ON FRAGMENTATION IN PRIVATE LAW

BY

BERTIL BENGTSSON

1.

Undeniably, private law in Sweden is no longer in the same relatively clear and thought-out condition as it was thirty or forty years ago. This applies perhaps chiefly to the law of contracts and torts. The legal material has grown almost to the limit of lucidity. Earlier, the field was dominated by certain central statutes through which general principles were considered to be expressed; they could often be applied analogously and in this way performed a function largely corresponding to the general part of the great Continental codifications of civil law. There were in addition a limited number of special laws on issues of particular practical importance. Now there is more modulated regulation of every conceivable legal circumstance, continually being developed and reworked.

At the same time there remain unregulated many important types of contract where there is a need to elucidate general guiding principles. Not even the most ambitious legislator can hope to cover all the varying types of contract coming into use. Whoever now seeks general legal principles for guidance through the material finds an assorted collection of rules with different purposes. Some tally with traditional views; some have been created in the desire to support certain categories, predominantly wage-earners and consumers; some appear, rather, to have happened when a handy pattern has been found in some new statute. This is not much help to the judge or the solicitor: on what should one base one's analogy?

Precedents have not multiplied in the same way within the area of central private law, but this material, too, has become harder to survey in its entirety, partly for the very reason that decisions so often concern special problems. The recurrent question becomes how far one should draw general conclusions from these cases and, in the case of the Supreme Court, how general may the principles be which the Court can reasonably extrapolate from a particular dispute? In its law-creating role the Supreme Court has had to be grateful for the fairly few contracts disputes brought before it for judgement, even if they are not as cut-and-dried as one could have wished by a good precedent; the very singularity of the case must often give the decision limited scope of application.

Add to this the fact that civil law doctrine hardly has the same standing

today as half a century ago when such legal scholars and judges as Tore Almén, Birger Ekeberg, Hjalmar Karlgren and others were reverently quoted in discussions of contract law. Of course a presentation by a legal scientist of particular authority can always have an effect in his special field, but the time is past when more general doctrinal statements on applicable fundamentals can have an effect comparable with, for example, the Supreme Court's statements of the principles of law bearing upon the situation in question.

By and large, this development has made it harder for the courts to hold to consistent principles in the application of the law, and for all practising lawyers to find their way about the material. Formerly you could do your judging with the statute-book, the "Nytt Juridiskt Arkiv" (NJA—a collection of Supreme Court cases), intuition and common sense—on the old country juridical circuits there was not so very much more in the way of legal material. But the statute-book and the "Archives" become more and more confusing, intuition far from always helps one to perceive the trains of thought underlying the laws and precedents and even common sense is sometimes said to be quite inadequate for elucidating the purpose of such sources of law.

All this is a well-known lament, struck up by theoreticians and practitioners alike, and need not be elaborated here; as with so many other dire outpourings of this kind, take it with several pinches of salt. Yet the trend does give some grounds for misgiving. This area of the law ought not to become more untidy than it is at present if we do not wish to risk serious repercussions within our legal system. This could lead to a certain self-examination among us who have been concerned with jurisprudence, legislation or court work: after all it is the first juridical post-war generation that is largely responsible for the present state of things. Here, of course, only a few special aspects of these questions can be dealt with.[1]

One view which I myself, among others, have neglected should be specially stressed: the importance of *consistency* and *systematisation* in legislation and application of the law. I am not thinking primarily as a legal theorist—I shall not venture into system theories or suchlike—but as a practitioner. The question appears particularly urgent in view of developments in the law expected both internationally and in Sweden, and I shall return to this. Respect for certain general principles can be reconciled both with a socially-oriented private law (if one desires this) and the need

[1] Similar questions have been discussed in far greather depth by Jan Hellner in *Lagstiftning inom förmögenhetsrätten*, 1991.

of development in step with social circumstances.[2] Regardless of the general orientation of a piece of legislation, one should ensure that it fits in with the rest of the legal system.

Here I need not labour the importance such overall principles of legislation have for the *predictability* of lawyers' judgement—a view continuously stressed by practitioners, and of particular concern in the considerable areas of property law where special legislation is lacking. That the demands for a logical and lucid system of rules are also urgent *pedagogically* is obvious, and surely this argument is by no means trivial. For a future lawyer to bring order and control to his knowledge naturally requires that the material be structured to make it more or less lucid and graspable. But the qualified lawyer, also, needs the same thing when, often under heavy pressure of time, he attempts to familiarise himself with new areas of law—continuation training is now a necessity in most legal professions. And not least, the need emerges in the precedent-creating work of the Supreme Court (and also in the appeal courts where a good many theoretically important disputes end up these days). It is unrealistic to assume that a judge, even in a court of higher instance, can immediately grasp the pattern into which a decision is to be fitted; it may require some time and trouble, specially when new types of conflict are brought before the courts. Faulty consistency in application is often its own penalty: if one principle is established in one area and another in a relatively adjacent area, there is always the risk that intermediate cases pop up to cause difficulties in application, or where a principle so established entails unfortunate consequences. One or two examples of this are given below under 5. In addition, a contradictory and untidy rule system can further reduce public understanding of and confidence in the legal order, and further increase the risk of misunderstanding in the media—and these are drawbacks that cannot be disregarded either.

It is clear that when the legislator, the judge and the legal writer ponder individual cases of conflict, a shaded judgement often appears well grounded. This probably applies very particularly to many of us who ventured into private law in the 1950s happily confident that we could arrive at thoroughly satisfactory solutions by bringing a sufficiently penetrating and purposeful line of argument to bear upon different type-situations. Our generation, in contrast to the previous one, felt entirely free of the bands laid upon private law by *Begriffsjurisprudenz*. We could at last conduct a realistic discussion of suitable solutions and expected, with a little help from social engineering, to be able to abolish a great many

[2] See here chiefly Thomas Wilhelmsson's *Social civilrätt* (Social Private Law), 1987.

obsolete, socially unfortunate rules. References to legal-systematic views not infrequently seemed a suspiciously formalistic way of arguing which overshadowed rational consideration and led to inappropriate results in precisely the type-situation then being discussed. And the general principles of private law which had earlier been so important now seemed unnecessary ballast which could often be chucked overboard without much trouble.[3]

Still I would maintain that the method of which we hoped so much is appropriate in several juridical contexts. But should similar reasoning be allowed to mark our legislation and precedent-formation more generally, this can easily have a number of less fortunate side-effects. It is chiefly these that will be dealt with in what follows.

2.

From the points of view indicated above, of course, the anathematised *Begriffsjurisprudenz*—the dirtiest of all the dirty words known to a young lawyer of the 1940s and 1950s—could be conceded some advantages. The legislator had a usable, though far from ideal, tool; the practising lawyer could with reasonable probability know what he was to follow—if the concepts were analysed sufficiently acutely, one could hope to predict the courts' decisions. And when the concept-chasing gradually began to be viewed with increasing scepticism, at least a few general legal principles established with its help could be a help and comfort in unregulated conflict situations. It was not all that hard to learn, understand and apply a body of private law organised in this fashion.

Even when this method proved inadequate for achieving socially and humanely satisfactory results in differing contexts, certain main traits could be discerned in the rule system. The modulation and softening-up of the main principles of private law, particularly from the 1960s on, did not prevent one from noting chiefly two main tendencies: on the one hand what was often formulated as "the demands of trade", expressed in such statutes as the Sale of Goods Act, and on the other the notion of consumer protection and social views (or concern for equity in the individual case). Strict justice belonged within the circumstances of commercial life or wherever companies' obligations came to the fore: for private persons, social concern and views of what was reasonable could mitigate the obliga-

[3] Examples of such a view occur in, among other places, my own *Hävningsrätt och uppsägningsrätt vid kontraktsbrott* (Right of Cancellation and Termination in Breach of Contract, 1967).

tions and extend the rights. Distinguishing between situations where one or the other tendency predominated—mainly between commercial contracts and consumer relations—worked fairly well. In this way one could in spite of everything find certain main lines for practitioners to argue along and students to learn through. The rule system was multifarious and hard to master, but for the core of contract law one could nevertheless, with Thomas Wilhelmsson, talk of a social private law,[4] separate from commercial law; and that difference was clearer in Swedish legislation and administration of justice than in Finnish.[5]

However it has proved difficult to maintain this strict line in the legislation. It is well known that the technique of legislating within private law altered somewhat towards the end of the 1960s. Among other things it has no longer been considered sufficient to distinguish more commercial conflict situations from more social ones: the rule system has been rendered much more sophisticated. It is not easy in a statutory text to express such an all-round balancing of views as to the purpose of a legal provision as in a legal-scientific discussion or in the general grounds in a commission report. One often had to be content with giving a more generally couched provision with scope for such consideration. The courts were allowed great latitude for taking account of the circumstances of the individual case. It was stressed that reality was far too diverse to be captured in detailed rules, and this view carried more weight than the parties' and the courts' desire for clear guidance concerning the legal position in various disputes. For those brought up to believe in the value of the finely shaded arguments of legal policy this appeared fully legitimate, regardless of one's political attitude otherwise; the mere expressions "unreasonable", "unwarrantable", "particular reasons" and "special reasons" could trigger off long expositions on all the factors that should be considered in different circumstances (which the present author has also been known to indulge in with a certain enthusiasm).—In other cases the result could be a mass of rules, differing in detail, in which each nuance could be merited on its own though the variations became hard to oversee from case to case, at least for the practitioner and the future lawyer.

Added to this are certain special complications which met those who took part in the legislative work of those decades. First may be mentioned the *politicisation* of private-law issues—including those customarily left to lawyers to ponder. Gone is the time when expert committees of the law-drafting type could work their way in peace and quiet through the more

[4] See note 2.

[5] For administration of justice of Bengtsson in *Festskrift till Lars Welamson*, p. 13 ff.

troublesome parts of the juridical material, undisturbed by the media or ambitious ministers, and could aim for a consistent regulation of a fairly large area of the law, based on certain fairly general principles. The committees' terms of reference as well as their schedules have now rendered this impossible. One is requested, for example, to review a certain statute rapidly with certain fixed aims in mind, without a chance of getting an overall grasp of a rule complex of any size. It is natural that consumer policy or environmental policy, for example, have demanded a different work tempo and partially a departure from traditional legislative technique; but the development has also entailed more irregularity and capriciousness in legislation. Questions of limited importance may in discussion in the *Riksdag* (the Swedish Parliament) or the media be elevated to significant political problems—not infrequently through misunderstanding of the legal position. There is a risk that small sub-issues may be separated in this way and solved without regard to the consequences this may have in adjacent areas of law.

The law of torts has in recent years given several examples of such confusion in discussion. One is the issue of adjustment of compensation for personal injury for drunken drivers, which came up during the changes of the law in 1975;[6] another the cherished myth that burglars can get compensation if they slip down your front steps on their way from burgling your house[7] and a third the sometimes wholly misleading presentations given of the state's liability in damages by people indignant about the outcome of the "Alvgard case" (in which a businessman ruined following his wrongful arrest for a tax crime was refused full compensation in the absence of negligence on the part of the authorities).[8] Such contributions to the discussion risk leading to a number of curiosities if one is setting out to reform the rules in this area.

Yet another divisive factor that should be indicated is the *division of private law among various ministries*. Important issues can even fall outside the Ministry of Justice—questions of real property e.g. in the Ministry of Housing, Agriculture or the Environment and Energy. The already tangled legislation in such a central area of contract law as rent was earlier, for example, handled by the Ministry of Housing, and this was scarcely conducive to order in the system. There legislation was planned, peremptory even, on such a theoretically and economically important type of agree-

[6] See LU 1975/76:3 p. 24 ff, 38 ff.

[7] Cf. e.g. LU 1988/89:25

[8] Cf. ibid. 1988/9:12 p. 14. The comments appear mostly in the daily press; but see also a number of Parliament private bills (e.g. Mot. 1988/89 L 601, 607, 611:K 222, 236; Ju 804) in which both rule system and practical development are descriped in misleading ways.

ment as contracts between firms of contractors.[9] And it is probable that, for example, the Ministry of Justice and the Ministry of Agriculture have differing opinions on such a topical question as the civil-rights position of the Sami people.[10]—Differences in attitude may well be explained partly by the traditional orientation of interests in different ministries, but one should probably add the shifting desires to create a distinctive image and to show initiative through energetic work on topical issues. In sum, the division easily allows political considerations to take precedence over such a conspicuously juridical canon as systematisation and uniformity in the rule system.

In close connection with this is the well-known circumstance that a reform of the law in favour of large groups—consumers, wage-earners, private persons suffering injury—often appears to be as good as definitive. No government, irrespective of political colour, with any sense of self-preservation wishes to propose legislation that will worsen its position.[11] And if the lawyers do proffer an idea for a good way of solving a lesser issue, this can have great repercussions: give a large pressure-group your little finger and it will happily take your whole hand. In this way, too, inconsistencies can arise in the legislation which become almost impossible to correct.

One example, again from the law of torts, is the present provision that damages for personal injury can be adjusted only in cases of grave contributory neglience (6:1, para 1 Damages Act)—a rule wholly different from what applies in comparable legal systems. The Torts Committee proposed this as a main rule with certain not inconsiderable exceptions; but the Swedish Confederation of Trade Unions (largely alone among the bodies invited to give their opinion) considered that the exceptions should be removed, which they were.[12] A somewhat comparable case is the rule in sec. 3, para. 3 of the Environmental Damage Act regarding mitigation of the requirements of proof of causal connection: the environmental damage investigation committee wished a special provision of this kind to apply only to damage whose course was difficult to investigate, type environmental toxification; but according to the final wording it applies to any damage through emission and water pollution, regardless of cause. To limit the rule now to areas where it is suitable is probably almost impos-

[9] Cf. ibid. 1990:14 (in which, it must be confessed, the present author collaborated on certain legal-technical points).

[10] The position of the Ministry of Agriculture is given in Government Bills 1990/91:3 and 4.

[11] Disregarding the spring, 1990, plans to limit the right to strike, etc. (when a sense of self-preservation was not very much in evidence).

[12] Cf. Government Bill 1975:12 p. 89 f., 133.

sible; on the contrary it will probably be extended to other areas where the legislator wishes to appear generous.[13]

It is however not only such non-juridical factors that have hampered any consistent regulation of, in particular, the law of contract. Other, more weighty reasons have complicated the picture. It has gradually become clear that commercial dealings are far from uniform: legal-policy views differ in transactions between large companies from what they are when one party is a small business (even if this party can obtain some support from his organisation).[14] Correspondingly, a company's dealings with private persons cannot be judged along exactly the same lines when its scope has been smaller. The legislator has been given to ask whether there is not good reason to differentiate between different categories of business enterprise.[15] Special consideration also appears in the dealings of private persons, and can affect such important contracts as those for purchase of real property or tenancy of dwelling. And when the public—state or municipality—is party to the legal relationship, the legislator is not so inclined to adopt consumer-protective attitudes; the view has old traditions in, among other places, the relation of the public corporations to their customers.[16] Public-law consideration appears specially clearly at the periphery of private law, for example in its special property law: but even in the central area of contract law such elements occur (see the recent significance of the Ordinance on the Financing of Housing for liability under the new Ch.4 sec.19(d) of the Land Code and sec. 3 of the Consumer Services Act). Consumer protection is not infrequently considered to require both peremptory rules and all kinds of intervention by different administrative authorities in contract-legal relationships.[17] In the law of torts and adjacent areas in recent years, the legislator has taken up another contradiction, which it is conceded can be justified by social considerations but can run counter to the traditional view: distinction is made between personal injury and other types of damage, including damage to proper-

[13] Cf. here Bengtsson in *Festskrift till Sveriges advokatsamfund* (1987, p. 89 ff.). Yet another example gives the position of consumers according to the Consumer Insurance Act; whether the rules are suitable or not, any change to their detriment has seemed unrealistic in a survey of insurance legislation (cf. SOU 1989:88 p. 118 f.).

[14] The problem has been made topical by, among other things, the work of the insurance law committee. Cf. SOU 1989:88 p. 121 ff.

[15] See 4 below on mitigation of liability according to the Consumer Service Act and the Consumer Sales Act. In legal practice, too, the same tendency may be glimpsed. Cf. e.g. NJA 1989, p. 346, where the outcome would hardly have been the same had the insured been a large enterprise.

[16] Here the relationship to public law can in itself entail problems, cf. NJA 1988, p. 503.

[17] See here Hellner, op. cit., p. 66, 195.

ty—which marks such an important area of damages as product liability.[18] To these complications may be added that various special types of contract have called for special regulation or special application of the law. One example is the Share Accounts Act, where reliance on computer technology has justified certain departures from former principles (see below).

3.

The question of the role of general legal principles in the law of contract has arisen in several different pieces of legislation during the last ten years.

With the proposal for a new Sale of Goods Act in 1989 there appeared to be clear awareness of the problems of systematisation involved in interfering with what had been the basis of the system of civil law rules that the 1905 Act constituted. At the very beginning of the Bill it was maintained that the 1905 Act had come to offer guidance in decisions on general issues of contract law not specially regulated in other statutes, and had therefore, through the use of analogy, gained a significance far outside its true scope. There should, however, be no question of designing a Sale of Goods Act directly so that it would function as a general civil statute, even though there was reason to adopt at many points a broad private-law perspective: it would be for those applying the law to decide whether the new statute should have this function.[19] Regarding this point the Drafts Legislation Advisory Committee observed that the role of the current Sale of Goods Act had become appreciably smaller as a result of developments within consumer law, and that the same thing could be predicted of the new statute.[20]

In this light it might have been appropriate in the *travaux préparatoires* to the Consumer Purchases Act shortly afterwards proposed to raise as a question of principle its significance for other consumer contracts; but this did not happen.[21] Rather illuminating for the prevailing uncertainty is the

[18] See ibid 1989:79. – The distinction occurs, except in 6:1 of the Tort Liability Act, in among other places the Traffic Damage Act, which of course borders the law of damages, and the Criminal Injuries Compensation Act.

[19] Government Bill 1988/89:76 p. 23 f.

[20] Government Bill 1988/89:76 p. 222.

[21] A conceivable reason is that the more practical types of consumer contracts are largely regulated in modern legislation – the Consumer Services Act, the Consumer Credit Act, the Consumer Insurance Act – and that, moreover, sec. 36 of the Contracts Act can protect the consumer in areas outside the scope of this detailed regulation. In the Preamble to the Consumer Services Act the analogy issue had also been touched upon but only in connection with certain service contracts other than those coming directly under the Act. See SOU 1979:36 p. 121, cf. p. 109; the question is touched upon in Government Bill 1984/85:110 p. 142. Cf. also Bengtsson in *Festskrift till Lars Welamson*, p. 36 ff.

treatment in various legislative matters of such general contract-law questions as cancellation and damages, which arise in all types of contractual relation. In the Consumer Purchases Act, general principles considered to apply on the basis of the 1905 Sale of Goods Act and maintained in the new Sale of Goods Act have at some places been consciously avoided. One example is the position on the purchaser's right of cancellation for reasons of breach of contract. Traditionally it has been required that the breach has been material for the cancelling party.[22] The new Sale of Goods Act further required, also in agreement with customary attitudes, that the seriousness of the breach be visible to the other party (secs. 25 and 39). In the Consumer Purchases Act this visibility requirement was removed (secs. 13 and 29) chiefly because of a somewhat debatable argument on the vendor's possibility of checking how material for the other party a breach could be.[23] The difference brought objections in the *Riksdag* from the point of view of systematisation,[24] but as has been shown a difference is natural, at least from the standpoints adopted here: the special nature of the consumer contract has been observed. However, it is debatable whether the argument holds generally in different consumer contracts—even regarding defects in goods sold it is strange if the vendor must previously examine the significance of possible breach of contract and, for example, in the rental of movables and several types of service, the principle may lead to a somewhat over-comprehensive right of annulment.

In the purchase of real property, however, it has been considered that a requirement as to material significance should be specially grounded if the purchaser is to be allowed to annul the contract for reasons of defect, which should be obvious in such a far-reaching and economically important contract.[25] Here there is mention only of breach of contract "of material significance", without it being stressed that the significance shall be seen from the purchaser's side (Ch.4 sec.12 of the Land Code).

In other cases the legislator has considered that a new rule in the commercially oriented Sale of Goods Act should also be introduced in the Consumer Purchases Act and at some places also in the Consumer Services Act. Regarding damages, this applies specially to the much-discussed "control liability"—a type of rule now in fashion, which turns up in legislative

[22] This general principle in both commercial contracts and consumer contract was for some reason said to have been prompted by consideration for the entrepreneur: see Government Bill 1989/90:89 p. 38.

[23] Government Bill 1989/90:89 p. 35, 81; 1989/90:LU35 p. 21 f.

[24] 1989/90:LU35 p. 21, 50 f.

[25] Prop. 1989/90:77 p. 49 f. Perhaps the point is that the requirement as to seriousness should now apply even in fraud; it may be wondered how the rule relates to sec 30 of the Contracts Act.

discussions in many fields. The vendor is liable for faults and delays if he does not show that breach of contract has been caused by an obstacle outside his control, which he could not reasonably have been expected to have considered at the time of purchase and the consequences of which he could not reasonably have avoided and overcome; he is correspondingly liable for assistants and suppliers (see secs. 27 and 40 of the Sale of Goods Act, secs. 14 and 30 of the Consumer Purchases Act). The same rule was incorporated in the Consumer Services Act in 1990 (sec. 31).[26] This is a consistent view, but it can be objected that it disregards a not unimportant difference between contracts for services and contracts for sales; in a contract for services relationship there is predominantly what has been called an obligation to exercise care[27]—the service shall (sec. 4) be carried out in a professional manner and also with all due care—and a strict liability for unfortunate accidents causing departures from this norm is not really the same thing as a liability for delays and defects in sale.

More troublesome, however, is if the legislator continues to use this type of liability in all other possible fields. In the 1990 legislation on the acquisition of single-family houses, the control liability was not considered justified for defects in sold property. In support of this, it was adduced that the typical real property transaction took place between private persons and concerned "second-hand property"; the liability would therefore be too severe[28] (despite the fact that the legislation came about precisely with the commercial sale of single-family houses in mind). Instead, as already indicated, a special rule has been introduced to cover the consumer contract, which to refers to the conditions for state financing of housing (Ch. 4 sec.19(d) of the Land Code). Nor has the quality control liability been introduced in the less practical question of delay on the part of the property vendor (cf. Ch. 4 secs.13–15 of the Land Code). One can in any event agree that the object of sale may justify departure from liability in the purchase of moveable property, even though the technique can be discussed.—As against this, in the Share Accounts Act the control liability has been considered justified in the case of computer error; this concerns activity that is particularly sensitive to disturbances from without, such as interruption of the electricity supply and sabotage, and here regulation can appear appropriate.[29] The question then is, however, whether analogies are justified concerning other types of contract: probably not where it is not even possible to refer to a professional expert norm in the same

[26] On this point see Government Bill 1989/90:89 p. 40, 55 f., 1989/90:LU35 p. 24.
[27] See in particular Rodhe, *Obligationsrätt* (The Law of Contracts and Torts), p. 20 f.
[28] Government Bill 1989/90:77 p. 52.
[29] See on this point Government Bill 1989/90:152 p. 79 ff., 1989/90:LU5 p. 14 f.

way as for the consumer services, or where certain misjudgments must be considered defensible. Should for example solicitors or consultants be liable vis-a-vis consumers under the control-liability rules, this would imply a markedly stiffened liability—even more if analogies were also to be used in commercial contracts. In two recent statutes on contracts for non-material services, the Estate Agents' Act of 1984 and the Insurance Brokers' Act of 1989, the legislator has on good grounds prescribed a normal fault liability, including that vis-a-vis consumers, without any doubt appearing (see secs. 14 and 13, respectively).

Turning to delay on the part of the *purchaser*, here, too, the legislator has found it hard to maintain a consistent line regarding the damages. The traditional view regarding payment delay is expressed in sec. 57 of the new Sale of Goods Act: the vendor is entitled to compensation for damage unless the purchaser shows that the delay is due to certain circumstances resembling *force majeure* (law, interruption of public transport or payment services or other similar obstacle which the purchaser could not reasonably have expected at the time of purchase and the consequences of which he could not reasonably have avoided or overcome). Thus the matter here is one of a liability somewhat stricter than that of control liability. The same exception to the liability has been introduced in the corresponding rule of the Consumer Purchases Act, though here it concerns a limited liability in damages following a certain assessment of reasonableness (sec. 41).[30] But these rules conflict with sec. 45 of the Consumer Services Act, in which the consumer who does not pay for the service in due time incurs a normal presumptive liability: he is fully answerable for the trader's costs and other losses unless he shows that the delay is not due to his own negligence. The rule was initially justified by a parallel to the trader's then presumptive liability for delay,[31] and was not changed when this liability—on the advent of the new Consumer Purchases Act—changed over to a control liability. In the purchase of real property the rule is retained that the purchaser shall immediately compensate the vendor for his damages if the purchase is cancelled according to a reservation in the purchase contract (Ch.4 sec.25 of the Land Code). No alteration was ever even discussed—and even so, the point of the reform was to improve the position of the buyer of a single-family house.[32] Even though the practical difference between the liability rules is not so large, it appears undeniably as if the legislator was

[30] See on this point Government Bill 1989/90:89 p. 154 f.

[31] Government Bill 1984/85:110 p. 109. – The Drafts Legislation Advisory Committee claimed a number of other points at which the two statutes differ (Government Bill 1989/90:89 p. 184).

[32] On this in some respects strict rule, see Bengtsson in *SvJT* 1972 p. 666.

not particularly interested in the general principles of a protagonist's liability in damages for payment delays.

The problem already mentioned of special rules in favour of small businessmen has become relevant in the *mitigation* of the businessman's liability in damages. The attitude underlying many of the rules of the Tort Liability Act is that a businessman must have his insurance in order; there should normally be no reason to protect him against a far-reaching liability in damages. This view has appeared in, e.g., application of the general provision on adjustment of unreasonably burdensome damages in 6:2 of the Tort Liability Act. There was agreement that the rule should be used chiefly outside contractual relationships and in normal cases not in the case of breach of central obligations under the contract; essentially it concerns demands on private persons or possibly ruinous damage claims against businessmen. Adjustment cannot be considered where liability insurance covers the damage or should have covered it.[33]

From these main lines, however, there have been certain departures during the past ten years. Sec. 14 of the 1984 Real Estate Brokers' Act made it possible to adjust the estate agent's liability according to reasonableness even though the agent may have obligatory insurance; contributory cause is mentioned as an example, but adjustment on this ground would have been possible, anyway, on general principles. This possibility of adjustment is hard to reconcile with the reasoning behind the rule in the Tort Liability Act. No corresponding rule, fortunately enough, was included in the Insurance Brokers' Act even though it was included in the committee proposal on which this Act was based.[34] Here, then, two otherwise quite similar broker statutes differ from each other. In sec. 34 of the Consumer Services Act, however, an adjustment rule that departs from earlier principles was introduced for traders vis-a-vis private persons, to include breaches of central contractual obligations—precisely the case where according to the Tort Liability Act there should be no adjustment. The *travaux préparatoires* state at many places that a strict assessment could be made against the consumer suffering damage.[35] One reason may be that it is difficult for the entrepreneur to obtain insurance cover for certain of the types of damage in question; in many cases pure financial loss may be involved. But this does not alter the fact that the rule is hard to reconcile with the approach underlying Ch.6 sec.2 of the Tort Liability Act, which nevertheless was enacted as recently at 1975.—The development has sub-

[33] Cf. Government Bill 1972:12 p. 138, 176, 178 and Bengtsson, *Om jämkning av skadestånd* (On Adjustment of Damages) p. 285 ff.

[34] See sec 13 of the bill SOU 1968:55 p. 11; cf. sec 14 of the Insurance Brokers' Act.

[35] Government Bill 1984/85:110 p. 83 f., 34 ff.

sequently been rounded off with the corresponding rule in sec. 34 of the Consumer Purchases Act which was clearly to be harmonised with the Consumer Services Act provision and sec. 70, para. 2 of the Sale of Goods Act (which more particularly concerns damage that is hard to anticipate).[36]

Clearly it is now possible to adjust a businessman's liability both in commercial and consumer relations, including cases of breach of central contractual obligations; when the special rule in sec. 70, para. 2 of the Sale of Goods Act is applicable, the adjustment could be based on Ch.6 sec.2 of the Tort Liability Act. In that case this implies entirely altered circumstances in the adjustment issue. Undeniably the about-turn in the legislator's approach has led to considerable lack of clarity, specially regarding the possibility of using the general adjustment rule in contractual relations other than those being discussed here.

These examples, from central areas of contact law, of somewhat capricious legislation may illustrate the problems arising when one places special considerations in certain situations above legislative consistency. While the legislator has started from a difference between commercial contracts and consumer contracts, there seems to have been no attempt to follow this line more consistently. For reasons of time, not least, it may have seemed simpler to weigh each statute individually than to consider how one provision fits in with the rest of the legal system.—The inconveniences should not be exaggerated, though; the majority of the rules mentioned appear well grounded or at least defensible; in some cases it is only a matter of fairly small inequalities in the legislation, while the lack of clarity in the legal position in unregulated types of contract can partly be overcome through standard contracts or specially-designed contracts. But in many such contractual relationships, including those between businessmen, detailed regulation is scarcely practical, and it is then that imprecision can become a problem.

4.

This paper has so far dealt with fragmentation in the *legislation*. But it must be confessed that when one starts looking for such tendencies there, one also finds them in the *creation of precedents* (where the present author is not without guilt, either). This is partly a natural consequence of the fact that the Supreme Court has a different point of departure from that of the legislator: like other courts, it makes decisions about concrete cases, not abstract problems. A certain change may be achieved through the new

[36] Government Bill 1989/90:89 p. 43; Government Bill 1988/89:76 p. 206 f.

1989 rules on the formation of precedents in the Supreme Court, but it may be wondered how practically important this legislation may become. The evident aim is indeed to guide the application of the law, but it is natural for the particular circumstances of the case to be specially noted, and they may very easily influence the decision—often the more or less reasonable consequences a certain principle can have in cases similar to the one being heard. It is considerably more difficult in the particular examination to form a reliable impression of the repercussions a decision may have in other parts of the pertinent area of law, even though one naturally attempts to consider such aspects as well.

In addition, the inclination to lead development of the law along new paths also varies among the members of the Court; as the present author has shown elsewhere,[37] the greater or smaller willingness to produce leading precedents can sometimes be explained by the adjudicating members' background and expert knowledge of the relevant area of law. Especially a division of the Court that attempts to make statements of principle on issues with which none of its members have previously dealt, easily risks saying too much.

Lastly it is natural that such a large court includes members with differing opinions on controversial issues of principle. Going through leading decisions of earlier years, specially where opinions have differed, one is not infrequently prompted to ask: what would the outcome, or at least the reasoning, have been if Justice X or Y, with his known view of the problem, had taken part in the decision? However, in the Supreme Court today, there are scarcely such marked judge profiles as those of e.g. Hjalmar Karlgren, Gösta Walin or Erland Conradi, and the extent to which the majority view in a question of principle can be influenced by the composition of the division is uncertain.[38]

Whatever the cause, the formation of precedents in recent years has not been fully consistent, either.

The application of the law in the consumer area affords an example of this. As mentioned, the Supreme Court has shown an increased tendency to protect the consumer's interests even in contexts where the position lacks support in law.[39] In the last few years it has been found that the short period of limitation of consumer claims also applies in public-law connections (NJA 1988 p. 503) and that the classical principles of *condictio indebiti* should also be affected by consumer considerations (NJA 1989 p. 224). In

[37] See e.g. *TfR* 1989 p. 694 f.

[38] However, one can go so far as to say that it sometimes happens that some member reading a principle decision containing differing opinions sighs "If only I'd been there"!

[39] For more detail see Bengtsson in *Festskrift till Lars Welamson* p. 13 ff.

a fairly analogous situation, concerning the effect of clauses in hire-purchase contracts on the effect of payment to the original party, the Supreme Court also exhibited a marked benevolence towards the consumer[40]—until the discovery in Case NJA 1989 p. 671 of how hard it was to reconcile this position with certain rules of the Promissory Notes Act. If the notification of take-over of a claim brought property-law protection of the acquirer of the contractual claim, it was not easy to consider at the same time that payment by the notified debtor to the assigner had the effect of discharge on the ground that he could not be required to have understood the notification. Thus the Supreme Court took half a step backwards, which was hardly calculated to clarify the legal position.

In another consumer area, however, the Court has had a different view, without it being possible to bring any systematic consideration to bear. Where truly important social considerations are at stake—in the forfeiture of a rental contract—there is not much left of consideration for the weaker party: even insignificant breaches of contract, particularly rent delays, have been considered important enough to lead to eviction. (See recently NJA 1989 p. 74, NJA 1990 p. 412.) This strict line is by no means novel in court practice but the contrast is no less striking in view of the thinking that dominates both the Court's view of other types of contract and also in the tenants' protection rules in the legislation on landlord and tenant.[41]

As to dealings between traders, the legislator has shown restraint in intervening: freedom of contract is the main rule. In the application of sec. 36 of the Contracts Act, legal practice has in general also been restrictive in these relations.[42] However, the Supreme Court departed from this line in the much-discussed decision NJA 1989 p. 346 regarding a condition in business insurance: nevertheless the condition was factually justified and in no way implied that the insurance company had abused its position.[43] The result can indeed appear attractive in the individual case and the Court seems to have exerted itself to link the outcome to the rather special circumstances of the case, but the effect can be greater than intended: contracting parties and courts can easily feel the field is free for all kinds of departure from clear and in themselves well-grounded conditions of contract, not only in the insurance field.

[40] See in particular NJA 1986 p. 44.

[41] The tendency has been criticised by the present author, without the slightest result, in the work mentioned in footnote 3.

[42] See e.g. NJA 1984 p. 229 just on insurance contracts (but about arbitration clause; see on this point, on the other hand, NJA 1979 p. 666). Cf. further on this issue Grönfors, *Avtalslagen* (The Law of Contracts) passim and p. 186 ff.

[43] Cf. on this case Kleineman in *Juridisk tidskrift* 1989/90:1 p. 103 ff.

A certain amount of irregularity can also be noted in such an important area as indemnity for product damage. After successively increasing liability nearly to strict (see especially NJA 1977 p. 538), the Court was seized with misgivings when legislation in the area could be expected; it was not considered that strict liability for property damage could be imposed (leaving aside the fact that this concerned damages to others than consumers; see NJA 1982 p. 380, NJA 1983 p. 118). But when the legislator was finally about to make up his mind, the Supreme Court ran out of patience and imposed strict liability upon a municipality for personal injury—the case concerned an employee who had been poisoned by food served in a school—and here strict liability was spoken of both for manufacturer and for supplier. The position may seem well grounded, particularly since there was injury caused by foodstuffs; but it cannot be denied that the various convolutions can cause headaches for anyone attempting to familiarise himself with the relevant legal position.[44]

These irregularities in the application of the law are scarcely a great problem when seen from the perspective adopted here. The theoretical value of a consistent rule system should be clear to the adjudicating members even though the argument must be weighed against the desirability of a satisfactory solution to the individual conflict. The cure for fragmentation in relation to legislation and earlier practice is most probably to allow oneself time to attempt to oversee the overall legal position before establishing a new principle; more remote repercussions should also be considered. It is probably wisest to avoid the temptation to write oneself into legal history when one cannot say that matters are ripe for such a step. In many cases the traditional safety measure of referring to certain concrete circumstances in the particular case can be merited in the long run, even though this may require some self-restraint from more forceful members. When under the new leave-to-appeal rules the Supreme Court raises a more abstract question of civil law (see Ch.54 sec.12 of the Code on Civil and Criminal Procedure), it is harder to use this method; under these circumstances there is reason to put time and effort into analysing how the question under dispute appears in the larger context.

[44] The situation is treated in rather more detail in the authors's *Lectures on Product Liability* (Helsinki 1990) p. 1 ff.

5.

The threat of further fragmentation in the *legislation* is probably not equally easy to do anything about. Should a government wish to show initiative, not least before an election, systematic consideration and investigation of the more theoretical consequences of a piece of legislation probably appear as irritating obstacles to a determined policy. To point to the possibility that the Drafts Legislation Advisory Committee takes such views into account is often unrealistic given the pace of work usually required of that body; at most a couple of weeks' work, even with broad and complicated legislative proposals, is not normally enough to gain an overall view of the general problem, formulate a tenable alternative solution that better fits the system and develop arguments that will convince an impatient ministry of the excellence of the alternative. And when a bill has once been brought before the *Riksdag*, any references to legal traditions, systematic consequences, general fundamentals of law or similar more juridically-based considerations are as a rule doomed to failure.

Fragmentation can today hardly be seen as much more than an inconvenience, yet for several reasons the danger of an unclear and contradictory private-law ruling can soon become acute. To begin with may be mentioned the expected integration with the EC system; both for the movement of capital and services and for consumer protection, there exist directives and draft directives that may have direct significance for the central area of contract law. There may also be harmonisation in other areas, but this is not imminent. In addition, in any planning of legislation, a changed majority pattern in the *Riksdag* must be considered. A blurring of party lines, where various combinations are possible, must also affect the chances of maintaining consistent lines of legal policy. There is an increase in the probability of compromises which will weaken older principles, and of sudden vote-seeking ploys. But it is also conceivable that there may be sooner or later a clear change of course in the direction of a more enterprise-friendly private law—if signals from general discussion, motions in the Riksdag and so on are anything to go by. International competition can offer a motive for such initiatives.—Whatever direction matters take, it is to be hoped that the complications an increasingly self-contradictory and fragmented civil legislation entails will be clear to Ministry and Riksdag. To undertake part-reforms with no overall view of the topography of property law can muddle the position of the law in an unacceptable way.

There are consequently good reasons for the legislator to devote some time to investigating the general guidelines for a forthcoming overhaul of

property law, regardless of what political aim such an overhaul may have. To begin with, and as a minimum requirement of legal technique, the same legal principle must be used in similar cases. Allowing the rules of cancellation and those of compensation to vary in detail in different consumer contracts as discussed above appears somewhat hard to justify. But it is also desirable that certain more general principles should be drawn up for the reform operation—not with such an ambitious goal as some sort of general legislation on civil law, but chiefly as guidelines when drafting individual pieces of legislation. In cases where reforms in different directions may be contemplated, it should be made clear how the reform in various alternative cases shall be effected to fit into the legal system as a whole. An example to follow could partly be the preparatory investigations in the area of tort legislation undertaken at Nordic level around 1950 and which later underlay the tort law reforms of the 1970s;[45] similar problems of coordination can be expected in our neighbouring countries.

Be that as it may, there are reasons for Sweden, at least, to consider how the two predominant lines within private law—the commercial and the social—may be adapted to new circumstances and new desires without abandoning the reasonable demand for a fairly consistent and lucid rule system. Actually, this ought to be an entirely uncontroversial demand to which all should in principle agree; the only problem is that it all too frequently becomes obscured by the legislator's daily pressure of work. It is for this reason that the view has, with a certain bias, been stressed in the present discourse.

[45] See for Sweden Strahl's enquiry SOU 1950:16 which bore late fruit in the 1972 Tort Liability Act.