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## Flexible Qualification – a Key to Labour Law?

Ann Numhauser-Henning, *Lund University*



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ANN NUMHAUSER-HENNING\*

## Flexible Qualification – a Key to Labour Law?

**Abstract:** This article argues that *flexible knowledge* (and thus continuous education) has the potential to out-date employment protection versus new forms of works as the touchstone of labour law discourse in the Knowledge Society. Hitherto labour law discourse has usually focused on labour market segmentation in terms of a core group of permanently employed workers and more peripheral groups of workers in atypical employment. However, recent Swedish labour market statistics show that employability in terms of qualification appears to be the crucial quality, regardless of mode of employment, when it comes to the risk for the individual of being subjected to unfavourable labour conditions, transfers and unemployment. This implies new challenges to labour law. Legally defined or negotiated rights to education and training is an important way forward. It is argued that while such rights as part of employment protection schemes seem to imply a strengthening of employer prerogatives as regards the functional flexibility dimension, a right to education and training as part of more general conditions of employment may work to the 'empowerment' of individual employees. What we need is 'a normative shift' as regards the employer's obligation, from an obligation to guarantee continued employment to an obligation to guarantee continued employability.

### 1. INTRODUCTION: CHANGING LABOUR-MARKET CONDITIONS

During the last few decades, the labour market has undergone fundamental change on a worldwide basis. In the annex of a press-release on the European Commission's *New Strategy for Jobs in the Knowledge Economy*,<sup>1</sup> this development is described in the following way: 'Technological devel-

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1 <[http://europe.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=g.../119/0/RAPID&ig=E 2000-02-07](http://europe.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=g.../119/0/RAPID&ig=E 2000-02-07)>.

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opment and the globalisation of economies have permanently changed the character of both work and employment. Work in successful enterprises no longer follows the old industrial model with hierarchical chains of command, narrow divisions of tasks and a large component of unskilled labour: it requires flexible, adaptable and multi-skilled workers. Employment has become on average less stable and less certain than in the past and more dependent on high skills and adaptability. The worker and workplace in the Information Society will be very different from those we are familiar with today. In the Information Society, an increasing number of people work in jobs centring on information and knowledge and will make use of Information Society tools and services, both at work and during leisure time'.

The text is quoted from a recommendation on a strategy to promote European competitiveness, especially as regards the use of information and communication technology, and the key concepts used are the Knowledge Economy and the Information Society.<sup>2</sup> Another concept frequently used in this context is the Network Society.<sup>3</sup> Other authors on other occasions have used such concepts as the Post-Industrial, Post-Capitalist, Post-Fordist or, simply, Knowledge Society. The last concept is the one I choose to use in this article.

The very concept *Knowledge Society* reflects knowledge as the central productive resource, while technical development and global competence are phenomena generally stressed as the forces behind the growing demand for knowledge, qualifications, (continuous) education and adaptability to change.

In labour-law discourse the described developments have hitherto generally been addressed as the *Flexibilisation of Work*, which has long been an issue of conflicting interests. The discussion has frequently focused on the tension between traditional employment and employment protection on the one side and so-called *New Forms of Work* or *A-Typical Work* on the other. Traditional employment and employment protection are usually defended by workers' organisations, centre-leftist political parties and so-called institutionalist economists. On the other side we find management, more right-wing political parties and neo-classical economists. The centrepiece of discussion has long been the issue of deregulation (or not) of traditional labour law.

2 Information Society was the concept used already by A. Toffler in *Future Shock*, 1970, but *The Information Age* is also the title of M. Castells' major work on societal developments in recent decades, M. Castells, *The Information Age: Economy, Society and Culture*, Blackwell Publishers, Oxford, 1996, Volumes 1-3.

3 M. Castells, *The Rise of the Network Society*, 1996, Volume I.

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In the course of writing this paper I have come to the as yet somewhat preliminary conclusion that *knowledge* – or rather *flexible qualification* – has the potential to override *New Forms of Work* as the ‘touchstone’ of labour-law discourse in the Knowledge Society.

## 2. KNOWLEDGE/QUALIFICATION AS THE CRUCIAL QUALITY

As was already indicated, the very concept Knowledge Society reflects knowledge as a central productive resource. The conceptions of knowledge and other concepts such as qualification, skill and competence have varied throughout the years owing to societal (and scientific) developments; but these are concepts which have long been deeply embedded in labour-market studies and analyses. However, this is not the time and the place for a detailed analysis of these concepts, and in the following I will use the words knowledge and qualification in a rather general sense.<sup>4</sup> Neither do I feel the need to specify the importance of knowledge and qualifications in relation to production since there is no *one* such definition to make.<sup>5</sup> Working life is comprised of several stages of industrial development at one and the same time,<sup>6</sup> and an argument on such a generalised basis as the one presented here is of course a gross – but nevertheless a necessary and in this context, in my opinion, justifiable – simplification of things. I will stick with the following quote from Nielsen: ‘*Although the new conditions make the contribution of the workers crucial, it is not happening in the sense of a traditional concept of the productivity of labour, but on the contrary in the sense that the capital productivity is increasingly relying on the workers*’<sup>7</sup>.

However, an extremely important observation to make for our purposes is that knowledge or qualification as an adequate production resource is not a static thing.<sup>8</sup> On the contrary, the already addressed rapid tech-

4 For an interesting, condensed and yet comprehensive presentation of the theoretical history of the Anglo-Saxon concept of *Skill*, the German concept of *Qualifikation* and the more recent *Competence* discourse and its relations to labour market developments, see G. Gudmundsson, ‘Old Wine in New Bottles: The Concepts of Competence and Qualification,’ in *Global Redefining of Working Life*, Nord 1998/12, Nordic Council of Ministers, Copenhagen.

5 For a discussion on knowledge and qualifications and their relationship with the traditional concept of the productivity of labour, see G. Gudmundsson, *op. cit.*

6 See A. Toffler and the *Wave*-metaphor, A. Toffler, *The Third Wave*, 1980, London.

7 Nielsen, K. Aagaard, *Arbejdets sociale orientering*, Forlaget Sociologi. Copenhagen, 1996.

8 Compare Tinbergen, *op. cit.*, who already in the 1970s described labour-market long-term development as ‘a race between technology and education’.

nological development and global economic competition demand flexible, ever-changing, knowledge and qualifications from the future labour force. Thus, the central basic knowledge is 'learning to learn' in combination with *continuous and lifelong education*, or to put it in Gudmundsson's words '*the central component of general qualifications can be defined as flexibility, the ability to adapt to changing conditions and to transform one's qualifications as needed*'.<sup>9</sup>

From *the management/activity point of view*, adequate qualifications (knowledge and continuous education) mean increased intellectual capital in the organisation, as well as increased allocative flexibility – that is ability to adjust to change.

From *the employee point of view*, adequate qualifications (knowledge and continuous education) mean increased security as regards (continuous) employment, but also increased chances of achieving high-quality working conditions and a fulfilling working life.<sup>10</sup>

From *the societal point of view*, adequate qualifications (knowledge and continuous education) mean increased possibilities as regards labour-market participation (employment) and economic growth/competitiveness on a global scale, and thus the ability, to meet legitimate demands for social inclusion – in short, a stable society.

The adequate concept when it comes to the relation between qualification and employment is of course the now very frequent term *employability*. Thus, employability is the first 'pillar' in the four-pillar structure of the EU Employment Guidelines adopted by the European Council in pursuit of the Amsterdam Treaty rules under the Employment Policies Title (now Title VIII, Employment). As used there (see further below sec. 4), it seems to be in line with the employee or societal point of view as just described. Even so, of course, the very term *employability* above all reflects the attention paid to management views on qualifications really in demand for employment.

### 3. KNOWLEDGE/QUALIFICATION AND THE FLEXIBILITY DISCOURSE

The changing paradigm of the labour market is generally considered to create new conditions for labour law. Current conditions are hence said

9 G. Gudmundsson, *op. cit.*, p. 218.

10 Compare the concept of 'the good work' as one of the central policy elements in union politics in Sweden in the late 1980s and the 1990s, first developed by the Swedish Metal Workers' Union in 1983. A statutory expression is found in the Swedish Working Environment Act, Chapter 2 sec. 1. See also the Government Bill 1990/91, 140.

to involve in labour-law implementation and margin into a debt employment forms

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to involve increased demands for flexibility and market adjustment. The labour-law flexibility discourse frequently focuses on labour-market segmentation and the division into core-groups of workers on the one hand, and marginalised workers on the other. In the legal area, this has turned into a debate on employment protection versus different modes of employment, or permanent (traditional) employment versus new (a-typical) forms of work.

An early model – maybe still the best-known one – of the new way of organising labour is Atkinson's model of 'The Flexible Firm'.<sup>11</sup> At the centre of the employer's concern is what Atkinson calls the core group of workers. This core group consists of workers whose qualifications are of special value to activities and not easy to come by – in other words, experience and internally accomplished qualifications are important. With regard to this segment of the labour force, the relevant flexibility strategy is described as *functional flexibility* – that is, the reallocation of labour through adequate and flexible organisational and competence structures. This can also be labelled *internal flexibility*. Typically management has no problems when it comes to offering the core group of workers both employment protection and high-quality working conditions. On the contrary, the problem is how to retain these workers. The core group of workers is thus conceived of as typically permanently employed. The second segment is the *peripheral group of workers*, workers with qualifications more easily available and thus people who could be recruited on demand. Here, the adequate managerial strategy is supposed to be *numerical flexibility*, including more or less precarious forms of work such as part-time work and fixed-term work – or what has earlier been referred to as New Forms of Work or A-Typical Work. A third layer of workers are the *external or distanced workers*, that is workers who are not even integrated into the employer's organisation in the sense of being employed there. This group includes workers hired out by Temporary Work Agencies, but also consultants, freelancers and, ultimately, any other form of 'out-sourcing'. One could describe both the numerical flexibility strategy and the distancing strategy as forms of *external flexibility* in the sense that adjustment and flexibility are achieved mainly through means outside the employer's organisation upon demand.

Labour-market developments and the increased need for allocative flexibility have generally been perceived as forming a trend towards an increase in the peripheral and distanced workforce. This entails an increase

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<sup>11</sup> J. Atkinson, 'Manpower Strategies for Flexible Organisations', in *Personnel Management*, London, 1984.

in part-time, fixed-term work, temporary agency work and other unstable employment relationships – and a decrease in the group of core workers offered permanent, relatively secure, traditional employment. This is not the place to trace such a general development; rather the point at issue is whether this is really the relevant line of discussion.

It seems quite obvious that workers' qualifications are of vital importance as regards the flexibility strategy to be chosen by management already according to the Atkinson theory. From the *internal* flexibility point of view – that is, with regard to the core group of workers – adequate and hard-to-come-by qualifications can even be described as a categorising element. A management strategy involving, among other things, continuing education is of crucial importance as regards the allocative flexibility of the organisation. Generally speaking, this also implies a management strategy that offers employment protection and high-quality working conditions in general. From the *external* flexibility point of view, in the eyes of management, continuous education might be more of a strategy for society and for individual employees seeking to change employment possibilities and conditions.<sup>12</sup>

From the workers' perspective this has generally been perceived as a situation of (according to the protection offered by general regulations) relative protection for those with permanent positions and a more or less precarious existence for those in peripheral or distanced positions.

This is, however, a much too idealised or over-simplified perception of the state of affairs. Recent statistics and research indicate that the importance given to different modes of employment in labour-law discourse might be misleading. Legal rules on employment protection in most countries imply that employers have 'core groups of workers' in the sense of permanent employees (with employment contracts of indefinite duration) who are not that crucial to activities in the firm, and thus almost as likely to suffer the consequences of weakened demand as some of the workers in new forms of work.

Recent Swedish investigations on labour-market developments in the 1990s<sup>13</sup> show that there is reason to divide permanent employees as well into different categories on the basis of their labour-market experiences. The full-time permanently employed were divided into two categories, one category frequently working overtime<sup>14</sup> and another (almost) never

12 Compare what is said on the *EU Employment Guidelines* below.

13 A. Wikman et al., *Nya relationer i arbetslivet – en rapport om tendenser mot flexibla marknadsrelationer i stället för permanenta anställningsrelationer*, Arbetslivsinstitutet, Stockholm, 1998.

14 This group consisted of those who, at least once a week, had to work during lunch-hour, stay on after regular hours or bring work home.

doing so. In the deep labour-market recession in the early 1990s more than half a million regular employments disappeared in the Swedish labour-market, but only some 30,000 of those involved the first category, the 'overtimers'.<sup>15</sup> The overtimers were also the ones with the greater influence on workplace conditions; despite their overtime work they had a higher degree of 'self-regulated' working hours and access to education and training. They can thus be said to have constituted the 'real inner core group of workers'. Among part-timers permanently employed, there was also an 'inner category' of voluntary part-timers and an 'outer category' of those who wanted to work full-time but were not allowed to do so.

Such a categorisation of permanent workers is also reflected in another investigation which studied the different stages in the employment crisis of the 1990s.<sup>16</sup> In the first stage there was insecurity, and no new recruitments whatsoever were made; the second stage was characterised by the voluntary retirement of older workers with unwanted qualifications; and in the third stage there were redundancy dismissals that complied with the 1982 Employment Protection Act seniority rules (the last-in-first-out principle). But then, in the fourth stage, there were local collective agreements which deviated from the seniority rules of the 1982 Employment Protection Act: these agreements allowed for exceptions according to the qualifications and experience needed among the workers involved.

On the other hand, tight bonds may be the managerial strategy as regards skilled core labour; but when it comes to the really 'employable' ones, employees' strategies also play a vital role, and more and more workers (whether employees, hired-outs, free-lancers, consultants or other self-employed) seem to prefer 'new forms of work'. As the 'restructuring phase' of the traditional labour market has passed, it might be that what seems most attractive for management also with regard to crucial, but so rapidly changing, qualities is an externalised or distanced *network* mode of organisation.

According to Swedish investigations,<sup>17</sup> different categories of employees may be distinguished here too: again an 'inner' privileged group of fixed-term employees seems to be contrasted with another, 'outer', less fortunate one. In the inner group we find employees (mostly men) in project- and probationary employment, in the outer one public-sector substitutes and on-call workers (mostly women). While the proportion of

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15 The over-timers were not a small group but made up 19.9% of all employed in 1989, 19.4% in 1993 and 22.9% in 1997 as compared to 43.6% in 1989, 38.5% in 1993 and 37.3% in 1997 for the other group, A. Wikman et al. *op.cit.*

16 A. Björklund et al., *Välfärdspolitik i kristid - håller arbetslinjen?*, SNS Förlag, Stockholm, 1998, p. 69 f.

17 A. Wikman et al., *op.cit.*

substitutes in the workforce has been more or less stable since 1993, other types of fixed-term work have increased their share of the total employment considerably. Project work is the type of employment where the share of low-qualification jobs is considered the second smallest, only after the permanently employed 'overtimers'.<sup>18</sup>

Employability in terms of qualification appears to be the crucial quality, regardless of mode of employment, when it comes to the risk for the individual of being subjected to unfavourable labour conditions, transfers and unemployment, or to quote Gudmundsson: '*The basic cleavage in the labour market is between the core of the qualified and flexible and the margin of the unqualified and inflexible*'.<sup>19</sup>

The realisation that the mode of employment/employment protection as understood in traditional labour-law discourse – and even in the post-modern labour-law flexibility discourse – might not be what matters most implies new challenges to labour law. Inadequate qualification is the really weak part of the chain, regardless of the mode of employment etc. Hence, employability in the sense of adequate qualification may really be the key factor.

#### 4. KNOWLEDGE/QUALIFICATION AND EMPLOYMENT PROTECTION

In the context of traditional permanent employment, we should study the legal standing of (lacking) qualifications with regard to dismissals for personal reasons as well as collective dismissals in connection with just-cause requirements, seniority-systems and the like. The 'precariousness' of non-core permanent employment of course depends on the employment protection offered; but there is no doubt that well-developed employment protection regulation also entails considerable loop-holes in cases where the qualifications of an employee do not meet the needs of business.<sup>20</sup> Here the development of legally defined or negotiated *rights to education and training* is a way forward. And we have to consider such rights not only as an important part of employment protection in the traditional sense (making continued employment with the original employer possible), but also (to enhance 'external' employment) as an important

18 A. Wikman et al. *op.cit.*

19 G. Gudmundsson *op.cit.*, p. 205.

20 For a recent and initiated description on developments in Swedish labour law regarding these issues, see M. Rönnmar, *Redundant Because of Lack of Competence? Swedish Employees in the Knowledge Society*, in this issue.

complement to such protection substituting (or as part of) employment-protection, redundancy-payment and unemployment-insurance schemes.<sup>21</sup>

This may be a good place to refer to the *EU Employment Guidelines*, which reflect adequate qualification and continuous education as the key to competitiveness. According to the Presidency Conclusions of Amsterdam, 16 and 17 June 1997, 'The European council attaches paramount importance to creating conditions in the Member States that would promote a skilled and adaptable workforce and flexible labour markets responsive to economic change', something that requires 'active intervention by the Member States in the labour market to help people develop their employability'. Employability thus became the first pillar in the four-pillar structure of the Guidelines, adopted on a yearly basis since the Amsterdam Treaty in 1997. The rules have not undergone any more important changes since the start with the 1998 Employment Guidelines. Paying particular attention to young people, the long-term unemployed and – with special mention since 1998 – otherwise disadvantaged groups and individuals, Member States are obliged to improve workforce employability through active measures like training, retraining, work practice and individual vocational guidance in accordance with certain quantified goals. 'Benefit, tax and training systems – where that proves necessary – must be reviewed and adapted to ensure that they actively support employability'. The guidelines also bring up the need to improve initial school systems to 'make sure they equip young people with greater ability to adapt to technological and economic changes and with skills relevant to the labour market', easing the transition from school to work. The Guidelines also especially encourage the partnership approach, urging social partners to conclude agreements with a view to increasing the possibilities for training, work experience, traineeships or other measures likely to promote employability.

The guidelines, of course, first and foremost uphold continuous education as a strategy adequate for society (and the individual) to prevent unemployment and to re-integrate dropouts. The invitation to the social partners to take part in this endeavour, however, indicates a more integrated view on the importance of rights to training, education and employment protection devices initially addressed in this section.

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21 Another side of the coin is shown in an ongoing investigation at the Swedish Arbetslivsinstitutet (aronsson@niwl.se). About one third of the permanently employed in the Swedish labour market would rather have another employment but, owing to employment-protection rules and other 'obstacles', they stick to their employer. This attitude is, according to the investigation, likely to cause health problems in the long run.

The employability approach of the guidelines has been characterised as a switch in labour-market policies from passive to active measures and from a curative to a preventive approach, but it also reflects the need for more or less comprehensive reforms of the initial educational system. Swedish labour-market policies have long been ruled by the 'activation principle'. Since Amsterdam these policies have been reaffirmed and additional initiatives taken. One such initiative is *the Adult Education Initiative*, through which since 1998 over 100,000 persons annually have been offered the opportunity to upper secondary school education as a basis for lifelong learning. Most of those have been unemployed (55%), while some (20%) were already employed or had other activities (25%). During education a special training allowance equivalent to unemployment compensation is offered, also to persons with jobs if they were replaced by long-term unemployed. The initiative is to go on at least through the first half of 2002. There was also an initiative concerning an *IT venture*, worked out in co-operation with the Federation of Swedish Industries, designed as IT training primarily in private industry.

More interesting from our point of view is the work of the *tripartite working group on competence development on the job* initiated in 1998. A proposal for agreements between the Government and the social partners was put forward as early as September 1998, but the incentives to organise training have not yet been agreed upon. Among the social partners there is consensus on an agreement at the central level. The difficulties have consisted in getting the Government committed to the endeavour. The general idea is to stimulate local agreements on skills development covering all employees at the workplace, based on personal educational accounts for employees and on tax reductions (subsidised by the State) for employers. Now, the financing is meant to take place within the framework of the new Objective 3, one half of the venture funded by the EU's European Social Fund, and the other half from central government co-financing. The initiative will now, according to the government's plans, also include unemployed persons with special emphasis on marginalised groups such as immigrants and the disabled. However, at least since 1998 skills development has also been a high-priority issue in Swedish wage negotiations in a broader perspective, and there are agreements on increased skills development in several sectors today. One example is the agreement between Skandia – a big insurance company – and the local union in 1998 on a right to study leaves with pay every five years. The basis is a system of personal educational accounts, financed through wage negotiations and individual contributions (with a maximum of 5 % of the wages) on behalf of the employee, to be 'matched' by the employer. The 'educational account' is a type of insurance, now marketed by Skandia on a more general basis as well. When 'used', the funds are paid to the employer who pays normal

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wages to the employee. The educational account can thus be used as a paid study leave in the course of employment. In redundancy cases the whole amount is also paid out, while an individual on optional leave is only entitled to the funds built up from his own wages, not to the employer's contributions. (This part is also inherited in case of the death of the employee.) Another example is the 1998 agreement in the retail-trade sector of the labour market. 0.25% of the total amount of wages is to be put aside during 1998, 1999 and 2000 for educational purposes. In this case, too, the basis is personal educational accounts, but only for those permanently employed, and upon voluntary retirement the funds remain at the disposal of other employees at the workplace.<sup>22</sup>

The right to education and training seems to be a right especially appropriate for negotiated solutions, since financing is such an important part of it. Here a parallel can be drawn to the obligations according to which employers' must adapt the working environment and offer rehabilitation to disabled employees. Legal obligations for employers in these cases are generally constructed as more or less vague rules on 'reasonable' adjustments, etc. Another aspect is that such an obligation on the employer's part also stresses the responsibilities of the employee. This is reflected in a proposition on labour-law reforms put forward by the big Swedish trade union in the municipalities sector, the Swedish Municipal Employees' Union (SKTF), suggesting a legal right to education and training for the employee to be included in the 1982 Employment Protection Act. It is supposed to come with sanctions, so that a redundancy dismissal in a case where the employer has neglected this duty to offer the necessary education is regarded as null and void, a right that 'of course is met by a corresponding obligation on the part of employees to undergo the education needed, as well as to accept changes in his or her obligation to perform work'.<sup>23</sup> More developed rights to education and training as part of employment-protection schemes thus seem to imply a strengthening of employer prerogatives as regards the functional flexibility dimension. However, a right to education and training as part of the more general conditions of employment can also help to 'empower' indi-

22 As part of so-called 'Security agreements' the social partners on the Swedish labour market in many cases also have joint agencies for questions relating to employment protection and change and for vocational training issues. For an ongoing investigation on employment protection and education in redundancy cases on the Swedish labour market during the 1990s in the car-manufacturing, telecom- and banking sectors, see peter.docherty@niwl.se.

23 Swedish Municipal Employees' Union, *Rättigheter i arbetslivet, SKTFs bidrag till debatten om en reformerad arbetsrätt*, document dated Stockholm 1999-02-10.

vidual employees. This may turn out to be a new and important field for the solidarity principle, traditionally characterising not least Swedish wage-bargaining.

The Swedish collective agreement on educational rights in the retail-trade business excludes the peripheral labour-force segment. This may reflect the traditional differentiation separating permanent employees from employees in new forms of work. However, when it comes to part-time employment, fixed-term work and temporary agency work, we have reason to pay special attention to the *equal treatment principle* as expressed in, for instance, community law directives. The comparatively early Council directive 91/383/EEC on the health and safety at work of fixed-term workers and Temporary Agency workers is already based on the equal treatment principle. In more recent directives, 1997/81/EC concerning the Framework Agreement on Part-time Work (the part-time directive) and 1999/70/EC concerning the Framework Agreement on Fixed-Term Work (the fixed-term work directive), the application of the principle of non-discrimination/equal treatment provides a solid basis for improving the quality of part-time and fixed-term work, respectively. Thus, part-time workers and fixed-term workers must not be treated differently (in a less favourable manner) than comparable full-time/permanent workers solely because they are part-timers/have a fixed-term contract or relation, unless this differentiation is justified on objective grounds. Without diminishing the problems caused by the fact that different (but not necessarily 'inferior') working conditions are what constitutes the very categories to be compared, as well as the exceptions and justifications to be allowed, this legal development within community law indicates the validity of the argument that underlies this article, namely that the mode of employment is irrelevant to the precariousness (or not) of an employment.<sup>24</sup> Here one might emphasise that given the fact that the peripheral or even externalised workforce may also constitute core categories of workers, management has incentives to invest in (some of) them, too. In return, such a development may work to strengthen the actual stability in employment also for these categories.

24 In cases of equal treatment between the sexes, the ECJ has, through the concept of indirect discrimination, long provided a way to declaring inferior working conditions for (for instance) part-timers illicit; see for instance case 96/80 *Jenkins v. Kingsgate Ltd*, 1981, ECR 911. See also C-189/91 *P. Kirshammer-Hack v. N. Sidal*, 1993 ECRI-6185 and C-167/97 *Regina v. Secretary of State for employment*, ex parte N. Seymour-Smith and L. Perez (not yet published) – both on employment protection.

### 5. KNOWLEDGE/QUALIFICATIONS AND MANAGERIAL PREROGATIVES, ETC.

Knowledge is a production resource, which is ultimately (although it may well be dependent on the employer and his organisation) in the possession of the individual employee and *not* optimally utilised in the context of orders given within hierarchically arranged structures. This new 'position' of crucial workers must be considered to have important implications not only for management prerogatives, but also for industrial relations including collective bargaining and the mode and the content of decision-making. Production relies on the commitment and sense of responsibility of individual co-workers, something which calls for a different kind of management from the one that prevails in traditional industry. Management does not itself possess the knowledge which various employees have; it is the former's job to formulate targets and organise knowledge as 'productively' as possible. The success of this undertaking is crucial to competitiveness. An over-mobile workforce constitutes a threat to the employer. When an employee leaves, his or her knowledge goes as well. In respect of the production of knowledge, we must bear in mind that the salary is not the only pertinent factor; instead, human-resource management and the development of competence are key concepts. It is also often pointed out that there is a close connection between functional flexibility solutions and mechanisms of consensus – that is to say, co-determination, industrial democracy, and procedural flexibility-enhancing schemes.

This development can be said to put a pressure on *the legal concept of the employee* as such, traditionally characterised by subordination. Other legal issues likely to be of growing significance in future labour law are rights of property as regards the employees' acquired skill, knowledge and expertise as well as the legitimacy of non-competition clauses and 'slavery contracts' and their relation to the fundamental freedom of occupation.

### 6. SUMMARY AND FINAL REMARKS

In recent years, labour-law discourse has been described as a struggle between institutionalists and neo-classicists, and the core issue has been employment protection versus new forms of work. Technological developments and the global market economy probably imply that labour-market terms and conditions must be regarded as being subjugated under those of the economy to a higher degree than before. It is probably also true that the terms and conditions of the new economy engender new demands for flexibility and adaptability – demands which require us to accept a more varied concept of employment than the traditional one.

However, the Knowledge Society with flexible qualification as the key quality makes standard solutions like 'permanent' employment less crucial; instead, it highlights new ways of securing 'continuous' (not necessarily with the same employer) employment and of dealing with new issues that involve the risk of conflict.

Thus, the Atkinson model of the Flexible Firm is far from accurate in the sense that both peripheral workers and distanced workers may be 'core workers' in the Network Society, and permanently employed staff may not. And maybe the solution of the recent community directives on part-time and fixed-term work, applying the equal treatment principle, is to be interpreted as a reflection of the insight that the mode of employment is not what really matters. *'The basic cleavage in the labour market is between the core of the qualified and flexible and the margin of the unqualified and inflexible.'* Rights to education and training are an increasingly important part of employment protection, but may also be a substitute or a complement to employment protection. Such rights may be a part of employment protection, but they may also be seen as part of more general conditions of employment. How the costs of such educational rights should be distributed is far from obvious. Collectively negotiated solutions may turn out to be the best; but several considerations also favour initial schooling and social security schemes, given the increasing importance of transitional employment as part of the 'continuous employment' system.

Finally, we must not over-simplify these issues. Labour-market development as well as investigations show that it is far from easy to match demands for qualification by educational means; and in Sweden, for instance, the labour market has provided incapable of converting the prevailing economic growth into increased employment. Nor does the conclusion that the mode of employment does not necessarily reflect the precariousness of an employee's position on the labour market permit us to draw the conclusion that there is no problem with marginalisation. We can expect a segmentation of labour market also in the future. My point is that rights to education and training – cleverly structured – may turn out to be much more effective, both for workers and management, than traditional employment protection. What we need is 'a normative shift' as regards the employer's obligations, from an obligation to guarantee continued employment to an obligation to guarantee continued employability. The bottom line is that an employer should not be able to contract manpower on conditions that threaten the future employability of the individuals. Even so, all cannot be winners on the labour market despite increased employability, whether we make our comparisons within the segments of permanent employment and peripheral employment or between different labour-force segments. The way in which you utilise the

education and training offered (by employers' and society) may be decisive; but, still, winning is a relative thing. There will always be those better off and those worse off!