THE FREEDOM TO CONTRACT—A COMPLEX CLUSTER OF RULES

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1. People often say of the weather that everybody complains about it but nobody does anything. One might possibly call this somewhat resigned opinion to mind when the subject of contractual freedom comes up. It is indeed a concept that lends itself to ceremonial proclamations, promises and demands made in general terms; but it is very seldom that one finds attempts to analyse with full precision the factual and legal circumstances implicit in any effective realization of this freedom.

In a respected Swedish textbook by a well-known expert in the field of competition, marketing and consumer protection, it is stated quite simply that contractual freedom is "the freedom to decide whether and with whom to conclude a contract and to give that contract such content as the parties to it may agree upon".[1] In a monograph by the same author a somewhat fuller definition is given, with the statement that contractual freedom is a main principle of the market economy system. "Competition for buyers on the market assumes, in order to function, that the freedom to contract prevails. The freedom for seller and buyer to agree on a price here normally appears particularly significant. Contractual freedom, however, like freedom of trade, is a concept of many components, and freedom cannot be conceived of as unlimited. Consequently the law must, for polity, social or similar reasons forbid certain forms of agreement. In other cases, owing to what has obtained between the parties, contracts cannot be allowed legal force. A parallel may be drawn here with freedom of competition, which, as mentioned, is limited by the boundary-marks of what measures may be considered warrantable.

It may be important to note the difference between the freedom to decide whether and with whom one wishes to conclude a contract and the freedom for the contracting parties to give the contract such content as they may agree upon. Normally these two sides of the matter are closely linked. When contractual freedom is limited by special rules of various types, however, it is common for these to refer to the content of the contract only in certain respects. Such, for example, is normally the case with price control regulations."[2]

[1] Ulf Bernitz, *Svensk marknadsrätt*, 2nd ed. Uddevalla 1986, p. 14.
[2] Ulf Bernitz, *Marknadsrätt*, Stockholm 1969, p. 27.

By and large, contractual freedom has not often been discussed in any detail in Swedish legal writing.[3] Contractual freedom has been taken for granted.[4] The same applies, moreover, to the majority of modern states with a legal system of Western type. It is all-too-easily forgotten that sweeping characterizations of contractual freedom as one of the legal foundations of a certain social system are in fact greatly compressed descriptions of a legal state of affairs arrived at only after much time and no little trouble.

In this paper we shall first attempt to give a theoretical analysis of what "contractual freedom" must with reasonable logical necessity imply if it is to be even a modestly approximative concept. There follows a review of what might be termed the most important conflict surfaces between contractual freedom and a society of modern Swedish type.

The concept *contract* must, for reasons of economy of presentation, be taken for granted, and the question "what is it that makes 'contracts' binding?", which belongs more to the history of ideas than to practical law or to jurisprudential analysis, must also be left aside. Let us merely note that it is—and *was* perhaps to an even greater extent in the heyday of liberalism more than a hundred years ago—a very common claim that *the contract* lay at the heart of the modern industrial/commercial state, as the mechanism with whose help economic forces were mobilised with maximum efficiency. "What an enormous step forward in human history it was when the rule was established that contracts are binding. That was the rule that made trade and turnover possible." Thus a famous Norwegian work from the beginning of this century.[5] Against the modern dynamics of the contract was set the older static nature of the status-bound society; in the liberal view of development, the development of law consisted broadly of a shift *from status to contract*, to quote one of the best-known representatives of this simple and comforting view of history, Sir Henry Sumner Maine.

2. What then is "contractual freedom" in terms of general rules of law; what conditions must be fulfilled for such freedom to be possible, and what consequences follow inseparably from a functioning contractual freedom?

There seems to be reason to distinguish four phases, or four ele-

[3] A useful presentation of principles is Håkan Nial's essay in *Minnesskrift utg. av Juridiska fakulteten i Stockholm vid dess femtioårsjubileum, 1957*, Stockholm 1957, pp. 190 ff.

[4] See *SOU* 1974:83, p. 31; see also Stig Strömholm, *Rätt, rättskällor och rättstillämpning*, 3rd ed. Stockholm 1988, pp. 172 f.

[5] Fredrik Stang, *Innledning till formueretten*, 3rd ed. Oslo 1935, p. 4.

ments. (1) First and foremost, it is meaningless even to speak of contract or contractual freedom unless there exists an accepted principle that human beings (legal entities) can *independently and voluntarily commit (bind) themselves and another party*. The meaning of "commit" will be considered shortly; it suffices here to note that it implies some kind of legal effect. Nowadays this possibility of modifying legal reality through agreement between individuals appears self-evident. This is not so, of course, even though it is hard to see how a society would function if it totally denied any effect whatsoever to people's expressed wishes in matters concerning them. Intermediate forms are easier to imagine, for example social orders that require more or less comprehensive formalities, fees, controls and so on before accepting the form of law creation that the mutually binding contract represents. Historically, such intermediate forms are more common than systems of total contractual freedom. Also, comparative reflection shows more clearly that confidence in the individual's ability to foresee his actions and their consequences, which may be assumed to find expression in an extensive "contractual freedom" in this sense is rather unusual. In states directed by economic planning, the sector that is freely at the disposal of individuals in this way is relatively narrow: public property such as land and artificial means of production is simply withdrawn from independent responsibility of this nature. Historically, the situation is the same, particularly if one considers what a small portion of the existing utilities in, for example, a mediaeval agrarian society were seen as having an exchange value and thus as suitable objects of "contract".

(2) Secondly, it must be *permitted in theory and possible in practice to conclude contracts and to abide by them*. Societies can be imagined which, though they recognize the theoretical possibility of committing oneself and others, raise such significant obstacles in practice that no contract worthy of the name can actually be concluded. If for example rights in all property of genuine importance in a given society are excluded, or if the conclusion of contracts regarding work performed or cooperation in work is not allowed, then the principle that it is legally possible to commit oneself becomes so attenuated as to be unrecognizable. Thus in medieval Nordic law, for example, the chief object of wealth—landed property—was subject to ties (in the interests of the extended-family society) that in practice rendered free contracts for the sale of such property impossible.

It is obvious that this element in contractual freedom lies very near, and appears fundamental in relation to, certain other economic and personal freedoms normally asserted to be essential in modern market

economies: the freedoms of association, of establishment and of trade. Some form of freedom of association, i.e. the possibility of cooperating with others without hindrance, is hard to realize unless certain fundamental contracts are possible and legally binding. Freedom of establishment likewise presupposes the lawfulness and the binding force of at least some basal agreements; were these (for example contracts to acquire premises, hire contracts, certain work contracts) not possible, a form of "establishment" could scarcely come about. Similarly, it is hard to see how an economy of any real significance can be run without a considerable number of typical contracts.

(3) *The freedom* to conclude contracts without hindrance from the public power would obviously be worth little unless the legal system granted these agreements some form of *legal protection*, i.e. *sanctioned breaches of contract* in some way.

This statement underlines the special nature of contractual freedom, and thereby also certain difficulties in its juridical formulation: while freedom of trade, for example, in theory (and disregarding its practical implications) expresses a claim on the part of the individual to be "left in peace", contractual freedom in reality includes *a requirement for active support* from the legal system: that the sanctity of the contract be upheld by the legal machinery. This observation, too, leads on to the statement that contractual freedom is "primary", or fundamental, in relation to other economic freedoms. The wish of the businessman to be left in peace obviously gives him, in practical terms, little of economic and social interest: unless the legal system protects his contracts with suppliers and customers, the "peace" he seeks is practically without value. In the same way the possibility of voluntary agreement with a freely chosen partner is an essential element in the *owner's* ability to employ his property for economically active purposes. The right to destroy or throw away one's possessions is hardly of particular interest from an economic point of view.

It is normal when discussing what are termed human rights and freedoms to distinguish between "negative" and "positive" rights. Swedish law has—with good reason—rejected the latter (for example the right to work or to somewhere to live): a society *cannot*, for purely practical reasons, assume such obligations, although it is quite another thing for the community to *strive* to meet such needs. The "negative" rights imply that the state shall refrain from certain intervention. We see, however, that no meaningful "contractual freedom" is really possible without the positive elements which the demand for legal sanction of breach of contract implies. "Contractual freedom" is consequently not

merely a *freedom* from public intervention: it is also a *claim* for public action.

A more limited variant of "full contractual freedom" is when the community makes itself available for the enforcement of *certain* special types of contract (*pacta vestita* in Latin; in French *contrats nommés*). In former times this view was represented by certain jurists: legal protection was given to such types of contract, e.g. purchase, exchange, leasehold and hire, as were "recognized" in the law books. Development has, however, moved generally in the direction of full recognition of all types of contract, including so-called *contrats innommés* (*pacta nuda*). Nowadays the recognition of, i.e. the "service of implementation" of, agreements freely composed as to content is probably viewed in many quarters as an essential component of the concept "contractual freedom".

(4) Fourthly, the *form of the legal sanction* is obviously not without importance. Again "contractual freedom" shows its *positive* side, its *claim* not merely that the social order refrain from intervening in a certain legal position but also that this order be formed in a certain way. This aspect is illustrated most simply through a comparison between legal systems that make their apparatus of sanctions available for the *enforcement* of the claim of a negligent party to a contract (English law speaks of *specific performance*) and those that support the interest of the wronged party by imposing upon the offending party an economic obligation (damages). The difference is clearly very great. To give one concrete example: in a noted decision of a Swedish court in 1957 (1957 SvJT 24), an author was enjoined, on pain of a certain fine per day elapsing without fulfilment, and in compliance with a contract entered into by him, to produce and deliver to a publisher a certain section of a planned handbook. The case is extreme. For natural reasons it is unusual for an intellectual production of this type to be extorted through legal compulsion. Another possible form of implementation is that the party entitled to the product or service be authorized to have a third party supply the product or service of the negligent party at that party's expense. The most usual solution, however, is that contractual obligations not met in time and in the correct manner are dissolved, as it were, through an obligation to compensate the wronged party economically for damage arising through the default.

Here it should be added that there is probably a connection between the degree of willingness of a given legal system to recognize as legally valid and binding practically every reasonable contractual content, and the forms of execution used by that system. If the forms—as has for

centuries been the case in Anglo-American *common law*—are limited to compensation only, it is clearly easier and less "risky" to accept all contracts. If, however, the system admits "specific performance" with legal enforcement, it would seem reasonable to "censor", as it were, the legally valid forms of contract with regard to content (and thus confine oneself to or, at any rate, prefer) *contrats nommés* or at least fairly well defined *types* of obligation.

Given this latter argument, it may be appropriate to pause to ask whether, if one is to maintain that a given legal system is characterized by "full" or "total" or "highly developed" contractual freedom, one should require that the system make its enforcement apparatus available to virtually all reasonable voluntary assumptions of obligation, or whether on the contrary one should stress the possibility of obtaining legal aid to achieve exactly those utilities (actions or whatever) one has secured through contract. The answer is clearly that the linguistic usage that is content with the unqualified expression "contractual freedom" is quite simply too unsophisticated and could well be avoided in more demanding contexts.

3. Contractual freedom is not, has never been, and can never be unlimited, even if when defining the concept one settles for the first three of the above elements and refrains from seeking the correct point of balance when determining the content of the fourth point. Actually, it is only in what may be broadly termed the "economic" field that far-reaching freedom has existed and continues to exist.

Consequently, there can hardly have been—at any rate in the modern West—a period or a state in which contractual freedom has obtained regarding what is perhaps the most important of all contracts: *the formation of the family*—matrimony. A number of reasons, varying from period to period, have been at work here: ethical and religious principles, the community's interest in the growing family and its upbringing, and so on. Even in our time and in our country where the majority of religious principles have been suppressed and the ethical aspects of human cohabitation, particularly sexual life, have to a large extent been replaced by "liberty" for the individual and passivity on the part of the community, society supplies partly imperative rules covering the partners' legal relationships. The whole of the traditional legal distinction between *peremptory* rules, i.e. rules that cannot be waived through contract, and *optional* norms which may therefore be "contracted away" represents a concrete and still very significant reminder of this distinction.

What has been exemplified by reference to the laws of matrimony can be generalized: in questions affecting *persons*, as opposed to *possessions* and *rights of property*, contractual freedom has always been greatly limited. There are also, however, fairly comprehensive areas of property law in which the public power has long, in some cases probably for as long as social order has regulated relationships, circumscribed individuals' liberty to settle their affairs freely between themselves through mutual agreement. Examples—in our country—are the division, disposal and mortgaging of land, at least in rural areas. Whether the dominating counter-interest has been the family-based society's watch over the fixed property of the extended family, the demands of the village community for conformity with its circumstances or the interest of the Crown in maintained taxability, individual legal actions with agricultural land as object have been denied validity unless they comply with the conditions laid down by society.

Considerations of the same type as those referring to land have very long been expressed in legal obstacles to free contracts concerning certain scarce utilities important for the national economy, for example mining deposits, particularly desirable objects of taxation such as alcoholic beverages or goods controlled for other reasons, such as weapons and explosives.

To the limitations mentioned may be added the prohibition on the unlimited conclusion of contracts in favour of a person not born at the time of the contract. The reason here, as for the rule introduced at the same time on wills in favour of the unborn, is the desire to avoid *commitment* of property for over-long periods. The entailment (in favour of male heirs with primogeniture) of real property became legally impossible in Swedish law as early as 1810: the reasons were probably different from those underlying the prohibition of entailment of personal property.

It is thus not hard to find limitations to contractual freedom—however one then defines the concept in general—which have been explained by consideration for the true or represented opposing interests of the collective (which is another way of saying that *decisions* regarding the *utilities* or the *import* referred to in this connection should, it is considered, rightly be taken in forms other than through free expression of the will of the individual, that is, through political decisions, through a statutory legal or administrative procedure or similar). At the other end of the scale we find a group of contracts which again in some measure illustrate what is complicated—and contradictory—in the very formation of the concept "contractual freedom". These are agreements that are of

such little importance that the legal system does not even make itself available for their sanctioning. A young man and a young girl agree to go to the cinema together one evening: they fix a time and a place to meet. One party does not turn up. Should the other come upon the improbable idea of wishing to enforce the agreement or receive compensation for what is in effect a clear and obvious breach of contract, there is no help to be had from the legal system. *De minimis non curat curia*. Such contracts are, if you will, *totally free*. Within a broad sector of private and social life there obtains a kind of anarchistic "contractual freedom" with an entirely different content than elsewhere. It should moreover be added that it is hardly the scant importance of the breach of contract *itself* that explains the passivity of the legal system; it is rather the predominantly subjective and non-economic nature of the damage incurred.[6]

Disregarding the *family law* limitations to contractual freedom and those *associated with certain personal property* mentioned here, it appears reasonable to describe the position of the law in our country as it has appeared since the decades immediately preceding the turn of the century, in such a way that the *basic principles* for legal regulation, at least in the sphere of property law, are that contractual freedom obtains and that contracts shall be observed according to their wording. The *technique of control* selected by the legislature (and the best *legislative technique* in terms of economy of presentation) was and remains, against this background which is nowhere expressed in the legislation, to regulate only conditions and forms for the *coming into being* of the contract, *conflict situations* reasonably likely to arise, and *deviations* from the basic principles. Another general principle—likewise not expressed—is also fundamental to legislation and unwritten law: contracts are free as to form; only *the exceptions* from this principle are explicitly stated, for example in the form of rules regarding the written nature and witnessing of contracts concerning real property or the drawing up of deeds of marriage.[7]

4. Even in legal systems with almost complete "contractual freedom" as defined here, exceptions from this are made in a number of cases analysed a very long time ago—since the heyday of classical Roman law in the 2nd century AD. Here, enforcement of contracts according to

[6] Cf. the "photograph case" and the "dream case" in Strömholm, *op.cit.* in footnote 4 above, pp. 29–31.

[7] Regarding these legal and legal-technical principles, see *op.cit.* in footnote 4 above, pp. 172 f.

their content meets with various types of moral or social-ethical disapproval.

Here belong first and foremost those cases in which one party is under age or has acted while of unsound mind.

Here belong also a number of type cases that were not regulated systematically in our country until the 1915 Contracts Act: situations where contracts have been concluded under duress in the form of violence or threat involving pressing danger, or milder types of coercion; contracts made through the exercise of fraud; cases of usury, that is, where a person has exploited another's distress, imprudence, improvidence or position of dependence to appropriate unreasonable benefits to himself.

Of old—albeit in varying forms and for varying reasons—*mistakes* made by one party to a contract have been considered to free that party, to a greater or a lesser extent, from his contractual obligations. The way in which—from the first heyday of rational natural law in the 17th century right down to our times—lawyers have related the rules on *when* (at what exact point in the negotiations and preparations) a contract becomes binding upon the parties, and *under what circumstances* release from its obligations may take effect, to various psychological factors such as the party's *will* or *understanding*, appears when viewed from some distance to be an expression of the attempt to achieve consistency in the system rather than the result of a genuine trial of different possible solutions from case to case. Such a way of arguing has often since been clothed in the dress of a pragmatic assessment of fairness, with definite reasons given for and against one solution or another (and these often appear to have equal value), and this is a part of the way the law works, with its striving for rationality, logical context and absence of contradiction.

During this century the moral demands on contractual negotiations and parties have become more stringent, probably under the impression of a more "social" view of commercial life and of the dramatic and for some categories not infrequently disastrous economic upheavals that have occurred. The Swedish Contracts Act, 1915, originally contained some special rules for extreme cases; the most far-reaching was sec. 33 which provides that a legal act which would otherwise be regarded as valid should not be upheld if the circumstances under which it was initiated were such that to invoke it with knowledge of them would conflict with faith and honour. In 1976, however, a provision in very general language (sec. 36) was inserted, which empowers the courts wholly or partly to set aside contracts and contractual conditions which

may on general examination prove to be unreasonable. In this examination, as stated in the second paragraph of the section, particular consideration is to be paid to the need of protection for the party who, as consumer or otherwise, assumes an inferior position in the contractual relationship. Both when it was inserted and since, this rule has been criticized with some severity. The courts have hitherto been very restrained in applying it.

It is quite possible to trace the critical and the positive attitudes regarding sec. 36 of the Contracts Act to more positive or less positive views of *contractual freedom*. While discussion of the provision has been marked by elements, or at least traces, that have exceeded legal technique and reached ideological heights, there is no doubt that it has been described as a new and significant interference with this freedom. On the other hand, since those involved are the general courts and since the yardstick for corrections is "reasonableness", it appears that we are remaining within classical territory, as it were, regarding the technique for dealing with, and the purpose of, limitations made to this freedom. From this point of view, which is neutral as to legal policy, and technical, the method chosen is debatable in many respects.

The first paragraph in sec. 36 of the Contracts Act states that terms "may be adjusted or disregarded" if certain circumstances obtain. The auxiliary verb "may" indicates, following normal linguistic convention, that the provision opens one or more special possibilities not otherwise available to the courts. It implies a *permission*. What, one may wonder, would the legal position have been if this possibility had not been created? The surrounding rules in chapter 3 (secs. 28–35, 37 and 38) of the Contracts Act should be examined to find an answer. Characteristic of them all is that they are "*shall-rules*", and that the sanction stipulated is that the contract in question *shall lack validity* vis-à-vis the injured party. The contract, it is stated—in varying linguistic forms—"shall be void" (= "shall not apply") against this party, or "cannot be invoked" against him.

What then is the relation between sec. 36 of the Contracts Act, according to which the courts "may" set aside or adjust a part of the content of a contract, and the special rules regarding invalidity in secs. 28–35, 37 and 38? On a first comparison it is striking that while the latter rules appear to be directed at the parties (a legal act is invalid or without effect regarding one or other party; a party may not assert a legal act), sec. 36 appears directed at the courts. This difference, however, is superficial; it is one of language. Rules that by their wording lay down how the parties "can", "may" or contrariwise "cannot" or "may

not" act are of course at the same time directions to the court on how a dispute is to be judged in given cases. Thus these rules can without change of meaning be re-written as rules for the courts: if for example there is constraint/duress of the type defined in the first paragraph of sec. 28 of the Contracts Act, the court *may* not give judgment obliging the constrained party to fulfil his obligations under the contract; the court *shall* instead dismiss the other party's action for performance; it *shall* if the constrained party brings an action for a declaratory judgment regarding the invalidity of the contract, find according to this claim. The invalidity rules can thus be read as *prohibitions* directed to the courts regarding judgments of a certain content or as *directives* regarding judgments of opposite content. The essential difference between the provision in sec. 36 and the other relevant rules in chapter 3 of the Act thus has nothing to do with *those to whom the rules are addressed.*

What is singular about the broadly worded provision in sec. 36 of the Contracts Act is the power it affords the courts (under customary procedural conditions), first, of invalidating all the terms of a contract on the basis of a more liberal examination of the contractual relation than the traditional chapter 3 rules allow. Secondly, the courts may *invalidate only part of the content*, and thirdly they may *replace this part with new, adjusted terms* instead of declaring the contract null and void.

It is thus possible to determine the relationship between the specialized invalidity rules and the area of application of sec. 36 in such a way that if legal facts obtain according to one of the invalidity rules, the court *shall* treat the whole contract as invalid. If this is not so, the court *may* under the new provision make a more or less far-reaching reduction or adjustment of the content of the contract.

The legislative technique thus chosen raises questions that must be touched upon here since they illuminate the problems of *any* interference with contractual freedom within the frame of "classical" legislative techniques. Assume that one party invokes and offers proof of one of the facts named in the invalidity clauses but seeks partial invalidation or adjustment of the contract. *Can* the court use sec. 36 to allow the suit? This seems very probable. *Shall* the court allow the suit? In other words, does the permissive rule in sec. 36 become a "shall-rule" instead of a "may-rule" because the facts are of the nature of those occurring in the *unconditional* invalidity rules? The answer is probably in the negative. Parties that can show a clear case of invalidity have an unconditional right to a judgment of invalidity but cannot with the same evident right claim partial disallowal or adjustment. The court has discretionary powers to rule on legal consequences of the latter type. Is it thus

possible that parties citing and supporting facts that give grounds for invalidity but seeking, for example, only a certain degree of adjustment may have their action dismissed whereas the same action would have been upheld if complete invalidity had been sought? Theoretically—granted, the case is impractical—such a result appears possible. It is by no means self-evident that a claim for adjustment would be "less" than—and thus on the principle of *majus includit minus* (the greater includes the less) a part of—a claim for complete invalidity. It is clear from the wording of sec. 36 that the author of the text had in mind that an adjustment claim can in certain cases be of such significance for the "balance" of the contract that the most suitable solution is to "disregard" the contract in its entirety, i.e. to declare it invalid. A related question is then: a party claims and proves certain facts which in his view represent grounds for invalidity under, for example, sec. 33 of the Contracts Act (which, similarly, is of the nature of a "general provision" in very broad language), and demands complete invalidity of the contract. The court finds that the factual circumstances cited *do not* fulfil the conditions for application of sec. 33, *but are* such that conditions exist for applying sec. 36. Should the action be dismissed, or can partial disallowal or adjustment be considered? The deciding factor would seem to be whether the partial declaration of invalidity or adjustment in the individual case can—as *minus*—be viewed as included in *majus*, total invalidity.

It should be clear from this simple illustration that general rules such as sec. 36 of the Contracts Act involve risks of upsetting the logical structure of the legal system, or at least reducing its clarity and lucidity. From the point of view of practical application—that is, where the instructions for interpretation included in the *travaux préparatoires* and intended partly for the avoidance of such conflicts are observed, and where claims preferred may be relied upon to be so formed that claimants' interests are met in a rational way—these inconveniences are probably not very great.

However, the problems are not quite so simple. An attempt to analyse in more detail the exact meaning of "may" in sec. 36 of the Contracts Act illustrates a dilemma of legislative technique. It appears probable that the attractive form "may" was chosen so as to open to the courts a *new* possible course of action not available without special provisions. But "may do" in normal linguistic usage implies also "may elect not to do"; in the case under consideration, however, this interpretation is unreasonable. The courts *should*—unless counter-reasons of some weight exist—use the powers afforded by sec. 36 of the Contracts Act. A

"shall-rule" on the other hand would have created conflicts with the surrounding rules of this type in chapter 3 or the Act. For the provision to fulfil a sensible function, the "may" of sec. 36 must read "may and should". The "discretion" of the courts is not entirely free. It is also usual in legal writing to speak of "bound discretion", that is, freedom within the framework of generally accepted values, general guidelines, etc.

Section 36 of the Swedish Contracts Act may hardly be viewed as a happy example of modern legislative technique. However, any more shaded assessment of available solutions must observe a number of complicated considerations. *One* alternative to the technique selected is obviously a body of highly detailed rules. If such a body exceeds a certain limit of complexity, however, the corpus of regulations becomes hard to comprehend. This may also involve the very considerable drawback of reduced foreseeability: not only the general public but also non-specialized lawyers are in practice unable to obtain a general grasp of the system. In a society subject to rapid change, this disadvantage may be exacerbated by the need for frequent amendment of many detailed rules, which in turn hampers both understanding and planning on the basis of them. Another important consideration when assessing the degree of misgiving associated with the broad language technique is how quickly guiding precedents can develop within the area or areas where the legislator's choice of this technique has partly left the legal position open. In the case of rapid establishment of precedents, the disadvantages as to legal security and predictability are of course reduced (though at the same time it may be asserted that the special advantages—chiefly flexibility—afforded by the adopted legislative technique are reduced appreciably if a comprehensive and authoritative practice quickly "locks" the legal position in the field in question). Lastly, the disadvantages of the technique now discussed manifest themselves differently in different areas of law. Penal and tax law are clearly most unsuitable for broad-language legislation.

Apart from the legally regulated cases of invalidity, the basic and age-old tenet obtains that *immoral contracts* may not be enforced by legal means. Here belong contracts concerning crime, prostitutes' agreements with their customers, etc.

It may be said that the *degree* of social disapproval of these different types of contract finds expression in the *scope* of the invalidation. In the worst cases (e.g. robbery under compulsion) the legal instrument is invalid in relation not only to the perpetrator but also to a party acting in good faith (in whose favour compulsion is exerted). In milder cases the contract is binding in relation to parties acting in good faith.

It is also normal to establish a *difference of degree* between severe cases where invalidity makes the contract a *nullity*—it is treated as if never concluded—and a case where the contract is *contestable*, that is, where the invalidity must be demonstrated and established at law.

5. Contractual freedom—with the complex meaning the concept has here been found to possess—is obviously, in the market economy, a key point of a whole system of personal and economic freedoms. In a modern Swedish work quoted earlier, this "freedom" is grouped together with the freedoms of establishment, of competition and of association or organization. Alongside these are also mentioned the freedom to choose one's own profession, work and place of residence, and personal and economic freedom of movement across national frontiers. Taken together, it is said, these various freedoms form "the core of general freedom of action and movement in society". It is also stated that while these freedoms cannot be maintained without considerable modification, their great significance lies in the fact that they are points of departure. "The Swedish legal system assumes that these freedoms normally obtain. Legislation establishes more detailed rules, and above all limits, for their exercise. Differences of political opinion often regard the question of how far the state should go in intervention."[8]

The quotation well illustrates both the central position of contractual freedom and the vulnerability of the system as well as the interdependence of individual rights. Far-reaching interference in the freedoms of establishment or association may in practice deprive contractual freedom of a large part of its content. Without reasonably wide contractual freedom, on the other hand, freedom of establishment, of competition, of consumption and of association is impossible to maintain or is for practical purposes without content.

Modern development has entailed a number of limitations, in some cases very great, to contractual freedom and to those "neighbouring freedoms" that affect it indirectly. Here, these interventions can only be exemplified briefly.

The two long *periods of war and crisis* in this century necessitated considerable intervention in the sphere of economic freedom. Rationing and price control of scarce utilities were introduced, as were obligations of the type milling obligation, import and export embargoes, requisitioning and compulsory purchase. The housing market was for long periods subject to public control, with the intentions of obtaining

[8] See Bernitz, *op.cit.* in footnote 1 above, pp. 14 f.

homes for those in need or for groups of key importance for the national economy; of keeping rents down in situations of shortage; of countering speculative profits and unreasonable rises in value following rapid urbanization, and of planning land utilization. Regarding the latter, particularly, there is disagreement on where the limits for the loyal exercise of power run; in other words where unavoidable control becomes a regimentation that can be suspected of expressing other, more far-reaching intentions.

The exigencies of war and a war economy were recognized by most people. At the same time it is clear that modern states have acquired both the experience and the apparatus for continued and continuing active interference with contractual freedom. For political movements with so-called state economic planning and nationalization on their programme, the temptation was evidently great to maintain the controls even when they were no longer justified by a war situation but were intended only to afford the state apparatus control of economic life.

Even before the great wars certain *tendencies to abuse* in the developed market economy had appeared, and had prompted measures entailing interference with contractual freedom. In commerce, where a small number of very large companies had put all competitors out of business, it turned out that the survivors sometimes preferred to agree among themselves regarding prices and conditions of delivery to the public rather than competing with each other on the markets. Trusts and cartels came into being. To counter these limitations on competition, which were damaging to the public, legislators introduced special rules intended to check the trust and cartel phenomenon. Other deviant forms within competition were also combatted. There is probably great agreement on the usefulness of these rules, at least in principle.

A further development of the law of competition is *consumer law*, the purpose of which is to protect weak consumers, who are many, against unilaterally formed or treacherously formulated terms of contract in a market where even very large and important contracts are often concluded using pre-printed standard forms which have been produced by the seller or his organization and which exploit the advantages this affords.

A field in which the totally free market of early liberalism replaced an order long marked, especially in country areas, by relations governed by earlier feudal rights, but one where the return "from contract to status" took place early and became stronger than elsewhere, was *labour law*, where individual contracts, quantitatively speaking, are today of but small significance. Here the collective solutions are now fully complet-

ed, and opportunities for individuals to remain outside are in many cases illusory.

From modest beginnings in the second half of the 19th century, state *planning legislation*, touched upon above by way of introduction, has grown to such dimensions that one is justified in asking whether in the area of land use the old principle really applies that what is not expressly forbidden is permitted.

6. Neither contractual freedom, freedom of trade or economic freedom of movement in general enjoy constitutional protection in Swedish law. Freedom of association (chapter 2, sec. 1, clause 5, of the 1974 Constitution) may be said to give very fragmentary protection of *one* aspect of this freedom of movement. Indirectly, one can without doubt read into chapter 8 of the Constitution, as an unstated principle, that provisions entailing public interference with individuals' mutual economic relations require what of old has been termed *legal support* (chapter 8, sec. 3, first paragraph; cf. chapter 8, sec. 2, first paragraph and second paragraph, clause 3, where it is stated that provisions on "the right to real and personal property, regarding contracts and regarding companies, associations, combines and foundations" must be issued in the form of *statutes* as opposed to *ordinances* and similar instruments). On the other hand chapter 8 sec. 7 opens the door wide to regulation by *ordinance*, following, it is true, authorization in law of "the import and export of goods, money or other assets; manufacture; communications; the granting of credit; commercial activity; rationing or the design of buildings, plant and environmental aspects of built-up areas".

In other international and national documents, legal protection is more developed.[9] Naturally, securing contractual freedom in the Constitution would present serious problems of definition and delimitation. However, the mere explicit mentioning of an individual right in the Constitution produces the healthy result that legislators are given reason to think first and then to argue before they exercise their powers. The final outcome in the individual case may well be identical to that which would have been reached if the right concerned had not been explicitly recognized in the Constitution. In order to arrive at that outcome, however, the holders of legislative power would have been forced to make their way by legal reasoning, i.e. by methods more civilized than the naked exercise of power.

[9] The reader is referred here to Stig Strömholm, *Folket, grundlagen och etablissemangen* (The People, the Constitution and the Establishment), Stockholm 1973. In other respects, too, this work offers critical discussion and concrete proposals which, twelve years after the so-called Constitutional Reform of 1974, would seem to have *regained* their topicality.