TEMPORARY EMPLOYMENT: A CRITICAL STUDY OF THE SWEDISH REGULATIONS GOVERNING CATEGORIES OF EMPLOYMENT AND THEIR FUNCTIONS

BY

ANN NUMHAUSER-HENNING

This paper is based on a study of the regulations governing categories of employment in Sweden which was published in 1984.[1] In this fairly comprehensive underlying study an analysis was made, against the background of the structure of Swedish society, of temporary employment from a historical, legal and empirical point of view. The main emphasis of the present paper will be on the account of this analysis of the social functions of the regulations governing categories of employment, an analysis that may be said to lie within the area of the discipline known as Critical Theory and which is, at least partly, based on a Marxist line of thought.

1. THE SUBJECT AND SCOPE OF THE STUDY

Security of employment may be described as a vital interest of employees in all countries whose industrial and working life is centred on industrial production.

One way in which this interest is safeguarded is through protection of employment legislation, and in this legislation employment protection is usually linked with employment of a permanent kind for an indefinite period of time. This means that the scope allowed in employment protection legislation for less secure categories of employment, temporary employment, will have a vital role to play. This was confirmed at the recent Eleventh World Congress on Labour Law and Social Security held in Caracas in September 1985, where New Forms and Aspects of Atypical Employment Relationships was one of the main topics discussed.

Originally, employment for an indefinite period of time, i.e. permanent employment, was the most insecure form. The background to this was the prevalence in the early days of industrialism of the liberal ideas which regarded the employers and the employees as free and equal parties to a contract. A contract agreed for an indefinite period of time could be terminated by one side or the other without any reason being given.

Temporary employment for a certain period of time, on the other hand, did

[1] Ann Henning, *Tidsbegränsad anställning, en studie av anställningsformsregleringen och dess funktioner* (Temporary Employment, a Study of the Regulations Governing Categories of Employment and Their Functions), Lund 1984 (summary in English).

afford a certain inherent, relative element of security of employment. From the start such employment was for a fixed period, involving some specific work or the like, and the contract was in principle binding. As against this, however, it is characteristic of temporary employment that it ceases without the employer being obliged to give any reasons for this when the period specified in the contract runs out, say, at the end of the season or when the work is completed.

Concurrently with the trend in many countries towards the linking of various rules protecting employees specifically with permanent employment the relationship between these two forms of employment has, however, been reversed. Now that more far-reaching security is available for permanent employees there is a danger that employers will circumvent this by using instead categories of employment with a specific time limit. The split between permanent employment and temporary employment is widening. This is the situation nowadays not only in Sweden but also in, for example, Norway, Finland, West Germany, France and Belgium. In all these countries the development of job protection for employees in general has led to statutory limitations of the right to make use of temporary categories of employment.[2] The vital role played by temporary employment in security of employment is evident not least from the fact that these statutory limitations have subsequently been revised, as has happened in Sweden and West Germany.[3]

Consequently, it is not only the level of the statutory employment protection as such that is important when assessing employees' security of employment but also the scope allowed for less secure categories of employment.

There are many other aspects of importance when it comes to defining the scope of employment protection. The legislator himself may have excluded certain categories, for example, young people and pensioners, or have accepted that the parties on the labour market themselves should agree on such exceptions. The possibility of having work carried out according to contractual forms other than those of employment comes to mind here. At this point mention could be made of the international trend towards a division of the labour market into three parts which, *inter alia*, was noted at the Labour Law Congress in Caracas. It is perhaps especially in what are known as the developing countries that a large proportion of the labour force within precisely the third sector, the service sector, are not employees in any formal sense.

[2] Regarding Swedish conditions, see also below. In other respects, see for example *NU* 1984: 10 (Norway and Finland) and the reports to the XIth International Congress on Labour Law and Social Security, Theme II, vol. 1, pp. 35–103 (West Germany), pp. 271–303 (Belgium) and pp. 519–50 (France) (mimeographed, Instituto Venezolano de Derecho Social. Sociedad International del Derecho del Trabajo y la Seguridad Social, Caracas 1985).

[3] Cf. also Belgium, where similar plans existed in 1984, but were scrapped after determined resistance from the union, see the Belgian report (mentioned in footnote 2), p. 288.

Instead they work as self-employed persons, *a cuenta propia*.[4] If the scope allowed for making such contracts is large then the rules governing employment protection and categories of employment can be nullified by employers choosing a form of contract other than that providing employment. If, on the other hand, very little scope is allowed then this increases the importance of existing rules governing employment and protection of employment.

The demand from employees for security of employment is based on a contradiction that is fundamental to the industrial mode of production. The underlying conflict may be described in the following way.

In the industrial mode of production labour is a factor in the production process just as are raw materials and machinery. When production varies with fluctuations in the business cycle there is also a variation in the demand for the various factors of production, including labour. The needs of the economy are best served by a completely mobile labour force which can be dispensed with when production falls and then re-engaged when production picks up. There is furthermore a natural desire in economic life to strive constantly to increase productivity, since the production of a larger quantity of goods with a smaller input of human labour leads to cheaper products. For this reason, at every point of time in economic affairs it is of interest to be able to employ those members of the available labour force who are best suited to their jobs. Where someone achieves a poorer result than someone else then in the interest of the economy he should speedily be replaced. Thus, in principle a total absence of regulations that bind employees to employers is to be preferred from the point of view of the economy, at least when the supply of labour is ample.

On the other hand, the employee is socially dependent on being able to sell his labour, and for social reasons he is as a rule also dependent on the particular establishment where he is employed. Where the employee cannot hold his own with the help of market forces he has therefore a great interest in security of employment. This conflict between the interests of the economy and the social needs of the employee is sharpened in times of structural rationalizations, economic crisis and high unemployment, and expresses itself in demands for security of employment. For the employee, being declared redundant in the interests of production is a threat to his whole social existence. It is true that in a society such as Sweden a drop in wages is usually compensated through social security etc. with allowances of various kinds. However, the social security system itself is based on the idea that the members of society themselves must in the first place earn their living by undertaking wage work. The

[4] In Argentina, for example, up to about 30 % of the labour force are in this category and the problem, which is termed "cuentapropismo", attracts a great deal of attention, see e.g. *Elementos para una politica de empleo en la Argentina*, OIT, Buenos Aires 1983.

grants that are available are a necessary—but marginal—complement to paid employment, and the allowances paid out are often related to previous paid employment or present occupations. Wage work is therefore at all times the controlling principle for the distribution of the resources of society.

Because of the structure of production wage work is of course also necessary in order to maintain production in its present forms. For this reason it is in the interests of production to maintain wage work as a social system. By degrees the ideas linked to wage work have come more or less to permeate the structure of society. Employees are linked to wage work not only through the compulsion to provide for their material requirements but also through the internalization of general social ideas concerning the positive values of work as such. Work is a form of self-realization, it leads to the emancipation of women, to social status and a feeling of community, and so on. In this way the labour force is disciplined and social chaos is prevented, at the same time as the positive drive of wage work helps to link the best labour force to production. Where productivity trends lead to large groups of employees, e.g. young people, being excluded from the ordinary labour market, the interests of individual producers can not only collide with the social needs of employees but can also threaten the very foundations of the social order. The existence of the present social order is dependent on whether the social ideology surrounding wage work can be upheld. The conflict which thus arises between the individual producer's economic interests and the mutual interest in maintaining wage work as a system of production stems from the fact that production is mainly undertaken in privatised forms. This may sound strange in view of the often great importance of the public sector in the economic life of society. However, even if public enterprise is not based on the same fundamental contradiction as industrial production it is usually organized along the same lines as industry. Public enterprise is divided up into separate units each with its own sphere of responsibility, budgetary framework, and so on, within which the fundamental ideas relating to economic efficiency still apply. Conflicts arise because what benefits the existing structure in the long run does not always seem rational to an individual employer, for example, a county council, that runs its enterprise in accordance with basic economic principles. What is special about this conflict is that it is not an expression of a conflict regarding goals between the interests of production and the social needs of employees, but rather between the immediate interest production has in the existence of a mobile labour force and its longer-term interest in maintaining the structure of wage work as a form of production and social order.[5]

[5] Concerning wage work, see also Anna Christensen, *Wage Labour as Social Order and Ideology*, The Secretariat for Future Studies, Stockholm 1984.

Thus, demands for security of employment are typically in conflict with basic economic laws relating to business activity at the same time as they express the social importance work has for the person employed in industrial production, a system that has come to influence whole societies, in some cases radically. The demands for security of employment may therefore be assumed to vary according to the extent to which wage work is given a central role. Once a certain stage of social development is reached protection of employment ceases to be exclusively a matter for the employee and becomes a matter of common social interest or even one in which production has an interest.

This study of the regulations governing employment protection in Sweden is based on the theory that legislation in this field constitutes an intervention in the economy which ultimately aims at maintaining the prevailing structure or social order.[6]

One of the functions of the legal system itself is to be an overall ideology in society and as such it provides the government with an important means of upholding the social order without needing to resort to compulsion.[7]

The legal system consists to a great extent of rules that simply spell out the prevailing social structure and indicate the basic rules of the game. In Sweden the rules concerning the right to own property and the institution of contract could be mentioned, as well as the basic rules relating to freedom of trade and freedom to compete. When these established values, principles and rules of the game are encroached on, the legal system intervenes with rules concerning sanctions and mechanisms for solving conflicts.

Production is then so organized that the economy itself can by and large perform the important task of keeping the game going.

There are, however, certain needs that are not effectively met directly through the inherent driving forces of the system. These are needs of the kind that may in some sense be said to be common to production as a whole or are more long term in character. Among these are to be found, for example, the maintenance of communications, road networks, and so on, but also support functions vis-à-vis the reproduction of the labour force in the form of health insurance and social security, employment exchanges, labour market policy measures and training. As was indicated earlier there are also in the system certain fundamental contradictions that lead to conflicts, namely contradictions between the demands of production for economic efficiency and the social needs of employees, and the contradiction contained in the fact that what is rational for society as a whole (for instance, economic management with scarce

[6] Cf. above all Håkan Hydén, *Rättens samhälleliga funktioner*, Lund 1978 (summary in English).

[7] Here ideology stands for false notions concerning reality, cf. the use of the term within what is known as the Critical Theory School—see also footnote 10 below.

environmental resources) does not always seem rational to the individual producer. It is here that the intervening norms enter the picture.

The fact is that because of the course of events the fundamental oppositions touched on above will constantly find new forms of expression. Material conditions change so that a gap appears between what people actually experience and the ideological explanations furnished by society. This leads to social conflicts—the legitimacy of the system is in danger. Material conditions can also develop in a direction that will damage the system in the long run and so call for remedial action. Sometimes the conflicts cannot be resolved without the intervention of the legislator.

The aim of the intervening norms may be to channel the action along lines that meet other values than those generated by the economic system itself, for example, regard for the environment or social security. The aim may also be ideological in that it confines the discontent within manageable limits and in so doing moderates the conflict. What is typical of the intervening norms is that as a result of structural limitations they cannot provide a fundamental solution to the underlying conflict. Ultimately, the aim is always to uphold the structure, and even a modest display of hostility to the structure results in the intervening norms making strong demands for control and sanctions mechanisms.

The idea that, alongside the purposes that are at once evident from the contents of the rules, law has in this way an ideological function is not disputed by a growing number of Nordic legal scholars.[8] Nor is the idea that legislation may be seen as intervention a new one.[9] Here, however, intervening norms are envisaged as norms of a special kind in a typology that seeks to classify legal rules according to the functions they perform in the social process.

[8] As early as in 1952, in *En lov i sökelyset* (Oslo, Lund and Copenhagen), Eckhoff, Aubert and Sveri argued that the evaluation of the Norwegian Act relating to domestic service showed that the effects were so far removed from the stated goals of the Act that one was forced to ask whether, right from the start, the Act was not expected to produce other, unstated effects, and also that legislation often dresses up conflicts in one form and steers this along special channels so that it appears less dangerous than it could otherwise have been (pp. 171 and 179 f.). Among other legal scholars who have expressed similar thoughts concerning the functions of law mention may be made of Henrik Bang and Gitte Jensen, "Arbetskraftens reproduktion—Statsinterventionens former" in *Retfærd* nos. 1 and 2, Niklas Bruun, *Kollektivavtal och rättsideologi*, Helsinki 1979, Anna Christensen, "Ideologikritik contra dogmatik" in *Rätten som instrument för social förändring* (ed. Håkan Hydén), Lund 1982, Jörgen Dahlberg-Larsen, *Retsstaten, Velfærdsstaten och hvad så?*, Aarhus 1984, Lars D. Eriksson, "Utkast till en marxistisk jurisprudens" in *Retfærd* no. 11, Ole Krarup, "Den juridiske aura—om arbeidsrettens grundbegrebe" i *Juristen & Ökonomen* 1980, pp. 211 ff., Thomas Mathiesen, *Rätt, samhälle och politisk handling*, Lund 1980, Torsten Sandström, *Privatjustis mot anställda*, Lund 1979, and Dennis Töllborg, "Att ersätta en ideologi med en annan" i *Rätten som instrument för social förändring* (ed. Håkan Hydén), Lund 1982.

[9] See the works referred to in footnote 8 and Axel Adlercreutz, *Kollektivavtalet*, Lund 1954, Sten Edlund, *Tvisteförhandlingar på arbetsmarknaden*, Stockholm 1967, Per Eklund, *Rätten i klasskampen*, Stockholm 1974, and Boel Flodgren, *Fackföreningen och rätten*, Stockholm 1978, as well as O. Kahn-Freund, *Rapport Général, Actes du Deuxième Congrès International de Droit Social, Section II, Rapports Collectifs du Travail*, Brussels 1958, pp. 205 ff.

The aim of this study of Swedish protection of employment legislation is to examine how the contents of the legal rules, their application and practical use are in agreement with the assumptions noted here concerning intervening norms and their functions. It is not of course a question of proving in a positivist sense that the rules do have these functions or that the structural connection postulated here does in fact exist. The criterion as regards the attainment of new knowledge is simply that the theoretical bases appear as a coherent and reasonable explanation of the material presented in the study. As noted, the study may be said to lie within the area of the discipline known as Critical Theory, and the aim behind it extends no further than that of ideological criticism—to attempt to reveal the concealed structures and how they are reflected in the contents and implementation of the legal rules.[10]

The carrying out of this work has involved an attempt to make use of methods currently employed within historical, jurisprudential and empirical statistical research. The material has of course been selected according to principles that are independent of the theoretical explanatory model used for the final analysis. The full account of the material was given in the original presentation of the study. Here, however, the presentation covers only an attempt to provide a coherent explanation of the development of the regulation of employment protection in general and particularly the contents of the rules relating to categories of employment, against the background of points of departure outlined earlier (section 2). In principle the presentation here contains no footnotes. The basic material and sources for the analysis are listed in the original work. In conclusion there is a short commentary (section 3).

2. THE FUNCTIONS OF THE REGULATIONS GOVERNING EMPLOYMENT PROTECTION

2.1. *A General Survey of the Development of Employment Protection*

On the breakthrough of industrialism the demands of production for an efficient and mobile labour force were met by means of what is called the independent service and labour contract.

The opposition between the interests of the economy on the one hand and the social needs of employees on the other did not at that time generate any

[10] The leading name within Critical Theory is Jürgen Habermas. His most important work is *Erkenntniss und Interesse*, Frankfurt 1968; see also the collected essays *Technik und Wissenschaft als "Ideologi"*, Frankfurt 1968. Other representatives are Max Horkheimer, Herbert Marcuse and Theodor W. Adorno. See also, for example, David Held, *Introduction to Critical Theory*, London 1980.

particularly strong reactions in the form of social conflicts in the field of employment protection, in spite of the increasingly widespread use of the independent service and labour contract. For employees, salaried employment had not yet acquired the significance it was to receive later on. In the transition from one social order to another there were still "niches" in social life which rested on a social order of former days. Nor, in society as a whole, was security of employment regarded as an urgent issue. Production was in a powerfully expansive phase. The early decades of the twentieth century were regarded as a golden age for industrialism and in society as a whole work was plentiful. The conflict between employers and employees was expressed in other ways, notably in demands for higher wages and shorter hours of work.

When restrictions on the independent service and labour contract were first discussed in a legislative connection in the early years of this century this took place in reverse, at least seen from our vantage point. At the same time as work stoppages became an increasingly common weapon in the collective struggle the employers developed an interest in the legal regulation of the employment contract. The fact is that stoppages and strikes—in the absence of regulations concerning peace obligations—were not regarded as illegal, though it was taken for granted that regulations concerning periods of notice etc. would be observed also in cases where work ceased because of industrial action. Therefore, the employers called for a statutory period of notice covering one or two weeks. This could help to reduce the number of stoppages or at least eliminate some of the inconvenience they caused.

In those cases where the employees' side pressed for rules designed to protect employment levels the underlying conflicts were essentially different from the one between the interests of the economy and the social needs of employees. The demands were concerned with protection for the growing trade union movement and with the terms of employment set out in the collective agreements.

What is known as the December Compromise of 1906 between the Trade Union Confederation (LO) and the Employers' Confederation (SAF) in Sweden contained an agreement on this point.

Through the compromise the employees' side was guaranteed protection against dismissals that violated the right of association while the employers' side retained the right freely to direct and allocate work and also to hire and fire employees. The right of the employers freely to hire and fire labour meant above all the freedom to engage also non-union labour and the agreement would not appear to have had the far-reaching intentions in the field of employment protection that were later attributed to it.

It was not until 1936 that the December Compromise was followed up by legislation in respect of the remaining groups on the labour market, mainly

salaried white-collar workers, through the prohibition in the Right of Association and Negotiation Act of dismissal in violation of the right of association.

Apart from this the legislation on specific points in the field of employment protection prior to 1950 may also in the first place be seen as having been initiated by conflicts other than the vital one between the interests of capital and the social needs of employees in general. This is true, for example, of the prohibition against the dismissal of safety representatives in the 1949 Workers' Protection Act as well as the prohibition against dismissal because of marriage, pregnancy, and so on, and in connection with compulsory military service in accordance with two Acts from 1939. The intervention in economic life resulting from these prohibitions may be presumed to have been relatively slight. The main weight lay instead in the ideological functions of these Acts.

The opposition at the individual level between the interests of the economy and the social needs of employees found more direct expression, however, in other connections even during the period under review.

This is reflected for example in a proposal from 1923 relating to works councils which was supported by the Social Democrats. This proposal undoubtedly represented a more direct attack on vested economic interests. Its aim was to ensure by means of legislation employee participation in the decision-making process, via statements from a so-called works council and later possible consideration at trade union level, and so gain a hearing for demands that dismissals should be objectively justified and that a certain order of seniority should be observed in situations when there was a shortage of work. However, apart from a prohibition against dismissing members of the works council without any compelling reason, the proposal did not amount to a formal assault on the employer's right to fire at will. The proposal was an early example of how, when its main function is to reduce conflicts between opposing groups, the law loses its normative content and leaves it to case law to find a solution, which can then be adapted to the conflicting pressures in each specific case.

Yet another expression of the fundamental conflict in the field of employment protection was the 1935 proposal for the statutory regulation of the employment contract. The proposal did not contain any real attack on the right to dismiss at will but it provided for mandatory rules concerning the observation of a period of notice in the event of the termination of permanent employment.

However, neither the 1923 nor the 1935 proposal resulted in legislation. The social conflicts in the field of employment protection were evidently not yet so strong as to justify general intervention. In 1932 the then newly established Labour Court summarized the legal situation in the field of employment protection in the much discussed ruling 1932:100. The judgment shows that

the view of the employment contract was in principle the same as it was at the end of the 19th century. The duration of employment depended entirely on what the parties had agreed on and in the absence of any contractual restrictions either party could terminate the agreement without notice and without giving any reason.

The vigorous expansion of industry—during the 1920s the GNP increased by on average 5 % per year—and the stabilization of the conditions of production led to the gradual strengthening of the standing of wage work as a form of production, a key to distribution, social order and social ideology. The social significance of wage work to the employees was enhanced. Increased competition and increased growth were accompanied by specialization and structural transformations, which resulted in increased conflicts in the field of employment protection. The development can be assumed to have led the individual employee all the more often to feel that his interests were threatened. However, if one considers society as a whole the economy was growing at a satisfactory rate and employment at the macro level was not threatened. That the social conflicts were not more acute can also be explained by the fact that the increasing demands for employment protection were met by means of collective agreements within large areas of the labour market, in the first place through rules concerning the observance of a period of notice but also in that reasons for dismissal were normally given. 1938 witnessed what is known as the Saltsjöbaden Agreement between the Trade Union Confederation (LO) and the Employers' Confederation (SAF). As a result of the demand that no employee could be dismissed without just cause being given this agreement came to represent the first extensive general limitation of the right to fire at will. Even so, given the legal form of the agreement this did not entail any formal limitation of the employer's right to fire at will; instead it was based on a model of joint consultations and negotiations. The agreement also included stipulations concerning the observance of a short period of notice.

After World War II industry finally replaced agriculture as the most important branch of the economy and contributed more to the gross national product and employment than any other branch. The years 1951 to 1958 were characterized by a steady but modest growth in industrial production, while the years 1958 to 1965 brought about a vigorous growth. However, the growth of industrial production did not lead to any correspondingly large increase in employment in industry. In particular the vigorous expansion after 1958 took place because of increasing productivity as a result of extensive structural changes and the exploitation of the advantages of large-scale operations. Employment increased steadily during this period but most of the increase was in the service sector. This economic development, with at times ruthless structural rationalization, may be presumed to have led to more demands for

security of employment from the employees' side. At the same time, though, production was increasing satisfactorily and there was a strong demand for labour, so there was a certain willingness to accede to the growing demands from the employees' side by means of agreements as long as these demands did not seriously conflict with the needs of production. In 1964 the Saltsjöbaden Agreement was amended so that an employer could be required to pay compensation if he dismissed an employee without just cause.

Since agreements provided for an acceptable solution to the conflict over large areas of the labour market there was now no basis for intervening legislation, though the legislator did in fact intervene in one area. In the State Officials Act of 1965 rules were included which may be compared to a demand for just cause for dismissal with regard to officials in state employment. The special point here was that in this sector matters relating to dismissal could not be agreed upon in collective agreements.

After 1965 the economic picture changed. The great industrial boom seemed to be over, production increased more slowly and then stagnated during the 1970s, and in some years it even fell. It is true that the service sector continued to increase for some years, but even here the level of employment has now stagnated. In spite of the fact that employment overall continued to increase during most of the period after 1965 it has not been possible to conceal the growing elimination of employees from the labour market. The huge increase in productivity at the same time as stagnation appeared meant that the whole of the labour force was not needed in production and that the scope for an increase in living standards and for an expansion of the public sector was unlikely to be open-ended. The increased number of women on the labour market had also helped to illustrate the elimination of weak groups that was a result of technical developments. During the deepening economic crisis in the late 1970s and early 1980s unemployment became more widespread in society.

This state of affairs led to the conflict in the field of employment protection following a somewhat different pattern.

The conflict between the immediate interests of the economy and the social needs of employees still existed of course, and the growing problems on the labour market led to the conflicts becoming more frequent and more acute. With the rise in material living standards there were also demands that consideration be shown to values other than material ones.

However, the trend of events also sharpened the conflict between the immediate interests of production and the social order in society, which is represented by the wage-earner structure and which was touched on in the introduction.

Developments since 1965 may be said to have meant that wage work as a superior social ideology is now threatened. It is true that via the community at

large production can still support everyone at a level which compared with that of many other countries is undoubtedly high. Despite this, the fact that increasingly large groups of the population are being compelled to be a burden on the community can lead to the social structure appearing irrational. Reality is completely at odds with the values that have prevailed hitherto in society. When natural employment levels cannot be maintained large groups of employees, their good intentions notwithstanding, are deprived of the chance of responding to the demands made on them by society and by the prevailing social ideology. This collision between reality and ideology is reinforced by the fact that society seeks in various ways to confirm the wage-earner structure as the key to distribution. Increasingly artificial occupations for those discarded are created by means of labour market policy measures and the social security system is closely geared to wage work and maintaining occupation. Producing in order to satisfy one's needs is essential in all forms of society and we have for years now been accustomed to the idea that small children, the sick and the old do not need to work. On the other hand, being compelled to undertake work that is not essential in order to earn one's living is degrading, and being described as "handicapped" because one is not able to meet all the demands of technical developments is both degrading and absurd.

It must be regarded as important to conceal at all costs this growing irrationality in the system and counter its negative consequences. Otherwise the common social ideology and the social order cannot be maintained. The greater the practical employment problems are the less likely is it that the task of solving them will succeed through the sole use of measures that influence attitudes. One way could then be to introduce intervening legislation which compels the individual producer to bear directly a portion of the social expenditure, since this enables one to avoid including in the national budget a clear and unambiguous statement of the real state of affairs. Underemployment is concealed in other and less degrading forms than unemployment. However, legislation cannot be so effective that it brings the fundamental economic mechanism to a full stop—it must contain the "loopholes" that are needed to enable the structure to survive.

What is known as the older employees' legislation which was introduced in 1971 may be regarded as a response to the social conflicts caused by the development of production referred to above.

The stated aim of this legislation was to tackle the unacceptable consequences of a narrow view of efficiency and profitability in business management and so safeguard employment and security for older employees on the regular labour market. The intention was that the employers should accept some of the social responsibility that would otherwise have to be shouldered by society.

The protection, which applied to employees aged 45 or over, consisted mainly of a financially guaranteed period of notice of a certain length and priority as regards re-employment with the employer for a short period after the termination of employment. It is doubtful whether the Act ever included any protection against dismissal for personal reasons and there were no rules as regards priority in the event of dismissal because of lack of work.

The protection was restricted to those in permanent employment. Employees in temporary jobs were not covered by the protective rules for older employees, though only if the temporary form of employment had been occasioned by the special nature of the work or was in conformity with accepted practice within the trade.

The Act can be presumed to have had a steering effect when it was a matter of protecting older employees in permanent employment. Occasional fluctuations in production could no longer be countered by the dismissal of older employees since the period of notice had to be observed. Dismissal for personal reasons was made more difficult by the fact that the subsequent hiring of other employees could not take place because of the priority enjoyed by older ones. To the extent that the structural rationalization then in progress in industry and commerce resulted in a need for permanent redundancies the Act did not, however, constitute any protection for older employees, and one way of evading the effects of the Act was of course to avoid all new hirings of older employees. In this respect the legislator's weapon was a labour market Act passed at the same time, the Promotion of Employment Act. During the debate in the Swedish Parliament (*Riksdag*) it was above all against this Act that the business community and the political opposition directed their fire. The Act may be said to contain quite far-reaching provisions for sanctions in relation to employers, as a last resort compulsory use of the labour exchange can be required. At the same time the effect of the Act will of course depend on how it is applied. Developments since the coming into force of the Act have demonstrated that this fundamental part of the statutory protection of employment is little more than "window dressing". The Act is a clear example of how intervention that is too "alien" is not provided with "teeth".[11]

The Act protecting older employees may also be assumed to have had certain ideological effects. At least, older workers could no longer be discarded by firms at random, though it is clear that basically the Act did not solve the problem of the employment of older persons. Instead the problems expressed

[11] In this paper mention has been made throughout of the Promotion of Employment Act. In actual fact the original Act (1971: 202) which was mainly concerned with older employees was replaced by a new Promotion of Employment Act (1974: 13) which was wider in scope. However, the differences between these two Acts are of little importance as far as this paper is concerned.

themselves in somewhat different ways. The continued shedding of labour was steered into more acceptable paths than that of unemployment—early retirement increased very strongly in the years that followed and the possibility of what is known as the "part pension" was introduced. The employers too were compensated with various labour market policy remedies.

As was previously suggested the categorization of the labour market continued in spite of the Act protecting older employees, and also other groups than older employees were in the danger zone. One could say that the crisis of the legitimacy of the system was becoming more acute.

It was against this background that the Employment Protection Act of 1974 was passed, and it was through this Act that for the first time a general protection of employment was introduced into Swedish legislation.[12]

The legislation was now made more effective. The Employment Protection Act was to be a final solution. The stated aim was to give all employees satisfactory protection of employment and also to provide special protection for older members of the labour force.

The Employment Protection Act differentiates between temporary employment and permanent employment and the type of employment is important above all when the employment is terminated.

The more developed form of protection is linked with permanent employment. The employer must have just cause for dismissing his employee. Disputes as to whether just cause exists may be settled by the Labour Court, and until the Court's decision is known the employment must continue. The employment ceases only after the expiry of a certain period of notice of between one and six months. The employee is guaranteed full pay during the period of notice. Shortage of work is regarded as being just cause for dismissal but here the employer must observe a certain order of seniority and those dismissed have priority as regards re-employment.

Those employed on a temporary basis may be dismissed without notice and without the employer being required to give a reason when the agreed time of employment expires, or at the end of the season or when the work has been completed. If the period of employment has been a long one—usually more than twelve months during the previous two years—the employer is obliged to give the employee notice at least one month in advance that no further employment will be offered. If the reason for this is shortage of work the employee has priority as regards re-employment during the coming twelve months.

In spite of the protection rules that apply to temporary employment in certain cases such employment is much less well protected than that on a

[12] See *SFS* 1974: 12 and also *SOU* 1973: 7, *prop.* 1973: 129 and InU 1973: 36.

permanent basis. In view of this the legislator found it necessary to restrict the permitted use of forms of employment with a specific time limit. The 1974 Employment Protection Act allowed contracts concerning employment with such a time limit provided these were justified by the particular nature of the work to be performed or if the employment was related to practical training or deputyship.

The Act contained rules that may be thought to have implied certain obstacles to the mobility of labour. The rules concerning the observance of a period of notice prevented employers from responding to temporary fluctuations in demand by dismissing employees. The rules which in the event of a shortage of work protected especially the older employees by requiring that dismissals follow a certain pattern, conflicted with the interests of the employers who in critical situations wished to retain the services of the most efficient and competent employees. The limitations imposed on the right to dismiss employees for personal reasons also conflicted with these interests.

The Employment Protection Act therefore meant that the functioning of the economy was hampered in certain respects and would seem to have resulted in a portion of the employment problem being concealed in a certain excess capacity within firms. It was in this way that the Act countered the threat to the legitimacy of the system that the employment crisis had created. At the same time rules that put a premium on long periods of employment with the same employer tend to link the labour force more securely to firms. To the extent that the rules prevent employers from suddenly or arbitrarily dispensing with employees they do of course meet the social interests of employees in the protection of employment conflict.

However, even as regards its contents and aims the Act was an obvious compromise; the employers would be compelled to take social considerations into account but only to an extent that did not conflict with the basic economic interests of production. Among the rules that meet the more immediate interests of production in having a mobile labour force there is notably the fact that according to the Act shortage of work constitutes just cause for terminating employment and that the protective rules have essentially been reserved for certain employees, those with permanent jobs. The opportunities provided for hiring employees for specific periods of time, where the need to provide just cause or observe a period of notice or a certain order of priority, etc., did not arise, gave the employers the freedom of action they needed. It is obvious that the legislation did not in any serious sense manage to solve the problems facing the individual employee and the threat to the social structure brought about by continuing developments.

Even so, the Employment Protection Act, together with its limited guidance functions, may be presumed to perform an important ideological function.

Since the threat to the social order that accompanies falling levels of employment and the increased elimination of labour as a result of technological advances, had been reformulated as a problem of security of employment, the conflict was channelled into paths that conformed to the wage work structure. This view is supported by the supplementary Promotion of Employment Act, which is based on the idea that work is the goal dreamed of by older people, and by the occupationally handicapped and the socially outcast, too, even though the chances of them finding a place in the production process are virtually nil. The terminology and the formulation of the Employment Protection Act as such do lend strength to the idea that the Act provides protection for employees. To the extent that the Act meets the basic needs of production it reinforces at the same time acceptance of these needs, and they are perceived as legitimate and unquestionable. The most important point here is the fact that according to the Act shortage of work is "just" cause for dismissal, an idea that it is of course particularly important to drive home when full employment is threatened. The ideological function of the Act is emphasized by the fact that nowhere in the text is there any specific mention of this limitation which in practice is very important indeed. It emerges only indirectly and in statements in the *travaux préparatoires*. Nor does "shortage of work" apply just to situations where for compelling financial reasons it is necessary to cease production; it can apply to reorganizations that might even lead to an increase in hours of work. The just-cause rule also gives the average employee the impression that complete protection of employment exists in spite of the fact that the shortage-of-work cases, in practice so important, are not covered. This idea has been reinforced by the strict practice that has been developed in connection with dismissals for personal reasons. The fact is that the requirements are so extreme that the idea is conveyed that those employees who are dismissed for this reason only have themselves to blame. This may be assumed to influence attitudes to the problems of employment in a way that benefits the social order. Unemployment is seen, at least partly, as self-inflicted—not as a sign of the absurdity of the system.

The fact that the main task of the Employment Protection Act is to function as a compromise designed to reduce conflicts is reflected in the shape of the Act. It is true that the rules have in the main been formulated as mandatory norms, though on essential points the content of these norms is often vague and imprecise. This is the case, for example, as regards sec. 7 of the Act, where "just cause" is not given any clear and unambiguous meaning and where, moreover, there is a requirement that consideration be given to whether it is "reasonable" to transfer employees to other work instead of dismissing them. When it is a matter of both a period of notice and order of priority, and the use of temporary employment—the rules that comprise the most serious threat to

the economy—the legislator has left it to the parties on the labour market to enter into collective agreements designed to find suitable solutions to specific conflicts.

In the years since 1974 the economy has been characterized by a profound economic crisis, which presumably made firms less inclined to bear the social charges for the labour force they did not need. The continued improvements in productivity have led to ever-increasing numbers of employees becoming superfluous. At the same time the intervention implied by the Employment Protection Act of 1974 may be presumed to have led to more serious and frequent conflicts in the field of employment protection. Even if the legal intervention has not been so far-reaching in all respects the Act may have had an ideological "surplus effect" also on the employers' side, so that the employers have hesitated to act contrary to the values stated in the Act even when this might have been legally possible. Against this background it is natural that it was the employers who were particularly discontented after 1974. The political situation after 1976, when the non-socialist parties formed the government, may also have contributed to the fact that the demands of production were expressed so forcibly and that the legislator was so alive to them.

The current Employment Protection Act from 1982 provides for a considerable extension of the right to make use of forms of employment for limited periods of time.[13] According to the 1982 Act employment for a specific period is allowed also for holiday work, working off temporary piling-up of work, while awaiting compulsory military service, for employees who have reached pensionable age and also where trial periods are concerned.

When related to the underlying conflicts in the field of employment protection these rules mean above all that production has much better opportunities of meeting its immediate interests of having a mobile and—via employment for a trial period—efficient labour force. Giving the employers more scope for what to them are less onerous forms of employment may also lead to the employment of more people and in this way conceal the troublesome employment situation. This could presumably have beneficial effects on the social legitimacy crisis.

2.2. *The Regulations Governing Categories of Employment*

As was mentioned above, the basic rules governing categories of employment are to be found in the 1982 Employment Protection Act.

According to sec. 5 of this Act temporary employment is allowed in the following cases:

[13] See *SFS* 1982:80 and also Ds A 1981:6, *prop.* 1981/82:71 and AU 1981/82:11.

1. Contracts for a certain period, a certain season or for certain work providing these are occasioned by the special nature of the work.
2. Contracts for a certain period which relate to deputyship, practical training or holiday/vacation work.
3. Contracts referring to a certain period of time, though not exceeding six months out of two years, due to temporary piling-up of work.
4. Contracts valid for the time up to the date the employee is due to take up National Service duties, or some other comparable service, lasting for more than three months.
5. Contracts for a certain period of time which refer to employment for persons who have reached retirement age.

According to sec. 6 contracts referring to employment for a trial period may also be made covering a period not exceeding six months.

The regulations governing categories of employment contained in the Act may be replaced by collective agreements at central union level. These regulations can then be applied also in respect of non-union labour employed by the employer. It is also possible by statute or other statutory instruments to prescribe for departures from the regulations in the Act. In the sector of the labour market where the state regulates wages and salaries the question of employment for certain periods of time is regulated in a number of statutory instruments.

According to the Act employment shall be held to be permanent unless there is agreement to the contrary. From what is known as the presumption rule it follows that anyone who claims that the employment contract has been limited in some way must be able to prove this in the event of a dispute.

Thus the Act means that any temporary employment must in order to be valid be specifically permitted by the Act or else be provided for in a current collective agreement. If the employer is unable to show that such provision exists then following a claim by the employee the employment can be declared permanent. This applies even if at the start of the employment both the employer and the employee were agreed concerning the termporary nature of the employment, though the employee or his union have to object to the prohibited category of employment. According to sec. 14 of the Promotion of Employment Act the County Employment Board is also in a position to intervene in cases where it is felt that an employer has essentially disregarded the regulations governing categories of employment contained in the 1982 Act. Through the rule in sec. 28 of the 1982 Act relating to the duty of the employer to report new temporary employment contracts to the trade union that signs collective agreements, the employees' side also has some possibility of checking on the employers' hiring policy in this respect. However, sec. 28 of the Act applies only to places of work that are covered by collective agreements.

An analysis of the regulations governing categories of employment, their implementation and use indicates that their content as regards steering actions is such that they both prevent and encourage employment in insecure categories. This may seem contradictory but ought to be understood to mean that the Act makes permanent employment in insecure categories more difficult at the same time as it affords an almost unlimited right to short temporary employment.

Consequently, the regulations prevent lasting insecure employment conditions because the rules and their implementation are drawn up in such a way as to make it difficult for the employer to have one and the same employee more permanently employed without offering the benefits involved in permanent employment. According to the practice of the Labour Court employment that is temporary because of the particular nature of the work should refer to duties that have in some way a definite time limit right from the start. The longer the estimated time span becomes the greater the reason that normally exists for engaging the employee on a permanent basis. According to sec. 5(3) of the 1982 Act it is permitted for one and the same employer to engage labour for a temporary piling-up of work for not more than six months during a two-year period. If the intention is to give the employee further work thereafter this must be done within the framework of some other category of employment. Also as regards employment for a trial period the time limit fixed applies only to the individual employee. Such employment must be agreed for a period not exceeding six months and cannot normally be repeated. The special protective rules linked with temporary employment also mean that where, in spite of the rules mentioned earlier, such employment has continued for a considerable time then there are fewer differences between it and permanent employment.

The regulations governing categories of employment encourage insecure employment conditions owing to the tensions that arise between the intervening rules concerning the protection of the employee in more permanent employment and the general scope of the rules that permit temporary employment. Overall, the regulations governing categories of employment hardly constitute any limitation of the employer's right to make use of temporary employment as long as such employment does not continue for one and the same employee for a lengthy period.

The list of situations in which temporary employment is permitted under the 1982 Act covers virtually all conceivable short-term needs for a mobile labour force within production. Additional opportunities arise because of special regulations in ordinances in various fields, especially in the public sector, and in collective agreements. Temporary employment may be designed in such a way that the labour force becomes very mobile, for example, by linking the period of employment direct with the leave of absence of some permanently

employed person. The fact is that temporary employment often corresponds substantially to the free employment contract in its original naked form.

As regards the most strategic areas of the economy in particular the preconditions laid down for the right to use temporary categories of employment are vague or virtually unverifiable. In the implementation of sec. 5(1) of the 1982 Act uncertainty arises when it is a question of deciding what makes a job special in the sense that there is reason to justify classing it as temporary employment. In the *travaux préparatoires* it was clearly indicated that certain occurrences, employment in typically seasonal trades and within the construction and installation industry, are special in the sense required. The matter has not yet been brought to a head in the application of the law, but judging by the practice of the Labour Court it is indirectly evident that this assessment of the areas concerned is accepted, even though it would hardly stand up to considerations of the kind that characterize the application of sec. 5(1) of the 1982 Act in less strategic areas. For one thing, the requirement that the duties that the temporary employment involves should differ essentially from those normally performed by the permanent staff engaged by the employer is not met.

Where deputyships are concerned the usual practice has been to be guided by how these have been generally viewed on the labour market. A deputy is the person who replaces an absent employee or holds a temporarily vacant position until such time as the post is finally filled. In the specific case the employment offered should from the start be linked with a particular absent employee or a particular post and the duties involved should faithfully reflect this relationship. Since in practice there is acceptance of the reorganization of duties at the place of work, of an overlapping of duties between the deputy and the regular employee, and of other modifications of the vital precondition, the limiting functions of the precondition are nullified, making it difficult to keep a check on deputyship employment. The use of deputies is also dependent on how the employer chooses to organize his business activities and this means that it lies well outside the control of the legislators and the judicial authorities. Not even when there is a foreseeable and permanent need of replacements in the business is the employer required to meet this need other than by engaging deputies.

The time rule in sec. 5(3) of the 1982 Act does not involve any limitation whatsoever of the extent to which the employer may use employment for a temporary piling-up of work as long as he does not contravene the time rule by employing the same employee. He may have a larger number of employees engaged at the same time to cope with a temporary piling-up of work or he may allow one employee to succeed another. The limitation lies instead in the requirement that the piling-up of work should be regarded as temporary, though according to what is stated in the *travaux préparatoires* the question of

what is to be regarded as a temporary piling-up of work in the business is in principle one that should be decided by the employer. Only in the event of more obvious evasions of the rule is review possible and then primarily through the activities of the labour market authorities according to the Promotion of Employment Act.

Finally, with regard to employment for a trial period, it is certainly the case according to the *travaux préparatoires* that a real need for a trial period must exist, though it is pointed out at the same time that it is up to the employer to decide that such a trial period is needed and that in principle this decision cannot be challenged by a court of law. The only limitation imposed by the rule is the six-month deadline. Consequently, sec. 6 implies a virtually unrestricted right to employ persons for a temporary period not exceeding six months with a concurrent "period of notice" of two weeks. The limitation is linked with the individual employee and the employer can hire as many employees as he wishes for trial periods.

The inherent characteristics of the rules are closely linked with conceptions regarding the employer's unrestricted right to direct and distribute work. These conceptions, which permeate labour law, may be seen as a legal expression of fundamental structural needs arising out of the form of production. The assumption is that assessments within this field are of such strategic importance in the economy that they cannot effectively be steered by means of intervening norms.

It is especially deputyships, seasonal employment and employment for a specific task that may also be seen as exemplifying the view that activities that traditionally have been carried out by means of temporary categories of employment may in future also be organized in this way. This, too, is of course a mark of respect for the employer's unrestricted right to direct and distribute work. But acceptance of traditional forms of organization can also be explained by the fact that the task of the intervening legislation is to reduce conflicts. In those trades where, for example, employment for a specific task is traditionally used this employment category is widely accepted by the employees' side too, and this can be partly explained by the fact that here this employment category caters for other essential employee interests.

The question then is what is the relationship between the steering function of the rules, according to this description, and the fundamental conflicts that may be presumed to have led to the legislation?

As regards the conflict between the interests of the economy in having an efficient and mobile labour force and the social needs of employees one could say that to the extent the rules prevent the permanent employment of employees in insecure employment categories they support the other rules in laws that intervene in the economy in order to meet the employees' need of security of

employment. These protective rules mean, *inter alia*, that the employers have difficulty in divesting themselves of a labour force which for some reason, for example, age, illness or a lack of education, no longer meets the requirements of production for efficiency. Rules relating to periods of notice make it more difficult for employers to respond to short-term fluctuations in production by laying-off labour, that is, the need for a labour force that is mobile in the short run. This intervention is in conflict with fundamental economic interests. The availability of temporary employment in general performs an important function here. It meets the short-term need for a labour force in forms that allow of a very mobile supply of labour. The permitted use of categories of temporary employment therefore functions as a "regulator" in employment protection and limits the impact of intervention in the economy.

Even when it is a question of the conflict between the interests of the individual employer in undertaking rationally operated business activities and the social legitimacy crisis that arises in the wake of productivity trends, the rules that make it more difficult to have permanent employment in insecure categories of employment tend to benefit the long-term needs of production. Production needs to link first-class labour more firmly to it when wage work as the social order and a social ideology is threatened. The fact that trial periods of employment are possible helps to ensure that there will really be a supply of first-class labour that can be linked with firms in ways that involve an obligation. To the extent that these protective rules are nevertheless seen as an excessively troublesome intervention in the economy it may be assumed that the regulations governing categories of employment operate so that an increasing amount of employment is directed towards temporary categories. The rules concerning temporary employment do not in any real sense limit employment in such categories. The special protective rules linked with longer periods of temporary employment probably encourage the temporary employment of persons for short periods of time, and in order to avoid being committed the employer ought therefore to arrange for frequent changes of employees.[14]

This is how the use of temporary employment can have the effect of creating employment, and this is also the stated aim of many of the examples of temporary employment listed in the Act. This is the case, for example, as regards the employment of young people for a specific period during holidays, as regards pensioners and also as regards those awaiting call-up for National Service. The assumption is reinforced also by the fact that temporary employment is the ruling principle in labour market policy. As regards what is

[14] The statistical enquiry which forms part of the underlying study (cf. section 3 below) shows that the proportion of temporary appointments was throughout noticeably higher as regards offers of unskilled work than as regards those for skilled work.

referred to as public relief work, the sole aim of which is to create jobs, the authorities have initiated a system of allowing as many persons as possible to enjoy for a limited period of time the privilege that employment is presumed to imply.

Even if the substance of the regulations governing categories of employment is clearly related to the underlying conflicts, since the regulations are in fact directed against vital economic interests, there is, according to the theoretical point of departure, reason to expect that the steering effects do not really constitute a decisive intervention in the way the economy functions. The main task of the legislation is to have a moderating effect on conflicts.

This emerges clearly from the compromise the substance of the regulations constitutes in relation to the fundamental conflict between the interests of production and the social needs of the employees—something which has already been touched on.

In general, the area of application of the 1982 Act is also such that it reduces the effects of the regulations. Under a rule in sec. 4(1) of the Act large groups of employees, especially young people, have been excluded from the area covered by the Act. This is true of, *inter alia*, those employed on relief work, in sheltered employment or in what are called youth teams. Such employment is not covered by limitations of the right to use temporary categories of employment, though the terms of employment are regulated mainly in statutory instruments in other areas. What is characteristic of these regulations, the stated aim of which is to encourage employment, is that they are based on relatively short periods of temporary employment. Also for other groups of employees, particularly those employed in the public sector, there are other rules which extend the right to employ persons in temporary employment and permit extra "regulators" in relation to the rules which make it difficult to employ persons permanently in insecure categories.

In making the regulations governing employment categories optional in character the legislator also leaves it to the parties on the labour market, where they so wish, to decide on the most suitable solution to the conflict in question. The parties on the labour market have also made considerable use of this possibility of themselves regulating the question of the use of various categories of temporary employment. Certain collective agreements are more generous than the 1982 Act, while others are more restrictive. It also happens that collective agreements allow more permanent employment in the form of repeated engagements for specified periods of time. One example of this is to be found in stevedoring.

It is worth noting here that the general conceptions concerning freedom of trade and the right of the employer to direct and distribute work mentioned above also provide the employer with ample opportunity to sidestep both the

regulations governing employment categories and protection of employment and instead have both permanent and temporary jobs of work carried out in contractual forms other than actual employment. This means that quite a number of contractual forms may be in use. The most usual forms are probably those relating to specific tasks, to the hiring or lending out of labour, to the hiring or leasing of places of work, and to purchase agreements and agreements about companies of various kinds.[15]

It may be assumed that, alongside their steering effects, the regulations governing categories of employment also have important ideological effects.

The fact that the supposed point of departure of the Act is that temporary employment is prohibited unless specifically permitted by the Act creates a conception that temporary employment is rare. This also applies to the terminology employed in the rule contained in sec.5(1) of the 1982 Act which permits temporary employment if the work is of a "special" character. This expression leads the reader to conclude that temporary employment is permitted only in exceptional cases with the support of the rule. These impressions are reinforced by the remarks in the *travaux préparatoires* to the effect that permanent employment should be the normal category of employment and that the attitude of the legislator to other categories of employment is in principle restrictive. As we have seen in the foregoing such ideas are not borne out by the substance and implementation of the regulations. Through the regulations governing categories of employment the situations in which temporary employment is accepted by the legislator are at the same time given increased legitimacy. Although the legislator is so restrictive as regards these categories of employment reason has been found to permit deputyships, seasonal employment, and so on, and this has given to these categories of employment a touch of legitimacy. For this reason the regulations may be said to have reinforced indirectly acceptance of the demands of the economy for efficiency regardless of any social considerations involved in these situations.

The judicial findings of the Labour Court also perform an important function as regards the creation of legitimacy. By bringing a matter before the Labour Court for consideration—and this includes cases such as those involving employment for temporary piling-up of work and employment for trial periods, where the employer's view cannot in fact be challenged—the employ-

[15] See also Axel Adlercreutz, *Temporary Employment, Acta instituti upsaliensis jurisprudentiae comparativae* no. 12, 1970, Tore Sigeman, *Contract Labour in Sweden, Annales academiae regiae scientiarum upsaliensis* 14/1970, Reinhold Fahlbeck, *Temporary Work in Modern Society. A Comparative Study*, International Institute for Temporary Work, Deventer 1978 and 1981, as well as Ronnie Eklund, "New Forms and Aspects of Atypical Employment Relationships" (Swedish national report to the XIth International Congress on Labour Law and Social Security—see footnote 2 above), Theme II, vol. 2, pp. 371–400.

er's assessment acquires increased legitimacy because of the authority and respect accorded to this judicial body. In this way even toothless regulations acquire reinforced functions when it comes to reducing conflicts.

So, to sum up, the regulations governing categories of employment can be assumed to intervene in the economy in two different ways. They make it more difficult for the employer to employ permanently certain personnel in temporary employment categories and in that way they intervene in the conflict between the interests of production in having a mobile and efficient labour force and the social needs of employees. At the same time they steer some of the employment over into insecure temporary categories and with that have the effect of reinforcing legitimacy in relation to the structure of wage work. Added to this are the purely ideological effects of legislation.

There is reason to believe that using intervening norms in an attempt to compel employers to take more account of social considerations has a limited impact. Although in a more long-term social perspective such rules may in a certain sense be presumed to favour the economy, these rules often conflict openly with more immediate economic interests. On closer analysis of the rules it appears that even more permanent employment can be organized to quite a considerable extent in the category of temporary employment. This is the case above all in the areas where seasonal work and employment for a piece of work are accepted, where organizational patterns can justify positions in the "rolling deputyship" category or where the parties on the labour market have approved repeated employment for specific periods of time through the collective agreements.

On the other hand, the function of steering some portion of employment into insecure categories and in so doing concealing employment problems is likely to be more effective. The fact is that such a course of action is in keeping with the immediate interests of production in important respects.

3. CONCLUDING REMARKS

Many labour-law specialists—especially perhaps the Swedish ones—have embraced the idea that Sweden is a pioneer country in the field of labour law and when it is a matter of meeting the demands of citizens for social security. Against such a background the present analysis of the regulations governing employment protection has been regarded as unjustly critical and too negative in some circles. However, the aim has not been to review employment protection in Sweden or to present the legislator as conspiring and malign. The purpose of this study is instead to show how the structure steers and restricts legislation whether we (or the legislators) want it to or not. The analysis shows

that the Swedish protective legislation designed to benefit the employee—and by international standards it is perhaps far-reaching—is at bottom in agreement with the underlying economic structure and consistently serves to reinforce this structure. Even rules which at first sight seem to have as their aim the protection of the employees against the arbitrariness of economic life prove at the same time, or on another level, to favour production in important respects.

The result of this study may be described as sounding a warning note. It may be that excessively far-reaching rules concerning security in permanent employment of the traditional type are not in the first place a threat to the efficiency of the economy but are instead a long-term threat to the social security of employees as a group. Demands for very far-reaching measures to protect employment hasten the polarization of society. The fact is that not everyone can be guaranteed absolute security of employment. Such a static system of production would become far too unproductive and would undermine the whole structure of society, and this is something no one—be he employer, legislator or wage earner—can accept.

There is much to suggest that the Swedish labour market is moving towards such increased polarization. The material the study is based on is not such as to enable the present author to measure the extent to which the post-1974 legislation itself has had the effect of steering employment into temporary categories. Both the statistical enquiry made by the present author and an earlier government investigation[16] suggest, however, that temporary employment may now be "normal" on the labour market. At least it may be considered clear that temporary appointments now constitute the majority of new appointments. According to the enquiries made by the Protection of Employment Committee, as early as in 1977 349 000 of 530 000 appointments made were of the temporary kind. According to enquiries made by the present author with reference to 1979 48 % of the positions advertised as vacant by employers were temporary, and there is reason to believe that the proportion of temporary appointments in that year was actually greater (see also fig. 1). The enquiry does not permit one to draw any direct conclusions as to the legality of the vacancies advertised, though there is nothing to suggest other than that the use of temporary employment was in the main supported by the legislation. Since the enquiry was completed the legal scope available for temporary employment as a result of the 1982 changes in the law has been widened quite considerably. At the same time economic trends have made it increasingly difficult to maintain full employment in the natural way. The so-called eco-

[16] See the report of the Employment Protection Committee in Ds A 1980: 2, Anställningsformer m m (Categories of Employment, etc.).

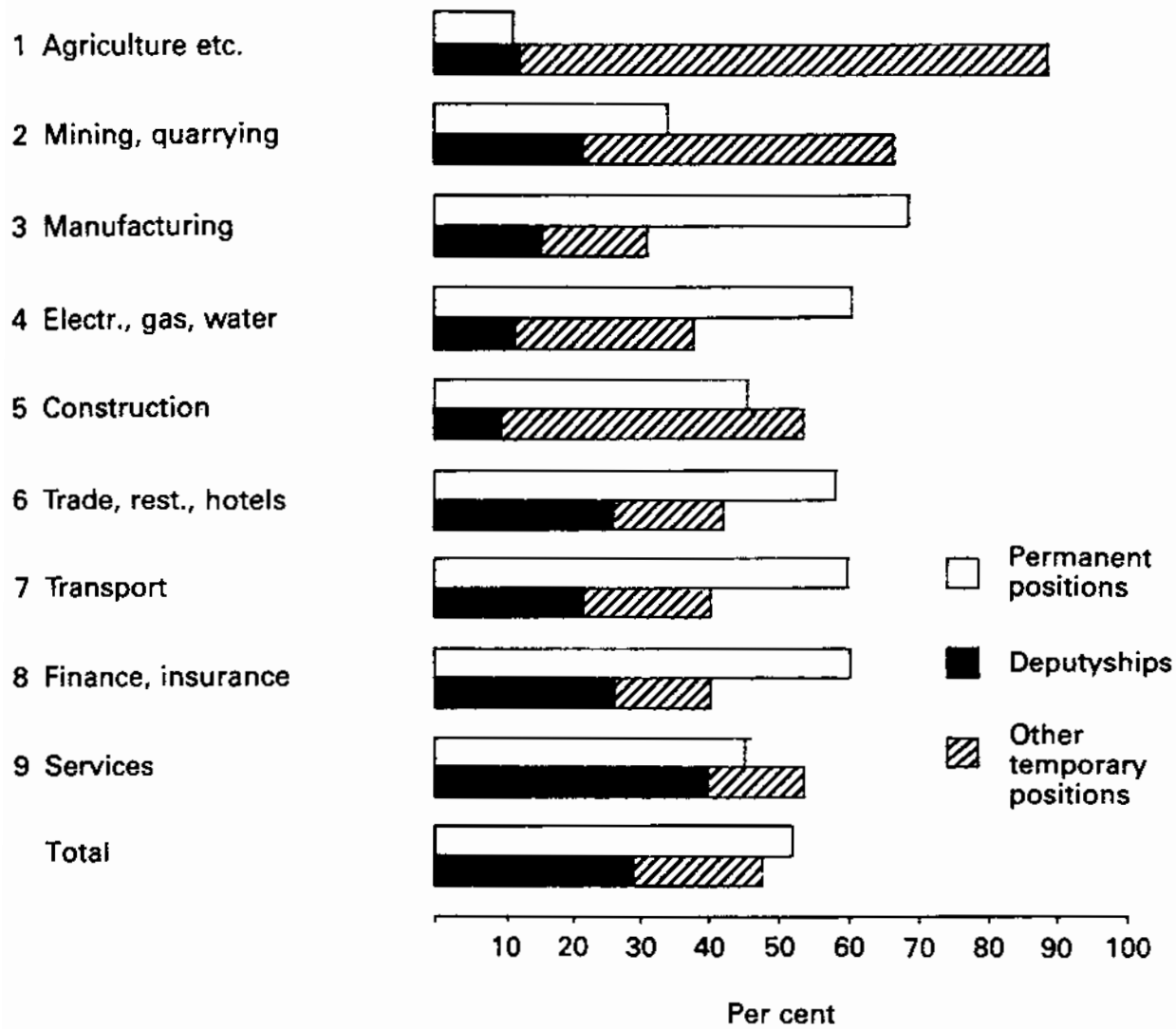

Fig. 1. Employment Categories in the Job Supply 1979

The investigation material—a total of 376 047 jobs—was established by way of extracts from the National Labour Market Board data bank containing freshly reported vacancies for the year 1979. The basis for the storage of this material is found in the Act of Parliament (1976: 157) requesting employers to report any vacancy to the public employment exchange. Preparatory to the analysis, the vacancies were systematised with the aid of the Central Bureau of Statistics standard for the *Swedish Branch-of-Industry subdivisions (SNI)*, which are connected with the *United Nations' ISIC categories*.

The proportion of *temporary employment* varies greatly from one line of business to the next. It is extremely high in Branch 1, comprising agriculture, forestry etc. (88 per cent). But the share of temporary employment is also great in Branch 5, the construction industry (54 per cent) and Branch 9, services (54 per cent). The proportion of temporary jobs is particularly small in the manufacturing industry (31 per cent).

With regard to the use of *different categories of temporary employment*, the differences between branches are also great. Thus, the number of deputyships is especially high in the public and other services (40 per cent). A particularly low figure is presented by the construction industry (10 per cent), but the proportion of deputyships is low in Branches 2, 3 and 4, too (manufacturing etc.), varying from 12 to 16 per cent in these branches.

nomic crisis has of course been an important factor, but it is also obvious that what we are faced with is a more long-term—and international—trend. Labour-saving technology leads to production along more capital-intensive lines and to falling employment. In many countries—most notably perhaps in West Germany—this has led the trade union movement to demand that shorter hours of work be introduced and that employees be allowed to share the volume of employment that society has to offer.

As yet these tendencies have hardly met with much sympathy within the Swedish trade union movement. In the end, however, the conflicts between the continuing drive for greater productivity and the idea of full employment cannot be concealed, either through the reinforcing of employment protection or by means of what are called labour market policy measures. There is as little likelihood of the fundamental conflict between the driving forces of the system of production and the social needs of employees being solved in this way. A system in which the employer is required to accept excessively far-reaching welfare responsibilities does not meet the socially necessary demands for economic efficiency. A system in which employees are obliged to perform the work of a machine simply in order to maintain employment levels is also unlikely to be able to meet reasonable demands for respect for individual freedom and human values.

However, full employment and security of employment are needed only in an ideology which regards wage work as the only decent way of life and as the key to the allocation of the resources of society. It is time we posed the question whether our present idea of social security as security in permanent employment must not be replaced by an entirely new one!