practice those in standard form contracts, between enterprises and consumers.²³ If the Ombudsman does not reach any results by negotiations he can bring a suit to the Market Court for a cease and desist order against unfair terms. This statute and the proceedings under it have had some indirect influence on the individual contractual relations between enterprises and consumers, in so far as the contents of the standard form contracts used in consumer contracts have been controlled and to some extent revised. Otherwise the statute did not apply to individual contractual relations. Where there is no special mandatory regulation, Sec. 36 of the Contracts Act supplies the statutory basis for setting aside or adjusting unfair contract terms.

However, since 1995 the two topics, control of standard terms and adjustment of individual contracts, are in enterprise–consumer relations subject to one statute, the Contract Terms Act (*Lag 1994:1512 om avtalsvillkor i konsumentförhållanden*), which is to implement the EEC Directive on the subject of unfair terms in consumer standard contracts. Sec. 36 still remains in force with regard to both commercial and consumer relations.

The new Contract Terms Act can be seen as an instance of a new tendency in Swedish contract law, which is to enact statutes that are inspired internationally. Partly this tendency is due to legal obligations, in so far as the enactment is required by the EES Convention. Partly it goes further than is required by international obligations.

The United Nations Convention on Contracts for the International Sale of Goods (CISG) entered into force for Sweden in 1988.²⁴ In addition three of the Nordic States, Finland, Norway and Sweden (but not Denmark or Iceland) have enacted new national Sale of Goods Acts that are based largely on the principles of CISG. The Swedish statute was enacted in 1990.²⁵ As mentioned before, there is a new Consumer Sales Act, which is due partly to the need for adjusting the rules relating to consumer sales to those relating to commercial sales, partly to a wish to enhance consumer protection. Other statutes as well have been amended in order to adjust them to the new Sales Act and the new Consumer Sales Act. This is the case with the Consumer Services Act and also with Chapter 4 of the

²³ *Lag (1971:112) om avtalsvillkor i konsumentförhållanden.*

²⁴ *Lag (1987:822) om internationella köp.* The statute is short and decrees simply that CISG in all its languages shall have force as Swedish statute law.

²⁵ *Köplag (1990:931).*

Land Law Code. However, these changes are fairly small. It may be noted that the changes in Finnish and Norwegian legislation have gone further.

The influence of the EEC Directives is seen in a number of statutes, some of which can be said to concern the law of obligations. The new Contract Terms Act of 1994 and the new Consumer Credit Act of 1992 have already been mentioned. In addition there is a new Commercial Agents Act of 1991 and a Products Liability Act of 1992.²⁶ This latter statute belongs systematically to the law of tort, but it is intimately connected with contract law, both by its aim, which is to enhance consumer protection, and by its scope, which for Sweden comprises also contractual relations between a seller and a buyer.

The implementation of the EEC Directives in national legislation has caused problems, in Sweden as well as in other states. One technique is to try to maintain earlier legislation as far as possible but amend it in order to make it conform with the Directives. Another technique is to introduce new legislation based on the Directives, possibly besides older legislation where such exists. Even in Sweden the choice between the two techniques has not been consistent. Apparently the Ministry of Justice prefers the first technique, and as a result there are some statutes from whose text it cannot be seen that in effect they are based at least partly on EEC Directives. Other Ministries let it be seen at least from part of the text that the statutes implement EEC Directives. Notwithstanding the technique, the implementation has important consequences for legislation.

It can hardly be denied that the present situation is somewhat confused, with a number of influences – implementing international requirements, consumer protection based on national ideas, and adjustment to modern business practices – operating in a way that cannot easily be surmised from the wording of the statutes alone.

6 Tort Law

Swedish statutory law relating to tort has its own, somewhat curious, history and its own technique. As mentioned before, tort liability received comparatively little attention in the Book on Commerce that was proposed during the first part of the 19th century. The Book on Commerce was never enacted, but some of its provisions regarding liability for damages were transferred to Chapter 6 of the Criminal Code (*Strafflagen*, literally “Act on Punishments”) of 1864. This Chapter contained, as Sec. 1, a general provision that all crimes, whether intentional or negligent, entailed liability to pay damages. Chapter 6 of the Criminal Code thus came to be the principal statute on tort law in Sweden. It was supplemented by a general principle, which had no statutory basis, prescribing that injury to person and damage to property that had been caused negligently led to tort liability. Strict liability was not mentioned in Chapter 6, but it was introduced for limited fields by special statutes. Chapter 6 of the Criminal Code continued to be the main statute on tort law until 1970, when a

²⁶ *Lag (1991:351) om handelsagentur, Produktansvarslag (1992:18)*.

Tort Liability Act was enacted.²⁷ A more literal translation of the Swedish title (“*Skadeståndslagen*”) would be “Damages Act”, since the statute in principle applies to contractual liability as well. However, its importance for contractual liability is limited, with the exception that damages for personal injury and damage to property in the contractual liability field are generally computed according to the rules found in the Tort Liability Act.

A major part of the Tort Liability Act is in fact derived mainly from Chapter 6 of the Criminal Code of 1864. Vicarious liability, which was not mentioned in Chapter 6 and had been developed by case law, is also regulated by the Tort Liability Act. Purely strict liability on the other hand is not mentioned in the Act. The Tort Liability Act was amended in 1975 by introducing new rules on the computation of damages for personal injury, contributory negligence and some other matters.

Some statutes imposing strict liability have been enacted after 1970. The Products Liability Act of 1992 has already been mentioned. Another such statute is the Environmental Liability Act of 1986, which has now been incorporated in the Environmental Code as Chapter 32.²⁸ Strict liability has also been imposed on railways, by an Act of 1985 which comprises other parts of railway traffic law as well.²⁹

However, the main evolution in the field of tort liability is found in the creation of insurance in favour of those suffering injury and damage. Such insurance replaces tort liability wholly or partly. Part of the reform has been effected by statute. This is the case with motor traffic insurance, which is the subject of the Traffic Damages Act of 1975.³⁰ This insurance is based mainly on strict liability, even for damage to property, although as mentioned the technical construction is that of an insurance in favour of those suffering losses. The patient insurance, which covers medical injuries, was originally created by private initiative, but it is now subject to a special statute.³¹ Two other kinds of insurance of the same type, which can be styled a “no-fault insurance”, are entirely private and based on collective arrangements. Work injuries insurance is the subject of collective agreements between employers’ organizations and trade unions. Pharmaceutical insurance, which at least partially replaces product liability with regard to injuries from drugs, has been instituted by an agreement between drug manufacturers and drug importers on the one side and a group of insurers on the other side, under the unofficial supervision of the Ministry of Justice.³² Since in general such insurance is more favourable to the victims than the right to damages under tort liability, it tends to replace tort liability even if it does not deprive the victim of the right to claim tort damages.

²⁷ *Skadeståndslag* (1972:207).

²⁸ *Miljöbalk* 1998.

²⁹ *Järnvägstrafiklag* (1985:192).

³⁰ *Trafikskadelag* (1975:1410).

³¹ *Patientskadelag* (1996:799).

³² See *Compensation for Personal Injury in Sweden and Other Countries* (C. Oldertz & E. Tidefelt eds.), Stockholm 1988.

It is not possible to analyse this development here, but it is obvious that it changes many aspects of tort liability. Moreover, tort liability for personal injury is in Sweden largely only a supplement to the victim's right to benefits from social insurance. Both tort liability proper and the no-fault insurance must be seen as parts of a more extensive system which also covers social insurance and private insurance.

7 The Overall Picture

The preceding description has, I believe, proved that the Swedish law of contracts and torts cannot easily be presented as an orderly system, in which main principles are carried through strictly. On the contrary, it has grown irregularly and pragmatically, and the legislators have not seen as their task to create any consistent system.

As a result of this development, it is dubious to what extent the concept of a law of obligations is relevant for describing the structure and main principles of present Swedish statute law. This is the case both if we look at the law of contracts and the law of torts separately and, even more so, if we see them as parts of a general system. Under present circumstances, the case for retaining the law of obligations as a fundamental element of the Swedish legal system seems to be based on two features of the law.

In the first place there is the advantage of adhering to a system that is so well established as the German one as found in the Civil Code. What corresponds to the law of obligations in Germany should with this approach be admitted as being the law of obligations in Sweden. The term would then serve as a common name for the fields of contract law and tort law and some other parts of private law that cannot be described as belonging to either of these two fields. Unjust enrichment might be mentioned as one such part, except for the fact that very few Swedish rules can well be described as applications of this principle.³³

However, in my opinion "the law of obligations" is unsuitable both as a term and as a device for the systematic treatment of the subject. With regard to legislation, the reasons are found in the previous exposition. The picture is not changed if case law is added. As for legal science, my own view appears in the fact that I have written treatises on contract law and on tort law, but none on the law of obligations.

In favour of retaining the law of obligations as a basis for systematics it can none the less be argued that there are a number of rules of a general character that apply to both contracts and torts and to the other fields indicated. These are the rules relating to prescription, interest on debts, set-off, assignment of claims, etc. Some of them are in Sweden subject to special statutes applicable to the whole of what in Germany is styled the law of obligations, some are not regulated by statute. However, the existence of legislation cannot justify

³³ The possibility of applying principles of unjust enrichment (or "restitution") to Swedish law have been examined by myself, in my doctor's dissertation *Om obehörig vinst*, Uppsala 1950, and by Hj. Karlgrén, *Obehörig vinst och värdeersättning*, Stockholm 1982, on the whole with negative results. Other principles and constructions have been used where legal systems based on civil law have applied principles of unjust enrichment.

accepting the law of obligations as more than a name for a bundle of rules that on the whole have little in common.

In the second place, the great merit of the concept of a law of obligations is found in its focussing the attention on the questions peculiar to and common to direct relations between two parties.³⁴ The rules and principles that belong to the law of obligations can, in the absence of mandatory rules, be modified by contract. The rules that are described as belonging to the law of property cannot generally be changed by contract, since two parties cannot contract to the detriment of a third party. There are of course exceptions, in Swedish law as well as in other legal systems. The rights and duties of third parties may depend on special features of the contractual relations between two parties. A well-known example is that a clause by which a seller retains the property of goods sold even after it has passed into the possession of the buyer (*pactum reservati dominii*) is under specified conditions valid against third parties. The main issue is always to decide which rules affect parties other than those that have the immediate relations. This distinction – which lies at the bottom of the German division between the law of obligations and the law of property – seems even more important for Swedish law than for German law, since Swedish law does not admit any “*constitutum possessorium*”. It is therefore important for legislators, courts and legal science.

There are a number of Swedish statutes that by the first of these criteria and to a large extent by the second of them deal with the law of obligations. However, concentrating on these two criteria will easily lead to an unrealistic picture of the body of statutes as a whole.³⁵

The overall picture must be supplemented by a brief analysis of the internal structure of the statutes dealing with a law of obligations.

8 The Special Statutes

As can be inferred from the previous survey, each individual statute has its own structure. There is an interdependence between the systematics of the whole body of the legislation and the structure of its parts. In a Code, a rigid structure of the whole code easily leads to a rigid structure of the parts as well. In Swedish law, on the other hand, there is more scope for individuality in the structure of the statutes. This tendency is strengthened by the fact that the statutes date from different periods. Some features that the statutes have in common can be explained by an assumption that the legislators have attempted a harmony

³⁴ Such an attitude can be said to be the basis of Knut Rodhe's great work *Obligationsrätt*, Stockholm 1956. Rodhe does not regard the “general” and the “special” law of obligations as distinct parts of the law. According to his opinion, the law of obligations connotes typical features of a number of rules of private law.

³⁵ It may be added that the notion of a law of obligations plays a much smaller part in the Swedish rules that concern land. For land, both rules dealing with the rights and duties of third parties and rules belonging to public law have for a long time had strong functional relations to those that can be ascribed to the law of obligations.

between new and earlier legislation, but it is hard to perceive any consistent policy of this kind. To some extent, the harmony that exists can be explained by the simple fact, which has been mentioned before, that for a considerable time the same group of persons took part in the preparation of statutes. On the other hand, a tendency to depart from earlier principles can be discerned in recent years. This tendency affects both the harmony between statutes of different age and the harmony within the Nordic states.

For understanding the legislative technique, which is intimately connected with the contents of the statutes, the concepts of a “vertical” and a “horizontal” structure are useful tools of analysis.³⁶ With a vertical structure each duty and the consequences of its breach are kept together as a whole. With a horizontal structure the stress lies on general principles that are applicable to several or all duties and breaches.

Lassen’s previously cited view of the character of the Nordic legislation on contracts indicates clearly that he preferred a vertical technique, although this expression was hardly known at the time. The Sale of Goods Act of 1905 provides an example of this technique. The technique is most clearly visible in the rules pertaining to remedies for breach of contract.

The seller’s breach of contract with regard to the time of performance (“*dröjsmål*”, which can be literally translated as “delay”) is regulated in Secs. 21–27, with rules on specific performance, avoidance of the contract, damages and the notice that the aggrieved party is to give to the party in breach.³⁷ Next, the buyer’s corresponding duties with regard to payment are regulated in a similar way (Secs. 28–41). The following part of the statute deals with the seller’s breach of contract with regard to conformity of the goods (Secs. 42–54). Most of the rest of the statute (Secs. 55–61) deals with some less important rules that are common to all breaches of contract.³⁸

The vertical structure leads, when the rules are substantially similar, to references from one section to another or to repetitions. Both these features are found in the Sales Act of 1905. The principles excluding liability to pay damages because of impossibility (which is extended to cover some other cases of “*force majeure*”) are the same for all three breaches of contract that are regulated. However, systematically they are separated, and later provisions refer to the first occurrence (in Sec. 24, relating to the seller’s delay in delivering the goods). The rules for contracts for delivery of goods by instalments differ somewhat for the various breaches of contract, but substantially the rules are

³⁶ As far as I know, the analysis along these lines started with K. Ball, *Vom neuen Weg der Gesetzgebung*, 1921, pp. 31 ff. See further P. Noll, *Gesetzgebungslehre*, Rehbek 1973, pp. 224 ff.

³⁷ “Delay” corresponds to the German concept of *Verzug*, with the important difference that under German law impossibility excludes *Verzug*, whereas under Nordic law delay can occur also when performance is impossible, although there is no liability for damages.

³⁸ The Sales Act of 1905 contained a number of provisions concerning the interpretation of some terms that are said to be “common in contracts of sale” (Secs. 62–71). Here are included some trade terms, such as f.o.b. and c.i.f. There are no corresponding provisions in the new Sale of Goods Acts.

repeated. The vertical structure thus makes it less easy to perceive the main principles.

With regard to the scheme of concepts, there are two features that are specially worth noting.

One such feature is that the passing of risk is regulated without any reference to the passing of property (in Sec. 17), in the same way as was later adopted in the Uniform Commercial Code and in CISG. The reasons are not entirely clear. The passing of risk belongs undoubtedly to the law of obligations, whereas the passing of property – at least in the sense that is accepted in present Swedish law – concerns third parties and thus belongs to the law of property. However, it is also possible that purely practical considerations were decisive.³⁹

The other feature to be observed is that the remedies of avoidance of the contract and of damages are separated, as is also the case in the U.C.C. and in CISG. This separation simplifies the structure and the contents of the rules. None of these features was entirely new in the Nordic Sales Acts, but they prove that the originators had put experience from various other legal systems to use.⁴⁰

The structure of the other statutes belonging to the same period is less original and cannot be analysed in detail here.

The Commission Agency Act of 1914 contains some rules that deal with the relation to third parties to the contracts (Secs. 53 – 64), and it is thus not confined to the law of obligations. The general scheme for presenting the rules in this Act is to state all rules from the point of view of the commission agent, and the rights and duties of the principal must therefore be deduced from what is stated regarding the duties and rights of the agent.

The Contracts Act of 1915 consists of three separate chapters that have little connection between them. Chapter 1 deals with the formation of contracts. Chapter 2 deals with “*fullmakt*” (an agent’s power to bind his principal).⁴¹ Chapter 3 deals with the invalidity of contracts and of special contractual terms. Much of the contents is drawn from the German Civil Code. Art. 36 – which was introduced in 1976 – has been mentioned before.

The Instruments of Debt Act of 1936 has no direct models in foreign law. It harmonizes successfully law that before its enactment differed largely in the Nordic states. One part refers to negotiable instruments (other than bills of exchange and cheques, which are subject to special statutes based on international conventions). Another part deals with non-negotiable instruments of debt. The provisions have perhaps less practical importance for such instruments than as a basis for analogies to money debts in general, chiefly those based on contracts and not embodied in negotiable instruments. Provisions that belong to the law of obligations, in the sense used here, are mixed with such as

³⁹ See E. Rabel, *Das Recht des Warenkaufs* Vol. 2 (1958) pp. 292 ff. Cf. T. Almén, *Om köp och byte av lös egendom*, Stockholm 1960, § 17 at footnote 13 ff. Almén stresses on the one hand that the passing of property and the passing of risk are two different matters, but on the other hand he does not define the passing of property as a matter relating to third parties.

⁴⁰ Cf. Rabel, *op. cit.* Vol. 1, Berlin 1958, pp. 429 ff.

⁴¹ The concept corresponds to the German *Vollmacht*, which has no exact counterpart in the common law. The word “power” is used here in the hope that it will not deceive readers familiar with the common law.

refer to the rights of third parties, on the basis of their close functional relations. The provisions of this statute are crammed with contents, which makes it fairly difficult to read and understand, in spite of the provisions being on the whole unambiguous.

The Sale of Goods Act of 1990 represents to some extent a breach with the earlier Nordic tradition. It is influenced, chiefly as to contents but also as to structure, of CISG. CISG has on the whole a “horizontal” structure, which attempts to set out the principles and rules as generally as possible, particularly with regard to remedies for breach of contract. In CISG we find common provisions on remedies for breach of contract by the seller (Part II Chapter II Section III) and similarly common provisions on remedies for breach of contract by the buyer (Part II Chapter III Section III). A number of provisions are common to the duties of both the seller and the buyer (Part II Chapter V).⁴²

The Nordic legislators, when they shaped the new Scandinavian Sale of Goods Acts, compromised between the legislative technique of the earlier Sales Acts and that of CISG. Accordingly, the technique mixes vertical and horizontal elements. There is one set of rules for the seller’s breach of contract with regard to the time of performance (“delay”, Secs. 22–29) and another set that deals with non-conformity (Secs. 30–41) and one that contains provisions common to breaches by the seller (Secs. 42–44). The provisions relating to the buyer’s breach of contract (Secs. 45–60) have a similar but not wholly identical structure. There are also a number of provisions that apply to all duties of the seller and buyer, most of them dealing with breaches of contract (Secs. 61–82). As a result, there is, e.g., a common provision for the seller’s breaches of contract with regard to sales with delivery in instalments (Sec. 44) but another provision for the buyer’s breach of contract with regard to such sales (Sec. 56). There are identical rules relating to *force majeure* for the seller’s duties and the buyer’s duty to take delivery (Secs. 27, 40 and 57). There is another rule, which is considered to be better suited to money obligations, for *force majeure* with regard to the buyer’s duty of payment (Sec. 57 para. 1). Most – but not all – provisions on the computation of damages are common to the seller’s and to the buyer’s duties (Secs. 67–70).

The Sale of Goods Act of 1990 contains no mandatory rules. There are no provisions affecting the rights of third parties, with the exception of one that permits the creditors in bankruptcy to succeed into the contractual rights and duties of the debtor, subject to providing security if this is required by the other party to the contract (Sec. 63).⁴³

⁴² Cf. J. Hellner, *Das internationale Kaufrecht aus dem Blickwinkel der Gesetzgebungstechnik*, *Zeitschrift für Gesetzgebung* 1988 pp. 249 ff.

⁴³ Different opinions have been expressed as to whether this provision is subject to agreements between seller and buyer or not. In the former case it would be correct to classify it as belonging to the law of obligations, in the latter case not. In favour of the former view speaks *inter alia* the fact that it is found in the Sale of Goods Act, which according to its Sec. 3 is non-mandatory. In favour of the latter view it is argued that the rule refers to the rights of creditors that are third parties to the contract. See for the former view J. Hellner, *Speciell avtalsrätt* II:2, Stockholm 1993, pp. 91 ff., for the latter view T. Håstad, *Sakrätt avseende lös egendom*, Stockholm 1994, pp. 388 ff.

Altogether the structure of the new Sale of Goods Act, with its combination of vertical and horizontal elements, is somewhat hard to survey.

9 Conclusions

The survey of the individual statutes, although incomplete, demonstrates that the Swedish legislators have, with some few exceptions, kept within the precincts of the law of obligations when creating the various statutes. This restriction in scope has been generally accepted, chiefly because it has drawn the borderlines of and to some extent guaranteed contractual freedom. Mandatory rules intended to protect the weaker party to a contract are generally found in statutes with a limited scope, such as the Consumer Sales Act and the Consumer Services Act.

The view of the special statutes confirms the picture that emerged when the whole body of legislation was discussed, i. e. that the “law of obligations” may be useful as a concept that leads to distinguish between rules that concern the parties to a contract and rules that affect third parties. However, even if the introduction of the concept of a law of obligations may be useful it is not necessary for this purpose.

As mentioned previously, a characteristic feature of the German law of obligations is its hierarchical structure. There is not only a General Part of the German Civil Code, there is also a General Part of the Book of Obligations, and the Special Part of this Book consists of a number of chapters that have often more general and more special parts. There is no counterpart to this system in Swedish legislation. As has been demonstrated, the elements of a hierarchic system that are found in Swedish statute law on contracts are still comparatively small, in spite of the innovation that was carried through by the Sale of Goods Act of 1990. A more important feature of the special statutes is the occurrence of vertical and horizontal structure. As has appeared, although only briefly, the structure is closely connected with the contents and the general aims of the statutes.

Although Swedish (and other Nordic) law has undoubtedly been strongly influenced by the German law that was based on Roman law, this influence has only had limited importance for the structure of the legislation, as regards both the whole body and the special statutes. With regard to the future, there are other, perhaps more important aspects of the development of private law to be considered. New tendencies in consumer protection and the influence of international norms also tend to decrease the importance of the law of obligations as an instrument for the analysis of private law.