Protection of the Established Position

A Basic Normative Pattern

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1 Introduction

1.1 The Multitude of Legal Norms

The law comprises a multitude of norms. One often speaks of "the legal system". In the present connection I prefer the more neutral description "the multitude of legal norms". The systematic character of this multitude of norms is rather feeble. The constituent norms have arisen through different means and at different times. A considerable portion has its origin in the social norms grown out of various areas of life and different kinds of relationships among people. This is the case, for instance, regarding the Law of Property as well as the central principles of the Law of Contract or the Law of Tort. Other parts have a more technical character. They are constructed by a central administrative unit, the so-called "law-maker"; and they presuppose the existence of other administrative institutions, whose task is to ensure the proper function and maintenance of the norms.

There are no uniform rules prescribing *which* of these norms should fall under the province of *legal* norms. Many important social spaces have been left practically untouched by regulation through legal rules.[1] The rules and principles which are constituents of this multitude of norms often come into conflict with each other, and there is no pervading hierarchical order for the resolution of these conflicts. Not even the doctrine on the sources of law furnishes us with any reliable hierarchy.

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1 These spaces in the legal void are often represented by the "feminine" areas of life and therefore constitute both a problem and a challenge for women's law. Tove Stang Dahl discusses the problems concerning "judicial voids" in her introduction to *Women's Law* p.15 ff. (*Women's Law, An Introduction to Feminist Jurisprudence*, Scandinavian University Press, Oslo 1987.)

1.2 To Bring Order into the Multitude

Some form of order must be put into this stuff to make it possible to orient oneself. There are many ways to arrange the multitude of legal norms. A common point of departure is to classify the norms in accordance with the areas of life they regulate, *e.g.* family life and working life. The boundary between the Law of Obligation and the Law of Property is founded on another principle, *viz.* the structural dissimilarities between the different kinds of conflicts. The distinction between real property and chattels is built upon the central role of real properties in the agricultural society and their importance for credit facilities. Consumer Law has its basis in the special relation between the consumer and business enterprises at large. It may be considered as a special field *sui generis*, but may also be treated as modifications of the general laws of sales or insurance.

A set of norms can also be classified according to the degree of generality. A distinction is made between the General Law of Contracts and rules which belong to specific types of contracts. In a similar way, one distinguishes between the general principles of Tort and the special rules regarding damages applicable under different kinds of contracts and in non-contractual situations.

Within certain legal fields, specific "legal cultures" have developed which differ from the ordinary legal culture. This is the case with Labour Law with its special relation to the parties in the labour market and with Criminal Law with its intimate relations to Criminology.

There is, consequently, no uniform way to bring order into the variety of legal norms. Different principles are employed in various situations and under divers connections. There is however nothing wrong with this state of affairs. Quite the opposite.[2] The different ways to arrange this multitude of norms illuminate the different aspects of the norms. Thus a varied, if not totally comprehensive, illumination of the content of the norms is achieved. There was a dream of ordering the whole of the legal norms in one single system with no overlapping, no repetition and no internal inconsistencies. The great continental codifications of laws are monuments to such aspirations. Nowadays the intellectual movement tends towards the opposite direction under the banner of deconstructionism and polycentrism.

1.3 The Social Dimension

New arrangements of the multitude of norms also suggest new patterns. There is now a course entitled "The Social Dimension" in the undergraduate curriculum at the Faculty of Law in Lund. This course comprises Family, Labour, Tenancy and Social Security Laws, four subjects which in earlier curricula were dealt with independently from each other. The name is inspired by EC-law and EC-politics. The fundamental tenets of the European Community have been the economic dimension, which sets out to create a free and open market for free competition, and through this to promote economic growth. But alongside with

2 *Cf.* Ann Numhauser-Henning in *SvJT* 1988 p. 386 f.

this economic dimension, a Social Dimension has taken shape, with the aim to create a "Citizens' Europe" founded upon a common social philosophy.

Grounds for a common policy in the social field can already be found, to certain extent, in the Treaty of Rome. Nevertheless it was the economic dimension that occupied the predominant position, and in particular under the 1980's this predominance became almost absolute. This is evidenced not least by the programme put forward in the so-called White Paper of 1985. Criticisms raised against the "economistic" trend of the White Paper resulted in the establishment by the Commission of a working group, which in 1988 published its report "A Social Europe". This was followed by a declaration at the 1989 summit-meeting in Madrid that the social dimension should rank equally in importance as the economic. At a meeting in 1989 of the heads of state of the member countries, a Charter of the Fundamental Social Rights of Workers was established: the so-called Social Charter.[3]

The Social Charter has become a part of EC-law through the Maastricht protocol on social politics and related agreements, in so far as member states have pledged to strive, within EU's institutional framework, towards the achievement of the aims of the Social Charter. Certain agreements in the social field can now be reached by way of majority decisions.[4]

The EC-norms which have developed within the framework of the Social Dimension deal primarily with Labour and Social laws. Family law is too deeply rooted in the different national cultures to be dealt with by supranational regulations, but a considerable number of the social legislation and certain rules on free movement, do affect the family as well. Likewise the prominent legislation within the EC on equality and non-discrimination touch upon the family, since a woman's standing in her career affects even her position in the family, and in such a way that the family and a career may, from the woman's point of view, be regarded as competing alternatives. The institutions of the EC has (as yet) not taken up in its programmes issues concerning residential right.[5]

What is it then, that unites the areas of law usually described as "social" and which have been integrated in a single course of legal study at Lund entitled the Social Dimension? All rules of law are social in the sense that they are products of social conventions and not reflections on the regularities of natural phenomena. But the rules of the Social Dimension are social in the specific sense that they govern circumstances and relationships, which directly affect

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3 On the development of the Social Dimension in EC/EU, see for example, Blanpain, Roger, *Labour Law and Industrial Relations of the European Community*, Kluwer 1991.

4 The idea of the social dimension has been encapsulated by Jacques Delors in his description "L'Espace Sociale Européen". See for example Delors, *Le Nouveau Concert Européen*, Odile Jacob, Paris 1975., *Bulletin of the E.C.* 1986, p.12 and *The EC Commission's Background Report* ISEC/B18/90 (6 April 1990).

5 However, see Ghekiere, Laurent, *Les politiques du logement dans l'Europe de demain*, La Documentation Française, Paris 1992, which provides an outline of a future European policy on housing. The ministers for housing from the member states have met on a few occasions for discussions on housing issues. The communiqués from these meetings are appended to *op. cit.* under Annexe I.

practically all women and men in their everyday lives, and the function of the rules is to maintain, secure and develop the everyday life.

The fundamental norms of the Social Dimension are social in a further sense that they have grown out in a social way from the interplay between people, and has a firm normative anchorage in society. Labour Law in Sweden is in the main a codification of the system of norms which has been developed by the actors in the labour market in the industrial society. Family law also has deep roots in the normative culture of society. Even Tenancy Law has its basis in fundamental social norms and needs. Social Law, and not least Social Security Law, may appear to bear all the pronounced characteristics of Administrative Law. Both sickness and unemployment benefits are, however, originally forms of private insurance. On a closer inspection, it becomes apparent that even the fundamental normative content of the modern Social Law is built upon deep-rooted social norms.

1.4 Distinguishing Patterns

When the multitude of norms is being arranged in a new way, new patterns emerge. Douglas Hofstadter is the man who wrote *Gödel, Escher, Bach —An Eternal Golden Braid*, one of 1980's greatest intellectual hits. The central theme in his other book, *Metamagical Themes*,[6] is how people —and machines— think and feel. The author questions, why it is that even the most advanced of computers are so stupid, so totally devoid of common sense. The answer is not that they are only machines, but that there is a fundamental fault in practically all AI (Artificial Intelligence) programmes.

> AI researchers started out thinking that they could reproduce all of cognition through a 100 percent top-down approach: functions calling subfunctions calling subsubfunctions and so on, until it is all bottomed out in some primitives. Thus intelligence was thought to be hierarchically decomposable, with high level cognition at the top driving low level cognition at the bottom.[7]

I would like to raise the same criticisms against the picture of the multitude of legal norms as a system constructed by the law-maker and the dream of a complete and absolutely consistent system.

People simply do not think like this, Hofstadter claims, the human brain and the human mind do not function in this way.

> The crucial thing in human intelligence is a general sensitivity to patterns, an ability to spot patterns of unanticipated types in unanticipated places at unanticipated times in unanticipated media.[8]
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> [P]erceived situation seems to be surrounded by a cluster, a halo of alternative versions of itself, of variations suggested by slipping any of a vast number of features that characterise the situation.[9]

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6 *Metamagical Themes: Questing for the Essence of Mind and Pattern*, Basic Books 1985.

7 *Ibid.* p.653.

8 *Ibid.* p.531.

It is this which, according to Hofstadter, is "the dead centre of thinking". What Hofstadter describes in the latter quotation is in fact what in the legal field is known as analogical deductions. But even in a more general way I think that Hofstadter's description of the working of the human mind apply equally to legal thinking in everyday juridical life.[10]

1.5 Normative Patterns

In my way to study the multitude of norms of the Social Dimension I follow Hofstadter's model of human thought, attempting to distinguish and to describe certain patterns. And it is a special kind of patterns that I seek. There are much talks of the formative effects of legal norms on morals. However, we seldom hear about the formative effects on legal norms of morals. But the effects are there. A large part of our legal rules' content, and not least in the Social Dimension, are simply a legal codification of the moral customs and attitudes of our society. Within the Social Dimension, we can distinguish some patterns which resurface now and again in different connections, and yet maintaining a certain degree of constancy. I shall call these patterns *basic normative patterns*.

The phrase is perhaps new, but the phenomenon is well-known. Within the study of law, one speaks of principles or fundamental principles. But not all legal principles are *normative* in the sense the word is used here. The principle *pacta sunt servanda* is normative, whereas the so-called principle of prevention is not. The first principle has arisen from and responses to a pattern of social behaviours which is found to be morally binding. The principle of prevention, on the other hand, has a more technical, if not to say manipulative, character. It is designed to affect people "externally" and can never function as an internalised norm for interpersonal relationships; but this fact, of course, cannot deprive the principle of prevention as such from being a good and sensible principle. I could have spoken of moral basic patterns, but it would appear a little provocative in a legal culture impregnated with the so-called legal realism.

Only very rarely do we see, in our "legal-realist" culture, legal works which have as a starting point the normative patterns in society. But there are such works. One of the best examples in modern Scandinavian law is Torstein Eckhoff's book *Retferdighet ved utveksling og fordelning av verdier*.[11] Eckhoff examines in his work two important normative basic patterns. The first being the pattern that there should be balance between the different parties' performance in various types of exchanges, and even in other situations. The other basic

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9 *Ibid.* p.652.

10 Hofstadter himself takes up analogical deductions as a form of legal reasoning and comes up with many thoughtful reflections upon legal thinking.

11 Eckhoff, Torstein, *Retferdighet ved utveksling og fordelning av verdier (Justice in connection with exchange and distribution of values)*, Oslo 1971.

pattern concerns the varieties of Just Distribution, such as a distribution based on equality in quantity, or in accordance with need, or on a queue basis.[12]

1.6 Protection of the Established Position

In this essay I shall investigate another basic normative pattern which I shall call the Protection of the Established Position. It deals with a pattern which truly is as basic and fundamental as it is venerable. It is a pattern with great significance and tenacity, and it appears in all areas of law of the Social Dimension. In Labour Law this pattern manifests itself in the security of employment, in Tenancy Law in the security of tenancy, and in the field of social security in the principle of Replacement of Lost Earnings. In Family Law, this basic normative pattern has been weakened considerably, if not to say that it has disappeared altogether. But this pattern has previously found its expression in the protection of the marital state, and most poignantly in the rules governing alimony and maintenance after dissolution of marriage. The clearest manifestation of this normative pattern is to be found in the protection of a rightful owner's possession or "quiet enjoyment" of her property.

The special characteristics of the pattern, which I call Protection of the Established Position, are exhibited most saliently by means of contrasts with other normative patterns. This protection is available only to those who have already established themselves in a certain position. The security of employment, like the principle in Social Security Law of Replacement of Lost Earnings, applies only to those who have established themselves in an employment; security of tenancy is a security only for those who have acquired a contract with the landlord. This pattern, however, is silent on *how* these positions are established, and *who* will be able to achieve these establishments. The only prerequisite here is that the position has been achieved by lawful means. In this respect, this normative pattern differs from the normative pattern which concerns the Distribution of Values. This latter pattern deals with the distribution and re-distribution of values, which as a consequence, leads to the creation of new positions. The Protection of the Established Position focuses on already established positions and can afford no relief for those who as yet have not achieved a position.

Protection of the Established Position differs also sharply from the norm which governs contractual relations such as sales or exchanges of goods, which lays down the principle that there should exist a balance of performance from the different parties. Neither the security of employment nor the security of tenancy create any balance in the relation between the employee/tenant and the employer/landlord. Both of these contractual relations are asymmetrical. The security of employment and of tenancy have not been forged in order to create balance or justice in the relationship with the employer or the landlord; but in

12 See also Thomas Wihelmsson, *Social civilrätt —Om behovsorienterade element i kontraktsrättens allmänna läror (Social Civil Law. On need-oriented elements in the general principles of contract law)*, Lakimiesliiton Kustannus 1987. The method in this work is to first take hold of a recurring pattern, and from this follows an attempt to establish a general principle of the normative kind.

order to protect the employee's or the tenant's social position, established through her employment or her rental contract with the landlord. A clear expression of this asymmetry of the relationship lies in the employee's and the tenant's freedom to terminate the contract at will.

1.7 The Market Functional Pattern

The various normative patterns do not constitute a coherent system. They have come about at different times, for different types of relations, and in order to meet different kinds of needs. Each normative pattern has its own defined core territory or source of origin, but can also be transposed to other situations. A conflict between patterns with different contents may then arise. For instance, the Protection of the Established Position may perpetuate a *status quo* which does not conform to the basic pattern of Just Distribution. A very clear example of this conflict is to be found in Property Law, but even in other fields of law the conflict manifests itself in certain circumstances.

The Protection of the Established Position is a *conservative* pattern. It preserves the positions and the social constellations which have been achieved, and constitutes therefore a barrier against changes that threatens the established order. In this way, this basic pattern comes unavoidably into an inimical conflict with the basic pattern which forms the basis of the modern market economy. This basic pattern comprises the Right of Ownership, the Free Contract[13] and the Freedom of Trade.[14] This is a dynamic pattern which aims to promote new activities and businesses, a constant redistribution of wealth, and consequently also a continuous shift in achieved positions. I shall call this basic pattern the Market Functional Pattern.

The Free Contract is a part of the Market Functional Pattern. But it is at the same time an independent pattern, which also features in other connections and has a more fundamental significance than even the Market Functional Pattern. The normative development towards the modern society has been described as a development *from status to contract*.[15] The Contract has indeed always existed as a normative pattern, but in most forms of pre-industrial societies, contracts were of very limited importance in the everyday lives of the everyday people. The individual's social relations were defined —to the greatest extent— by reference to his or her *status* in society.[16] This status was more or less pre-

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13 "The free contract" encompasses not only the freedom to enter into, but also the freedom to terminate a contractual relation. In this essay I shall use the term in this extensive sense.

14 See, for example, *Marknadsekonomins rättsliga grundvalar*, Johan Myhrman, Gustaf Petrén, Stig Strömholm, AB Timbro 1987; and Göran Skogh & Jan-Erik Lane, *Äganderätten In Sverige*, SNS Förlag 1993, in particular Chapter 2 on ownership and the market.

15 Maine, *Ancient Law*, 1861, reprinted in *The World Classics*, Oxford UP 1959. *Cf.* Weber, *Wirtschaft und Gesellschaft, Grundriss der verstehenden Soziologie*, 5th ed., Tübingen 1976.

16 *Cf.* P.S.Atiyah, *The Rise and Fall of Freedom of Contract*, Oxford UP 1979. Even Atiyah employed Maine's famous observation in 1861 on the development "from status to contract" as his starting-point (*op.cit.* p.259), and then concluded his discussions with another observation —*from contract to status*— which he took from Kahn-Freund's study *in A Note on Status and Contract in British Labour Law*, 30 Modern Law Review 635 (1967). In

determined and could not be changed by means of contracts. In this context, the contract and the freedom of contract mean the possibility for individuals to liberate themselves from their pre-determined plights and to create new kinds of relationships of their choice.

The Protection of the Established Position of today does not present in principle any obstacles for an individual to relinquish a less desirable predicament and through his or her own efforts —for instance by means of a contract— succeed in establishing a new and better position. So far the Protection of the Established Position is compatible with the Free Contract. However, the freedom of contract for one person can imply, for another person, the loss of his or her established standing.

Thus conflicts arise constantly amongst the different normative patterns. These patterns do not make up a system, they cannot be ordered into a hierarchy, and there is no law-maker and no principles of superior dignity capable of deciding which normative pattern should, ultimately, get the upper hand. I permit myself to cite another passage from Hofstadter, where he describes the activities of the human brain:

> There is no central manipulator, no central program. There is simply a vast collection of patterns that trigger other patterns. The brain is the medium in which the symbols are floating and in which they trigger each other.[17]

Correspondingly, the law can be described as a medium with no central steering, and where different normative patterns float about and trigger each other.

1.8 The Normative Field

I prefer, however, another metaphor, *viz.* the Normative Field. The Normative Field is the social field where legal rules are in motion. The different normative basic patterns are like magnetic poles seeking to attract legal rules. Where in this field the various legal rules eventually end up depends on the strength of the attractive force which the different poles exert. The normative poles can even have a powerful political charge. This is the case today with the poles that exert influences within a greater part of the Social Dimension. The split in Maastricht, between the United Kingdom and the other members states, on the social dimension of the European Community is a striking witness to the tension between politically charged normative poles.

Within the legal framework the normative patterns seldom appear in entirely pure forms. It is more or less always the case that legal regulations in any area of life are influenced by a number of normative patterns within the Normative Field. Even if a certain pattern is predominant for a particular type of legal rules, one will invariably find modifications caused by other normative patterns. Neither are the legal regulations fixed and stable; they are constantly influenced

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certain places, Atiyah came very close to the themes that I develop in this essay, but he never drew the same conclusions as mine, which is understandable as Atiyah had another object for his investigations.

17 Hofstadter, *op.cit.* p.648.

by the normative forces in the field and oscillate between the normative poles. When one examines a given normative pattern behind a legal rule, one must consequently attend to other normative patterns which may also influence the legal rule in question. The main task in this essay is to identify and to describe the basic normative pattern which I call the Protection of the Established Position in the laws of the Social Dimension. But I shall also attempt to depict the dynamics of this normative development, through a description of the laws' fluctuation between the opposite poles in this normative power field in a given period.

With this perspective in mind, I shall now go over to a study of the different constituent subject areas of the Social Dimension.

2 The Right to Property

2.1 Protection of Rightful Possession —the Conservative Element

The Right to Property is the most poignant manifestation of the normative basic pattern which I call the Protection of the Established Position. In the following, I shall neither go into the history nor the detailed material contents of ownership, yet it is important in this context to ascertain the meanings of several aspects of this concept. The basic normative tenet of the Right to Property is *conservative.* It seeks to maintain and protect possession and traditional employment of a certain property. In the modern version of the Right to Property, this conservative element is combined with the right to freely organise the disposition of the property, not least through different kinds of contract for selling the property. The owner even has the right to destroy his property. This is the *dynamic element* of the Right to Property —the element emphasised in the Market Functional Basic Pattern. The dynamic element is however not a constituent element of ownership in the same way as the conservative element, in any case not in a wider historical perspective. The forms of ownership of real property available to ordinary people in the Swedish agricultural society did not encompass the free right of disposition, not to say the right to sell or squander agricultural land.

The boundary between ownership and the right of use in the old Swedish agricultural society was not clearly defined, in fact one spoke of the Right to Property being divided between the "owner" and the "user". The stability of land usage was secured through different forms of *perpetual possession* or *seisin*. The oldest form of seisin in Swedish law was "åborätten"[18], a tenure built upon the same basic pattern as the institution of *emphyteusis*[19] in Roman law. During the land reform of the 16th and 17th centuries, new forms of seisinal rights[20] arose.

18 See Almquist, *Om ärftlig besittningsrätt till jord före det sjuttonde seklets slut*, Uppsala 1929, pp. 95 ff.

19 *Emphyteusis*, or *ius emphyteuticarium*, was in Roman law a lease for agricultural purposes granted for a very long period or in perpertuity, carrying most of the rights of ownership but requiring the payment of a regular annual rent to the owner. The grant of *emphyteusis* was heritable, transferable, and recognized and protected by law.

20 For example, "bördsköpen" and "skatteköpen".

Grounds in urban areas were often leased by means of contracts of perpetual tenure in return for rents to the owner.[21] These perpetual tenures encompassed what I call the basic normative content of the Right to Property, that is to say the temporally unlimited protection of possession and traditional employment of the property. These rights were often heritable. However, they did not stretch so far as to include the right of free disposition of the land through different types of contracts.

The conservative element of ownership, the protection of the possession and traditional employment of the property, is often tied with a duty to take care of and to preserve the property. This duty was evident in an agricultural society, both on a basic normative plane as well as in legislation. Ownership of real property was regarded rather like a kind of trusteeship. The protection for such seisinal rights presumed that the user of the land actually cultivated the property in addition to paying his rent. Nowadays, one can only come across some remnants of such duties. One relies instead on the dynamic element of the Right to Property to give the user incentives for proper usage of the property, and on the general sanctions for severe economic mismanagement consisting in the possibility of the property being distrained for the owner's debts.

2.2 The Freedom of Disposition —the Dynamic Element

The perpetual tenures, which tied the owner and the user of the property in a mutually dependent relationship, became an obstacle for the changes required by a new era. The granting of new perpetual tenures was actually forbidden in the course of the 19th century. The committee which carried out the investigations resulting in the Act on the Right of Use[22] described the changes as follows:

> Since the law on a time limit for grants of agricultural tenures was enacted, our experience has confirmed that the grounds for the law's enactment were unequivocally valid. In particular, during periods of economic growth, there is a need that a land unit's usage be changed in order to optimise productivity. It is therefore paramount, not only for the owner himself, but also in the interest of development, that tenure of land not be granted for such a long period of time that the owner becomes unable to act in accordance with the needs of new circumstances.[23]

The law committee's proposal to the new Land Law Code[24] of 1905 was permeated with a strong belief in the dynamic effects of the owner's right of free disposition of his or her property. The proposal brought about the 1907 Act on the Right of Use for real property, where rights of use were made subordinate to the new market functional conception of ownership.

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21 Sw. Tomtlega or tomtören.

22 Sw Nyttjanderättslag.

23 *Op.cit.*, p. 69.

24 Sw. Jordabalken.

The basic element of the Right to Property is, as already mentioned, conservative. However, it is generally believed that this conservative element is compensated by the incentives given by the market economy to sell and buy and use property in a new way. The Market Functional concept of the Right to Property can therefore be regarded as an operationalisation of the social interests of economic growth and development on an individual level.

But not all owners are rational beings, and even in a modern market economy, there will be times when the conservative right to property lies in the way of desirable, or perhaps necessary, changes in the property's usage. A modern market economy presupposes a well-developed infrastructure and central planning of, for instance, different uses of land. The planning and construction of these structures constitute a dynamic element in the society's development. If the Right to Property lies in the way of this development, it can, ultimately, be expropriated.

However, the owner has a right to compensation for the value of the property, if the property is expropriated. Through expropriation, the owner loses, inevitably, the concrete and unique position associated with the ownership of the particular property which is the subject of expropriation. But, through the compensation, he maintains nevertheless his relative economic position in society. In this way the basic normative pattern in maintained even in the case of expropriation.

2.3 The Right to Property versus Just Distribution

The Protection of the Established Position inherent in the Right to Property can obviously come into conflict with normative patterns, which aim at an equal distribution of wealth (or a fair distribution based on some other principles than equality). This conflict arises as soon as the Right to Property expands beyond the closest personal sphere, and in the modern society, there is no boundary as to what this right can envelop. The basic normative pattern of Just Distribution has gained a strong political anchorage due to the long period of Social Democratic government in Sweden. But this has not led to any marked or direct limitations on the protection of the owner's established position. The principle of Just Distribution has been applied by ways which do not constitute a direct threat to the established Right to Property: for example through taxation, income policy and policies of social insurance.

2.4 The Right to Property as a Human Right

The European Convention on Human Rights contains a provision on the safeguard of the right to property. This provision was politically controversial and was therefore not part of the Convention itself, but was only included as a protocol to the Convention. According to Article 1 of the first protocol of 20 March 1952, everyone has a right to respect of his property. Acts which deprive

one's right to property can only be carried out in public interests and under conditions as expressed by law.[25]

It has become evident that the European Convention has left a great amount of discretion to the contracting states to decide at the national level what constitutes public interests, and what is required in order to achieve these interests, not least when it comes to acts striving for improved "social justice". The James-case[26] dealt with a law, which gave the lease-holder of a certain type of "long-leases" the right to purchase the leased property. The Court held, in the first place, that even compulsory transfer of ownership to *individuals* can constitute a *public* interest, precisely when the aim is to improve social justice. In such cases, the compensation needs not reflect the full market value. This decision means that the European Court not only permits that the Right to Property be limited, but even that the right be expunged altogether in order to achieve a fairer distribution of values. Undoubtedly, the fact that the lease-holder already had a bond to the property which lied very close to that of ownership, played an important part in the judgment. It is therefore by no means certain that the same Court would allow property being taken from the rich against a low compensation in order that it be distributed amongst poor persons with no previous connection to this property.

In September 1995 the European Court decided two cases concerning the conflict between property right and tenancy right. The background in both cases was the far-reaching statutory protection for the tenant applicable in Italy since the end of the war. Until 1983, there was a statutory extension of all current leases (which also prescribed rent control). When this legislation expired, a range of temporary statutes prohibiting eviction of tenants without the permission of a special authority were introduced. Such permission should be granted inter alia when the owner had an urgent need to regain the flat for his own accommodation or when the tenant did not pay the rent. In the first case, Spadea and Scalabrino v. Italy, a couple in good financial circumstances bought two neighbouring flats as their common abode. The tenants were two elderly ladies with meagre means. The owners attempted on various occasions to obtain the necessary permissions for eviction, but in vain. They did not gain access to the flats until 1988, when one of the elderly ladies died, respectively 1989, when the other moved voluntarily.

The case was decided according to the second paragraph of Article 1 of Protocol No. 1. The current tenancy legislation was considered not to constitute a formal or de facto expropriation, but a limitation of the owners' right of use in the public interest. The court stated that national legislature can exercise a wide margin of appreciation in implementing social and economic policies, especially

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25 Article 1: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

26 James and Others *v.* The United Kingdom, judgement of 21 February 1986, ECHR Series A, Vol. 98.

in the field of housing. This freedom is constrained only if the ratio for the legislation can be described as manifestly unreasonable. Furthermore, the employed measures should not constitute a disproportionately heavy burden on the owners.

In the other case, Scollo v. Italy, the owner, a man of limited economic capacity, bought the flat in question in 1982 in order to reside there with his family. Even in this case the owner had exhausted all reasonable means to gain access to the flat, but all attempts failed. First in 1995, i.e. twelve years afterwards, could he move into the flat, and then only because the tenant moved voluntarily. The tenant had not even paid full rent for the flat since 1987. In this case, the Court considered that the measures – or rather the lack of measures from the side of the authorities – had led to unreasonably burdensome consequences for the owner. In this case, the conditions for conviction required by the national legislation were satisfied. The owner had great need of the flat and besides, the tenant was in arear with rental payment. This notwithstanding, the authorities had not issued the necessary permit.[27]

These two cases constitute a suitable transition to the question on the protection of tenancy right in housing law.

3 Security of Tenancy

3.1 The Free Contract of Lease

The provisions on rented dwellings in 1734's code of laws were rather meagre. Leases for residential purposes were simply not an important type of contract. The rented dwelling was only brought about by industrialisation and concentration of the population. The first Swedish law governing rented dwellings, Chapter 3 of the Act on the Rights of Use of 1907, was founded upon the market functional concept of ownership. Full freedom of contract prevailed. There were no talks of the Security of Tenancy at all. In fact, to do so would have meant a reversion to the "perpetual rights of tenures" based on "a view of the law which belongs to the past".[28]

During the First World War, it was however considered necessary to implement a temporary rent control through the Rent Control Act. If the prohibition on rental increases were to be effective, a form of security of tenancy for the tenants was necessary. Otherwise, the landlords would be able simply to terminate the contract with the tenants not willing to pay rent at a premium. The Rent Control Act was accepted only reluctantly, and the minister responsible for this piece of legislation ensured that it was only a temporary measure, not meant to be a permanent limitation on owners' free right of disposition.[29] However it was legal practices developed during the Rent Control Act's period of validity

27 Spadea and Scalabrino v. Italy and Scollo v. Italy, judgments of 28 September 1995, ECHR Series A, Vol. 315 B and C.

28 The Law Commission's proposal to the Land Law Code I, Stockholm 1906, p.69.

29 See my *Hemrätt i Hyreshuset*, Ch. 2.1, pp. 25 ff on the Rent Control Act.

that gave shape to the Security of Tenancy which came to be introduced, albeit much later, in the Rent Act.

3.2 Residential Right in the Tenement House - A New Normative Concept

When the Rent Control Regulation was finally on its way out, a new normative idea was introduced for the first time —the idea of a form of Security of Tenancy in tenement houses even under normal circumstances, a Residential Right. This idea was presented by C.G. Bergman, professor of law, in two articles: the first one entitled "The Tenant's Home" in the periodical *Tiden* 1902, the other being "The Question on Leases and the Right to one's Home", published in pamphlet form in order to provoke public discussion.

"What is this struggle about?", Bergman wrote. "A tug of war between the landlord and tenants on the level of rents which one hear so often? No. This would be a belittlement of the issue. The real conflict lies in fact on a different and much deeper plane. It is about, on the one hand hundreds of thousands of homes, and on the other hand, the content of ownership."[30]

It is obvious that Bergman's Residential Right is founded upon the conservative element of the basic normative pattern of the Right to Property. According to Bergman, it would be ideal "if home and the right to property were united in the same hand. However, the development in Sweden has moved towards the direction where the majority of the population in urban areas live in tenement houses. The question is, therefore, how to create a counter-part of the right to property in order to protect all the homes in tenement houses."

Residential Right did not break through this time. Against it was the Market Functional argument, advocated in a legislative investigation by Vilhelm Lundstedt[31], the well-known jurist, Social Democrat and "legal realist". But the *idea* of a Residential Right in tenement houses continued to live on and grew, *inter alias*, under the Tenants' Movement and branches of different political parties.

3.3 Towards the Security of Tenancy

During the Second World War, rent control was again introduced in 1942. And as it was before, the effectiveness of the regulations was secured through the Security of Tenancy. This period of rent control, however, became very protracted, and during this time the Security of Tenancy became a part of the accepted system of norms in the market of residential leases. It was thus possible to introduce, albeit temporarily, in 1956 a special law on the Security of Tenancy[32], independent of rent control. The introduction of Security of Tenancy in the Rent Act[33] came in 1968.

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30 Bergman, *Hyresgästens hem* in Tiden (1922), p.92.

31 See *SOU 1923:76*.

32 SFS 1956:568.

33 SFS 1968:346.

During the ensuing years the Security of Tenancy stabilised and was strengthened on several points. Under the Liberal government of 1991—1994, legislation in the housing field moved towards the Market Functional Pole. But proposals which directly undermined the Security of Tenancy were not carried through. Security of Tenancy found strong sympathies also amongst many non-socialist voters.

3.4 The Shape of the Security of Tenancy

Technically, the Security of Tenancy is not constructed as a right to the residential flat or apartment as such, but as a right of renewal of the lease. In relation to the new owner, however, the right can be described as a right *in rem*. According to 7:13 of the Land Law Code, the lease is binding upon a new owner of the tenement house, provided that the lease is written and the tenant has moved into the flat.

The lease is renewable, in principle, as long as the tenant himself wants to stay in the flat; in other words, there are no time limits. The Security of Tenancy presupposes however that the tenant really lives in the flat, that he has his "home" there, and that he pays the rent and conducts himself properly otherwise. Thus the modern Security of Tenancy in tenement houses follows the same basic normative pattern as the rights of perpetual tenure in the agricultural society. The fact that Security of Tenancy even has a duty aspect is in full accordance with the basic pattern.

The rights of perpetual tenure in the agricultural society were heritable. The rights under a lease cannot be inherited, but they are included in a partition of the estate both after a divorce and upon death. The spouse or co-habitant, who has the right to take over a residential flat according to the rules of Family Law, has also according to the Rent Act the right to get her own lease with the landlord. The legislation on leases is thus subordinate to legislation in Family Law. Even other close relatives, e.g. children, have the right to take over the lease. This right presupposes, however, that the acquirer of the lease actually resides in the flat he takes over and that he has lived there together with the original tenant.

3.5 Security of Tenancy and the Interest of Change

The prescribed Security of Tenancy for tenants constitutes of course a restriction on the owner's right of free disposition over his property. However, the dynamic aspect of the Right to Property was catered for through Sec. 46 of the Rent Act, which permits that the Security of Tenancy be interrupted when the owner decides to use his property differently. If the building should be torn down, reconstructed, or made into offices, then the Security of Tenancy would cease without further ado. The actual wording of the law says that the Security of Tenancy ceases only "if it is not unreasonable against the tenant that the lease be terminated". This locution does not mean, however, that a weighing of interests should be undertaken where the tenant's interest to stay is considered. If the owner decides to tear down the building and has obtained the necessary permit,

then the tenant must always move. The dynamic interest of change overrides the tenant's conservative interest of staying behind.

The cases where the Security of Tenancy always has to give way is precisely the cases where the interest for change is most obvious and is of a more general interest to society. The owner's wish to terminate a contract because he prefers to lease the flat to a friend or a relative is a personal interest of the owner with no relevance to the dynamics of the market economy. The tenant's interest to remain at his home defeats the owner's personal interest. But if the owner's interest works as a component in the development of the housing stock, then this interest will defeat the tenant's conservative interest to stay behind. The owner can, when the interest of change requires, "expropriate" the tenant's legally safeguarded Security of Tenancy.

Full compensation shall in principle be given in cases of expropriation. Such compensation is a part of the normative pattern of the Right to Property. The tenant receives no pecuniary compensation when his tenancy right to a residential flat is expropriated, but in accordance with established practice, the tenant has a right to a replacement-flat of equivalent standard. Otherwise, it is considered unreasonable that the lease be terminated. This practice has developed without any explicit support in law or in the legislative preliminaries. The legislator, on the contrary, has tried to modify this right to a replacement-flat, which undoubtedly delays the owner's plans for changes. But legal practice has held on to the right of a replacement-flat of equivalent standard. Obviously legal practice has felt itself bound by the normative pattern of the Right to Property, which says that one cannot be deprived of one's legitimate possession without full compensation.

3.6 The Basic Normative Pattern

It is beyond doubt that the tenant's Security of Tenancy is founded upon the same basic normative pattern as the conservative content of the Right to Property. The similarity with the Right to Property is striking. The general normative background is the same. Security of Tenancy did not arise in order to protect "weaker groups", it developed rather as an alternative to normal ownership for a large group consisting of orderly industrial workers. The Security of Tenancy, just like the Right to Property, applies only to those who have already established a position. It does not distribute any value to those who do not already find themselves in the circle of "tenants". Security of Tenancy is not based on needs. It applies equally to the average family in a "project for the millions" as well as a single occupant of a luxury flat in the most attractive area of town. The Security of Tenancy for a residential flat can, in the same way as the Right to Property, be expropriated in the interest of change, with the proviso that the tenant then has a right to full compensation in the form of a replacement-flat of equivalent standard. The value that the Security of Tenancy represents cannot be sold for money, but it can be exchanged for the same kind of value, *viz.* the right to another home. A tenant who has Security of Tenancy also has the right of substitution. This is the only dynamic element in the Security of Tenancy and this right has arisen primarily to counteract the

conservative effect of the protection of the established order entailed by the Security of Tenancy.

There are several limitations in the Security of Tenancy when compared to the modern Right to Property. The severest of the limitations lies in the fact that the Security of Tenancy to a residential flat has, legally, no money worth. However, my comparison is not concerned with the modern market functional Right to Property, but rather the basic normative pattern upon which the Right to Property is built, a basic normative pattern which is substantially more ancient than the money economy. Other limitations, too, in the Security of Tenancy, correspond to the older forms of the Right to Property. The Security of Tenancy is broken when the tenant does not pay his rent or is guilty of other misconduct as a tenant. This applied in a similar way for the Right to Property and perpetual tenures in the agricultural society.

3.7 Security of Tenancy versus Just Distribution

Even in the field of Tenancy Law conflicts can arise between the Protection of the Established Position and the normative patterns which prescribe a distribution of available resources based on equality or on needs. The conflict appears very clearly in situations like where a patient in a sick-home for long-term treatment wishes to retain his service-flat for which there is a long queue of other pensioners, or where a single person wishes to remain in a large flat which the landlord would otherwise lease to a overcrowded family. As a rule, the Security of Tenancy prevails even in these situations. An owner who wants to tear down or reconstruct a building often gets help from the Housing Agency. It assists in obtaining replacement-flats for tenants who lose their actual flats due to demolition or reconstruction. One can question why these people should be given priority in the housing queue. But even here, the Protection of the Established Position takes precedence over Just Distribution.

The conflict between the Established Position on the one hand and Just Distribution on the other is nevertheless not as poignant as in the field of the Right to Property. The modern market-economic Right to Property not merely permits but also presumes the accumulation and concentration of capital in private ownership for investments in productive enterprises. From the distributive point of view, this is not "fair". The Security of Tenancy has in-built limitations that prevent concentrations of the values which the Security of Tenancy represents. Security of Tenancy applies only to the flat that is one's "home", and normally one cannot reside in more than one home.[34] Naturally, there are economically foresightful people who would try to build up a stock of "residential flat capital" in the form of sublocated flats, which can later be used as a currency for exchange or purchase of a owner-occupied flat[35] or a house. But there is no legal protection for this form of strategy. This restriction on the Security of Tenancy has its counter-part in older forms of Right to Property. According to Johan III's statue for Stockholm of 10 March 1570, no one was

34 See my *Hemrätt i hyreshuset*, Ch.7, pp. 79ff.

35 Sw. bostadsrätt.

allowed to settle in more houses than he himself and his children can have use and possession of".[36] The thought behind this is that land within the city should be used in such a way that the largest possible number of citizens could become "propertied", *viz.* in possession of land. The same norm and the same thought apply to the modern tenant's Security of Tenancy.

4 Security of Employment

4.1 The Free Contract of Employment

The aim of the Statue of Labourers of 1833[37] and other legislation on trade was to uphold stability in social live. They included a certain measure of Security of Employment, but it also put restraints on the employee from leaving the employment. The security worked both ways. This situation was however replaced by another normative basic pattern, *viz.* "the Free Employment Contract". A proposal for a law on certain contracts of employment was put forward in 1901. Admittedly, there were mandatory rules prescribing the minimum period for notices for termination of employment, which rendered strike actions more difficult, but there were no limitations on the employer's right to dismiss an employee at relatively short notice. The proposal did not lead to legislation. It reflected nonetheless the legal attitudes of the time. Through the so-called December Compromise of 1906, the Trade Union Confederation[38] accepted employers' right of management, a prerogative which at the time included the right to "fire at will".[39] This employer's prerogative of free dismissal was subsequently established by the Labour Court as a general principle of law.[40]

The Free Contract of Labour meant that employees also gained a liberation from their previous confinement to the contract. Even the trades unions founded their strategies on the new normative pattern, *viz.* the (Collective) Agreement. The free and freely terminable contract became thus the basic normative pattern for work in the industrial society.

4.2 Towards a Security of Employment

Before long, the norms of labour relationships began to move towards the other normative pole. The right to fire at will was restrained, first through the principal agreement of 1938 between SAF and LO, and later through the so-called "April

36 Quoted from the Law Commission's proposal to the Land Law Code I, put forward 1905, p. 350.

37 Sw. Legostadgan.

38 In Swedish, *Landsorganisation* (hereafter, LO). *Cf.* the federation of employers, in Swedish, *Svenska Arbetsgivarföreningen* (hereafter, SAF).

39 See, for example, Schmidt, *Facklig arbetsrätt*, p.109 f.

40 The Industrial Tribunal —*Arbetsdomstolen* (AD)— is the Supreme Court in Sweden in areas concerning Labour Law. On the employer's free dismissal right, see ADD 1932:100 and 1933:159.

settlement" of 1964 between the same parties.[41] The first Employment Protection Act came in 1974.

The Employment Protection Act was re-enacted in 1982 under the brief period of coalition government of the non-socialist parties. New provisions in the Act extended the possibilities to temporary employment; a clear swing towards the Market Functional Pole. These new and liberal provisions remained in the statue book, however, even after the Social Democratic party after a short time returned to power. The situation was quite stable until the Liberal parties came into power again in 1991. During this mandate period, the Market Functional pole strengthened considerably, and Labour Law drifted towards this pole as well. The attraction towards the Market Functional Pole is clearly illustrated by the various commission reports on new legislation put forward during this period.[42] However, only a lesser portion of these legislative proposals became law under this period of government: *viz.*, certain changes in the rules concerning the order of redundancy and an extension in the possibility of probationary employment. When the Social Democrats resumed power in the autumn of 1994, the new minister for employment, previously the chairman of the Union of Metal Industry Workers, declared that Employment Laws should be restored back to "Square One", *viz. status quo* before the change of government in 1991. These restorations came into force on 1 January 1995.[43]

4.3 Employment in the Public Sector

The breakthrough of the Free Contract as the basic normative pattern for employment in the public sector came much later. In particular, public employment had the character of a legally regulated status, and rules governing "officials" were a part of the Public Law. The Security of Employment was gained by the advancement through steps of different forms of employment with increasing Security of Employment leading finally to the much sought after "ordinary employment". An ordinary post gave a stronger Security of Employment than that afforded by the Employment Protection Act. Some groups of public employees held, moreover, special forms of offices, which gave even stronger Security of Employment, *e.g.*, commissioned appointments.[44]

Nevertheless, the Contract Principle began to force its way even through the public sector, firstly in actual practice and gradually in the legislation itself. The first breakthrough came in 1965 through the introduction of the possibility to enter collective agreements in the public sector, even if the new acts governing state and municipal employees still constituted considerable restrictions on the

41 For details, see Adlercreutz, *Svensk arbetsrätt*, 9th ed., p.107 f.

42 See *Ny anställningsskyddslag, SOU 1993:32*, and *Ändringar i hyresförhandlingslagen m.m., Ds 1993:30*, which above all was concerned with the system of rental negotiations and the principle that the rent shall correspond to the flat's utility value. These rules are however very intimately connected with the security of tenancy.

43 The Act repealing the previous government's changes in Labour Law: SFS 1994:1685.

44 Sw. fullmaktsanställning.

Freedom of Contract. The Security of Employment was not affected directly by this reform.

The next breakthrough came with the great Labour Law Reform during the 1970's. Both the Joint Regulation Act and the Employment Protection Act became applicable even in the public sector and the previous Acts governing state and municipal employees were replaced by a new Public Employment Act (SFS 1976:600), which had the character of a supplementary special legislation for public employees. The express prohibition on collective agreement in the previous Acts was superseded by certain principles in law, which limited the Freedom of Contract in the public sector with reference to political democracy, and a special agreement between the labour market and the public sector, in which the unions had undertaken to be prudent in industrial actions which might encroach upon a political democracy. The rules governing terminations of employment in the Security of Employment Act became applicable in the public sector, which meant a weakening of the Security of Employment for the previous category of "ordinary employment". The special types of employment in state employment also began to be replaced by normal permanent employment. However, immediate dismissal of state officials was still regulated only in the Public Employment Act, which set more stringent criteria for dismissals than the Employment Protection Act.

The latest stage of the development is the new Public Employment Act (SFS 1994:260) which entered into force on 1 July 1994. Through this new Act, the rules governing termination of employment and dismissal in the Employment Protection Act became directly applicable even on public employees. Sec. 3 in Chapter 8 of the old Public Employment Act contained a rule that made terminations of employment contrary to the seniority rules invalid. This rule was repealed through the new Act. The overwhelming majority of public employees thus lost the last remnants of the special Security of Employment in the public sector. Commissioned appointments, which give a particularly strong Security of Employment, remain and are regulated in a special Act[45]. However, it is more or less only judges who are now employed under commission.

The development in the legislative field reflects the change in attitudes towards public employment and especially state employment, where previously the employees were "officials". Even the word has disappeared from the legal vocabulary. In the 1994 Public Employment Act it was replaced by "employee". This change in attitude has not been party-political. All of the political parties have in the main been concordant in the idea of revoking the special regulations governing public employees. The change in attitude together with the poor financial state of the public sector led to extensive lay-offs in both the state and the municipal sectors.

4.4 Security of Employment versus the Interest of Change

The development over the past few years shows, not least, that the Security of Employment oscillates between two normative poles, on the one hand the

45 Commissioned Appointment Act (1994:261).

Protection of the Established Position, and on the other the Market Functional Basic Pattern. The normative pattern of the Protection of the Established Position can be clearly distinguished in the modern Security of Employment. At the same time, the restrictions in the Security of employment resulting from the influences of the Market Functional pattern are also evident.

A "permanent employment" is not considered to be an ordinary contractual relation. It is rather a social asset, something which one "possesses", and which cannot be taken away without valid reasons. This asset has the formal character of a contract with the employer, but it should be understood rather as a right to work and pay in the enterprise. I recall an article in a newspaper many years ago, where a free publicist wrote about "work-owners"[46] as opposed to those who did not have a permanent employment. This expression captures something essential in the normative aura which surrounds Permanent Employment, and is akin to the normative aura which surrounds the Right to Property. EC's Directive on Transfer of Enterprises is built upon the conception of the employment contract as having a quasi-character *in rem*. The rights under the employment contract are tied to the place of work and are not affected by a change of owners. The transferee assumes through cession the transferor's obligations under the contract.

The Protection of the Established Position associated with an employment is expressed in the well-known rule in Sec. 7 of the Employment Protection Act, which says that the employer cannot terminate an employment without "objective grounds". A distinction is made between "personal grounds" and "redundancy". Employment as an Established Position is not only an asset, but is also united with a pronounced duty aspect. Those who neglect their duties grossly can be dismissed on personal grounds and thus lose their Established Positions. This is part of the basic normative pattern and applies even for certain types of Right to Property.

In case of redundancy, Security of Employment ceases to afford protection to the employees. In these circumstances, the Market Functional Basic Pattern - which in the field of Labour Law asserts itself as the employer's right of management and the right to determine what kind of business to carry on, or if he is to carry on any business at all - has precedence over the Protection of the Established Position.

The individual employee has, however, a protection for his position in the rules governing the order of dismissal at redundancy, "seniority rules", which primarily is based on the length of employment. The longer the period of employment, the more secure the Established Position in a redundancy situation where only part of the workforce is to be dismissed. The employee thus gradually builds up a more and more secure position at his place of work. This process plainly reflects the underlying normative pattern.

Those who despite this must lose their employment are entitled in accordance with the Employment Protection Act to certain economic compensation, either in the form of salary under a period of notice, different types of lump-sum payments or compensations for the loss of income. The compensation does not,

46 Sw. arbetsägare.

however, amount to the full worth of the employment and can only ensure the employee's economy under a transition period. A more permanent protection for the economic position enjoyed in a hitherto employment lies in another legal area, namely in the principle of Replacement of Lost Earnings in Social Security Law.

The employer has yet another possibility to "expropriate" the Security of Employment. Even if a dismissal is "invalid", the employer can, by a provision of Sec. 39 of the Security of Employment Act, "buy out" the employee by a settlement with a severance pay whose amount depends on the employee's age and length of employment.

4.5 Security of Employment versus Just Distribution

It says in the Swedish Constitution that it is a public duty of the government to "safeguard the right to work". This right has, however, a very general character. It does not touch upon the Security of Employment, and even less is it meant to impose upon the state a duty to ensure that all available works are distributed fairly.

The basic pattern of Just Distribution has a very limited space within modern Labour Law so far as it concerns "employment opportunities". The legal principle in this area has found its expression in the so-called § 32-prerogatives of the employer. He has the right to "hire at will". The Freedom of Contract, in this respect, is total. Within the public sector, vacancies shall be filled by reference to objective grounds such as merits and abilities, but the intention of this rule is not to distribute available vacancies in a certain way but rather to ensure that vacancies are filled with the best-qualified applicants. This is particularly true as the application of the rules is based more and more on abilities than on merits.[47]

To the extent that fairness is considered in the Security of Employment, the focus is always put upon the relation to the employer. Through the Security of Employment, the relative strengths of the parties are being levelled out, and it is claimed that a more balanced and fair relationship between the employer and the employees is hereby achieved.[48] On the other hand, one never talks about fairness or unfairness in the Security of Employment for those who do not have an employment. We simply do not think in such terms when we are concerned with the Security of Employment. The thought is alien to us that a person should be forced to give up his job in order that another, say a long-term unemployed, should obtain his employment. There are, however, situations where the thought lies a little closer to us, for example when it concerns the extended Security of Employment in the case of re-employment after redundancy. Why should someone who has had the privilege of being employed over a considerable

47 See the statement of the parliamentary committee on labour affairs at the time of the enactment of the new Public Employment Act, 1993/94 AU 16 pp. 8 f. The Swedish conception of "merits" (Sw. "förtjänst") include factors, *inter alias*, like the length of service. A candidate with such merits is said to deserve the appointment.

48 I myself am sceptical to the idea of applying the principles of fairness or balance on such an asymmetrical relation as the relationship of employment, see above 1.6.

period of time go before someone who is long-term unemployed? We can also consider the extended Security of Employment under the different regulations on leaves, where one person's Security of Employment is another person's Temporary Employment. But it is not usual to reason in this way. Even the strategy of the trades unions is built upon protecting those who already have an employment at the cost of those who as yet have not obtained an employment. A typical example is the often-raised demand from the trade unions that employers should offer their part-time employees full-time employment before they begin to hire new staff.

There is one situation where the idea of Distribution has gained some inroads in practice. The law orders the Security of Employment in redundancy cases by reference to the length of employment, and this normally means that the oldest employees would have the best Security of Employment. It happens, however, through collective agreement, the order of redundancy is reversed, and the older employees are the first to go. An argument here is that the aged should give up their places in favour of the younger generation. The real driving force behind this reverse order is, however, not fairness across generations, but rather production's need for a young and well-educated workforce.

Job-sharing in the form of a general reduction of working hours has been mooted as a solution to the problem of unemployment. The idea has received footage in other European countries, but in Sweden it has only been met with repudiation, not least by the trade unions. However, in these days, the argument of Distribution has been evoked, particularly by the trades unions, to induce employers to cut down the large overtimes in the export industry and thus be able to employ new staff and reduce unemployment. The explanation to this lies obviously in the fact that overtime work does not constitute part of the Established Position, which the trade unions wish to defend, but is regarded rather as an over-exploitation of the workforce.

Relief work, work at sheltered workshops and work at special places of training are exempted from the provisions of the Security of Employment according to Sec. 1 of the Act. The reason behind this exemption is that these kinds of work are only meant to be temporary solutions pending entrance into the open labour market. It should not be possible to create a secure position in this kind of work. In this field, the argument from Distribution can become decisive in determining who should get an employment, for instance in such a way that relief works are distributed so that everyone receive the required amount of work in order to qualify for unemployment benefits.[49]

5 Replacement of Lost Earnings in Social Security Law

5.1 Social Security and Gainful employment

Social Security has developed as a necessary complement to the modern institution of gainful employment. Before industrialisation, work was an integrated part of a wider social organisation, which guaranteed a position

49 See below 5.2.

(status) to everyone who belonged to the social entity in which the work was organised. Industrial development and the market economy has led to the detachment of work from other parts of social life. Work has become a special form of contractual relation, which deals only with the performance on the part of the worker and the salary which he receives as determined by the needs of productivity and profitability. Most people will, at least during some periods of their lives, be unable to perform the work that earns salaries. In the modern industrial society, it is not possible either to fall back on other private social institutions, for instance the family. The gaps in gainful employment as a system of maintenance are filled by Social Security.

5.2 Replacement of Lost Earnings

The fundamental principle in the Swedish Social Security system is the Replacement of Lost Earnings. The benefit received is calculated as a percentage of previous earnings up to the upper earnings limit, "the ceiling". The general level of compensation in short term benefits, sickness benefit, unemployment benefit and parental benefit, is 80 percent. Supplementary occupational schemes add another ten percent to the benefit.

Old age pensions and other long-term benefits are also calculated on previous income from work. A new statutory old age pension scheme was adopted in 1998.

The previous scheme consisted of two parts, a basic pension ("folkpension") awarded to all residents, and a general additional pension amounting to 60 percent of previous earnings up to an upper earnings limit and linked to a price index. The scheme was a defined benefit scheme. Qualifying time for a full additional pension was 30 years and the amount of pension was calculated on "the best 15 years". The statutory scheme was supplemented by occupational schemes based on "final salary". The level of compensation together with the statutory pension has ranged between 70 and 80 percent of final salary. Thus, even the pension system was designed to protect the position in working life established before retirement, provided that the beneficiary fulfilled the condition of 30 qualifying years.

Disability pension was and is still calculated in the same way as the previous old age pension scheme. A pensioner on disability pension is however allowed counting the remaining years up to the age of 65 as qualifying years. Such a pensioner cannot be blamed for not being able to work these years. In this way disability pension is even more closely related to the position established before retirement than is old age pension.

The principal part of the new pension system, adopted in 1998, is The Earnings-based pension, which is a defined contribution scheme based on life-long average earnings. An amount equivalent to 18.5 percent of pensionable earnings is transferred to the pension system. 16 percentage points go to a Pay as you go (PAYG) system. The remaining 2.5 percentage points are invested in individual accounts in a prefunded system.

There is no guaranteed level of compensation in the earnings-based scheme. Instead, pension rights and pensions in the PAYG system are linked to an

earnings index reflecting the general earnings trend and calculated on the basis of average life expectancy at the time of retirement. The pensions in the prefunded system are linked to the value of the fund(s) where the contributions have been invested. There is no maximum qualifying time. The longer you work the higher pension you get. All earning years give the same right to pension. There is no rule of "the best working years".

The new old age pension scheme represents a step away from the Protection of the Established position and its manifestation in the principle of Replacement of Lost Earnings. It is built upon another normative pattern, which can be called the Principle of accumulated entitlement, and much closer to the principles of private insurance and thus to the Market Functional Pattern.

The supplementary occupational pension schemes are moving in the same direction, from "final salary pensions" to pensions calculated on life-long average earnings, from defined benefit schemes to defined contribution schemes.

The present disability/early retirement pension does not fit into the new old age pension scheme, so strictly based upon contributions made. It will be replaced by another scheme, not yet decided upon. Presumably it will be more close to the sickness benefit model and thus the principle of Replacement of Lost Earnings.

Work injury pensions are an even more direct, if not to say extreme, manifestation of the principle of Replacement of Lost Earnings.

There is no need for a "qualifying period". The benefit is based upon the qualifying income or - in case of injuries under training - the income which the insured should receive if the injury had not taken place. The rules in this area in Ch. 4 of the Social Insurance Act are very complicated. The aim is to put the insured back in the same economic position as if the occupational injury never took place, and thus similar to the so-called subtraction principle used in the calculation of damages in the Law of Tort.

There are different requirements within the various branches of Social Security on how firmly the economic position be established before the earnings-related benefits are to be granted. A minimum period of employment is required for unemployment benefits. The qualifying period is a minimum of six months of employment during the twelve months period preceding unemployment. Parental benefit presupposes a minimum period of insurance of 240 days before the child's birth.[50] There are no corresponding requirements for the ordinary sickness benefit. And for annuity after occupational injuries, one is not even required to have achieved the position on which the compensation is based. Compensation can be paid even for the hypothetical future income as if the injury never took place. As was mentioned before, other pensions are calculated with reference to the number of qualifying years.

All branches of Social Security have certain rules on abeyance periods. These rules enable the insured to retain the position he once established in Social Security, *e.g.*, classification in a certain compensation class, even if he under the abeyance period does not have any income or only reduced income, and as a result should be downgraded to a lower compensation class or ceases to qualify

50 Sec. 6 of Ch. 4 of the Social Insurance Act.

for the benefits altogether. The rules on abeyance periods are generous. Those who interrupt their gainful employment for reasons acceptable or even encouraged by society, *e.g.* in order to take part in vocational training, need not jeopardise their already established positions. But even those who are imprisoned for not too lengthy a period retain the established classifications.

One should therefore act, within the field of social security, in order not to lose the once established position. Parental benefit is paid for a maximum of 450 days, but a woman could stay at home longer if she wishes to without losing her qualifying income. She does this by ensuring that she becomes pregnant again within a given time. According to Sec.6 of Ch. 4 of the Social Insurance Act, a woman can retain her qualifying income if she becomes pregnant again within one year and 9 months of the previous delivery, and consequently begin a new period of parental benefit. It is a lot of money at stake. It would be surprising if this rule had not influenced the pattern of childbirth in Sweden.

5.3 The Ceiling and the Floor

One thing common for all forms of Social Security payments is that there is a "ceiling" to the amount of income taken into consideration when computing the Loss of earnings. The ceiling is 7.5 times the base amount. The base amount for 1999 is 36 400 SEK. The economical top positions in society are therefore not protected by Social Security. There is also a "floor" for most branches of Social Security —such as in retirement, sickness or unemployment— which gives a guaranteed amount regardless of previous income. The guaranteed amount is however on such a low level that those not entitled to earnings related benefits will generally have to rely on other forms of benefits, and ultimately on social assistance which is based on an entirely different principle, *viz.* the principle of basic needs. Social assistance is not paid in order to preserve a position above basic needs. On the contrary, one can be forced to sell the house or the flat before one can receive social assistance for everyday expenses.

For the majority of groups in society with a "normal life", even on different economic levels, it is the Principle of Replacement of Lost Earnings, which constitutes the basic principle of compensation. The intention of this principle is that everyone should be able to continue to live his normal life and pay for his normal expenses at the economic level in society which he has achieved. The Earnings Replacement Principle stabilises everyday life —and preserves till death the differences in incomes.

5.4 The Duty Aspects of Social Security Norms

The Protection of the Established Position in Social Security is also accompanied by certain duties whilst benefits are paid out. These duties are in full accordance with the basic normative pattern. The insured is required, under these duties, to do what he can in order to return to working life. The recipients of unemployment benefit must, as it is called, "be at the disposal of the labour market" by registering at the employment office ("to sign on") and be prepared to take up assigned jobs. The one who refuses to accept a suitable offer of

employment will suffer economic sanctions, normally exclusion from benefits for 9-12 weeks. This sanction is more severe than even fines for relatively serious crimes since the *whole* of the income is withdrawn. If one is sick or has impaired working capacity, one has to attempt to become well and regain working capacity. According to Sec. 3 of Ch. 20 of the Social Insurance Act, sickness benefit, disability benefit and survivor's pension can be withdrawn or reduced if the insured refuses to follow the course of treatment or rehabilitation the authority prescribes. This rule is a flagrant violation of a fundamental principle in Medical Law, *viz.* that all treatments should be voluntary[51]. Here we have a very marked conflict between two different basic normative patterns. Medical Law is based —at least officially— on the basic normative pattern which protects the individual's integrity and thus requires voluntary consent to all forms of treatment, even if the treatment is necessary for maintaining the capacity to work or even life. Social security requires, on the other hand, that the insured submit to the type of treatment which improves his working capacity.

5.5 Tension between Opposite Poles

In recent years the field of Social Law has been characterised by strong tensions. The trend has been for lower levels of benefits and more stringent demands for qualification for entitlement to benefits. This movement cannot be explained solely by the poor state of the economy. It is also concerned with the tension between the two normative poles - on the one hand the Protection of the Established Position, and on the other the Market Functional pole, which requires that people relinquish their Established Positions and accept new conditions in the labour market, conditions which may fall below the level that Social Security provides. The market-economic argument asserts that the Social Security system should not be constructed in such a way that one can choose to retain one's Established Position in the system instead of accepting the new conditions that the labour market can offer. In this way, people are locked into a life on Social Security. It is therefore necessary to sharpen the qualifications for benefits and to lower the level of compensation in order to preserve the difference even in relation to the lowest pays in a labour market with an ever increasing divergence in salaries. A salient example of this effect of a certain level of compensation in Social Security is the rule established in practice on the exclusion from benefit when the unemployed refuses a suitable employment. An employment is not considered suitable if the pay is substantially below the unemployment benefit. A difference of at least 10 percent is here considered to be substantial.[52] Otherwise, the rules on suitable employment do not give any protection for the Established Protection. As long as the professional trades unions themselves financed the unemployment benefits and steered the structure

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51 See Rynning, Elisabeth, *Samtycke till vård och behandling (Consent to medical care and treatment)*, doctoral dissertation, Iustus, Uppsala 1994.

52 See my *Avstängning från arbetslöshetsersättning*, Lund 1980, pp. 225 ff. So far as I know, the practice has remained unchanged since the book was published. See also my *Disqualification from unemployment benefits: a critical study in Swedish Social Security Law*. Scand. Studies 1980.

of the rules, it was clear that members were not obliged to accept an offer of employment outside their profession. But since the state has overtaken the steering of Social Security insurance, it is claimed that Social Security is not a "professional insurance". There is therefore an obligation to give up the old profession in order to enter into a new, if only the salary is not substantially lower. Neither is there a protection for the established place of residence.[53]

It is this argument which lies behind the most significant changes in Social Security in recent years. Insurance for occupational injuries is the Social Security benefit, which gives the best economic compensation and consequently has provided the greatest temptation to stay within social insurance. Through SFS 1992:1698, the criteria were sharpened for what constitutes harmful effects in general, and even the burden of proof of the link between a particular injury and the harmful effects which are supposed to have caused the injury. Through SFS 1993:357 the sickness benefit for occupational injuries and the ordinary sickness benefit are co-ordinated. Previously, a higher level of benefit was paid during a long-term illness due to occupational injury. The insured had therefore an economic incentive in claiming that it was an occupational injury which led to the long-term illness. Not only a few doctors had the opinion that this rule gave rise to "annuity neurosis", *i.e.*, a disease caused by the insured's desire to retain his benefits. The favourable calculation of annuities after an occupational injury remains however unchanged.

Even the criteria for disability pension have been sharpened. It is no longer possible to receive disability pension purely by reason of the state of the labour market (labour market reasons).

The rules governing unemployment benefits were changed by the Liberal government in 1994.[54] Relief work would not be taken into account when computing the qualifying employment period. The intention of this change was to prevent people from falling into a life fluctuating between a period of unemployment benefit and five months of relief work just in order to qualify for a new period of unemployment benefit. These changes have already been repealed by the Social Democratic government,[55] perhaps chiefly due to the fact that the changes also entailed a weakening the position of the trade unions in the system of unemployment benefits. The government has already appointed a new committee to investigate the rules governing unemployment benefit.

There is, in the main, a political consensus with a determined emphasis on the "work line" instead of the "benefit line". Even this entails a move away from the Protection of the Established Position towards the Market Functional Pole. The different political measures in the labour market which the state (and municipal authorities) offer *in lieu* of earnings related benefits do not create any Established Positions. Instead they seek to prepare for an open and new labour market.

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53 *Op. Cit.*, Ch. 10 (employment outside customary occupation) and Ch. 11 (employment outside home district).

54 SFS 1993:357.

55 SFS 1995:30 and 31.

Social Security Law can be seen as moving in the same direction as Labour Law and Tenancy Law, *viz*. away from the Protection of the Established Position and towards the Market Functional pole. The trend here is even more pronounced than in Labour Law and Tenancy Law. The changes in Labour Law which the Liberal government introduced have already been restored by the Social Democratic government. In the field of Social Security, however, the movement continues towards a more market functional system, above all through the Social Democrats strong emphasis of the "work line", which in practice must imply an adjustment to the conditions of the market.

5.6 Replacement of Lost Earnings versus Just Distribution

The fundamental principle in Social Security is thus the Protection of the Established Position, and not a Just Distribution according to the Principle of Equality or the Principle of Needs. Since we all get old, the re-distribution of income over our lifetime through the pension system does not ensue in any re-distribution from the point of view of fairness. It is true that one can speak of "the elderly" as a distinct group in society, and pensioners have even an own national association. Nevertheless, in evaluating the effects of Social Security, old age must be regarded as a period in life. Then it is no longer a question of justice, but a question of suitability and necessity. Neither should sickness insurance be seen primarily as a re-distribution of resources from the group of the healthy to the group of the sick. It should be seen rather as a system of insurance which insure all people against a certain risk.

A transition from a Social Security system based on the Protection of the Established Position to a system based on Equal Distribution or Distribution based on Needs would mean a transition from the Earnings Replacement Principle to a principle where the same benefit is paid to all pensioners and all unemployed regardless of previous incomes or to a principle based on needs, which takes consideration only of the basic needs, not the need to preserve an above-average Established Position. Such ideas have of course been raised in public debates, but they have not gained any political anchorage. The Social Democrats have re-introduced a higher marginal tax for high-income earners. But they have *not* put forward any proposal for changes in Social Security which would mean a greater deterioration for high-income earners, for example through a lower percentile level of benefit at high incomes or a lowering of the "ceiling" in Social Security.

The principle of equal distribution or distribution based on needs is a subsidiary principle in the system of Social Laws and is only applied when the Principle of Replacement of Lost Earnings does not meet the most basic needs.

6 Legal Protection of Matrimony

6.1 The Life-long Marriage

The family was the fundamental unit in society before industrialisation and the laws on marriage had as their aim to maintain stability of this unit. According to

the teachings of the Roman-Catholic Church, marriage is a life-long union which can only be dissolved by the death of a spouse. The Lutherans and the Calvinists were not as harsh as the Catholics and permitted certain grounds for divorce, namely adultery and desertion. These grounds for divorce were taken up in the Ecclesiastical Acts of 1571 and 1686, as well as the Marriage Code in the Law of 1734. However, even in Sweden, the basic attitude in this matter was to maintain the family as a stable unit and divorce was permitted only under exceptional circumstances.

During this period, it was marriage that defined a woman's position in society. An order that promotes the institution of marriage also works as a protection for the positions that the spouses have acquired through marriage. This had a special significance for women, since the woman in principle followed the status of her husband.

6.2 Dissolution of the Family

Industrialisation broke up the family as a unit of production and maintenance, and this led of course to a general weakening of the family as a social unit. At the same time, a more general development took place which emphasised the independence and freedom of individuals from institutional bonds.

The dissolution of the old institution began as usual from within as people in their daily lives no longer respected the established norms. Migration to cities meant that the old social controls no longer functioned, in particular the controls exercised by the Church. Women and men of the new working class simply refrained from marriage. The middle class families employed desertion as collusive ground to obtain divorce. One of the spouses travelled to Copenhagen and the other spouse brought an action for divorce on the ground of desertion.

The social pressure upon the old marriage-preserving legislation became all the more bearing. A new Marriage Code was introduced in two stages, in 1915 and 1920. Through the legislation of 1915 a new ground of divorce was introduced, *viz.* the irretrievable breakdown of a marriage. In these cases, the final dissolution of the marriage should be preceded by a year of separation. The legislation of 1915 continued to build on the idea of the preservation of marriage and only made the most necessary concessions to modern time. The legislation of 1920 dealt with the estates of the spouses.

Divorces became more and more common despite the residual restrictions in the legislation. The requirement for irretrievable breakdown was abolished through SFS 1968:758, but the obligatory year of separation remained in these cases. It took a few more years yet, before the Free Divorce was accomplished.

6.3 The Free Contract and the Free Divorce

The Report of the Expert Committee on Family Law of 1972 reflects the new attitude towards marriage and accentuates the fundamental normative questions. "From the legal point of view, the act through which a man and a woman consent to entering into marriage can be described as a contract. The parties give mutual declarations of intent that the relationship between themselves shall

henceforth be governed by the Law of Marriage."[56] The Report contains a rather long section on principles with the title "The Voluntary Basis of Marriage". In the view of the committee, the voluntary basis had been fully accomplished and satisfactorily guaranteed as far as the entry into marriage was concerned. However the applicable law restricted in various ways the freedom to dissolve a marriage as it permitted only certain grounds for divorce and required in certain cases a year of separation. It was of course a social interest that the stability of the family be upheld, but the experts on the committee doubted whether any real stability of the family could be achieved through the restrictions of the right to dissolve a marriage.[57]

The (almost) entirely Free Divorce was introduced through SFS 1973:645. If there are minor children, the divorce becomes absolute only after a "period of consideration" of six months. This is the only remaining limitation.

6.4 Maintenance and Alimony

There were no provisions for alimony after the dissolution of a marriage in earlier legislation except in certain exceptional cases. The intention was, of course, that marriage should not be dissolved unless there were some extreme situations at play. A provision on alimony after a divorce was introduced in the Marriage Code of 1915. If a spouse after the divorce was "in need of contribution towards his/her due maintenance", the other spouse could be obliged to pay an alimony "in accordance with his/her ability and for other reasons as may seem fit". One of these reasons was, according to the committee, that the woman divorcee's ability to maintain herself is often limited, especially after a marriage of long standing. The committee continued: "At times she has, through marriage, been placed in an entirely new and improved economic and social situation, and become accustomed to a way of life different from her previous one; perhaps through the marriage her station in society has become one such that she rightfully would feel humiliated if she were forced to seek gainful employment." Even in other cases, "when the divorcee's needs can be said to be more or less created by the marriage", it would be "offensive against one's sense of justice that the spouses, through the divorce, be put into too different levels of economic conditions."[58] Thus we can see, that the basic normative pattern - the Protection of the Established Position - stands out clearly in the stated intentions of the legislator. The "needs" which the law text talks about encompass even the psychological need to preserve one's old social and economic position.

Gradually, it became more and more unusual to award alimony after a divorce. Moreover it was more often that alimony be awarded only for a limited period of time.[59]

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56 SOU 1972:41 p. 145 in the section dealing with the entry into marriage.

57 See SOU 1972:41 under 3.4, pp. 101 ff.

58 The Law Committee's proposal to amendments of the Marriage Code I, p. 448 f.

59 SOU 1977:33 p. 128 f; Agell, *Underhåll till barn och make*, 4 ed. (1988), p. 73 and pp. 110-113.

It was already clear through the directives in 1969 to the Expert Committee on Family Law that as the main principle in future, alimony should *not* be awarded after a divorce. The reasons given by the Minister in charge was that an obligation to pay alimony would limit the right to the Free Divorce. "The obligation for one spouse to pay alimony to the other can in practice mean that he is restrained from petitioning for a divorce, because he might not afford the alimony".[60] The Expert Committee followed the same line of reasoning: "A residual economic obligation means that the marriage survives partially and the right to its dissolution is therefore incomplete. The retention of such an obligation over a protracted period can mean a heavy burden for the one who pays the alimony, as well as a dependent position for the one who receives it."

This new way of looking at the obligation to maintain an ex-spouse broke through in the reform of the Marriage Code in 1978. Section 11:14 of the previous Marriage Code was amended thus by SFS 1978:654:

After a divorce, each spouse is responsible for his own maintenance.

If during a period of transition, a spouse is in need of contribution towards his maintenance, he is entitled to a reasonable alimony from the other spouse based on that spouse's earning capacity and other relevant circumstances.

If a spouse has difficulties to maintain himself after a long period of marriage or it is otherwise justifiable due to special circumstances, the spouse is entitled to alimony for a longer period than is provided under the second paragraph.

This provision is now Sec. 6:7 of the new Marriage Code. The wording has been modernised somewhat, but the content remains the same.

Thus it was the normative principle on the individual's personal freedom - here, the husband's freedom to divorce without an all too large economic sacrifice - that superseded the protection of the social and economic position which the wife had established through marriage.

6.5 Widow's Pension

Social security has followed the trend. Until 1990, there were special rules on widow's pension. If a woman was over 36 years of age upon the husband's death, and she had been married to (or co-habiting with) him for more than five years, she was entitled to a widow's pension. This entitlement lasted, in principle, until the woman remarried or became entitled to her own pension. A survivor's pension was also given to the surviving spouse who had custody of children under the age of 12.

SFS 1988:881 abolished the widow's pension. The rules on survivors' pensions in Chapter 8 of the Social Insurance Act are completely gender neutral. A survivor's pension can be paid as an "adjustment pension" over a period of six months if the length of the marriage has been substantial or if there are children under 12 years of age. Special survivor's pension can be paid over a longer period if this is justified on grounds of health or the situation in the labour market.

60 Secretary of State Kling's statement in minutes of the Cabinet meeting of 15 August 1969.

In this manner, the last remnant of the protection for the special position which a woman establishes through marriage disappeared.

However, while the protection for the position which lies in the marriage itself and the right to alimony after divorce was abolished, the right to economic compensation upon divorce out of the other spouse's estate has been strengthened rather over the recent years.

7 Summary

7.1 Protection of the Established Position —A Basic Normative Pattern

My first task was to prove the existence of a normative pattern, which I call Protection for the Established Position. I think I have accomplished this task. The pattern is a *significant* one. It is easy to recognise, though it displays itself in different legal frames —Family Law, Public Law etc., and in different external guises — an employment, a tenement flat, a payment from a social security fund. There can be no doubt that it is *the same pattern*, which appears in Family Law as alimony, in Public Law as widows' pensions, in Labour Law as employment protection and in Tenancy Law as the tenant's residential security.

The pattern is also a *basic* one. It has *historical constancy*. The same pattern, which marked the perpetual tenures in the old Swedish agrarian society reappears in the modern tenement building. It is a pattern with *broad application* in the multitude of norms. It appears in all legal areas belonging to the Social Dimension. It is also *a forceful and persistent pattern* that puts a pregnant mark on the content of the rules. It may disappear for a period of time in the regulation of a certain legal area, but remains in the Normative Field and reappears time after time in new legal guises.

Protection of the Established Position is a *normative pattern*. Its foundations are everyday life norms and conceptions about how relations between people ought to be shaped. Even this limited study shows that the pattern often evolves through a normative practice, which is not confirmed by law until later. The provisions on Residential Security in the Rent Act are chiefly a codification of the practice developed by the local tribunals during the periods of Rent Control. This practice in turn can have no other foundation than what the members of the Rent Control Tribunals considered right and reasonable. The statute-regulated protection of employment has its predecessors in collective agreements between the parties of the labour market. The pattern is not always rational from the point of view of the social planner. One example is the right to a replacement-flat of equal value for a tenant under notice due to the demolition of the tenement building. This right constitutes an obstacle in the process of reconstructing the housing stock, and the legislator has tried to restrict it, albeit without success. Another example is the high level of compensation in occupational injury cases, which may constitute a psychological obstacle for return to working life.

7.2 The Market Functional Pattern

In the legal regulation of the Social Dimension another normative pattern displays itself in a very significant way, i.e. the pattern I call the Market Functional Pattern. It is a composite pattern. One part of it is the conservative pattern of Property Right, but this conservative element has been combined with a dynamic element consisting of the owner's Freedom of Disposition, first and foremost the Free Contract. The old conservative element in Property Right and the Free Contract have in the Western Market Economies been so firmly integrated that they now form a new composite normative pattern.

Market economy in itself is not a normative pattern. However, Market Economy as an economic system presupposes the existence of legal regulation protecting Ownership, the Free Contract and the Liberty to Pursue a Trade. Those are the three principles or rights forming "the legal foundations" of Market Economy. The legal regulation presupposes in turn that the rules have normative anchorage in society. The legitimacy of the Market Economy is first and foremost built upon the fortunate economic and democratic development in the western countries, not least in contrast with the former eastern plan economies. But that is not enough! The basic principles must at least be compatible with the basic normative patterns in society. The politico-philosophical debate in recent years has been marked by an intense normative plead for the fundamental principles of Market Economy, above all Private Ownership and the Free Contract. The modern market-economic Property Right has been extended far beyond the normative core-content of Property Right, namely the protection for the possession of certain property. However, it is still this core-content which forms the normative anchorage and can motivate, for instance, a reinforced constitutional protection for Property Rights or Property Right as a "human right".

7.3 Labour Law and Tenancy Law —Movements in the Normative Field

The development of Labour Law and Tenancy Law under the latest 100 years can be seen as a movement in the Normative Field between two poles: at one end the Protection of the Established Position, on the other the Market Functional Pole. The movements in these two legal areas have at large been parallel.

The old structures emphasising stability and Protection of the Established Position gradually dissolved during the nineteenth century. Tenancy rights with no limits in time were forbidden. The Statute of Labourers of 1833 and other labour laws were not applied any longer. The new Market Functional Pattern appeared and was recognised in statutes and other central documents in both legal areas, in Tenancy Law through the 1907 Act on the Right of Use and i Labour Law through the December Compromise between LO and SAF in 1906. The Act of 1907 is built upon the owner's right to freely dispose over his real estate, a power which also includes the right freely to enter and to terminate tenancy contracts. The preparatory works display very clearly what lies behind these rules, namely the belief in the dynamic element in "modern" Property Right. The December Compromise has the same normative core-content. Even this document establishes the owner's right to dispose freely over his property.

The right to "hire and fire" is expressly included in the agreement itself. These basic principles were never incorporated in statute law, bur have been confirmed in the rulings of the Labour Court. The employer's § 32-preogatives are built upon his Property Right and cannot be derived from general principles of contract. However, they are considered to be included as "hidden clauses" in the contracts agreed upon in the labour market.

After some time, both Labour Law and Tenancy Law began to move back in the direction of the Protection of the Established Position. Perhaps the public Rent Control during the first world war, which included residential security, should be regarded as a parenthesis in the development. But during the 40's the new direction of movement became obvious. In the labour field the development took place within the framework of collective agreements, in Tenancy Law in public rent control administered by the parties of the market. In 1968, Security of Tenancy was incorporated in the regular Rent Act. The first Employment Protection Act was enacted in 1974.

Even a closer look upon how and to what extent Protection of the Established Position is given reveals significant conformities between the two Acts. Under certain circumstances both Security of Tenancy and Protection of Employment must stand aside and give way to the owner's right of free disposition, namely in situations where this right of free disposition is essential for meeting the interest of change and development. When the owner of an enterprise decides to close down, to rationalise or to restructure his business, redundancy arises. Such redundancy always constitutes *just cause* for dismissal. When the owner of a tenement house decides to pull down, rebuild or transform dwelling-flats into offices, an analogous situation arises, which could be called "redundancy of tenants" and which "breaks" the direct Security of Tenancy. It is much more difficult to break the Protection of Employment or the Security of Tenancy invoking individual-related causes, i.e. causes consisting in that the employee or the tenant does not fulfil his obligations under the contract in a proper way. In Labour Law as well as in Tenancy Law there are rules restricting the use of temporary agreements.

Even in Sweden it is possible to discern a new turn in the movement already during the 80's. In 1982, the Liberal coalition government made certain amendments to the Employment Protection Act, which considerably extended the employer's possibilities to engage workers in temporary employment. These amendments were *not* drawn back when the Social Democrats took over in 1988.

The liberal governmental period of 1991 - 1994 was marked by a general political and ideological movement towards a more pure market economy. This general movement was manifested clearly in Labour Law. Tenancy Law was influenced in the same direction, but not as strongly. Labour Law was one of the main topics of controversy between the two political blocks. The Social Democrats promised to restore Labour Law to where it was before as soon as they were back in government, and so they did. Thus, the development in recent years has shown that the two normative poles, which have determined the development in Labour Law and Tenancy Law, also have a strong political charge.

7.4 Social Security Schemes

The Swedish social security system is built upon the Replacement of Lost Earnings Principle. The benefits are intended to be a compensation for the lost income, and thus to protect the economic position which the insured person has achieved in his working life. But even in the social security system a clear movement towards a more Market Functional system has become visible in recent years; more restrictive conditions for benefits, waiting days and a lower level of compensation are just a few examples. However, the relation between the two poles within Social Security is more complicated than the corresponding relation within Labour Law. The existence of a Social Security system with generous provisions for long-term sick benefits and early retirement pension has made it easier for individual enterprises (after agreement with the unions) to get rid of the low-productive and elderly work force and in this way actually reinforced the employer's discretionary powers over the labour. So-called "elderly dismissals" — where the legal priority order is turned upside down and *only* persons above a certain age are dismissed — would not have been possible without unemployment benefits and early retirement pension for labour market reasons. In this way the protection given for the established income level in Social Security Schemes has led to a weaker protection for the actual employment.

On a more general level, however, this leads to production and business enterprises being burdened with costs for an ever increasing part of the population not participating in production. According to the logic of Market Economy the protection granted for the Established Position renders the insured persons less willing to reconsider their situations and accept new and different positions offered by a new and different labour market. This Market Economy logic lies behind a good deal of the changes which have taken place in Social Security schemes in recent years. On that level the conflict between Protection of the Established Position and the Market Functional Pattern manifests itself in a very clear way.

It is true that the Social Democrats have restored the old unemployment benefit scheme. This restoration, however, has a very specific union-political background and i not a manifestation of a general policy of restoration in the Social Security field. The financial and demographic conditions necessitate continued restrictions in the Social Security system. Perhaps the difference between the two blocks in the Social Security field is more a question of rhetoric. The Social Democrats' strong emphasis on the "working line" instead of the "benefit line" must lead away from the Protection of the Established Position towards an adaptation to the conditions offered by the new labour market.

Maybe it is a too shortsighted view to look upon the changes during recent years in the legal fields under consideration as manifestations of the power relations between the two political blocks in Sweden. Perhaps a wider perspective will show that the normative development in Sweden is a part of the development in the entire industrialised Western Europe, where the ever

hardening competition enforces all actors to give up their old established positions and adapt themselves to the conditions of the new markets.

7.5 Just Distribution

With the Social Democrats being in power for such a long time, it might be expected that normative patterns on Just Distribution should have had a great influence upon the legislation in the Social Dimension. However, the present investigation indicates that this is not the case.

The Social Security system is built upon the Principle of Replacement of Lost Earnings, not upon principles of equal distribution according to needs. Both the Employment Protection Act and the Rent Act are constructed in such a way that they can give protection only to them, who have already achieved a certain position. Besides these pieces of legislation in the field of Private Law, the government has carried out both a labour market policy and a housing policy in order to create *new* jobs and *new* housing opportunities and also to allocate them according to principles of just distribution. But this policy of distribution has never been allowed to intrude upon already established positions. In situations where a conflict occurs between these two normative patterns, Protection of the Established Position always prevails.

This says something about the Swedish Welfare state. It is not built upon any radical policy of distribution and redistribution, which includes already established positions into the amount of wealth that can be distributed. It has rather been constructed carefully and patiently by allocating new resources in such a way that larger and larger parts of the population have been able to obtain certain positions, which then are granted a fairly strong protection.

7.6 Matrimony —From Status to Contract

Even within Family Law the pattern Protection of the Established Position is to be found, but the background and the shaping is not the same as in the other legal areas under consideration. One should be careful not to draw too far-reaching parallels.

The protection previously granted for the position as a spouse has not - at least not primarily - been intended to protect the individual parties, but Matrimony or Family as an institution. Matrimony as an institutional relationship was indissoluble, and from that followed a protection for the positions each of the spouses had established through marriage. The other side of this protection was the confinement to the same institutional relationship. When Matrimony became dissoluble, the Protection of the Established Position disappeared and in a symmetrical way. Both parties received the same right to enforce the dissolution of the marriage.

In that way the Protection of the Established Position, previously granted in Matrimony, is different from the Protection of the Established Position now granted in Labour Law and Tenancy Law. Modern employment protection and security of tenancy protect the position, which the employee or the tenant

obtains in the employment and tenancy relationship, not that relationship in itself. The employee or the tenant can always terminate the relationship at will.

In that way Protection of the Established Position as a basic normative pattern is different from the *status-relationship*, which is another basic normative pattern. The development towards modern society has been described as a development from Status to Contract. The Status-relationship as a normative pattern is different from Protection of the Established Position in a number of ways. The most important differences in this context are that the individual interests in a Status-relationship are subordinated to the institutional wholeness, and that the protection given by a certain status entails a corresponding confinement. This is in accord with the old indissoluble institution of Matrimony but not with modern Employment Protection or Tenancy Security. The indissoluble marriage follows rather the pattern for a Status-relationship. The duty to pay alimony after a divorce was, on the other hand, a typical manifestation of the Protection of the Established Position, and so were the recently abolished Widows' pensions.

Thus the step-by-step disintegration of the old indissoluble matrimony during the nineteenth and twentieth centuries shall first and foremost be regarded as a development from Status to Contract. But here the contract is not part of the Market Functional Pattern but a more general pattern, which seeks to safeguard and promote *personal* freedom and autonomy. The Market Functional Freedom of Contract must put up with certain necessary restrictions in order to protect other individuals' established positions. The right to shape the personal relationships freely with other grown-up individuals no longer contains any restrictions of that kind. When the duty to pay alimony after a divorce was abolished in 1978, the reason was to guarantee the freedom of divorce —in practice the husband's freedom to divorce his wife. Under an ongoing marriage there are still some elements of Status, but one can always regain one's freedom through a divorce.

Even work and dwelling were previously parts of a Status-relationship, which could be so wide that it embraced practically all rights and duties in daily life. A great part of work in society was organised within the frame of the patriarchal family, and the patriarchal family in turn served as a pattern for organisation of work outside the family. Labour Law of the nineteenth century had strong elements of Status-relationship. The free contract of labour was not only a manifestation of the new Market Functional Pattern, but also —from the worker's point of view— an emancipation from the old Status-relationship.

The modern employment relationship, too, contains elements of Status, since the rights and obligations under the relationship are mainly defined by the parties' positions in the existent organisation of work and not by an individual contract. Like other normative patterns, Status and Contract are seldom found in entirely pure forms. It is the same with other kinds of patterns appearing in the vicissitudes of life around us.

7.7 Protection of the Established Position in Other Areas of Law

Protection of the Established Position is to be found in many other areas of law. The protection in International Law for the sovereignty of a state within established borders is a basic, not to say the most basic principle of International Law. The UN-Charter, Art. 2(4), contains a prohibition on the members states from using violence or threat of violence directed against the territorial integrity of another state. The protection of the established borders maintains stability in the international society. When a border is firmly established, the argument that it would be "more fair" to draw it otherwise is of no help. In the field of intellectual property, the protection of patterns and trademarks is also a result of the Protection of the Established Position. In both International Law and Intellectual Property Law, it is easy to see the close connection with the Law of Property.

Citizenship is another example of the Protection of the Established Position. It comes into being as a Status-relationship, most often already through birth. Later on, however, it functions more as a Protection of the Established Position. Modern citizenship is first and foremost a right, whereas the duty aspects get thinner and thinner. As a rule it is possible to keep one's citizenship even after immigrating into another country. In many situations the individual can choose if he wants to keep his old citizenship or not. Usually the difficult part is to obtain a new citizenship, a new Established Position.

Different kinds of certificates, licences and diplomas actually function more as a protection for the position once obtained through passing an examination or a test than as a proof that the holder still has the competence or the knowledge indicated by the document. It is not easy to take the licence from a person who has been a car-driver all his life, even if there are good reasons to believe that he, due to the ailments of old age, no longer fulfils the original requirements. In cases where the driver's licence is withdrawn it is rather a punishment for violation of some duties connected with the position as a car-driver.

7.8 The Comparative Aspect

As emphasised already in the introduction there are many different ways to arrange the multitude of legal norms and many different kinds of patterns to pick up. In that way different aspects of the rules can be illuminated. When a normative pattern is being used as the point of departure in a legal investigation, it throws light upon the connections between the legal rules and the underlying moral norms.

But there is another aspect too. The investigation of a pattern, which is not derived from the traditional legal division of the material, gets a *comparative* character already on the national level. Rules from different areas of law are brought together and can be compared from a normative perspective without hindrance from the legal-technical construction in the different areas.

Normative patterns could also be the point of departure for comparative investigations of the content of the rules in different countries. The conclusion of a comparative study, once the legal-technical problems are penetrated, is often that the different countries under consideration have reached the same practical

solutions in a given conflict situation. The explanation may be that the different legal systems are in fact built upon common normative patterns.

A fruitful conjecture would be that basic normative patterns arise and influence the legal order in such a way that by and large the same normative patterns are to be found in the different legal systems. In countries similar to each other from a cultural and economic point of view, the evaluation of the different normative patterns will be carried out in a similar way.

Taking normative patterns as a point of departure could then be a way to emancipate Law from its confinement to the narrow boundaries of a national legal system.