

The Growth of Social Private Law

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1 Introduction

In her study of Swedish medieval law, Elsa Sjöholm depicts a law influenced by the ambitions for power of both the church and men.¹ The regulations in the Village Code, for example, give the impression that the objective of creating a basis for the church's tithes of one-tenth was as important as the protection of property. The protection of the individual's social status was primarily a question for the extended family but social considerations also came to expression. Elsa Sjöholm mentions as an example the provisions concerning a wife's right to slay a woman that the husband has taken home to his bed.² The man, on the other hand, was not to be slain, as the family's support was dependent upon him.

A social dimension of the law is expressed in the preamble to the laws of Västmanland: The law is to be established and founded for all people as guidance, both poor and rich, and to be able to distinguish between right and wrong. The law is to be observed and held by the poor as protection, the peaceful as peace, with the violent as punishment and warning.

The French Code Civil from 1804 manifests the development towards a secular society in which the individual citizen's rights stand in the foreground. Equality before the law and the abolition of privileges were leading ideas. Statutory provisions with social objectives also existed in legislation from this period of time, for example, the provisions in the law on master and servant as to the master's obligation to care for the sick and the old, however, these were not a question of rights intended to be carried out in a private law manner. It is first during the 1900's that private law regulations received a social aspect in the sense that the regulations purported to give economic protection and safeguard support for the working population. The 1901 Act regarding compensation for injuries as a consequence of work (as well as the subsequent 1916 Act as to insurance for accidents in work) can be said to constitute a starting point for private law legislation that places social costs on one party in a contractual relationship.

During the twentieth century, more and more legal areas came to contain social protective regulations. Beginning in the 1960's, consumer law came to be an important legal area for the purpose of protecting consumers from unexpected economic consequences of contracts with commercial actors. Even these regulations purported to protect a typical consumer's economic status. Consumer law also has another function. In the modern consumption society, consumption is almost as important a driving force for societal development as production. Consumer law purports therefore not only to create consumer protection but also to promote societally necessary consumption and turnover in general. These different objectives are evident, for example, in the regulations concerning debt forgiveness.

A number of sources have argued that the postmodern society, a society that is characterized by pluralism and a weaker state responsibility for the individual,

1 See E. Sjöholm, *Sveriges medeltidslagar* 1988.

2 Sjöholm at 115.

means that social protection to an increased extent will be based upon private law regulations.³ There are a number of signs indicating that such can be the case. For example, there are tendencies today as to self-regulation and to introducing social clauses in contracts between commercial actors. The state also uses private law contracts to an increased extent in order to meet social objectives.

The development of social private law is discussed in the following. This is not, however, a review of different substantive regulations but rather the spotlight is on the character and legislative technique of these rules. The societal development and driving forces behind the enactment of social protection in the private law legislation is first treated in Section 2. The distributive and commutative regulations within private law are addressed in Section 3 in order to illustrate two different ways to affect social relationships. Examples are given in Section 4 as to distributive private law regulations with social objectives and Section 5 gives comparable examples as to commutative regulations. A brief summary is given in Section 6.

2 The Development of Society and of the Social Private Law

Several factors fueled the development towards social private law regulations. At the beginning of the 1900's, the modern welfare state had not yet even been envisioned in the world of ideas, and if one wanted to create better conditions for those worst off, these costs were placed on other individuals. The probably most important reason that there was a broad acceptance in society for social reforms was the increasing population and emigration. After the considerable increase in the population up until approximately 1860, the one usually ascribed to "peace, vaccines and potatoes", a considerable depletion of the Swedish population occurred through emigration that culminated in the 1880's, but also had a second wave in the beginning of the 1900's. Emigration can be said to have invoked a re-evaluation of the entire Swedish societal model, creating a consciousness of the necessity to improve social conditions within agriculture and for the entire working population.⁴ It cannot be ruled out that the creation of a department of law and economics at Stockholm College was affected by the moods that followed the emigration waves.

A state commission was appointed in 1907 to study emigration under the leadership of the liberal Uppsala Professor Gustav Sundbärg. The commission was split and the concrete results were few. Among other things, a prohibition against emigration with penal sanctions of the type we later have seen in the socialist dictatorships was considered. The different proposals were primarily expressed in legislative reforms within the area of private law. In this manner, society could be modernized without burdening state finances.

3 T. Wilhelmsson, *Senmodern ansvars rätt* 2001.

4 As to emigration as a political issue *see*, for example A-S Källemark, *Reaktionen mot utvandringen. Emigrationsfrågan i svensk debatt och politik 1901-1904* (1972).

The mood after the dissolution of the union resulting in Norway's independence, and after the wave of emigration at the beginning of the 1900's, can be seen as reflected in the strange writing, *The Swedish Mentality*, published in 1911 by Gustav Sundbärg. The bitterness against Norway is clear, and the entire writing breathes of self-examination, being of two minds characterized by a feeling of impotence when faced with the situation in the country. Sweden no longer was a great power but rather one of Europe's poorest countries with a fleeing population. It can be added that Sundbärg's book contains many observations concerning Swedish society that are still apt today.

In the legislative reforms enacted during the beginning of the 1900's, one can clearly see that emigration affected the choices as to the areas of subjects. Emigration had religious causes, among others, and there was an extensive dissatisfaction with the lack of religious freedom. The church's monopoly as to performing wedding ceremonies was difficult to accept not only for atheists but also particularly for those new Christian congregations that were founded during the 1800's. Many chose to marry in their congregations, which meant that they lived together unmarried in the eyes of the law. The right to perform marriage ceremonies was reformed through 1908 legislation that also introduced a right to a civil marriage. At the same time, new marriage legislation was prepared and a new act as to the commencement and dissolution of marriage came in 1915. The old regulations forced spouses choosing to divorce to undergo a drawn-out procedure with a warning and a separation as to bed and home, a procedure many viewed as invasive.⁵ Many chose instead to emigrate. A new Marriage Code was enacted in 1920 with new regulations as to the division of property between spouses based on spouses being two independent legal subjects with the possibility to enter into contracts with each other. Even regulations concerning the surviving spouse's right to inherit were enacted in 1920 but were reformed through the 1928 Inheritance Act in which the present regulations as to statutory inheritance rights for secondary classes of individuals inheriting were enacted.⁶

The dissatisfaction within the agricultural population was most likely an important driving force behind emigration. The great land consolidation and subsequent second land consolidation reform had as objectives reducing the splitting of real estate properties and creating rational and economically sound agricultural parcels. That the endeavor was also to increase the tax base of the agricultural population cannot be ruled out as playing a role in the state view as to the parceling of real estate. The reforms' significance for food production has probably been overexaggerated. This is particularly true of the large estates in Southern Sweden that chose to follow the Eastern European (and later the Communist) models by creating large agricultural units. In England and France, property was divided up into lesser parcels that increased yields greatly, resulting in the estate owners receiving compensation in monetary terms, which probably facilitated the transition to a monetary economy. The opposite direction

5 G. Inger, *Svensk rättshistoria* (1983) at 201. A mandatory settlement procedure between spouses is based however on rational considerations that still have validity.

6 With respect to the development of the law, see V. Boström, *Tolkning av testamente* (2003) at 270.

was chosen in Ireland, Prussia and other Eastern Europe and this model was applied also in Sweden. It can be noted that several of the latter countries had a high level of emigration to North America.

The shortage of agricultural land for the less wealthy led to a new act on real estate parceling already in 1896 when a new act as to creating tenancies, real estate subdivision and partitioning arose. Through this reform, it was practically entirely free to divide land without taking into consideration any interest of self-sufficiency and the suitability of the agricultural units. At the same time, the tax base was reduced. First through the 1926 Act on land subdivision was a societal control over the parceling of land reinstated and this control was tightened during subsequent decades.

It is characteristic that it was within agriculture that one first meets the concept of social legislation in the private law area. In contrast, for example, with Norway, the birth right to agricultural estates was repealed early in Sweden, already in 1863. This facilitated owners of capital purchasing up forest properties and in Norrland and Dalarna, large areas of agricultural land came to be transferred to forestry companies. In order to placate the agricultural population in Norrland and Dalarna whose lack of understanding had led to them conveying their properties to forestry companies while they got to see greatly increasing values on forest real estate parcels, the concept of a social lease was enacted in the Norrland tenancy legislation.⁷ The concept social lease was transferred in 1927 to general tenancy legislation⁸ and in 1943, the protection of social leases was tightened further, among other things by regulations concerning the right to extensions of the lease contract upon the expiration of the lease period (option right) as well as the right of first refusal. The social lease became a grant reform in which specific regulations for smaller leased farms (originally less than 25 hectre acres and raised in 1943 to 50 hectre acres) where the landowner was a company or a private person investing. The objective with the regulations in these cases was to give the landowner the responsibility for certain investments in the farm, and this took legal expression in the regulations as to the obligations concerning both work and residential buildings. Instead of state subsidies to agriculture, the landowner became obligated to pay for necessary investments in order to increase production and in order to create a higher standard of living. Here is an example as to a radical social private law in which the law places upon one party in a contractual relationship the costs for the other party's support and maintenance.

Another area in which one early recognized the contract's social significance was within landlord and tenant law, which already in connection with the 1907 Act on rights of use emphasized landlord/tenant law's significance for the sustenance needs of the country's population.⁹ In contrast with the agricultural tenancy legislation, the act on residential tenancies from 1907 contained few regulations that entailed any reallocation of the economic balance in the

7 See 1909 Act on arrende av viss jord å landet inom Norrland och Dalarna.

8 §§ 47-54.

9 See further, A. Christensen, *Hemrätt i hyreshuset* (1994) at 18.

landlord/tenant relationship. On the other hand, the tenant's protection against arbitrary evictions was strengthened and a settlement procedure was enacted in order to strengthen the tenant's protection in the event of alleged breach of contract, a procedure that has scarcely garnered any greater appreciation from either side. We see here another type of social protection that does not have the purpose of disturbing the economic balance in the agreement but rather has security as a goal. Arbitrariness is the greatest threat against the security of the individual. This perspective has also characterized modern social private law legislation, for example, the Employment Protection Act from 1974. The 1907 Act on residential leases was quickly seen as insufficient and already in 1917 legislation was enacted as to the regulation of the landlord/tenant relationship with provisions as to protection against rent increases and a legal protection afforded parties in possession of real estate. Here contract law regulations were utilized, in the same manner as within the law on agricultural leases, to place the social costs on the economically stronger party in the contract relationship.

The solutions existing in the Norrland agricultural tenancy act and the regulations during the first world war of the landlord/tenant relationship exist nowadays as general regulations in the Land Code regulations as to leases and rent. The social significance of the rules related to the status of the lessee and tenant have been greatly improved through a reformed dispute resolution procedure. The creation of lease and landlord/tenant boards with the task of assisting tenants in enforcing their rights has led to the regulations, which from the beginning existed only on paper, being given a strong effect. In addition, the organizations for tenants entailed that the costs for dispute resolution could be distributed over the collective. It is worth contemplation that identical substantive regulations can receive such different significance depending upon how the procedures for asserting rights are formed. In order to become effective, the substantive and procedural regulations must be seen as a unit. Consciousness as to this ought to have increased with harmonization of the European Community law and its requirement of "effective enforcement."¹⁰

In addition to the concept of the social lease, it is within labour and employment law that a socially tinged type of contract appeared early, the social law concept of the worker. Already in 1901, legislation was enacted concerning compensation for injuries resulting from work. This law was already replaced in 1916 by the Act as to insurance for accidents in work. The circle of persons eligible for compensation was limited by who was to be considered as a worker. The delineation of this boundary occurred through a social concept of a worker, and the right to compensation was assessed based on the injured's social situation and not by the terms of the contract. Consequently, not only workers had the right to compensation but also certain groups of smaller contractors. While the social lease purported to allocate social costs and certain investment costs on the landowner, the social concept of worker had another function. The concept purported to delimit the persons eligible for compensation within the circle in a social insurance system.

As stated, the social lease regulations were incorporated into the general lease

¹⁰ See J. Malmberg, ed., *Effective Enforcement of EC Labour Law* (2003).

regulation. In the same manner, the social concept of worker was incorporated into the uniform private law concept of worker as formed by the Swedish Supreme Court in NJA 1949 p. 768. While the social law concept of worker starts with that which is contracted between the parties, the social law takes its starting point in the working party's social situation. Integrated in the uniform concept of worker are social factors in such a manner that the social circumstances may be viewed as illustrating how the contract is to be understood. The social factors came to be considered as a basis for interpretation. Even in questions as to the social concept of worker, a social focused specific solution was shifted to become a fundamental principle for the entire area of law.

3 Distributive and Commutative Regulations

We have ascertained in the foregoing how contract law regulations at the beginning of the 1900's became a means to reach social objectives. The social costs could be placed upon the economically stronger party. Private law regulations can affect social conditions without for that reason being based upon explicit social objectives. Examples are given in the following as to how private law regulations in different ways can affect social conditions.

Private law regulations can have as a purpose regulating a legal subject as such. The regulations in the law of persons as to name, name of business, legal capacity and the right to enter into binding legal acts and contracts is of this character, but it can also be a question of regulating the legal subject's economic status in relation to another legal subject. Such regulations giving a legally secure position in relation to another party can be designated as distributive. Such regulations exist within family and inheritance law, which for example prescribe that children inherit from their biological parents, etc.

The distributive regulations ought to be distinguished from other private law regulations that have as their task regulating an exchange of performances between legal subjects. These latter regulations can be designated as commutative. Examples as to such regulations exist within contract law, landlord and tenancy law, etc. The distinction between distributive and commutative regulations is old and constitutes a basis for the construction of the larger legal structure. In the introductory codes of 1734 Act, the Marriage Code, the Inheritance Code, the Land Code and the Village Code, provisions existed that to a greater extent are distributive. The introductory chapters in the German BGB (Allgemeiner Teil) concern the law of persons, which also is distributive in its nature. Belonging to the commutative regulations are those concerning sales, exchanges, gifts and leases of real and personal property.

The distinction between distributive and commutative regulations does not appear, as far as I know, in modern legal scholarship. Within the law of third party rights to chattels, however, there are concepts of a similar type. There a concept of static and dynamic rights is used. The static third party rights to chattels have the purpose of creating a secured position as against everyone else,

and the dynamic rights are intending to safeguard turnover.¹¹ The concepts of static and dynamic rights of third parties to chattels are reminiscent of the concepts distributive and commutative rights. The static regulations encompass that which here is called distributive regulations and concern regulations, for example, regarding ownership rights and protection of possession. A party in possession can cite the distributive regulations in relation to all other legal subjects. The dynamic/commutative rights of third parties concern the protection given to legal subjects upon the assignment of real and personal property and rights.

The distributive regulations have traditionally constituted the private law regulatory system's basis with the tasks to both mirror as well as change the social life. In the following (Section 4), examples from different areas of the law as to the inception of the distributive regulations and their content are given. As to the question of commutative regulations, the objective traditionally has been to frame a secure and fair system for the exchange of performances. As seen from Section 2, the commutative regulations have afterwards received a social function. Examples as to private law regulations for the exchange of performances containing different forms of social considerations are given in Section 5.

4 Distributive Regulations

4.1 *In General as to Distributive Regulations*

The distributive regulations are the basis of the legal system. This is not always a question of statutory provisions, but rather, as we have seen for example within the law of third party rights to chattels, often rules based on custom and usage. Characteristic for these regulations is that in many cases, they have considerable significance for the distribution of assets and social conditions. The distributive regulations are often a stable legal regulation or a usage rule with a tradition that goes far back in time. An example of the latter is the right of public passage that is a usage based distributive rule giving everyone the right to pass through another's land, pick berries and branches, etc., as long as it does not infringe upon the real estate owner's land use. As the right of public passage is based on custom, the scope of the exercise of this right can fluctuate depending upon geographical area, business' form, etc.

Through a distributive regulation, the legislator can with the flourish of a pen carry out large changes economically and socially. The abolishment of the birth right (1857 and 1863), a distributive regulation that gave relatives the right to first refusal upon the sale of real estate, created in one blow a market for real estate which particularly in the countryside entailed large economic and social changes. Hereby forestry companies were given the possibility to extensively purchase forest real estate parcels. As a comparison can be mentioned Norway where the birth right was retained, creating a different ownership and social structure in the countryside.

11 T. Håstad, *Sakrätt* (1994) at 15.

An often used distributive legal regulation within real estate law is to require the registration of ownership rights for ownership to be valid. The system for claiming a mining concession within the mining industry entailed that anyone could register an ore deposit with the right to extract minerals from another's land. In accordance with the current mineral act, any person has the right to investigate mineral deposits on another's land as long as it is not obvious that he or she does not have the possibility or intent to conduct the survey (the Act on minerals, Chapter 2 § 2 second item). The mining legislation is an example as to a distributive legislation that has not been stable but rather that the landowner's right to compensation for the abstraction of minerals from his or her land has varied after social economic objectives.

Distributive regulations are normally usually a relatively stable regulation that remains in the closest meaning unchanged during a long period of time. In the economic area nowadays, regulations protecting property rights in the constitution and in the European Convention of Human Rights impose impediments that can change distributive regulations. The significance of the distinction between distributive and commutative regulations is illustrated in the 2007 judgment by the European Court of Justice as to labour union monitoring fees, the *Evaldsson* judgment. The Labour Court in AD 2001 no. 20 probably understood the monitoring fees as a commutative regulation, in other words, that it concerned an exchange of performances and the conditions for that. The European Court of Justice instead viewed that the collective agreement regulations as to the obligation for an employer to make a wage deduction for the labor union organisation's behalf as distributive, in other words, it transferred assets from an employee to the labor union organization without an exchange of performances existing. Therewith the collective agreement regulations violated the protection of property in the first amendment protocol to the European Convention.

A current and debated issue concerning change in a distributive right is the Sami's right to hunt and fish. This is a current example in which the legislator plans a distributive regulation within the real estate law area. Already in 1886, a regulation in the act was included on herding reindeer of a distributive character in that the owners in the Sami villages had the right to hunt and fish. It has been questioned whether this explicit rule in the act on herding reindeer extinguishes the right to hunt and fish based on customary law. In the legislative proposal that a commission presented in SOU 2005:116, there is a distributive regulation in the form of co-administration of the right to hunt and fish within Lappland and reindeer pastures in the mountains. The right to hunt and fish according to the proposal would only be able to be assigned by a cooperation organization consisting of members from Sami villages as well as concerned land owners.¹²

The proposal as to the Sami's right to hunt and fish in Lappland and reindeer pastures in the mountains is an example of a distributive regulation of a fundamental type that is of both economic as well as social significance. In accordance with § 25 of the act on reindeer herding, members in a Sami village

¹² See § 1 para. 3 in the proposal to a law on cooperative areas for hunt and fish within Sami land and reindeer pastures in the mountains.

have the right to hunt and fish as to outlying land within the village's pasture areas that belongs to the reindeer pastures in the mountains or Sami land when breeding reindeer is permitted there. What significance this regulation has in relation to the right to hunt and fish for the Sami population that follows from immemorial usage has been discussed.¹³ The discussion has also concerned whether the provisions in § 25 of the Act on reindeer herding completely regulate the Sami's right to hunt within the areas at issue or if the law only defines the right accruing to the Sami population in accordance with immemorial usage. The core of the problem is whether the original distributive regulations (immemorial usage) in general can be pushed aside by a legal regulation. No position as to this is taken in the state commission report SOU 2005:116. The starting point, however, appears to be that hunting and fishing rights can exist in accordance with immemorial usage but that the proposed regulations only regulate the exercise of statutorily regulated rights and possibilities to grant them.

There is in itself no absolute impediment for a legislator as to changing distributive regulations. Restrictions applicable to a legislator exist in the constitution as well as in the European Convention on Human Rights (particularly article 1 of the first amendment protocol). This in itself rather fragile protection of property rights in the European Convention prevents the legislator from depriving a person of property through a distributive regulation. On the other hand, the legislator can rather freely decide as to how rights are to be exercised. There is nothing that prevents the legislator from deciding, for example, that hunting rights may only be exercised by an association if there is public consideration (preservation of wild animals, order and order etc.). Legislative encroachment as to how the right may be exercised is allowed if the principles of equality and of proportionality are observed.¹⁴ However, it can be questioned whether the proposal as to a mandatory membership to a cooperation organization is consistent with regulations on freedom of association in Article 11 in the European Convention. We see here that distributive regulations can be of two types, those that are focused as to the right as such and those regulating the exercise of the rights.

4.1.1 Implicit distributive regulations

The example of the right to hunt and fish demonstrates that distributive regulations are decisive not only socially but also for economic existence. Many distributive regulations are implicit in a legal regulation. There is a distributive rule of the content that only a person who has a dedicated capital of SEK 100 000 can conduct business without personal liability. This follows implicitly from the rule in Chapter 1 § 1 of the Swedish Companies Act.

In the same manner, there exists within labour and employment law a regulation in RF 2:17 that only associations of employers and employees as well as individual employers can take industrial actions. This from an international perspective is not a self-evident rule, that groups of employees cannot strike

13 SOU 2005:116 *Hunting and fishing in cooperation* at 177 with references.

14 See The European Court of Justice's judgment *Chassagnou et al. v. France*.

other than in organized forms.¹⁵ This is an example as to a distributive rule that affects the power structure in the society.

4.2 *Distributive Regulations and Social Private Law*

Distributive regulations are the basis of a legal system from a systematic perspective. Coursebooks as well as strictly systemizing legal works begin, as maintained, with the law of persons, in other words, distributive regulations as to legal capacity and the right to enter into binding legal acts and contracts. The law concerning children as well as inheritance law also contain a large number of distributive regulations that govern social existence.

The most important change in the distributive social private law regulations during the twentieth century occurred within family law. As example can be mentioned the Marriage Code that introduced the principle that spouses were two independent legal subjects with complete legal capacity even in relationship to each other. Even a right to inherit for the surviving spouse was enacted in 1920 but was reformed in 1928 with the enactment of statutory inheritance rights. As examples of a reform from a later period can be mentioned the 1987 inheritance reform through which the right to inherit for the surviving spouse enters into place prior to the right to inherit of mutual children. This reform is interesting from different perspectives. The marital legislation during the larger part of the twentieth century had as a fundamental principle strengthening the individual's status in marriage. During the 1970's, a spouse's liability for his and her own support was particularly emphasized. Through the 1987 reform, distributive regulations were enacted that place the surviving spouse's need of support before the children's right to inheritance and the interest of transferring wealth between generations.

Another important change in the distributive regulations with social effects is the right for out of wedlock children to inherit. Previously, for example in the 1928 Inheritance Act, out of wedlock children were considered not ought to be able to inherit from the biological father since the social ties between them as a rule were weak. The right to inherit for out of wedlock children was enacted in Sweden at a late stage (1969) in comparison with other Nordic countries.¹⁶ The right for out of wedlock children to inherit was enacted at a time when one-half of all children were born outside of marriage and that out of wedlock children regularly had contact with their father. Regulations on the right for out of wedlock children to inherit became the first step towards a family concept that is structured around the biological parents' mutual responsibility for children. Rights of inheritance therewith received a social dimension. The interest of preserving family wealth, an idea that to the highest degree was alive at the point of time for 1928 Inheritance Act, entirely faded to the background. This socially focused right to inherit was enacted through the above named strengthening of the surviving spouse's right to inherit through 1987 reform.

Distributive regulations with a social dimension also exist within labour and

¹⁵ NJA 1974 p. 36.

¹⁶ P. Lödrups *Nordisk arverätt* (Nord 2003:3) at 58.

employment law even if these regulations concern the exchange of performances within employment. Servants and workers had priority creditor rights in bankruptcy in accordance with § 17:4 of the Commerce Code in the 1734 Act, and this right was not dependent upon the contract but rather on the social situation of the party performing the work. In the same manner, the 1901 Act regarding compensation for injuries as a consequence of work, as well as the subsequent 1916 Act on insurance for accidents in work, were based on a social law concept of worker that gave a right to compensation on the basis of the injured's social situation and not after the type of contract. The right to compensation arose not only to employees but also contractors with an enterprise of a lesser extent. The social law concept of worker had a distributive character as it gave rights to persons in a certain actual social situation regardless of that which had been agreed upon by the contracting parties. The concept of worker that nowadays is applied is the civil law one and as is maintained in NJA 1949 p. 768, the legal effects are to be assessed after that which can be seen contracted. The starting point here is commutative, in other words, the exchange of performances between the parties is at the center. At the same time, however, it usually is stressed that the concept of worker is mandatory, which indicates that the parties do not own the content of the concept and the scope of application of the regulations. This mandatory effect goes farther than that normally meant with this concept within contract law. It is not a question of a prohibition of deviating from certain regulations. A person who places his or her work at the disposal of another has certain rights regardless of that which the parties have agreed upon and regardless of the intentions of the parties.

An example of the distributive effect of the mandatory concept of worker is the legal assessment of a person at a work place for educational purposes. The question is whether he or she is included in the labor and employment law regulations even if neither of the parties have expressed an intent in that direction and it neither is a question of actual employment. The concept of worker is applied as a distributive regulation giving the social partners the right to dispose over educational operations at the work place.¹⁷ In such a manner, a broader perspective as to educational operations is guaranteed.

5 Commutative Social Private Law Regulation

Commutative regulations have the purpose of insuring the turnover of goods and services. We have seen that since the beginning of the 1900's, the legislator has enacted a social moment in the contract relationship by changing the balance in the contractual relationship to the economically stronger party's disadvantage. This can occur in different ways. It can be a question of directly affecting the contracting parties' performances. The previously touched upon social leases placed upon the landowner responsibility for investments in the leased premises so that residential and agricultural circumstances would become socially acceptable. The regulation of the landlord/tenant relationship entailed a control

17 K. Källström & J. Malmberg, *Anställningsförhållandet* (2006) at 36.

of price setting as to residences. It can also be a question of restricting contractual freedom in order to prevent an arbitrary treatment that could lead to social insecurity. This method of regulation was used already in the 1907 Act on rights of landlord and tenant and has since also come to use within labour and employment law. We have also seen that procedural regulations are important in order to receive an effective application of the system of regulation. The Employment Disputes Act and the Small Claims Act are examples of this. Different forms of settlement procedures and specialized courts exist within family law, labour and employment law as well as landlord/tenant and leasing law.¹⁸

In summary, it can be stated that the social private law can be of two different types: it can be a question of regulations that modify the economic balance in the contractual relationship and it can be regulations of a qualitative type that strengthen the effect of social and/or legal norms. The first type is represented by the social lease and debt forgiveness act and the later legal protection afforded parties in possession of real estate, employment protection regulations and discrimination regulations.

The social aspects in a contract relationship come to expression in different ways. It can be a question of the following contract moments:

- a) The status of the parties relative to a social situation;
- b) The object of the contract socially related; and
- c) Procedural regulations and dispute resolution mechanisms having a social moment.

Examples of that the status of a party relative to a social situation can be found in § 36 of the Swedish Contracts Act, the debt forgiveness act, as well as consumer and tenancy legislation.

Examples of that the object of the contract is socially related exist in the landlord and tenancy legislation as well as within consumer law.

As to the question of procedural regulations and dispute resolution mechanisms, it can first be stated that certain rights within the social private law to a large extent are procedural regulations that force one party to take into consideration the other party's social interests. Section 7 of the Employment Protection Act requiring objective grounds for a dismissal is an example of this.

Within family law, we have found that for more than one hundred years, there was a tradition of mediation between the parties. Generally, however, this is not as strongly prevalent in comparison, for example, with Norway. Within landlord and tenant law, and the law on agricultural leases, however, a well-functioning settlement procedure with landlord and tenant boards has existed for a long time.

Specific procedural rules are also a way to incorporate social consideration.

¹⁸ In the state commission report *Alternativ tvistlösning SOU 2007:26* is proposed a settlement procedure that is tied to the general courts. The proposal is based on a EC directive as to the promotion of mediation as a dispute resolution mechanism.

Both the small claims act as the employment disputes act have the purpose that the individual is not to be drawn into expensive procedures on the basis of disputes concerning small amounts.

6 Summary

The social private law that has grown during the twentieth century has been expressed in two main types of statutory provisions. First there are regulations that can be cited by everyone that do not assume an obligation by another legal subject. These regulations have here been designated as distributive and examples as to such regulations exist within family law and also real estate law (for example, the right of public passage) and within consumer law (for example, the debt forgiveness act).

Second, there are mandatory regulations that enter into a contract relationship for the purpose of safeguarding one party's livelihood. These regulations in their turn can be divided into two subgroups. The first is regulations that have the purpose of restraining arbitrary treatment of a weaker party. The modification rule in § 36 of the Swedish Contracts Act and the requirement as to objective grounds for a dismissal of an employee in § 7 of the Employment Protection Act are examples as to such regulations. Second are the regulations that place the social costs on one party in a contract relationship. Regulations concerning the duty to repair with leases and rentals are examples as to regulations of this type.

An important aspect of the social private law regulations is legal procedure. More and more attention is being given to creating within and outside of court procedural settlement procedures for the purpose of giving the regulations a stronger effect. Many interesting research issues concern these aspects of private law regulations.