THE LAW OF CONTRACTS

JURISPRUDENTIAL WRITING IN SEARCH OF PRINCIPLES

BY

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1. LAW, LANGUAGE AND PARTICULAR CONTRACTS

When we speak our native language it is such a matter of course that, unconsciously, we fail to consider the qualities of the linguistic tools that are at our disposal. Nevertheless, our language exercises considerable power over our ways of thinking. If it is correct to say—like Geijer, the classical Swedish 19th-century writer—that to know a language is to know how to think, it is also true that our language forces our thinking onto certain tracks which are not necessarily the same in different languages.[1]

Legal language has its own peculiar "grammar" in the dogmatic structure of the legal system. At times, then, dogmatic divergencies will lead to differences which cannot really be understood without an insight into the dogmatic structure of each legal system. The comparativist, being in transition from one legal system to another, must of course beware of such difficulties.

The law of particular contracts offers one example of such a comparative-law difficulty. The ways of looking at this part of the law are certainly quite different in, on the one hand, English law and those legal systems which are based upon that law—"common-law countries" as they are sometimes called—and, on the other hand, Roman law and those legal systems which have developed that law, that is to say the Continental law systems. The divergence, as seen from the English point of view, has been put by Lawson in the following formula: "We have a law of contract, while theirs was a law of contracts."[2] By this he meant that Eng-

[1] Drion, *Limitation of Liabilities in International Air Law,* The Hague 1954, p. vii: "The mere using of the English language sets its stamp on the way of one's legal thinking." Alten touches on the same point in his review in *T.f.R.* 1956, pp. 476 ff., of Grönfors, *Air Charter and the Warsaw Convention,* Stockholm & The Hague 1956.

[2] Buckland & McNair, *Roman Law & Common Law—A Comparison in Outline,* 2nd ed. Cambridge 1952, p. xvi. This remark and the subsequent quotation relate to one of those points, as to which Lawson says: "I was led to take a different view from that of the authors (Buckland and McNair); and while not feeling at liberty to substitute my own statement for theirs, I could not withhold it in justice to the reader or myself. I have adopted the compromise of letting the original text stand ... adding to it an excursus of my own." *Op. cit.,* p. xii.

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lish "authors... have concentrated their attention very much on problems connected with the formation and the discharge of contract, and the assignment of contractual rights and duties, all of them matters which can be dealt with generally for all classes of contracts". In Roman law, on the other hand, "the jurists paid far more attention to the terms of contracts, and very little of this can be dealt with on a general level. One cannot ask in general what a contracting party naturally intends by his contract, but one can ask what is implied in a sale or in some other particular contract. Why the Romans concentrated on the terms, rather than on the problems more closely connected with the general law of contract, we shall probably never know... but one fact is clear: the central point of their thought is the difference between a contractual figure with a well-defined shape manifested in terms[3] which can be implied from the nature of the transaction, and the unilateral promise, every term of which must be expressed. In dealing with the former they had the dexterity and tactical sense to establish those contractual figures which were most essential and which covered nearly all the transactions which naturally fell into well recognized types"—by this Lawson refers to the four consensual contracts: sale, lease, mandate and partnership—"and the rest they left to be dealt with by the unilateral promise, the *stipulatio,* or by combinations of such promises. ... The proper choice and construction of these figures, so as to reconcile the firm outline of a specific shape with the inclusion of as many transactions as possible, was one of the most remarkable performances of the Roman mind. It is a task which English lawyers never attempted..."[4]

I will not venture to explain why the English never attempted such a task: suffice it to say that part of the answer may lie in the prolonged English hostility to implied contract terms.[5] The

[3] Dealing with the Roman Law of the Roman Empire, Lawson had no reason to expound at this place the distinctions between different kinds of terms, such as the later distinctions between *essentialia, naturalia* and *accidentalia.* See further *infra.*

[4] Buckland & McNair, *op. cit.,* pp. 267 f.

[5] See, e.g., Pollock, *Principles of Contract,* 13th ed. by Winfield, London 1950, p. 227; Parry, *The Sanctity of Contracts in English Law,* in The Hamlyn Lectures, 10th Series, London 1959, p. 39–46; Buckland & McNair, *op. cit.,* pp. 268 f.—For further discussion, see Sundberg, *Air Charter—A Study in Legal Development,* Stockholm 1961, pp. 162 ff., 276 f.—Contributory to this state of things may of course also be that, as noted by Lundstedt in *Legal Thinking Revised—My Views on Law,* Stockholm 1956, p. 340, "the interest in law as a science in that country does not seem to be too great". It is certainly true

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result is, however, as may be ascertained by a look at English—and American—legal literature, that very little exists which can be said to treat the law of particular contracts, whereas there is an abundant supply of such treatises in Continental law. At the same time it follows that this part of the law must be, if not incomprehensible to Anglo-Saxon lawyers, at least unfamiliar to them. Its problems must appear strange.[6]

2. THE CLASSICAL SCHOOL

The Continental law has developed a classical school as regards the treatment of this law of particular contracts. The school well deserves to be called "classical", for it follows a pattern which was first outlined by the Byzantine lawyers. They invented the "nature" of each type of contract[7] and worked towards the distinction in contract law between *essentialia contractus, naturalia contractus* and *accidentalia contractus,* although the ultimate tripartite distinction may have been an achievement of the Glossators.[8] Thus there arose in Continental law the dogmatic superstructures

that the English production of legal literature has on the whole been small. The very names of the authors suggest that the recent expansion on this point is largely due to foreign influences.

[6] Compare, e.g., Kean, review in *The International and Comparative Law Quarterly* 1962, pp. 1224 ff.—Contrariwise, difficulties arise in the reverse direction as well, viz. when Continental lawyers seek to understand the English law. Lundstedt (*Grundlinjer i skadeståndsrätten, senare delen, Strikt ansvar,* vol. II: 2, Uppsala 1953) tells about his difficulties when trying to penetrate the English law of employment relations, using the Swedish concept of "arbetsbeting" (*locatio operis*) as a point of departure. With a literal translation into English, Lundstedt says: "But this concept appears to be in England, as contrasted with ourselves and on the Continent, no clear and settled institution of the law of obligations. Attempting to put the concept in English, one would have to say contract relating to the 'hire of work', as contrasted with contract relating to the 'hire of services' (i.e. 'tjänstelega' = contract of service)." See *id.*, pp. 378 f. with further critical discussion. (Translation mine.)

[7] The typification of the Roman contract law depended upon the categorization of actions. The latter fell into decay towards the time of the lower Empire. "Als materiellrechtliches Substitut erstand dafür in der Lehre des Ostens die neue Idee der natura contractus, die ... dazu bestimmt war, dem einzelnen Vertragstyp Festigkeit und Begrenzung zu geben, aber doch so elastisch aufgefasst wurde, dass sie sich dem jeweiligen konkreten Parteiwillen anzupassen vermochte." See Levy, *Weströmisches Vulgarrecht. Das Obligationenrecht,* Weimar 1956, pp. 32 f.

[8] Cf. Kantorowicz, *Studies in the Glossators of the Roman Law,* Cambridge 1938, pp. 210 f., and literature there cited in note 2.

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on the implied terms, the contract types, which so strikingly contrast with the Anglo-Saxon preference for dealing with the equivalent matters in terms of legal relationships only.[9]

By *essentialia,* then, was meant those elements of a contract which were essential to permit the determination of what type of contract it was, or, looked at the other way, to permit a correct subsumption of the contract under a contract type: as put by Winroth, "that which must be agreed upon between the parties in order to make the particular contractual relationship in question arise".[1] *Naturalia,* on the other hand, meant such legal consequences of a contract as applied without being expressly agreed upon, but which could be avoided by a contract provision to the contrary.[2] *Accidentalia,* finally, meant such legal consequences of a contract as would not follow from its subsumption under a contract type but would require that the parties had agreed—expressly or impliedly—upon them.[3]

This way of constructing the law of contracts placed the *naturalia contractus* in the area which in Continental law is designated by such terms as "règles supplétives", "nachgiebiges Recht" and "dispositives Recht"[4] although it may be a matter of dispute what the exact interrelationship should be.[5]

The dogmatic set-up led to the creation of a certain pattern for expounding the law of each particular contract type. Following this pattern, Continental—including Scandinavian—writers find it natural to deal, under the title of the respective autonomous contract type, with those rules which supplement the order established by the contract as written by the parties themselves, perhaps

[9] Cf. Sundberg, *op. cit.*, p. 162 ff.

[1] Winroth, *verbo essentialia contractus* in *Nordisk familjebok,* 1907 edition. (Translation mine.)

[2] Hammarskjöld, *verbo naturalia contractus, Nordisk familjebok,* 1913 edition.

[3] See *verbo accidentalia contractus, Nordisk familjebok,* 1904 edition. Note Winroth's indication that *naturalia* really should form a subcategory of *accidentalia. Op. cit.*

[4] For a recent discussion, see Ekelöf, *Processuella grundbegrepp och allmänna processprinciper, några problem inom den allmänna processrättsläran,* Stockholm 1956, Institutet för rättsvetenskaplig forskning VIII, pp. 136 f.

[5] Constantinesco says: "Bien qu'établies par la loi, ces obligations rentrent dans le contrat par la volonté, directe ou présumée, des parties qui auraient pu en décider autrement... L'on peut affirmer que les parties l'ont incorporée [i.e. incorporé une de ces obligations] dans le contrat, précisement en n'y dérogeant pas par une clause expresse." *Inexécution et faute contractuelle en droit comparé,* Stuttgart & Bruxelles 1960, Publications de l'Institut de droit européen de l'Université de la Sarre, Série A, vol. 5., pp. 146 f. Cf. my paper "Avtalstyper och typavtal", *Sv.J.T.* 1961, pp. 12, 16 f.

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adding a discussion of *essentialia* and *accidentalia*. This pattern was followed in, e.g., *Fraktaftalet* (Contract of Carriage) by Hammarskjöld, in Wikander's treatises on the "arbetsbeting" or contract for work (*locatio operis*) as well as in Folke Schmidt's recent work on "tjänsteavtalet", i.e. the workman's employment contract, to mention only a few Swedish examples.[6] Even those writers who find their task conveniently delimited by the existence of an Act relating to the contract type in question, replete with the contract's *naturalia*, stick to the distinction between *naturalia* and *accidentalia*.[7]

This pattern of writing thus has been a persistent success with legal writers. Its merits are to a certain extent evidenced by this success. Yet it cannot escape criticism.

3. DILEMMA OF THE CLASSICAL SCHOOL

One of the characteristics of this law of contracts is that the parties to a contract by provision in their contract can, within certain limits, set aside the written law that applies to it. This functions in a manner somewhat parallel to that of customary law, and some of the distinctions relied upon in the discussion of the latter are believed to be useful in the discussion of the law of contracts as well.

Consuetudo, it is sometimes said, may be *contra legem vel secundum legem vel praeter legem.*[8] Similarly, clausal law—which term is hereby adopted to signify those rules which are created by the contract and derive their force from the validity of the contract, and which set aside the law of the cases and the govern-

[6] K. H. L. Hammarskjöld, *Om fraktaftalet och dess vigtigaste rättsföljder,* Upsala 1886; H. Wikander, *Bidrag till läran om arbetsbetingsavtalet enligt svensk rätt,* Uppsala & Leipzig 1913; *Om det materiella arbetsbetinget och dess viktigaste rättsföljder med särskild hänsyn till svensk rättspraxis,* Uppsala 1916; Folke Schmidt, *Tjänsteavtalet,* Institutet för rättsvetenskaplig forskning XXI, Stockholm 1959.

[7] Almén-Eklund, *Om köp och byte av lös egendom, kommentar till lagen den 20 juni 1905,* 4th ed., Stockholm 1960, pp. 32 ff. But see Hellner, *Försäkringsrätt,* Stockholm 1959, Försäkringsjuridiska föreningens publikation Nr 15, pp. 61 ff. Contrariwise Engströmer, *Om försäkringsgifvares förpliktelse på grund af försäkringsaftalet,* akad. avh. Uppsala 1908, which was written prior to the pan-Scandinavian legislation relating to insurance contracts, informs the reader in the preface that the main purpose of the book is to find out the *essentialia* of the insurance contract. See p. 2.

[8] Jolowicz, *Roman Foundations of Modern Law,* Oxford 1957, pp. 29 f.

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mental legislation unless it is *ius cogens*[9]—may be clausal law *contra legem,* which refers to the clauses which oppose the rules of case law and legislation; or clausal law *secundum legem,* which means the clauses elaborating certain points which otherwise are regulated only in principle or summarily by case law and legislation; or clausal law *praeter legem,* which refers to contract clauses during the formative stage of case law and legislation.

With this in mind, we may return to the criticism of the Classical School.

There are two counts on which the Classical School in Continental law invites criticism. One relates to the formative period of contract law, the other to the internationalism which imbues the formation of some commercial law. The former deals with clausal law *praeter legem,* the latter normally with clausal law *contra legem.*

The inconveniences of the Classical School are not so apparent when one deals with the traditional commercial transactions, e.g. the sale. They become all the more apparent, however, when novel forms of contract are to be treated. The classical principles will only work adequately in stable legal situations. Acquiring the requisite stability takes time. There is an intermediate formative period. It may be illustrated by Folke Schmidt's remarks in his article "Around the Legal Sources of the Workman's Employment Contract" (1957): "Fifty years back it could confidently be said that nobody really knew what rules applied when you contracted for a workman. Today, however, that is no longer the case. Most questions of principle have received their special legal solutions. Law has been made by the cases. Our courts have functioned as 'legislators'. My task will be to tell what principles have been adopted by the courts when acting as legislators."[1] In this case, apparently, the fifty years mentioned were the formative period.

The interval between the first appearance of a new contract phenomenon and its scientific treatment cannot, of course, be put at fifty years as a general rule. There is little doubt, however, that the delay in the formation of contract law in the classical sense is considerable. At the same time, with no other legal tool than

[9] Cf. the definition in Sundberg, *Air Charter* (see *supra*, p. 126, note 5), p. 139.

[1] The translation which I have given in the text is based on the article as it appears in *Minnesskrift utg. av juridiska fakulteten i Stockholm ...,* Stockholm 1957, p. 205. A German version, "Quellenprobleme des schwedischen Arbeitsvertragsrechts", is published in *Zeitschrift für ausländisches und internationales Privatrecht* 1959, vol. 24, pp. 401 ff.

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the new contract phenomenon, commerce may nevertheless expand and arrive at a position of striking importance.[2] One may then consider it urgent to grasp and expound the situation before it has acquired the stability requisite for presentation according to the classical principles. But here the Classical School has little to offer. Only by pursuing conceptualistic methods, like subsuming the new phenomenon under a pre-existing contract type and thereby bringing all the legal consequences attached to that concept to apply, can the school lay down law in the classical sense. Such conceptualism is not fashionable in present-day Scandinavia. Hence the Classical School is at a loss in so far as it sticks to the classical principles for dealing with the law of contracts.[3]

The formation of the law of particular contracts has important international aspects. Formerly, these aspects were manifest inasmuch as commerce in great parts of Europe had produced a common and quite autonomous system of law, the *lex mercatoria*.[4] This meant that "in commercial life a system of rules was functioning along with, yet independently of, the rules of law framed in statutes and in the decisions of courts ... strong enough to set aside the applicable system or systems of law to a considerable extent".[5] Today the *lex mercatoria* is certainly dead;[6] however, its internationalism has taken on modern forms. The entity of norms which govern in modern commerce has progressively taken on

[2] Inland carriage by road in Sweden may serve as an example. Its importance has increased enormously over the years, yet there is almost no legislation and very little case law relating to this contract of carriage. Grönfors, in Schmidt, Wilkens, Grönfors & Pineus, *Huvudlinjer i svensk frakträtt*, 2nd ed. Stockholm 1962, p. 42.

[3] In this respect Undén's 1912 treatise on the collective agreement (*Kollektivavtalet enligt gällande svensk rätt*, Lund) is illustrative although not dealing with any classical contract type. His approach conforms closely to the Classical School and its demerits on that virgin field stand out when compared with Adlercreutz's treatment of the same subject and period, done some 40 years later (*Kollektivavtalet—Studier över dess tillkomsthistoria*, Lund 1954). Adlercreutz's fact research method, which he labels as one of legal genetics, contrasts strikingly with the sterile pattern of analysis in terms of pre-existing legal concepts followed by Undén.

[4] Cf. Sture Petrén, "Domstolarna och handelskamrarnas responsaverksamhet", *Sv.J.T.* 1961, pp. 491 f.; Karlgren, "Usage and Statute Law", *Scandinavian Studies in Law* 1961, pp. 58 f. Bewes, *The Romance of the Law Merchant. Being an Introduction to the Study of International and Commercial Law ...*, London 1923, gives a general survey of this part of the commercial law with many references to other sources.

[5] Karlgren, *op. cit.*, p. 58 f.

[6] Reference may here be made to the part called "The Incorporation of the Law Merchant into Municipal Law" in Schmitthoff, "International Business Law: A New Law Merchant", *Current Law & Social Problems* 1961, vol. 2, pp. 129 ff., at pp. 136 ff.

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international character. In 1957, Schmitthoff wrote that "the general trend of commercial law everywhere is to move away from the restrictions of national law to a universal, international conception of the law of international trade".[7] He was mainly concerned with the independence from the national systems of law which was "founded on the universally recognized twin principles of freedom of contracting and recognition of commercial arbitral awards, and supplemented by international legislation dealing with specific topics".[8] The norms thus governing internationally, in particular when they form clausal law *contra legem,* in turn influence the national law. Karlgren considered them to be "a reality to which even more recent legislation in the branches of law concerned had to pay some attention".[9] Indeed, the pan-Scandinavian Sale of Goods Act of 1905–1906, is said to have been based to no small extent on international commercial usage as it existed at the time of the preparation of the Act and in so far as it could be traced and fixed at that time.[1]

Accordingly, we may expect a floating element of internationalism to remain active in the formation of contract law. For practical purposes this element may be described as the recurrence in various countries of the same entity of rules, that is to say, contracting parties normally adopt the same clauses in their contracts wherever they may be active. It is then, obviously, not necessarily identical with such commercial customs as are recognized as customary law.[2] The decisive point is that certain clauses, appearing in identical patterns, are found in a number of countries at the same time. The "Government Form" in time chartering offers one example.[3] Another example is the airline ticket contract

[7] "Modern Trends in English Commercial Law", *Juridiska Föreningens i Finland Tidskrift* 1957, vol. 93, pp. 349 ff., at p. 354.

[8] Schmitthoff, "International Business Law: A New Law Merchant" (see *supra,* p. 131, note 6), p. 152.

[9] Karlgren, *op. cit.,* p. 59.

[1] Sture Petrén, *op. cit.,* p. 492.

[2] For a general discussion of how custom interferes with the contract between two private parties, see Tiberg, *The Law of Demurrage,* Stockholm 1960, pp. 108 ff. Compare however Karlgren, "Usage and Statute Law", *Scandinavian Studies in Law* 1961, pp. 39 ff.; Wortley, "Mercantile Usage and Custom", *Zeitschrift für ausländisches und internationales Privatrecht* 1959, pp. 259 ff.; and the remarks by Schmitthoff, "International Business Law: A New Law Merchant" (see *supra,* p. 131, note 6), p. 149.

[3] Time chartering of dry-cargo ships in many, perhaps most, parts of the world is contracted upon either the Baltime charterparty document or the Produce charterparty document. The former was originally prepared in 1912 by the Baltic and White Sea Conference in Copenhagen, the latter similarly in 1913 by the New York Produce Exchange. The official name of the

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offered by the international airlines. This contract is indeed globally uniform in clauses.[4] In my work on air charter[5] I had occasion to show a third example, air charter contracts, in which the internationalist element was clearly functioning although it had far to go before uniformity was reached.

To identify and elucidate the decisive factors working in this internationalist element means accounting for the growth and setting of the clauses. It also means shifting the centre of gravity of the presentation to the international plane; the national legal patterns must be relegated to the periphery. The national law—the essence of the law as understood by the Classical School—must be made to serve as the counterpoint to the international development rather than as the theme of the presentation.[6] There is reason to believe that the Classical School will be reluctant to acquiesce in such demands. Meeting the requirements of the internationalist element means that too little room is left for the practising of such accepted arts as the construction of statutes and cases to be really attractive.

4. THE CLASSICAL SCHOOL SET ASIDE

Any attempt to break away from the pattern of the Classical School will of course have to face the forces which have helped to secure the persistent success of that school. One of these forces, perhaps the most important one, is believed to be the convenient support which the Classical School can derive on the legal-philosophical side from the fact that, as a practical matter, the school of positive law is generally accepted. The idea of "positive law",

Produce, incidentally, is "Government Form Approved by the New York Produce Exchange". Both documents can be traced back to the contract pattern followed by the British Government during the 19th century when chartering ships to add to the carrying capacity of naval expeditions. See Jantzen-Dybwad, *Håndbok i godsbefordring til sjös (befraktning)*, 2nd ed. Oslo 1952, pp. 335 f.

[4] See Lemoine, "Vers une uniformisation du Contrat de transport aérien international", *Revue française de droit aérien* 1954, vol. 8, pp. 103 ff.; Sundberg, "Om flygbiljett enligt svensk rätt", *Arkiv for Luftrett*, vol. 1, pp. 321 f.

[5] See *supra*, p. 126, note 5.

[6] Referring to "overseas sale" cases Nussbaum observes how much the courts "are hampered ... by their national traditions which are often in disaccord with the international spirit of the subject matter". "Fact Research in Law", *Columbia Law Review* 1940, vol. 40, p. 205.

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which permeates all but a few of the various teachings labelled as belonging to this school, or this array of schools, is the idea that there is no law unless it is supported by State machinery for compelling compliance, as well as being applied by the courts. This basic idea of positive law cannot easily be reconciled with any other attitude than that of the Classical School and it remains mainly unimpressed by what the study of the formative period or the internationalist element may require.

This statement can be supported most illustratively by confronting the contract problem with the earliest and perhaps most sterile of all positivist schools—the one delineated by Austin. His pattern of analysis of law in terms of force has been accepted and further developed by the leading 19th-century German jurists,[7] and it may therefore be justifiable to let his school contribute to the discussion of a Continental law idea even though Austin himself worked only in England. To him the pattern followed by the Classical School is the only possible one because only that pattern has a place in the notion of binding law. Austin's definition of binding law will appear from the following quotations: "Laws properly so called are a species of commands".[8] "Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme."[9] Contract clauses certainly are not "set by a sovereign person", although their enforceability to a certain extent may depend on him.[1] The only contract clauses that possibly can be so classified are those which are to be implied in the contract because it is so laid down in an Act of Parliament or some equivalent piece of legislation. It follows that the law of

[7] Friedmann, *Legal Theory*, 4th ed., London 1960, p. 213, mentioning Rudolf von Ihering (1818–92) and Georg Jellinek (1851–1911). Fuller, *Basic Contract Law*, St. Paul, Minn. 1947, p. 523, says that Austin's "attitude was, in fact, carried much farther on the Continent than it was in the countries of the common law, chiefly because the existence of comprehensive codes in those countries made it more plausible".

[8] Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence*, The Library of Ideas, London 1954, Lecture V, p. 133.

[9] Austin, *op. cit.*, p. 132.

[1] It is doubtful whether Austin considered this problem closely. It is true that he refers to "imperative laws set by masters to servants; imperative laws set by lenders to borrowers" classifying them as "not positive laws but rules of positive morality" (*op. cit.*, p. 139). In those days, however, the legal relations between master and servant and between lender and borrower were illustrations of the Anglo-Saxon relational obligation and were not contractual in the sense of Continental law. On this point, see Sundberg, *Air Charter—A Study in Legal Development*, pp. 170 ff. *et passim*.

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contracts will only cover promulgated contract enactments such as the pan-Scandinavian Sale of Goods Act or the affreightment chapter in the pan-Scandinavian Maritime Code. It may include case law and deal with *naturalia contractus* growing out of such case law. What is outside this area, however, is not law in the positive sense and therefore—as indicated in part 2 *supra*—will rarely enter the legal discussion. In fact, where there are no enactments, and no case law, there can be no room for a law of contracts. The treatment must be terminated as soon as it extends beyond the rules for the formation, the modification and the dissolution of contract.

Despite all criticism[2] of the school of positive law there is reason to believe that its impact remains considerable. Whether by accident or by design, even modern writers who in other respects have certainly left the positivist school behind stick to the same area as the one which was outlined by the positivist schools. Olivecrona says—approvingly as far as can be seen: "We only refer to the legal order such rules as are connected with the state organization, i.e. with an organization which is created for the purpose of compulsion being exercised within a certain area and which dominated within that area."[3] This coincides with the essence of the idea of positive law expounded above. Ekelöf, for his part, takes a view of the notion of "legal rule" which seems to leave as little room for any study of clausal law as such as does the school of positive law. By "legal rule"—he comments—we mean a legal norm which is of a general character in the sense that it addresses itself to a collective body which can be determined, and which norm applies to a certain mode of action generally. "A directive to one certain named individual—how he is to act in a certain situation—is not normally called a legal rule. Probably nobody would consider calling the individual decrees and orders of courts legal rules."[4] It follows that *pacta sunt servanda* is a legal rule in this sense, but the individual contract, however binding it may be, is not.

As a result we still feel that somehow an unscientific flavour is

[2] Hägerström's criticism of legal positivism is conveniently summarized by Olivecrona in his article "The Theories of Axel Hägerström and Vilhelm Lundstedt", *Scandinavian Studies in Law* 1959, pp. 134 f.

[3] *Om lagen och staten*, Copenhagen & Lund 1940, p. 43. (Translation mine.) The passage appears in the context of a discussion of the distinction between legal and moral rules which was omitted in the original English version of this work, *Law as Fact*, Copenhagen & London 1939, see p. 48.

[4] "Juridisk slutledning och terminologi", *T.f.R.* 1945, pp. 223 f. (Translation mine.)

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conferred upon all writings on the law of contracts which do not conform to the basic principles of the school of positive law,[5] notwithstanding that these writings may be able to meet some of the demands of the formative period and show consideration for the internationalist element. If such ability and consideration are of the essence, then, obviously, the school of positive law cannot be of much help. Assistance must be sought elsewhere. It is then interesting to note that the once most formidable rival of Austin's positivist school, von Savigny's historical school, was much more responsive to this aspect of the problem.

von Savigny taught that law is organically connected with the development of social life. It arises from silent, anonymous forces, which are not directed by arbitrary and conscious intention, but operate in the manner of customary law.[6] Like languages, manners and constitutions, law develops with civilization. With the development of civilization the making of law, like every other activity, becomes a distinct function, and comes to be exercised by the legal profession—the *Jurisprudenz*.[7] In this way the historical school arrived at its famous comparisons between the development of law and the development of language.[8]

Austin found von Savigny's teachings incomprehensible and rejected them as "hollow".[9] More recent writers, however, have pointed out that what separated the two schools was not their degree of truth in representing reality but rather their ambitions. Kantorowicz declared: "When Austin considers law a command of the Sovereign, he tries to justify and explain its binding force;

[5] Something of this is reflected when Adlercreutz, discussing the "legal genetics" of the collective agreement, feels obliged to call this regulation of working conditions "extra-legal" because originally "the parties to a collective agreement never counted on judicial means for its enforcement". See his article "The Rise and Development of the Collective Agreement", *Scandinavian Studies in Law* 1958, pp. 12 and 18; compare his original treatise (see *supra*, p. 131, note 3), p. 4 and note 3.

[6] von Savigny, *Grundgedanken der Historischen Rechtschule* 1814/40, Heft 8 in series Deutsches Rechtsdenken, hrsgb. von Prof. Dr. Erik Wolf, Freiburg i. Br. 1948, p. 6.

[7] von Savigny, *op. cit.*, p. 3 ff. Cf. Strauch, *Recht, Gesetz und Staat bei Friedrich Carl von Savigny*, Schriften zur Rechtslehre und Politik, vol. 23, Bonn 1960, pp. 89 f.

[8] Cf. Kantorowicz, "Savigny and the Historical School of Law", *Law Quarterly Review* 1937, vol. 53, p. 335 and note 29: "The whole comparison... seems to owe its origin to the great jurist's greatest pupil, Jacob Grimm. ..." For more detail about their relationship, see Schoof, "Savignys Begegnung mit den Brüdern Grimm. Ein Gedenkwort zu Savignys 100. Todestag am 25. Oktober 1961", *Neue Juristische Wochenschrift* 1961, pp. 1945 ff.

[9] Lecture XXXIX, n. 83.

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when Savigny considers law as an unconscious emanation of the *Volksgeist,* he tries to justify and explain the contents of the law. Austin's theory is a rational construction, Savigny's chiefly a sociological description."[1]

In the light of the descriptive ambitions of the historical school, it seems that the contributions of contract drafters to the law grow important. If you introduce the mechanisms which dominate present-day commercial law—commercial customs, contract forms, etc.—into the intellectual processes of the historical school, it becomes evident that the ideas and activities of contract drafters form as important a part of the *Jurisprudenz* as ever did those of judges and jurists, indeed that the conceptions of contract drafters are more important than those of judges and jurists in so far as the formation of contract law, its crystallization and change are concerned.[2]

The triumphant progress of the schools of positive law, however, has left von Savigny's historical school to be forgotten. Has it also suppressed altogether all writings on clausal law?

In fact it has not. Whatever opposition the prevailing school of positive law may have raised, a number of books have been produced dealing with clausal law.[3] What has led writers to devote their attention to this is not very certain. It may have been the growing practical importance of commercial forms, or the fact that commerce has hardly ever known a long period of equilibrium and consequently is always in a formative stage, or it may have been something else. Whatever the reasons, the books commenting upon contract clauses exist.

At times this type of comment is merely offered in the course of

[1] "Savigny and the Historical School of Law" (see *supra,* p. 136, note 8), p. 334. Kantorowicz' observation was not new, however. The kinship between the historical school and the sociological school was noted by Bonnecase, *La Notion de Droit en France au dix-neuvième siècle—Contribution à l'étude de la philosophie du Droit contemporaine,* Bibliothèque de l'histoire du droit & des institutions, tome XVIII, Paris 1919, p. 200 note 1. Bonnecase outright characterizes von Savigny "comme un précurseur de l'Ecole sociologique" and even refers to Beudant's work *Le droit individuel et l'Etat,* 1891 edition, for support.

[2] Cf. Strauch, *op. cit.,* pp. 54 f.

[3] The clauses of the "Baltcon" charterparty, for instance, are treated in a number of works. Here may be indicated Rørdam, *Treatises on the Baltcon Charterparty,* London & Copenhagen 1954; and Jantzen, *Haandbok i Baltcon-certepartiet,* Oslo 1925 and 1954. Similar commentaries on shipping documents are Braenne & Sejersted, *Hydro-certepartiet med konossement,* Oslo 1949; and Gram, *Fraktaftaler og deres tolkning,* Oslo 1948 and 1955. Outside the shipping trade, see, e.g., Berg, *Kommentar till de år 1930 i bruk varande trävarukontrakt . . .,* Uppsala 1930.

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a discussion of the case law arising in the interpretation of clauses. Here, basically, the clausal law is nothing but *accidentalia contractus* and is discussed as such. Beyond the presentation of "binding law" the method then explores only what is meant by a certain clause, by a certain expression.[4]

Certain authors, however, proceed further and present more or less independent accounts of the body of clauses. Sometimes they have mainly been impressed by the negative effects of the clausal law, i.e. that it means that "the codified legal rules are set aside to such an extent that they are deprived of their character of law in force in a certain field".[5] Sometimes the more positive results of the clausal law have been considered. Grönfors underlines—within the context of a presentation of legal source materials but apparently without wishing to take a stand as to the merits of clausal law as a positive source of law—that through the standardized clauses there have "arisen extensive regulations of a number of particular contracts where the clauses *may be said* to constitute a small legal order apart".[6] At times authors advance clausal law as the precursor of future binding law. In view of future codifications—which is a reference to the time when the law has passed its formative period—the law of commercial forms ought to be studied now. Godenhielm writes that the law "may develop apart from the codified legal rules" and he wants "to search in what direction the development is going".[7] The aspect of the commercial custom, of course, is also ever-present, that is to say the problem "whether a contract clause in long and common use, belonging to a commercial form or not, has created a commercial custom of independent life".[8]

It thus appears that observers have realized some of the

[4] Reference to economic and social factors, such as what clauses were common, was long considered as rather a peculiarity of commercialists; in particular the German Professor Levin Goldschmidt (1829–97) and the French Professor Lyon-Caen (1843–1935) exhibited great familiarity with business ways and institutions. Being incidental in nature, however, these references never exceeded the frame of a reference to *accidentalia contractus*. Cf. Nussbaum, *op. cit.*, p. 197.

[5] Godenhielm, *Om säljarens bundenhet under ändrade förhållanden*, Juridiska föreningens i Finland publikationsserie N:o 25, Helsingfors 1954, p. 4. (Translation mine.)

[6] At p. 126 in Eek, Grönfors *et alii, Juridikens källmaterial*, Stockholm 1959. (Translation mine. Italics added.) As to the ambiguity of the term legal order ("rättsordning") used by Grönfors, see Ekelöf, "Juridisk slutledning och terminologi" (see *supra*, p. 135, note 4), p. 222.

[7] Godenhielm, *op. cit.*, p. 4.

[8] Sture Petrén, *op. cit.*, p. 498. Cf. Karlgren, *op. cit.*, p. 76.

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problems of all three kinds of clausal law, *contra legem, secundum legem* and *praeter legem*. But the basic legal-philosophical problem has consistently been left untouched. Probably it has been considered irrelevant. Perhaps this in turn reflects the fact that modern legal philosophy has opened up new avenues alongside that of positive law. The new tendencies seek among other things to establish how far law corresponds to factual behaviour in society.[9] And when one looks for factual behaviour the positive law has little to tell.[1] On this point Aubert, Eckhoff and Sveri say: "the principal task of the law never was to describe society. ... The jurist may have indicated how the judge, the attorney and—to some extent—the legislator ought to ... act with some sort of methodological strictness. ... Contrariwise, however, lawyers have not developed any method for a systematic investigation of what actually is happening in society. Opinions in such matters are often insufficiently supported and may in various ways bear the impress of normative views."[2]

The new movements—sociologically-minded as they may be called—have set out to investigate systematically and describe the legal processes. Chiefly they obtain their source materials through interviews as to behaviour.[3] Observers generally agree, however, that the results gained under this new approach are insignificant by comparison with the work and expense required to arrive at

[9] For a general review, see Nussbaum, "Fact Research in Law", *Columbia Law Review* 1940, vol. 40, pp. 189 ff.; and same author, "Some Aspects of American 'Legal Realism'", *Journal of Legal Education,* vol. 12, pp. 182 ff. A survey of the Scandinavian situation will be found in Eckhoff, "Sociology of Law in Scandinavia", *Scandinavian Studies in Law* 1960, pp. 29 ff. See further the following articles in Swedish: Agge, "Till frågan om rättsvetenskapens gränser", *Festskrift tillägnad Nils Herlitz,* Stockholm 1955, pp. 1 ff.; Stjernquist, "Preliminärer till en undersökning om lagars verkningar", *Rättsvetenskapliga studier ägnade minnet av Phillips Hult,* Acta Universitatis Upsaliensis, Studia Iuridica Upsaliensia 2, Uppsala 1960, pp. 413 ff.

[1] Cf., however, Aubert, Eckhoff & Sveri, *En lov i søkelyset—Sosialpsykologisk undersøkelse av den norske hushjelplov,* Oslo, Lund & Copenhagen 1952, p. 10: "It often happens ... that directions, or duty propositions, are interpreted as statements of what is actually happening in the area covered by the directions. ... They often correspond to authoritative demands, supplemented by sanctions, with which many people, perhaps most people, will comply." (Translation mine.)

[2] Aubert, Eckhoff & Sveri, *op. cit.,* pp. 9 f. (Translation mine.)

[3] Aubert, Eckhoff & Sveri have in their work described one such investigation. Further examples will be found in Eckhoff's article "Sociology of Law in Scandinavia" (see *supra,* this page note 9). The purpose to find factual behaviour is also believed to permeate Stjernquist's work *Föreningsfirmans funktion,* Skrifter utg. av juridiska fakulteten i Lund XIII, Lund 1950, see p. 14.

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them.[4] Whatever the merits of the system, however, it is clear that it has relieved writers on clausal law, whether by accident or design, of some of their concern about working in a legal-philosophical vacuum. Indeed, the growing liberty in fixing the purpose of legal science allows a more liberal appreciation of what can be gained by the study of clausal law.

These gains may be formulated as follows. During the formative period the study helps to provide information about the actual form of the contract, at that time the only normative element functioning. Similar considerations apply when searching for the internationalist element. Since international commercial law can to no little extent remain independent of national law by mere resort to a discreet arbitration process,[5] only the study of clausal law can provide information about what is going on. In both cases important information may be found about the directing function of the contract and about the form in which the contract exercises this function. These, obviously, are normative elements. But the possibilities of the study of clausal law are not exhausted thereby. It also provides information about the factual behaviour of the parties after they have concluded the contract. Here it may be that the information must be used with a certain caution. The study will not provide any immediate answer in the search for behaviour. Business policy may dictate that contracts are not enforced exactly as written. The ability of the study of clausal law to show factual behaviour is, however, considerable. In law you can compensate for deviation as well as in navigation. To the extent that there are no indications of a discrepancy between actual behaviour and behaviour prescribed by the contract, one may safely assume that the clauses provide adequate information about the former behaviour.

When put in this way, apparently the study of clausal law has gained an independent life of its own. But this has also meant the

[4] Cf. Agge, *op. cit.*, pp. 15 f.; Eckhoff, "Sociology of Law in Scandinavia" (see *supra*, p. 139, note 9), p. 54; Nussbaum, "Fact Research in Law" (see *supra*, p. 139, note 9), p. 210, "Some Aspects of American 'Legal Realism' " (see *supra*, p. 139, note 9), pp. 185 f.

[5] See on this point Schmitthoff, "International Business Law: A New Law Merchant" (see *supra*, p. 131, note 6), pp. 145 ff. and 152.—Compare the observation by Folke Schmidt & Lennart Geijer that in the period after the turn of the century a tremendous evolution was taking place in Swedish labour relations but that it was untouched by court decisions. "The courts had no opportunity to guide the development already due to the fact that employers and employees generally avoided submitting their disputes to the judges". *Arbetsgivare och fackföreningsledare i domarsäte,* Lund 1958, pp. 341 f. (Translation mine.)

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suppression of the Classical School. Treatises written according to the classical pattern and treatises on clausal law, in fact, speak about different things. We may then ask whether the Classical School can be set aside with impunity?

The answer to this question, of course, lies in what limitations go with any new approach. Limitations here are synonymous with results not achieved. It has been shown what results are not achieved by the Classical School—are there then results which will not be achieved when the new approach concentrating on clausal law, the clausal law approach for short, is applied in order to remedy what the Classical School could not accomplish?

5. CHARACTERISTICS OF THE CLAUSAL LAW APPROACH

Kelsen has emphasized that the word " 'Contract' designates both the specific procedure by which the contractual duties and rights of the contracting parties are created and the contractual norm created by this procedure"; this, he adds, is "an equivocation which is the source of typical errors in the theory of contract".[6]

Accepting his recommendation "clearly to distinguish between the legal transaction as the act by which the parties create a norm for themselves, [hereinafter referred to as "contracting"] and the norm created in this way",[7] it is easily seen that the element of "contracting" belongs to the general law of contract while the law of contracts will centre on the contractual norm, as also will the clausal law approach.

At times the separation between the contractual norm and the element of contracting comes forth very strikingly. The standardized contract document as such may serve as an illustration. At the time of contracting the norm is already pre-existing. The document outlines the legal consequences which will follow when it is contracted upon, but these legal consequences will not become binding upon the parties until the moment of this contracting. When Adlercreutz says that "in the beginning... the parties to a collective agreement never counted on judicial means

[6] *General Theory of Law and State,* translated by A. Wedberg, 20th Century Legal Philosophy Series: vol. 1, Cambridge Mass. 1945, p. 137.

[7] *Ibid.* In Swedish literature, see Ekelöf, "Juridisk slutledning och terminologi", (see *supra,* p. 135, note 4), pp. 249, cf. p. 227.

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for its enforcement",[8] thus suggesting very pointedly that the norm need have nothing to do with the element of enforceability in the law of contracting, he illustrates another phase of the independence of the contractual norm.[9] On a modern and practical level the same theme recurs in Schmitthoff's discussion "whether, in view of the multitude of unforeseeable difficulties which might arise in the performance of a contract, it is possible to devise a [contractual] regulation which is truly autonomous"[1]—that is to say "which makes redundant a reference to a national system of law".[2] While admitting that such a "legal regulation can apply in a municipal jurisdiction only by leave and licence of the municipal sovereign", he stresses that this causes but little "practical difficulty because experience shows that most sovereigns admit it without objection" and concludes that a "practically workable degree of autonomy can ... be achieved if the autonomous regulation is complemented by an arbitration agreement".[3]

The normative element in contract, however, can also be brought into the light by the mere application of a norm perspective to contract. To consider contract as norm is a logical approach to each who realizes that the consequences of a contract can be read from its contents. Viewed from this aspect, every contract clause is normative, i.e. appears as a norm, as a legal rule, in short, as law. Now, the contents of the contract are in this respect not limited to such conditions as are expressly agreed between the parties or written into the contract document. The contents of a contract include all rules which determine the legal effects of the contract in a certain respect, unless the contract is invalid, in which case they do not apply. Thus, the contents may be filled from various sources. There are those materials which form what

[8] "The Rise and Development of the Collective Agreement" (see *supra*, p. 136, note 5), p. 12.

[9] Cf. Ehrlich's statement that "for a century, at least, a large part of the business transacted at the Exchange has been beyond the bounds of the legally enforceable...": *Fundamental Principles of the Sociology of Law* (translation by Moll of *Grundlegung der Soziologie des Rechts*), Harvard Studies in Jurisprudence 5, Cambridge Mass. 1936, p. 110.

[1] "International Business Law: A New Law Merchant" (see *supra*, p. 131, note 6), p. 145.

[2] *Ibid.*

[3] *Ibid.*—Compare Battifol, "Conflict Avoidance in European Law", *Law & Contemporary Problems* 1956, vol. 21, pp. 579 ff.: "recent experiments, such as that of the Scandinavian Airlines System, show that the refusal to subject the contract or creative statute of a company to a particular body of [national] law raises the necessity of providing for an arbitral jurisdiction that will create the rules necessary for the fulfillment of the contract or statute".

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I have called the contract proper,[4] viz. those norms which are immediately contemplated by, and supported by the will of, the contracting parties. Further, there is the category of contract-building rules,[5] by which I mean the clausal law which is not included in the contract proper as well as the classical supplementing rules. From the point of view of contract as law there is little reason to attach decisive importance to such matters as whether the contract rule in question stems from regular legislation, administrative fiat or mere agreements of industry-wide character. I have therefore felt it useful to adopt a terminology which provides a common denominator for all these materials outside the contract proper.

When the contractual norm is completely separated from the element of contracting, as in the case of the standardized contract document prepared in advance, it is normally not a legal fact. It will not become a legal fact until the moment of contracting. Once the parties have contracted, however, their transaction is a legal fact. It is then possible to apply the fact perspective.

The quality of contract as fact may be described as its being the symptom of certain societal conditions of particular interest to governmental representatives—whether they be legislators or administrative agencies or courts. Therefore the fact perspective is the perspective of the governmental representatives *par excellence*. Such a symptomatic function, of course, underlies the general rule *pacta sunt servanda*. Here the legal fact is contract as such, the legal effect is that the obligor is forced to live up to his promise. But the symptomatic function underlies the supplementing rule as well. Here the legal fact is not contract generally but contract of a special character. The legal effect is the force applied to

[4] See my paper "Avtalstyper och typavtal", *Sv.J.T.* 1961, p. 12. The terminology is also discussed in my paper "Charterparties and Contracts of Carriage" which was submitted to the New York University School of Law in January 1960 in partial fulfilment of the requirements for the M.C.J.

[5] See "Avtalstyper och typavtal" (see *supra*, this page note 4), p. 13.—It must be observed that in the proposed system there is no room for rules of interpretation. In so far as they contribute to the determination of the common intention of the parties, they add nothing to the contract proper. For the rest they are mainly rules for the negotiations, that is to say—as put by Schmidt—"To a great extent, rules of interpretation have the character of standards for the contribution of the parties towards the creation of the contract." See his work *The Law of Labour Relations in Sweden*, Cambridge Mass. 1962, p. 107. Further rules of interpretation are probably best classified as rules to prevent too arbitrary an intervention into the contract by the courts. Since we wish the legal consequences of a contract to be reasonably foreseeable, we cannot permit the courts to rewrite the contract between the parties unfettered by all rules.

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establish that solution which is prescribed by the supplementing rule. The author of the supplementing rule, accordingly, does not consider the contract as such, he looks at it as the symptom of the particular type of situation in which he wishes to intervene by prescribing a certain type of behaviour. The *essentialia* of the contract serve as indicators of this type of situation. Moreover, even clausal law as such may have a kind of symptomatic function. From a statistical point of view it may be informative to courts and legislators as to what is normal in the trade.

The classical rule of scientific treatment—the aim of science being to reduce chaos and multiplicity to unity—is to group the similar and separate the dissimilar. It is then important to note that, as applied to the contractual norm, this rule will lead to different results depending upon what perspective is applied. Similarities are not the same under the fact perspective and under the norm perspective. Under the fact perspective there is only reason to gather what is symptomatically similar. The centre of the presentation will be the symptomatic values of the contract particulars to the governmental representatives. But the fact perspective is much broader than the law of contracts as such. It is as broad as governmental interest and action. Whenever governmental intervention in a situation is discussed, the particulars of that situation become relevant and the fact perspective will be applied. Considering this it is logical to select as the object of study such matters as the protection of *bona fides* in the turnover of commercial goods, or the general regulation of civil liability. It does not follow with the same logic that the contract types or the standardized contract forms are similarly to be dealt with. What reason could there be to gather together the symptomatically dissimilar merely because it is found within one contract type? The contract type as such, as already noted, usually has only one symptomatic function and that is to indicate a type of contractual situation, a certain kind of human relationship. The contract particulars perhaps have more precise symptomatic functions but, on the other hand, they are likely to have counterparts outside the boundaries of the contract. The conflict here imbedded has been rendered acute by the tendency, much nursed since the later school of natural law, to gather separately from the law of contracts the rules common to all kinds of obligations.[6] The codification of those rules, on the Continent in the great systematic codes

[6] Molitor, *Grundzüge der neueren Privatrechtsgeschichte*, Karlsruhe 1949, p. 37.

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and in Scandinavia in such minor pieces of legislation as the Contracts Act and the Promissory Notes Act, has, of course, added weight to the controversy. Considered from the angle of this tendency the question may also be put in the opposite way: What reason could there be to separate the symptomatically similar elements found in a number of contract types merely because they are so found? While the conflict may often boil down to one of the better arrangement of contract materials, it is certainly a living problem in jurisprudential writing[7] and occasionally, when on a certain point the law of contract is in conflict with the law of contracts, it may lead to court cases.[8]

As to the standardized contract form, it may happen that its symptomatic value is simply too doubtful to permit a profitable use of the fact perspective. Occasionally one and the same form is used for transactions as to which the government pursues very different policies.[9] The absence of a symptomatic value, of course, not only reduces the desirability of applying the fact perspective but destroys the very possibility of doing so.

Under the norm perspective, on the other hand, the symptomatic functions cause no difficulty. The considerations now accounted for are secondary and subordinate. It is natural to treat contract types as well as standardized contract forms. By assembling the clauses under their respective patterns the principle of grouping the similar and separating the dissimilar will be satisfied. The

[7] Undén, *Panträtt i rättigheter*, 2nd ed., Lund 1923, p. 2, observes: "The contract of sale signifies one systematic entity, although it contains such different species as the transfer of title and the assignment of claim". (Translation mine.)

[8] E.g., 1961 N.J.A. 192 (*Karin Norrman* v. *Daga Modinger*). In this case the Swedish Supreme Court had to decide upon the effect of the delivery of three receipts issued by the National Debt Office (Riksgäldskontoret) in return for state bonds received in deposit and entered in the National Debt Register (Statsskuldboken). The document delivered could either be considered as a mere receipt within the framework of a contract of depositum, in which case the right to receive the bonds was determined by the *naturalia* of this contract type; or it could be considered as a kind of promissory note, in which case the rules applicable to such notes would apply regardless of what kind of contract was involved. The decision indicated a preference for a mitigated variant of the latter alternative, so that the Office, which had considered the receipts under the aspect of the law of contracts, must thereafter reconsider them under the aspect of the law of contract.

[9] One example of this may be found in my work *Air Charter* (see *supra*, p. 126, note 5), p. 235 and note 486, cf. p. 140 note 35. The standardized forms used in conditional sales contracts may serve as another example. The same form is often used whether the goods sold are valuable or not, but governmental policy in this field often attaches decisive importance to the price of the goods.

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area of investigation need only be limited according to the concentration of vegetation and its outer boundaries will be set by the name of the contract. This perspective guides us towards the aim of elucidating the formation of norms, arranging them in intelligible categories and deepening our understanding of the development of law.

What results then will follow when the clausal law approach is considered from each of these separate perspectives?

The clausal law approach can seldom make profitable use of the fact perspective. The reason for this is the difference between private and public norm-givers. The legislator's norm-giving enjoys conditions quite different from those prevailing when the contractual norm is set by private parties. Attempts to assess the norm-giver's intent depend for their success on those conditions. If the attempts fail, the fact perspective must be abandoned, because its rationality cannot be utilized.

How then is the norm-giver's intent identified? In Continental law a number of rules exist about how to establish what was the intent of the legislator.[1] This intent is permeated by legal reasoning. While the legislative body itself may be lay, it is guided in legal matters by a staff of highly skilled lawyers who are trained in the legal affairs of government. This staff undertakes all the *travaux préparatoires* leading to a piece of legislation, down to the very bill itself. The legislative intent is derived from these works.[2]

In the case of clausal law, however, the intent behind the clause

[1] For a general discussion of these matters, see Folke Schmidt, "Construction of Statutes", *Scandinavian Studies in Law* 1957, pp. 155 ff.; and Ekelöf, "Teleological Construction of Statutes", *Scandinavian Studies in Law* 1958, pp. 75 ff.

[2] It may be proper to note here that the situation of the international convention is somewhat different, more akin to the clausal law situation. While the convention is normative, it is not normative in the same way as a piece of national legislation. To a certain extent it lacks legislative intent. Its internationalism excludes the will of the national governments from any active role. Obviously, there is no international will of government. The convention is effective not because of any international legislator but because of a number of national legislators. At the same time the latter are deprived of their normally active role because of the internationalism of the convention. This internationalism is the expression of a desire for uniform regulation. It cannot then permit national deviations. The national legislator must adopt it passively and the convention in turn must be interpreted more passively than national legislation. Here, therefore, one should rarely refer to any legislative intent but should stick to an analysis of the language of the convention and its construction. It is understood that this resembles somewhat the task of an English common law judge who, at least in principle, is not allowed to look further for legislative intent than into the words of the pertinent statute itself.

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is a very elusive element. Not only are there two classes of norm-givers involved, but moreover persons belonging to one of these classes often are indifferent to legal argument.

First, the process by which the norm arrives at its effect is two-fold. On the one hand, there is the decision of the contracting parties; on the other hand, and normally found to be separate therefrom, is the decision made by the draftsman. The very setting from which the norm emerges, obstructs the parallel to the legislator's situation. Only in the case of the so-called "agreed documents" can one say with some assurance that the decision of the contracting parties is rendered so relatively unimportant that the norm-giver's intent is for practical purposes constituted by the draftsman's intent. The role played by the documentary committee which drafted the form may here be equated with that of the legislator. With this exception, however, no equation of the two norm-giving situations seems possible.

Secondly, it must be realized that, when it comes to the contract-building rules, the contracting party is, to a certain extent, indifferent to legal argument when he adopts the norm. Accordingly, he is not too responsive to the rationality of the fact perspective. We deal here with the decisions of commercial men. Their process of motivation is lay, not legal. To them the exact meaning of the clauses is not very important. Nussbaum reminds us, as to uncertainty in the interpretation of clauses in overseas sales cases, that it "seems to be more annoying to jurists than to business men who in case of doubt resort to compromise or arbitration".[3] Accordingly, whatever compliance with the contract-building clauses may be anticipated, it seems certain that their adoption cannot be expected to be an exact science. There is considerable margin for the irrational. Even among lawyers, evolution is not always guided by well-considered, rational factors. Tunc reminds us about the "radiation" of the law of those countries which by the force of events have arrived at particular political and economic importance.[4] We have an example of this radiation in

[3] "Fact Research in Law" (see *supra*, p. 139, note 9), p. 203. Cf. E. G. M. Fletcher, *The Carrier's Liability*, London 1932, pp. 222 f.: "Whereas the lawyer is instinctively suspicious, and foresees potential difficulties more or less remote, the merchant has a high proportion of transactions in which nothing in fact goes wrong. Hence he takes chances. It pays him to do so. He assumes that a contract of carriage offered to him is fair. Usually the goods arrive safely. His chief concern is the amount of the freight. Nothing will induce him to read an enormous list of conditions couched in a jargon almost incomprehensible and printed in the smallest of small print."

[4] "English and Commercial Law", *Journal of Business Law* 1961, p. 240.

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Eckhoff's note that "in the years since the second world war Scandinavian jurisprudence has to some extent shifted its orientation from the European continent to England and U.S.A. . . ."[5] This irrational but guiding element may be described as the appeal of the fashionable. It certainly operates on commercial men also. This leaves room for the proposition that, as guided by clausal law, commercial law may develop like language, i.e. by the impact of silent, anonymous forces which are not directed by rational intention. So phrased, the formula amounts to a partial restatement of the once famous proposition of the historical school.

The response to be expected in the area of clausal law accordingly is such that the fact perspective will only exceptionally be allowable. This reluctance will have repercussions also as to argument *de lege ferenda*. While it certainly must be perfectly permissible to recommend what clauses merchants should adopt, most jurists will feel unwilling to do so in view of the very slight response which can be anticipated. Even the intellectual understanding of legal argument may be expected to be slight with merchants. On this point there is a marked difference in comparison with the legislator whose acts may not be easily influenced by the legal argument of jurists but whose understanding of legal argument is above suspicion.

As a result the clausal law approach will mostly be assimilated to the norm perspective. The principles for jurisprudential writing will be selected accordingly. Arguments *de lege ferenda* will seldom appear except perhaps when "agreed documents" have been developed. Adopting an idea of Rühl,[6] the university teacher—who can say that he is independent of pressure groups and economic politics—should assume the tasks of sharpening the eye for the defects in the forms set up by powerful economic groups in furtherance of their own interests and of indicating the control on clausal law exercised by such groups. But beyond the observation of the real and reasoning in the hypothetical in close connection therewith, the clausal law approach will seldom go. Broad discussions of what is desirable are likely to be conspicuously absent.

This passivity will substantiate an expectation with which the sociological orientation of the clausal law approach is associated. Gény once observed that the sociological method had little to

[5] "Sociology of Law in Scandinavia", (see *supra*, p. 139, note 9), p. 46.
[6] Helmut Rühl, *Juristischer Anschauungsstoff–Bürgerliches Recht,* Berlin 1931, Preface.

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offer in respect of the ascertainment of the aims to be followed in directing societal life. The sociological method was concerned with "l'observation de la vie sociale". "Etant donné l'étroitesse de son point de départ", no such ascertainment of aims was possible. "Sur ce point l'échec de la doctrine est complet."[7]

The fact that in this way the clausal law approach inclines to be passive, however, can be no objection to it since it is not meant to replace the Classical School. Its function is to supplement this school in the areas where the latter is unable to achieve results. When analysed, its peculiar blend of sociological orientation and normative views seems theoretically sound. Within its limited sphere of application it can hope to perform important functions. In a society subject to rapid change, and with the law of contracts otherwise limited to aging enactments relating to a few particular contracts, it does not seem unlikely that the clausal law approach may become the most important contributor to the law of contracts.

[7] *Science et technique en droit privé positif*, tome II, 2nd printing, Bordeaux 1927, pp. 82 ff.

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