

Communicating Justice
Providing Legitimacy

Communicating Justice Providing Legitimacy

The legal practices of Swedish
administrative courts in cases regarding
sickness cash benefit

Sara Stendahl

IUSTUS FÖRLAG

Abstract

Stendahl, Sara (2003) *Communicating Justice, Providing Legitimacy* (Uppsala: Iustus Förlag) 430 pp, ISBN 91-7678-548-3.

The volume is on an overarching level confronting the function of the legal system in the governance of modern welfare states. The point of departure is an analysis in which the *conflict* between individual needs and collective social risks is highlighted, and the role of the courts in resolving this conflict, is in focus. The study is situated in a context characterized by *change*, where the traditional welfare state is challenged by for instance globalization processes and in this process becoming more complex, more differentiated and more pluralistic, but also thinner and more fragile. In such a modern (complex and differentiated) society authors as for instance Rawls and Habermas have singled out the legal system as a key component in providing political legitimacy. It is proposed that the capacity of the legal system to provide *de facto* legitimacy is at stake, not primarily in the Supreme courts, but in the less glamorous, everyday production of judgments by county courts. It is further proposed that it falls upon the members of the legal community (such as the judges) to provide legal arguments (accepted as legal by the legal community) but also to make sure that these arguments are communicated to members of society in a dialogue reflecting *societal conceptions justice*. The core empirical chapters of the volume consist of an analysis of legal practises and societal conceptions of justice in the concrete area of deciding on access to sickness cash benefit.

The volume contributes an analysis relevant to three different areas of interest: 1) Law and governance in modern welfare states and the role played by the legal system as a provider of legitimacy. 2) The Swedish response to the crises of the 1990s, the introduction of the 'concentration policy', the tightening of the criteria of 'sickness' and 'capacity for work' and the reflection of these policy changes in legal practises. 3) The role of legal science in the debate on social and economic policies and their implementation (and how it could become less marginalized). Overall, the study concludes that the Swedish administrative court system could be described as an efficient implementation machinery in which social policies are effectuated promptly but, it is also concluded that the administrative courts have a potential capacity to practice law in a way that would increase the sustainability of the welfare state project and that this potential is far from being fully exploited at present.

Keywords: social law, law and governance, legitimacy, law and the welfare state, sickness insurance, social insurance, social protection, administrative law, administrative courts, administration of justice.

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BEFORE THE LAW stands a doorkeeper. To this doorkeeper there comes a man from the country and prays for admittance to the Law. But the doorkeeper says that he cannot grant admittance at the moment. The man thinks it over and then asks if he will be allowed in later. 'It is possible', says the doorkeeper, 'but not at the moment.' Since the gate stands open, as usual, and the doorkeeper steps to one side, the man stoops to peer through the gateway into the interior. Observing that, the doorkeeper laughs and says: 'If you are so drawn to it, just try to go in despite my veto. But take note: I am powerful. And I am only the least of the doorkeepers. From hall to hall there is one doorkeeper after another, each more powerful than the last. The third doorkeeper is already so terrible that even I cannot bear to look at him.' These are difficulties the man from the country has not expected; the Law, he thinks, should surely be accessible at all times and to everyone ...

F. KAFKA

Acknowledgements

In 1997, in the midst of the economic crisis and welfare retrenchments that the present work circles around, the Swedish prime minister published a book with the title: 'He who has run into debt is not free'.¹ This statement did not stand uncontested within in its own context, but for me the proclamation has gained a very specific meaning as I, in the process of writing this dissertation, has become more and more indebted to colleagues, friends and family.

The study that follows has its own conclusions, but my own, more personal, reflection is that what the writing of a doctoral dissertation is really about, is having the courage to get indebted. Marcel Mauss has written about the archaic meaning of the 'gift', about the duty to give, the duty to receive and the duty to give back.² Mauss' observations confirm the conclusion made by the prime minister – to be indebted is to lose freedom; to accept a gift is also to accept a social bond. In the process of writing this dissertation I have lost some of my freedom but become rich in social bonds. It is with joy that I now take the opportunity to acknowledge my 'debt' to some of those who have been so generous during the past years:

First, and foremost, I thank Lotta Westerhäll. Had she not offered me the opportunity to write about 'the right to sickness cash benefit', and insisted when I hesitated, I would have missed an excellent opportunity and a topic more fundamental than I myself realized at the moment. As my supervisor Lotta Westerhäll has been generous, patient and confident; generous with comments and contacts, patient with academic and other outbursts, and more confident than myself that the project would, in the end, be successfully completed. Thank you Lotta.

My work has been carried out at the Department of Law at Göteborg University. Before continuing by turning to those of my colleagues who have invested a considerable amount of time and energy into the present

¹ Persson, Göran, 1997.

² Mauss, Marcel, 1925 [1972].

work, I wish to thank, collectively, each and everyone working at the department for creating a working environment that I have found professionally fruitful and also warm and friendly: Britt, Anna and Salima should be specifically mentioned for all kinds of technical and administrative support; Robert, Rolf, Claes, Ann-Charlotte, Svante and Karol have all added critical and valuable comments.

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At an early stage of my work I came into contact with EISS (the European Institute of Social Security). The contacts, comments and criticism that have emanated from this source have been priceless. Specifically I

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I find myself now, after having so thoroughly fulfilled the duty to receive, at a point where I am looking forward to period where I can con-

centrate on giving back. Still, as the exchange of such gifts as the above are not bound by simple claims of reciprocity, this phase will begin with gifts to my three daughters: Ebba, Anna and Ella. To the three of you I dedicate this book, but also, and maybe more to your liking, I promise to dedicate some unconditional time.

Göteborg, 26 September 2003

Sara Stendahl

For

Ebba

Anna

Ella

Preface

The pre-history of this dissertation is the construction of a large research program funded by CEFOS (Centre for Public Sector Research) at Göteborg University, initiated in 1997. The theme of the program is *'The Welfare State and the Social Insurance System. A multi-disciplinary program on income compensation in case of sickness'*. The program includes three different projects: 1) Integration of organizing systems and welfare systems, 2) Income compensation during illness – fairness, stability and economy, and 3) The right to income compensation in case of sickness and incapacity for work.¹ The different disciplines involved in the program are economics, political science, psychology and law. The present work, representing the legal perspective, is the result of the third of the specific projects mentioned above. In the initial plan for this project the following overall aim was expressed:

... [the purpose is] to form a realistic image of how the application of law is functioning within the area [of the right to sickness cash benefit], how decisions are made, which groups and what individuals receive benefits, or not, – the *content related to allocation of resources* enclosed in the regulation – and of how the regulation can affect the behaviour of the insured – the *content related to behaviour* enclosed in the regulation.²

Even though the dissertation has its own research questions (see below, Chapter 2), the overarching aim of the project plan, quoted above, sent the dissertation off in a direction that has remained crucial and thus also coloured its final character. Important from the above is the quest for a 'realistic' approach to law, studying the legal content of decisions made and their possible impact on the society in which they are produced.

¹ Examples of published works within this project are: Fridolf, Marie, 2000a; Fridolf, Marie, 2000b; Biel, Anders, et al., 2002; Rikner, Klas, 2002; Stendahl, Sara, 2000 and 2002.

² Westerhäll, Lotta, 1996. 'Projektplan avseende projektet: Rätten till ersättning vid sjukdom och arbetsoförmåga'. Author's translation, italics added.

Content

Glossary and abbreviations 21

PART I · POINT OF DEPARTURE 25

1 Introduction 27

- 1.1 The problem – law and governance in an era of change 27
- 1.2 A conflict perspective on the distribution of social protection 32
 - 1.2.1 Conflict (1): Individual need and collective risks 32
 - 1.2.2 Conflict (2): Conflicts in court 35
- 1.3 The broader context – crisis and change 37
 - 1.3.1 Change (1): Reforms in the sickness insurance in the 1990s 37
 - 1.3.2 Change (2): Increased poverty and social exclusion? 39
 - 1.3.3 Change (3): The welfare state crisis of the 1990s 43
 - 1.3.4 Change (4): Global structural change – and welfare states gone astray? 47
- 1.4 The legal system and the implementation of social policy 50

2 Outline of the research mode 52

- 2.1 The aim of this dissertation and some questions to be answered 54
- 2.2 In search of a standpoint 55
- 2.3 Theoretical approach 59
 - 2.3.1 Legitimacy and the notion of de facto legitimacy 65
 - 2.3.2 Law as legal practices 76
 - 2.3.3 Law as societal conceptions of justice 85

- 3 The legal conception of law 90**
 - 3.1 The legal rationale of 'social law' 92
 - 3.1.1 Social law and legal systematization 93
 - 3.2 The right to sickness cash benefit 98
 - 3.2.1 Concentrating social insurance – the 1995 and 1997 social policy reforms 100
 - 3.2.2 Legal sources relevant for defining access to sickness cash benefit 105
 - 3.3 The administration of justice in administrative courts 115
 - 3.3.1 Introduction 115
 - 3.3.2 An outline of the decision-making process 117
 - 3.3.3 Characteristics of the procedure in administrative courts 118
 - 3.3.4 Legal aid 126
 - 3.4 Legal self-reflection 128

PART II · LEGAL PRACTICES 129

Methodological considerations 130

4 A quantitative study of legal practices performed by administrative courts 134

- 4.1 Prologue 135
 - 4.1.1 The pre-study 135
 - 4.1.2 Eight propositions on legal practice linked to the distribution of sickness cash benefit 139
- 4.2 Findings of the full-scale study 142
 - 4.2.1 Basic facts – presenting the material 142
 - 4.2.2 First proposition – the legal value of subjective experiences 144
 - 4.2.3 Second proposition – capacity for what? 156
 - 4.2.4 Third proposition – in search of the characteristics of the complainant 165
 - 4.2.5 Summing up – first, second and third proposition 173
 - 4.2.6 Fourth proposition – the prominence of 'insurance medicine' 174

4.2.7	Fifth proposition – the impact of experts	186
4.2.8	Summing up – fourth and fifth proposition	190
4.2.9	Sixth proposition – the legal weight of the recommendations of the insurance physician	191
4.2.10	Seventh proposition – a weakened position for the complainant?	193
4.2.11	Eighth proposition – multiple legal criteria?	198
4.2.12	Summing up – propositions six, seven and eight	212
4.3	Conclusions to be drawn from the quantitative study	213

5 Probing further into the material of legal cases in a continued study of legal practices 218

5.1	Adding qualitative aspects to the quantitative results	218
5.2	The writing of judgements	220
5.2.1	Main components of a written judgement on access to sickness cash benefit	221
5.3	Sickness or not?	223
5.3.1	The distinction between subjective and objective symptoms	223
5.3.2	The role of the insurance physician	228
5.3.3	The role of extra medical experts	232
5.3.4	Reflections on how the criterion of sickness is operated by the courts	236
5.4	Capacity for work or not?	237
5.4.1	The assessment of capacity for work – ‘remaining capacity for work’	238
5.4.2	Assessment of capacity for work when the complainant is unemployed	240
5.4.3	Reflections on how the criterion of capacity for work is operated by the courts	245
5.5	Reflections on the courts’ production of judgements	245

Methodological considerations 250

6 Basic welfare state values and current social insurance discourses 253

6.1 Introduction 253

6.2 Basic welfare state values 254

6.2.1 Characteristics of the Swedish welfare state 254

6.2.2 Social stability, individual freedom and social equality 263

6.3 Discourses on social insurance in the 1990s 270

6.4 The diverse identifications of primary social risks and urgent individual needs 273

6.4.1 Founding principles for the design of social insurance 273

6.4.2 The hegemonic work-line 279

6.4.3 Economizing social insurance 286

6.4.4 Individual needs and social risks 290

6.5 The concentration policy in a discursive context 292

6.5.1 Several concentrated schemes or one 'working life insurance'? 293

6.5.2 Excess usage and administrative control mechanisms 297

6.5.3 From 'appointed (confidence) physicians' to 'insurance physicians' 300

6.5.4 The values of the concentration policy 305

6.6 Concluding summary 306

7 Technical solutions providing income coverage to those unable to work for a living 308

7.1 Income coverage in situations of inadequate self-support – the mapping exercise 310

7.2 An 'insurance catalogue' 313

7.2.1 Income compensation in case of sickness 314

7.2.2 Income compensation in case of sickness resulting in long-term or permanent loss of capacity for work 327

- 7.2.3 Income compensation in case of occupational injury 335
- 7.2.4 Income compensation in case of unemployment 348
- 7.2.5 Income support (when there are no other alternatives) 357
- 7.3 The full picture 362
- 7.4 Technical solutions as a source generating societal conceptions of justice 366

PART IV · CONCLUSIONS 371

8 Conclusions 372

- 8.1 First question – the legal content of the criteria ‘sickness’ and ‘capacity for work’ as determined by the legal practices of Swedish administrative courts 373
 - 8.1.1 Courts opting out? 374
 - 8.1.2 Legal content according to the practice of the courts 376
 - 8.1.3 Medicalization and scientization – two different processes affecting the content of legal criteria 379
- 8.2 Second question – explanations of change, or lack of change, in the legal content of sickness and capacity for work 382
 - 8.2.1 The courts’ acceptance of the work-line while remaining hesitant towards the introduction of an objectivity criterion 384
 - 8.2.2 The low-key court positioning 388
 - 8.2.3 Demarcation functions 389
- 8.3 Law as a provider of legitimacy 394
 - 8.3.1 The changing welfare state 394
 - 8.3.2 Increasing the capacity of the courts 396
 - 8.3.3 Discursive governance or scientization and the end of politics? 397

- 8.4 Final reflections 399
 - 8.4.1 A common interest rather than conflicting interests? 399
 - 8.4.2 What should the administrative courts provide if not de facto legitimacy? 401

Bibliography 403

Index 431

Glossary and abbreviations

activity compensation	aktivitetsersättning
administration of justice	rättsskipning
administrative law	förvaltningsrätt
disability pension	förtidspension
emoluments	anställningsförmåner
employment taxes	arbetsgivaravgifter
general pension	folkpensionen
government bill	proposition
guarantee compensation	garantiersättning
income qualifying for pension	pensiongrundande inkomst (PGI)
income qualifying for sickness cash benefit	sjukpenninggrundande inkomst (SGI)
individual fees	egenavgifter
investigation principle	official princip
legal sourceology	rättskällelära
negotiation principle	förhandlingsprincip
official report	statlig offentlig utredning
preparatory work	förarbeten
price base amount	prisbasbelopp
principle of replacement of lost earnings	inkomstbortfallsprincipen
public administration	förvaltning
public courts	allmänna domstolar
public law	offentlig rätt
regulation	förordning
severance payment	avgångsvederlag
sickness compensation	sjukersättning
social allowance	försörjningsstöd
temporary disability pension	sjukbidrag
temporary sickness compensation	tidsbegränsad sjukersättning

Authorities and organisations

Confederation of Swedish Enterprise	Svenskt Näringsliv
Federation of Salaried Employees in Industry and Services	Privattjänstemannakartellen (PTK)
Legal Council	Lagrådet
National Government Employee Pensions Board	Statens pensionsverk (SPV)
National Labour Market Board	Arbetsmarknadsstyrelsen (AMS)
National Social Insurance Board	Riksförsäkringsverket (RFV)
National Social Insurance Supreme Court	Försäkringsöverdomstol
Regional Social Insurance Courts	Försäkringsdomstol
Swedish Agency for Government Employers	Arbetsgivarverket
The National Courts Administration	Domstolsverket (DV)
The Swedish Parliamentary Commissioner for the Judiciary and Civil Administration	Justitieombudsmannen (JO)
The Swedish Trade Union Confederation	Landsorganisationen (LO)

Legal acts

Act of Procedures for Administrative Courts	Förvaltningsprocesslag
Act of Succession	Successionsordningen
Administrative Court Act	Lag om allmänna förvaltningsdomstolar
Freedom of the Press Act	Tryckfrihetsförordningen
Freedom of Speech Act	Yttrandefrihetsgrundlagen
Guarantee Pension Act	
Income-Related Old-Age Pension Act	Lag om inkomstgrundad pension

Instrument of Government	Regeringsformen
Legal Aid Act	Rättshjälpslagen
National Insurance Act	Lagen om allmän försäkring
Occupational Injury Insurance Act	Lag om arbetskadeförsäkring
Sick Pay Act	Lag om sjuklön
Social Insurance Act	Socialförsäkringslag
Social Service Act	Socialtjänstlagen
Unemployment Insurance Act	Lag om arbetslöshetsförsäkring

PART I

POINT OF DEPARTURE

Part one of the dissertation, the first three chapters, constitutes the contextual, theoretical and methodological base of the present work and, thus, bestows the necessary tools for the following analysis where the capacity of the legal system to provide legitimacy as a mediator of social conflicts is in focus.

The present work contains a study of legal practices, performed by Swedish administrative courts, in 1993 and 1999, determining access to sickness cash benefit. In pursuit of increased knowledge about the complex interactions between law and society, the role of the legal system is scrutinized and the notion that law has a capacity to function as a provider of legitimacy by communicating with societal conceptions of justice is elaborated.

In Chapter 1 the research problem is introduced and situated in a context of 'conflict and change'. At the core of the present study, there is an analysis of Swedish social policies in the area of sickness cash benefit during the 1990s. Marked by the introduction of a 'concentration policy', access to allowances from the sickness insurance was tightened by reforms implemented in 1995 and 1997. It is argued in Chapter 1 that the potential conflict between individual needs and social risks was accentuated as the conditions for the welfare state were changing due to, for instance, globalization processes. This in turn may lead to an increased importance of the administrative courts, as mediators of social conflicts and as providers of legitimacy. In Chapter 2, the theoretical basis, as well as the methodological implications for the study, are outlined as the present work is situated in a 'realistic, critical, postmodern' sector of legal

studies. It is concluded that the present study is not dogmatic in a traditional legal sense and that the answers searched for do not include a normative description of the content of law (*de lege lata*). Chapter 3, consists of a descriptive account of the authoritative legal dogma that determine the professional legal conception of how to assess the right to sickness cash benefit in Sweden. It is argued that available to the legal profession is a dogmatic framework within which the members of the legal community can practice law in the dynamic and communicative fashion that is necessary if law is to function as an efficient mediator of social conflicts.

1 Introduction

1.1 The problem – law and governance in an era of change

The overarching problem approached in this dissertation is the role of the legal system in mediating social conflicts in an era of societal change.¹

In focus is the function of the legal system in the process of implementation of social policy reforms in Sweden during the 1990s.² At bottom, in any welfare state, there is a structural and continuous conflict of interests between individuals denied access to social protection (in this study: sickness cash benefit) and the collective (conditionally allocating such resources).³ This conflict of interests is regulated by law (the National Insurance Act), and specifically through the use of the key concepts of 'sickness' and 'capacity for work'. It is resolved through the interpretation of these concepts, in their function as legal criteria, by the courts and ultimately by the judges. As such, the court system has been assigned the task of mediating this conflict and thus it has been given the role of upholding a key component of the welfare state.⁴ In times of a changing nature of the welfare state, the proper functioning of this role is both

¹ I take an interest in the function of the legal system both as a medium for *conflict resolution* and for *conflict mediation*. Primarily I will talk of conflict mediation when referring to the structural level of the conflict between individual needs and social risks, while the function of conflict resolution refers to the courts' responsibility to determine access or no access in individual cases.

² This study takes an interest in those policy changes that are followed by implemented changes in law. It would also be interesting to study the response by the legal system to policy changes that are not directly enforced by changes in law. However, that is beyond the scope of the work at hand.

³ Different distinctions between individual and social security/insecurity (individual needs/risks and social risks) are elaborated by Viaene, Jos, 1997, pp. 53–71 and by Berghman, Jos, 1997, pp. 251–261.

⁴ The function of law in modern, complex and pluralistic societies is discussed by Habermas, Jürgen, 1996 [1998] and by Rawls, John, 1993 [1996]. In Chapter 2 I return to the work of these two authors as the issue of 'law as a provider of legitimacy' is approached. Both authors assign to law a unique capacity of providing legitimacy to modern societies.

crucial and more challenging than before. The purpose of the dissertation is to illuminate the role of the legal system as a mediator of social conflicts in relation to the determination of access to income compensation in case of sickness and incapacity for work.

The knowledge searched for is, thus, of a kind that: 1) increases the understanding of the content of the decisions made by the administrative courts in actual cases concerning sickness cash benefit, and 2) allows for an analysis of these decisions from a perspective where the legal system is conceived of as an important forum for legitimate conflict resolution in modern society. When this task is done, a basis has been created that could be used to discuss the *de facto* determination of access or no access, but also, it is argued, a basis for discussing the quality of the decisions made in terms of efficient legal conflict resolution and mediation. The former is an important aspect for the apprehension of implemented policies by members in society and also, possibly, one determinant of their behaviour. The latter is a necessity, especially in view of the changing conditions for the welfare state.

The hard legal core of the present work is narrow: it elaborates the two concepts 'sickness' and 'capacity for work' in their function as legal criteria regulating the distribution of sickness cash benefit in Sweden during the 1990s. On a concrete level, I deal with changes in the regulation of access to income compensation in case of sickness. The choice of study object is determined by the fact that several reforms were implemented in the Swedish sickness insurance during the 1990s; reforms that included an elaboration of the interpretative scope of the concepts of 'sickness' and 'capacity for work'. These changes are in the present work referred to as building blocks in a new, or at least intensified, 'concentration policy'.⁵ On a tangible, empirical, level, the responses by the legal community to said changes are dealt with in some detail. Thus, the present work contains an analysis of the role of courts in their performance as decision-makers in a process determining access to sickness cash benefit.

⁵ I will in this work describe the introduction of changes in Swedish social insurance, motivated by the aim to 'concentrate', as a change of policy. Thus, the 'concentration policy' becomes the collective name for a series of distinct changes held together by their compliance with common motives. Aiming to find a well-functioning translation of the Swedish word '*renodling*', concentration is here used in the meaning that *social insurance* is made more narrow, less allowing, more focused – but the beneficiaries of this policy of concentration are not necessarily those 'most in need', but those who best fulfil specific criteria. As a contrast one could compare with the word 'targeting', used in many countries to describe a narrowing trend in social insurance during the 1990s. The word 'targeting' is often used to describe a policy where there is a focus on those most in need, the poorest, the weakest, those who need the benefits most.

Although the core is narrow, the task to study legal practices, in a perspective emphasizing law as a prime instrument for mediating social conflicts in society, has made the work expand beyond mainstream legal science. In this view, the legal system – and how it is utilized – becomes a key in societal change; not only in upholding systems and structures. This puts additional stress on the legal system and the efforts made to govern modern welfare societies, in a period characterized by globalization processes and value pluralism, thus invoking questions on how to secure the function of ‘law as a provider of legitimacy’.

One constitutive building block of the present work is the understanding that ‘law’ in contemporary societies has an important capacity to deliver ‘legitimacy’ in the form of a procedure for efficient conflict resolution and mediation. The capacity to provide this ‘service’ to society is, in line with the reasoning of discourse ethics, understood as based on a communicative procedure rather than on a specific content.⁶

In line with the above, I have chosen to study how the legal system *de facto* communicates with society through decisions made in court. I have also, influenced by the theoretical landmarks of modern legal theory, worked on a conceptual model of ‘law as a provider of legitimacy’.⁷ This model, in its ideal version, would have provided a basis for constructing the applicable framework for the communicative procedure that judges in Swedish administrative courts would have worked within in order to fulfill their responsibility to: 1) solve conflicts concerning sickness cash benefit and 2) perform this task in a way that provides a maximum amount of ‘legitimacy’ to society. As it stands, the theoretical model used to analyse ‘law as a provider of legitimacy’ exists in a tentative version. This version offers a point of departure used for an analysis of why the judges, as key actors in the courts and as representatives of the legal system, act as they do. It also invites a comparison of *de facto* communication and potential communication, given the courts’ responsibility to maximize ‘legitimacy’.

⁶ Habermas, Jürgen, 1996 [1998]. See also Chapter 2, below. By ‘discourse ethics’ a reference is made to the moral philosophy developed by Jürgen Habermas, see Habermas, Jürgen (1990) *Moral Consciousness and Communicative Action* (Cambridge: Polity Press). Discourse ethics is a moral philosophy characterized by a claim that the moral validity can be rationally motivated, that a moral consensus on justice can be established through the ‘universalization principle’ and, further, that it is a practical discourse – it does not elaborate on moral content but prescribes a procedure through which moral validity can be tested. The procedure is one which presupposes an ‘ideal speech situation’ i.e. ‘an unconstrained dialogue to which all speakers have equal access and in which the force of the better argument prevails’. See Outhwaite, William, 1994 [1996], p. 40, see also, Andersen, Heine, 1999; Eriksen, Erik Oddvar and Jarle Weigård, 2000, pp. 75 ff.

⁷ See below section 2.3.

If discourse ethics is one constitutive building block of the present work, others are found within contemporary legal science. As will be further elaborated in Chapter 2, the present work is anchored in the 'realistic, critical, postmodern' sector of Scandinavian legal studies.⁸ As the dissertation is based on a problem-oriented approach, the character of the problem in focus has been decisive for the theoretical framework and methodological choices. This approach to the research assignment also necessitated an 'explorative' approach to law and legal science; an approach that might be unusual but hardly unique.⁹

In order to increase the understanding of the character of the work at hand, the aim of the first part of the dissertation (Chapters 1–3) is to provide a set of keys to the analysis performed. This is found to be a necessary step, as the prevailing paradigm within law, as an academic discipline in Sweden, is not accustomed to deal with the kind of questions asked nor the kind of knowledge searched for. Thus, although I mostly use a material familiar to lawyers (laws, preparatory work, doctrine, court cases etc.), and although vital themes of the work, such as 'legitimacy', have been part of a discourse within legal science for many decades, the study does not fit easily within the paradigm of traditional dogmatic legal science. This is a challenge to the author, as well as the readers, as the expectations concerning what to find in a legal dissertation might stand in the way of conceptualizing what is actually presented. The provided 'keys' consist of the present chapter, which probes into the problem area at hand, Chapter 2, which forms the theoretical and methodological frame, and Chapter 3, in which an encounter with basic legal dogma provides an introspective outline of how the legal community (in general) approaches the distribution of sickness cash benefit. Hence, departing from traditional dogmatic research in favour of a more experimental approach to jurisprudence, Part I of the dissertation is completed.

The purpose of this introductory chapter is, thus, to provide a contextual outline, a setting, for the work at hand. The research problem requires a background that probes further into the perspective of 'conflict' and 'change' that constitutes a point of departure for the dissertation

⁸ Examples of such sources, influential for the outcome of this work, have been found in the works of for instance: Kaarlo Tuori, Hanne Petersen, Jörgen Dahlberg-Larsen, David Doublet, Ulf Petrusson, Mats Glavå, Eva-Maria Svensson and Håkan Gustafsson.

⁹ I have found inspiration in the works of Anna Hollander and Karsten Åström, two authors who have studied Swedish social law by using empirical methods and focusing on legal practices, see Hollander, Anna, 1985 and 1995 and Åström, Karsten, 1988. A recent example of a 'problem-oriented' study in the field of Swedish administrative law, is Åsa Gunnarsson's work on the distribution of family taxes and social benefits, see Gunnarsson, Åsa, 2003.

project. The technique used to provide this background has been to illustrate both 'change' and 'conflict' with examples that illuminate their importance for the chosen study.

In section 1.2, the structural *conflict* between the individual and the collective is introduced by describing the essence of social protection as based on a separation between 'individual need' and 'social risk'. On a general and abstract level, the overarching concept of social protection is disaggregated, and the function of social security (as materialized in social insurance and social assistance) is discussed in terms of meeting individual expectations, ranging from an absolution from poverty to a promise of well-being. As the section continues, the concrete conflict at hand is visualized by the individual case of LM (illustrating apprehended individual needs as well as the response from the collective on an individual level). The purpose of this section is to illustrate the scope of the potential conflict arising between individuals and the collective (represented by the state and the responsible authorities) when access to social insurance schemes is defined, and how the legal system occupies a key role in that process.

In section 1.3, focus is shifted to *change* and to the welfare state crisis of the 1990s. Some of the main objectives of the welfare state are to combat poverty and diminish social exclusion. The crisis of the welfare state in the 1990s raised the question about to which extent modern welfare states have the capacity to fulfill these objectives. In Sweden, the question of poverty gained increased attention in the aftermath of the 1990s, and it is no coincidence that the reforms of sickness insurance were accompanied by voiced fear that they would lead to increased inequalities in society and that the legal system would perform a critical role in that change. Thus, section 1.3 starts out with a description of policy reforms instituted in Swedish sickness insurance in the 1990s, followed by a close-up on the developments of poverty and social exclusion in Sweden (and other Nordic countries). It continues with a general description of how the crisis of the welfare state was apprehended in the 1990s and what changes were noted. The chapter ends with a sub-section labelled 'Global structural change – and welfare states gone astray?', which encounters 'change' once again, but this time in terms of changing conditions for nation states, hence the framework for welfare states and their social protection.

1.2 A conflict perspective on the distribution of social protection

It should be noted that to use a conflict perspective in an analysis of the distribution of social protection in Sweden, is not an evident approach to the subject matter.¹⁰ The general debate has been dominated by a non-conflict perspective, in which the common interests of the state (in a social democratic 'people's home' tradition) and the individuals are emphasized. The (internal and external) image of the administrative court is marked by this non-conflict perspective.¹¹ The courts' assignment to solve conflicts is played down in favour of an image of the courts as a source for authoritative answers. Still, in the present work another approach is applied and a conflict perspective is emphasized. By doing this, I argue, it is possible to provide a critical analysis of the legal practices performed by the administrative courts and, thus, also to explore their full capacity as providers of legitimacy.

With the aim to further investigate the potential conflict between the individual and the state regarding access to sickness cash benefit, there is reason to explore the constitutive elements of social protection. Distribution of social protection is at the core of the welfare state project, and thus also at the core of the legislation implemented in order to obtain a realization of social policies.

1.2.1 Conflict (1): Individual need and collective risks

The welfare state carries a claim to provide a safety net protecting individuals from the risk of blatant poverty and social exclusion through the provision of social protection.¹² Social protection could be described as corresponding to a social (collective) risk, as distinct from a predom-

¹⁰ Social law has traditionally been associated with distribution of welfare and social governing rather than with the traditional legal function of handling conflicts. See, for instance, Andenaes, Kristian and Leif Oscar Olsen, 1990, p. 49 f.

¹¹ None the less, Lavin has described the legal practices of the administrative courts as a balancing of the interests of the collective and the interests of the individual, in a procedure where the position of the collective is strong. See Lavin, Rune, 1989/90, p. 73 f. Still, it could be argued that if the position of the collective is very dominant, the 'conflict character' of the procedure diminishes and the proposed 'weighing' of different interests tends to disappear.

¹² The concept of 'social protection' is used in a comprehensive way, thus including terms like social insurance, social assistance and social security. For a conceptual overview see Berghman, Jos, 1996. Björn Halleröd and Matti Heikkilä argue, the rather uncontroversial standpoint that the main objectives of the welfare state are to combat poverty and diminish the risk of social exclusion and other welfare problems. See Halleröd, Björn and Matti Heikkilä, 1999, p. 185.

antly individual need/risk. The social risk would be social fragmentation, political regime illegitimacy and ultimately social upheaval and societal eruption, caused by the lack of physical and psychological well-being of people.¹³ The bridging function of social protection, providing a possibility for those concerned to maintain an income and a status of well-being, in spite of events that unattended might cause poverty and social exclusion, does not only benefit the individual but society as a whole. The interests of the individual and the collective will thus correspond as long as individual need and social risk overlap, and conflicts will potentially arise when they do not. With this perspective, although the different schemes of social protection could be described as meeting the (income) need of individuals, and as addressing risk situations on an individual basis, the constitutive 'social' element would still be the risk of the collective.

The dynamics of society will finally determine what is considered a 'social risk' in each culture and each historical time. When describing the conflict of interests between *individual need* and collective *social risk* as 'structural and continuous', as done above, this is based on the understanding that a consistent and total overlap is not conceivable.

The welfare state, in general, is a response to the increased logic of modern states to approach individual risks on a collective, state level and thus, using the terminology of Esping-Andersen, to de-individualize, defamilialize and de-commodify the burdens of these risks.¹⁴ This develop-

¹³ Jos Berghman describes the 'societal need' for social security as follows: 'In the end, social and not just private insurances are used because it is society itself which tries to protect itself, internally, through obligatory schemes, against the dysfunctional effects of income interruption which manifests itself with some of its members and beyond the command and the responsibility of these citizens. [...] And this is done, not so much to have the income situation of the citizens protected, but to prevent that the latter would become a burden for the rest of society.' See Berghman, Jos, 1999, p. 27. Esping-Andersen answers the question of when individual risks become social by listing three reasons that resemble the arguments presented by Berghman above. Thus, according to Esping-Andersen, individual risks become social: 1) When the fate of an individual has collective consequences, 2) when society recognizes individual risks as warranting public consideration and 3) because the growing complexity of society means that a larger share of risks stem from sources over which the individual has no control. See Esping-Andersen, Gøsta, 2000, p. 37.

¹⁴ Esping-Andersen, Gøsta, 1999 [2000], p. 37 and pp. 43–45. De-commodification (i.e. to lessen or diminish workers' dependence on market forces) is a concept first used by Polanyi, Karl, (in (1944) *The great transformation: the political and economic origins of our time* (New York: Farrar & Rhinehart)) and later developed by Offe, Claus, (in (1972) 'Advanced Capitalism and the Welfare State', *Politics and Society*, 4:479–88, and in (1984) *Contradictions of the Welfare State* (London: Hutchinson)). In 1996 the concept was defined by Esping-Anderson as follows: '[De-commodification] is meant to capture the degree to which welfare states weaken the cash nexus by granting entitlements independently of market participation', see, Esping-Andersen, Gøsta, 1999 [2000],

ment increases the potential risk of a conflict of interests between the individual and collective as the scope of what is considered to be social risks expands. The same logic has historically increased the role of the legal system in the distribution of social protection, as it has responded to the codifications of the increased ambitions of the welfare state.

As noted above, *social protection* is, in this text, used as an overarching concept encompassing social insurance, social assistance and social security.¹⁵ *Social security*, on the other hand, could be described as:

... the set of policy instruments that is set up to compensate for the financial consequences of a number of social contingencies. Traditionally two kinds of instruments are distinguished: On the one hand there are replacement income schemes. On the other hand there are adjustment income schemes.¹⁶

The latter – ‘adjustment income schemes’ – refers to schemes that are constructed to meet exceptional expenditures. To see social security schemes as solely providing income compensation or income support is too narrow though, if the purpose is to describe the full function of the social protection instruments. Other social security provisions could for instance be: Actions aimed at prevention, actions for safety in the workplace, employment policies and retraining programs.¹⁷

Through the concept of ‘human damage’ the broad aim of social security, indicated above, has been further elaborated by Jos Viaene, Josse Van Steenberge and Dirk Lahaye.¹⁸ They argue for the need of shifting emphasis in social security from income compensation to ‘prevention’ and ‘reparation’, thus making ‘loss of earnings’ as well as ‘loss of well-being’ issues to be handled through social security.¹⁹ Following the reasoning above, two basic understandings of ‘social security’ could be identified: one narrow, focusing on financial compensation, and one broader, including prevention and rehabilitation measures. The Swedish sickness insurance could be used as an example of this broader approach to social security, in which eligibility provides access not only to sickness cash benefit but also to rehabilitation measures. Thus, if access is permitted,

p. 43. Magnus Ryner, to whom I will return later, defines de-commodification as ‘the “traditional” social democratic project of humanization of capitalism’. See Ryner, Magnus, 2002, p. 19.

¹⁵ See above footnote 12.

¹⁶ Berghman, Jos, 1999, p. 14.

¹⁷ Berghman, Jos, 1999, p. 15.

¹⁸ Viaene, Jos, (et al.), 1993, pp. 281–307.

¹⁹ Viaene, Jos, (et al.), 1993, p. 282.

there is, apart from income compensation, also a possibility from the side of the individual to gain access to rehabilitation.²⁰

As regards the conflict at the core of our investigation – the conflict between the individual and the state regarding access to social insurance allowances – the theories outlined above could be used to analyze the positions of the parties of the conflict on an abstract level. Given the reasoning above, social protection carries the promise (or at least the possibility) of securing individual need by offering means to manage individual risks. The promise could be interpreted not only as an absolution from the fear of poverty and social exclusion, but also as a promise of well-being. The state, on the other hand, is involved in the conflict as the provider of social protection. Protection that is delivered as an answer not primarily to individual need, but to collective risks.

1.2.2 Conflict (2): Conflicts in court

As this study proceeds, a close look is taken at how the courts deal with cases concerning the right to sickness cash benefit and thus how the legal system *de facto* deals with this conflict. These are cases where individuals have brought to court complaints against decisions made by the social insurance offices. The conflict at stake is one where the parties to the conflict are constituted by an individual, on the one side, and the authorities on the other. The recurring standpoints in these conflicts are those where the individual claims her or his right to sickness cash benefit and the authorities claim that no such right exists. The conflict of interests is one where the need apprehended by the individual clashes with the regulation of estimated collective risks as interpreted by the authorities.

In Sweden, as well as in many other countries, sickness as a cause for incapacity for work has been treated as a special risk category, and as a basis for benefits. Consequently, it becomes important to define who is sick and who is not, as well as finding a way of deciding whether or not there is – in each and every case – a causal relation between sickness and incapacity for work. Simple as this might seem at a first glance, it gets difficult when the complexities of real life must be faced. The case of LM (below), just to illuminate the argument, is a good example of some of the problems involved.²¹

²⁰ In case the insured individual takes part in rehabilitation measures, the cash benefit paid is called rehabilitation cash benefit (instead of sickness cash benefit). In economic terms there is no difference between the two types of allowances. Technical details on the different insurance instruments are provided in Chapter 7 below.

²¹ There is a twofold reason for highlighting this specific case; apart from the fact that it illustrates the interdependency between the two key concepts, 'sickness' and 'capacity for

LM, a woman in her thirties, came to Sweden in 1984. She worked as a maid in a hotel, and had been intermittently on sick leave for pain between 1990 and 1996. During this period, she lost her job due to the fact that the employer could not provide work of a kind she was able to perform. She went through numerous medical treatments. In 1996, the local social insurance office decided that LM was no longer eligible for sickness cash benefit. She complained to the County Administrative Court, which decided against her, arguing as follows:

For sickness cash benefit to be paid, the following condition has to be fulfilled: the insured individual must suffer from an illness that reduces the capacity to work by at least a quarter. In the law, it is explicitly stated that considerations concerning the labour market situation, economy, social, and others similar factors should not be taken into account. LM is on sick leave for chronic pain in her wrists and pain syndromes in neck and shoulders. There is no medical explanation for her problems. The examination made at 'Rehabilitation for Immigrants' shows that she has an unclear medical status in neck/arm and hand and that she needs physiotherapy of an orthopaedic kind. Apart from this, she has mainly social and psychological problems, such as poor knowledge of the Swedish language as well as anxiety and incapacity. Although her capacity for work has been evaluated as non-existent, it is the court's opinion that what dominates the picture, and what seems to be the main reason for the incapacity for work, are the social complications. According to the law, these circumstances cannot be taken into account. The social insurance office thus came to their decision correctly when refusing LM sickness cash benefit. (Case number Ö6582-96, The County Administrative Court in Skåne län, 1997-09-08.)

The case of LM is an example of the concrete implications of defining the scope of legal concepts. Access to benefits is made dependent on the fulfilment of certain criteria. In this case, the criterion is an inter-linked connection between sickness and incapacity for work. If fulfilled, there is access, if not, there is no access.

When the conflict reaches the court system, the interests of the collective are represented by either the local social insurance office that came to the initial decision that the individual should have no access to benefits, or by the National Social Insurance Board. The interests of the individual are communicated by the individual concerned. In this type of cases, the participation of professional legal representatives is relatively rare. The details of the procedure in court, as well as the *de facto* results of the work performed in the courts, are accounted for in Chapters 3–5.

work', there is also a more pragmatic reason – this is a case where the reasoning of the court is relatively extensive and thus possible to reproduce.

1.3 The broader context – crisis and change

The end of the twentieth century raised many questions as to the capacity of welfare states – not only Sweden – to adjust to ‘new social risks’. For instance, one major critic, Esping-Andersen, highlights changes affecting labour markets as well as families when approaching the theme of new social risks.²² According to him, the increased demands of the labour markets on flexibility, skills and education have made it more difficult to enter (to the detriment of the young and of women) as well as more difficult to remain attractive throughout a working life (to the detriment of older, experienced men). In this situation, when we might have needed families to fall back on, we find, still according to Esping-Andersen, that families are failing too. Thus, western welfare states tend to find themselves in a situation where ‘Resource inequalities between household types are undoubtedly growing and we face the menacing spectre that access to social and cultural capital is polarizing between ‘winner’ and ‘loser’ families. In this case, current inequalities will evolve into a future abyss.’²³

1.3.1 Change (1): Reforms in the sickness insurance in the 1990s

During the period of 1990 to 1998, several changes were made in the Swedish sickness insurance. At one stage, in 1992/1993, the government strongly forwarded the idea that most of the social insurance schemes that overtly have the aim of providing income protection in case of sickness, were to shift from being the responsibility of public administration to become the responsibility of the parties on the labour market.²⁴ The insurance schemes were, according to these ideas, to remain obligatory and the basic requirements were to remain constituted in law. Still, the ‘insurance’ character of the instruments would increase as the labour market parties would be given the responsibility for developing a new in-

²² Esping-Andersen, Gøsta, 1999 [2000]. The capacity of the western welfare state to adjust to new challenges is the theme in a wide range of works published by the end of the 1990s. See for instance: Svallfors Stefan and Peter Taylor-Gooby, 1999; Beck, Wolfgang, (et al.) 1997; Kuhnle, Stein, 2000a; van Langendonck, Jef, 1997; Ferrera, Maurizio and Martin Rhodes 2000; Pierson, Christopher, 1991 [1998]; and Esping-Andersen, Gøsta, 1996a.

²³ Esping-Andersen, Gøsta, 1999 [2000], p. 146.

²⁴ The different schemes discussed were: sickness cash benefit, rehabilitation cash benefit, occupational injury cash benefit and disability pension. See Prop. 1992/93:50 and Dir. 1993:44.

surance as well as its financing. If this idea had materialized into actual proposals and policies, it would have constituted a drastic change indeed. As it were, the idea faded, at least temporarily. The major changes that actually were installed in the sickness insurance during this period were the following:

- New levels of compensation, with the introduction of a waiting day.²⁵
- The introduction of sick pay, to be paid by the employer.²⁶
- The introduction of a new 'work-line' in social insurance.²⁷
- A new role for the social insurance offices as buyers of rehabilitation measures.²⁸
- An increased emphasis on the role of the employer as regards rehabilitation.

²⁵ In 1991, day(s) 1 to 3 in a sickness period were compensated with 65 % of the salary; days 4 to 90 were compensated with 80 % and days 90 and onward were compensated with 90 %. In April 1993, there was a change; day 1 became a waiting day with no compensation, days 2 to 3 were compensated with 65 %, day 4 and onwards with 80 %. On July 1, 1993, there was a new change; from day 365 onward the compensation was lowered to 70 %. The next change came on January 1, 1996, when compensation from day 2 onward was set at 75 %. In January 1998, the level of compensation was raised again, from 75 % to 80 %. Previous to 1991 the level of sickness cash benefit was 100 percent for most Swedes (if the statutory compensation and the compensation from collective insurances were added), see Edgerton, David, 1997.

²⁶ In 1992, the employer became responsible for paying sick pay for the first 14 days of a person's sickness period. The sick pay period was in 1997 extended to 28 days, and in 1998 lowered again to the original 14 days. (In July 2003 the sick pay period was extended to 21 days).

²⁷ Historically, the Swedish 'work-line' has its roots in a 'duty to work', a duty that in the nineteenth century was regulated in penal law (those who could not support themselves could be sentenced to prison or work-camps). In its more modern, twentieth century version, the work-line marked (and marks) Swedish labour market policies. The unemployed are offered education, training and rehabilitation by the authorities and they are obliged to actively participate in these programs and seek new employment, in exchange for allowances. When the 'new' work-line was introduced in social insurance in the late 1980s, this 'active' approach was materialized through new emphasis on rehabilitation programs in sickness insurance. See Lindqvist, Rafael, 1996, p. 19 ff. Later on, in the mid 1990s, the work-line would also help to legitimize the introduction of the concentration policy.

²⁸ The strong emphasis on rehabilitation in the sickness insurance started in the late 1980s and dominated the 1990s. This policy included a reform in which the social insurance offices were to act as buyers of rehabilitation measures on market-based conditions. The initial step in this direction was taken in 1990, when the social insurance offices became entitled to buy rehabilitation measures from other official authorities as well as from private providers. See Prop. 1989/90:62; SOU 1996:113, part 2, p. 20 ff.

- The employee's contribution to sickness insurance increased.²⁹
- New rules for calculating the level of income in relation to the right to sickness cash benefit.³⁰
- A more restrictive use of the criterion of 'sickness'³¹
- A more strict assessment of the capacity for work.³²

The recurring argument that carried these changes was the ambition to decrease state budget deficit and stabilize state finances. Criticism mainly focused on the risk that the costs would hit people unevenly, i.e. they would hit those groups harder who were already in a weak position. It was also argued that the redistributive function of insurance would be reduced, that it would become more difficult for the sick and disabled to enter the labour market, and that the changes were carried through too quickly and with insufficient analysis of the problems involved.³³ The fears voiced in connection with the reforms of sickness insurance were not surprising, considering that the reforms were implemented at a time when there was a visible and growing overall need to discuss questions of poverty, social exclusion and increased inequality.

1.3.2 Change (2): Increased poverty and social exclusion?

The issue of poverty and social exclusion has constituted an area of intense debate and research during the last decades. One reason for this is found in the arguments claiming that the welfare state lacks – or is losing –

²⁹ In the 1990s, contributions from employees were introduced in the sickness insurance, shifting the balance of financing so that employees' contributions increased and the employers' contributions decreased. In 1993, the general individual contribution was 0.95 % of the individual's income. In 1995, it was 2.95 %, in 1996, it increased to 3.95 %, and in 1997, it increased even further to 5.95 % of the individual's salary. At the same time, the sickness insurance fee paid by the employer decreased from 10.1 % in 1990 or 7.8 % in 1993 to 4.04 % in 1997.

³⁰ In 1994 and 1997, different measures were taken regarding how to calculate the basis for the income to be compensated for by the sickness insurance. The impact of these changes was that the basis for the income-related allowance became smaller.

³¹ In 1995, there was a change in law aiming at 'clarifying' the concept of sickness, thus requesting the administration of the sickness insurance to adopt a more restrictive application of the regulation.

³² In 1997, there was another change in the legal pre-requisites for obtaining sickness cash benefit. This time, the emphasis was on the concept of 'capacity for work', meaning that this capacity should be assessed on 'strictly' medical grounds. This reform reinforced the change made in 1995 and launched a policy of concentration, which was to guide changes in the social security system, at least through the rest of the 1990s.

³³ Criticism of this kind, voiced in motions presented in parliament by representatives of diverse political colour, is quoted in Chapter 6 below.

capacity to deal with the ultimate risk of poverty and social exclusion, thus failing to respond adequately to the constitutive function of the welfare state as such.³⁴ Another reason could be that combating social exclusion, and promoting social cohesion, has become an important objective of the EU and thus a recurring theme for member states to handle, not only in a purely national context, but also as member states of the union.³⁵

The actual concepts, 'poverty' as well as 'social exclusion', as used in a western welfare state context, are much debated and there is no general agreement as to their respective definition. The two concepts are sometimes used as substitutes for each other, but there are also strong arguments for making a distinction. Halleröd and Heikkilä list the following three observations on how the concepts are used when distinctions are emphasized:

First, poverty is said to be a narrow concept dealing with problems that are directly related to economic resources, while social exclusion deals with a broad range of questions dealing with an individual's integration in society. [...] Second, poverty is seen as a static phenomenon, dealing with people's economic situation at one point in time, while social exclusion represents a dynamic perspective focusing on the processes that lead to a situation of exclusion and, for that matter, poverty. Third, social exclusion is in some cases seen as an extreme form of poverty. The socially excluded are the worst off, the poorest among the poor.³⁶

It has been argued that the shift in usage of concepts, from poverty to social exclusion, is not merely a change on a semantic level but also on a scientific and political level.³⁷ In the 1990s, the notion of social exclusion replaced the notion of poverty at least within a EU context, thus announcing a shift from the Anglo-Saxon, liberal standpoint focusing on redistribution, to a continental, conservative/social democratic standpoint emphasizing relational issues.³⁸ Affiliated with the notion of social exclusion is the issue of citizenship and citizens' rights and thus:

³⁴ In the Nordic countries the increase in the number of unemployed, the cuts made in welfare programs, and the increase in the number of people who received means-tested benefits are examples of phenomena that made poverty an issue in the 1990s. See for instance: Gustafsson, Björn and Peder J. Pedersen, 2000, p. 2.

³⁵ For a discussion on the concepts of poverty and social exclusion in a European context, see Abrahamson, Peter, 1997; Saraceno, Chiara, 1997; and Room, Graham, 1997. On the conceptual links between 'social protection' and 'social cohesion', see Berghman, Jos, 2000.

³⁶ Halleröd, Björn and Matti Heikkilä, 1999, p. 189. (With a reference to Abrahamson, P, 1996 'Social Exclusion in Europe: Old Wine in New Bottles', *Druzboslovne razprave* XI pp. 19–29.)

³⁷ Room, Graham, 1997, p. 256.

³⁸ Room, Graham, 1997, p. 256 f.

Social exclusion can be analysed in terms of the denial – or non-realisation – of these social rights [of citizenship]: in terms, in other words, of the extent to which the individual is bound into membership of this moral and political community. [...] Where citizens are unable to secure their social rights, they will tend to suffer processes of generalized and persisting disadvantage and their social and occupational participation will be undermined. It is therefore necessary also to examine patterns and processes of generalized disadvantage in terms of education, training, employment, housing, financial resources and so on: in short disparities in the distribution of life chances. This may then also require us to investigate the ways in which inadequate resources and the denial of access to social rights may, if they persist long-term, separate one sub-group of the population from the normal living patterns of the mainstream of society.³⁹

However, although the notion of social exclusion, and the relational issues it highlights, has come to the forefront in the political and scientific discourse of the 1990s, it is nevertheless more of a challenge to empirically measure the level of social exclusion in a given society. It seems, thus, as if available data on the development of ‘poverty and social exclusion’, the distributional as well as the relational aspects of inequality, for western welfare states are still dominated by different measurements of levels of poverty.

In a study on poverty and social exclusion in the Nordic countries carried out by Halleröd and Heikkilä, the notion of poverty and social exclusion is dealt with in line with the above. Thus, poverty is ‘... defined and operationalized in a narrow and exclusively economic manner’, and social exclusion is ‘... defined and operationalized as an effect of accumulation of welfare deprivation that occurs in a broad range of areas’.⁴⁰ The time period studied by the team is the situation in the mid-1980s compared to the situation in the mid-1990s and includes Sweden, Norway and Finland. Although both Finland and Sweden went through a severe economic recession and share an experience of welfare retrenchment, the results show that during this period the effects on social exclusion differ between the two countries. According to Halleröd and Heikkilä, there was a definite increase in welfare problems and social exclusion in Sweden, while the same development was not noted in Finland. Further, their results indicate that in both Norway and Sweden the risk of social exclusion has increased over time for many groups, while the more prosperous Norwegian economy has made it possible for Norway to prevent

³⁹ Room, Graham, 1997, p. 257 f. (Room makes a reference to Robbins D., (1990) *Marginalisation and Social Exclusion*, a report to the European Commission, Brussels.

⁴⁰ Halleröd, Björn and Matti Heikkilä, 1999, p. 190.

this from happening.⁴¹ The risk groups mentioned are those living in single adult households and those who are unskilled, less educated and have a low income.

To this image of poverty and social exclusion in the Nordic countries, the results of Gustafsson can be added pointing out that poverty in Sweden seems to be transitory. Thus, it seems as if individuals living in poverty often do so during shorter periods. It could also, according to Gustafsson's results, be concluded that although 'Swedish poverty' has a transitory character, thus allowing individuals to move out of poverty, the experience of poverty is widespread in society. In conclusion, Gustafsson claims that:

The risk of being poor in present day Sweden is very large if one lives in a household with a weak attachment to working life and which does not receive pensions. This description fits many young adults and many families with a foreign, non-Nordic head, categories which have high rates of poverty. [...] While poverty in Sweden varies strongly with employment, age of the person and citizenship of the head of the household, gender differences are small. Present day poverty in Sweden has no regional variation.⁴²

Also noted by Gustafsson is a development of increasing income inequality. Poverty could be measured in many ways, but if measured by using a poverty line based on median contemporary income, the result is that '... ever larger proportions of the Swedish population have fallen below [such] a poverty line'. If measuring poverty using a poverty line based on constant purchasing power, the share of individuals and households who fall below such a line has not decreased since the 1980s, and these households turned out to be actually poorer in 1995 as compared to earlier in the time period (1975–1995).⁴³

The development of the capacity, or lack of capacity, of the welfare state to protect individuals from poverty and social exclusion is often discussed in connection with the welfare state crisis of the 1990s. Below, some opinions on the implications of 'crisis' on the welfare project are presented.

⁴¹ Halleröd, Björn and Matti Heikkilä, 1999, p. 210 ff. These results can be supplemented by studies on distribution of income, a field in which results also point to a divergence between the developments in Norway and Sweden as compared to Finland. See, Gustafsson, Björn, (et al.), 1999, p. 210 ff.

⁴² Gustafsson, Björn and Peder J. Pedersen, 2000, p. 202. The analyses performed are based on a material covering the years 1975–1995.

⁴³ Gustafsson, Björn and Peder J. Pedersen, 2000, p. 201.

1.3.3 Change (3): The welfare state crisis of the 1990s

Presenting the ‘major symptoms in the perennial welfare state crisis’, Esping-Andersen identifies the crisis ‘symptoms’ of the 1990s as: globalization, unemployment, rigidities, inequalities, social exclusion and family instability.⁴⁴ Concluding that although crisis is not exceptional in the history of the welfare state, he also states that the contemporary crisis differs notably from its predecessors. While crises used to be endogenous, the present crisis is ‘... essentially a manifestation of *exogenous* shocks that put into question the longer viability of the welfare state’.⁴⁵ Esping-Andersen continues:

The new global economy, it is said, undercuts polities’ discretionary use of fiscal and monetary policy, necessitates greater employment and wage flexibility, and especially the less skilled will be condemned to unemployment unless wages and social benefits are reduced. The ageing of populations means that our commitments to social security must be rethought. Family instability implies, on the one hand, that households’ traditional caring capacities are eroding and, on the other hand, that poverty risks are mounting – all the while that families are asked to absorb the new risks that come from labour markets. Above all, such exogenous shocks combine to create painful dilemmas: if, as in most of Europe, welfare states are committed to uphold existing standards of equality and social justice, the price is mass unemployment; to reduce unemployment, Europe appears compelled to embrace American-style deregulation. This will inevitably bring about more poverty and more inequality.⁴⁶

As the 1990s progressed, the condition of the welfare state was intensely discussed and analyzed. The ‘new crisis’ of the 1990s gave rise to questions on the affordability or sustainability of the welfare state, and implemented reforms were described in terms of ‘retrenchment’ and ‘dismantling’.⁴⁷ Still, although the challenges to the welfare state were complex

⁴⁴ Esping-Andersen, Gøsta, 1999 [2000], p. 2.

⁴⁵ Esping-Andersen, Gøsta, 1999 [2000], p. 3. In the same line Ollie Kangas concludes that the external pressure of ‘intensifying European integration’ and the ‘internationalization of national economies’ essentially will change the preconditions for the traditional Scandinavian welfare state, see Kangas, Ollie, 1994, p. 92. This standpoint is not uncontested though, see, for instance, Linda Weiss who argues that the explanations to the crisis of the Swedish model in the 1990s are not found in globalization theories, but rather in the inability of the Swedish model to combine distributive goals with a strategy for ‘upgrading and expanding investment in growth sectors of the economy’, see Weiss, Linda, 1998, pp. 83–115.

⁴⁶ Esping-Andersen, Gøsta, 1999 [2000], p. 3.

⁴⁷ Kautto, Mikko, (et al.), 1999, p. 5 f. (A reference is made to Pierson, Paul, (1994) *Dismantling the Welfare State: Reagan, Thatcher and the Politics of Retrenchment* (Cambridge: Cambridge University Press)).

and manifold, what by the end of the decade could be concluded in general by empirical studies was ‘... the persistence rather than ‘crisis’ or ‘breakdown’ of the major institutions of the welfare state’.⁴⁸

In a short-term perspective, it would seem as if the welfare state kept stable during the turbulent years of the 1990s. It is in the long-term perspective that question marks might remain. As the quotation from Esping-Andersen indicates, there may be good reasons for concern regarding the ‘longer viability’ of the welfare state. Arguing in the same direction, Kees van Kersbergen presents a hypothesis claiming that the ‘contemporary welfare state development is characterized by ‘creeping disentanglement’.⁴⁹ This would ultimately, according to the hypothesis, lead to rising poverty amongst specific groups. Van Kersbergen concludes: ‘The chance for survival of the welfare state is gloomy if the political debate over restructuring continues to assume the inherent mechanisms of resistance of the status quo.’⁵⁰

Although globalization is a phenomenon much debated and hardly agreed upon, many would, just as Esping-Andersen above, include the ‘transnationalization of production and the globalization of finance’ as factors that have posed new problems to the welfare project of modern western states. There have also been political attempts to respond to these challenges (and thus to uphold social protection). Interesting from a Swedish perspective is the ‘Third way’ answer, most clearly exemplified by the politics of the British Labour party under the leadership of Tony Blair and in the writings of Anthony Giddens, but influential in several European countries led by Social Democratic governments during the 1990s. Below, arguments pro and contra the ‘Third way’ position are presented, making it possible to visualize that although there might be

⁴⁸ van Kersbergen, Kees, 2000, p. 20 f., see also Kautto, Mikko, (et al.)1999b, p. 7.

⁴⁹ van Kersbergen, Kees, 2000, p. 28. A cluster of five different hypotheses is offered in support of the main statement of creeping disentanglements. Thus, firstly, many small changes and adaptations, currently interpreted as signs of resistance, might add up and result in fundamental transformations. Reform policies implemented in some areas of social protection tend to affect other areas of the system. Secondly, according to the presented hypothesis, this would ultimately lead to increasing reliance on means tested social assistance. Thirdly, the impact of ‘adaptations’ might lead to a change of attitudes and approaches and henceforth to a re-evaluation of the value of welfare. Fourthly, a new generation has been brought up, raised in the welfare state – but taught not to expect too much from it. According to the hypothesis, this group of young adults will be less loyal to the patterns of solidarity carrying the welfare state project. Fifthly, there is a danger that due to the political risk of retrenchment policies, the effects of these policies will hit those hardest ‘that are poorly organized and electorally harmless’.

⁵⁰ van Kersbergen, Kees, 2000, p. 30.

some agreement as to the causes of the 'crisis', there is no agreement as to what needs to be done.⁵¹

The 1990s was not only a time for welfare state crisis, it was also a period in which European Social Democracy re-established itself on the political scene. In Great-Britain, the British Labour Party under Tony Blair launched the politics of the 'Third way', a new Social Democratic standpoint, intellectually elaborated by Anthony Giddens.⁵² With the support of analyses presented by for instance Esping-Andersen, Giddens argued that '... the Swedish case provides indisputable proof that Social Democratic Keynesianism was fatally flawed and destined to collapse under the impacts of globalization'.⁵³ Giddens, as the main academic prophet of the Third way proclaimed that: 'The overall aim of third way politics should be to help citizens pilot their way through the major revolutions of our time: *globalization, transformations in personal life* and our *relationship to nature*'.⁵⁴ As prime mottos for these politics he suggested: *no rights without responsibilities* and *no authority without democracy*.⁵⁵ In Great Britain, these politics, as launched by Blair, meant a welfare program with stricter control of the distribution of social allowances and increased emphasis on the prime responsibility of individuals to solve their own problems. Using the allegory of a 'contract' between the state and the citizens, the labour-led government introduced a 'welfare to work' program, resembling the increased emphasis on a work-line in Swedish social security policies.

In contrast, Magnus Ryner delivers a fierce critique of third way politics (especially) and Social Democratic neo-liberalism (in general), with the ambition to provide the European left with arguments for claiming the benefits of the de-commodifying universal welfare of a Swedish type even in times of globalization.⁵⁶ Ryner concludes that Giddens' attempt to combine the call for an increased participatory and developmental democracy with neo-liberal economics is implausible'. The criticism presented by Ryner is interesting here, as it is based on an analysis of the Swedish model. The criticism focuses on the first of Giddens' mottos referred to above, the claim that there are 'no rights without responsib-

⁵¹ For an overview of the debates surrounding the implications of globalization on the European welfare states, see Rhodes, Martin, 1996.

⁵² Giddens, Anthony, 1998.

⁵³ Ryner, Magnus, 2002, p. xi.

⁵⁴ Giddens, Anthony, 1998, p. 64.

⁵⁵ Giddens, Anthony, 1998, p. 64 ff.

⁵⁶ Ryner, Magnus, 2002, p. 186 f. For another attempt to use the Swedish/Nordic model as a model for welfare distribution in a globalized world, see Patomäki, Heikki, 2000.

ilities', and, according to Ryner, the neo-liberal aspects concerning economic rationality encapsulated in this argument.

Ryner finds that the Social Democratic response to the Swedish crisis of the 1990s resulted in a 'relative re-commodification of social relations', a development, still according to Ryner, in line with the neo-liberal ideology of the third way. What is described by Ryner is a situation where the principle of de-commodification in the labour market was side-stepped in favour of a policy of re-commodification, resulting in a wider spread of wages, reappearance of poverty, longer work hours and more stress at work.⁵⁷ Also, more at the core of Ryner's criticism, is that this is a policy hard to combine with the agreed need to increase the level of democracy and pluralism in contemporary welfare states. Given Ryner's position, defending policies 'presupposing Bretton-Woods' and rooted in pre-globalization Keynesian economic theories, questions arise as to approaches to the impact of globalization on the welfare project. His response is:

There is no point in denying that tendencies and developments towards transnationalisation of production and globalisation of finance have made the configuration of such a mode of regulation [the Swedish model] a lot more difficult. [...] The question is however, what conclusion do we draw from such developments? This, in turn, depends on the extent to which such developments are most plausibly interpreted as intransitive 'objective' and structural changes that manifest themselves as necessities *on* social practice or whether they are in fact more transitive and contingent outcomes *of* social practices. If the former is the case, then we had better yield to them and accordingly adapt our practices in a market-conforming direction, as Giddens, Esping-Andersen and others suggest. On the other hand, if the latter is the case, then these practices can be questioned, and potentially they can be replaced by other practices that might be part and parcel of a socio-political project that seeks to institutionalise a mode of regulation to support de-commodification.⁵⁸

⁵⁷ Ryner, Magnus, 2002, p. 158. For an overview of the use and interpretation of the concept of 'de-commodification' see Lindqvist, Rafael, 1987, p. 9 ff. In Lindqvist's book the following description of de-commodification, used by Korpi and Esping-Andersen, is provided: 'De-commodification can be defined in terms of the extent to which individuals and families can uphold a normal and socially accepted standard of living regardless of their performance on the labor market. The degree of de-commodification is accordingly a function of the extent to which citizenship rights supplant market distribution', (ibid, p. 12). That 'de-commodification', no longer is a hallmark of Swedish welfare policies, has also been noted for instance by Arthur Gould who describes the previous process of de-commodification in Sweden as being 'put into reverse', see Gould, Arthur, 1996, p. 91.

⁵⁸ Ryner, Magnus, 2002, p. 100. For an overview of arguments surrounding the neo-liberal and the Social Democratic options see Rhodes, Martin, 1996, pp. 305–327.

Later in the text, Ryner exemplifies what such alternative practices might include:

Such policy would imply a transnational mix of supranational economic regulation and cooperation, above all to counteract the structural power of capital which depends on 'territorial non-correspondence'. It would include the political construction of boundaries to make autonomy and autocratic spaces of human self-governance and the construction of 'distributive growth coalitions' possible in specific locales.⁵⁹

Thus, the broader context puts Swedish reforms in the area of social policy in the middle of a debate on the viability of the welfare state and in the middle of ideological and political crossroads. Under the pressure of *exogenous* factors, such as globalization, one of the questions raised is how the adjustments made in western welfare states have affected their capacity to meet some of the main objectives: to combat poverty and to diminish social exclusion.

1.3.4 Change (4): Global structural change – and welfare states gone astray?

For a long time the nation state has been the obvious frame within which social legislation has been devised. However, according to theories of the growing importance of globalization, there is another scenario where the powers of the new era challenge the nation state sovereignty in areas that have hitherto clearly fallen within national legislation and authority.

The western welfare states were established during a period when social security and economic growth were seen as non-opposing goals. Today, the traditional western welfare state seems to be challenged by what Esping-Andersen describes as a 'universal trade-off between equality and employment'. According to him, this trade-off situation might be explained by reference to a new global order, but one that still allows different nation states to respond in a national way. A Swedish (or Scandinavian) strategy would be to shift 'welfare state resources from passive income maintenance to employment and family promotion'.⁶⁰ This is a strategy that is visible for instance in the emphasis on the 'new work-line' in Swedish social policy.⁶¹

⁵⁹ Ryner, Magnus, 2002, p. 190, with a reference to Hirst, Paul and Thompson, Graham (1999) *Globalization in question*, (Malden, Mass: Polity Press). For other suggestions on globalist strategies for carrying out global social democratic reforms, see Pato-mäki, Heikki, 2000, pp. 115–154.

⁶⁰ Esping-Andersen, Gøsta, 1996b, p. 25.

⁶¹ The 'new-work-line' approach being 'new' only to the extent that the old idea of a work-line was introduced in sickness insurance. See above footnote 27.

Another example of a social policy reaction to the globalization would, according to Deacon, be the dual processes of: (1) accommodating insurance-based social security to a globally mobile skilled workforce, and (2) decentralizing the responsibility for social assistance to impoverished local authorities.⁶² Deacon's example is not based on an investigation of Swedish social policy, but a critical assessment of the policy of concentration applied in Sweden could be described in similar terms. In the process of making social insurance more efficient, it will provide in a more stringent way for those who are categorized as beneficiaries. Those who do not fit into this categorization are referred to social assistance, which is financed by local communities with a strained economy.

Bauman argues that modern society is changing '... from a 'society of producers' to a 'society of consumers', and accordingly from a society guided by work ethic to one ruled by the aesthetic of consumption. In the society of consumers, mass production no longer requires mass labour, and so the poor, once a 'reserve army of labour', are recast as 'flawed consumers'. Bauman sees this world as an answer to diverse and clashing purposes, but still with at least one basic aim – that of 're-commodification of labour' – and here the western welfare state is 'out of tune'. And so:

The 'reserve army of labour' and the costs of its readiness for active service are now global, while all welfare provisions are – like state authority itself – state-bound. The arms of the state might thus be too short to reach where it truly counts. To the expansion and security of capital the old-style state's assistance has become largely irrelevant. The local businessmen, knowing only too well that to remain businessmen they had better stop being local, need their prime ministers and foreign secretaries mostly as their trade agents to introduce and endear them to the authorities of targeted localities during their diplomatic voyages, and if need be to subsidise the trips.⁶³

In Claus Offe's description of the modern capitalist state there is a pervasive new divergence between democratic politics and social policies threatening the once 'supportive relationship of mass democracy and welfare stateness'.⁶⁴ An analysis that, taken at face value, foresees that the majority votes away the welfare state and the protection for vulnerable groups. This opens up for a scenario of what Boaventura de Sousa Santos popularly labels the two-third society; a society in which the 'class of excluded [...] assumes the form of an internal Third World'. After this remark, de Sousa Santos proceeds by stating that there are 18 million

⁶² Deacon, Bob, 1997, p. 17.

⁶³ Bauman, Zygmunt, 1998, p. 54.

⁶⁴ Offe, Claus, 1996, p. 157

unemployed and more than 52 million people below the poverty line in Europe.⁶⁵

While theories of globalization capture a significant and radical change in the conditions of the nation state, the changes made in Swedish social policy are usually seen as a response to the economic crisis of the 1990s. The policy of concentration in Swedish social security was born in a period that was described in a report to the Department of Finance in 1993 as follows:

The expenditure for social insurance increased by 28 per cent in real value between 1980 and 1991, which corresponds to an increased share of GDP from 17.7 per cent to 20.1 per cent. Most forms of insurance have become under-financed – in spite of increased contributions. Since 1987, the Work Injury Fund has accumulated a debt, covered by state grants, of SEK 27 billion. Contributions to the Supplementary Pension (ATP) have increased from 9.4 per cent of the gross wage base to 13 per cent between 1982 and 1993. Yet the ATP pension payments have exceeded the contributions, and pensions have had to be financed with investment returns on the ATP funds. In the late 1980s, sickness insurance contributions covered 80 per cent of total costs, instead of the legislated share of 85 per cent, and the State direct budget grants had to be expanded.

A major factor behind this development is the increase in the number of insurance and benefit recipients. Early retirement pensioners have increased by 32 per cent from 1980 to 1992. Old age pensioners with ATP have increased from 57 per cent in 1980 to 78 per cent in 1992. Sickness absence, measured in average absence days per insured, increased from 18 days in 1980 to 26 days in 1990. The expenditure for unemployment insurance was SEK 5 billion in the late 1980s, but had exploded to an estimated SEK 50 billion in 1992.⁶⁶

It can be concluded that there was an urgent need in the early part of the 1990s to respond to challenges facing existing Swedish social policy.⁶⁷ Within a mainly national setting, it can be argued that the adjustments made in the Swedish welfare systems in the 1990s could be described as adjustments to fluctuations in the economy. The structure of the welfare system could be perceived as firmly established, although in need of measures to increase efficiency and cost control. If this perspect-

⁶⁵ de Sousa Santos, Boaventura, 2002, p. 452.

⁶⁶ Olsson, Sven E., (et al.), 1993, p. 9 ff. The report is written at the request of the ESO (Expert group for studies in public economy), a committee working for the Ministry of Finance.

⁶⁷ Another major reform work initiated during these years is the creation a new old age pension system.

ive is chosen, it follows that, if the economy expands, a more generous policy could be expected again. It could also be argued that this indeed happened, since levels of compensation were adjusted upwards again by end of the 1990s.⁶⁸

On the other hand, analyzed in an international setting, the challenges are no longer necessarily of a kind that flow back and forth with national economic recession and growth. Bauman, Deacon, Beck, as well as Giddens, Esping-Andersen and Ryner, are describing a 'new world order'. If the process of globalization is taken seriously, an evaluation of the Swedish social policy strategies chosen in the 1990s might pose questions about how to interpret the changes that were made. Are they just adaptations to a variable economy or can structural shifts be identified that will remain in hard times as well as in good times?

1.4 The legal system and the implementation of social policy

The purpose of providing a broader context to the present study has been to elucidate some of the key aspects of the problem area at hand. Thus, the focus of this study is the role taken by the legal system in the process of implementation of social policy reforms in Sweden during the 1990s. In order to analyze this issue, given the claim that a prime function of the legal system is to provide legitimacy to modern, pluralistic societies through a procedure of peaceful conflict resolution and mediation, an in-depth knowledge of the conflict at hand is needed. In the court room, there are, on the one hand, apprehended individual needs and, on the other, an interpretation of social (collective) risk made by the authorities. The judges are to determine the conflict within the framework of stipulated laws, using the interpretive space provided by the dynamics of legal method.

If this had been a dissertation in the tradition of legal dogmatics, what would have followed had included a reasoning, based on legal method, concerning solutions *de lege lata*, and maybe also *de lege ferenda*, to the specific conflict at hand.⁶⁹ This kind of reasoning is not offered in the text that follows. Instead, what is offered is an empirical study of how the legal system, in this case exemplified by the courts, actually responded to

⁶⁸ In 1998, the level of compensation in sickness insurance was raised from 75 % to 80 %. Still, the reforms made in 1994 and 1997 affecting the calculation of sickness cash benefit in a manner that made allowances smaller were not reversed. See also footnote 30.

⁶⁹ For these concepts, see reasoning in Chapter 2, p. 59 f.

the policy reforms of the 1990s, and an analysis of how this response corresponds to the conflict resolving function of the courts. The analysis will be performed on two levels. The first is an abstract level where 'legal method' is discussed from a perspective where law is understood as a prime provider of legitimacy in contemporary societies, using a theoretical model influenced by Habermas' notion of 'discourse ethics'. The other level of analysis is very concrete, exploring the many aspects of a conflict where individuals claim the right to sickness cash benefit and the authorities claim that no such right exists, and where the legal system has the assignment to resolve the conflict.

It is for this two-level analysis that the arguments of, for instance, Giddens, Esping-Andersen and Ryner fill the function of setting the stage. The broader context outlined in this section has aimed at delineating the actual situation in the 1990s, the kind of solutions offered and the ideological standpoints that were at stake.

2 Outline of the research mode

To suggest that the growth and development of the welfare state have affected the function and structure of 'law' is an understatement, to say the least. Much of the discourse in legal theory during the last decades has circled around dilemmas evoked by the rapid changes of modern life, of which the ever-growing scope of the welfare state is a strong and recurring theme.¹ There is a quantitative aspect of 'juridification' linked to the welfare state, as the amount of rules used to govern the expanding state in itself becomes a dilemma, but the qualitative aspect of this change is even more complex for law and society.

In a historic perspective, periods characterized by 'juridification processes', have occurred before. In these periods, there has been a marked increase of written law and the legal society has expanded as social situations, previously informally regulated, have become regulated in statutory law. Habermas describes four such 'thrusts of juridification': The first thrust led to the bourgeois state, the second to the constitutional state, the third thrust led to the democratic constitutional state and, finally, the last stage of juridification has (so far) culminated in the social and democratic constitutional state.² Juridification is a challenge to society and its members, but also to law and the legal system. As juridification processes intervene and disrupt established societal structures, law and the legal profession are challenged by new assignments. Lawrence Friedman describes the modern welfare state as a 'giant machine for making an applying law', and he continues:

It is a giant machine of social control, but social control which is exercised through law. Hence the modern legal system evokes, quite naturally, the curiosity and interest of scholars. They worry about the state's capacity for providing justice – social justice as well as justice of the ordinary sort. They ask, what kind of legal system does a welfare-regulatory state generate? What is the role of law in this sort of society? How is it different from the

¹ The literature on this theme is abundant, see for instance: Teubner, Gunther, 1986 or Wilhelmsson, Thomas and Samuli Hurri, 1999.

² Habermas, Jürgen, 1986, p. 204 f.

role of law in other kinds of society? How can it be improved? What is the future of law – and of justice – in the complex world of the welfare state?³

The present work is an example of research sprung from a curiosity about how the ever-growing complexity of the modern welfare state challenges the traditional impact of law and justice in state governance. The challenges of modernity and complexity underscores, I claim, the necessity to carefully scrutinize existing legal practices for the purpose of exploring how the potential capacity of law to safeguard basic welfare state values, such as redistribution and social equality, is maintained. Law could function (at best) as a tool for democratic governance, as a safeguard against injustice and as a medium for conflict resolution and mediation. In the present work it is also claimed that one of the prime potential functions of law is to provide legitimacy, and that this is a factor of importance for the legal practices of administrative courts and for creating a sustainable welfare state.

In the previous chapter, the present study was situated in a context of conflict and change, and examples were provided that illustrated how the more general dilemmas of ‘law in the welfare state’ could materialize in the distinct field of distribution of sickness cash benefit in Sweden during the 1990s. In this chapter, some of the implications of these welfare dilemmas for legal theory are encountered, as the theoretical and methodological basis for the present study is presented.

In section 2.1, I state the aim of the study and some research questions to be answered. Section 2.2 consists of an account of how the present work relates to a general, meta-theoretical (ontological and epistemological) discussion on our way of gaining access to and acquiring knowledge about the world around us. In this section it is stated that the present work is ‘realistic’ in character rather than ‘normative’. In section 2.3, the theoretical building blocks are discussed further and linked to relevant discourses in legal theory. Topics such as ‘law and morals’, ‘law and coherence’ and ‘law and a critical perspective’ are briefly encountered for the purpose of bringing clarity to the framework of the research project. A review of different approaches to the topic of ‘law and legitimacy’ is presented and the notion of ‘*de facto* legitimacy’⁴ is introduced. Finally, I present the theoretical model to be used for the analysis of how the ad-

³ Friedman, Lawrence M., 1986, pp.13 f.

⁴ The notion of *de facto legitimacy* is introduced as an analytical tool for the purpose of highlighting the importance of the everyday, more or less routine based, activities of the legal community in providing accepted procedures for conflict resolution in modern societies. See further section 2.3.

ministrative courts in Sweden, during the 1990s, acted in cases regarding distribution of sickness cash benefit – a model where ‘law as a provider of legitimacy’ is conceived of as a two-sided phenomenon in which ‘legal practices’⁵ interact with ‘societal conceptions of justice’.⁶

2.1 The aim of this dissertation and some questions to be answered

The problems focused upon in the present work have been introduced in the previous chapter. My aim is to explore the role of the legal system in mediating social conflicts in the modern, democratic, welfare state of Sweden, and, specifically, I aim to illuminate the role of the legal system as a mediator of social conflicts in relation to the determination of access to income compensation in case of sickness and incapacity for work. In order to meet this aim, two questions have been elaborated:

- 1) What is the legal content of the two criteria of ‘sickness’ and ‘capacity for work’ – when these criteria appear together – as determined by the legal practices of Swedish administrative courts in the late 1990s, compared to the practices of the early 1990s?
- 2) What explanations can be found – either for change or lack of change – given that the question above is studied in the nexus of interactions between ‘legal practices’ and ‘societal conceptions of justice’?

As the text proceeds, the theoretical and methodological choices made in order to approach these questions are developed. In the final chapter I return to the questions above and as I reconnect to the overall aim of this study I also reflect on the possible advantages or disadvantages of the chosen theoretical framework.

The following investigation of legal practices in Swedish administrative courts focuses on the interaction between law and social policy changes, and thus also on the interdependence between law and the society in which it functions. A simplified image of society as a mechanical machine, and of the creation of social policies and legal structures as social engine-

⁵ *Legal practices* refers to the activity of providing legal arguments performed by members of the legal community. See further section 2.3.

⁶ The notion of *societal conceptions of justice* is used to capture general conceptions of what could be fair to expect from the legal system as a mediator of social conflicts, given the ‘basic values’, the ‘current discourses’ and the ‘technical solutions’ offered in each specific society. See further section 2.3.

ering is no longer (if it ever was) a credible analogy.⁷ ‘Complexity’ is one of many tokens of the early twenty-first century, a time in history when the challenges of pluralism make us set quotation marks around concepts like ‘state’ and ‘government’. This work takes a ‘scientific’ interest in ‘law’, again two concepts that have acquired indecisive meanings. In the era of pluralism and complexity, it has become more important to acknowledge that the results of academic research also reflect the ontological and epistemological position of the researcher (not to mention her political, moral and ideological conceptions). For the purpose of increased transparency, I will therefore go on to give an account of the general standpoints that form the basis of the work at hand.

2.2 In search of a standpoint

In the present work, law is studied under the presumption that law (as a provider of legitimacy) exists in the form of ‘legal practices’ and ‘societal conceptions of justice’. The present study can, thus, be described as a realistic study of law.

As an epistemological standpoint, saying something about what kind of knowledge that is perceived as possible, positivism as well as realism signals a natural science ideal. It signals a striving for objectivity, for hard scientific methods, causal explanations, empirical investigations, and quantitative methods. Ontologically, saying something about the perception of ‘reality’, a positivistic standpoint signals an approach to ‘reality’ as something that can be objectively described and analyzed. In the present work law is studied in the form of practices and conceptions – the existence of reality is assumed. The methodological approach is realistic, with an aim to say something about this reality by the use of empirical studies and quantitative and qualitative methods.⁸ Still, the standpoint

⁷ The analogy in which law was described as a social machine was frequently used by, for instance, the Scandinavian realists, see Glavå, Mats, 1999, p. 54 f. Still, just as Doublet has noted, the analogy is an expression of ‘political optimism’, but it fails as ‘it often happens that social changes caused by means of changes in law do not always correspond to the intentions of the legislator’. Doublet, David Roland, 1995, p. 353. Thus, the presumption that there exists a simple duality between norm and reality, to the extent that society can be changed through the making of better laws, does not offer a useful image for trying to understand the interdependence between law and society.

⁸ Claes Sandgren has noted that although, traditionally, ‘legal studies have had little empirical input’, it has not been ‘as little as one might think’. See Sandgren, Claes, 2000, p. 446. For an overview of work in Swedish civil and procedural law using an empirical material see Sandgren, Claes, 1995/96a, p. 729. A recent example of an empirical study from the field of Swedish social law is Mattsson, Titti, 2002.

of the present work must be further elaborated, as it is not encompassed by references only to the traditional ideals.

The use of a positivistic approach in legal science was a radical move in the middle of the 19th century. Confronting a natural law paradigm in which law was considered as having a real existence beyond human constructions, gaining its legitimacy from God or nature or common sense, positivism meant a revolution. While positivism is still a thriving (if not uncriticized) ontological standpoint in general theory of science as well as in law, legal positivism, in its original meaning, is described as a historic phase in legal textbooks of today.⁹

Too narrow and too static in its approach to law, the first positivistic era in law, manifested for instance in the German historical school or in the so-called 'conceptual jurisprudence', dissolved early in the 20th century.¹⁰ However, what happened then was not a return to natural law but rather a development of the positivistic approach, which in the Scandinavian countries took the form of a realistic paradigm, proposed by Axel Hägerström. Scandinavian realism, later elaborated by for instance Alf Ross, Vilhelm Lundstedt and Karl Olivecrona, was to become an important theoretical school, influencing legal practice as well as legal research for decades. Born in opposition to the prevailing dogmatic jurisprudence Scandinavian realism, however, became less radical as time passed.

The debate on legal positivism and legal realism of today manifests the seemingly unending importance of certain key issues in legal theory; issues such as the relation between law and morality, the notion of law as a (more or less) coherent system, the room for critical analysis and the methodological consequences of a positivistic or realistic theoretical standpoint (issues that I will return to in the following section). A common denominator in the pro-positivistic/pro-realistic arguments is the willingness to approach 'legal positivism' not as a given entity, a precise standpoint, but rather as a promising point of departure. There are examples of recent legal studies that bring to the fore the founding fathers of the Scandinavian realism in a new context. Influenced by Hägerström, Lundstedt, Olivecrona and Ross, and by the Nordic critical/alter-

⁹ Strömholm, Stig, 1992, p. 78 ff.

¹⁰ For an account of the work of Carl von Savigny (1779–1861), the founder of the German historical school, and for an account of the influential 'conceptual jurisprudence', see Strömholm, Stig, 1992. There is also an Anglo-American tradition of legal positivism that is usually seen as derived from the work of Jeremy Bentham (1748–1832) and John Austin (1790–1859). In modern times, the scope of Anglo-American positivism is strongly influenced by the work of Sir Herbert H. L. Hart (*The Concept of Law*, 1961), as well as by the work of his prominent critics, such as Ronald Dworkin and Joseph Raz. See: Guest, Stephen, 1996; Kramer, Matthew, 1999; and Jori, Mario, 1992.

native jurisprudence (represented by for instance Wilhelmsson and Eriks-son), Mats Glavå, as well as Ulf Petrusson, seek to combine the two in a pursuit of a 'critical/alternative realism'.¹¹ Kaarlo Tuori's launching of a critical legal positivism and Jan Hellner's arguments for the methodological usefulness of a positivistic approach are other examples of a debate reflecting a wide range of arguments.¹²

In the present study an interest is taken in the 'law' that can be described and investigated as a socially constructed 'reality' and in the possibilities inherent in 'critical realism'. This is a law that materializes, for instance, in legal practices such as court decisions and judgements, as well as in the conceptions of justice held by the members of society. Common traits can also be found between the present work and the American Critical Legal Studies movement; thus, there is a focus on the practices of courts and a critical perspective towards notions of legal coherence. Still, in spite of common traits, law is in the present work not conceived of as politics (nor as morals) but as an entity in constant interaction with politics and morals, carrying its own rationalities.¹³

In order to gain increased knowledge of the societal functions of law and its everyday interactions with the members of the welfare state, I assume that law 'exists' in its own right and that it can be studied empirically. The ideas of 'reflective empirical research' discussed by Alvesson and Sköldbberg are of interest here. In their attempt to visualize the essence of reflective empirical research, they make the following statement:

Empirical research characterized by reflection presupposes a sceptic attitude towards what at first sight will appear as unproblematic reflections on how society functions, at the same time as it is maintained that the study of adequate (carefully considered) segments of this reality can give an import-

¹¹ In 1999, two dissertations in law were presented that proposed a 'neo-realistic' approach and a new reading of the representatives of Scandinavian legal realism. See Glavå, Mats, 1999 and Petrusson, Ulf, 1999.

¹² Tuori, Kaarlo, 1999, and Hellner, Jan, 1999.

¹³ Costas Douzinas has described the CLS movement (of the 1970s and 1980s) as follows: 'As a jurisprudential enterprise the critique of the form of law took as its starting point contemporary positivistic theories of law and criticized the self-proclaimed objectivity of their accounts of legal processes. More specifically, critical legal theory was concerned with the manifestations of legal categories and institutions, with disciplinary demarcations and with the hierarchy, practices and places of law, rather than with global or totalizing negations of the value of law or similarly extravagant denials of the possibility of justice. The task of theory was to evidence, at the level of structure, both the impossibility of liberal versions of the rule of law and the ideological content of all supposedly scientific or positivized accounts of legal practice. The conceptualization of law as a system of rules or as a strictly normative order was displaced by conceptions of law as power and more specifically by the politicization of all aspects of legal practice'. See Douzinas, Costas, (et al.), 1994, p. 12.

ant foundation for generating knowledge that opens up rather than closes, gives possibilities to understanding rather than establishes ‘the truth’.¹⁴

I would like to describe my approach as being in tune with the above.

A combination of quantitative and qualitative methods is used. Primarily, there is a qualitative approach, but as a tool to get an overview of a large material of legal cases, basic quantitative methods are also used. ‘Triangulation’ is sometimes used as a concept to describe a research strategy where the researcher will use more than one method in order to gain a higher degree of credibility for the results.¹⁵ It is more often used in situations where quantitative research is supplemented by qualitative aspects, but it has also been used the other way around. For this work, I have found that a combination of methods has increased the possibilities to understand the problem area in focus.

Still, access, even to an assumed reality, is complex. As postmodern common knowledge tells us, there is no such thing as research without a standpoint.¹⁶ Reality might be there, still it is not accessible without a reading that will be coloured by the identity of the reader. Contradictory to a strict positivistic approach, the present work, then, emphasizes the importance of contextualization. Further, my approach to the research topic is problem-oriented rather than deductive, and I do not work with elaborated hypotheses. The idea that knowledge and understanding are dependent on pre-understanding is embraced. The hermeneutic way of making interpretation dependent on the interconnection between the parts and the whole is agreed with, and qualitative methods are used to a large extent. My hope is that the declaration of these precautionary considerations marks the character of the work at hand and that the most objectionable positivistic simplifications have been avoided.

This said, I maintain that it is ‘pragmatically fruitful to assume that a reality can be found outside of the researcher’s ego – and the research community’s ethnocentricity (paradigm, awareness, text, rhetorical manoeuvring) – and that we as researchers should be able to make some discerning statements about this reality.’¹⁷

¹⁴ Alvesson, Mats and Kaj Sköldbberg, 1994, p. 12 Alvesson and Sköldbberg mention Anthony Giddens and Pierre Bourdieu among researchers who carry out reflective empirical research. Author’s translation.

¹⁵ Bryman, Alan, (et al.), 1997, pp. 157–160.

¹⁶ That facts are always theoretically ‘loaded’ or ‘impregnated’ has been concluded before the era of postmodernism, see Alvesson, Mats and Kaj Sköldbberg, 1994, p. 49 (with a reference to Hanson, Norwood Russell, (1958) *Patterns of Discovery. An Inquiry Into the Foundations of Science*, (Cambridge: Cambridge University Press) and to Popper, Karl, (1968) *Conjectures and Refutations: the Growth of Scientific Knowledge* (New York: Harper Torchbooks)).

¹⁷ Alvesson, Mats and Kaj Sköldbberg, 1994, p. 9 f. Author’s translation.

To conclude this first section, and with an aim to further clarify the basic standpoint, it should be added that I bring into this research a concern for the position of weak groups in society, a fear that the capacity of the welfare state to protect values of social equality is undermined as demands for efficiency and flexibility increase, and I also bring a positive attitude towards basic welfare functions such as redistribution from those who have to those who have not.

2.3 Theoretical approach

Three meta-theoretical building blocks are vital for the construction of the present work:

- A realistic (non-normative) approach to the study of law, where the societal functions of the legal system are in focus;
- a critical perspective, sensitive to legal expressions of structural power relations;
- an emphasis on discourse ethics as a means for law to fulfil the core legal mission of providing legitimacy to modern, complex, pluralistic and differentiated welfare states.

Accordingly, the present work is not dogmatic in the traditional legal way (obtaining or reinforcing an image of internal coherence in the legal system) and it is not normative in this sense.¹⁸ The results of the analyses do not attempt to clarify *de lege lata* by providing legal practitioners with a normative answer as to the content of law.¹⁹

¹⁸ In Chapter 3, below, the traditional field of interest approached by legal dogmatics is described as the 'interpretation and systematization of legal rules' (see also Peczenick, 1980). This is a simplified description of the dogmatic interest that underlines the arguments for describing the present work as (mainly) non-dogmatic in character. It should be emphasized, however, that the notion of 'legal dogmatics' is not as easily defined as might be concluded from the above reference. Still, I have chosen to use the notion of 'dogmatics' to describe a traditional understanding of law that proposedly is widespread among the members of the legal community and greatly affects the legal conceptions of law as well as legal practices. See also Sandgren, Claes, 1995/96a, p. 727 and his description of 'legal method'. Sandgren concludes that although it is difficult to provide a decisive definition of what exactly is meant by 'legal method', there is in practice enough of a consensus around this concept to diminish the risk of misunderstandings when it is used.

¹⁹ It has been suggested by for instance Petrusson (with a reference to Ross) and Doublet that the content of *de lege lata* should be understood as a description of the *factual* legal application of legal norms by the courts. See also Sandgren, Claes, 1995/96a, p. 732. Given this definition, it could be argued that such descriptions appear in this work. Although, nota bene, in the present work I do not find the distinctions *de lege lata/de lege*

In a presentation of the impact of postmodern theories on legal sciences, Dalberg-Larsen draws a historical line connecting theories such as Scandinavian realism, critical legal studies and postmodern legal theory.²⁰ The linkage between these approaches to the study of law is their opposition to the traditional dogmatic position – they are linked by their critical position. In focus of their criticism is an approach to law as a closed system of rules and the notion that it is possible to make legal decisions that could be defined as objectively correct as they are the result of a correct application of *de lege lata*.²¹ This dualism, dividing the approach to legal science into (primarily) two broad categories, is repeated in legal doctrine.²² Doublet describes the dividing line in legal science by using the concepts of a ‘functional’ versus a ‘substantial’ approach to law.²³ The substantial perspective will, according to Doublet, answer the question of legal content from a position where the existence of a coherent legal system is a basic prerequisite for the investigation, and the answer would lead to a determination of *de lege lata* in a traditional dogmatic tradition. The functional perspective will apprehend law as a system of social communication, a system of rules for action, regulating the interactions between the members of a society. The question of legal content is then decided from a standpoint outside the legal system, focusing on the function of law in society. Thus, as may already be evident, the present work should be categorized within the ‘realistic, critical, postmodern’ sector of legal studies identified by Dalberg-Larsen and, more to the point, as ‘functional’ according to the terminology used by Doublet.

With the acceptance of a ‘realistic, critical, postmodern’ perspective, a broad spectrum of new questions on the nature and function of law clamour for responses. Previously, I have indicated some topics of this

ferenda as useful for the kind of knowledge that I seek. For a discussion on the value of these concepts and on how they are, and have been, used in a Swedish context, see Glavå, Mats, 1999, p. 31 ff. For the arguments of Ross, Petrusson and Doublet see: Petrusson, Ulf, 1999, p. 6 and Doublet, David Roland, 1995, p. 338.

²⁰ Dalberg-Larsen, Jørgen, 1998. It could be noted, as a comparison, that Alvesson and Sköldbreg, in their description of reflective empirical research, name four important inspirational sources: grounded theory, hermeneutics, critical theory and postmodernism Alvesson, Mats and Kaj Sköldbreg, 1994, p. 14.

²¹ Dalberg-Larsen, Jørgen, 1998, p. 26.

²² For instance, Niklas Bruun and Thomas Wilhelmsson make a similar distinction between two epistemological areas of interest for legal science: the dogmatic and the non-dogmatic (see Glavå, Mats, 1999, p. 30, where he makes a reference to Bruun and Wilhelmsson, (1983) ‘Rätten, moralen och det juridiska paradigmet’, *Svensk Juristtidning*, p. 701 ff. See also Westberg, Peter, 1992, in which he makes a distinction between a ‘rule-oriented’ and a ‘problem-oriented’ approach to legal science.

²³ Doublet, David Roland, 1995.

kind of relevance for the present study: 'Law and coherence', 'law and morals' and 'law and a critical perspective'. As the chapter continues, these issues are approached along with the focal theme of the present work: 'Law and legitimacy'.

The proponents of legal pluralism and legal polycentricity have opened up a new area when they question the coherence of the legal system, one of the basic prerequisites of traditional dogmatic legal research. Consequently 'law' as it was commonly conceived, has conceptually disintegrated into a plurality of overlapping, non-coherent, legal norms, legal structures and legal actors.²⁴ In her work 'Home Knitted Law. Norms and Values in Gendered Rule-Making', Hanne Petersen approaches the topic of law and coherence as she describes the essence of legal polycentricity:

Most modern legal theories are dominated by a monistic understanding of law. This paradigm asserts that the 'legal' order is structured around one centre, in relation to which all principles, rules and norms are founded. Legal polycentricity as it has been discussed in the Nordic countries, attempts to study 'law' from a pluralist approach. – Legal norms are not understood as issued by or linked to one exclusive authority to whom or which all other norm initiating entities are subjugated. The doctrine of hierarchically structured legal sources is problematized and the term legal polycentricity indicates an understanding of legal norms – or legal sources – as being engendered by different, overlapping, coexisting, cooperating and/or competing sources.²⁵

In the analysis of the role of the legal system as a mediator of the social conflict between individuals denied access to sickness cash benefit and the collective conditionally allocating such resources, there is a need to reflect on what it is that constitutes the relevant 'legal system' and to what extent there might be pluralistic aspects of this system that should be considered.

Behind the labels of 'legal pluralism' and 'legal polycentricity', it is possible to find a broad set of different and differing theories on modern law. The notion of an existing pluralism within the field of official law is

²⁴ For a survey of the different aspects of 'legal pluralism', see Gustafsson, Håkan, 2002 and Dalberg-Larsen, Jørgen, 1994.

²⁵ Petersen, Hanne, 1996, p. 76. Petersen distinguishes between the two concepts of 'legal pluralism' and 'legal polycentricity' as follows: 'Whereas the legal anthropologist and legal sociologist may mostly tend to understand and describe the legal landscape from outside, legal polycentricity approaches legal science from within and tries to reach another understanding – and practice – of law. Legal polycentricity attempts to contribute to a change of understanding of law from inside. In this sense it may be perceived as a continuation of the attempts to develop an 'alternative dogmatics' launched originally by a Finnish colleague Lars D. Eriksson', (ibid. p. 77).

particularly interesting.²⁶ Dalberg-Larsen has listed five possible perspectives that illustrate how a plurality within the official legal system can be manifested: 1) a pluralism based on different historical backgrounds of the normative elements of the legal system, 2) a pluralism based on a variety of (independent) centres for legal decision-making, 3) a pluralism of (non-coherent) values inherent in the official legal system, 4) a pluralism of rationalities related to how to apprehend and solve legal conflicts, and, finally, 5) a pluralism of legal subsystems within the one official system in which the different parts have their own history and ways of systematizing and interpreting law.²⁷

I find that the pluralistic perspective (as indicated in the list above) cannot be disregarded in a realistic analysis of law, but, to the contrary, that different aspects of pluralism have to be taken into account.²⁸ The account of pluralism is intertwined with the realistic (non-normative), empirical ambitions of the present study, and it is visible in the description of law as a system where official law is interdependent on, and in constant interaction with, non-official normative aspects of law. Thus, by claiming that the capacity of law (as a provider of legitimacy) is dependent on an understanding of law as a two-sided phenomenon, where *law as legal practices* and *law as societal conceptions of justice* are interdependent, official law has to take into account the normative complexity of the society in which it functions.

On the topic of 'law and morality', Petersen has noted that 'polycentricity reveals and demonstrates not only formal but also axiological differences underlying the different legal systems'. And she continues:

An empirical investigation of different types of norms does not automatically include an acceptance of the different values underlying these norms. It does, however, imply a more profound examination and evaluation of the different values at stake and a process of reconciling values rather than subjugating some under others. There is more than one single source for legitimacy and legitimate argumentation.

Norms generated within multiple centres, semi-autonomous fields or networks are pluralistic not only in form but also according to the values they promulgate. This is a challenge for a hierarchical single-value approach to 'legal' order.²⁹

²⁶ Dalberg-Larsen makes references to the work of Hans Petter Graver, Henrik Zahle and Torstein Eckhoff in an overview of how an 'internal' legal pluralism (pluralism within official law) could be conceived. See Dalberg-Larsen, Jørgen, 1994, p. 83 f.

²⁷ Dalberg-Larsen, Jørgen, 1994, p. 83 f.

²⁸ This is also a conclusion drawn by Dalberg-Larsen, see Dalberg-Larsen, Jørgen, 1994, p. 83 f.

²⁹ Petersen, Hanne, 1996, p. 76.

As will be explored further, the unique capacity of law to provide legitimacy to the welfare state will in the present work, in line with the theories on discourse ethics, primarily be explained by reference to the procedural qualities laid down in the dynamics of 'legal method'. Thus, it is not as a defender of a specific ethical or moral position that law gains its position as an efficient actor for conflict resolution and mediation, but through procedural competence.³⁰

At this point it should be emphasized that the procedure, as understood in the present work, makes it the duty of the members of the legal community to form decisions that are marked by their professional knowledge of law as well as by *societal conceptions of justice*. When Hanne Petersen claims that 'law is grown, not just given by a single lawmaker, and that ordinary people participate in the process of cultivating law', I agree and claim that in order for law to provide legitimacy, it has to respond (in a discursive fashion) to the plurality of values present in society. I also agree with Dennis Töllborg who claims that in order for law to function as an efficient, legitimate institution for conflict resolution, it has to 'sponge' on the basic (culturally and contextually determined) normative structures prevailing in society.³¹

Thus, while the legal discourse on 'modern law' for long has emphasized the 'de-ethicalization', the exclusion of ethics, morality and values, as well as politics, from the operation of the legal system,³² it is also possible to find proof of a 're-ethicalization'.³³ The present work acknowledges an existing interdependence between law (as a provider of legitimacy) and politics and morals. It is also claimed that it is law 'as procedure' that allows for the potentially unique intermediary role of the legal system that can facilitate governance, as political ambitions hit ground in the

³⁰ See further reasoning on this theme in section 2.3.1, below. As with Rawls and Habermas (and Kant), a distinction is made between an *ethical* and a *moral* perspective on normative issues. The distinction could briefly be described as follows: When making an ethical consideration I reflect on what is good for me in a given situation. When making a moral consideration I have to reflect on a general level of applicability – asking myself if it would be good if everyone did as I decide to do in a given situation. It is when approaching a normative issue with a moral perspective that the obligation to act fairly and justly towards others is revealed.

³¹ Töllborg, Dennis, 2003. Töllborg provides two examples of such basic normative structures; the classical Dworkian example: 'No one should be permitted to benefit from his own wrongdoing' and also 'Power generates responsibility while powerlessness gives freedom from responsibility'.

³² Goddrich, Peter (et al.), 1994, p. 17.

³³ See Petersen and Töllborg above, but also: Goodrich, Peter, (et al.), 1994, p. 21. On this topic, see also for instance: Aarnio, Aulis and Kaarlo Tuori, 1989, and Alexy, Robert, 1989 pp. 167–183.

individual, exclusive circumstances of particular cases. It is also emphasized that in order for law to fulfil this function as efficiently as possible, there is need for transparent legal argumentation. The ethical and moral base of the assessments made should be accounted for in a discursive fashion in order to promote an open political debate and discussion on possible solutions to structural conflicts.

The present study can be regarded as a pursuit of critical research. By this I mean that the study describes the actual practices of the actors involved rather than legal dogma, and also that it suggests that there might well exist a surface level of official truths that contradict the *de facto* existing situations where official practices might systematically favour some and not others. Law will not be approached primarily as a tool for the use of power, but the possible dimension of conflicting interests and covert agendas will certainly be scrutinized. I agree with the statement that: 'A critical approach to current ideologies is not always a chosen position, but often what you are forced into when you have chosen a problem area where a false view of reality prevails.'³⁴ The critical position taken in this study has evolved over time and has become more firm as I have gained increased knowledge of the field.

Two research questions were put in the first section of this chapter. The *first question* could justifiably be interpreted as asking for a descriptive analysis of empirical data. In order to answer the first question, information on the legal practices of the administrative courts and their assessment of two vital criteria in sickness insurance has been searched for in a comprehensive study of legal cases, and the results have been compared over time. The approach to the *second question* has been to study 'law as a provider of legitimacy', constituted by 1) *legal practices performed by members of the legal community* and 2) *societal conceptions of justice*.³⁵ In the sections below, this two-sided understanding of law and how the two sides interrelate is studied more closely by means of a figure showing

³⁴ Töllborg, Dennis, 1986, p. 25.

³⁵ A description of law as a two-sided phenomenon is provided by, for instance, Jürgen Habermas (separating a 'system of knowledge' from a 'system of action'); Kaarlo Tuori (separating 'law as societal practices' from 'law as a normative phenomenon'); and Ulf Petrusson (separating 'law as conceptions' from 'law as acts'). See Habermas, Jürgen, 1998, p. 79; Tuori, Kaarlo, 1999, p. 5; Petrusson, Ulf, 1999, pp. 42 ff. In line with the tradition of Scandinavian realism, Petrusson emphasizes the importance of the legal community of trained jurists as a constituting element of law, and thus also *their* conceptions and *their* acts (ibid, p. 6). The interdependency between legitimacy, the legal system and the conceptions of justice/fairness that prevail in society has, in a Swedish context, been discussed by, for instance, Svensson, Eva-Maria, 1997a, p. 197 ff, and by Töllborg, Dennis, 1986, p. 59 ff.

‘law as a provider of legitimacy’.³⁶ Below, this two-sided understanding of law and how the two sides interrelate is studied more closely by means of a figure showing ‘law as a provider of legitimacy’.

Figure 2.1. *Law as a two-sided phenomenon*

LAW (as a provider of legitimacy)	
<ul style="list-style-type: none"> • Law as a legal practices performed by members of the legal community 	<ul style="list-style-type: none"> • Law as societal conceptions of justice

Figure 2.1: The two interrelated aspects of law: ‘law as legal practices’ and ‘law as societal conceptions of justice’. The members of the legal community are also members of the society in which they act, thus they have access to both of these aspects of law simultaneously.

The question of ‘legitimacy’ is important for the continued discussion and thus I proceed by describing the main positions in this debate, and my own use of this concept.

2.3.1 Legitimacy and the notion of *de facto* legitimacy

A point of departure for my interest in ‘legitimacy’ is what has been touched upon as ‘modernity’ with an emphasis on pluralism. The challenges put to modern, complex, societies by the fact that they harbour a population that is pluralistic in terms of how they perceive ethics and values, is also a challenge for the possibilities to make collective decisions that are conceived of as legitimate for society as a whole. I borrow a definition of what constitutes ‘modern society’ from Eriksen and Weigard:

Modern societies here means societies that have gone through the democratic and the industrial revolution and that acknowledge human rights and the principle of democracy, thus the main western states and states similar to them. These societies are characterized by several centres of power and authority as well as by far reaching specialization and a wide multitude of opinions. They are characterized by social conflicts and deep moral disagreement on what is encompassed in good living. They are complex, dif-

³⁶ This model is further elaborated on p. 77.

³⁷ Eriksen, Erik Oddvar and Jarle Weigård, 2000, p. 164. Author’s translation.

ferentiated and pluralistic.³⁷

By using this description of developments in western societies as an incentive to raise the question of legitimacy, I follow John Rawls and Jürgen Habermas.³⁸

One way to approach the field of theories discussing the legitimacy of law is to make the underlying conceptions of law the decisive category for a typology. A widely used demarcation line in legal theory is the one dividing positivistic legal theories from natural law theories. An earmark of positivistic legal theory is the position that law is man-made. Law is created on the basis of human decisions. The core characteristic of natural law theories is the position that there are basic principles which are not created by human beings but which are binding for individuals as well as societies. There is a higher normative order which human law cannot violate.³⁹ The 'pure' positivistic standpoint is often exemplified with the work of Kelsen, and thus also with a theory of legal order associated with a lack of normative (moral) content. The demarcation line between the positivistic standpoint and the natural law position may at one point have appeared clear and unquestionable but modern legal theory gives a number of examples of how to leave the positivistic project without ending up in natural law. For the limited purpose of an initial orientation on the topic of legitimacy, the following typology listing five key positions may suffice:

- 1) The original positivistic approach of a closed legal system stripped of values existing in a society lacking absolute moral standards (Kelsen, Weber) and modern positivism (Hart) sharing the view of law as void of values but arguing that there are extra-legal values that law could be tested against. The positivistic position, in the version of Kelsen and Weber, means that no relevant distinction can be made between legality (justification on the basis of law) and legitimacy (justification on the basis of values).
- 2) The instrumental approach, using the space given by the early positivism, making law relative to the use of power in a totally open system of law, thus inherently value-laden with any kind of values (Schmitt).

³⁸ Primarily, I will refer to the following works: Habermas, Jürgen, 1996 [1998], and Rawls, John, 1993 [1996]. Apart from different aspects of 'modernity' as described in the reference above, Habermas adds the dilemmas connected to 'welfare paternalism' as an incentive for seeking a new proceduralist legal paradigm to guarantee the legitimacy of law in modern complex societies. See also Habermas, Jürgen, 1998, p. 17.

³⁹ Strömholm, Stig, 1992, p. 76.

- 3) The liberal criticism of positivism, exemplified by Dworkin and Rawls, where the liberal democratic values are made fundamental to a legitimate legal system.
- 4) The social (-democratic) criticism of positivism, the semi-autonomous, procedural approach where the legitimacy of law lies in its interactions (discourse) with other societal systems and where values protected by the legal system are neither a mere reflection of the values prevalent among people in general, nor inherent in law as such (Habermas, Alexy, Heller).
- 5) The natural law approach.

As indicated above, the approach to legitimacy applied in this work belongs to the middle field of the typology above. Wary of the possible consequences of pure positivism, exemplified by Schmitt, and not finding reassurance in a natural law perspective, I have taken an 'anti-positivistic' position in line with the positions of Jürgen Habermas and John Rawls. Above, it has been clarified that the capacity of law to provide legitimacy is found to be dependent on procedure rather than on specific content.⁴⁰ This is a position strongly influenced by discourse theory, and thus by Habermas. Still, the specifics of the discourse position, relating to legitimacy, become clearer when reflected in the liberal position as represented by Rawls.

Rawls is acclaimed primarily for his theory of justice and not for a specific approach to the problems of legitimacy. Still, the issues are interrelated. Rawls has created a political theory applicable to modern, democratic and liberal states (exemplified by USA), with the ambition to formulate principles of justice that will favour the stability of such societies in spite of the modern challenges of pluralism. According to David Dyzenhaus, this ambition is what makes Rawls formulate a 'liberal principle of legitimacy' as follows:

Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and

⁴⁰ This is not to say that legitimate decisions do not have a moral content, only that the potential key role of the legal system to provide legitimacy is based on its intermediate, procedural function in solving structural conflicts. The moral content of the decisions made should respond to 'societal conceptions of justice' (see below) that are culturally and historically dependent but still contain values that are broad and universal in scope. In the present work, it is argued that in the modern state, in the 'era of profound moral catastrophe', (Goodrich, Peter (et al.), 1994, p. 14), legal argumentation on which legal decisions are based must be transparent.

equal may reasonably be expected to endorse in the light of principles and ideas acceptable to their common human reason.⁴¹

In his later work,⁴² Rawls makes a distinction between political liberalism and liberalism as a comprehensive doctrine. Whilst the comprehensive doctrine is value-laden in terms of how individuals should live, political liberalism is more limited in that it 'only' dictates the basic structure of modern, constitutional democracies. As a consequence, according to some critical analyses, modern, liberal democracies, in order to cope with pluralism and at the same time guard the value of stability, have no room on a political level for comprehensive doctrines including guidelines for how people should live good lives. Ethics are assigned to the private sphere:

On the social level, political liberalism thus has the effect of encouraging individuals to regard their views as to the good of life as matters of purely private choice. It cannot in fact ensure that individuals will so regard their views. Thus at the political level, political liberalism seeks to restrain exercises of political power that appeal to such views. Hence it forces all citizens to subordinate their views to the values of political liberalism. And that further forces them to privatize their views about morality – to rule their own lives and only their own lives by what they consider to be morally sound.⁴³

Politics, on the other hand, or political liberalism, becomes a formula for conflict resolution in pluralistic societies. The elaboration of liberal principles of justice becomes a practical solution to a political problem (to create stability) rather than a statement with moral content.⁴⁴ By the critics of his later work Rawls is accused of striving to defuse all conflicting doctrinal standpoints through the procedures offered by political liberalism, thus suggesting, or even aiming for, 'the end of politics' or 'the end of political philosophy'.⁴⁵

What is then, it may be asked, the role of the legal system in Rawls' constitutional, liberal democracy governed by liberal principles of justice? According to Dyzenhaus, it is possible to identify a function of courts (the supreme courts) as to 'screen out' any intrusion in legislation that is based on, or claims, the rightfulness of a comprehensive doctrine.⁴⁶ Rawls describes the role of the 'justices' as follows:

⁴¹ Rawls, John, 1993 [1996], p. 137, commented in Dyzenhaus, David, 1997, p. 223.

⁴² Mainly Rawls, John, 1993 [1996].

⁴³ Dyzenhaus, David, 1997, p. 228 f.

⁴⁴ Kukathas, Chandran, (et al.), 1992, p. 169 f.

⁴⁵ Dyzenhaus, David, 1997, pp. 219–235, and Kukathas, Chandran, (et al.), 1992, pp. 154–173.

⁴⁶ Dyzenhaus, David, 1997, p. 228.

The justices cannot, of course, invoke their own personal morality, nor the ideals and virtues of morality generally. Those they must view as irrelevant. Equally, they cannot invoke their or other peoples's religious or philosophical views. Nor can they cite political values without restriction. Rather, they must appeal to the political values they think belong to the most reasonable understanding of the public conception and its political values of justice and public reason. These are values that they believe in good faith, as the duty of civility requires, that all citizens as reasonable and rational might reasonably be expected to endorse.⁴⁷

Thus the role of the legal system is to guard the 'neutrality' between 'fully privatized moralities'. Dyzenhaus again:

Citizens in Rawls's republic do not debate or deliberate on what values should govern their lives. They abide by the values decreed to them, even if what they consider most important politically is put off limits. Indeed the only time citizens speak is when the supreme court speaks against a legislative decision, or against executive action, in the name of the higher law of 'We the people'.⁴⁸

Thus, the highest court becomes the defender of the values of the liberal constitutional order, and the legitimacy of law becomes dependent, not on a specific set of morals, but on a strategy of making ethical disputes private, thus ensuring the stability of the pluralistic, liberal state.

From the same point of departure, the fact that modern societies are no longer characterized by only one normative system, Habermas' position is that law must be exercised in dialogue with all of them in order to gain legitimacy.⁴⁹ Evolving a 'reconstructive theory of the procedural legitimacy of modern law developed on the basis of the theory of discourse ethics'⁵⁰, Habermas enters the scene. As the purpose of this probing into the question of legitimacy is to reach a point where general theories on legitimacy meet the notion of *de facto* legitimacy, the foundations of discourse ethics and the theory of procedural legitimacy will not be elaborated as such. What follows is an attempt to throw light on some of the crossroads where the standpoint of discourse ethics differs from the liberal standpoint. From there follows a discussion on what might be the conclusions to be drawn for legal practice.

In the typology above, it was noted that an effect of the original positivistic position was that it was impossible to uphold a distinction between legality (justification on bases of law) and legitimacy (justification

⁴⁷ Rawls, John, 1993 [1996], p. 236.

⁴⁸ Dyzenhaus, David, 1997, p. 230.

⁴⁹ Eriksen, Erik Oddvar and Jarle Weigård, 2000, p. 67.

⁵⁰ Tuori, Kaarlo, 1989, p. 125. A theory Habermas develops further in Habermas, Jürgen, 1996 [1998].

on basis of values), as there are no external values available that could be used for judging law. According to Rawls there does exist, above and beyond law, an external moral standard – political liberalism – that allows for a distinction between legality and legitimacy. Thus, Rawls' position has provided a possibility to assess the legitimacy of law. Still, as Rawls poses that political liberalism is the only possible external moral standard, his critics have implied that this is a position that leads to a favouring of liberalism above democracy.⁵¹

Habermas also argues that there is a tension between legality and legitimacy, but according to him, moral standards are not pre-existing, or accessible, outside the law. According to Habermas, law is, in complex societies, 'the only medium in which it is possible reliably to establish morally obligated relationships of mutual respect among strangers'.⁵² Thus, legislation should reflect a public debate and its outcomes should be tested by the same debate. Legitimacy can, according to Habermas, emerge from legality but only if the procedure of democratic legislation will 'confront participants with the normative expectation of an orientation to the common good'.⁵³ Thus, Habermas states that:

Law can be preserved as legitimate only if enfranchised citizens switch from the role of private legal subjects and take on the perspective of participants who are engaged in the process of reaching understanding about the rules for their life in common.⁵⁴

The extent to which Habermas emphasizes the importance of debate is maybe the single most distinguishing factor between the position of discourse ethics and the liberal position. Dyzenhaus' conclusion is that Habermas, in contrast to the liberals, gives priority to democracy over liberalism. He describes the position of Habermas as follows:

In his [Habermas'] view, just like the content of positive law, the content of morality has to be made by individuals acting together. It is the product of the process that best approximates to the ideal conditions under which strangers, with all their subjective baggage of tradition, conviction, and prejudice, would reach agreement.⁵⁵

The 'process' suggested by Habermas is the one provided by the procedures of the legal institutions of the democratic '*Rechtsstaat*'. The procedures encompass five basic categories of rights that the citizens must acknowledge in order to achieve peaceful coexistence: classic rights of

⁵¹ Dyzenhaus, David, 1997, p. 238.

⁵² Habermas, Jürgen, 1996 [1998], p. 460. See also Dyzenhaus, David, 1997, p. 238.

⁵³ Habermas, Jürgen, 1996 [1998], p. 83 f.

⁵⁴ Habermas, Jürgen, 1996 [1998], p. 461.

⁵⁵ Dyzenhaus, David, 1997, p. 238.

freedom, citizens' rights of protection, legal procedural rights, political rights and welfare rights.⁵⁶ It is important to note, however, that Habermas' theory is a theory of procedural legitimacy, not one of content. Thus the five basic categories of rights are 'fixed points of reference', but 'their content can and should change in the light of experience'.⁵⁷ Habermas again:

The idea of self-legislation by citizens, then, should not be reduced to the *moral* self-legislation of *individual* persons. Autonomy must be conceived more abstractly, and in a strictly neutral way. I have therefore introduced a discourse principle that is initially indifferent vis-à-vis morality and law. The discourse principle is intended to assume the shape of a principle of democracy only by way of legal institutionalization. The principle of democracy is what then confers legitimating force on the legislative process. The key idea is that the principle of democracy derives from the interpretation of the discourse principle and the legal form. I understand this interpretation as a *logical genesis of rights*, which one can reconstruct in a stepwise fashion.⁵⁸

Like Rawls, Habermas makes a distinction between an ethical and a moral perspective on normative issues. The ethical response to the question 'What should I do?' is related to the personal life-project and to the individual striving for a good life. The moral response to the same question demands a reflection on a general level: Would it be good if everyone in a similar situation acted in the way I do? Habermas describes the difference between a moral and an ethical discourse as follows: '[Moral discourses] aim at the impartial evaluation of action conflicts. In contrast to ethical deliberations, which are oriented to the telos of my/our own good (or not misspent) life, moral deliberations require a perspective freed of all egocentrism or ethnocentrism.'⁵⁹ The distinction made by

⁵⁶ Habermas, Jürgen, 1996 [1998], p. 122 f. See also Eriksen, Erik Oddvar and Jarle Weigård, 2000, p. 191. For an elaboration of the basic principles of the '*Rechtsstaat*' from a Swedish perspective, see Westerhäll, Lotta, 2002a and Pettersson, Olof, 1996. Westerhäll argues that there is no sharp dividing line between the ideology of the *Rechtsstaat* and the ideology of the welfare state, rather both of these are characterized by a striving for a reasonable (fair) weighing between the formal interest of predictability and equality and the material interest of justice; between consistency and ethical (moral) considerations (ibid, p. 61). Westerhäll further underlines the link between these ideologies and democracy and she observes the need for a competent legal community capable of practicing law in such a way that the principles of the *Rechtsstaat* and the welfare state are taken into account (ibid. p. 47). In Chapter 3.1. I have (with a reference to Westerhäll, Lotta, 2002a and Gustafsson, Håkan, 2002) described how these principles also form an integral part of the legal conception of law.

⁵⁷ Dyzenhaus, David, 1997, p. 245.

⁵⁸ Habermas, Jürgen, 1996 [1998], p. 121.

⁵⁹ Habermas, Jürgen, 1996 [1998], p. 97. See also Habermas, Jürgen, 1995, p. 20 ff.

Habermas between ethics and morals has been interpreted by Eriksen and Weigård as a distinction between an ethical, subjective and particular, point of departure on the one hand, and a moral, intersubjective and universal, on the other.⁶⁰

While we use ethics to determine the way we choose to live our own lives, morality contains a perspective that can be used to legitimately govern societies. Thus, the interconnectedness between law and morality becomes a key issue where morality is conceived of as finding ways of realization only through law, and where law only can be legitimate within the framework of morality.⁶¹ At this point it should be noted that when discourse ethics is applied in legal theory it is the *normative legitimacy* (validity) of legal norms and judgements that is an issue – in contrast to *empirical legitimacy* (acceptance). Tuori has elaborated this theme:

Discourse ethics is procedural ethics which instead of substantive principles tries to formulate procedural rules for the solution of contested moral issues. Correspondingly, discourse ethics also approaches the relationships of law and morality from a procedural point of view. From the perspective of discourse ethics, what matters are not primarily the substantial similarities and differences between legal norms and moral norms but the relationship of legal procedures to the procedures that the theory of discourse ethics has designated for the solution of contested moral issues. The discourse-ethical legal theory does not merely maintain that legal norms and judgements raise a validity claim analogous to moral norms and judgements. It also maintains that the legal procedures of modern law can be characterized as institutionalised moral-practical discourses. This means that modern law itself has adopted, institutionalized, the criterion of legitimacy formulated on the basis of discourse ethics; the concept of normative legitimacy is not a yardstick external to modern law but an internal requirement which opens the possibility of the so-called immanent criticism of law.⁶²

As the role of judges and the application of law have now been approached, a point where it is possible to connect to the notion of *de facto* legitimacy has come closer. According to the quotation from Kaarlo Tuori above, in a system providing *normative* legitimacy abiding by the principles of discourse ethics, the responsibility of judges is faithfulness to a specific procedure for producing law rather than to a law with a specific moral content. The procedure is one which safeguards that legislation reflects public debate and where the judiciary constantly should 'keep the legislation responsive to public experience'.⁶³ The complexities of the assign-

⁶⁰ Eriksen, Erik Oddvar and Jarle Weigård, 2000, p. 103 f.

⁶¹ Eriksen, Erik Oddvar and Jarle Weigård, 2000, p. 175.

⁶² Tuori, Kaarlo, 1989, p. 130.

⁶³ Dyzenhaus, David, 1997, p. 243 f.

ment thus inherent in (high quality) judicial decision-making is described as follows by Habermas:

It is not enough that conflicting claims are transformed into legal claims and decided in an effectively binding manner after hearings in court. In order to fulfil the socially integrative function of the legal order and the legitimacy claim of law, court rulings must satisfy simultaneously the conditions of *consistent decision making* and *rational acceptability*. Because these conditions do not easily harmonize, two sets of criteria must be reconciled in the practice of adjudication. On the one hand, the principle of legal certainty demands decisions that can be consistently rendered within the framework of the existing legal order. [...] On the other hand, the claim to legitimacy requires decisions that are not only consistent with the treatment of similar cases in the past and in accord with the existing legal system. They are also supposed to be rationally grounded in the matter at issue so that all participants can accept them as rational decisions. Judges decide actual cases within the horizon of a present future, and their opinions claim validity in the light of rules and principles that are here and now accepted as legitimate.⁶⁴

Three different notions of legitimacy have been found useful for making distinctions: *empirical legitimacy*, *normative legitimacy* and *de facto legitimacy*, of which the first two have been introduced above. The notions of *empirical* legitimacy and *normative* legitimacy are used by Tuori in his article on discourse ethics: 'The de facto social acceptance (the empirical legitimacy) of legal norms does not allow us to draw definitive conclusions about their validity, that is, about their normative legitimacy.'⁶⁵ Only those legal norms that can 'be accepted in a moral-practical discourse' have *normative* legitimacy. Thus, the notion of *empirical legitimacy* is used to measure and analyze, externally, to what extent legal norms are socially accepted in the society in which they function. The investigation performed in the present work does not deal with *empirical* legitimacy. I carry out a critical analysis of the quality of legal practices performed by the administrative courts in Sweden, but the 'yardstick' used does not measure to what extent decisions made by the courts are socially accepted. If I had made an analysis of *empirical* legitimacy, I would have been investigating the effects of, and the reactions to, legal practices in society. Such an investigation has not been carried out.

In this work, an interest is taken in law as a possible provider of peaceful conflict resolution in modern pluralistic societies. *Normative* legitimacy of legal norms is understood to be present (or not) on an aggregate level in society as a whole, depending on the capacity of the legal system

⁶⁴ Habermas, Jürgen, 1996 [1998], p. 198 f.

⁶⁵ Tuori, Kaarlo, 1989, p. 130.

to provide peaceful conflict resolution and mediation according to the principles of discourse theory. When the notion of *de facto* legitimacy is introduced, it is in order to make it possible to focus, not on the aggregate level (and the legislative process), but on its constitutive parts (and the practice of law in courts).

Still, the three notions of legitimacy (*empirical*, *normative* and *de facto*) are interlinked. It is hard to visualize a society characterised by a high degree of *empirical* legitimacy and a low degree of *normative* legitimacy, or vice versa. As a high degree of *normative* legitimacy is dependent on a legal system that 'keeps the legislation responsive to public experience', it seems plausible that if the legal system succeeds in delivering such responsive legal practices (*de facto* legitimacy), it would also generate *empirical* legitimacy.

My concern has been to find a formula that would allow a study of how the legal community responds to the challenge of policy reforms in their concrete activity of delivering judgements in individual cases, given their responsibility to be in dialogue with the rest of society in such a way that their judgements gain respect.

The formula chosen impelled me to try to get a grip on the theoretically complex and much debated issue of legitimacy, some of which has been roughly outlined above, and bring it down to the level of everyday experience.⁶⁶ In order to gain the respect necessary for law to '... represent a mechanism of peaceful conflict resolution and a medium for the realization of moral norms within a wide area,'⁶⁷ the actors of the legal system will have to take on this responsibility in their everyday communication with the members of society. To provide 'legitimacy' to society through conflict resolution and conflict mediation, I suggest, is not an issue primarily for the Supreme Courts or an issue reserved (only) for 'hard cases'⁶⁸. If we are concerned about the capacity of the legal system to provide *de facto* legitimacy, we will find it at stake, for instance, in the less glamorous, more routine-based, production of judgements by county courts.

⁶⁶ While Habermas' elaboration of 'ethical discourse' is a theory focusing on the macro level (on the basic structures of society) the present work takes an interest in the practices of courts on a meso-level (on the level of institutions and organizations). Still, focusing on the specific mediating function of the legal system, it is the capacity of the courts to connect micro-meso-macro conceptions of justice that is studied. For this purpose I introduce the notion of an 'interface', see below 2.3.3.

⁶⁷ Eriksen, Erik Oddvar and Jarle Weigård, 2000, p. 181. Author's translation.

⁶⁸ 'Hard cases' are cases that cannot be determined on the basis of a distinct legal regulation, Eriksen and Weigård describes them as 'precedents with implications for legal policy', see Eriksen, Erik Oddvar and Jarle Weigård, 2000, p. 177 f.

What is suggested should not be understood just as a ‘code of conduct’ urging the members of the legal community to fulfill the important assignment linked to their profession. The proposed understanding of the legal community as an actor providing *de facto* legitimacy has internalized the societal conceptions of justice, making them part of ‘law as a provider of legitimacy’. A consequence for the practice of law is that it is not optional whether or not to acknowledge the extra-jurisprudential influences on legal arguments. Thus, it rests with the members of the legal community to provide the legal arguments (accepted as legal by the legal community) and also to make sure that these arguments are communicated to the members of society in the form of a dialogue regarding the societal conceptions of justice. It should be noted that there can be a number of solutions to the same problem, which all are valid as applied legal arguments accepted by the legal community, and in response to ‘societal conceptions of justice’.

Legitimate law, in modern complex societies, is created in legislative processes marked by democratic procedures. When judges practice law in courts, the law thus instituted constitutes the given framework for legal argumentation and legal assessments. Still, in order for law to function as a provider of legitimacy, and as an efficient source of conflict resolution, legal decisions must be accompanied by arguments that clarify the basis for the assessments made. Judges do not have a mandate to make decisions that are in conflict with implemented law, but they have the responsibility to use the dynamic legal method for making legal assessments that are responsive to societal conceptions of justice. If this is not possible, legal argumentation should be transparent enough for the democratic processes to become activated and thus, law could be changed by the legislature as a result of political debate.

The model of ‘law as a provider of legitimacy’ can be explored further if new aspects are added that clarify how the interrelationship between ‘law as legal practices’ and ‘law as societal conceptions of justice’ is perceived. Thus, it is suggested that the members of the legal community, the actors of ‘law as legal practices’, are *qualified by their capacity to provide legal arguments accepted as legal by the legal community*, see below section 2.3.3. It is also suggested that a first step towards identifying the content of ‘law as societal conceptions of justice’ is to use the notion of a ‘social interface’. In order to delineate this interface, three different sources are explored: *basic values*, *current discourses* and *technical solutions*, see below section 2.3.4.

I want to point out some specifics of the proposed model and its usage at this initial stage:

- A main, if not *the* main, function of law is thought of as providing a procedure for mediating social conflicts in modern, western, welfare states. The legitimacy of the decisions delivered by legal practices stems from this procedure (see section 2.3.2 above). The model is an effort to illustrate how this procedure could come into effect on a level where law is practiced by members of the legal community.
- An aim of the present work is to use the theoretical model presented in this chapter on an actual example of conflicting interests in society (the individual's access or denied access to income compensation provided by the state). In the chapters that follow, the different aspects of law laid out in the model are discussed in this context.
- The model should not be interpreted as suggesting that 'societal conceptions of justice' are to be conceived as a 'legal source' to be treated within the hierarchy of legal sources according to the methodology of legal dogmatics. What is suggested is that legal dogmatics presupposes that members of the legal community take into consideration conceptions of justice prevailing in society, without making them a legal source. In order to communicate this procedure (sometimes illustrated by using the terminology 'context of discovery' and 'context of justification', see section 2.3.2) and provide *de facto* legitimacy, legal arguments must be transparent. Without transparency the communication necessary for the procedure, the guarantee for legitimacy, will be lacking.

2.3.2 Law as legal practices

It is as actors that the 'legal community' is given specific significance in the present work.⁶⁹ In other words, not primarily as holders of conceptions of law (although they do that as members of society as well as members of the legal community), but as members of a legal community delivering legal arguments. The 'legal community' is constituted by members with professional knowledge of 'legal culture', a concept used by Kaarlo Tuori to describe: '... the elite and expert culture that the profession of lawyers embodies.' Legal culture should be understood as containing: '... the current legal culture in professional legal ideology; this

⁶⁹ The terminology, 'the community of individuals with legal competence', is borrowed from Doublet (p. 23), who also labels it shorter as 'the legal community' (p. 24) or as 'the community of legal communication' (p. 25). See, Doublet, David Roland, 1995. Author's translation.

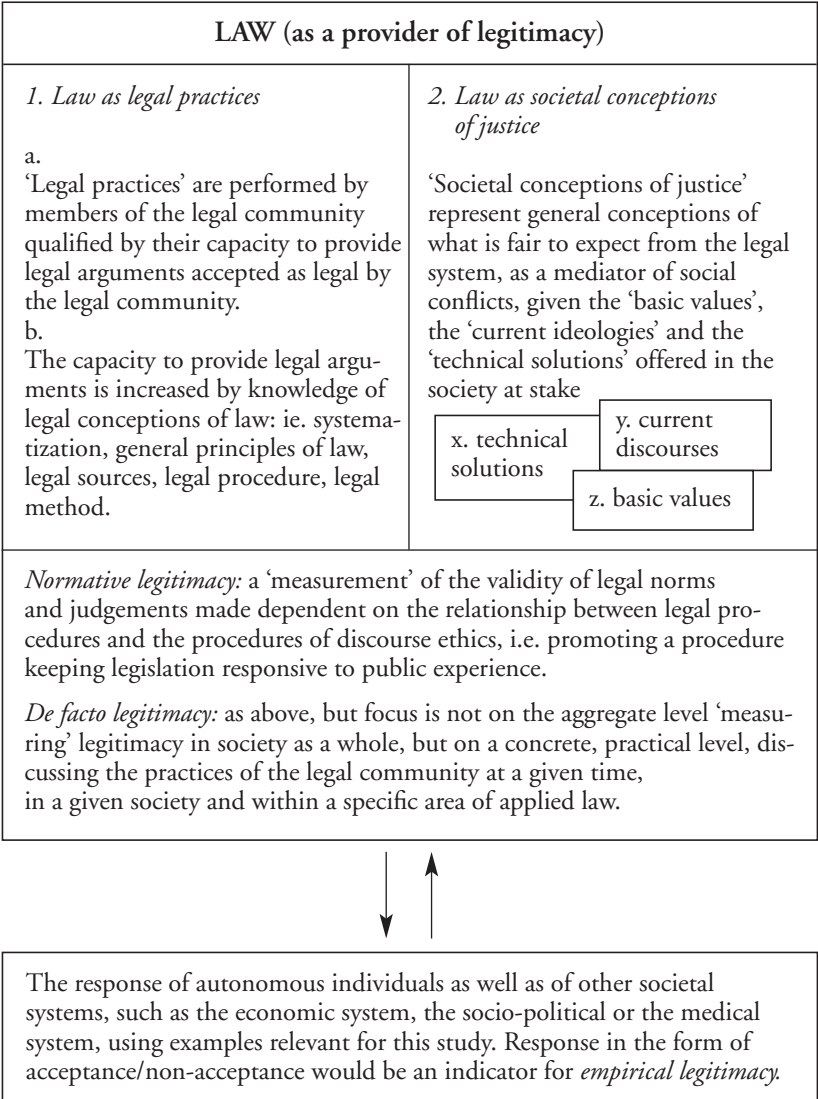


Figure 2.2: A model of ‘law as a provider of legitimacy’: ‘Law as legal practices’ (1) is concretized by the legal arguments delivered by the members of the legal community (a). These arguments should combine professional knowledge of law (b) with knowledge of the ‘societal conceptions of justice’ (2). Sources containing information on ‘societal conceptions of justice’ are ‘technical solutions’, ‘current discourses’ and ‘basic values’, (x, y, z). The level of *de facto* legitimacy provided by the legal arguments depends on their capacity to relate to societal conceptions of justice.

legal culture encompasses legal systematization of general doctrines, basic concepts and legal principles.⁷⁰

The actors involved in the decision-making process involving access to sickness cash benefit in Sweden are: 1) judges (and lay-assessors) working within the administrative court system, 2) officials working at the social insurance offices, and 3) medical doctors, sometimes working for the social insurance offices and sometimes not.

A basic assumption of the investigation is that judges belong to the legal elite and expert culture, as described by Tuori above. The legal practices of judges working at the administrative courts are at the core of the present work. The courts and the judges have an absolute key role in the legal system as authoritative sources for the determination of the content of practiced law. Lay-assessors work together with judges in the local administrative courts and in the administrative courts of appeal. Although the lay-assessors are often in a majority position (see Chapter 3), the assessment made in this work is that the judge is still responsible for formulating the legal arguments explaining the decisions made by the court. Thus, although the court is constituted of both judges and lay-assessors, I consider the judges to be responsible for the legal arguments produced by the courts.

In the case of judges, the presumptions are strong that they, in general, provide legal arguments for their decisions and thus belong to the legal community. However, to what extent the judges working in the administrative courts actually do provide legal arguments to back up their decisions, will be further scrutinized in the investigation of legal cases that follows in Chapters 4 and 5.

In order to decide whether the range of participants in the legal community (deciding on access to sickness cash benefit) should be expanded to include more actors than judges, a 'qualification norm' based on the

⁷⁰ See, Gustafsson, Håkan, 2002, p. 54 with a reference to Tuori, Kaarlo, 1999. As clarified by Gustafsson's account of the different levels of law, Tuori, for instance, will classify as *conceptions of law* the knowledge contained by the community of professional lawyers and as *legal practices* the activities performed by the same actors. I do not oppose the proposal that there are *legal conceptions* of law (quite the contrary), but for my investigation of the *de facto* legitimacy of law, emphasis is on *legal practices* and *societal conceptions of justice*. My claim is that the community of professional lawyers have conceptions of law both as members of society and as part of their profession. For this study, I have chosen to elaborate on the societal conceptions of justice and how they interact with legal practices. I have further chosen to approach the legal conceptions of law as part of the professional knowledge that members of the legal community share, thus acknowledging the impact of these conceptions on legal practices. A description of the general professional understanding of the relevant legal area (i.e. social law and the distribution of sickness cash benefit) follows in Chapter 3.

work of Doublet is used.⁷¹ According to Doublet, the delimitation of who belongs to the legal community is decided as follows:

It is the practice of argumentation in the communicative legal community which sets the normative conditions for what must be fulfilled if an actor is to be accepted as a member of the legal community. Someone who does not reach the requirements will simply not be taken seriously as an actor in the professional exchange of opinions.

These requirements may and actually often seem to be given the form of a demand that the actor must have legal education and training. From a strictly structural point of view, it should be enough that this argumentation satisfies the communicative norm of legal argumentation, and, in the end, the structural requirements must be decisive.⁷²

As a consequence of the 'qualification norm' (i.e. whether the arguments presented are determined to be 'legal arguments' by the legal community), it is not enough to have knowledge of 'legal culture' in order to participate in legal practice; there is also a demand for adaptation:

The requirement for adaptation to the legal community means that the individual judge, lawyer or other person who claims to be practicing legal argumentation cannot freely choose 'the law' which is to guide his arguments. Or in other words: The individual actor cannot erect his own qualification norms when it comes to an assessment of what is to be regarded as legal argumentation. However, what can be done and should be done on an individual basis is to evaluate whether the arguments are tenable or not. But such an evaluation presumes that the argumentation is legal, if you are to draw conclusions for the legal dialogue and not use it just as material for your own legal argumentation. You can evaluate the tenability of ethical and political argumentation by means of legal criteria.⁷³

The reasoning of Doublet can be used to determine the scope of actors belonging to the legal community of relevance for our study of access to income compensation in case of sickness. It is clear that by using the qualification norm as outlined above, no simple answers are available. In accordance with the qualification norm, anyone providing *legal* arguments of importance for the decision on access to benefits is also a member of the legal community. Legal arguments are the arguments recognized by the acceptance by the legal community as being legal arguments (i.e. based on and communicated within the flexible framework of the established methodology for legal reasoning). Doublet acknowledges that in practice the providing of legal arguments usually demands legal school-

⁷¹ Doublet, David Roland, 1995.

⁷² Doublet, David Roland, 1995, p. 26. Author's translation.

⁷³ Doublet, David Roland, 1995, p. 31. Author's translation.

ing. My understanding of this is that legal arguments demand knowledge of 'legal culture'⁷⁴, knowledge that is usually acquired through extensive legal schooling and developed through experience of work within the legal professions.

The main official actor in the process of deciding on access to sickness cash benefit is the local social insurance office. It is at the local social insurance office that first decisions are taken, and in case the insured individual complains, the local social insurance office will also make a second assessment of the issue. In quantitative terms, the bulk of all decisions will not be tried outside the local social insurance offices. The medical doctors do not make official decisions, although it is widely recognized that the impact of their advice is substantial. In case the insured (or, in exceptional cases, the National Social Insurance Board) is unsatisfied with decisions made by the local social insurance offices, the court system and the judges will become active.

Holding on to the qualification norm provided by Doublet, it is the individual quality of the arguments provided by the decision-makers involved that decides whether or not to include her or him as a member of the legal community along with the judges. In the process of selecting the members of the legal community involved in the decision-making process on sickness cash benefit, I start by excluding the medical doctors. Not on the basis that their role is unimportant but because they do not (primarily) use *legal arguments* to back up their position. As a consequence of their practice, they, as a group, neither claim to be, nor are they, members of the legal community.

What remains to be studied is the role played by the officials working at the local social insurance offices. The use of the qualification norm implies that it can neither be ruled out nor determined that the officials working at the local social insurance offices are, or are not, members of the legal community simply by virtue of their general lack of extensive legal schooling, or by reference to the fact that they work for the administration and not for the courts. In order to determine whether or not to include the officials working at the local social insurance offices in the proposed definition of the legal community, I have made an assessment of whether or not decisions made by the social insurance administration are concluded and circulated as legal arguments embedded in the knowledge provided by legal culture. The material used is the written decisions from the local social insurance offices that are (fairly frequently) attached to the judgments delivered by the administrative courts. My

⁷⁴ Using the concept of 'legal culture', as introduced by Kaarlo Tuori and developed by Håkan Gustafsson.

conclusion is that the officials working at the social insurance offices do not work out decisions using the full potential of legal culture and legal method. Therefore the officials working at the local social insurance offices are not considered to be members of the legal community. The reasons for this conclusion are further elaborated below.

To study the administrative bodies making decisions as a first instance bodies of applied law, was an approach taken for instance by Lotta Westerhäll and by Anna Christensen in their respective work from the early 1980s.⁷⁵ My understanding is that the reason for acknowledging the decisions made by the administration in legal doctrine was a response to the immense importance these decisions have for the individual. It is far from evident though that this choice was made from the point of view that the administration provided 'legal arguments' based on knowledge of 'legal culture'. Another factor that points in the direction of acknowledging the officials working at the local social insurance offices as members of the legal community, is the proposal made by modern legal theory that the notion of law as a legal system (in the singular) has been challenged by notions of law as normative systems (in the plural). Doublet, for instance, acknowledges this development, saying that the production and reproduction of law in modern welfare states now fall on several institutions, and as a consequence that: '... the application of law within public administration has become an equally important factor when it comes to the delimitation of the concept of law on purely empirical grounds.'⁷⁶

Within the sector of applied social law, the gap between *judicial application of law* and *bureaucratic administration of law* has been put forward as one example of how law in the modern welfare state challenges the notion of a coherent, unified legal system.⁷⁷ It is a fact that the administration of social protection to a large extent is taken care of by non-jurists. In an analysis of a Norwegian committee report written by Hans Petter Graver, Kristian Andenaes elaborates the differences between a judicial and a bureaucratic branch:

The report maintains that a difference between judicial and bureaucratic application of law can be established empirically, theoretically and normatively. From empirical results we know that some decisions made in public administration digress from and are based on other sources of law than what classic dogmatic judicial methodology teaches. From a more theoretical perspective, it is maintained that the empirical results concerning the bure-

⁷⁵ Westerhäll-Gisselsson, Lotta, 1983 and Christensen, Anna, 1980.

⁷⁶ Doublet, David Roland, 1995, p. 40. Author's translation.

⁷⁷ From a Norwegian, perspective, the division between 'judicial' and 'bureaucratic' use of law is made by Graver, Hans Petter, 1987.

aucratic application of law may be regarded to be close to the ideal type of legal bureaucracy; a mechanical use of rules issued by superior authorities. ... Lastly, it is maintained that normative factors may help to explain the differences between the bureaucratic and judicial application of law. Public administration is to a larger extent than the courts bound by the principles of conformity; public administration has a hierarchical structure and public administration is controlled by parliament.⁷⁸

Eckhoff has written that 'there is every indication that the authorities' use of the law is different, in many cases, from that of the courts',⁷⁹ and although Eckhoff's comment is a reflection on the Norwegian situation, Westerhäll has, from a Swedish perspective, noted and criticized the 'administrative' and 'mechanical' approach to law promoted by the Swedish National Social Insurance Board.⁸⁰

What is described so far is thus a situation where, on the one hand, the legal system is increasingly conceived of as polycentric, in the sense that an increasing number of actors are involved in producing and re-producing law, and also in the sense that these actors are described as using different sources/methods in their legal practice. The idea that there is one legal system in society is thus challenged by the notion that there are several legal subsystems. On the other hand, it has also been proposed that the members of the legal community are conceived of as playing a fundamental role as guardians of modern, democratic, pluralistic, rights-based societies. And, *nota bene*, the legal community is conceived as having this role by the strength of its method (in the singular) rooted in legal culture (i.e. providing legal arguments based on knowledge of legal culture).

The response, in this study, to this seemingly contradictory analysis of the condition of the welfare state is that, for the moment, on the threshold between the last decade of the twentieth century and the first decade of the new millennium, the polycentric aspects of law do not seem to have altered, or decreased, the responsibility of the members of the legal community, identified by their ability to solve conflicts by providing legal arguments. It is also suggested that the legal community, empowered by the societal expectations that it should indeed do this, has an exclusive role to play of fundamental importance to the functioning and sustainability of the modern state. Whether these members are *de facto* judges or officials of the administration, whether they write the laws or act as company lawyers is not important. It is only if they use

⁷⁸ Andenaes, Kristian and Leif Oscar Olsen, 1990, p. 49 f. Author's translation.

⁷⁹ Eckhoff, Torstein, 2001, p. 17.

⁸⁰ Westerhäll, Lotta, 2002a, p 583 and in an interview in *Socialförsäkring* 1998, p. 16 f.

methods in their production or reproduction of law that have the capacity to blend the two sides of law – societal conceptions of justice (generated by basic values, current discourses and technical solutions) and legal practices (as in legal culture) – that they are important as producers of *de facto* legitimacy. However, maintaining Doublet's qualification norm, the fact should not be ignored that factors such as, for instance, education, professional self-insight, and the institutional framework of a profession will affect the capacity of the individual to provide *legal arguments*.

The more specific conclusion drawn for the purpose of this study is that the officials working at local social insurance offices in Sweden do not, in general, have access either to the knowledge or to the institutional expectations that would allow them to take the issue of *de facto* legitimacy into consideration when making decisions on access to sickness cash benefit. I do not question the possibility that they might produce and reproduce law, but I do not consider them, as a group, to be members of the legal community bearing the responsibility of providing legally based, peaceful conflict resolution and conflict mediation to the modern welfare state. Like the exclusion of the medical profession from the legal community, this decision does not imply that the role of the officials working at the social insurance offices is not of vital significance. Neither does it imply that they and the medical advisors, do not have responsibility for decisions delivered. What I am claiming is that these actors, for the moment, do not have primary responsibility for maintaining *de facto* legitimacy in society. As actors in the field of deciding access to sickness cash benefit, they have the responsibility to interact, respond to and stay in dialogue with the legal system, but this responsibility, in contrast to the responsibility of judges, does not include the assignment of being primary guardians of 'law as a provider of legitimacy'.

Thus I focus on the role of judges in the administrative court system who deliver judgements regarding access to income compensation in case of sickness. The professional knowledge of law should not be understood as knowledge limited to the content of legal rules; knowledge of general principles, general clauses, guiding norms and legal standards is just as important, just to mention some of the material used by the profession.⁸¹ Above all, I want to emphasize the knowledge of the legal method, a method that allows judges to argue for decisions made within the flexible framework provided by the established methodology for the interpretation of law.

⁸¹ Gustafsson, Håkan, 2002, p. 38 ff. The professional knowledge of law, in the specific context of distribution of sickness cash benefit, will be further explored in Chapter 3.

The decision-making process performed by judges has been described by means of a distinction between a 'context of discovery' and a 'context of justification'.⁸² In a legal context, judges are described as influenced by a broad range of sources, including her or his professional competence, but also as using the conceptions of law that she or he shares as a member of society, in a 'context of discovery'. On the basis of the analysis performed in a 'context of discovery', the judge will form a decision. This decision is in a 'context of justification' formulated in way that fits in with the flexible framework provided by the established methodology for interpretation of law. In legal doctrine this description of how the judges work (and also the rest of the legal community) has been used both in an affirmative way and as a clarification of what needs to be changed.⁸³

A cause of disagreement in legal theory (with implications for legal practice) has been the question of whether there is a need for the legal system, in order to gain authoritative respect, to nurture an image of law as providing legally objective solutions. Is there a need for an image of law as a coherent system with the capacity to objectively, logically and systematically search in the internal sources of law for answers embedded in law as such?⁸⁴ By describing law as two-sided, and when emphasizing the interdependence between 'law as legal practices' and 'law as societal conceptions of justice', a belief in the possibility of finding 'law' in the law that is only accessible to the profession has been rejected. However, the disagreement as outlined above, does not seem to concern the actual existence of a 'context of discovery' in advance of legal decisions. The main dilemma seems to be to what extent this non-legal influence should be accounted for in the decisions made. By describing the legal profession as guardians of vital societal interests, responsible for the *de facto* legitimacy of law, a faith in the capacity of the profession to act accordingly has been revealed. Without a firm empirical basis to back my arguments, I still think it safe to state that judges in Swedish courts today to a large extent fulfil this assignment. More or less aware of the impact that societal conceptions of justice have on their decisions, more or less keen to dress their decisions in objectifying language, they still act as guardians of the *de facto* legitimacy of law.

⁸² See for instance Glavå, Mats, 1999, p. 29 with a reference to Wasserstrom, Richard, A. (1961) *The Judicial Decision. Toward a Theory of Legal Justification* (Stanford: Stanford University Press).

⁸³ Glavå, Mats, 1999, p. 28 with a reference to Peczenik, Alexander (1991) 'Rättspraxis och rättsdogmatik' in *Festskrift till Ulla Jacobsson*, pp. 161–174 (Stockholm: Norstedts Juridik).

⁸⁴ For a survey of these arguments in a Swedish/Nordic context and from a critical standpoint, see Glavå, Mats, 1999, pp. 25–119; for a common law approach to the same issue from another, but as critical standpoint, see Kerruish, Valerie, 1991.

Still I agree with those who emphasize the added and essential significance of courts acknowledging the arguments (values) decisive for the balancing of interests behind legal decisions.⁸⁵ There are reasons to believe that the position of Glavå, below, is becoming true at an escalating pace as the once fairly homogeneous Swedish society evolves into an increasingly dynamic and pluralistic one:

The awareness that the application of law generally does not involve logical conclusions or searching for the correct answer, places freedom and responsibility in the hands of the legal actor. The legal actor, in performing his task, should be aware of this function and openly explain his decisions.⁸⁶

It seems to be a risky position to trust that arguments, justified with reference to the fictitious image of an objective authority, will gain the approval of the members of modern society.

In the present work I have included a substantial empirical investigation of legal cases from the administrative courts in Sweden. This makes it possible to analyze how the legal community actually form their decisions. Questions such as: How are the conflicts solved? What arguments are put forward? What influences can be found?, are put to the material in order to reveal the specifics of the decision-making process performed by the members of the legal community. I will come back to the subject of 'law as legal practices' within the framework of the empirical study of legal cases in Chapters 4 and 5 below. At that point, *law as legal practices* will no longer be discussed in general, but in the specific field of law that regulates income compensation in case of incapacity for work caused by sickness. The specific methodological considerations relevant for the analyses presented will be discussed in the introduction to Part II.

2.3.3 Law as societal conceptions of justice

In the model of 'law as a provider of legitimacy', two aspects of law are emphasized: law as '*legal practices*' and law as '*societal conceptions of justice*'. What are then 'conceptions' of justice? In this text the conceptions of justice are ideas, notions, theories etc. about how conflicting interests in specific situations should be solved in a just and rightful way. These ideas may be more or less contradictory, and more or less shared by members

⁸⁵ Increased transparency is called for by representatives of, for instance, early Nordic realism (Lundstedt), critical or alternative jurisprudence (Wilhelmsson), see Glavå, Mats, 1999, p. 76. Other proponents can be found among representatives of modern legal theory (Gustafsson, Håkan, 2002), critical/alternative realism (Glavå, Mats, 1999 and Petrusson, Ulf, 1999), and legal feminism/ postmodern/ cultural studies (Svensson, Eva-Maria, 1997a).

⁸⁶ Glavå, Mats, 1999, p. 58. Author's translation.

of society. *Societal conceptions of justice* are dynamic, they evolve over time, through interaction with changes in society and through the influence of the practices of the legal community. In this work, *societal conceptions of justice* determine what, in general, is considered to be reasonable (fair and just) to expect from the legal system, as a mediator of social conflicts, given the 'basic values', the 'current discourses' and the 'technical solutions' available. Below, the three factors – values, discourses and technical solutions – will be discussed further.

Still, the question 'What are societal conceptions of justice?', is not easily answered. For the purpose of providing a broader theoretical understanding, as well as a useful battery of concepts, I have found it essential to introduce the notion of a '*social interface*'. According to Norman Long, an interface can be described as follows:

Interfaces typically occur at points where different, and often conflicting, lifeworlds or social fields intersect, or more concretely, in social situations or arenas in which interactions become oriented around problems of bridging, accommodating, segregating or contesting social, evaluative and cognitive standpoints.⁸⁷

There are some key concepts used by Long that, when applied in the present context, clarify how *law as a provider of legitimacy* can be conceived of as a social interface. The key concepts in mind are 'arena', 'actor', and 'interface'. The first steps to be taken in order to locate the forthcoming analysis of *societal conceptions of justice* within an interface framework, are the identification of an 'arena' and the identification of relevant 'social actors' on this arena. Arenas are, according to Long:

... spaces in which contests over issues, claims, resources, values, meanings and representations take place; that is, they are sites of struggle within and across domains. [...] Domains represent the loci of rules, norms and values that become central to this process of social ordering and to the establishment of certain pragmatic rules of governance.⁸⁸

The specific 'arena' of this study is the situation that occurs when individuals have been denied the right to sickness cash benefit by the authorities deciding on allocation of means. On this arena, conflict situations arise when the interest of apprehended individual needs clashes with estimated social risks. There are a number of different 'social actors' active on the arena. Social actors are, still according to Long:

... all those social entities that can be said to have agency in that they possess the knowledgeable and capability to assess problematic situations

⁸⁷ Long, Norman, 2001, p. 65.

⁸⁸ Long, Norman, 2001, p. 241 f.

and organise ‘appropriate’ responses. Social actors appear in a variety of forms: individual persons, informal groups or interpersonal networks, organisations, collective groupings, and what are sometimes called ‘macro’ actors (e.g., a particular national government, church or international organisation).⁸⁹

The main *social actors* in the present work are those directly represented in the conflict: individuals claiming the right to sickness cash benefit and social insurance offices denying them this right. There are also other actors involved as the conflicts are rarely resolved without consultation with experts in medicine and/or experts in insurance medicine. Apart from those mentioned above, there are other social actors who have an impact on the allocation of sickness cash benefit, for instance: the legislator, the National Social Insurance Board, political parties and individual politicians active in the legislation procedure. The role of the courts and the judges, on the other hand, is dual – they are social actors but with the special assignment of mediating emerging conflicts.

In Chapter 1, the present study was situated in a context of ‘conflict’ and ‘change’: The *conflict* is one of conflicting interests between individuals and the collective, while *change* is related to the shifting conditions for the traditional welfare state. It is in this situation of conflict and change that individuals and institutions involved in conflict become ‘social actors’. Long, again:

All societies contain within them a repertoire of different lifestyles, cultural forms and rationalities which members utilise in their search for order and meaning, and which they themselves play (wittingly or unwittingly) a part in affirming or restructuring. Hence the strategies and cultural constructions employed by individuals do not arise out of the blue but are drawn from a stock of available discourses (verbal and non-verbal) that are to some degree shared with other individuals, contemporaries and maybe predecessors. It is at this point that the individual is, as it were, transmuted metaphorically into the social actor, which signifies that the term is a social construction rather than simply a synonym for the individual or a member of *Homo sapiens*.⁹⁰

The above identification of a specific ‘arena’ and significant ‘actors’ leads to the notion of an interface perspective. What is suggested is, that by approaching the conflict situation at the core of this work, as an interface situation, the identification of parameters needed for an analysis of *societal conceptions of justice* is facilitated.

⁸⁹ Long, Norman, 2001, p. 241.

⁹⁰ Long, Norman, 2001, p. 18.

Interfaces can, over time, become what Long describes as ‘an organized entity of interlocking relationships and intentionalities’.⁹¹ Thus, the interface persists ‘in an organized way over time, with rules, sanctions, procedures, and ‘proven’ practices for handling conflicting interests and perceptions’.⁹² The distribution of sickness cash benefit is, since long, well organized. Different actors have acquired distinct roles in this process of allocating resources. There are also established procedures for how to handle conflicts. Still, the actors involved could also be described as acting at a critical point of intersection between individual and collective interests, an intersection characterized by conflicting positions, based upon discrepancies in values, interests, knowledge and power. As this intersection – marked by the characteristics of an interface – is approached in this study, it will be as a socially constructed location for *societal conceptions of justice*; an intersection that can be studied through an analysis of different sources that are proposed to generate these conceptions: *basic values*, *current discourses* and *technical solutions*.

The choice of sources used and other methodological considerations are indicated below, but more elaborated in the introduction to Part III below (Chapters 6 and 7). The following are important sources generating *societal conceptions of justice*, relevant in cases where the courts act as mediators in conflicts regarding access to sickness cash benefit:

- The normative foundation, the *basic values*, of the Swedish welfare state. Values that, although they do not necessarily point to different, distinct solutions, and are not even internally coherent, still provide a framework that feeds conceptions of what is fair to expect from society.

The study of *basic values* serves the purpose of identifying the ethical and moral basis of societal conceptions of justice shared by members in society. This category will allow for a discussion of welfare models and the kind of societies these models constitute. What fundamental, basic, values are at stake in the creation of income protection for those who are sick? Dealing with three broad value clusters (social equality, social stability and individual freedom), the universalistic approach of the Swedish welfare model is discussed.

- The *current discourses*, indicating the span of strategies possible to voice, given the frame of basic values. Of these strategies, some are implemented and effectuated, others are not. Implemented and alternative

⁹¹ Long, Norman, 2001, p. 65.

⁹² Long, Norman, 2001, p. 69.

strategies, together, constitute the concretized output of prevailing, current discourses in society.

The main forum I have used for the investigation of *current discourses* on social insurance has been the Swedish national parliament. I have found that the motions and bills, presented in parliament during the 1990s, provide a rich source from which it is possible to identify different kinds of social insurance strategies in the period of interest to this study. In addition I have studied the debate on social insurance as presented by *Dagens Nyheter*, the largest daily newspaper in Sweden.

- The different *technical solutions* offered as an effect of implemented strategies, solutions that constitute ‘intentional legal constructions’, carrying the objectives of the legislator and other actors involved.⁹³

In the category *technical solutions* I place an outline of the (main) existing instruments in Swedish society with the function of providing income compensation to individuals with an inability to provide for themselves. This outline is considered an important source for learning what members of the Swedish society believe they can reasonably expect in terms of risk protection, in relation to the fact that all of society’s inhabitants cannot provide for themselves at all times. At the core of the investigation is the content of the concepts/criteria ‘sickness’ and ‘capacity for work’ and, thus, the part of the regulation aimed at deciding who has access to what kind of income compensation in case of lost ability to earn a living. Included in the outline are the instruments that provide an income in case the individual has no ability to support her or himself, and where access is made dependent on an individual assessment of the ability to support oneself.

The investigation of how the legal system responds to social policy changes can now proceed and will, hopefully, increase our understanding of the legal processes of social governance in a modern, western, welfare state like Sweden.

⁹³ The concepts ‘intentional’ and ‘applied’ legal constructions are introduced by Glavå and Petrusson, see Glavå, Mats and Ulf Petrusson, 2002. See also below, the introduction to Part III.

3. The legal conception of law

As declared above, chapter 3 concludes the first part of the dissertation by providing an encounter with basic legal dogma. The subject approached is Swedish social law, in general, and access to sickness cash benefit in Sweden, more specifically. The ‘self-reflection’ sought for is the authoritative account of relevant law, the mainstream ‘legal conception of law’, held by ‘members of the legal community’.¹

Legal conceptions of law held by members of the legal community obviously are essential for how these members carry out their profession. When the field of legal dogma is approached below, it is with the ambition to describe the state of the art of mainstream (authoritative) legal dogmatics within the relevant field of law (rather than, for instance, to describe alternative standpoints, arguing for changes or adding new interpretations). The chosen approach, descriptive rather than analytical, answers to the need for knowledge of the specific legal context surrounding, and determining, the decisions on access to sickness cash benefit made by administrative courts in the 1990s. What follows is an account of ‘legal dogmatics’ in its function of providing a professional basis for practicing lawyers, that is, a description of dogmatic knowledge relating to Swedish social law as rendered in textbooks and doctrine by some members of the legal community to other members of the same community. What also follows is a description of the legal sources that, ac-

¹ The terminology used is based on the discussion in Chapter 2. Qualifying as ‘*members of the legal community*’ are those with a capacity to provide legal arguments accepted as legal by the legal community. The notion of ‘*legal conceptions of law*’ refers to the knowledge of law held by ‘members of the legal community’. When legal decisions are made in the administrative courts, in cases regarding access to sickness cash benefit those decisions should, according to the qualification norm, be followed by arguments accepted as legal by members of the legal community. Cases regarding sickness cash benefit are tried in administrative courts made up of different combinations of legally trained judges and lay assessors. In this chapter, the legal conceptions of legally trained judges in the administrative courts are important, as these judges have a key role in the court procedures determining access to sickness cash benefit. The legal conceptions of the broader legal community is also important of course, as judges in the administrative courts do not work in isolation but are dependent on the acceptance by the wider legal community as a whole.

ording to the established 'legal sourceology', should be used as references in the legal decision-making process. However, the dogmatic academic discourse surrounding these practices is not accounted for. My purpose is to illuminate the general, professional basis for decision-making, characteristic of the work performed in Swedish administrative courts in the 1990s.

Broadly speaking, the interests of legal dogmatics can be described as the 'interpretation and systematization of legal rules'.² Within this field of research a varying landscape of different legal theories emerges. The notion of 'legal dogmatics' is here perceived as enclosing what has been described above as 'professional knowledge of law' or 'legal conceptions'.³ In the model introduced in Chapter 2, focus lies on 'law as a provider of legitimacy' and special mention is made of the legal knowledge of systematization, general principles of law, legal sources, legal procedure and legal method because of the crucial impact this kind of knowledge has on legal practices. Legal conceptions of law held by members of the legal community (and thus questions related to the interpretation and systematization of legal rules) are relevant for the function of 'law as a provider of legitimacy'.

Following Strömholm, the problem-solving practice performed by lawyers is conceived of as based on 'more or less conscious and articulated' conceptions regarding law and the systematization of legal rules.⁴ In this chapter, three different dogmatic areas are approached, all three important for understanding the legal context in which decisions on sickness cash benefit are made: 1) Systematization of legal rules, 2) Legal sources (legal sourceology), and 3) Administration of justice.

Systematization of legal rules: The dogmatic systematization of legal rules (approached in section 3.1) provides a basis for extracting general principles, guiding norms etc. that are specific for the different subcategories of law. Thus, with reference to dogma, one could argue that some principles are specific for 'social law', and others are specific for 'public law' or 'administrative law'. These principles (guiding norms and legal standards etc.) are tools to be used by the profession and they are essential for what has been described above as 'the flexible framework provided by the established methodology for interpretation of law'.⁵

² This is the description of legal dogmatic interests used by Peczenik, Alexander, 1980, p. 9. The portrayal of law as a coherent unity is to be added to the often emphasized core interests of legal dogmatics, see, for instance, Dalberg-Larsen, Jørgen, 1994, p. 16.

³ See the discussion above in section 2.3.2., *Law as legal practices*.

⁴ Strömholm, Stig, 1992, p. 195.

⁵ See section 2.3.2., *Law as legal practices*.

Legal sources (legal sourceology): In section 3.2, the question of the legal content of the criteria ‘sickness’ and ‘capacity for work’ in the National Insurance Act is approached from a perspective where the established legal sources, and the method for weighing them, are accounted for. The issues of ‘legal systematization’ and ‘legal sources’ are thus linked, as the different principles resulting from systematization become part of the ‘sourceology’ described in section 3.2.

Administration of justice: In section 3.3, the legislation providing a procedural framework for the decision-making process in administrative courts is described. The court procedure is presented from a perspective where the formal aspects connected to ‘legal certainty’ are made central.⁶ This approach is partly based on the prevailing dogmatic understanding of ‘social law’ as an area protected by values connected to legal certainty, and partly on the increased attention that this issue has been given through different legal reforms during the last decades.

This is to be an account of basic dogma surrounding the legal core of the present work i.e. the elaboration of the two concepts of ‘sickness’ and ‘capacity for work’ in their function as legal criteria regulating the distribution of sickness cash benefit in Sweden during the 1990s. Thus, I have also set the stage for the empirical analysis which follows in Part II and III of the dissertation. Section 3.4 consists of a brief summary of the conclusions drawn in the present chapter.

3.1 The legal rationale of ‘social law’

This work discusses conflicts that occur in society; conflicts that are regulated in laws referred to by lawyers as ‘social law’. The conflicts are of a kind where the individual interest in receiving economic allowances from the state does not coincide with the interest of the state to pay such allowances. In this section, ‘social law’ is scrutinized as a specific category of law. The perspective is mainly Swedish, although there is also some Nordic input. My aim is to provide a descriptive survey of legal frameworks and structures developed within legal doctrine and legal theory, in order to increase the understanding of the internal legal rationale of social law. Thus, what is searched for is legal self-reflection, legal self-insight and legal ideology when it comes to legal practices, and legal conceptions usually put together under the banner of ‘social law’.

⁶ The concept of ‘legal certainty’ is in this text used as a synonym for the German concept *rechtssicherheit* or, in Swedish, *rättssäkerhet*.

3.1.1 Social law and legal systematization

An important task for the dogmatic study of law is to systematize legal material. 'Law' as a broad, general entity is, when systematized, divided into smaller entities. This dogmatic systematization of legal material is often decisive for the structure of textbooks as well as the disposition of courses for law students. Strömholm has compared the dogmatic systematization of law with a map that lawyers learn by heart, a map that expresses ideas concerning 'closeness, affinity or kinship' between different sets of legal rules constituting a common tool used by lawyers for orientation and internal communication.⁷ In Sweden, this systematization is not based on law itself but rather on the dogmatic tradition constructed by many generations of lawyers.⁸

In Swedish law, as in many other national legal systems, there is a primary line of division drawn between civil and public law.⁹ The conflict of interests in this work – a conflict between public authorities and private individuals – is categorized within the sphere of public law. In order to efficiently capture the diverse characteristics of all the legal material that concerns these kinds of conflicts, six additional subcategories are used in the systematization of public law in Sweden: constitutional law, administrative law, criminal law, law of legal procedure, tax law and public international law.¹⁰ In the overall systematization of Swedish law, 'social law' is generally placed within the box labelled 'administrative law'.

What are then, according to the dogmatic tradition, the constituting elements of 'social law', the elements that make 'social law' different from other kinds of 'law'? There is an obvious link between social policy and social law, but the scope of social policy in modern welfare states is very comprehensive. The broad scope of social policy makes it complicated to use it as the decisive determinant of social law. Already in the work of Eek, published in 1954, the discrepancy between the scope of social policy and the scope of social law is noted and commented on. Eek establishes that modern social policies, in close interaction with economic policies, have influenced almost all traditional legal entities (for instance family law, criminal law, civil law, tenancy law, labour law, financial law and tax law). Eek finds it impossible to label as 'social law' all the effects of social policies.¹¹ His proposal on how to systematize social

⁷ Strömholm, Stig, 1992, p. 195. Author's translation.

⁸ Strömholm, Stig, 1992, p. 196.

⁹ Although it should be noted that not even this demarcation line is clear and uncontested, see for instance Westerhäll, Lotta, 1990, p. 20 and Lehrberg, Bert, 1993, p. 45.

¹⁰ Bernitz, Ulf, 1996, p. 25.

¹¹ Eek, Hilding, 1954, p. 33.

law is instead to focus on administrative law, as he considers this to be the legal area predominantly influenced by social policy. Eek defines the scope of social law as follows:

Clearly all the results aimed at by social policies within the legal system cannot be regarded as 'social law'. [...] By giving public administrative authorities, locally and nationally, new or extended tasks and by establishing new authorities and institutions, social policy has had a greater impact on administrative law than on any other discipline of law. [...] The totality of the legal rules forming the normative basis for social service administration is the object of our report. This area of administrative law can be designated social law.¹²

Eek's definition of social law seems at first to be 'institutional'. The governing principle, for determining the boundaries of 'social law' is the public/social character of the administrative entity responsible for policy output. 'Social law' is, according to Eek, the normative base for social administration. What then constitutes 'social administration', according to Eek? It is not, as one might have thought, the legal character of the administrative unit as such that is in focus (whether it is private or public, state or municipal). Instead, Eek uses the following three 'criteria' when delimiting the scope of social administration: 1) the social measures performed by the administrative entity should be based on law, 2) the activity should continuously be supervised by the state, and 3) the activities performed should be carried out on behalf of the state.¹³ Following Eek's definition, a shift of an administrative unit in relation to any of these criteria, will also lead to a shift as to where a specific rule belongs in the legal systematization.

Westerhäll has chosen a method of systematization in the same tradition as Eek, in the sense that she is (fairly) loyal to the established structures of legal systematization.¹⁴ According to Westerhäll, who has written the most comprehensive work on Swedish social law since Eek, social law is defined by its function to 'regulate society's efforts in the sphere of social policy'.¹⁵ Focusing on the difference between social policy and social law, the line of demarcation, according to Westerhäll, could be illu-

¹² Eek, Hilding, 1954, p. 33. Author's translation. It could be noted that Gunnar Bramstång, a key figure in the development of Swedish social law, in 1964 presented his doctoral thesis in what he called 'social administration law', see Bramstång, Gunnar, 1964.

¹³ Eek, Hilding, 1954, p. 47. Eek describes the organization of 'social administration', and thus also the different institutions used by the state to execute social policies.

¹⁴ Other prominent legal scholars, apart from Eek and Westerhäll, whose works have established social law as an independent legal discipline in line with traditional systematization in Sweden, are Gunnar Bramstång and Rune Lavin.

¹⁵ Westerhäll, Lotta, 1990, p. 20. (Author's translation).

minated by the two concepts of 'governing' and 'legal certainty', thus connecting social policy with 'governing' and social law with values contained in the concept of 'legal certainty'.¹⁶ In section 3.3 below, the administration of justice by administrative courts is approached from a perspective where the issue of 'legal certainty' is in focus.

The scope of social law, according to Westerhäll, is demarcated by a reference to 'traditional legal systematization'.¹⁷ The result is a list of substantial areas of 'social concern': a) social insurance law, b) law that concerns different forms of social support, c) law that concerns social assistance, d) health care law, e) law that concerns social secrecy, and f) legal procedural law concerning a-e.¹⁸

Westerhäll does not use a positive, formal, definition of 'social law', rather she presents an inventory of social protection measures regulated in law traditionally defined as 'social law'. The difference in approach between Westerhäll and Eek (where Eek points to the function of providing a normative base, while Westerhäll makes a list of areas of concern) could, to some extent, be explained by the fact that during the 36 years between the two textbooks, 'social law', as an independent legal discipline, has been firmly established. Thus, although both are working within the framework of traditional legal systematization, there is a difference in approach that has consequences which can be exemplified by the sick pay reform.¹⁹

When sick pay was introduced, the initial responsibility for distributing income compensation in case of sickness (day 1–14) was shifted from the social insurance offices to the employers. Following the principles of 'traditional legal systematization', and thus also Westerhäll, this safeguard measure for loss of income, distributed in the form of sick pay, is not identified as social law but as labour law (civil law). Sick pay is

¹⁶ Westerhäll, Lotta, 1990, p. 21.

¹⁷ Westerhäll, Lotta, 1990, p. 20.

¹⁸ Westerhäll, Lotta, 1990, p. 21. In the 1950s, when Eek wrote his book on Swedish social law, he ended up with five core areas which he defined as the legal institutes of social law: 1) General precautionary public measures, 2) Social insurance, 3) Social assistance, 4) Social care, 5) Services. See Eek, Hilding, 1954. There are almost 40 years between the work of Eek and that of Westerhäll, something that certainly explains some of the discrepancies between what is considered to be part of social law and what is excluded. The similarities could be noted: social insurance is treated as a separate category and so is social assistance, although, if studied in detail, there are, of course, differences also within and between these categories. The differences are noteworthy and challenge any clear-cut framework of what is social law and what is not.

¹⁹ In 1992, the employer became responsible for paying sick pay for the first 14 days of a person's sickness period. The sick pay period was in 1997 extended to 28 days, and in 1998 lowered again to the original 14 days. (In July 2003 it was extended to 21 days.)

viewed primarily as a civil obligation involving employers and employees. On the other hand, if Eek's definition of social law is applied, together with his characterization of what constitutes 'social administration', the systematization of the Sick Pay Act gets more intricate. One could well argue that an application of Eek's three criteria used to define what constitutes 'social administration' implies that the shift of responsibility for delivering income compensation in case of sickness to the employers did not change the legal nature of the social protection measure at stake and that the Sick Pay Act is part of social law.²⁰

The technique used above to separate social law from other law (thus, defending a specific systematic structure with reference to general principles of systematization) makes it hard to answer the question about what it is that distinguishes social law from other disciplines of law – unless one accepts that the boundaries of social law are determined by legal tradition, and thus a circular reasoning that social law is what is considered to be social law by the legal community. Eek's definition creates a basis from which the systematization could be criticized in its details. An example is Eek's criticism of the demarcation between social law and labour law and his suggestions for change. Still, Eek, as well as Westerhäll, works within the framework of legal systematization as such and does not question the possibility of identifying a distinct unit of legal material that should be labelled 'social law'.

The determination of the scope of 'social law', according to Eek in 1954 and later developed and reinforced by Westerhäll in 1983, represents an established and authoritative conception of legal systematization in this field.²¹ Above, legal systematization was compared to maps used by lawyers for orientation and internal communication. These principles can be more or less 'fundamental' in character and thus have a fairly broad range of application within the overall legal system. Thus the legal material, connected through the logic defining 'social law' as a specific

²⁰ In opposition to Schmidt, Eek argues that it would be more logical to define several of the instruments traditionally (in 1954) systematized as 'public labour law' as social law instead.

²¹ There are also other standpoints; Kairinen argues that there are aspects of social law that could be studied across the traditional legal systematization as social law affects all legal sectors, public law as well as civil law. Social law makes, according to him, the whole legal system more social and thus refutes traditional systematization efforts. See Kairinen, Matti, 1989, p. 71 f. In much the same line, Anna Christensen suggests that we give up the ambition of finding *the* way of ordering law. As principles of differing character are employed in a variety of situations and under shifting circumstances, we are facing an inconsistent and multifaceted material that could be systematized in different ways depending on the object of our study. Christensen, Anna, 2000.

entity of legal material, is also, according to the dogmatic tradition, linked to specific legal principles. In the case of 'administrative law' and 'social law', relevant principles are for instance:

Administrative law is based on the principle of public openness, the principle of legality, the principle of objectivity and equality, the right to insight of parties concerned and communication etc. The area of *social law* is clearly influenced by certain guiding or commanding objectives for the individual's participation in society: central principles concerning for instance integrity, freedom of choice and the principle of autonomy.²²

When Westerhäll emphasizes that social law is based on values connected with 'legal certainty', it could be argued that this also is an argument concerned with legal principles.²³ In a similar mode, although more explicit, Gustafsson argues that the notion of 'legal certainty' could well be conceptualized as a legal principle constituting the modern democratic state.²⁴

For members of the legal community working with the determination of who has access or not to sickness cash benefit, the conceptualization of 'social law' has bearing on how conflicts in court are conceived and how decisions are justified. For the legal profession, the internal classification of certain issues as 'social law', as described above, provides an authoritative platform, a (fairly) fixed postulate, from which a coherent legal reasoning can be construed. What has been described so far is, thus,

²² Gustafsson, Håkan, 2002, p. 41. Author's translation. In much the same spirit, Gunnar Bramstång has emphasized, for instance, the following legal principles as essential for public law: the principle of legality and the principle of objectivity and equality, see Bramstång, Gunnar, 1987, p. 147.

²³ See also Westerhäll, Lotta, 2002a, pp. 529 ff. In this comprehensive study of the Swedish welfare state Westerhäll introduces the concept 'principle law' and performs an analysis of the concordance between 'value-open and context dependent principles' (characteristic of the welfare state and the *Rechtsstaat*) and the regulation of, for instance, the insurance protection available in case of sickness in Sweden from the 1950s and onward (ibid, p. 64). Westerhäll also introduces the concept 'basic law' that allows for a discussion on basic values prevailing in society and their reflection in law. Her conclusion is that the basic values which are legally expressed in Swedish social law primarily concern 'justice' based on the ethical principles of equality, equal value, uniformity and distribution (ibid, p. 630).

²⁴ Gustafsson, Håkan, 2002, p. 41 f. It should be noted though that a main point in Gustafsson's work is that the concept of 'legal certainty' is not unambiguous. Gustafsson elaborates with three different 'local' categories of 'legal certainty': formal, material and substantial legal certainty. See Gustafsson, Håkan, 2002, p. 454 (the English summary). In the present work, the concept of legal certainty is mainly, unless otherwise indicated, used as a reference to the formal (traditional) aspects of legal certainty that provides the individual with tools for the protection against the interests of the state.

a socially constructed legal typology used by the profession as a tool to systematize the complex material inherent in different kinds of conflicts of interests.

3.2 The right to sickness cash benefit

The first issue dealt with in this chapter was ‘systematization’, the second issue, linked to systematization, is ‘legal sources’. An essential part of the method applied by members of the legal community when forming legal decisions is knowledge of what sources to use as references in their argumentation and knowledge of how these sources relate to each other.

In dogmatic legal doctrine, the definition of the concept of ‘legal sources’ is a core issue, and so are related questions such as how these sources (whichever they are) should be interpreted and how they should be weighed in relation to each other. Strömholm makes a distinction between a *descriptive* and a *normative* approach when describing a distinct ‘legal sourceology’. If the description of legal sources is aimed at describing the different factors that actually influence judges, it is a descriptive approach, but if it is aimed at describing the sources that, for one reason or another, ought to be used by judges when forming decisions, the approach is normative.²⁵ The following, descriptive, definition of ‘legal sources’ is suggested by Strömholm:

Legal sources comprise all factors guiding the courts (or other administrative authorities) in their choice of or establishing of the norms to be applied in specific cases, as well as these actual norms.²⁶

This definition results in the following list of factors that are actually reflected upon when law is practiced (generally in Sweden):²⁷

- A. Judicial principles.
- B. Other legal source factors.
 - 1. legal rules and regulations;
 - 2. preparatory work (for Acts of Law);
 - 3. legal practice (particularly in courts of appeal);

²⁵ Strömholm, Stig, 1992, p. 296.

²⁶ Strömholm, Stig, 1992, p. 296. Author’s translation.

²⁷ Strömholm, Stig, 1992, p. 298. The distinction between a descriptive and a normative account of relevant legal sources, made by Strömholm, can be linked to the two concepts ‘context of discovery’ and ‘context of justification’ that can be used to describe the decision-making process performed by judges. In a ‘context of discovery’, a wide range of different sources are used as judges form their decisions, while a more limited number of officially approved legal sources are used in a ‘context of justification’ when the decisions made are justified. See above, section 2.3.2. Author’s translation.

4. customs;
5. opinions among lawyers (and sometimes also, for instance, technical experts);
6. general considerations, not specifically tied to law;
7. (agreements)

In a 'legal sourceology' (whether descriptive or normative), the definition of relevant legal sources is a first step towards shedding light on the application of law. This first step is followed by other steps elaborating, for instance, different interpretative methods and on the weight that is or should be given to different legal sources.

This chapter is intended to be descriptive rather than normative, but the phenomenon described is 'legal ideology' rather than legal practice. It should be kept in mind that to describe the rendered, authoritative legal sourceology relating to the application of Swedish social insurance law in the 1990s is not the same thing as describing all the factors that actually influence the legal decisions.

According to Westerhäll, in her introduction to Swedish social law, a 'legal sourceology' must be developed in tune with the differing characteristics of the diverse parts of the legal system.²⁸ Westerhäll presents an argument in favour of allowing specific points in different parts of the legal system to have an impact on what should be assessed as a legal source and how each source should be weighed in relation to the other sources. Westerhäll's conclusion is that within the field of social law such special characteristics are to be found when it comes to the implementation of laws, preparatory work, legal practice and the official documents produced by state authorities.²⁹ Westerhäll continues:

The basic thought behind having a 'legal sourceology' at all is to form a lasting theory of legal argumentation; it is not to decide in theory what 'the

²⁸ Westerhäll, Lotta, 1990, p. 23.

²⁹ Westerhäll, Lotta, 1990, p. 23. Examples of such characteristics are for instance: A situation where relevant law is applied largely by non-jurists (at the local social insurance offices) using non-traditional legal sources and where traditional legal institutions have a limited impact on the decisions taken. (This is also true for other fields of public law, such as tax law, for instance.) A set of laws that provides a general framework rather than detailed rules, thus introducing an aspect of governing through setting goals rather than through detailed norms. (The diverse rules regulating social insurance schemes do not fit this description, which exemplifies that there is no absolute inner coherence amongst the legal fields sorted under the label of 'social law'.) A prevailing conception of social law emphasizes the double legal function of distributing welfare and social governing of behaviour, rather than the traditional legal function of handling conflicts. All, or parts, of these aspects of social law are discussed by for instance: Westerhäll, Lotta, 1990 and Andenaes Kristian and Leif Oscar Olsen, 1990. Author's translation.

law' is. Legal sourceology is a means of assistance when we assess the application of law and its objectives, that is, it gives us ways of argumentation, working methods and concepts to determine whether the application of law is to some extent *rational* and consequently *promotes legal certainty*. In general, people expect legal decisions to follow the principle of legal certainty, that is, to be, at the same time, foreseeable and consequently also possible to examine afterwards and in addition to be highly acceptable from a moral (ethical) standpoint.³⁰

What is emphasized above is the function of a 'legal sourceology' as a means to assess legal practices, but this also implies that knowledge of the established 'legal sourceology' is part of the established method for making legal decisions.

When determining the right to sickness cash benefit, the main legal sources available to Swedish administrative courts are usually described as: law, preparatory work, court practice, legal principles and legal doctrine.³¹ Below, these different sources are scrutinized as to what they yield on the issue of determining access to sickness cash benefit. Thus, the perspective is shifted from a description of the scope of social law and associated legal principles according to mainstream dogma, to a description of how the established 'legal sourceology' functions as a tool for identifying the interpretive framework of social insurance legislation. This description is pursued in two steps: first, an outline of the process of implementing the policy of concentration in sickness insurance is presented (section 3.2.1), secondly, relevant legal sources are studied in more detail (section 3.2.2).

3.2.1 Concentrating social insurance – the 1995 and 1997 social policy reforms

The notion of 'concentration' was first put forward in the new instructions given by the government to the Sickness and Occupational Injuries Committee in April 1995. The government wanted suggestions on how

³⁰ Westerhäll, Lotta, 1990, p. 24. Author's translation. Westerhäll here makes a reference to Peczenick, Alexander 1986, *Rätten och förnuftet. En lärobok i allmän rättslära*, (Stockholm: Norstedts), p. 31 f. According to Gustafsson's 'typology' of different categories of 'legal certainty', Westerhäll provides an example of the double character of the concept. There is a legal-technical content of 'legal certainty' that has to do with foreseeability, but also a contextual aspect that is concerned with social and moral values. See Gustafsson, Håkan, 2002, p. 313 f.

³¹ In line with my ambition to describe the 'state of the art of mainstream legal dogmatics', this list of legal sources is based on how issues related to social (insurance) law have been treated in legal literature by representatives of the discipline like Rune Lavin, Gunnar Bramstång and Lotta Westerhäll.

an evaluation of a person's reduced capacity for work, in a more 'concentrated' way, could be based on medical grounds alone. However, as a policy, 'concentration' was not only of concern to sickness insurance but embraced the social insurance system in general.

In 1995 concentration was described as a means to create more distinct tools for helping people without ability to support themselves, by emphasizing the diverse functions of the different social insurance instruments. Thus, sickness insurance should more clearly become an instrument for those lacking capacity for work for medical reasons, while unemployment insurance was to provide for those with a capacity for work but without a job. The demarcation between the instruments should, according to the policy aims, become more distinct and the demands on individuals to comply with more clear-cut concepts should be increased. The concentration policy was implemented in law through changes that could be interpreted as narrowing the available interpretive range when making assessments of sickness and capacity for work for the purpose of deciding eligibility to sickness cash benefit. These changes could also affect unemployment insurance and social assistance as they facilitated assessments that could result in some individuals being pushed out or ending up between the different instruments offering income support. A concern for the problem of individuals being 'stuck in-between' was voiced during the process of launching the concentration policy as well as in its immediate aftermath.³² The main suggestion offered to moderate the effects of the concentration policy was to emphasize the need for the different administrators of benefits to communicate and interact.³³

³² For instance, a concern for those 'falling in-between' the assessments made by the unemployment offices and the social assistance offices is voiced in SOU 1999:97, part A, p. 21. The committee writes about this 'far from insignificant group of people' that 'they are out of work but assessed by the employment offices as impossible to place on the labour market. They are therefore given very little service or none at all. The social services often consider these people to be employable on the labour market and that they should be able to take part in employment measures.' See also SOU 1995:149, p. 233 f, for a discussion on the use of the concept of 'capacity for work' in different social insurance instruments.

³³ The need for co-operation between different authorities has been underlined also in official reports as well as in government bills. In Prop. 1996/97:63, the government emphasized the double goal of creating a more strict delimitation of the social insurance instruments while at the same time maintaining a comprehensive (overall) view of the situation of the individual (ibid, p. 41). Experimental projects in the field of co-operation have been carried out especially within the field of rehabilitation. For a survey, see SOU 1996:85 and later SOU 1998:104, pp. 192–200 and SOU 2002:5, part 1, pp. 118 ff. For an analysis and a discussion, see for instance: Fridolf, Marie, 2000a and Fridolf, Marie, 2000b.

The official reasons for concentration were the following:³⁴

- Costs caused by sickness should as far as possible be dealt with within the sickness insurance system and the disability pension system. Costs that stem from unemployment should be dealt with through the labour market policies. In order for this to function, the regulations within each system should be clarified.
- Concentration aims at providing a more efficient system for directing individuals to the administrative body with the best resources to help them in their specific situation.
- Well-defined criteria for eligibility for provisions from social insurance will increase the legitimacy of the system.
- A strict administration of provisions will lower the risk of excessive use.
- Concentration strengthens the ‘work-line’.

The idea behind the introduction of a concentration policy in the national social insurance system was that different categories of people in need should be referred to different authorities. Only those who were considered ‘sick’ by a strict medical definition were to be taken care of by the sickness insurance system. People who, as a result of other types of problems, cannot work should look elsewhere to get support for their living. The idea was that a strictly effected concentration would lead to reductions in state expenditure in addition to increased efficiency, as people would get more adequate help for their problems. By emphasizing the ‘work-line’ also in social insurance, long-term sick listing was to be countered and it would be possible to get a clearer picture of the national costs.³⁵ The ultimate aim was not just to achieve concentrated sickness insurance, even if this was the area where the policy started. The policy was also aimed at controlling the overall development of social insurance. The instruments affected, apart from sickness insurance and disability pension were, as mentioned above, unemployment insurance and, indirectly also social allowance, as the last resort.

The notion of concentration was explicitly used to direct the committee that in 1997 suggested changes in the law opening up for a stricter assessment of a person’s ‘incapacity for work’.³⁶ The 1995 changes

³⁴ The same kind of arguments for concentration recur in official documents from 1995 and onwards. See for instance: Prop. 1994/95:25; Dir. 1995:54; SOU 1995:149, p. 229; Prop. 1996/97:28, p. 9 f; SOU 1997:166, pp. 92 ff.; Prop. 1997/98:111, p. 6; 1997/98:SfU11, p. 14.

³⁵ Prop. 1996/97:28, p. 25 f.; 1996/97:SfU6, p. 4.

³⁶ Dir. 1995:54.

mainly concerned what was described as a 'clarification' of the criterion of sickness. This reform was tied to a substantial enforcement of the insurance offices' access to medical expertise of their own, the so-called 'insurance physicians'. It was argued that an intensified participation of the insurance physicians would help to improve and clarify the medical foundation on which decisions were made. To this end, there was also an introduction of a rule saying that after four weeks of sick-listing, every case should be thoroughly evaluated. The participation of insurance physicians in this evaluation became a criterion spelled out in law.³⁷

The role of the insurance physician is to work on behalf of the insurance offices as a consultant in medical questions. The insurance physician does not make a face to face examination of the insured, but makes his or her evaluation solely on the basis of the written reports available at the local social insurance offices. The local social insurance offices were given an extra 75 million SEK in their budget to make sure that there would be an increased participation by the insurance physicians. In an evaluation made by the National Social Insurance Board in 1997, it is concluded that the local social insurance offices found that the emphasis put on the insurance physicians' participation had led to a stricter administration of cases concerning sickness cash benefit and an improvement of the medical grounds.³⁸

Apart from the reforms implemented in 1995 and 1997, the policy of concentration was supported, for instance, in the report from the Disablement Pension Committee.³⁹ The committee discusses at great length the pros and cons of a concentrated social insurance, and their conclusion is that the arguments for the principle of concentration outweigh the arguments against it. According to the committee, the turning point is the view that the 'work-line' should be a common basis for the insurance system.

In an evaluation made to map the consequences of the concentration policy in the sickness insurance in May 1997, the National Social Insurance Board carried out an investigation of decisions made at the local social insurance offices during the period July 1 to September 30 in 1997.⁴⁰ One of the questions in this investigation concerned what happened to the individuals whose applications were denied. In 70 percent of the cases, it was possible to find information about the individuals' ways of supporting themselves one month after the negative decision from the insurance office. When the negative decision concerned sick-

³⁷ National Insurance Act, Chapter 3, § 8a.

³⁸ RFV Anser 1997:3.

³⁹ SOU 1997:166.

⁴⁰ RFV Anser 1998:5.

ness cash benefit, 26 percent had some kind of unemployment benefit and 10 per cent received social assistance. Ten percent still had some level of sickness cash benefit (25, 50 or 75 percent) and 6 percent lived on study grants. In 30 percent of the cases, the insurance offices could not tell in what way the individual denied benefit provided for her- or himself.

A follow-up of the policy of concentration up to the year 2002 leads to the conclusion that there is no visible adjustment or readjustment of the policy as such. The silence on the subject is striking. Two official reports dealing with sickness insurance (published in 2000 and 2002) indicate the need for improvements in the regulation.⁴¹ But these reports do not present any results stemming from instructions to review the policy of concentration or to deal specifically with the concepts of 'sickness' and 'incapacity for work', and it is noteworthy that the concept of 'concentration' is not mentioned anywhere.⁴²

The description of the 'sickness' criterion in the report from 2000 is based on suggestions made in an official report from 1944⁴³ (just as was done previous to the reforms of the 1990s), and in the description of the developments of the insurance from the 1960s to present time, not a word is said on the subject of 'concentration'. In the same historical review, there is a description of the introduction of the 'deepened assessment' that should be made by the insurance physician after 28 days, but not as a core aspect of making the concentration policy efficient in practice. The step-by-step model is also described in an overview of the concept of rehabilitation, but not in a context where the explicit motives behind the reform in 1997 are brought forward.⁴⁴

In the report from 2002, approaching the subject of sickness and its societal implications, there is no elaboration of the concepts of 'sickness' and 'capacity for work'. What is interesting in relation to the concentration policy as described above is that a 'new' instance of expertise is pointed at, namely the occupational health service.⁴⁵ So far the government has not decided on any bill based on either of the two reports mentioned above.

⁴¹ SOU 2000:121 and SOU 2002:5, part 1.

⁴² SOU 2000:72.

⁴³ SOU 1944:15.

⁴⁴ SOU 2000:121, p. 165 f.

⁴⁵ SOU 2002:5, p. 147 f. and p. 172 ff. This standpoint is prepared already in SOU 2000:121, where it is suggested with reference to reports from occupational health services, that 'a sick-listing process that is more goal oriented and adapted to the specific situations replaces the present general, strictly regulated handling of notifications of sickness.' In this process, the formal role of insurance physicians as scrutinizing experts would, according to the official report, disappear (*ibid*, p. 191). (The report adds that there is, of course, still a need for medical expertise within the social insurance administration in the area of insurance medicine.)

3.2.2 Legal sources relevant for defining access to sickness cash benefit

Below follows a description of the *normative* sourceology (using Strömholm's distinction) that according to the prevailing legal dogma is applicable in cases regarding sickness cash benefit. This account of legal sources serves the purpose of identifying and describing the normative framework within which the professional judge argues for decisions made.

The material criteria for the right to sickness cash benefit rest on the two central legal criteria 'sickness' and 'capacity for work'. If the individual is to be entitled to sickness cash benefit, it is not enough that the individual is sick; it is also necessary that the sickness is making her or him incapable of working. The material criteria are stated in chapter 3, § 7 of the National Insurance Act:

Sickness cash benefit is granted in the case of sickness which reduces the insured individual's capacity for work by at least a quarter. At the assessment whether it is a case of sickness or not, labour market circumstances, economic, social and other similar circumstances should not be taken into account. A condition of reduced capacity for work, caused by a sickness for which sickness cash benefit has been granted and which remains after the sickness is over, such a condition is to be categorized as sickness. (Author's translation.)

The way in which the criteria 'sickness' and 'capacity for work' are defined, interpreted and applied determines who is to be covered by the insurance and who is to be left without benefits. These material criteria can be compared to a 'gatekeeper' who has the power to decide who is to be let inside and who has to remain outside a specific scheme.⁴⁶ From this stems their legal significance and weight.

The first part of an assessment whether the insured individual is entitled to sickness cash benefit or not is to decide whether she or he suffers from something, which as regards the sickness insurance legislation can be defined as sickness. The criterion of sickness is not defined in the National Insurance Act, but for an interpretation, recourse has instead been taken to the preparatory work for the Act.⁴⁷ An important part of

⁴⁶ There is, of course, the possibility that you are pushed out of one insurance into another, thus regaining an inside position. There is also the possibility that you do not fit into any of the insurance schemes – but will still be inside the social protection system as a beneficiary of social assistance.

⁴⁷ Westerhäll-Gisselsson, Lotta, 1983.

that work is the Social Services Committee's report from 1944, where it is stated:

When judging whether a case of sickness is present or not, one should first of all be guided by what is regarded as sickness in common usage and in current medical opinion.⁴⁸

The Social Services Committee also stressed the importance of including a consideration of what was reasonable in the application of the law. Altogether, this was for a long time taken to mean that all 'abnormal' bodily and mental conditions, that is, conditions not belonging to the normal life process, are to be regarded as sickness. More exactly, it meant that processes that come with ageing and pregnancy were not, to begin with, regarded as sickness, as they were considered to be part of the normal life process.

Through the statement from the Social Services Committee, cited above, the legal insurance criterion of sickness was, from early on, strongly linked to the medical concept of sickness. The committee's definition of sickness became dynamic through the reference to 'common usage' and 'current medical opinion'. Thus, the legal sickness insurance criterion, as well as the medical concept of sickness, have changed over time. In medicine, for instance, new knowledge about different complex relations between sickness and social conditions has made way for a social medical view of health and illness. The awareness of different relations between sickness and mental conditions had the effect, for the legal sickness insurance criterion, that the dominating position of a strictly biomedical view of what is sick and what is healthy, was challenged, at least for some time.⁴⁹

In the area of sickness insurance legislation, in rules of law as well as in practice, there was during the 1980s a widening of the criterion of sickness, which meant that a number of bodily and mental conditions hitherto regarded as 'normal' came to be looked upon as 'abnormal' and thus classified as sickness. Examples of this development are, for instance, the assessment of various problems during pregnancy, various surgical measures, and also conditions of sorrow and weariness.⁵⁰ As a culmination of this development, a government committee in 1988 proposed a new criterion, which, if fulfilled, was to give the right to sickness cash benefit. It was suggested that in addition to sickness 'other reduction of the phys-

⁴⁸ SOU 1944:15, p. 162. Author's translation.

⁴⁹ Westerhäll, Lotta, 1997, p. 361.

⁵⁰ DS 1994:91, p. 38; SOU 1995:149, p. 215.

ical or mental capacity' should be entered as a material criterion. The committee's motivation was that such an addition was an adaptation of the legislation to the actual situation. Moreover, it marked a transition to a more pronounced social medical view of health and ill-health. However, the proposal was not carried out. A couple of years later, there was instead a strong reaction against it. The changes that have been made as regards the criterion of sickness in the 1990's have gone in a totally opposite direction. By the end of the 1990s, once again, a somatic, more 'strictly medical' sickness concept dominated the discussion on how to regulate access to sickness cash benefit.

On 1 October 1995, an alteration in the National Insurance Act came into force that aimed at 'clarifying the criterion of sickness'.⁵¹ In the bill, it was expressly stated that the change was not to be taken as a widening or a narrowing of the current criterion of sickness.⁵² This is the first time since the Act came into force that the legislator directs the interpretation of the criterion. The alteration took the form of an addition:

At this assessment [of whether sickness is reducing the insured individual's capacity for work], labour market, economic, social and other comparable circumstances should be disregarded.⁵³

According to the government, this clarification was not to be seen as a criticism of the widening of the criterion that had come about through the rulings of courts of law, particularly in the 1980s. But it was a criticism of a shift in the application of the criterion that seemed to have taken place at the administrative level – in the assessment of various 'conditions' that was carried out by the insurance offices, by the physicians and also by the patients.⁵⁴ The government feared that the sickness insurance was turning into a 'general income compensation insurance', which was a development that had to be stopped. It was also an indication that the legislator and the courts of law were the authorities that should be in control of the interpretation of the criterion.

The alteration that was decided in 1995 was jokingly called 'the October Revolution' at the insurance offices. The preparatory work emphasized that there was no intention to change the legal content of the criterion of 'sickness'; still, the interpretation of the alteration as well as its outcome in practice was debated. Some argued that it had indeed become harder to get sick-listed without (strict) medical grounds, others

⁵¹ Prop. 1994/95:147.

⁵² SOU 1995:149, p. 216; Prop. 1994/95:147, p. 21.

⁵³ National Insurance Act, chapter 3, § 7. Author's translation.

⁵⁴ Prop. 1994/95:147, p. 21.

thought that the reform had not had much effect on the practice of the social insurance offices.⁵⁵

In January 1997, there was yet another development as regards the criterion of sickness. This time, focus was on the meaning of 'capacity for work', but the motivation also touched on the criterion of sickness. The main rule now is that capacity for work is to be assessed only on 'strictly medical grounds'.⁵⁶ An assessment of what may be reasonable in view of the circumstances, which was possible before, is still allowed, but only as an exception to the rule. What is interesting here, concerning the criterion of sickness, is that in the preparatory work for the 1997 reform, it was very strongly emphasized that a 'strictly medical' criterion of sickness should be applied. The wording may be taken as a decision in favour of a traditional, biomedical concept thus implying more of a narrowing of the criterion of sickness than in the clarification made in 1995. During the relevant period there were no cases tried in the Supreme Administrative Court that threw light on the room for interpretation as regards the scope of the criterion.

For an insured person to be entitled to sickness cash benefit, not only must she or he be found to be sick, but it must also be stated that the sickness is leading to a reduction in the capacity for work by at least 25 percent. Capacity for work is, if possible, to an even greater extent than sickness, a legal criterion with a content that is hard to pinpoint precisely. However, a basic delimitation used in the social insurance system has been that capacity for work is present when a person can work for her or his own living in spite of being sick.

In the last few years, two important problem areas as regards the interpretation of the criterion of capacity for work have been: 1) What work is the capacity to be assessed against? The work at the time of falling ill? Some corresponding work (with respect to wages, qualifications, etc.)? Any other work that the insured person might be expected to get? Or any other job that is normally available on the labour market?, and 2) How close should the connection be between sickness and an assessment of the capacity for work? Which possibilities are there to include other circumstances in the assessment?

In the 1980s, the capacity for work was set against all normally available jobs on the labour market. The assessment was not based on whether

⁵⁵ Some varying voices on the theme of 'concentration' appear in an article written by Lindén, Eva, 1998. One of the conclusions drawn in a 1998 report from the National Social Insurance Board is that the reforms in 1995 and 1997 indeed had a tightening effect on the application of rules made by social insurance offices. See RFV Anser 1998:5.

⁵⁶ Prop. 1996/97:28.

it was actually possible to get an income, but on the capacity to hold a job which could give an income.⁵⁷

In the 1990s there have been several attempts to clarify the criterion to be used at the assessment of capacity for work. The first alteration, which came into force on January 1, 1992, involved an increasing recourse to rehabilitation from the side of the state. The idea was that an intensified use of rehabilitation would stop people from remaining in long-term sickness, which was assumed to carry an added risk of not being able to re-enter the labour market at all. In practice, the reform meant that the insured person, who could not go back to her or his previous job, was to be given other opportunities, first of all by her or his employer. A result of the change was that the employer's responsibility for rehabilitation measures increased. The change comprised clearer guidelines concerning the assessment of the capacity for work among those who suffered from long-term sickness and who were considered to be able to benefit from rehabilitation. Moreover, the change led to an increased emphasis on the work-line in the sickness insurance, a tendency that became progressively more marked some years later.

The regulations about capacity for work in cases of long-term sickness in the National Insurance Act, chapter 3, § 8, were given the following wording:

If the sickness is deemed to last long or if the insured person cannot be expected to be able to return to his work, the insurance office is to consider whether – after a rehabilitation measure according to chapter 22, § 7 – the insured person can support himself through work if working conditions are changed or some other suitable work can be obtained. Then it should be taken into consideration what is reasonable to demand with respect to the sickness, to education and earlier work, as well as living conditions and other comparable circumstances. (Author's translation.)

If the change is linked to the two problem areas pointed out above (1. What work is the capacity for work to be assessed against? 2. How close should the connection be to the criterion of sickness?), then it is clear that capacity for work should be related to 'other suitable work'. In the special motivation for the alteration, it is stated that the meaning of 'suitable work' is determined by the list of circumstances which should be taken into consideration at the assessment.⁵⁸ The scope of these circumstances shows that the relation between sickness and capacity for work is far from the only matter that should be included in the assessment of the insured person's capacity for work.

⁵⁷ SOU 1995:149, p. 218.

⁵⁸ Prop. 1990/91:141, p. 85.

It was still not clear how the assessment of capacity for work should be done as regards those who had been ill for a long period of time, who could not return to their earlier work, and who could not get other work with the same employer without recourse to rehabilitation, but who could get another job on the labour market without any rehabilitation measures. The law expressed what the capacity for work should be set against in a decision on whether the insured person could be expected to return to her or his earlier work. Reversibly, the law was interpreted as saying that if the insured person could not be expected to return to his earlier work, his or her capacity for work was to be tested against other types of work.⁵⁹

On October 1, 1995, there was yet another alteration. Until then, capacity for work was assessed differently depending on the expected length of the sickness period. For short sickness periods, the capacity for work was set against the insured person's regular work, but in the case of long-term sickness, the scope was widened to include more types of work on the labour market. In 1995, this distinction was abolished and from then on, the capacity for work should in the first place be related to the insured person's regular work, irrespective of the length of the sickness period. If the insured person could not return to her or his earlier work, the capacity for work was to be related to other available jobs. If she or he had no capacity for any work, various rehabilitation measures were to be considered.⁶⁰

In connection with the changes in 1995, the disposition of chapter 3 in the National Insurance Act was altered in a way that obscured its contents. One reading of the law gave an opening for an unintended possibility to make rehabilitation measures more generously available for the insured person who could not return to his earlier work. Therefore, the parliamentary Social Insurance Committee made a clarification, where it was emphasized that before rehabilitation measures were applied, an attempt should be made to 'directly place the insured person in another job on the open labour market'.⁶¹

The latest change as regards the interpretation of the criterion of capacity for work came into force on January 1, 1997. A 'step-by-step' model was introduced, which increases the demands on the individual.⁶² In the report from the Social Insurance Committee, it was stressed that

⁵⁹ See, for example, SOU 1995:149, p. 218 f.

⁶⁰ SOU 1995:149, p. 217.

⁶¹ SfU10 1994/95, p. 32.

⁶² The step-by-step model is a model with seven steps for making assessments of capacity for work. It is constructed as seven questions that, depending on the answer (yes or no), will lead to a decision regarding the individual's right to income compensation from

the proposed alteration was part of the aim to 'concentrate' the social insurance. The process was begun in 1995, with the 'clarified' criterion of sickness commented on above. The committee maintained a criterion of sickness that rested on more strictly medical grounds, and from this it could be argued that also the criterion of capacity for work was narrowed. It is incapacity for work caused by sickness, as assessed on strictly medical grounds, which is to be compensated through the sickness insurance. Incapacity for work from other causes does not entitle a person to sickness cash benefit.⁶³

The step-by-step model was described as being, to a large extent, a clarification of the legislation that was already in force, but it was also interpreted as a tightening of the insurance administration, particularly through the introduction of what is called 'step 5'. This step implies that if the insured person, in spite of her or his sickness, can manage to do a job that is normally available on the labour market, she or he is not entitled to sickness cash benefit.⁶⁴

In the preparatory work, the notion of 'work normally available on the labour market' was discussed at some length. It was claimed that capacity for work must be assessed in relation to a certain job or to certain work assignments, but also that the insured person should be assessed as having capacity for work even if no work was directly available to him or her. In the government bill, the meaning of 'work normally available on the labour market' was discussed as follows:

The capacity for work of the insured person, in spite of sickness, could be assessed in relation to every type of work normally available on the labour market. However, the report states that such an assessment would go too far and maintains that the range of work to be related to the assessment of the person's capacity for work should be limited to what is practical and rational. [...]

the insurance. The seven steps are as follows: 1) Can the insured carry out his or her regular work after necessary treatment and convalescence? 2) Can the insured carry out his or her work after some rehabilitation or after adaptations of the working conditions? 3) Can the insured carry out or be given other types of work by his or her employer without recourse to special measures? 4) Can the insured be given other types of work by his or her employer after some training, adaptation of working conditions or similar rehabilitation measures? 5) Can the insured carry out other types of work normally found on the labour market, without recourse to special measures? 6) Can the insured carry out other types of work normally found on the labour market, after some rehabilitation measures like training or re-education? 7) Is the insured incapable of working permanently or for a considerable length of time? Prop. 1996/97:28, pp. 18–21.

⁶³ For a different interpretation, see Westerhäll, Lotta, 1997, pp. 356 ff. See also p. 114 below.

⁶⁴ Prop. 1996/97:28, p. 20.

In the individual case, the assessment must start with the sickness of the insured. What is decisive is which sickness is present and the way in which this sickness reduces the person's capacity for work. [...] When the sickness and its consequences have been confirmed, the decision-maker should establish whether the remaining capacity for work can be used by the insured to earn a living in work normally available on the labour market.

The government maintains ... that a wider assessment, that is, one which includes more types of work than normally available on the labour market, may lead to consequences that cannot be regarded as acceptable. If the sickness results in a condition where the insured person solely can manage a specific type of work that is available on the labour market only in a very limited degree, it is not acceptable to assess his or her capacity for work in relation to such work, unless he or she really is offered this work.⁶⁵

The above reasoning around the notion of 'work normally available on the labour market' is concluded with the remark that capacity for work should be assessed in relation to the national labour market: 'the assessment should not be limited only to the local or regional labour market.' Moreover, it is specifically added that in this context, it must be pointed out that in certain cases it is possible to take into account other factors than strictly medical ones.

The main rule, according to the legislation in force, is that the incapacity for work must be caused by sickness and the assessment of incapacity for work should be made on medical grounds alone. When sickness has been established, circumstances like age, living conditions, education, and work experience can also be included but only as an exception to the main rule.⁶⁶

The very idea behind the changes described above, as formulated in the preparatory work, was to accomplish a concentration of social insur-

⁶⁵ Prop. 1996/97:28, p. 17 f. Author's translation.

⁶⁶ In December 2002 the Supreme Administrative Court tried a case in which the issue at stake concerned the application of the exception clause, a clause that allows for an inclusion also of non-medical facts in the assessment of whether an individual has the right to sickness cash benefit. The case concerned a woman with an immigrant experience working with cleaning. Her physical condition (pain in back, in knees and a foot) totally reduced her capacity for work with cleaning. In addition to her physical problems she had insufficient education, insufficient language skills, and very limited work experience. This situation, as a whole, was according to the lower courts sufficient reasons to apply the exception clause. The Supreme Administrative Court disagreed, as, according to preparatory work, the age criteria should be given special weight in the use of the exception clause. As the woman was only 46 years old at the time of the decision at the social insurance office this, given the other circumstances of the case, was not sufficient to make the exception clause applicable. See RR case number 5606-1999, 30 December 2002.

ance.⁶⁷ The clearly stated motivation is that the persons in question should be referred to the authority that can help them most adequately. If the incapacity for work is not caused by sickness, as defined by medical criteria, the individual should be told to turn to the labour market authorities or to the social services.

To summarize: If relevant legal sources are studied within the field of determining access to sickness cash benefit, the following can be concluded:

Law: In 1995 and 1997, alterations were made in the National Insurance Act, chapter 3, § 7, adding 'guidelines' on how the legal criteria of 'sickness' and 'capacity for work' should be assessed. Thus, as regards the criterion of sickness, a sentence was added in which a number of conditions were listed as examples of individual conditions not to be assessed as sickness according to law. As regards the criterion of capacity for work, a 'step-by-step model' was introduced in order to facilitate assessments. The change related to the criterion of sickness was described as a 'clarification'; the change related to the criterion of capacity for work was described as an implementation of already existing practices.

Preparatory work: The preparatory work conceptualizes the ideas and values contained in the policy of concentration. The key words are: increased efficiency, increased emphasis on the work-line and increased recourse to arguments based on medical science.

Legal practice: The Supreme Administrative Court received a fairly large number of complaints related to sickness insurance, but has stayed silent on the issue of how to interpret the legal criteria 'sickness' and 'capacity for work'. The complaints have not been granted leave to appeal. The court has, so far, not made the assessment that this is an issue on which it should take a stand.⁶⁸

Legal principles: Apart from constitutive values related to the principle of 'legal certainty', legal principles relevant for administrative law and/or social law are, for instance: the principle of public openness, the principle of leg-

⁶⁷ See for instance: SfU6 1996/97, p. 9. These arguments were questioned in the debate that followed. For an outline of the different arguments related to the concentration policy, see Chapter 6, below.

⁶⁸ Since July 1995 (when the National Social Insurance Supreme Court ceased to exist) the Supreme Administrative Court received an increasing number of complaints related to sickness insurance and in an increasingly large part of these cases the complaint was directed at the decisions not to grant leave to appeal made by the administrative courts of appeal. In total 341 'sickness insurance complaints' were received by the Supreme Administrative Court during 1995–1999 and, of these, four cases were granted leave to appeal. None of the cases tried by the Court was related to the kind of issues dealt with in the present work.

ality, the principle of objectivity and equality, the right to insight of parties concerned, integrity and freedom of choice, and the principle of autonomy.

Doctrine: Westerhäll has taken a critical position towards the concentration policy arguing that, although (or because) the implemented reforms were far from lucid, the most reasonable interpretation is that probably no change was intended. Representatives of social law doctrine, taking an interest in this issue, have not been numerous and the opinion of Westerhäll has not been challenged by other representatives of legal science.

When the courts determine cases regarding access to sickness cash benefit by making assessments of 'sickness' and 'capacity for work', the dogmatic knowledge linked to their profession leads them to make decisions that could be argued for within the framework of these legal sources.⁶⁹

It was stated above that the identification of legal sources is just a first step in the dogmatic understanding of a 'legal sourceology'. The second step involves methods used by the courts to interpret and weigh these different sources. In the texts produced by the commentators of social law, it is hard to find confirmation for any specific 'social law' method related to these issues. In general, it may be stated that for judgements delivered by public (administrative) courts, the normative description of the Swedish tradition is that: Law is the obvious primary legal source, preparatory work is used for guidance, legal practice is influential if delivered by supreme courts and well argued, legal principles are used for arguments on an 'essential level' and reference to doctrine (or other experts) is made if needed.⁷⁰

⁶⁹ According to the investigation of legal cases that will be accounted for in Chapters 4 and 5, the legal sources directly referred to in the judgements delivered by administrative courts are: law (in 56 percent of the cases from 1993 and in 44 percent of the cases from 1999), preparatory work (in 1 percent of the cases from 1993 and in 14 percent of the cases from 1999). Extensive references to relevant law are made in no cases from 1993 and in 3 percent of the cases from 1999. In 3 percent of the cases from 1993, the courts make reference to the recommendations from the National Social Insurance Board; in 1999, the comparable figure is 5 percent.

⁷⁰ Previously in this chapter, I have referred to Strömholm's distinction between a descriptive and a normative approach when describing a legal sourceology. What is described above is an account of how the prevailing legal sourceology looks according to a mainstream dogmatic position. Compared to Strömholm's descriptive definition of legal sources (describing the factors that are actually reflected upon when law is applied), the sourceology above includes only sources that are considered as 'legally relevant', and thus sources that are accepted as such by members of the legal community. The distinction made between a 'context of discovery' and a 'context of justification' (described in Chapter 2) overlaps the above distinction between a descriptive and a normative sourceology. The normative sourceology is the one that is used in a context of justification; the descriptive sourceology is used in a context of discovery.

It is a characteristic of law, compared to other social science disciplines, that it is intrinsically connected with the very concrete, and unavoidable, activity of making decisions.⁷¹ Courts have to deliver judgements. In an endless number of very specific cases, courts have to reach conclusions; they cannot choose to opt out. Above, the importance of legal method has been emphasized as a key factor providing the legal system with a capacity to mediate social conflicts in modern societies. When it comes to the distribution of sickness cash benefit, legal method – concretized in the specific sourceology described above – allows for judges to argue for their decisions within the flexible framework provided by the established methodology for the interpretation of law.

3.3 The administration of justice in administrative courts

3.3.1 Introduction

As a main rule, the structure of public administration in Sweden is built around a national central administrative authority that supervises regional and sometimes local administrative offices. Together, these institutions constitute a ‘civil service department’. The administration has an obligation to follow the government, but they are also independent in the sense that state institutions like the government, the parliament or an individual minister cannot decide how a specific issue should be dealt with by the administrative authority. Nor can the central administrative authority decide how regional offices should decide in individual cases.⁷² The National Social Insurance Board is the central administrative authority in issues regarding social insurance; the regional and local administration is constituted by social insurance offices.⁷³ In Sweden a fairly

⁷¹ This theme has been developed by Ketscher, Kirsten and Steen Rønsholdt, 1987 [1997], p. 19 f.

⁷² Instrument of Government, chapter 11, §§ 6 and 7.

⁷³ The definition of the legal status of the social insurance offices is important in a further discussion of their responsibilities and their relation to the insured individuals. In the legal systematization, the division between public and private is used to separate laws that involve the public sector (Public Law) and laws that involve private actors (Civil Law). Private actors can be individuals but also companies and other sorts of associations. From a legal perspective, this identification of whether something is a private or a public entity is important for the set of rules that will be applicable to distinguish rights, duties and obligations. The institution of social insurance offices muddles this clear-cut way of creating order. This is clear from our description above. The social insurance offices are formally independent civil law organizations but still defined as ‘specific public law

strong and independent administration is used to protect the interests of the individual, whereas the role of courts in this process has traditionally been relatively weaker. Still, in Swedish administrative courts, both the appropriateness and the lawfulness of decisions made by administrative authorities are tried.⁷⁴

The Swedish Constitution is not based on the principle of division of power.⁷⁵ Instead, the leading principle is that 'all public power emanates from the people', as is stated in the very first paragraph of the Constitution, and thus, at least in theory, the Swedish parliament (as elected by the people in free and democratic elections) is the body from which all state authority stems.⁷⁶ It has been argued that Sweden has a weak constitutional tradition in a legal perspective, in the sense that the constitution is rarely used in legal argumentation in the courts.⁷⁷ In the Swedish welfare state, given that the constitutional tradition is weak (in the sense described above), the protection not only of 'formal', but also of 'substantial' legal certainty, in statutory, procedural and other legal acts and practices becomes essential for the protection of the individual against the arbitrary use of power by state authorities.⁷⁸

entities'. To understand the role of the National Social Insurance Board as well as the role of the social insurance offices, it is important to have this background. These are, or are to be considered as, entities of administrative authority. As such they are obliged to follow the government policies. They should administer the laws in a fashion that pays due attention to the intentions of the government.

⁷⁴ In comparison, both in the continental and in the Anglo-Saxon system, courts will, as a main rule, not try the appropriateness of decisions made by the administrative authorities, but cases will be tried only regarding their lawfulness. Ragnemalm, Hans, 1992, p. 101.

⁷⁵ Instrument of Government, chapter 1, § 1. 'The Swedish Constitution' is not one single statute; instead, four different fundamental acts together constitute the Constitution. The four acts are: the Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Freedom of Speech Act.

⁷⁶ For a discussion on how the guiding principle of the constitution shifted from 'separation of power' towards a principle of 'separation of functions', see Ragnemalm, Hans, 1991, pp. 16 ff.

⁷⁷ Nergelius, Joakim, 2000, p. 16.

⁷⁸ Gustafsson introduces the concept of 'substantial legal certainty' as a legal-strategic tool 'for strengthening social rights under the regime of a neo-liberal market economy and the dismantling of the welfare security systems'. While the concept of *formal* legal certainty is concerned with legal-technical issues, and the concept of *contextual* legal certainty focuses on ethical aspects, the concept of *substantial* legal certainty 'focuses on the social consequence and social justification of legal decisions' and thus clarifies the social responsibilities of the members of the legal community. See Gustafsson, Håkan, 2002, p. 444 ff. (English summary).

Going back as far as the 16th century, no difference was made in Sweden between the administration of justice and public administration. Decisions in these fields used similar procedures and the same forum. In the 17th century, under German influence, the procedure started to change and public administration and the administration of justice, were increasingly treated separately. In the same period, public administration started to split into two different activities: 1) the administration per se and 2) the administration of justice in matters of an administrative character. Both these activities were dealt with within the sphere of government services. Thus, two parallel systems for dealing with the administration of justice began to evolve: one public court system dealing with civil and criminal law, and another court system dealing with administrative law.⁷⁹

Looking specifically at the procedural rules, one can see that they were similar and equivalent in the public courts and in the administrative courts in their early history. One important difference was that the administrative courts used a written procedure (influenced by the procedures in the higher (appeal) instances in the public court system). In the middle of the 18th century, the split between the two systems widened as the procedural rules for the public court system became more elaborated. The division was emphasized in a reform in 1948, a reform that further refined the procedures of the public court system. In 1971, the legal procedure to be used in the administrative courts was regulated in a specific act, the Act of Procedures for Administrative Courts. Until 1971, the procedural rules of the public court system were used as a source of influence for the procedure of the administrative courts.⁸⁰ It was not until the 1990s that the administrative courts got a three instance institutional structure parallel to the one of the public courts.

Thus, there are, and have been, similarities between the two systems, but also some major differences. What is argued now is that some of these differences are diminishing and that the two systems are again approaching each other.⁸¹

3.3.2 An outline of the decision-making process

The way in which decisions regarding sickness cash benefit can be appealed by the insured in a procedure involving responsible authorities, and courts, has changed drastically since the sickness insurance became

⁷⁹ SOU 1991:106, p. 461.

⁸⁰ Ragnemalm, Hans, 1992, p. 25 ff.

⁸¹ SOU 1991:106, pp. 461 ff. See also Lavin, Rune, 2000/01, pp. 93–110.

part of the public insurance in 1962. In general, one can detect a shift from a decision-making process dominated by the institutions responsible for public administration, to a situation where the institutions responsible for the administration of justice – the administrative courts – play a more important role. There has also been a development from specialized courts to public administrative courts. Moreover there has been an increased emphasis on formal structures safeguarding legal certainty in the interrelations between individuals and the state. One should keep in mind, however, that only a small percent of cases dealing with social insurance issues are taken to court.⁸² Thus, in quantitative terms, decision-making regarding the distribution of sickness cash benefit is, indeed, still a matter mainly for the institutions responsible for public administration.⁸³

To get a first image of the developments of the decision-making process regarding sickness cash benefit, figure 3:1 presents a rough overview of some major changes and the years in which they were implemented. The figure provides information on the different institutions involved in the determination of who is and who is not eligible for sickness cash benefit, and how they have changed over the years.

As this chapter proceeds, the institutional setting will be described, as well as the procedural rules that surround the decisions provided by the administrative courts. In this process, the text will sometimes be on a general level, discussing the administrative process as such, and sometimes the specifics of distribution of sickness cash benefit will be in focus.

3.3.3 Characteristics of the procedure in administrative courts

The procedural rules regulating the court procedure of the administrative courts are laid down in the Act of Procedures for Administrative Courts. Rules concerning the administrative courts are laid down in another act called The Administrative Court Act. A close study of these

⁸² In Sfu 1981/82:7, there is an estimated number of 15,000 decisions per year, which is thought to be a reasonable estimation of decisions made by the social insurance offices and which individuals can take to court. According to the National Social Insurance Board the total number of social insurance cases received by the county administrative courts in 2002 was 15,500 and this seems to be a fairly consistent frequency. In 2002, 1,563 sickness insurance cases were appealed to the county administrative courts. During the same year 862,000 individuals were granted sickness cash benefit by the social insurance office. See RFV, Socialförsäkringen. Årsredovisning 2002, pp. 29 and 76.

⁸³ Focusing on content rather than numbers, it is important to keep in mind that the administrative bodies have a responsibility to keep themselves informed on the developments of legal practice. To this end, the National Social Insurance Board, publishes case law reports with commentaries.

Figure 3:1. *The different administrative and legal institutions involved in the decision-making process regarding access to sickness cash benefit during the period 1962–2002*

PUBLIC ADMINISTRATION				ADMINISTRATION OF JUSTICE		
Year	First decision	Self-correction of first decision	Re-evaluation	First appeal	Second appeal	Third appeal
1962 ^I	Local Social Insurance Office	National Social Insurance Board (Ex officio)	National Social Insurance Board	Social Insurance Court		
1979 ^{II}	Local Social Insurance Office	Local Social Insurance Office	Local Social Insurance Office (limited scope of re-evaluation)	Social Insurance Court of Appeal	National Social Insurance Supreme Court	
1982 ^{III}	Local Social Insurance Office	Local Social Insurance Office	Local Social Insurance Office Senior officer (increased scope of re-evaluation)	Social Insurance Court of Appeal	National Social Insurance Supreme Court	
1988 ^{IV}	Local Social Insurance Office	Local Social Insurance Office	Insurance Board at Local Social Insurance Office	Social Insurance Court of Appeal	National Social Insurance Supreme Court	
1991/92 ^V	Local Social Insurance Office	Local Social Insurance Office	Insurance Board at Local Social Insurance Office	County Administrative Court	Administrative Court of Appeal	National Social Insurance Supreme Court
1995 ^{VI}	Local Social Insurance Office	Local Social Insurance Office	Insurance Board at Local Social Insurance Office	County Administrative Court	Administrative Court of Appeal	Supreme Administrative Court
1998 ^{VII}	Local Social Insurance Office	Local Social Insurance Office	Local Social Insurance Office	County Administrative Court	Administrative Court of Appeal	Supreme Administrative Court
2002	Local Social Insurance Office	Local Social Insurance Office	Local Social Insurance Office	County Administrative Court	Administrative Court of Appeal	Supreme Administrative Court

Figure 3:1: The table, if read from left to right, will give information on which institutions are involved in the decision-making process during different years. Comments are provided below.

^I On May 25, 1962, the National Insurance Act is implemented.

^{II} On January 1, 1979, the social insurance courts of appeal were established and decisions made by the local social insurance offices were appealed to these courts and not to the National Social Insurance Board. Previous to 1979, re-evaluations (in some form) had been performed, not only by the National Social Insurance Board, but also by local social insurance offices to a relatively large degree, although practice differed between different offices. Another change introduced at this point was an 'optional' two-party procedure. Thus, at this point, the National Social Insurance Board could choose to speak for the public interest in court (but it was not obligatory). See Ds 1998:42, p. 50. See also Prop. 1977/78:20, p. 55 f.

^{III} In 1982, the institute of 'leave to appeal' was introduced in the National Social Insurance Supreme Court. Also, re-evaluations of first decisions should from now on be made at the local social insurance office and not by the National Social Insurance Board. Re-evaluations were performed either by the board at the local social insurance office or by officials working there, depending on type of matter. At each local social insurance office there is an elected committee that includes members appointed by the government and by the county councils. There are also boards connected to the local social insurance offices, boards that are directly involved in the decision-making process in individual cases. All cases regarding sickness cash benefit that are going to court have first been in the process of re-evaluation at the social insurance office. An important argument for creating an increased scope for re-evaluations in 1982 was to lessen the workload of the courts.

^{IV} Since January 1, 1988, the re-evaluation performed by the local social insurance office was to be made by the Insurance Board at the office. See Prop. 1985/86:73.

^V On July 1, 1991, the county administrative courts became first instance courts in social insurance cases. The social insurance courts of appeal were closed, and in July 1992, the remaining cases were transferred to the administrative courts of appeal.

^{VI} On April 1, 1995, the institute of leave to appeal was introduced in the administrative courts of appeal for social insurance cases. (For some other types of cases, leave to appeal was introduced already in October 1994. On July 1, 1995, the National Social Insurance Supreme Court ceased to exist and the remaining case load was taken over by the Supreme Administrative Court.

^{VII} Until July 1, 1998, the Insurance Board at the local social insurance office was handling re-evaluations of decisions made by the officials in a broader category of cases. Initial decisions, regarding sickness cash benefit, were made by the officials at the local social insurance offices, but re-evaluations were made by the Insurance Board. After 1998, first decisions, as well as re-evaluations, are made by officials working at the social insurance offices (second decisions are taken by senior officers). Thus, the Insurance Boards are no longer involved in matters that concern sickness cash benefit. The argument for this change was a proposal made in an official report to introduce an automatic transfer that would turn sickness cash benefit into temporary disability pensions after one year. See SOU 1997:166. As the transfer was to be automatic, the government saw no reason for the Insurance Boards to be involved in this kind of cases. As no one would stay for more than one year on sickness cash benefit, it was argued that the legal rights of the individual would not be harmed by the reform. Prop. 1997/98:41 p. 84. It may be added that by the end of year 2002 this proposed one-year limit in sickness insurance has not yet been introduced.

two acts is thus very informative for the purpose of getting a picture of how formal court proceedings that concern sickness cash benefit are structured.

What kind of interests are at stake in the cases dealt with in the administrative courts? One way to answer this question is to describe the administrative procedure as a balancing act weighing the interests of the individual against the interests of the public.⁸⁴ Sometimes, the administrative procedure is said to balance the value of legal certainty (protecting the interests of the individual) and the value of efficiency (protecting the interests of the state).⁸⁵ It can be of explanatory value to keep this balancing in mind as the specifics of the administrative procedure are studied.

There are some areas where it is interesting to make a comparison between the court procedure in the public courts and the one in the administrative courts, and where such an exercise will be rewarding in terms of a deepened understanding of the specifics of the administrative procedure:⁸⁶

- One-party or two-party court procedure
- The application of the negotiation principle or the investigation principle
- Written or oral proceedings

Below these procedural characteristics are discussed and analysed in relation to how values connected to legal certainty are protected in the administrative court procedure.

The question of one-party or two-party court procedure was in focus for government policies during the 1990s and new reforms were implemented.⁸⁷ The one-party procedure used to be a landmark that showed the different characteristics of the procedural forms of public and administrative courts. In a one-party procedure, the court will have the double role of representing the public interest as well as forming a judgement. This kind of procedure is hard to understand as legitimate, unless elaborating with a conception that there is no genuine conflict of interests at hand to be solved by the courts. Thus, the courts are responsible for making sure that all relevant facts are available, and when they have done this,

⁸⁴ Lavin, Rune, 1989/90, p. 73 f.

⁸⁵ Ragnemalm, Hans, 1992.

⁸⁶ These three areas are (among others) encountered by Lavin in his comparison of the court procedure in public and administrative courts, see Lavin, Rune, 1989/90, p. 72.

⁸⁷ See SOU 1991:106.

there is no room for legal argumentation. The idea is that the courts will, on the basis of objective facts, make a legally correct decision.

In other words, the trial is a sort of inquisitorial procedure. For the individual party, it is very difficult to safeguard his interests in this form of legal proceedings. In his pleading, he must convince the court that the deciding public authority was wrong. It is no easy task to make the public representatives change their opinion ... The basic idea is that the individual should be able to trust that the administrative court makes a full and objective investigation of the case. Of course, it may be hard to convince the individual that such an investigation is really carried out, considering the fact that public interests also must be served within the frame of the proceedings.⁸⁸

In May 1996, a reform was launched that introduced an obligatory two-party procedure in the public administrative courts.⁸⁹ The public interest was from now on to be represented by the authority that made the first decision in the case that was up for trial. Before the reform in 1996, the situation had been mixed and thus there were a few types of cases where the administrative procedure was already performed as a two-party procedure, although the main rule was different. In social insurance cases, the situation was that the National Social Insurance Board could act as a party in a case in the Insurance Court, if it chose to, and the National Social Insurance Board was always a party in a case tried by the Supreme Insurance Court.⁹⁰ The main reason for the reform was to create a situation in which the administrative authorities could appeal against decisions that had been made by the lower court instances (the local administrative courts and the Courts Administrative of Appeal). Before the reform, the administrative authorities could not do this, as they were not formally a party in the cases tried. Those objecting to the reform argued that the introduction of a two-party system in the administrative procedure would also influence the courts' ambitions to investigate the cases fully. Thus, the courts would (although no legal change was made in this direction) in reality come to use more of the 'negotiation principle' and less of the 'investigation principle' (see below) once the procedure changed character. Therefore, the critics argued, a reform of this kind had to be preceded by changes that increased the possibility for the individual to get legal aid in cases concerning administrative law.⁹¹

⁸⁸ Lavin, Rune, 1989/90, p. 76. Author's translation.

⁸⁹ Prop 1995/96:22, and (revised by) JuU07 1995/96.

⁹⁰ Lavin, Rune, 1989/90, p. 75.

⁹¹ Motion 1995/96: Sf 20, and Motion 1995/96: Ju5. See also Westerhäll, Lotta, 2002a, p.196. Westerhäll maintains that the reform mainly served public interest as the courts increasingly came to apply the negotiation principle while individuals gained no increased access to legal aid.

The application of the 'negotiation principle' or the 'investigation principle' in the procedure. As a main rule, the 'investigation principle' has been used in the administrative procedure. In contrast to the 'negotiation principle', the 'investigation principle' means that the court is responsible for making sure that all the relevant information regarding the case is available in order to make a fair judgement. The administrative courts have predominantly worked in a way that has made the investigation principle very important, although none of the two principles is used in its extreme form:

Nor is the investigation principle fully applied in an administrative case. Normally, the initiative of the court as regards investigation is considered to take the form of an instruction to a party that his claim needs additional material. In certain cases, it is also felt that the responsibility for the investigation should be shared so that the party or parties provide some of the evidence. When the procedure is a two-party process, the court is even considered to be able to carry out a contradictorial procedure. [...] However, in particular when an individual party has no legal representative in a one party procedure and when it appears that the party has difficulties in securing his rights, the procedure should be actively conducted.⁹²

There is a tendency in the literature to describe the formal aspect of the 'investigation principle'; more rarely is there a description of how this principle actually works when cases are tried in court. In another article Lavin has described the actual performance by the courts when applying the 'investigation principle' in a harsh way:

In practice, the responsibility for the investigation mainly means that the court gives instructions as to how a claim might be supplemented in a certain case. The individual must in any circumstance try to convince the court, through arguments and evidence, that the authority made the wrong decision. Many times this is a very difficult task for an individual, who most often has no qualified legal assistance.⁹³

The above-mentioned reform, changing the traditional administrative procedure from a one-party procedure to an obligatory two-party procedure, gave rise to a discussion in the preparatory work on whether or not such a change would also influence the court's attitude towards applying a 'negotiation principle' or an 'investigation principle'. The reform was not meant to include this kind of change, and it was emphasized, as an argument towards the critics, that the law prescribed

⁹² Lavin, Rune, 1989/90, p. 77. Author's translation.

⁹³ Lavin, Rune, 1992, p. 455. Author's translation.

that the court had a responsibility to make sure that the case was fully investigated.⁹⁴ It is noteworthy that in 1996, in a comment on a proposed new Legal Aid Act, the Legal Council gave voice to the following opinion: 'It is true that the introduction of a two-party procedure has not brought about a change in the courts' responsibility to investigate, regulated in law, but still it seems evident that as a consequence the court procedure will be characterized by the negotiation principle more than by the investigation principle.'⁹⁵

The administrative procedure is predominantly carried out in writing. If the individual party of a case tried by the public administrative courts demands an oral procedure and it is not unnecessary or there are specific reasons that speak against such a demand, it is clearly stated that oral negotiations are to be held in the first two instances.⁹⁶ The right to be heard in oral hearings is one of those repeated in international conventions on human rights. The administration of justice in the administrative courts has been an area where Sweden has had a weak spot, although the reforms of the 1990s have improved the situation. Still, it is likely that an increase of oral hearings in the lower instances would further improve the quality of the procedure in the administrative courts.⁹⁷

In order to get an overview of the basic framework structuring the work of the administrative courts, the following table has been constructed. It contains information on how the different courts are composed when making decisions related to the distribution of sickness cash benefit.

⁹⁴ 'The court must see to it that cases are investigated to the extent that the matter involved demands. If necessary, the court should point out what ought to be added to the investigation. Superfluous investigation material may be rejected'. Act of Procedures for Administrative Courts, § 8, compare with the similar wording in the Code of Judicial Procedure chapter 43, § 4, 'The court must also see to it that the case is investigated according to what the matter requires and that superfluous material is not included in the case. Through questions and comments the court should try to remedy what is unclear and incomplete in the statements made'. Author's translation.

⁹⁵ Prop 1996/97:9, Appendix 1, see comments made on § 7 by the Legal Council.

⁹⁶ Act of Procedures for Administrative Courts § 9.

⁹⁷ See Lavin, Rune, 1989/90, pp. 86 ff.

Figure 3:2. *Basic framework of the administrative courts*

	Local Administrative Court	Administrative Court of Appeal	Supreme Administrative Court
Number of judges ⁹⁸	1 (2)	3 (4)	4 (5)
Number of lay assessors ⁹⁹	3 (4)	2 (3)	0
Leave to appeal ¹⁰⁰	No	Yes	Yes
Who makes decisions on leave to appeal ¹⁰¹	Not relevant	2 judges (if they agree), otherwise 3 judges.	1 (3) judges
Grounds to give leave to appeal ¹⁰²	Not relevant	1. If it is important for guiding the application of law that the appeal is tried in a higher court. 2. If there is reason to change the decision made by the local administrative court. 3. If there are other extraordinary reasons to try the appeal.	1. If it is important for guiding the application of law that the appeal is tried by the Supreme Administrative Court. 2. If there are extraordinary reasons for such a trial as that there are grounds for a new trial or that the outcome in the administrative court of appeal was obviously due to a severe oversight or a severe error.
Written/oral proceedings ¹⁰³	Written as main rule.	Written as main rule.	Written as main rule.
Number of courts in the country	23	4	1

⁹⁸ The numbers in the table indicate the number of judges that is demanded in order for the court to be competent to form judgments, but also (the numbers in parenthesis) the maximum number of judges allowed to participate. In the material of legal cases analyzed for the present work, there were no cases that did not keep within the ‘normal’ or minimum requirement. See the Administrative Court Act § 4a (as regards the Supreme Administrative Court), § 12 (as regards the administrative courts of appeal) and § 17 (as regards the county administrative courts).

⁹⁹ The numbers in the table indicate the number of lay assessors that is demanded in order for the court to be competent to form judgments, but also (the numbers in parenthesis) the maximum number of lay assessors allowed to participate. In the material of legal cases analyzed for the present work there were no cases that did not keep within the ‘normal’ or minimum requirement. See the Administrative Court Act § 12 (as regards the administrative courts of appeal) and § 17 (as regards the county administrative courts).

¹⁰⁰ Act of Procedures for Administrative Courts § 34a (as regards administrative courts of appeal) and § 35 (as regards the Supreme Administrative Court). It should be noted that as regards the administrative courts of appeal, not all types of cases need a leave to appeal; still, social insurance cases are among the types of cases that do. See also DV-rapport 2002:4.

¹⁰¹ The Administrative Court Act § 4a (as regards the Supreme Administrative Court) and § 12 (as regards the administrative courts of appeal). In the specific regulation for proceedings in the administrative courts of appeal, it is specified that when making decisions

Lay assessors in the local administrative courts and in the administrative courts of appeal are appointed through political elections. The appointments are proportionate to the results of the national and municipal elections taking place every fourth year and distributed on a political party basis. It is also recommended that when the political parties select representatives to act as lay assessors, this should be done in a way that favours a varied composition considering age, sex and occupation. The lay assessors must be adult Swedish citizens and registered in the county or municipality where the relevant court is situated.

3.3.4 Legal aid

It is difficult to get legal aid in administrative law cases.¹⁰⁴ In preparatory work and official argumentation, the reason given for this is that the prevailing investigation principle should be applied by the administrative courts and, therefore, the courts are responsible for safeguarding the interests of the individual. This kind of argument is forwarded in combination with a description of the relevant case law as legally uncomplicated: 'the nature of the administrative law cases and the fact that these cases generally concern down-to-earth circumstances, in which the individuals can understand the points at issue in a satisfactory manner, has led to a situation where legal processing only in exceptional cases draws costs for the individual.'¹⁰⁵ It has also been forwarded that the written form of the administrative procedure makes it easier for the individual to perform the processing in court on her own.¹⁰⁶ In a very direct and critical comment, Lavin writes:

Most of those who work with administrative law probably think that it is hard for an individual to look after his interests in the administrative legal proceedings, because of the very complexity of administrative legislation and because of the written form of the legal procedure. In the official report, it is argued that there is no widespread need for legal aid in the ad-

on leave to appeal 'the president, and the vice president are to participate', Regulation 1996:380, § 22, third section.

¹⁰² Act of Procedures for Administrative Courts § 34a (as regards administrative courts of appeal) and § 36 (as regards the Supreme Administrative Court).

¹⁰³ Act of Procedures for Administrative Courts § 9.

¹⁰⁴ Legal Aid Act § 7. In this paragraph the distribution of legal aid is made dependent on a 'need' for legal aid on the side of the recipient, a need that cannot be fulfilled in any other way. According to preparatory work, as well as legal practice, such 'need' is, as a main rule, not considered to be present in cases dealt with by the administrative courts.

¹⁰⁵ SOU1991:106, p. 631.

¹⁰⁶ SOU1991:106, p. 632.

ministrative procedure. An earlier, theoretical motivation for this opinion was that the extensive responsibility for investigation that lay on the administrative courts, according to FPL [Act of Procedures for Administrative Courts] § 8, made legal aid superfluous. In practice, legal aid is probably just as necessary in administrative legal proceedings as in the public court procedure. However, public finances cannot cover higher costs for administrative legal proceedings. It would have been fairer to admit this fact, than to put forward unfounded opinions as the report does.¹⁰⁷

In 1996, four years after the publication of the report from the Court Investigation Committee that Lavin is referring to above, a new Legal Aid Act was passed. In the government bill accompanying this Act, the reasoning from the Court Investigation Committee is repeated: The responsibilities of the administrative courts in combination with the nature of the cases tried makes it unnecessary to change the prevailing practice and to increase access to legal aid. In the comments made by the Legal Council, a more problematizing standpoint can, however, be identified. The Legal Council identifies a development where an increasing number of cases relating to administrative issues are brought to the administrative courts. Reforms within the structure of the administrative courts have led to a three-instance court system dealing with a broad range of cases. The Swedish entry into the European Union has increased the importance of European legal principles, and the Legal Council foresees a development with an increased frequency of oral hearings where the parties of the case are present in court. They also mention the introduction of leave to appeal in the administrative courts of appeal and say that the simplification that this reform can provide for the administration of cases should give room for increased capacity in the cases that are given a full trial. The Legal Council continues to say:

With these changes and trends within the administrative procedure as a background, the Legal Council finds it reasonable to assume that the need for legal assistance in administrative cases will at least be somewhat greater than is suggested in the very restrictive practice up to now. [...] An increased need for legal assistance can, above all, be expected in cases where the actual circumstances are hard to grasp and the legal questions are unknown to the complainant or hard to evaluate.¹⁰⁸

¹⁰⁷ Lavin, Rune, 1992, p. 463. Author's translation.

¹⁰⁸ Prop. 1996/97:9, 'Appendix 1', see comments made on § 7 by the Legal Council. Author's translation.

3.4 Legal self-reflection

The purpose of this chapter was to reflect upon the authoritative, dogmatic, legal conceptions of law held by members of the legal community and, related to the issue of determining access to sickness cash benefit. In order to illuminate these conceptions, as they are communicated through textbooks and legal doctrine, three headings have been used: 'Systematization', 'Legal sources' and 'Administration of justice'. As could be foreseen, the outcome of such an exercise is not a fully coherent, firm image of law and its functions. Rather, what emerges is a framework within which members of the legal community can practice law in the dynamic fashion necessitated by the function of law to solve conflicts in society. It is also clear that this framework is in itself dynamic and evolves over time.

In the following chapters, continuing this investigation of the conflict arising between individuals and the state as regards access to sickness cash benefit, I go beyond the dogmatic approach. The questions asked do not primarily concern either interpretation or systematization of legal rules in the sense that dogmatic research usually presupposes. Still, it should be emphasized that the basic knowledge of 'legal self-reflection', contained in this chapter, is essential for the following analysis of how the administrative courts function in a legal system where law is perceived as an important provider of legitimacy.

As was indicated in the introduction to this chapter, there are reasons to return to the question of legal self-reflection in the final chapter, but then from a more analytical perspective. The impact on legal practices of legal conceptions of law, and the different dogmatic elaborations on this theme, is vast. Thus, the efficiency of 'law as a provider of legitimacy' and the capacity of the legal system to mediate social conflicts are inter-linked and dependent on the content of dogmatic conceptions of law. Still, in order to obtain a basis for this forthcoming analysis, the perspective of traditional legal dogmatics is not the most useful tool. My interest in the concrete content of 'legal practices' and 'societal conceptions of justice', in the field of distribution of sickness cash benefit, leads to non-dogmatic questions and the pursuance of non-dogmatic methods. The empirical basis thus sought is accounted for in the following chapters.

PART II

LEGAL PRACTICES

In the second part of the dissertation, focus is on 'legal practices'. By legal practices is meant the activity performed by members of the legal community as they form decisions on the basis of arguments accepted as legal by the legal community.¹ If the previously introduced distinction between 'applied legal constructions' and 'intentional legal constructions' is used, what follows could be described as an analysis of 'applied legal constructions'. In Chapter 2, it was argued, on the basis of Doublet's 'qualification norm', that of all the actors involved in the decision-making process regarding access to sickness cash benefit, only judges could be considered as 'members of the legal community'. Thus, in the following two chapters, my interest is directed at the actions performed by judges in the administrative courts as they form decisions regarding access to sickness cash benefit.² For this purpose, a study of legal cases has been performed.

Legal cases from the administrative courts, dealing with access to sickness cash benefit, in 1993 and 1999, have been collected and analyzed. The material has been used for a quantitative analysis, presented in Chapter 4, and for a qualitative analysis, presented in Chapter 5. The results of the quantitative analysis, based on a comparison of the practices of the courts in 1993 and 1999, form a point of departure for the

¹ See Chapter 2.

² For the arguments behind this decisions, see Chapter 2 above.

qualitative study. Thus, the basic material, the collected legal cases, is the same in both chapters, although the methods used for analysis differ. The quantitative approach is used in a search for systematic patterns, trends, changes, etc., in a comprehensive material of legal cases, while the qualitative approach is used to portray what these general patterns (trends or changes) consist of.

Below, the methodological considerations relevant for collecting the material (the quantitative and the qualitative) are elaborated.

Methodological considerations

Selection of time periods

The study of legal cases compares the application of law in the administrative courts in 1993 and in 1999. An interest was taken in how the policy of concentration had interacted with actual legal practice. As described previously, two changes in the National Insurance Act regarding sickness cash benefit, one in 1995 and another in 1997, were directly connected to the policy of concentration. The study of legal cases focuses on the years of 1993 and 1999, as these two periods come before and after the above mentioned changes in law. The motives for this choice of structuring the investigation are as follows:

Year 1999. The year 1999 was chosen as the possible effects of the reforms of the 1990s should have appeared by then also in the legal cases from the appeal courts. To choose a later year than 1999 was not possible for practical reasons.

Year 1993. The year of 1993 was chosen as a year for comparison as it is not marked by the generous policy in the administration of sickness cash benefit characteristic of the 1980s, but still not too close to the implementation of the concentration policy. It is also a year that is favourable from a comparative perspective, as the court structure, in the main, stayed the same between 1993 and 1999.³

³ For an overview of the changes in the court system and the procedural rules, see Chapter 3. The main change, instituted between 1993 and 1999 and of importance for my investigation, is the introduction of the institute of leave to appeal to second instance courts in 1994.

Selection of cases

I have chosen to study legal cases from all instances of the administrative court system; that is, cases from the county administrative courts, the administrative courts of appeal and the Supreme Administrative Court. In 1995, the court system was reformed and the Supreme Administrative Court took over the work of the Social Insurance Supreme Court.⁴ For the comparative part of this study, it means that for the years of 1993 and 1994, the material includes cases handled by the Social Insurance Supreme Court. An overview of how the material of legal cases is spread between the different instances in the court system is presented at the end of this section.

The principles used to select cases depend on what type of court that is being dealt with. Thus, a more restrictive selection has been performed regarding legal cases from the county administrative courts, in order to get a selection of cases that is comprehensive enough to be representative, yet not overwhelming in quantity. The same, a bit restrictive, selection has been used as regards decisions on leave to appeal from the appeal courts. Cases have been selected as follows:

County administrative courts

The investigation is limited to two two-month periods (March–April and October–November) in 1993 and 1999. The choice of these four months is random and insignificant, and done for the purpose of limiting the empirical material to a manageable size. I have found nothing in the material, nor from external sources, that suggests that the legal practices of the courts, as regards sickness case benefit, would differ in any systematic way due to what months were chosen.

The county administrative courts did not register their cases in data bases until 1994–1995, and there is no system of registration that classifies the legal cases from 1993 according to the issue of the case. In order to find the relevant cases dealing with sickness cash benefit during 1993, all the files from the relevant periods have been searched manually. The selection process in the two largest courts (Stockholm and Göteborg) was carried out by an assistant.

⁴ For an overview of the reforms of the court system, see Chapter 3.

Administrative courts of appeal

The investigation concerning judgements from the administrative courts of appeal includes legal cases from 1993 and 1999 (January to December). One should note, however, that the study of legal cases includes not only judgements from this period but also decisions not to grant leave to appeal.⁵ The reason to include decisions from the county administrative courts in which they decide not to grant leave to appeal is that although the appeal courts do not try these cases in a legal sense, they do take a stand when refusing to try them. It is interesting for the issue of this work to understand what kinds of cases are given leave to appeal and what kinds of cases are not. When comparing the 1993 situation (where all cases brought to the second instance were tried) with the situation in 1999 (when only a limited number of these cases were tried), it is interesting to have a more complete picture available from 1999, including cases that are appealed to the higher court although not tried. Thus, decisions not to grant leave to appeal are included in the study for the year 1999. The selection of such decisions has been limited to the periods March–April and October–November in 1999, for reasons of making the material manageable in size.

In 1993, the administrative courts of appeal started to register their cases in a data base. This means that for these courts it was possible to search in a data base for cases covering the right to sickness cash benefit, for the year of 1993 as well as for 1999.

The Supreme Administrative Court and the Social Insurance Supreme Court

As regards relevant judgements from the Supreme court(s), they are so rare that I have been able to study all relevant cases from these courts during the period of 1993–1999. For decisions from the Supreme courts denying leave of appeal, I have collected a material narrowed down to the two two-month periods mentioned before.

The final selection

The material collected according to the above premises originally consisted of 800 cases. For the final selection, each case was read in order to determine the exact legal issue at stake, and in this process the material was eventually narrowed down to 335 cases. Among the cases excluded

⁵ The institute of ‘leave to appeal’ was introduced in 1994, see Chapter 3.

in this process were a fairly large number dealing with how to calculate the sum of the benefit that the insured was entitled to. Other cases excluded in this selection were, for instance, those dealing with individuals' right to sickness cash benefit when being and/or working abroad and the right to sickness cash benefit when not complying with the requirements of treatment or job training. The cases excluded were not important for this investigation, as they did not involve an assessment of the criteria of 'sickness' and 'capacity for work'.

The final selection provided the following material:

Instance	Decision	Selection Period	1993	1999
Social Insurance Supreme Court	Judgements	1993–1994	2	
	Decisions on leave to appeal	March–April, October– November (1993)	6	
Supreme Administrative Court	Judgements	1995–1999		0
	Decisions on leave to appeal	March–April, October– November (1999)		8
Administrative Courts of Appeal	Judgements	January–December	32	20
	Decisions on leave to appeal	March–April, October– November		67
	Remitted	March–April, October– November	0	1
County Administrative Courts	Judgements	March–April, October– November	66	133

In total, there are thus 335 cases; 106 cases from 1993 and 229 cases from 1999.

In order to make the quantitative analysis, the material was coded by using 80 different variables in response to eight different propositions. These propositions are presented in Chapter 4.

4 A quantitative study of legal practices performed by administrative courts

The aim of the study of legal cases presented here is to give an overview of the practice of law by Swedish administrative courts on the issue of the right to sickness cash benefit. Another aim is to investigate whether legal practices have changed during the 1990s. This chapter and Chapter 5, constitute the empirical basis that will provide the necessary material for answering the questions raised in Chapter 2 as well as material for a critical reflection on theoretical and methodological standpoints.

The findings of two studies on legal cases are described (one pre-study and one full-scale study) and the results of an analysis comparing the practice of law in 1993 and 1999 is presented. I return to these findings in Chapter 8 in a context where they are more directly combined with the analytical tools introduced in previous chapters and where they are analyzed again, this time from the perspective of how they relate to the understanding of 'law as a provider of legitimacy'.

The following is a description of some aspects of court proceedings in cases where the criteria of 'sickness' and 'incapacity for work' are assessed. At first there is a presentation of the results of a pre-study made in 1999 and a presentation of how the results from this pre-study were used in the construction of the full-scale study. Then follows a presentation of actual findings. In the final section of this chapter, possible conclusions are discussed.

4.1 Prologue

4.1.1 The pre-study

The pre-study of court cases was performed in the spring of 1999 as a preparation for the more comprehensive study of legal cases initiated in 1999/2000.¹ Some years had passed since the policy of concentration had been launched. Reforms had been made to ensure a more restricted assessment of the criterion of sickness as well as of the criterion of capacity for work. How did the court system respond? The pre-study included judgements and decisions concerning sickness cash benefit that were handled by the Administrative Court of Appeal in Göteborg during the period of January 1 to December 31, 1998.²

In line with the overall aim of the dissertation the aim of the pre-study was: (1) to get an indication of where there might be a mismatch between the policies of the authorities and the claims of the individual, and (2) to describe legal practice in relation to the criteria of 'sickness' and 'capacity for work'. For this, the following three questions were formulated:

- 1) What are the characteristics of the individuals filing complaints to the courts (diagnosis, sex, employed/unemployed, occupation, background)?
- 2) What are the courts' interpretations of the criterion of 'sickness'?
- 3) What are the courts' interpretations of the criterion of 'capacity for work'?

In response to the first question, 'What are the characteristics of the individuals filing complaints to the courts?', it was found that there was a fairly clear pattern among the individuals who had filed complaints to the court. This did not come as a surprise, considering that previous research has established a connection between individuals receiving sickness cash benefit and factors such as class, age, profession, sex and education.³ What seemed to be particular for the material in the pre-study, compared to the image of the typical recipient of sickness cash benefit, was that among those filing complaints there were slightly fewer women

¹ Stendahl, Sara, 2000. (The article has been translated into Swedish and slightly revised, see Stendahl, Sara, 2002.)

² Only cases that are given leave to appeal are tried by the administrative courts of appeal. In the pre-study, cases resulting in judgements as well as cases that were not given leave to appeal were included.

³ Marklund, Staffan and Ulrik Lidwall, 1997.

than men represented. As women to a larger extent than men are receivers of sickness cash benefit, it could have been expected that this pattern would reappear also among the individuals complaining in court. The results of the pre-study indicated that this was not the case. Proportionally, male complainants were overrepresented in court.

It was argued in the pre-study that it was possible, by looking at the overall picture of who was complaining, to get an indication whether there were any specific group(s) who considered themselves maltreated by the existing regulation. In the conclusions, it was stated that, on the basis of the pre-study, it was possible to draw a generalized image of the complaining individual. This was an image of a person with a long and complex history of sickness, with diverse kinds of symptoms, including a subjective experience of pain. She or he would have a low degree of education and a loose connection to the labour market. Thus it was concluded that the nexus of problems represented by these individuals indicated an area where individual claims and the assessments made by the administration had a tendency to diverge.

For the full-scale study, a number of indicators were formulated regarding the characteristics of the insured individual (see below). These indicators were used to gather knowledge of the characteristics of the complainants in courts. They were also used to see if the courts treated complainants differently in any way, depending on their age, sex or (presumed) immigrant background. Data on sex and age was unproblematic to find. The kind of data available in the court cases also allowed for a distinction between cases in which several indicators pointed to the fact that the claimant was a first generation immigrant or refugee. Such indicators could be, for instance, recorded low knowledge of the Swedish language, experience of torture or experience of rehabilitation for immigrants. In the analysis, cases that contained such data as these constitute a specific category alongside sex and age. The indicator 'name' has also been used, making a distinction between (more) traditional Swedish/Nordic names and (less) traditional Swedish/Nordic names. The reason for using this indicator, however indistinct it is for identifying individuals with an immigrant experience, is that it could add information in combination with the more distinct category described above. Thus, while the category 'many facts point to a first generation immigrant experience' is so narrow that it will not capture the group 'immigrant background' and the category 'name' is too broad, the two variables in combination can provide data that might tell us whether individuals with a (presumed) immigrant background are treated in a discriminating way. The concept of 'class' was initially approached by setting up variables for data that would reveal the level of education and the profession of the in-

sured. However, such information, especially regarding education, was only available sporadically. Thus, 'class' was not used as a category parallel to sex, age and (presumed) immigrant background. The data collected on the profession of the complainants is used and accounted for as well as data on their occupational status, but not as a specific category used to analyze the neutrality of the law and court practice.

The second question, What are the courts' interpretations of the criterion of 'sickness', resulted in an analysis of the medical statements used in the proceedings. Important factors in this analysis were the descriptions of diagnoses and symptoms as well as statements by medical experts. The conclusion of the pre-study was formulated as follows:

If we study the history of medicine, it is possible to identify two different views of sickness: 1) a value-neutral, essentialist concept where sickness is considered as sharply marked, objective entities, possible to identify and describe by the science of medicine. 2) a value-laden, relational concept of sickness stressing the relationship between the science of medicine, the medical practitioners, the individuals and expectations and demands of society. [...] What my material indicates is that as the law is not explicit on the subject of which of these two views of sickness that should prevail – we have parallel application where courts at a lower level in the system tend to call out for the value-neutral, essentialist concept of sickness, whilst the appeal courts are more apt to use a value-laden, relational, sickness concept. Thus, we end up with a situation where we risk an inconsistent legal application.⁴

The full-scale study includes a large number of variables that, on a detailed level, relate to these issues. Data has thus been collected that further increases knowledge on what kind of diagnosis and what kind of symptoms the complainants suffer from, as well as knowledge of how the different medical experts involved in the proceedings assess these conditions.

In order to answer the third question, What are the courts' interpretations of the criterion of 'capacity for work', an interest was taken in what kind of work the insured's capacity was measured against. In many cases, the insured's capacity was measured in the broadest possible way. Thus, it was tried in these cases whether there was any capacity for work in relation to 'work normally available on the labour market'. For the pre-study, it was interesting to get an idea of how broadly this range of potential work situations was interpreted by the courts. The questions were approached by an analysis of how 'work normally available on the labour

⁴ Stendahl, Sara, 2000, p. 276. See also a report delivered to Trygderetten (The Social Security Court) in Norway, written by a group of researchers with an expertise in social medicine, Bruusgaard, Dag (et al.), 1995.

market' is described in the judgements, and by whom. In the pre-study, it was stated that:

While the court will form its judgement based on the 'medical statement', the physicians have often concluded that there does exist a capacity for work – in work of a specific kind. Thus we have a situation where the medical expert (usually the insurance physician) says that there is capacity for work in a job that is, for instance, more lenient, not straining, not heavy, adapted, not monotonous, varied. The most frequent word used is 'suitable'. The court will then, through its judgement, interpret these kinds of work situations as 'normally available on the labour market'.⁵

The frustration of the insured is obvious in some of these cases, especially when the abstract notion of what is included in the criterion of 'work normally available on the labour market' clashes with the stark reality experienced by the insured when there are no jobs available at all, and definitely not if the restrictions mentioned above are added.

Thus, the material in the full-scale study has also been screened for information that could be related to how work considered to be 'normally available on the labour market' is described. An effort has been made to identify cases where 'capacity for work' is the main issue. In these cases, there is often some agreement between the parties on the sickness status of the insured and also on how this affects her or his physical capacity. The main issue dealt with in court is what kind of work this capacity should be measured against.

Comparing the pre-study and the full-scale study, the selection of time periods and the selection of cases are different and the questions and methods of analyses have been refined. Still, the information gathered for the pre-study, on the character of the legal cases on sickness cash benefit, has influenced the design of the full-scale study. It has mainly been influential by pointing at some specific areas where it proved possible to extract relevant data from the material of written judgements from the administrative courts. Four such main areas were identified: 1) Data relating to the medical history, 2) Data relating to the complainant, 3) Data relating to the medical experts, and 4) Data relating to the activities of the court and the court procedure. These four areas correspond to the propositions elaborated for the main empirical study in the following section.

⁵ Stendahl, Sara, 2000, p. 270.

4.1.2 Eight propositions on legal practice linked to the distribution of sickness cash benefit

For the full-scale study, data was collected for the purpose of providing answers to some elaborated key propositions that are presented below. The process of formulating these propositions can best be characterized as interactive and hermeneutic. The findings of the pre-study, described above, were used as a new point of departure for an in-depth study of literature and legal sources, creating a framework for the full-scale study of legal cases. The main questions remain the same as for the pre-study: What is the scope of the legal criteria of 'sickness' and 'capacity for work' according to the legal practice of the administrative courts? For the full-scale study, a comparative aspect is added: Did legal practice change during the 1990s? Were there any changes in the cases brought to court? The basis of the propositions has been accounted for in the three previous chapters. Answers are looked for in the facts of the cases included in the material, and in the analysis of how the courts have weighed different arguments and interests.

The written judgements that constitute the material of the study rarely include legal reasoning of any length or substance. What is available in most cases is a description of facts and some short sentences providing the motives of the court and a decision.

This material is screened for answers to questions such as: Is there reason to believe that the sex or age of the complainant affected the outcome of the court proceedings? Does it matter if the judge was male or female? Legally, these are examples of irrelevant facts, but the empirical analysis concerns whether, or to what extent, these are facts that actually do matter. An interest is taken in the scope of legal criteria as determined by legal practice. Thus, it is of interest if (for instance) there is one legal criterion of sickness applied by female judges and another by male judges. Likewise, it is of interest whether or not the sickness criterion is neutral in relation to the sex, age and (presumed) immigrant background of the complainant.

The propositions circle around the four areas mentioned above: 1) Data relating to the medical history, 2) Data relating to the complainant, 3) Data relating to the medical experts, and 4) Data relating to the activities of the court and the court procedure. The propositions elaborated within this framework are fairly concrete and on a detailed level. The purpose of the gathering of data was to find out if there were facts available that would support or undermine the following propositions:

1. It is more common in 1999, as compared to 1993, that the conflict in court between the insured person and the social insurance office

concerns the interpretation of the content of the sickness criterion in relation to the so-called 'symptom diagnosis'.

2. It is more common in 1999, as compared to 1993, that the cases in court concern a conflict between the opinion of the social insurance office and the insured person as regards what kind of work the capacity for work should be measured against. The standpoint of the social insurance office is increasingly that the capacity for work of the complainant should be measured against the full spectrum of 'work normally available on the labour market' (regardless of, for instance, earlier training, education, work experience, wage, age and place of residence).⁶

Justification: The two propositions above are based on the presumption that the reforms of the 1990s did affect the social insurance offices' administration of sickness cash benefit. As stricter practices were effectuated, the insured would turn to court in frustration at what is comprehended as a new (and illegitimate) content of the criteria of sickness and capacity for work.

3. Given that the propositions above are correct, the characteristics of the insured individual taking a case to court are different in 1999 compared to 1993.

Justification: It is reasonable to presume that the categories specifically targeted by stricter policies will increase their presence in court. Thus, an increase in the age of the 1999 complainants, as compared to 1993, could be expected, and also an increase of female complainants, as well as an increase of complainants with an overall complex social situation, including a loose connection to the labour market.

4. The arguments and the position of the insurance physician (as an expert in 'insurance medicine') reinforce the concentration policy by emphasizing 1) the value of scientific objectivity and 2) the work-line. Through the insurance physicians, these arguments have become increasingly important and visible in court procedures.

⁶ The expression 'work normally available on the labour market' is explicitly used in the National Insurance Act after 1997. Previous to 1997 (and of relevance in the 1993 cases) this criterion was not expressed so clearly in the Act but in case of long-term sickness capacity for work would at some point no longer be measured against the complainants' ordinary work but against work on the labour market. In the comparison I have included the two types of cases from 1993 and 1999.

5. The external experts in court have increased in numbers and have become more influential between the years 1993 and 1999.

Justification: The key role of the social insurance physician is well-documented. Given the increased institutional importance handed over to this actor in the reforms of the 1990s, and the connected solitary position as an expert on capacity for work, anything but a strengthened position would be surprising. The proposition that external experts have become more visible (at least in numbers, maybe also as regards influence) between 1993 and 1999 is expected due to the increased overall reliance on 'science' in the decision-making process, as well as to the procedural reforms instituting a two-party procedure in the administrative courts.

6. The courts will, when weighing the arguments from different medical experts, only in exceptional cases deliver judgements that contradict the insurance physician. This is true for 1999 and 1993, but increasingly so for 1999.
7. The position of the insured person in court has generally weakened between 1993 and 1999.
8. The courts use a variety of legal criteria of sickness and capacity for work (alternately, one set of criteria that allow for a broad and shifting application).

Justification: The first of these propositions is based on the same arguments as above, namely the key role given to the insurance physician. The second proposition is based on an interpretation of the combined effect of the procedural reforms launched in 1994–1996 and the concentration policy. The last proposition is based on an overall analysis of how shifts in the understanding of the interplay between the individual, the state, and the administrative courts affect the practice of law in the courts.

A repetitive scheme is used when the different propositions are scrutinized. An interest is taken in how the propositions relate to the material in general but also in how they relate to two specific types of cases: 1) cases where the complainant's symptoms are described as 'subjective' (or 'not objective') and 2) cases where it is argued that the capacity for work of the complainant should be assessed in relation to work on the labour market. The first two propositions deal with these specific kinds of cases, one at a time, and as the analysis proceeds with the following propositions they become a recurring theme. Also, as mentioned above, an interest is taken in whether legal practice is neutral in relation to the

sex, age and (presumed) immigrant background of the complainant. The propositions are further discussed as the findings are presented below.

4.2 Findings of the full-scale study

The variables chosen to systematize the material of legal cases can roughly be divided into four different groups. Thus, there are a number of variables that concern the characteristics of the insured (such as age, sex, ethnic background, occupational status and profession). A second category of variables concerns the medical and capacity status of the insured person (such as diagnosis, descriptions of symptoms and descriptions of capacity for work in the individual cases). The third category concerns the role of medical expertise (number of medical experts and their opinions). Finally, the fourth category concerns the court procedure and the activities of the court (such as what is claimed and by whom, what decisions are made, written or oral procedure, references to legal sources, solicitor or no solicitor, legal aid or no legal aid).

The findings are presented below according to the structure provided by the propositions mentioned earlier, but first some basic facts about the material will be presented.

4.2.1 Basic facts – presenting the material

Of a total of 335 cases collected from the years 1993 and 1999, a considerable majority are from 1999. Thus, 106 cases were tried in court in 1993 whilst there are 229 cases from 1999. That means that 32 percent of the total material of legal cases is from 1993 and that 68 percent emanates from 1999. There are 76 cases in the 1999 material that were not tried in court (67 cases were denied leave to appeal to the administrative courts of appeal, one case was remitted by the administrative court of appeal to the county administrative court, and eight cases were denied access to the Supreme Administrative Court). If decisions of denied appeal are deducted from the 1999 figures, we end up with 153 cases tried in court (133 cases in first instance and 20 cases in second instance). This points to the conclusion that there was indeed a drastic increase in cases brought to court between the years 1993 and 1999, a change in behaviour that increased the workloads of the county administrative courts by 100 percent, and would have increased the workload of the administrative courts of appeal even more, had not the institute of leave to appeal been introduced.

Of the 335 cases, very few were tried by the supreme courts, only two cases in the material (both from 1993) were tried by a supreme court (the National Social Insurance Supreme Court). There are also 14 cases in the material that were denied access to the Supreme courts. There are a total of 120 cases that were dealt with by the administrative courts of appeal, but as mentioned above, only 52 of these cases resulted in a judgement (there are 32 cases from 1993 and 20 cases from 1999), the others were denied leave to appeal. These 52 cases are collected from the whole year of 1993 and 1999 respectively, thus the more limited selection procedure has not been used for the appeal courts. In the cases where leave to appeal was not given, the arguments and the facts available from the judgements from the county administrative courts have been analyzed. A majority of the cases in the material, 199 or almost 60 percent, are from the county administrative courts.

The geographic spread is good. The judgements come from courts all over the country. The material consists of court decisions from the Supreme Administrative Court (1999) and from the National Social Insurance Supreme Court (1993), from all the administrative courts of appeal (Stockholm, Göteborg, Jönköping and Sundsvall) and from 22 (out of 23 possible) county administrative courts.

The original decisions tried in courts are decisions made by the social insurance offices. In the majority of cases the original decision was made a year before the case came to court. Thus there is a peak in 1992 (42 cases or 14 percent) and in 1998 (83 cases or 25 percent). In the material from 1999, there were also a considerable number of cases that dealt with decisions made further back in time as well as decisions made in the same year: 1996 (27 cases or 8 percent), 1997 (63 cases or 18 percent), 1999 (42 cases or 12 percent).

To sum up, the material consists of approximately twice as many cases from 1999 as from 1993. There is nothing in the selection process that explains this difference.⁷ The most obvious explanation is that cases of specific interest for this study have increased in numbers. The complainants have become more numerous. This is in itself not surprising, considering that drastic changes were implemented in the insurance during the 1990s, although the scale of the increase is conspicuous.

4.2.2 First proposition – the legal value of subjective experiences

The proposition underlying the formulation of variables presented below is the following:

It is more common in 1999, as compared to 1993, that the conflict in court between the insured person and the social insurance office concerns the interpretation of the content of the sickness criterion in relation to the so-called ‘symptom diagnosis’.

The proposition is based on the prognosis that in the process of implementing the concentration policy in the sickness insurance, the insured individual with a so-called ‘symptom diagnosis’ would experience increased difficulties to obtain sickness cash benefit. Or put differently, when comparing 1993 and 1999, the implementation of the concentration policy could have had the effect of making it harder to get access to insurance in a case based on subjective symptoms, whilst a well-defined objective diagnosis would have increased the chances to get access to sickness cash benefit. Thus, it is reasonable to assume that a consequence of the implemented policy is that an increasing number of cases in court would be evidence of the effects of the new policy. The pre-study indicated that this type of cases was frequent in first and second instance courts and also that the courts differed in their way of dealing with the problem. I will come back to how the courts in the full-scale study handled these cases when dealing with propositions six, seven and eight.

The symptom diagnosis has a history of being ‘difficult’ in a social insurance perspective, because of the importance it puts on the subjective experience of the insured. Still, the policies of the 1990s were expected, according to many of the articles written at the time, to further increase or highlight the dilemma related to these cases.⁸ The status of ‘symptom diagnosis’ has been under debate for a long time. The kind of symptoms that are linked to ‘symptom diagnosis’ relies to a high degree on the in-

⁷ According to statistics from the National Courts Administration there was a decrease in the number of cases, decided by the courts in first instance, dealing with sickness insurance, in 1999, as compared to 1993; in the county administrative courts 906 such cases were registered in 1999 as compared to 1538 in 1993. In the administrative courts of appeal the comparable figures are 681 in 1999 and 423 in 1993, and for the supreme court(s) the figures are 127 in 1999 and 145 in 1993. It should be noted that the category ‘sickness insurance cases’ (case type ‘3803’), includes a broader scope of cases than the type of cases in focus for this study.

⁸ That the concentration policy would hit individuals with subjective symptoms was a prediction voiced in journals such as ‘*Socialförsäkring*’ and ‘*Svensk Läkartidningen*’ during the mid 1990s.

dividual's own description of her or his illness, without a possibility of a physician drawing objective conclusions. Symptoms such as 'fatigue' or 'anxiety', for instance, can be described by the individual, but it can be hard for a medical expert to get other findings that will confirm this information. In 1983, the social insurance offices' practice in these cases was to provide sickness cash benefit, but just for a shorter period of time, arguing either that the criterion of sickness or that of incapacity for work were not fulfilled.⁹ At that time, it was considered insufficient to rely solely (or to a high degree) on the individual's own subjective description of symptoms. After a period during the 1980s, when the bio-medical concept of sickness was challenged by a more socio-medical view of health and ill-health, the bio-medical position seemed to regain its position in social insurance legislation during the 1990s.¹⁰ What was new in the late 1990s was that the bio-medical view was supported by the arguments for concentrated sickness insurance. Also new was the growing importance of the insurance physicians who through their expertise in 'insurance-medicine', provided a bio-medical buffer between the individuals, the treating physicians, and the social insurance offices.¹¹

There seems to be a common understanding among those working with sickness insurance – administrators, physicians, and judges – that the change in law made in 1995 should not be interpreted as an effort to change the legal meaning of the criterion of 'sickness'. The legislature was also quite explicit in saying that this change was only intended to be a 'clarification'. Yet, the pre-study indicated that the aim of the concentration policy – to let 'strictly medical grounds' be the entrance ticket to sickness insurance – seemed to have coloured the language of the medical experts:

From these court cases, it can be concluded that a medical expert who wants to be convincing will describe the patient's symptoms in terms such as: 'objective', 'somatic', 'physical', 'strictly medical', 'orthopaedic', 'scientific', or 'organic'. On the other hand, – using words such as 'subjective' and 'psychological' will not carry as much weight. This weighted evaluation of different kinds of symptoms is characteristic of insurance physicians, and when the symptoms are not 'objective', they tend to be stricter in their assessment of the patient's capacity to work.¹²

⁹ Westerhäll-Gisselsson, Lotta, 1983, p. 211.

¹⁰ For an overview of the development of how the concept of sickness has been used in the sickness insurance until the 1990s, see Westerhäll, Lotta, 1990, p. 71 ff.

¹¹ The concept of 'sickness' is discussed in more detail above in Chapter 3.

¹² Stendahl, Sara, 2000, p. 267.

In order to find out if this result from the pre-study recurred in the full-scale study of legal cases, several variables were elaborated. One group of variables circles around the diagnosis of the insured: Is there a diagnosis? And if there is, what kind of diagnosis? Are the symptoms described? If described, what kind of adjectives are used to describe them? Are the symptoms categorized as objective/subjective? Are there symptoms of pain? Fatigue? Sleeplessness? Anxiety? These are the kind of variables taken into account in this section.

The concept of 'diagnosis' is used in a broad sense in this work, as the 'label' put on the difficulties experienced by the insured. Thus the characteristics that constitute a diagnosis and those that constitute a symptom overlap. An example of this could be a case where the complainant is described as suffering from pain and sleeplessness due to 'chronic pain in the back'. Thus, 'pain' and 'sleeplessness' have been registered as symptoms, and 'chronic pain in the back' has been registered as the diagnosis.¹³ This could be compared with a case where the symptoms are not described but the diagnosis provided is 'lumbago'. Such a case would not cause registration of any symptoms but the diagnosis 'lumbago' would be recorded. In the process of coding the material, a long list was constructed of the different diagnoses. Later on, the most frequent diagnoses were sorted within the following categories: 1) Back, neck and shoulder difficulties, 2) Fibromyalgia and myalgia, 3) Allergies, asthma and eczema, 4) Psychological incapacity and chronic fatigue. A fifth category – Multiple diagnosis – was also added, a category in which, to take one of many examples, it was possible to register a case where the complainant suffered from 'depression, gout, prostate problems and concussion of the brain'. In the coding process, it was not possible to distinguish between the so-called 'symptom diagnoses' and 'other diagnoses' directly. There are several reasons, but apart from the basic reason that the distinction actually is not quite clear, it should also be remembered that there is a conflict of interests in the cases described in court. Aware of the fact that the description of the complainant's difficulties is important for the outcome of the conflicting interests in court, different actors have good reasons to use either an objectifying terminology (including words in Latin) or one emphasizing the subjective side.

Given the broad definition used, there is in most cases information available on the diagnosis of the insured (99 percent in 1993 and 97 percent in 1999). On the other hand, there are a number, although a de-

¹³ 'Chronic pain in the back' is an example of a diagnosis belonging to the category 'Back, neck and shoulder difficulties'. In this category, I have also included, for instance, lumbago, ischias, lumbal spondylos etc.

creasing number, of cases in which there is no information on what kind of symptoms the insured is suffering from (21 percent in 1993 and 14 percent in 1999). An example of a case with neither a diagnosis nor a description of symptoms could be a case where the social insurance office has changed its opinion and decides to support the claims of the complainant (thus there is no longer a conflict).

In 1999, the distinction between 'objective' and 'subjective' symptoms was used explicitly in 13 percent of the cases. The comparable figure for 1993 is 8 percent. Thus, in these cases the exact words 'objective' and/or 'subjective' were used when describing the symptoms.

Other adjectives used in the description of symptoms were also registered in the study. Three different questions were formulated: the first asked whether or not the symptoms were described by using not only the exact word 'objective' but also (or instead) words with a similar connotation. The second question asked whether symptoms were described by using not only the exact word 'subjective' but also or instead words with as similar connotation. The third question was formulated in order to pinpoint those cases where symptoms were described in a negative way – as 'not objective' or 'not orthoepedic' etc. The broader group of adjectives with a connotation linked with 'objective' included the words 'somatic', 'orthoepedic', 'medical' and also the category 'others of the same character'. As can be noted in the graph below, such words were used in 4 percent of the cases in 1993. The comparable figure for 1999 is 8 percent. See Graph 1.

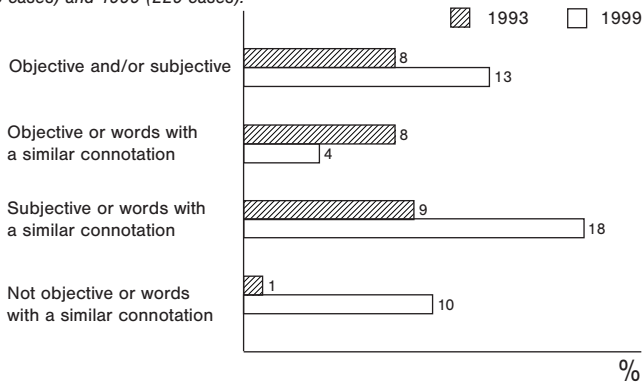
Words considered to have a similar connotation as 'subjective' were 'psychosomatic', 'psychological', 'social' and the category 'others of the same character'. In 1999, such words were used in 18 percent of the cases as compared to 9 percent in 1993. The cases where symptoms are described as 'not medical', 'not orthoepedic' or 'not objective', or are described by several of these expressions, add up to 10 percent in 1999 and to only 1 percent in 1993. These figures indicate, all in all, that the question of subjective symptoms indeed has become more of an issue in cases dealt with in court in 1999 as compared to 1993.

In order to be more precise and to find data on the symptoms actually described in the different cases, a number of symptoms that could be classified as more or less 'subjective' were screened. Information on whether there were any symptoms of pain, fatigue, anxiety, sleeplessness, or 'other subjective symptoms' described in the judgements, has been registered.¹⁴

¹⁴ In the category 'other subjective symptoms', I have included symptoms described as: numbness, pricking sensations, easily irritated, low-spiritedness, resignation and feelings of powerlessness.

Graph 1: Cases in which there is a categorization of symptoms as being either of an 'objective' or 'subjective' kind

Symptoms are described by using the following adjectives and measured in percentage of the total number of cases in 1993 (106 cases) and 1999 (229 cases).



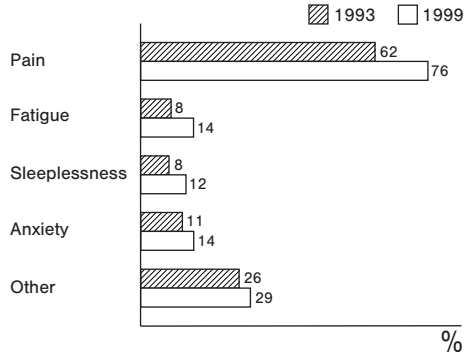
Graph 1: The graph shows the percentage of cases, in 1993 and 1999, in which symptoms are described by using different adjectives with a connotation linked to the distinction between the entities 'subjective' and 'objective'.

In many of the cases involving the kind of symptoms mentioned above, several of them will be represented. The figures in graph 1 are thus overlapping.

The second graph shows a general increase of subjective symptoms. In particular 'pain' dominates in overall quantity as well as in increase. It should be noted that although 'pain' itself is a subjective symptom, medical experts sometimes can verify 'objective' data that are used as arguments supporting or contradicting the story of the insured. In spite of the fact that 'pain' is sometimes 'objectively' confirmed, the cases where the dichotomy between subjective and objective is an important factor will very often include symptoms of pain. Thus, the presence of pain symptoms is a factor of relevance for the proposition dealt with in this section and these cases will be in focus for a while. As noted before, an interest is taken in whether the developments of the 1990s have been neutral in relation to the categories sex, age and (presumed) immigrant background. As the investigation proceeds, it will be studied how the first proposition, and thus the question of subjective symptoms, relates to an analysis focusing on the categories mentioned.

Graph 2: Cases in which typical subjective symptoms are described

The following symptoms are described in the material and measured in percentage of the total number of cases in 1993 (106 cases) and 1999 (229 cases). One case can include several of the symptoms mentioned below.



Graph 2: The graph shows the percentage of cases, in 1993 and 1999 involving the following symptoms: pain, fatigue, sleeplessness, anxiety or other symptoms of a subjective character. Cases involving these kinds of symptoms often overlap.

What could be noted is that the cases including pain symptoms have become more neutral to the category sex between the years 1993 and 1999. In 1999, there is a minor dominance of male complainants (52 percent), but the difference between the sexes has decreased as compared to 1993 (when the comparable figure was 58 percent). As will be seen later (section 4.2.4), male complainants have, during the same period, decreased their proportion of the total material of legal cases from 59 percent to 51 percent, figures that illustrate a development quite comparable with those mentioned above. Thus, the levelling of the differences between how cases with pain symptoms are represented by female and male complainants seems to follow the ratio of female/male complainants.

When studying how cases involving pain symptoms are represented in cases involving women and men respectively, it could be noted that there is an increase in the share of cases involving pain symptoms within the group of female complainants as well as within the group of male complainants. What could also be noted is that this increase is more striking within the group of male complainants. Thus, in the group of cases involving female complainants, 65 percent of the cases included pain

symptoms in 1993; the comparable figure for 1999 is 75 percent. In the group of cases involving male complainants, 60 percent included pain symptoms in 1993 compared to 77 percent in 1999.

Focusing on the age factor instead of sex, there are also some differences between 1993 and 1999. Thus, within the group of cases involving pain symptoms there has been a shift of balance to the extent that in 1993 complainants below the age of 45 dominated (54 percent), whilst in 1999 complainants below the age of 45 constitute a minority of these cases (35 percent). The age group which represented most of the 'pain symptom cases' in 1993 was 36–45-year-olds (39 percent) whilst the most dominating group in 1999 was the 46–55-year-olds (45 percent). In 1993 the ratio of 36–45-year-olds in the overall material was 37 percent (and they constituted the dominating age group), in 1999, the ratio of 46–55-year-olds was 44 percent and they had become the most dominating age group. Thus, just as when studying the factor 'sex of the complainant', it is note-worthy that changes in how the cases including pain symptoms are divided over different age groups seem to be parallel to changes in how the material of legal cases is composed.

If each age group is studied separately, a dominance of cases involving pain symptoms is found in each of the age groups (except for 16–25-year-olds in 1993). This dominance has increased especially for the age group 46–55. For this group, cases including pain symptoms constituted 58 percent in 1993, to be compared with 78 percent in 1999.

The third category of interest is immigrant background. Two different indicators are used for this category. The first indicator makes a distinction on the 'name' only, complainants with typical (traditional) Swedish names are in one category and all other complainants in another. The second distinction is based on the presence of several facts that indicate that the complainant has recently entered Swedish society. Such facts, as noted above, could be lack of knowledge of the Swedish language, experience of torture and/or experience of rehabilitation for immigrants.

In the group of cases involving pain symptoms, the ratio of complainants with atypical Swedish names have become smaller, as have the cases involving complainants with a recent immigrant background. Looking at the name only, the relation used to be 65/35 (with a dominance of complainants with traditional Swedish/Nordic names); in 1999, the comparable relation was 72/28.

Thus, within the group of cases including pain symptoms there is an increase between 1993 and 1999 in the proportion of cases where the complainants have a (presumed) Swedish/Nordic background. This tendency is the same both when the indicator used is 'name' and when several facts disclose that the complainant has a recent immigrant history. This

development coincides with changes in the ratio of how these groups are represented in the whole material, although the decrease of complainants with a presumed non-Swedish/Nordic background is very slight. In 1993, the relation was 70/30, with a dominance of complainants with a Swedish/Nordic name; in 1999, this relation had changed to 75/25, still with a dominance of complainants with a Swedish/Nordic name.

If the presence of pain symptoms is studied in each group separately, an overall increase in the proportion of cases that include pain symptoms appears. In the group of complainants with traditional Swedish/Nordic names, 58 percent of the cases included pain symptoms, compared to 73 percent in 1999. For complainants with untraditional Swedish/Nordic names, these cases constituted 72 percent in 1993 compared to 86 percent in 1999. In the group of cases involving complainants with a recent immigrant experience, pain symptoms were present in 69 percent of the cases in 1993, compared to 89 percent in 1999.

At this point, focus is shifted to the question of how the material of legal cases is divided on different diagnoses. In this section, the proposition that there has been an increase of cases in court dealing with so-called 'subjective diagnoses' is approached. There are some diagnoses in which the subjective symptoms mentioned above are quite important factors. In such cases, a nexus of subjective symptoms constitutes a specific diagnosis; it could be argued that 'chronic fatigue', to take one example, is such a diagnosis.¹⁵ Thus, it is interesting to see whether the increase noted above in the proportion of cases dealing with subjective symptoms also is followed by an increase of cases where there is a distinct diagnosis linked to subjective symptoms. Such diagnoses could be: pain in back, neck and shoulder (44 percent in 1993 and 42 percent in 1999); fibromyalgia (13 percent in 1993 and 14 percent in 1999); depression (8 percent in 1993 and 9 percent in 1999); allergies, asthma and eczema (12 percent in 1993 and 5 percent in 1999) and psychological incapacity/chronic fatigue (5 percent in 1993 and 5 percent in 1999). It was also recorded if the insured was suffering from multiple diagnosis (47 percent in 1993 and 42 percent in 1999). It could thus be concluded, on the basis of the figures above, that the quantitative development of different diagnoses between 1993 and 1999 is not parallel to the increase of subjective symptoms. Whilst the increase of the proportion of cases involving subjective symptoms is distinct, and sometimes dramatic,

¹⁵ For an overview of 'new diagnoses' such as chronic fatigue, fibromyalgia, somatic pain-syndrom etc, see Olin, Robert, 1999. In this booklet Olin argues that the 'new diagnoses' have neuro-biological causes rather than psychological or social.

an analysis of the proportion of cases including the diagnoses mentioned above results in a more split image. Most striking in the figures presented above is, with some exceptions, the moderate level of change.

Below, some figures are presented showing how these diagnoses occur in the overall material when split on the basis of sex:

When the information on different diagnoses is split on the basis of sex, it appears that the frequency of different diagnoses to some extent diverge between female and male complainants, but also a tendency that the differences between the sexes are reduced between 1993 and 1999. Within the group of female complainants, there is a decrease in the proportion of cases involving all diagnoses mentioned above, except for a slight increase in 'back, neck, shoulder problems'. Within the group of male complainants, the picture is a bit more complex: there is a definite increase in cases including the diagnosis depression and also a distinct increase in cases involving psychological incapacity/chronic fatigue. See Graph 3.

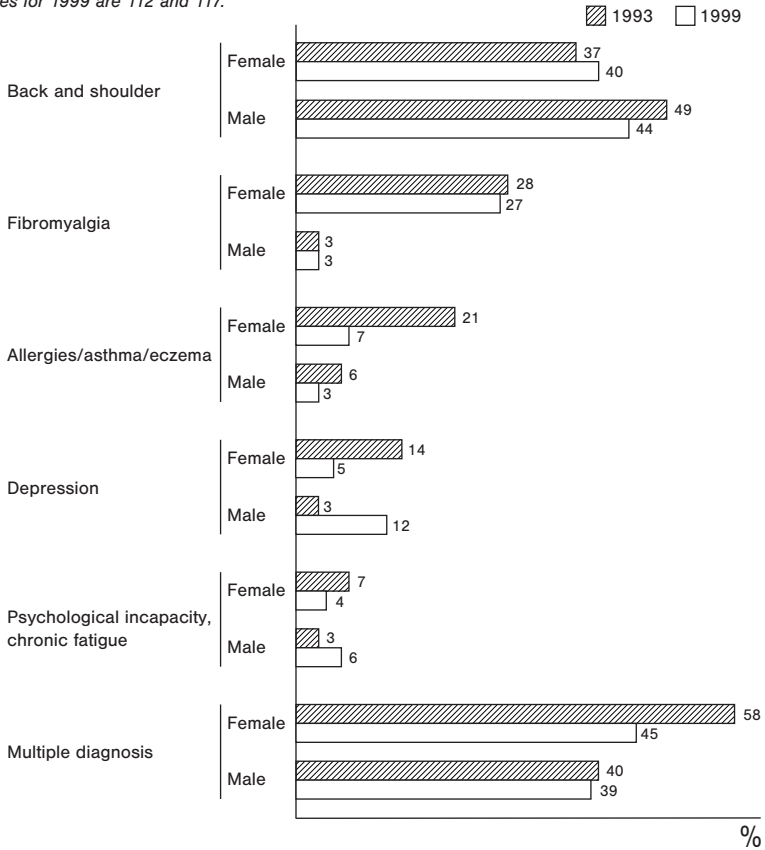
The diagnoses have also been compared in relation to the age factor and the (presumed) immigrant factor. If concentrating on the two age groups that are quantitatively dominating it could be established that the way in which the different diagnoses are proportionally represented by the 36–45-year-olds and the 46–55-year-olds respectively has shifted somewhat between 1993 and 1999, but it could also be noted that there is no singular trend in the direction of these changes.

In cases involving the two diagnoses allergies and fibromyalgia, there is an increase in the proportion of cases involving both age groups. If the figures for depression are studied, there is an increase in the proportion of cases involving 46–55-year-olds and the same is true for the group of cases where there is back/neck/shoulder problems or in cases with multiple diagnosis. In the group of cases where there is a diagnosed chronic fatigue or psychological incapacity, a decrease in the proportion of cases represented by the two age groups is noted.

When focusing on the diagnosis 'depression', and on the proportion of cases with this diagnosis within each age group, a slight increase for 46–55-year-olds (from 9 percent to 11 percent) can be established. In general, the same tendency, i.e. slight shifts upwards or downwards, is visible when studying how the different diagnoses are represented within each age group. The two exceptions are: 1) the diagnosis 'fibromyalgia' within the age group 36–45-year-olds, which has increased from representing 13 percent of these cases in 1993 to 22 percent in 1999, and 2) the diagnosis 'allergy, asthma and eczema' that used to be represented in 12 percent of the cases involving 46–55-year-olds in 1993 to be compared with 4 percent in 1999.

Graph 3: *The occurrence of different diagnoses where subjective symptoms are an important factor, split between male and female complainants*

The following diagnoses are described in the material and measured in percentage of the total number of male and female complainants in 1993 and 1999. In 1993 the number of female complainants was 43 and male complainants counted 63. The figures for 1999 are 112 and 117.



Graph 3. The graph shows the proportion of different diagnoses within the groups of male and female complainants. The diagnoses are not excluding, thus one complainant could have many diagnoses. For instance, in 1993, 37 percent of the female complainants had back and shoulder problems and the comparable figure for 1999 is 40 percent. These complainants could also be depressed or have the diagnosis fibromyalgia. In 1993, 58 percent of the female complainants had a multiple diagnosis.

Analyzing the material in relation to the category '(presumed) immigrant background', a similar result emerges as when looking at the category 'age'. Thus, there is no clear persistent trend of change in how these diagnoses are represented by those with a presumed Swedish/Nordic background and those with a presumed immigrant background. An examination of how the different diagnoses are represented within these two groups, shows two major changes: 1) There is a decline in both groups of cases with the diagnosis 'allergy, asthma, eczema' (which coincides with the overall decline of this diagnosis, see Graph 3); 2) In the group with a presumed immigrant background (based on name only), fibromyalgia was diagnosed in 6 percent of the cases in 1993 compared to 18 percent in 1999. And in the group where several facts point to a recent immigrant experience, fibromyalgia was diagnosed in 0 percent of the cases in 1993 compared to 17 percent of the cases in 1999. (In the group with a presumed Swedish/Nordic background, there is no similar increase but the proportion of cases with this diagnosis is fairly constant in the span 13–16 percent). In the cases of 'fibromyalgia' presented above, there is a change in the direction that the differences between the two groups with presumed different national background is getting smaller. Such a trend is also noted in relation to the other diagnoses in the category where a presumed background is based on name only. For instance, 'depression' is a diagnosis that is more common within the group of complainants with a presumed immigrant background than in the group with a Swedish/Nordic background; this true for 1993 as well as for 1999. But the difference has become smaller though, and in the case of 'depression' this change is due to a higher proportion of depression cases within the group with a typical Swedish/Nordic name. In 1993, depression was diagnosed in 5 percent of these cases, compared to 8 percent in 1999. The comparable figure for those with an atypical Swedish/ Nordic name was 12 percent in 1993 as well as in 1999.

What conclusions are to be drawn from these data? The proposition in focus in this section stated that it is more common in 1999, than 1993, that the conflict in court between the insured and the social insurance office concerns the interpretation of the sickness criterion in relation to so-called 'symptom diagnosis'.

The support for this proposition, found in the material, is the definite increase of cases where the distinction 'objective/subjective' is used. Added support for the proposition is found in the increased use of adjectives with a connotation linked to the dichotomy subjective/objective. Further, an increase is also found in the frequency of symptoms typically belonging to the 'symptom diagnosis' such as pain, anxiety, sleeplessness, and fatigue.

The data on the diagnoses is harder to interpret in relation to the proposition. What the figures seem to indicate is that there is an increase in cases where the description of subjective symptoms such as pain, fatigue, anxiety or other subjective symptoms is an important factor, but a relative standstill of diagnoses where such symptoms are frequent. This may indicate that it has become increasingly important to argue in terms of objective/subjective symptoms in court, although there has not been a proportional increase of cases with 'symptom diagnosis' as such. In *numbers*, there has been a distinct increase of cases involving the different subjective diagnoses between 1993 and 1999, but in proportion they seem to have stayed on a relatively permanent level. What has changed is thus mainly the way the different actors argue in court, increasingly emphasizing the dichotomy between the supposedly 'objective' and the supposedly 'subjective'.

Analysing the results in the perspective of whether the changes have been neutral in relation to the categories sex, age and background, different reflections can be made. Studying the factor 'sex', it could be concluded that there was an increased female ratio of complainants with pain symptoms in 1999 (48 percent compared to 42 percent), but also that there was an increased female ratio of the material of legal cases as such (49 percent in 1999 compared to 41 percent in 1993). More women have taken their cases to court in 1999, and more of these women have pain symptoms compared to the women who brought their cases to court in 1993. Still, the female complainants in the material do not have pain symptoms in a larger proportion of cases than the male complainants. Also, the increase in the ratio of cases where the complainant is suffering from pain symptoms is larger within the group of male complainants as compared to the group of female complainants. The result is a situation where differences between sexes have been levelled out. In addition, within the group of male complainants, there was an increased proportion of cases where the diagnosis was such that subjective symptoms often were an important part of the picture (depression, psychological incapacity and chronic fatigue).

Within the group of individuals with a presumed immigrant experience, there is an increased ratio of cases that include pain symptoms. Within the group of complainants, identified by having several factors pointing to a recent immigrant experience, a drastic increase, from 69 percent in 1993 to 89 percent in 1999, can be noted. However, this group of complainants decrease their overall proportion of cases including pain symptoms, from 14 percent in 1993 to 9 percent in 1999. Thus, it seems that complainants with an immigrant experience have not increased proportionally. However, pain symptoms are increasingly a very impor-

tant factor within this group.

Studying age groups, complainants within the age span 45–56 have increased in numbers and they have also increased their proportion of cases where pain symptoms are involved.

When each category of complainants (female, male, immigrant, non-immigrant, different age groups) is analysed separately, the results show that in 1993 pain symptoms constitute between 60–65 percent of the cases within each group, in 1999 the comparable figure is 75–80 percent. The exception to this pattern is found within the group of complainants with a presumed immigrant experience, where the ratio of cases including pain symptoms is consistently higher. In these cases (looking at name only), the ratio of pain symptoms was 72 percent in 1993 (compared to 86 percent in 1999) and for those where several facts point to an immigrant experience the ratio was, as noted previously, 69 percent (compared to 89 percent in 1999). It could also be noted that for the different age groups, for male and female complainants and for presumed immigrants, the changes of their proportion of cases with pain symptoms were (more or less) parallel to the changes in their proportion of the total material of legal cases.

To conclude, I consider the first proposition to be confirmed. There are indications that the changes in focus in this section might not have hit neutrally. Male complainants and complainants with a presumed immigrant background seem to have been hit harder by the developments between 1993 and 1999. The result, in the case of male complainants, is a decrease of the differences existing between men and women. This tendency has not eliminated existing variances but, to some extent, made them smaller.

4.2.3 Second proposition – capacity for what?

The proposition to be tried in this section is formulated as follows:

It is more common in 1999 than in 1993, that the cases in court concern a conflict between the opinion of the social insurance office and the insured as regards what kind of work the capacity for work should be assessed against. The standpoint of the social insurance office is increasingly that the capacity for work of the complainant should be measured against the full spectrum of ‘work normally available on the labour market’ (regardless of, for instance, earlier training, education, work experience, wage, age and place of residence).

The question of how capacity for work should be assessed was confronted in several official reports during the 1990s and it was also an issue for legal

reforms. In 1997, the 'step-by-step-method' was introduced, accompanied by the argument that the method clarified practice and made clear the distinct 'steps' taken in the assessment of an individual's capacity for work.¹⁶

When working with the second proposition, an interest is taken in the how the assessment of capacity for work is performed. The 'step-by-step-method', and thus also 'step 5' in this method (which confronted the question of at what point the capacity for work of the complainant should be assessed against work normally available on the labour market), is part of the concentration policy. A special interest is, thus, taken in the type of cases where it is argued that capacity for work should be assessed against 'work normally available on the labour market'.

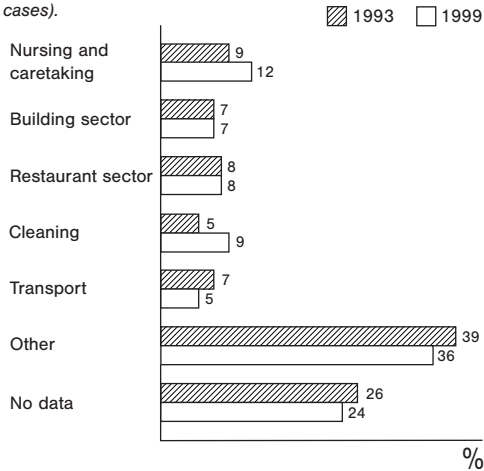
In order to pinpoint data that relate to the interpretation of an individual's capacity for work, a number of different variables have been used. The key variable makes a distinction between cases where it is argued that capacity for work should be assessed against 'work normally available on the labour market' and those cases where no such arguments are forwarded. In addition, different adjectives used in the argumentation to describe work that the complainant is supposed to have capacity to manage, have been studied. In addition to the categories sex, age and (presumed) immigrant background, some other variables that deal with the life situation of the complainant have also been added. Thus, an interest was taken in the occupational status (employed, unemployed) and the professional status of the complainant and how these factors relate to the second proposition.

There is a dramatic increase of cases where it is distinctly argued that the capacity for work of the insured should be assessed against 'work normally available on the labour market'. In 15 percent of the cases from 1993, it was argued that capacity for work should be assessed in relation to 'work normally available on the labour market'; in 1999, the comparable figure is 38 percent. Thus, it could already, on a basic level, be concluded that the second proposition is confirmed, but before this is done the three indicators: 1) The profession of the insured, 2) How 'work normally available on the labour market' is described and 3) Occupational status, will be studied. Graph 5 below shows how the complainants are divided in different sectors of the labour market. Defined as 'other' in the figure below are, for instance, professions such as teachers, industrial workers, out-door workers and car mechanics, but none of

¹⁶ For a discussion of these reforms, see Chapter 3 above.

Graph 4: Occupations of the complainants

The following occupations are described in the material and measured in percentage of the total number of cases in 1993 (106 cases) and 1999 (229 cases).



Graph 4. The graph shows the representation of different occupations among the complainants in 1993 and 1999.

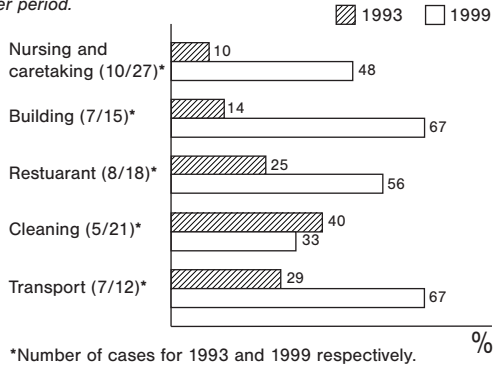
these (and others not mentioned) add up to substantial numbers. Notable in the graph above is the relative stability in how different professions are represented between the years 1993 and 1999, but also the increase in the proportion of complainants in professions traditionally dominated by women. The sector 'nursing and caretaking' increased its proportion from 9 percent in 1993 to 12 percent in 1999, and the sector 'cleaning' increased its proportion of complainants from 5 percent in 1993 to 9 percent in 1999.

If the group of cases is studied in which it is argued that capacity for work should be assessed against 'work normally available on the labour market', the result is that two of the professional sectors mentioned above have increased their ratio of these cases: Nursing and caretaking (from 6 percent in 1993 to 15 percent in 1999), and the building sector (from 6 percent in 1993 to 12 percent in 1999).

The following graph illustrates how the argument that capacity for work should be tried against 'work normally available on the labour mar-

Graph 5: *The presence of the argument that capacity for work should be assessed against work normally available on the labour market measured within different occupational groups*

Use of the argument that capacity for work should be assessed against work normally available on the labour market, within different types of occupational groups, measured in percentage of the total number of such cases per period.



Graph 5. This graph shows to what extent the argument that the capacity for work of the complainant should be assessed against ‘work normally available on the labour market’ is present within different groups of occupation in 1993 and 1999. For instance, in 1993 it was argued in 10 percent of the cases where the complainants were working with nursing and caretaking, that capacity for work should be assessed against ‘work normally available on the labour market’, while in 1999 the comparable figure was 48 percent. In 1993, the total number of cases where the complainants were working with nursing and caretaking counted 10 and in 1999 the comparable figure was 27 cases.

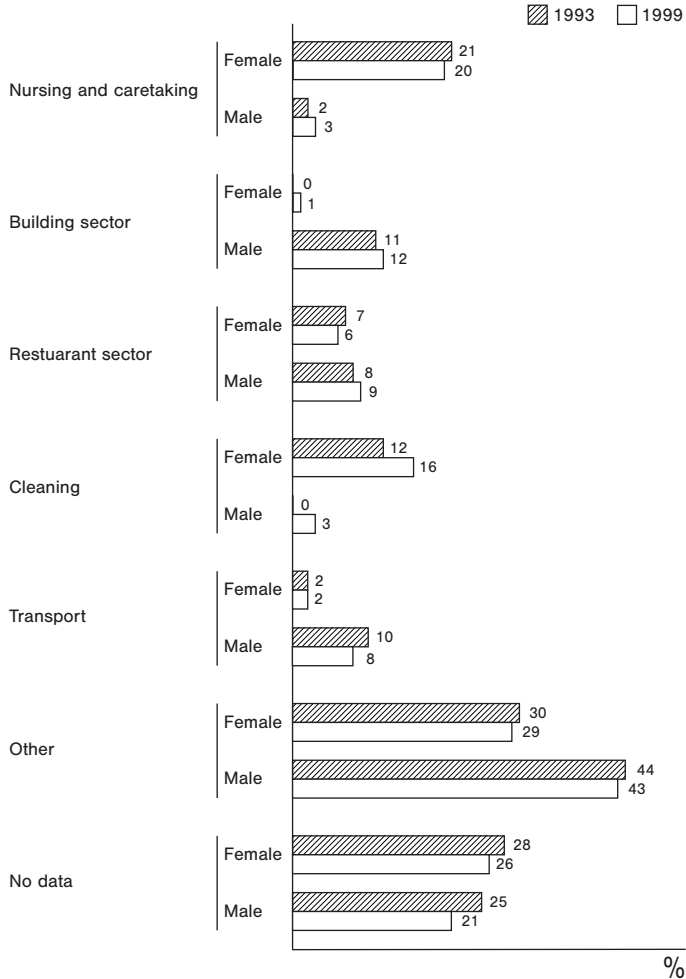
ket’ is present within the different occupational groups.

The graph also shows that there are some occupations where, in 1999, the likelihood of finding arguments for a comprehensive testing of capacity for work (i.e. that capacity for work should be assessed in relation to ‘work normally available on the labour market’) is more than 50 percent. This is true for complainants working in the building sector, the restaurant sector and for complainants working as chauffeurs. In 1993, there is no parallel phenomenon in any of the occupations.

Graph 6 illustrates how female and male complainants are represent-

Graph 6: *The occupations of male and female complainants*

The following occupations are described in the material and measured in percentage of how they are represented by male and female complainants in 1993 and 1999. In 1993 the total number of female complainants was 43 and the number of male complainants counted 63. The comparable figures for 1999 are 112 and 117.



Graph 6. This graph shows how the different occupations of the complainants are divided by sex in 1993 and 1999. For instance, in 1993, 12 percent of the female complainants and 0 percent of the male complainants were working with cleaning; in 1999, the comparable figures are 16 percent and 3 percent.

ed in the different occupations.

With the addition of available data, it is reasonable to conclude that the work sectors where the predominant argument in court is that capacity for work should be measured in a comprehensive way primarily are sectors that are heavily dominated by men (building and transport). In 1999, it was argued in 71 percent of the cases involving male complainants working in the building sector. The comparable figure for the restaurant sector is 64 percent and for chauffeurs 70 percent. This confirms what has already been stated, namely that the increase of this kind of cases is particularly marked in cases involving male complainants. What was not known previously was that the increase also was particularly marked for some distinct lines of work.

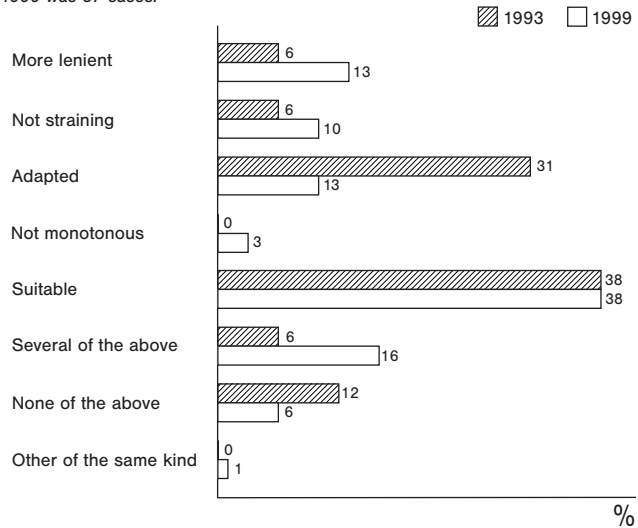
It is also worth noting how 'work normally available on the labour market' is described in the material. On basis of the results from the pre-study, an indicator was created that asked for information on such descriptions. Was the ideal work described as 'more lenient', 'not straining', 'adapted', 'not monotonous', 'suitable', 'several of the above' or 'none of the above'? Below, it is illustrated how the use of such adjectives varied in the relevant cases between the two years. See Graph 7.

What is indicated by Graph number 7 is an increased emphasis expressed in court (by the social insurance office and/or the insurance physician) on potential work situations in which someone with a physical hindrance still could use his or her remaining capacity for work.

Shifting focus to 'occupational status', the results show that in 1993, the complainants were employed in 44 percent of the cases where it was argued that capacity for work should be assessed against 'work normally available on the labour market'. In 38 percent of the cases they were unemployed (the remaining percentages represent those involved in 'other occupation', which usually means studies). In 1999, the comparable figures are that 28 percent are employed and 51 percent are unemployed. Within the two groups, 'employed' and 'unemployed', there is a distinct increase in the ratio of cases in which this argument is forwarded. Within the group of employed, an increase from 15 percent in 1993 to 34 percent in 1999, and for the group of unemployed an increase from 25 percent in 1993 to 42 percent in 1999. The change (increase) between 1993 and 1999 has affected both employed and unemployed, but the balance between these two groups has shifted. Thus, in 1999, a clear majority of the cases involves complainants who are unemployed.

Graph 7: Description of potential work assessed to be within the capacity of the complainants

Adjectives used to describe potential work situations in cases where it is argued that capacity for work should be assessed against work normally available on the labour market, measured in percentage of the total number of such cases per period. In 1993 the total number of cases was 16 and the comparable figure for 1999 was 87 cases.



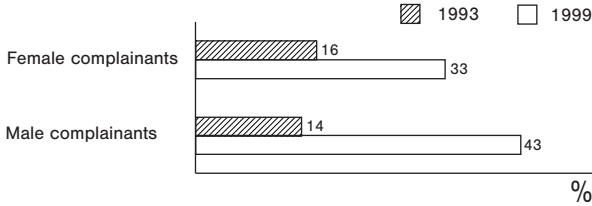
Graph 7. The graph shows the use of some specific adjectives that describe work that the complainant is assessed to have capacity to perform. For instance, in 1993, in cases where it was argued that capacity for work should be assessed against ‘work normally available on the labour market’, the potential work that the complainant was assessed to manage was described as ‘more lenient’ in 6 percent of the cases. The comparable figure for 1999 is 13 percent.

At this point, it is time to return to the data in this section that carried information on an increase from 15 percent to 38 percent of cases where it was argued that capacity for work should be assessed against ‘work normally available on the labour market’, and add a gender perspective.

When the cases are studied for the purpose of noting how they divide on male and female complainants, there is not much change between 1993 and 1999. Female complainants constituted approximately 43 percent of cases in 1993 as well as in 1999. If it is studied how this type of cases are distributed within the categories of male and female complainants, the following result presents itself:

Graph 8: *Cases involving male and female complainants where it is argued that capacity for work should be assessed in relation to work normally available on the labour market*

In the following cases it was argued that the capacity of the complainant should be assessed against work normally available on the labour market measured in percentage of the total number of male and female complainants, in 1993 and 1999. In 1993 the total number of female complainants was 43 and the number of male complainants counted 63. The figures for 1999 were 112 and 117.



Graph 8. The graph shows the proportion of cases where it is argued that capacity for work should be measured against 'work normally available on the labour market' within the groups of male and female complainants, in 1993 and 1999.

Graph 8 shows an increase of cases in which it is argued that capacity for work should be measured against 'work normally available on the labour market', and this increase occurs in cases involving female complainants as well as in cases involving male complainants. The increase is more marked within the group of male complainants.

If the factor 'sex of the insured' is exchanged for 'age of the insured', there is an overall increase between 1993 and 1999. There are two age groups (36–45 and 46–55) that together represent a clear majority of all complainants. Both groups increase their share of this type of cases. In 1993, the complainants between 36–45 were involved in 19 percent of these cases, as compared to 26 percent in 1999. The comparable figures for the age group 46–55 are 38 percent in 1993 and 44 percent in 1999. A study of the presence of this type of cases within the two age groups shows that in the age group 36–45 these cases constituted 8 percent of the cases in 1993 and in 1999 38 percent. In the age group 46–55, the comparable figures are 18 percent in 1993 and 37 percent in 1999. If all age groups are included, it appears that the presence of this kind of cases

were more age-related in 1993, but the overall increase in 1999 has blurred some of the differences. In all age groups in 1999, except one, between 33–38 percent of the cases are of the kind described above. It is only the age group 26–35-year-olds that differs and for them the comparable figure is 53 percent.

If (presumed) immigrant background is taken into account, there is an increase in the proportion of cases involving complainants in cases where it is argued that capacity for work should be measured in a comprehensive way. If the indicator ‘name’ is used, the increase is from 12 percent to 22 percent and if focus is on cases in which there are several facts that point to a recent immigrant experience, the increase is from 0 percent to 5 percent.

Cases where it is argued that capacity for work should be measured against ‘work normally available on the labour market’ are relatively more unusual within the group with a presumed immigrant background compared to the group presumed not to have an immigrant background. In 1993, such cases constituted 0 percent of the cases involving complainants with a presumed immigrant background as compared to 17 percent for presumed non-immigrants. In 1999, the comparable figures are 22 percent for presumed immigrants and 39 percent for presumed non-immigrants.

To conclude, the proposition dealt with has been confirmed. The data available support the proposition that between 1993 and 1999 there has been an increase of cases in which the conflict between the insured person and the social insurance office concerns whether or not capacity for work should be assessed against ‘work normally available on the labour market’.

Further examination of the available data also leads to the conclusion that this increase was particularly marked in cases involving two professional sectors: nursing/caretaking and building. For each sector separately, it is to be noted that the argument in focus is very frequent in cases where there is a male complainant and where the complainant is or was employed in the building sector, the restaurant sector or the transport sector. The type of cases including the argument that capacity for work should be assessed against ‘work normally available on the labour market’ used to be dominated by complainants with an employment, but this has changed between 1993 and 1999. There is an increase in both categories, but unemployed complainants have increased their ratio of the total number of cases in which this argument is put forth.

The increased use of a variety of adjectives describing the kind of work the insured would be capable of performing in spite of her or his physical problems, points to the conclusion that more effort and more

emphasis is put into these arguments from the side of the insurance offices (and/or the insurance physicians). It should also be noted that the adjective 'adapted' did not increase in usage but instead decreased. This is illustrative of the arguments forwarded in 1999, where the work assumed to be available for the complainant is work that does not need to be adapted in order for her or him to have capacity to perform it. (It is not reflected upon whether 'suitable', 'not straining', 'more lenient' work opportunities are actually available).

When the factors sex, age and (presumed) immigrant background are examined more closely, it may be concluded that there is a general, overall increase, but a larger increase within the group of male complainants as compared to the female group. For the (quantitatively) most relevant age groups, there was a larger increase within the group of 36–45-year-olds than within the group of 46–55-year-olds. This resulted in an equalized situation in 1999, where the frequency of this type of cases is similar within the two age groups 36–45 and 46–55-year-olds. Complainants with a presumed immigrant background have increased their proportion of this type of cases. The general increase does not seem to have touched complainants of different backgrounds proportionally. Still, it may also be concluded that complainants with a presumed immigrant background in 1999 are involved in a relatively small proportion of this kind of cases.

4.2.4 Third proposition – in search of the characteristics of the complainant

The proposition in this section deals with the identity of the insured person taking her or his case to court. What are the characteristics of the complainant and have they changed between 1993 and 1999? The key proposition is that:

The characteristics of the insured person who brings a case to court are different in 1999 compared to 1993.

The proposition above is based on the presumption that the social insurance offices have implemented the reforms of the concentration policy and that the shift in policy has led to increased dissatisfaction among groups that are 'targeted' by the new policy. Thus, an increased presence of these groups in court could be expected.

Knowledge about the complainant provides information that indicates tendencies in the administration of sickness cash benefit at the social insurance offices. This is interesting but not a key issue for this work. However, knowledge about the complainant could also, if analyzed in combination with the decisions of the courts, provide information about

the extent to which these kinds of facts are relevant for the content of decisions made. This aspect of the characteristics of the complainant is of more interest for this study.

In an effort to capture data that will describe the features of the typical complainant, a number of variables have been used. Thus the material has been screened for information concerning: sex, age, occupation and immigrant experience. I have also looked for information concerning sickness history, previous work injuries and previous decisions granting some level of disability pension. All these variables provide background information concerning the characteristics of the complainants. The results from 1993 and 1999 have been compared.

There are in the material some notable changes between the different years. One of them concerns an increase of female complainants in 1999 compared to the male dominance in 1993.

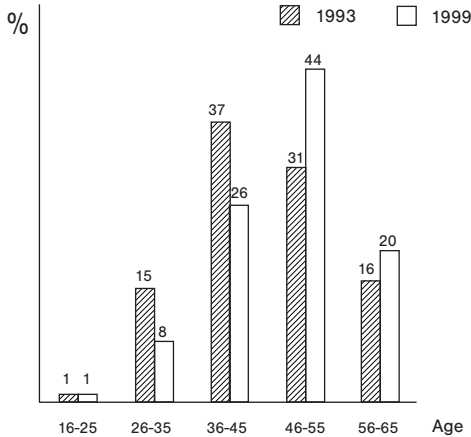
In 1993, there was almost a 40/60 relation between female and male complainants. In 1999, there is almost a 50/50 situation (41 percent of the complainants were female in 1993 compared to 49 percent in 1999).

Comparing the age factor, there is an interesting difference between the two years. In 1993, as well as in 1999, approximately 70 percent of the complainants belonged to the age span 36–55 years old. In 1993, though, the dominating group of complainants were between 36 and 45 years old (37 percent), whilst in 1999 complainants between 46–55 years old (44 percent) had this position. In harmony with this increased representation of the upper levels of the age groups, there is a decrease of cases in the younger age groups (16–36-year-olds) and an increase in the oldest age group (56–65-year-olds) between 1993 and 1999.

From a gender perspective, it can be noted that within the group of men, as well as within the group of women, this increase in the proportion of cases involving the age group 46–55 years old is visible, although much more drastically within the group of men. For women, the increase was from 35 percent to 40 percent, for men, the increase was from 30 percent to 50 percent.

The proportion of cases where there are several facts that point to an immigrant background has decreased from 12 percent in 1993 to 8 percent in 1999. An examination of the group of complainants with an untraditional Swedish/Nordic name shows that their proportion of the legal cases has decreased from 30 percent in 1993 to 25 percent in 1999. Still, in spite of a lower number of complainants with a (presumed) immigrant background, it may be concluded that the general increase in female complainants appears also within this group. Thus, in 1993, less than 10 percent of the complainants with a (presumed) immigrant background were female, while this figure was almost 40 percent in 1999.

Graph 9: Age of the complainants



Graph 9. The graph shows how different age groups are represented in the material measured in percentage of the total number of cases in 1993 (106 cases) and 1999 (229 cases), respectively.

In 1999, it was definitely more common that the complainant had some level of disability pension at the time of trial in the county administrative court. Cases involving individuals partly on a disability pension constitute an interesting group of cases that I will come back to. For now, it could be concluded that it is a kind of case that was unusual in 1993 but rather distinct in 1999. In 3 percent of the cases tried in the county administrative courts in 1993, some level of disability pension was paid to the insured. Of these, two thirds involve cases in which the insured, between the original decision of denied sickness cash benefit and court trial, has received full, 100 percent, disability pension. (Thus, once these cases reached court, there was no longer a conflict regarding the lack of capacity for work of the complainant). In 1999, all 14 percent of the cases that include individuals with a part-time disability pension are connected to situations in which the individual has been denied sickness cash benefit, thus another kind of case. A typical case of this kind in 1999 would be that the complainant has been granted a 50 percent

disability pension and claims the right to sickness cash benefit for the remaining 50 percent, a claim that is denied by the social insurance offices. It can be concluded from the material at hand that there is a definite increase of this type of cases. From being almost non-existing in 1993, they constitute 14 percent of the material of legal cases in 1999.

In 1993, as well as in 1999, 80 percent of the cases concern individuals who have a sickness history (linked to the present condition) that is fairly long and complicated. In 1993, almost 40 percent of the complainants had a sickness history that had lasted between 4–7 years (compared to 25 percent in 1999) 35 percent had a sickness history that had lasted between 1–3 years (compared to 40 percent in 1999). In 1999, as compared to 1993, there was an increase in cases that had lasted more than 7 years (from 4 percent to 9 percent) as well as an increase in cases that had lasted 6–12 months (from 5 percent to 10 percent).

The picture that evolves from these figures is that in 1999 the different cases represent complainants that together have a more diversified sickness history than in 1993. The ratio of complainants with a fairly short, as well as those with a very long, sickness history has increased. The only group that decreased its ratio in 1999 included those with a sickness history that had lasted between 4–7 years. It is to be noted that in the group with a very long sickness history (more than 7 years), some of the increase could be explained with a reference to the cases involving complainants with some level of disability pension. In 1999, complainants with a disability pension were involved in 40 percent of the cases where the sickness history was longer than seven years, compared to 0 percent in 1993.

The unemployed, as is shown in Graph 10 below, have drastically increased their presence in court (from 23 percent in 1993 to 46 percent in 1999).

To complicate the picture, one should note that the number of cases where there is 'no data' on the occupational status of the insured decreased between the years 1993 and 1999. There is at least a theoretical possibility that the 'no data' cases in 1993 were unemployed and thus that the remarkable increase of unemployed in 1999 could be less drastic.

There is an increase in the ratio of unemployed within all age groups but most notably within the age group 36–45 years old (from 18 percent in 1993 to 48 percent in 1999). Although the ratio of unemployed increased substantially between the two years, the balance between men and women within the category 'unemployed' stayed more or less the same (40 percent of the unemployed were female and 60 percent male in 1993 as well as in 1999). However, there is a shift in the proportion of male/female complainants who are employed. In 1993, men domi-

Graph 10: *The occupational status of the complainants*

The occupational status of the complainants measured in percentage of the total number of cases in 1993 (106 cases) and 1999 (229 cases).



Graph 10. The graph shows the occupational status of the complainants in 1993 and 1999 measured in percentage of the total number of cases in 1993 (106 cases) and 1999 (229 cases), respectively.

nated this group in a 60/40 relation. In 1999, women are in the majority in the group of complainants with an employment (60 percent women, 40 percent men).

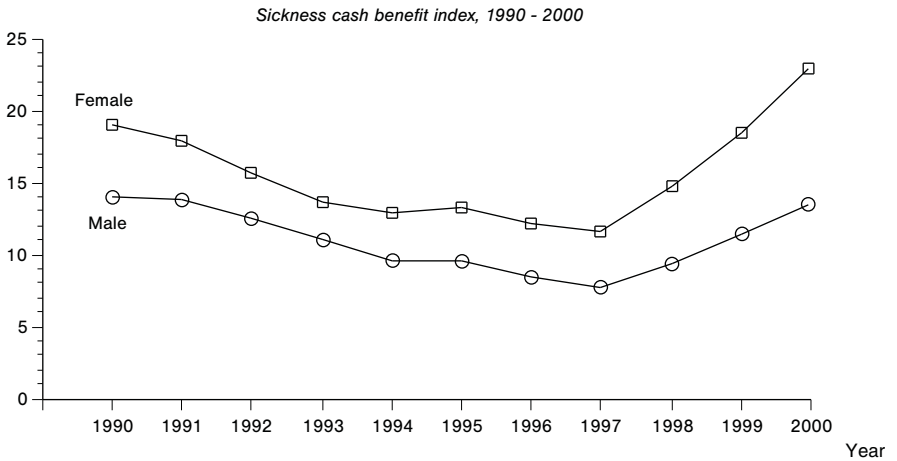
Before attempting to draw any conclusions, some official statistics provided by the National Social Insurance Board and the Swedish Labour Market Administration will be commented in order to provide a contextual framework. It would, to take an example, be interesting to know if the drastic increase in the proportion of complainants who are unemployed is a reflection of an actual increase of unemployment during the relevant period.

In the statistics from the National Social Insurance Board, there is a measurement called the 'sickness cash benefit index'. This measure is defined as the number of days that are reimbursed with sickness cash benefit and work injury cash benefit spread over the number of insured individuals. The graph below shows the 'sickness cash benefit index', male and females separated, for the years 1980–2000. For this investigation, a specific interest is taken in the years 1992 and 1998. As was shown above (section 4.2.1.), decisions that ended up in court in 1993

and 1999 predominantly originated in decisions made at the social insurance offices in 1992 and 1998.

The 'sickness cash benefit index' for women was 15.7 days in 1992 and 14.7 days in 1998. For men these figures were 12.5 days in 1993 and 9.3 days in 1998. The graph below shows that 1992 and 1998 are on each side of a dip in the usage of sickness cash benefit. The 'all-time low' of the 1990s was reached in 1997, and since then, there has been a rather steep increase in the use of the insurance. After 1997, a development of increased difference between the sexes is also be noted.

Graph 11: 'Sickness cash benefit index', 1990–2000



Graph 11. The graph shows the sickness cash benefit index for men and women during the period 1990–2000. Source: RFV statistics.

An examination of official statistics concerning unemployment shows that the percentage of open unemployment (not including labour market programs) was 7 percent in 1992 and 10.4 percent in 1993. In 1998, these figures had decreased somewhat to 6.7 percent in 1998 and 6.4 percent in 1999. On the other hand, given that most of the complainants, in 1993 as well as in 1999, had a sickness history that was fairly long, maybe the four years previous to 1992 and 1998 should be compared in order to understand the situation at hand when the complainant became sick. In the four years 1988–1991, unemployment figures

were between 1.5 percent and 3 percent of the workforce. During the years 1994–1997, the unemployment figures were much higher, between 8.6 percent and 10.3 percent of the workforce.¹⁷ Still, for these figures to serve as an explanation to the increase as such, and especially as an explanation for the increase of unemployed among the complainants in 1999, there ought to be an increase of cases where the insured had a sickness history that stretched back in time 1–4 years. As noted above there is a fairly moderate increase in 1999 of the proportion of cases with a sickness history that stretches 1–3 years back (from 35 percent to 40 percent) and a decrease of the proportion of cases which stretches 4–7 years back (from 40 percent to 25 percent).

What conclusions could be drawn this far? There is an increase in the proportion of female complainants as well as in the proportion of complainants in older age groups. There is an increase in the proportion of unemployed and in the proportion of complainants who have some level of disability pension. The last two categories may, or may not, fit under the description of having a ‘socially complex situation and overall loose connections to the labour market’, but it could be argued that being unemployed and/or on disability pension will increase the risk of having a complex total life situation. The proposition thus seems to be confirmed. Not predicted by the proposition is the large increase in the number of cases brought to court.

It seems as if none of the changes between 1993 and 1999 could easily be explained by simply referring to general tendencies in society. The number of unemployed did increase between the years 1992 and 1998 – the peak was reached in 1994 – but the situation in 1992/93 is quite comparable to the situation in 1998/99. If anything, the number of unemployed is smaller in 1998/99. What could be argued is that the individuals found in court in 1998 are those who have been unemployed since 1994. Thus, the big increase of unemployed individuals acting as complainants in 1999 could be an effect of the aftermath of the economic crises of the 1990s (rather than an effect of policy changes). The material provides no answer to this. There is rarely any information in the material of legal cases that will specify for how long an individual has been unemployed.

The trend of a steep increase in the ‘sickness cash benefit index’ that started in 1997, would not in 1998 have reached any levels that could explain the drastic overall increase of complainants in court. There is a trend of increased female usage of the sickness insurance between 1992

¹⁷ Source: Ams Statistikenhet, (2002-02-02), www.ams.se/admin/documnets/ams/arb-data/tidigare.htm#1.

and 1998, seemingly reflected in the increased number of females present in court as complainants. Still, in 1998, this increase was not substantial enough to fully explain the increase of women in the courts.

If the actions of men and women are studied a bit closer, the differences between how the sexes are bringing their cases to court cannot be explained by simply referring to the underlying situation of how sickness cash benefit is distributed. There was a debate during the launching of the concentration policy where arguments were raised forecasting that the proposed changes would hit unevenly and to the detriment of women.¹⁸ It was argued that women, to a higher degree than men, were troubled by 'subjective pain symptoms', and as a consequence, women would, to a higher degree than men, be hit by the reforms. Another contradictory, but fairly obvious, reflection would be that it is the 1993 figure that is odd. How can the absolute predominance of male complainants be explained given that men are in a minority as claimants of sickness cash benefit? In this perspective, the 1999 figures could be seen as an adjustment of the situation in the courts, moving towards a representation of sexes that better reflects the situation at the social insurance offices (where women, more often than men, claim the right to sickness cash benefit). Choosing this line of reasoning, it could be argued that as women are in a majority as claimants at the social insurance offices, it is only natural that they should also be in a majority as complainants in court. The increase of women as complainants could thus be part of a process quite independent of the social insurance legislation, reflecting increased equality between sexes to the extent that women increasingly claim their rights in court.

On the other hand, a line of reasoning could be adopted that interprets the characteristics of the complainants as indicators pointing at groups who are dissatisfied with the implementation of policies at the social insurance offices. In this perspective, the steep increase in the case load would indicate an increased dissatisfaction. The frustration over the decisions taken at the social insurance office seems to increase between 1993 and 1999, especially among women (of all ethnic backgrounds), amongst men within the age span 46–55 years old and among somewhat younger unemployed men. Another group that has become visible in the 1999 figures are those with a part-time disability pension.

The proposition put forward in this section is, in large, confirmed by the investigation. There are differences in the characteristics of the in-

¹⁸ An example of such argumentation can be found in Motion 1996/97:Sf6 in which the Green Party argues that the new 'concentrated' criteria, determining access to allowances from the sickness insurance, discriminate women.

sured between 1993 and 1999, and these differences can more or less be understood as being in accordance with the proposition. However, it must also be concluded that the explanations for why this development is at hand cannot be answered solely on the basis of the empirical material in this study.

4.2.5 Summing up – first, second and third proposition

The first three propositions all stem from a prognosis of what would be likely developments given that the local social insurance offices implemented the concentration policy. According to the prognosis, a new emphasis on a strict medical basis for sickness insurance would increase the proportion of cases in which the distinction between objective and subjective symptoms was made important (first proposition). Further, the implementation of the step-by-step model would increase the proportion of cases where it was argued that the capacity of the insured should be assessed against ‘work normally available on the labour market’ (second proposition). The group of insured supposed to be most affected by the emphasis on a strict medical basis for sickness insurance were those suffering from 1) subjective symptoms and 2) from a nexus of different ‘life problems’ where it can be hard to isolate the medical impacts and aspects. The group of insured supposed to be most affected by the implementation of the step-by-step model were the unemployed. Thus, given that the insured affected by the changes implemented as a result of the concentration policy increasingly would take their cases to court, a change of the characteristics of the complainant could be expected in 1999 as compared to 1993 (third proposition).

The results of the study of legal cases confirm all three propositions. I have made a detailed description of the results in the sections above; here, I will highlight some of the main findings:

Although there might not be an increase in the proportion of cases where subjective symptoms are an important part of the diagnosis, there is a definite increase of cases where the distinction between ‘objective’ and ‘subjective’ is used in the argumentation (first proposition). Proportionally (as well as in numbers), there is a definite increase in cases where it is argued that the capacity for work of the insured should be measured against ‘work normally available on the labour market’ (second proposition). There are also changes in the characteristics of the complainant (third proposition).

There are proportionally more female complainants in 1999 as compared to 1993, and within the group of female complainants, an increase of the two different types of cases of interest could be noted. Still, male

complainants seem to be struck hardest by the concentration reform. A general increase of older age groups in the material was noted in 1999 as compared to 1993. Still, in the type of cases where it is argued that capacity for work should be assessed against 'work normally available on the labour market', the largest increase is found in cases involving male complainants in the age span 36–45.

There is an increase of the proportion of complainants with some level of disability pension, an increase of the proportion of complainants who are unemployed and a decrease of the proportion of complainants who have a (presumed) immigrant background.

With these results in mind, I will continue by scrutinizing the fourth and fifth proposition.

4.2.6 Fourth proposition – the prominence of 'insurance medicine'

The reforms of the sickness insurance in the 1990s included changes that specifically pointed at the institution of insurance physicians and thus, indirectly, also at 'insurance medicine', the insurance physicians' field of expertise. The proposed importance of this institution depends on the influence insurance physicians have on decisions regarding access to sickness cash benefit. That the institute of insurance physicians is important was strongly indicated by the results of the pre-study performed in 1999. The fourth proposition is:

The arguments and the position of the insurance physician (as an expert in insurance medicine) reinforce the concentration policy by emphasizing 1) the necessity of scientific objectivity and 2) the work-line. Through the insurance physicians, these arguments have become increasingly important and visible in court procedures dealing with the right to sickness cash benefit.

In order to approach this proposition, variables were created that were to show in the position of the insurance physician. I have also included a question about the sex of the insurance physician in order to be able to perform a comparison between male and female physicians.

The fourth proposition will be scrutinized as follows: The position of insurance physicians in cases dealing with subjective symptoms is studied, as well as their position in cases where the core issue is how to measure capacity for work (the type of cases where the concentration policy is potentially most visible). The factors age, sex and (presumed) immigrant background of the complainants are analyzed in order to see if these are important variables for the standpoint taken by the insurance physi-

cian. The material will be analyzed in order to find out whether the position of the insurance physicians has changed between 1993 and 1999. Changes that indicate that insurance physicians embrace an increased emphasis on objectivity and the application of the work-line within the sickness insurance will be interpreted as supporting the first part of the proposition. Changes that indicate that these arguments are more important for the procedure in court will be interpreted as confirming the second part of the proposition. Specific questions to be answered in relation to the fourth proposition are:

- What is the standpoint (the assessment of capacity for work) of the insurance physician in court in general?
- How does this standpoint of the insurance physician compare to the position of the treating physician?
- How does the insurance physician assess capacity for work in the cases involving subjective symptoms?
- What assessment of capacity for work is made by the insurance physician in cases where the core issue is how capacity for work should be measured?
- Are the factors age, sex and national background of the insured relevant for the standpoint of the insurance physician?
- Is it of any relevance if the insurance physician is male or female?
- Have the arguments of the insurance physicians become increasingly important in court procedures dealing with the right to sickness cash benefit?

As there are some shifts in the position of different actors depending on the level in the process at which a certain standpoint is taken, I have collected data on the opinion of the insurance physician at the time of the original decision as well as at the time of court trial. The difference turned out to be marginal though, so below, focus is on the situation at the time of trial. In 42 percent of the cases in 1993 and in 45 percent of the cases in 1999, it is noted in the judgement that the insurance physician made the assessment that the complainant had 100 percent capacity for work. The major difference between the two years is that the proportion of cases in which there is 'no data' available on the opinion of the insurance physician has decreased from 47 percent in 1993 to 31 percent in 1999. A preliminary reflection to be made at this point is that the opinions of the insurance physicians are increasingly accounted for in the

judgements from 1999 as compared with those from 1993. The names of the insurance physicians are more often written down and their arguments more available. Apart from this, an increase of cases where the level of 50 percent sickness cash benefit is relevant, is to be noted. In 6 percent of the cases in 1993, the insurance physicians made an assessment of 50 percent capacity for work, compared to 15 percent in 1999.

The material consists of cases brought to court, and thus, cases where there is a dispute. The insured person who brings a case to court does not, in general, agree with the above interpretation of the level of capacity for work. The complainant will often make reference to the treating physician and claim her or his right to sickness cash benefit.

The opinions of the treating physicians on the capacity for work of the complainants were even harder to find than was the case for the insurance physicians. In 1993, the 'no data' cases constituted 61 percent of the cases compared to 47 percent in 1999. The 'no data' cases are, in the great majority of cases, represented by physicians who have sick-listed their patients, thus they have had the opinion that there is a lack of capacity for work. The explanation is that physicians describe the medical problems of their patients, but in a large proportion of cases, they do not say (or it is not referred to in the judgements of the courts) anything about how they estimate that these physical problems affect the capacity for work. There are, thus, in these cases no data on if, how, and to what degree the treating physician has reflected over the level of capacity for work.

In 1993, the treating physicians clearly stated in 26 percent of the cases that they assessed of the complainants' capacity for work to less than 50 percent. The comparable figure for 1999 is 35 percent. There is also a proportion of cases where the treating physician claims that the complainant has full capacity for work (12 percent in 1993 and 14 percent in 1999).

Although the opinions from treating physicians might not include any statement on their patient's capacity for work, the insured will use their description of diagnoses and symptoms, and especially their decision to sick-list their patient, as arguments for claiming sickness cash benefit in court. The opinions of the treating physician can also be used by the insurance office to prove the opposite, namely, that there is capacity for work to some degree. (In some cases there is also data on how a second treating physician interprets the level of capacity for work. These figures are almost identical with the opinions of the first physician and I have chosen to present only figures for 'treating physician 1').

The fact that it is noted in 14 percent of the judgements in 1999 that the treating physician finds that the complainant has full capacity for

work, may seem as a bit odd. (Odd, as the treating physician at some point has written a sickness certificate to the insured). To understand this figure, it is important to know that these cases include those where the treating physician assesses the capacity for work in relation to the complainant's usual work or training as non-existing, but in relation to any kind of 'available' and 'suitable' work, he has assessed the level of capacity for work higher. The insured can still use the statement from the treating physician, arguing that his or her capacity for work should indeed be measured in relation to the occupation or work he or she earlier possessed or trained for. These statements could also be used by the social insurance office to confirm their position that the insured has some level of capacity for work in 'work normally available on the labour market'.

The absence of data on the assessments made by the insurance physician and the treating physician, on the complainant's capacity for work is striking. It is also notable that there is an increase of data in the cases from 1999. This is a general trend, not just concerning the opinions of medical experts. There is a qualitative change between 1993 and 1999 in how the judgements are written. The judgements from 1999 are overall longer, more elaborated and more detailed, and this is especially true in the account of the arguments by the different medical experts involved in a case. The decrease of cases in which there is 'no data' available is thus a sign of a qualitative change. The judgements contain information on what the court considers to be important for understanding the conflict as well as the position of the court. Lack of data on certain issues could thus be interpreted as lack of importance for the decision making of the courts. Therefore, one way to interpret the increase of recorded data on the position of the insurance physicians in 1999 is that the role of the experts in insurance medicine became more important in 1999 and thus, their arguments were accounted for in more detail. It is still, in this perspective, surprising that in almost 30 percent of the cases in 1999, there is no recorded statement or information about the standpoint of the insurance physician in relation to the capacity for work of the insured.

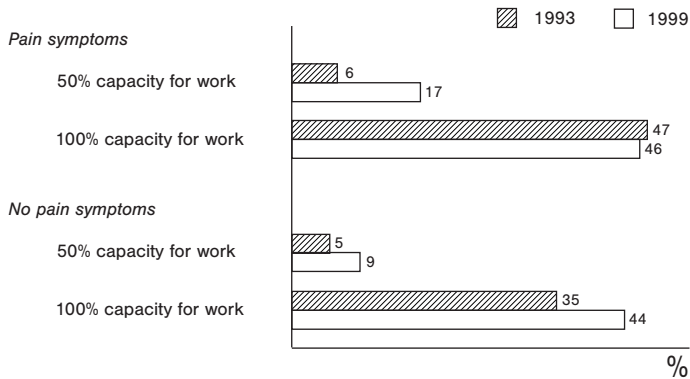
If the first two questions above are studied, it appears that in cases where the position of the insurance physician is available, the dominating standpoint of the insurance physician is that the insured has 100 percent capacity for work. There is also a distinct group of cases where the position of the insurance physician is that the insured has 50 percent capacity for work. What is to be noted is that this position of the insurance physician has become more frequent in 1999 as compared to 1993. If the standpoint of the insurance physician is compared with the standpoint of the treating physician, something of a reversed image appears. The cases where there is no data is larger, but in the cases in which data

is available, the most common standpoint among the treating physicians is that there is no capacity for work.

The lack of data should be noted. Treating physicians are not considered to be experts on 'capacity for work' and this is noticeable in how the arguments of the treating physicians are referred to. There is an imbalance between the position of the insurance physician and the treating physician to the extent that their expertise is not assessed to be overlapping. The treating physician is not in a position to provide a competing second opinion on the issue of capacity for work. To the extent that the treating physician does have an opinion regarding capacity for work, this opinion is not backed up with the expertise knowledge connected to the professional field of insurance medicine.

The third question listed above concerned the typical standpoint of the insurance physician in cases involving subjective symptoms. Graph 12 below illustrates the opinion of the insurance physician on the capacity for work in cases where there are pain symptoms and in cases where there are no pain symptoms.

Graph 12: *Assessment of capacity for work in cases involving /not involving pain symptoms*



Graph 12. The graph shows how the insurance physicians, in cases involving/not involving pain symptoms, assess the capacity for work of the complainants in 1993 and 1999. For instance, in 1993, in cases including pain symptoms, it was argued in 6 percent of the cases that the complainant had a 50 percent capacity for work. In 1999, the comparable figure was 17 percent.

The graph above shows that there is an overall increase in the percentage of cases where the insurance physician has made an assessment that the complainant has some level of capacity for work – except for one category. In 1993, the complainant was considered to have full capacity for work in 47 percent of the cases involving pain symptoms, to be compared with 46 percent in 1999, thus hardly any change at all.

Shifting perspective from cases where there is a pain diagnosis to cases in which the insurance physicians have made the assessment that the complainant has 100 percent capacity for work, the results show that within this specific category the percentage of cases involving pain symptoms has increased from 69 percent in 1993 to 77 percent in 1999. If the specific group of cases is studied in which the insurance physicians have made the assessment that the complainant has 50 percent capacity for work, there is an increase of cases with a pain diagnosis from 67 percent in 1993 to 86 percent in 1999.

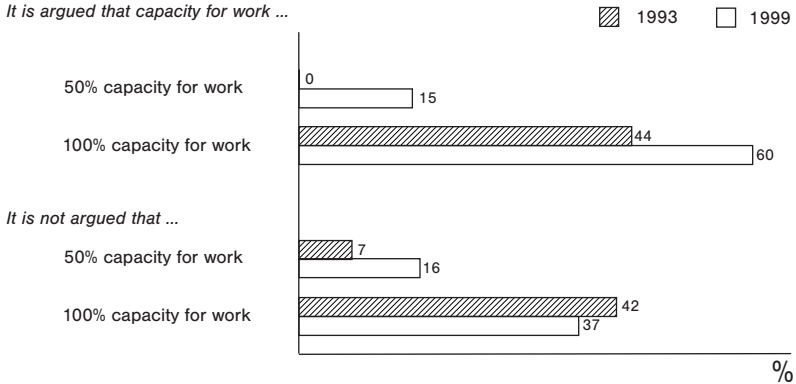
A comment to be made in relation to these figures is that the standpoint of the insurance physicians in cases involving pain symptoms does not seem to have changed in any drastic way between 1993 and 1999. This is said with some reservation, as there is a clear tendency that complainants with (or without) pain symptoms increasingly are assessed to have some remaining (50 percent) capacity for work. The other figures presented confirm what has already been concluded, namely, that there has been an increase of the proportion of cases where pain symptoms are included (from 62 percent in 1993 to 76 percent in 1999).

Thus, in answer to the third question, the material at hand indicates that the position of the insurance physician in relation to cases involving subjective symptoms has not shifted, although the arguments used increasingly emphasize the distinction between subjective and objective experiences. Although there is no clear indication that the position of the 'insurance physician' in relation to symptom diagnoses has changed between 1993 and 1999, the role of the insurance physician might have become more important, thus giving her or his standpoint a more penetrating power and affecting more cases. The main support for this argument is, so far, that the opinions of the insurance physicians have a much more prominent position in the written judgements from 1999 as compared to 1993.

The fourth question asks for the typical position of the insurance physician in cases where the issue in court concerns what kind of work the capacity should be measured against. Graph 13 below provides information on the opinion of the insurance physician regarding capacity for work in this kind of cases.

Graph 13: *Assessment of capacity for work in cases where the issue in court concerns what kind of work the capacity should be related to*

Assessment by the insurance physicians of capacity for work in cases where it was, and was not, argued that capacity for work should be assessed against work normally available on the labour market, measured in percentage of the total number of such cases per period. In 1993 the total number of such cases was 16 (argued) and 90 (not argued), the comparable figures for 1999 were 87 and 142.



Graph 13. The graph shows how the insurance physicians, in cases where it is argued that capacity for work should be measured ‘work normally available on the labour market’, assess the capacity for work of the complainants, in 1993 and 1999. For instance, in 1993, the insurance physicians argued in 44 percent of the cases where the issue in court mainly concerned what kind of work the capacity for work should be assessed against, that the complainant had full capacity for work. In 1999, the comparable figure was 60 percent.

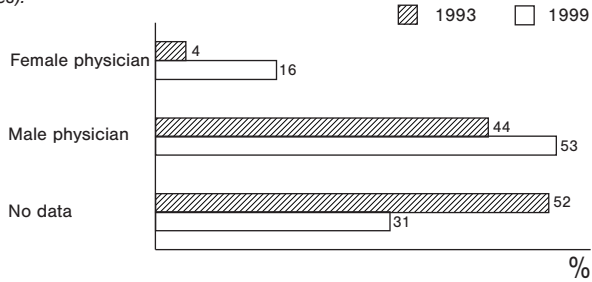
The graph discloses a large increase in the proportion of cases where the insurance physicians assess some level of capacity for work. The increase is, if all levels of capacity for work are added together, from 44 percent in 1993 to 80 percent in 1999. Also notable is the increased importance of different levels of capacity for work that are less than 100 percent but more than 0 percent, and the decrease of ‘no-data’ cases (from 56 percent in 1993 to 17 percent in 1999). The answer to the fourth question is that the typical position of the insurance physician in 1999 is that the complainant has some level of capacity for work. In most of these cases (60 percent), the insurance physician’s position is that the complainant, has full capacity for work.

The fourth and fifth questions concern the possible influence of the factors age, sex and national background of the complainant and the possible influence of the fact that the insurance physician is male or female.

Before analyzing these different variables, it is to be noted that there is a definite male dominance among the physicians acting as insurance physicians in the material.

Graph 14: *Insurance physician, sex*

Information on the sex of the insurance physician measured in percentage of the total number of cases in 1993 (106 cases) and 1999 (229 cases).



Graph 14. The graph shows the sex of the insurance physician in 1993 and 1999 respectively.

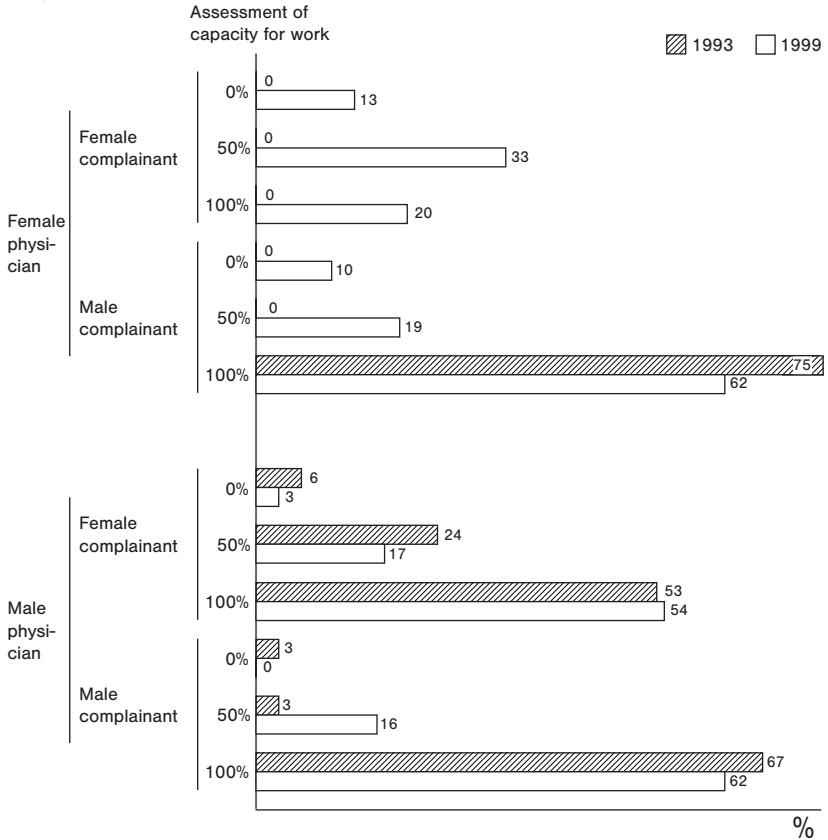
Apart from the male dominance, the decrease of ‘no data’ cases in 1999 could also be noted (again). The no data cases include cases where no reference has been made to the insurance physician or where the ‘insurance physician’ has been referred to in the judgement but without any name or other data.

Below, Graph 15 provides information from 1993 and 1999. The figures (in percent) give data on the insurance physicians’ opinions on the level of capacity for work. For the sake of clarity, only figures for the three levels: 100 percent capacity for work, 50 percent and 0 percent, have been included.

What could be noted in the graph above is that there is a difference in the percentage of cases in which female and male insurance physicians have found ‘no capacity for work’. The number of female insurance physicians is so low in 1993 that it is difficult to make a comparison between 1993 and 1999 of the assessments of female insurance physicians. A comparison between 1993 and 1999 of the assessments of male insurance physicians indicates no major changes in practice, with one major exception. There is a clear increase in the percentage of these cases in 1999, in which male complainants are assessed to have 50 percent capacity for work (from 3 percent in 1993 to 16 percent in 1999).

Graph 15: Assessment of capacity for work, made by female and male insurance physicians, of female and male complainants

The assessment of capacity for work, made by female and male insurance physicians, of female and male complainants. Percentage measured within each category. In 1993 there were 0 cases in which female insurance physicians assessed the capacity for work of female complainants and 4 cases in which they assessed the capacity of male complainants, in 1999 the comparable figures were 15 cases (female complainants) and 21 cases (male complainants). For male insurance physicians the figures were in 1993: 17 cases (female complainants) and 30 cases (male complainants), and in 1999 they were: 59 cases (female complainants) and 63 cases (male complainants).



Graph 15. The graph provides information on how male and female insurance physicians assessed the capacity for work of male and female complainants. For instance, in cases where female insurance physicians assessed the capacity of female complainants in 1999, they found that the complainants had full capacity for work in 20 percent of the cases. When male insurance physicians assessed the capacity for work of female complainants in 1999, they found full capacity for work in 54 percent of the cases.

Female physicians find, in 1999, when estimating the capacity for work of female insured, no capacity for work in 13 percent of the cases, and full capacity for work in 20 percent of the cases. If this is compared with how male physicians estimate the capacity for work of female insured during the same year, the result shows that they find no capacity for work in 3 percent of the cases and full capacity for work in 54 percent of the cases. The tendency of male physicians to find more capacity for work with the insured compared to female physicians repeats itself when the estimation of capacity for work of male insured is studied. Male physicians find no case of 'no capacity for work' in this group, while female physicians find that in 10 percent of the cases involving men, there is no capacity for work. In this comparison, there seem to be more of differences due to the sex of the insurance physician than to any substantial differences in the general developments between the years 1993 and 1999.

If the data providing information on sex is substituted with other data related to the characteristics of the insured, such as age or background, different graphs appear, but they share the attribute of primarily pointing at a difference in practice between male and female insurance physicians in 1999. If the age of the insured is used, the figures show that younger age groups are considered to have more capacity for work than older age groups. Both male and female physicians show the same curve. Still, there is a definite gap between the opinions of female and male physicians in a comparison of the percentage in each age group who are considered to have full capacity for work. Thus, in the age group 36–45 years old, female physicians will consider 40 percent of them as having full capacity for work, compared to 67 percent in the opinion of the male physicians. In the age-group 46–55 years old, female physicians consider 37 percent of them to have full capacity for work (male physicians, 54 percent). In the oldest age group, 56–65 years old, female physicians consider 33 percent of them to have full capacity for work (male physicians, 54 percent).

Changing perspective once again, from age to presumed immigrant background, the pattern above repeats itself. Thus, in 1999, female insurance physicians tend to find less capacity for work, independently of the background of the complainants, than do male insurance physicians. This difference is more emphasized in cases involving complainants with a non-traditional Swedish/Nordic name and also in cases where several facts point to a recent experience of immigration. Female insurance physicians assess that there is full capacity for work in 50 percent of the cases where there are several facts pointing to an immigrant experience, compared to 83 percent for male insurance physicians. In cases where the

complainants do not have this experience, female physicians find full capacity for work in 43 percent of the cases, compared to 57 percent for male insurance physicians. In cases where the complainant has a non-traditional Swedish/Nordic name, the female insurance physicians will assess that there is full capacity for work in 42 percent of the cases, compared to 67 percent when male physicians assess the same type of complainants. In the group with traditional Swedish/Nordic names, female physicians find full capacity for work in 46 percent of the cases, compared to the male insurance physicians' assessment of 56 percent with full capacity for work.

The fourth proposition stated that 'the arguments and the position of the insurance physician (as an expert in insurance medicine) reinforce the concentration policy by emphasizing 1) the value of scientific objectivity and 2) the work-line. Through the institute of insurance physicians, these arguments have become increasingly important and visible in the court procedures dealing with the right to sickness cash benefit'.

The first part of the proposition concerns the position of insurance physicians (insurance medicine) in relation to the concentration policy. This part of the proposition has been analyzed by an examination of two types of cases identified earlier in this chapter, namely those where there is a subjective diagnosis and those where the core issue concerns how to measure capacity for work. There is a general increase in the proportion of cases where the insurance physicians assess that the complainant has 50-100 percent capacity for work. In cases including pain symptoms, the increase is from 56 percent in 1993 to 66 percent in 1999. In cases not including pain symptoms, there is also an increase, from 40 percent in 1993 to 56 percent in 1999. In the cases including pain symptoms, the increase mentioned above is mainly visible as an increased proportion of cases in 1999 where the complainant is assessed to have 50 percent capacity for work, while it is not visible in cases combining pain symptoms and an assessment of full capacity for work. In 1993 and 1999, these cases constitute a similar proportion of cases (46-47 percent). There is, however, an increase in the proportion of cases combining a description of symptoms as being 'subjective-like' ('not objective-like') and an assessment of full capacity for work. One possible interpretation of these figures is that the position of the insurance physicians (and insurance medicine) in relation to how to assess a 'symptom diagnosis' has not changed, but the arguments emphasizing the dichotomy subjective/objective is more frequently used in 1999 than in 1993. Furthermore, these arguments are more frequently used in cases where the insurance physician is of the opinion that the complainant has full capacity for work. There is an increase between 1993 and 1999 in the proportion of

cases where there is a combination of 1) the argument that the complainant is suffering from sickness that could not be verified objectively and 2) an assessment of full capacity for work in the opinion of the insurance physician. Thus, from the experts of insurance medicine, arguments in favour of a strict medical sickness criterion have become more apparent. This development is in line with the concentration policy.

An examination of the cases where the core issue is how to measure capacity for work shows a definite increase in the proportion of cases where the insurance physician assesses that the complainant has some capacity for work. The concentration policy underscored the importance of applying the work-line in social insurance. It is likely that the overall increase of cases where the complainant is assessed by the medical experts to have capacity for work, and definitely the increase of cases where the complainant is assessed to have if not full, so at least 50 percent capacity for work, should be interpreted as a response to the work-line policy.

Although it is hard, on the basis of the material at hand, to distinctly confirm that the discipline of insurance medicine, and thus the insurance physicians, have come to function as the prime instrument for implementing the concentration policy, there are strong indications that the institute of insurance physicians reinforces the ideological basis connected to this policy. It is also noteworthy that the position and arguments of the insurance physicians have become much more visible between 1993 and 1999 in the written judgements. The judgements should be written in a way that makes the position taken by the court understandable; relevant facts and arguments should be part of the judgement. I do not consider it an over-interpretation to regard the increased account for the arguments of the insurance physicians in the judgements as a sign of their increased importance in the decision-making process.

Not predicted by the proposition, and to some extent questioning it, is the data falling out when making a gender analysis. The marked difference between how male and female insurance physicians assess the capacity for work of the complainants, questions the point of departure to the extent that the entity of the 'insurance physician' as representing 'insurance medicine' is split in two. It seems as if it is the dominance of male insurance physicians that makes the reasoning above come true, but had the proportion of female insurance physicians been larger, it is highly questionable if this institution could be considered as a factor reinforcing the concentration policy. While the expected opposing interests was foreseen (and confirmed) to appear between treating physicians and insurance physicians, there are now indications of such a split also within the group of insurance physicians.

4.2.7 Fifth proposition – the impact of experts

Unlike the propositions dealt with previously, the fifth proposition is not linked only to the introduction of a concentration policy in the sickness insurance. The fifth proposition deals with the increased emphasis on 'scientifically based arguments', and 2) the procedural reform in the administrative courts introducing an obligatory two-party court procedure. These two parallel developments provide a basis for the following proposition:

The external experts in court have increased in numbers and influence between the years 1993 and 1999.

The basis for this proposition is that arguments supported by 'experts' would to an increased extent strengthen the position of whoever is using them, given the value of 'scientifically based arguments'. Also, the procedural reform (the obligatory two-party procedure) should have increased the incentive for the different parties of the conflict to take more control over the procedure in court by referring to experts of their choice.

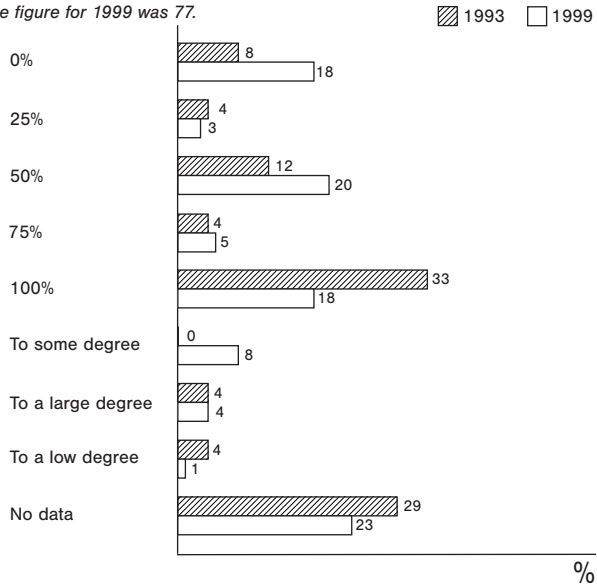
It is clear that there has been an increase in the use of 'extra medical experts' between 1993 and 1999. In 1993, extra medical experts were used in 23 percent of the cases, and in 1999, the comparable figure is 33 percent. As 'extra', I have categorized opinions from medical doctors who are neither the insurance physicians originally dealing with the case, nor the first or second treating physician. Other figures show that two extra experts are used in 8 percent of the cases in 1993 and in 11 percent of the cases in 1999. Three extra medical experts (or more) are used in 3 percent of the cases in 1993 and in 4 percent of the cases in 1999.

The material of legal cases has not provided information, with any certainty, on who (the insured, the social insurance office or the court) has made these expert opinions available to the court. In some cases, it is obvious that the experts are used to strengthen one of the sides in the conflict, but this is not always the case. Just as when treating physicians are involved, the medical experts can be unclear about their interpretation of the capacity for work of the insured and thus also less useful for the purpose of strengthening either side of the conflict. Below, Graph 16 shows the arguments of the medical experts. There are some notable differences between 1993 and 1999. One such difference is that the arguments put forward pointing to the fact that the complainant has no capacity for work have distinctly increased in 1999. This could be a sign that the insured to a greater extent are using 'their own' experts in order to meet the arguments from the social insurance office.

The fifth proposition could quite easily be confirmed. Yes, there is an increased use of extra medical experts in court in 1999 as compared to

Graph 16: Assessment of capacity for work by 'extra' medical experts

Assessments made by extra medical experts, of capacity for work, measured in percentage of the total number of cases in which extra medical experts were used. In 1993 the total number of such cases was 24 and the comparable figure for 1999 was 77.



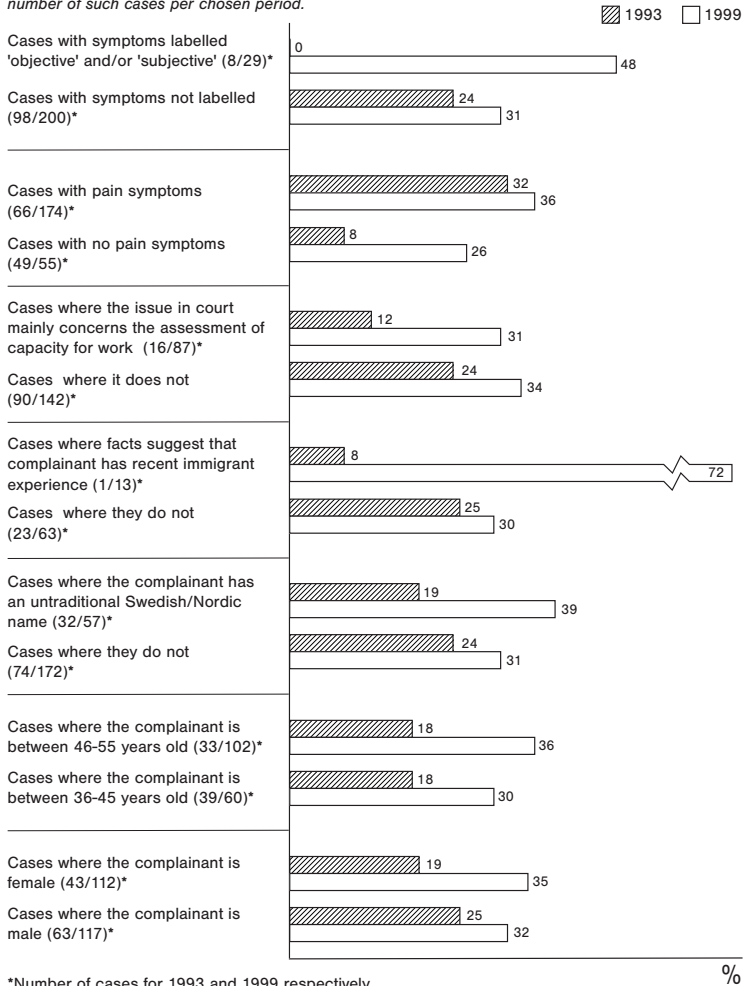
Graph 16: The graph shows how extra medical experts, in percentage of the cases in which they participate, assess the capacity for work of the complainants, in 1993 and 1999.

1993. Once this is stated, it is more difficult to use the data available to draw a conclusion about the role and impact of these experts. What I have done in graph 17 is to study the types of cases that are of key importance for this work and looked at the ratio of these cases in which extra medical experts are used. Thus, it is to be noted that within the group of cases where the adjectives objective/subjective are used to describe the symptoms of the complainant, extra medical experts were present in almost half of the cases (48 percent) in 1999 compared to 0 percent in 1993.

The figures in Graph 17 reveal an overall increase in the participation of extra medical experts in all types of cases studied. It is also to be noted that the increase is larger in the type of cases that previously have been concluded to be more apparent in 1999 as compared to 1993. Thus, an increase from 0 percent to 48 percent can be noted in cases where symp-

Graph 17: Use of extra medical experts in different types of cases

Use of extra medical experts in different types of cases measured in percentage of the total number of such cases per chosen period.



Graph 17. The graph shows the proportion in which extra medical experts are used in some selected types of cases in 1993 and 1999. For instance, in 1993, extra medical experts were used in none (0 percent) of the cases where symptoms were labelled 'objective' and/or 'subjective'; in 1999, the comparable figure was 48 percent. Within the group of cases where symptoms were not labelled 'objective' and/or 'subjective', there was also an increase in the use of extra medical experts, although not as drastic, from 24 percent in 1993 to 31 percent in 1999.

toms are labelled as subjective and/or objective, and an increase from 12 percent to 31 percent in cases where it is argued that the capacity for work should be assessed against 'work normally available on the labour market'.

Women have increased their proportion of cases taken to court, and the results show that there is an increased proportion of cases taken to court by women that involve extra medical experts (from 19 percent to 35 percent). The same applies to the 46–55-year-olds (from 18 percent to 36 percent). In contrast, the group that shows the largest increase of cases where extra medical experts are used (from 8 percent to 72 percent) are complainants where several facts point to a recent immigrant experience. At the same time, this group has not increased their proportion of the total number of cases taken to court.

May it be assumed that extra medical experts are used more often in cases where the issue dealt with in court is relatively more complicated? May it be assumed that extra medical experts are used to an increased extent in cases where the parties of the conflict find an extra need to emphasize and support the arguments put forward? Or is it maybe the courts that find an extra need to have the issue analyzed by a broader range of experts than the ones initially involved? If there is a relation between the use of extra medical experts and the character of the case, it would, hypothetically, be possible to explain the general increase by making reference to the increased weight given to scientifically based arguments, as well as to explain the distinct increase in some specific types of cases involving specific types of complainants with a reference to the more active role of the parties following from the procedural reforms.

To conclude, more extra medical experts are used in 1999 as compared to 1993. This increase is dramatic in cases where symptoms are labelled as objective and/or subjective and in cases involving complainants with a presumed immigrant background. The significance of this knowledge is not obvious, especially as the data does not reveal who is using the extra experts. Still, hypothetically, it may be assumed that there is a relation between the involvement of extra medical experts and the scope available for legal arguments/interpretation. The two groups of cases mentioned above, where there is a distinct increase in the participation of extra medical experts, have in common that the issue in focus often concerns the sickness concept. In cases involving the distinction between objective and subjective symptoms, this is obvious. In cases involving complainants where several facts point to a recent immigrant experience, the conflict often concerns how to interpret the total life situation of the complainant. In these cases, the question is often raised if 'non-medical' problems are primarily the cause of incapacity for work (such as lack of

language knowledge, lack of belonging in the Swedish society, a difficult social situation) or if the physical problems are to be defined as 'medical'. Thus, the results of the fifth proposition indicate that in cases where the issue dealt with in court concerns the sickness concept, there is more scope available for arguments and interpretation and a proportionally larger increase of extra medical experts.

4.2.8 Summing up – fourth and fifth proposition

The fourth and fifth proposition deal with the role of experts used in court. The fourth proposition is directly linked to the introduction of the concentration policy and the new emphasis on the insurance physicians following the reforms linked to this policy. The fifth proposition is indirectly linked to the concentration policy. It is linked to the extent that the proposition states an increased weight for arguments that are scientifically based, a phenomenon that is also suggested to be significant for the concentration policy. Still, the increased role of extra medical experts is also proposed to be the result of the procedural reforms implemented parallel to (and independently of) the concentration policy.

Both propositions are, in general, confirmed, although a gender analysis provides data that questions the very basis of the fourth proposition. The fourth proposition seemed to be confirmed due to the predominance of male insurance physicians. Had female insurance physicians been more frequently represented, it is not as clear that the institute of insurance physicians would have functioned as the primary instrument for implementing the concentration policy.

Some of the other conclusions presented in the two sections above should be highlighted. Especially the differences connected to the two main types of cases studied should be noted. In cases involving the distinction between subjective and objective symptoms (and thus the sickness concept), there seems to be a change in the way arguments are presented (rather than a change of standpoint), while in the cases dealing with the criterion of capacity for work, there seems to be an actual change in how these cases are assessed. There are also indications that the space for legal reasoning, the scope of interpretation, is considered to be more comprehensive in cases dealing primarily with the sickness concept.

4.2.9 Sixth proposition – the legal weight of the recommendations of the insurance physician

In order to look at how the insurance physicians act in the roles given to them as parties in a legal conflict to be solved in court, the position of the insurance physicians were studied in relation to the rulings of the court. The sixth proposition reads as follows:

The courts will, when weighing the arguments from different medical experts, only in exceptional cases deliver judgements that contradict the insurance physician. This is true for 1993 and 1999, but increasingly so for 1999.

This proposition concerns a familiar theme that has been prepared for in earlier sections of this chapter. In order to find out if the data in the material does (or does not) confirm this proposition concerning the key role of the insurance physician, the decisions and judgements of the courts are studied.

First, there is a focus on data revealing how often the judgements of the courts, in general, are in line with the recommendations of the insurance physician. Secondly, the two types of cases in focus are studied due to their linkage to the concentration policy: 1) Cases involving a 'symptom diagnosis' and 2) Cases in which it is argued that the capacity for work should be measured against a very broad range of possible work situations. As previously, the results are analyzed as to whether they are neutral in relation to the sex, age and (presumed) immigrant background of the complainant.

Initially, the inclination of the courts to form their decisions in line with the recommendations of the insurance physicians is studied. The results show that, in 1999, there is a definite increase in the proportion of cases where the judgements of the courts are in line with the recommendations from the insurance physicians; almost 60 percent of the cases were clearly and fully in line with recommendations of the insurance physicians, compared to less than 40 percent in 1993. The number of cases where it is unclear whether the court has decided in line with the insurance physicians' recommendations or not has decreased. The cases in which the courts have (clearly) not decided in line with the recommendation of the insurance physicians have decreased slightly, from 13 percent in 1993 to 11 percent in 1999. The proportion of 'unclear' cases corresponds fairly well with the proportion of cases where there is no data on the content of the recommendation from the insurance physician (see above, 4.2.6.). Thus, on a general level, the proposition seems to be confirmed.

An examination of how the courts position themselves in cases where it has been argued that the capacity for work of the insured should be assessed against 'work normally available on the labour market', yields figures that indicate that the proposition, stating an increased convergence between the opinions of the insurance physicians and the courts, seems to be particularly valid in this type of cases. In these cases, the convergence has increased dramatically, from a 30 percent overlap in 1993 to a 70 percent overlap in 1999.

The comparable figures in cases involving the problem of a subjective diagnosis are less available, as this kind of cases were harder to identify by just using one variable. In cases where the distinction subjective/objective was used, there was, just as above, an increase in the overlap between the opinions of the insurance physicians and the judgements of the courts (from a 62 percent overlap in 1993 to 76 percent in 1999). The same is true for cases involving pain symptoms (from a 42 percent overlap in 1993 to a 62 percent overlap in 1999).

Thus, the sixth proposition is confirmed in general, as well as in the specific kind of cases of interest to this study.

In a comparison of the group of male complainants with the group of female complainants, the results show that the courts' decisions more often are in line with the recommendations of the insurance physicians within both groups, although the increase is somewhat stronger within the group of male complainants. (Within the group of female complainants, the courts decided fully in line with the recommendations of the insurance physician in 37 percent of the cases in 1993 compared with 54 percent in 1999. For male complainants the comparable figures are 41 percent in 1993 and 65 percent in 1999.)

Comparing the two age groups 36–45 and 46–55-year-olds, there is, again, a general increase of cases in which the courts fully decide in line with the insurance physicians, although the increase is distinctly more emphasized in the group involving 36–45-year-olds. (Within the group of complainants between 36–45 years old, the courts decided fully in line with the recommendations of the insurance physician in 41 percent of the cases in 1993 compared with 67 percent in 1999. For complainants between 46–55 years old, the comparable figures are 46 percent in 1993 and 53 percent in 1999.)

In cases where many facts point to a recent immigrant experience, the courts decided in line with the recommendations of the insurance physician in 38 percent of the cases in 1993 and in 72 percent of the cases in 1999. The comparable figures for complainants without this experience is 40 percent in 1993 and 58 percent in 1999. In cases where complainants have a (presumed) immigrant background based on name only,

a similar development could be found, although not quite as drastic. In 1993, the courts decided fully in line with the recommendations of the insurance physician in 47 percent of the cases involving complainants with an untraditional Swedish name, and in 68 percent of these cases in 1999. The comparable figures for complainants with (presumed) traditional Swedish names are 36 percent in 1993 and 56 percent in 1999.

To conclude, it seems as if the insurance physicians, in the role of experts in 'insurance medicine', have strengthened their position in the courts overall, and especially in cases involving men, in cases involving complainants in the age span 36–45 years old, and in cases where the complainant has a (presumed) immigrant background.

4.2.10 Seventh proposition – a weakened position for the complainant?

The seventh proposition stated that:

The position of the insured person in court has generally weakened between 1993 and 1999.

The seventh proposition is approached by looking, first, at its most obvious angle and see to what extent courts have decided in favour of the insured. An interest is also taken in cases where the problem of 'symptom diagnosis' is prevailing, as well as in cases in which it is argued that the capacity for work of the complainant should be assessed against 'work normally available on the labour market'. The investigation proceeds by taking into account the factors age, sex and (presumed) immigrant background, in order to see whether any of these factors has influenced the decisions of the courts. Finally, the question of whether access to legal aid, legal counselling or oral proceedings affect the position of the complainant is studied.

It can be concluded that, in general, there is a decrease in the proportion of cases in which the courts decide in favour of the complainant. In 1993, the courts decided fully in favour of the insured in 26 percent of the cases compared to 18 percent in 1999. If the cases where the courts decided partly in favour of the insured are added, the trend is stronger, as this kind of cases also decreases between 1993 and 1999, from 7 percent to 2 percent.

Of interest to this study is the position of the complainant and thus also the possibility for him/her to reach a positive court decision in conflict with the social insurance office. The figures above will not fully illustrate this, as they include cases in which the social insurance offices have changed their position and no longer object to the claims of the

insured. Thus, other figures will have to be added in order to find out to what extent the decisions of the courts oppose the standpoint of the social insurance office. In 1993, the judgements of the courts opposed the standpoint of the local insurance offices in 26 percent of the cases, in 1999, the comparable figure is 13 percent. In 86 percent of the cases in 1999, the courts decided fully, or partly, in favour of the local insurance offices, to be compared with 67 percent in 1993.

Within the type of cases where it is argued that the capacity for work of the complainant should be assessed against work normally available on the labour market, this development is distinctly visible. In 1993, the courts decided fully in favour of the complainant in 19 percent of these cases, compared to 9 percent in 1999. In this type of case, the courts opposed the standpoint of the social insurance office in 8 percent of the cases in 1999, to be compared with 19 percent in 1993. Thus, in this type of cases, in 1999, the ratio of positive decisions, from the perspective of the complainant, is far below the average of 18 percent.

In cases where symptoms are labelled subjective and/or objective, a decrease of cases decided fully in favour of the complainant could be noted, still more in line with the average development. Within this group of cases, the courts decided fully in favour of the complainant in 25 percent of the cases in 1993 to be compared with 18 percent in 1999.

Still, the courts decided fully in favour of the complainant in only 6 percent of the cases in the specific cases where the symptoms of the complainant was described using the word 'subjective' compared to 40 percent in 1993. (But in 1993 there were only a small number of these cases.)

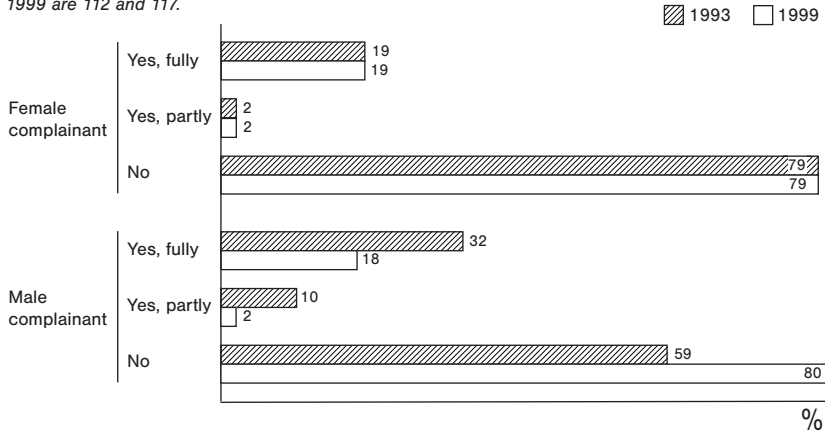
Next step is to see whether age, sex or (presumed) immigrant background has an impact on the decisions of the courts. Graph 18 below illustrates how the courts have decided in relation to the claims of female and male complainants respectively.

What can be noted in Graph 18 is the surprisingly stable situation if compared to the initial charts that did not take into account the sex of the insured. What is shown is that the decrease in the proportion of cases decided in favour of the insured seems to be found almost solely amongst male complainants. While in 1993 there was a situation where the decisions of the courts in relation to the sex of the complainants show some distinct differences between male and female complainants, these differences have disappeared in 1999. If the figures in Graph 18 confirmed the proposition that the position of the insured has weakened overall, it indicates that it is specifically the position of male complainants that has weakened.

Studying the age factor or the (presumed) immigrant background

Graph 18: *To what extent were decisions of the courts in favour, or not, of female and male complainants*

The decisions of the courts related to the claims of the female and male complainants, measured in percentage of the total number of such cases per chosen period. In 1993 the total number of female complainants was 43 and the number of male complainants counted 63. The comparable figures for 1999 are 112 and 117.



Graph 18. The graph shows how the decisions of the court relate to the claims of the male/female complainants in 1993 and 1999. For instance, within the category of female complainants, the courts decided fully in favour of the complainants in 19 percent of the cases in both 1993 and 1999. Within the category of cases with male complainants, the comparable figures are 32 percent in 1993 and 18 percent in 1999.

factor, instead of sex, the pattern is again an overall decrease in decisions taken in favour of the insured. Comparing the two age groups 36–45-year-olds and 46–55-year-olds, looking at the percentage of cases within each age group where the courts decided fully in favour of the complainant, the results show that in 1993, the courts met the claims of the complainant in 26 percent of the cases involving 36–45-year-olds, and in 24 percent of the cases involving 46–55-year-olds. In 1999, the comparable figures were 13 percent for 36–45-year-olds, and 20 percent for 46–55-year-olds. Thus, a more drastic decrease of affirmative decisions in the age group 36–45-year-olds is to be noted.

Within the group of complainants where several facts point to a recent immigrant experience, there is an increase in the proportion of cases in which the courts decide fully in favour of the insured. In 1993, the results show that the courts decided in line with the complainant in 23 percent of these cases in 1999, the comparable figure is 33 percent. Within the

group of complainants that is not presumed to have a recent experience of immigration, the comparable figures are 27 percent in 1993 and 17 percent in 1999. Looking at the factor name only, the results show that within the group of cases involving complainants with an untraditional Swedish/Nordic name, 25 percent ended in decisions fully in favour of the insured; in 1999, that figure is 23 percent. For the group with a presumed traditional Swedish name the comparable figures are 27 percent in 1993 and 17 percent in 1999. On the basis of these figures, it could be noted that although the courts have become more restrained in delivering decisions that are in line with the claims of the complainant, this does not seem to have affected the group of complainants with a presumed immigrant experience.

So far, it may be concluded that the proposition is confirmed on a general level, but if studied in detail, a more complex pattern appears. It seems as if male complainants had a privileged position in 1993, but this pattern of special treatment is not visible in 1999. The position of the insured has weakened, particularly for those who used to be in a favourable position.

Before the eighth, and last, proposition is approached, I want to raise the question of whether the position of the insured is influenced by instruments created to protect values connected to legal certainty. Data have been recorded on whether the complainant had a solicitor assigned by the union, some other kind of solicitor or no solicitor at all. In the category 'other solicitor' a broad spectrum of different agents is hidden. The other solicitor could be a lawyer, but it could just as well be a friend, a wife or a brother. It could be someone with legal training or it could be a layperson who has offered support. The result was that the proportion of complainants' solicitors assigned by the union had decreased slightly from 19 percent in 1993 to 17 percent in 1999, whilst the proportion of complainants with some other kind of 'solicitor' had increased from 15 percent in 1993 to 19 percent in 1999. The large majority of cases, in 1993 as well as in 1999, had no solicitor of any kind.

The factors age, sex and (presumed) immigrant background have some, although a rather small, impact on the presence of a solicitor. Women and complainants with a (presumed) non-Nordic background have slightly more often support from solicitors assigned by the union. Within the group of female complainants, there is a solicitor assigned by the union in 20 percent of the cases in 1999 (19 percent in 1993). Within the group of cases involving male complainants, the comparative figure for 1999 is 14 percent (19 percent in 1993). For complainants with an assumed non-Nordic background (based on several facts), the figure is 22 percent in 1999 (15 percent in 1993).

The main issue at stake is whether the presence of a solicitor will strengthen the position of the insured. The response to this issue, on basis of the data at hand, is that the presence of a solicitor assigned by the union was, in 1993, a sign of a relatively less favourable position. Comparing the following three categories: 1) cases with a solicitor, 2) cases with 'other' solicitor, and 3) cases with no solicitor, the results show that the proportion of cases in 1993 in which the courts decided fully in favour of the insured is largest within the group of cases without a solicitor. The figures are 20 percent within the group of cases with a solicitor assigned by the union, 25 percent in cases with another kind of solicitor and 29 percent in cases without a solicitor. In 1999, the situation is different; within the group of cases where the complainants have no solicitor at all, the proportion of cases decided in favour of the insured has decreased from 29 percent in 1993 to 17 percent in 1999. No such decrease is visible within the group of cases where the complainants are represented by a solicitor assigned by the union. It is thus possible to see a development from 1993 to 1999 where it has become relatively more favourable to have a solicitor.

The other instruments mentioned in relation to the protection of legal certainty are extremely rare in the material. In only six cases (three cases in 1993 and three cases in 1999), the complainants received legal aid. Oral hearing is almost as unusual (one case in 1993 and six cases in 1999). In four cases in 1993 and in five cases in 1999, oral hearing was denied. In the few cases where there was an oral hearing, the courts have predominately decided fully in favour of the insured (in 100 percent of the cases in 1993, and in 84 percent of the cases in 1999). In cases with legal aid, the courts have decided fully in favour of the insured in two of the three cases in 1993 and in one of three cases in 1999.

To draw any far-reaching conclusions from this scanty material is not recommendable. The main point might be the limited use of solicitors and legal aid as such. The reason to include these variables was to investigate to what extent instruments with an aim to strengthen legal certainty values could strengthen the position of the complainant. One conclusion is that the rare use of these instruments excludes their strengthening potential. Another conclusion is that it has become relatively more important for the insured to have a solicitor (of some kind).

Thus, it must be concluded that the seventh proposition is confirmed. On the basis of the material available, it is clear that the position of the complainant has weakened between 1993 and 1999.

4.2.11 Eighth proposition – multiple legal criteria?

The eighth proposition stated:

There are multiple legal criteria of ‘sickness’ and ‘capacity for work’ in use by the courts (alternately, one set of criteria that allows for a broad and shifting practice).

I have previously noted that the pre-study indicated that in cases where the issue in court concerned how to evaluate subjective symptoms, first and second instance courts had a tendency to (systematically) weigh the forwarded arguments differently. This is the kind of issue that I wanted to look further into when working with the eighth proposition. Are there systematic differences between how first and second instance courts assess how the relevant legal criteria are met? Thus, an interest is taken in whether there are specific kinds of cases, or specific groups of complainants, that on a frequent basis will have their case re-evaluated by second instance courts to the effect that the outcome is changed.

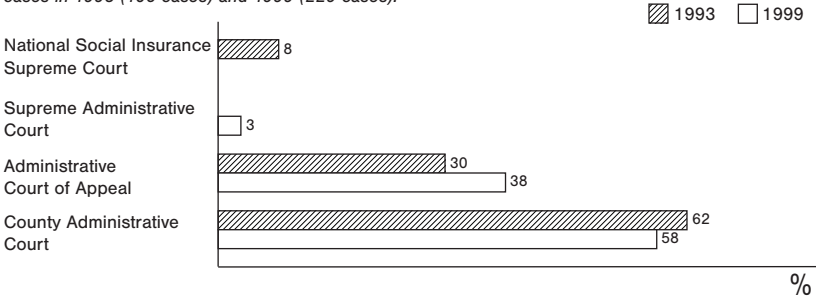
There are two indicators elaborated that may split the overall unity of ‘courts’ into smaller units. It is possible to study the actions of county administrative courts, administrative courts of appeal and supreme administrative courts (first, second and third instances) separately. It is also possible to compare judgements by female judges and male judges. In theory, it could also have been possible to study the different courts divided by their geographical spread, but unfortunately, the material is not extensive enough for this to be done. Too many courts would be represented by just a handful of cases, which would not be enough for any kind of generalized conclusion.

Judgements as well as decisions not to grant leave to appeal are included in the material of legal cases. The different courts using a system of leave to appeal are the following: the National Social Insurance Supreme Court in 1993, the Supreme Administrative Court in 1999 and the administrative courts of appeal in 1999.

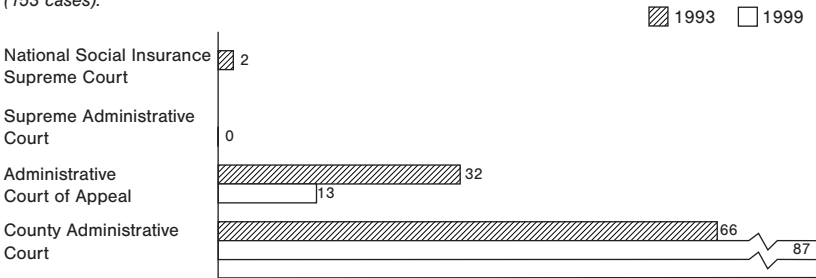
Graph 19 below contains information on how the material of legal cases (judgements and decisions) is spread between different instances in 1993 and 1999 respectively. The third instance courts (the National Social Insurance Supreme Court in 1993 and the Supreme Administrative Court in 1999) have delivered so few cases of relevance for this study, and thus such a small material, that it is not possible to include the third instance in the comparison that follows. As the institute of leave to appeal was not used in the administrative courts of appeal in 1993, all cases recorded from the administrative courts of appeal in 1993 are judgements. In 1999, this has changed; the administrative courts of appeal deliver judgements as well as decisions not to grant leave to appeal. While judge-

Graph 19: Sources of the material of legal cases

The material of legal cases (judgements and decisions not to grant leave to appeal) provided by the following instances measured in percentage of the total number of cases in 1993 (106 cases) and 1999 (229 cases).



The material of legal cases (judgements) provided by the following instances measured in percentage of the total number of such cases in 1993 (100 cases) and 1999 (153 cases).



Graph 19. The graph shows how the cases (judgements and decisions not to grant leave to appeal) in the material are spread over the different instances in the administrative court system, in 1993 and 1999. The first part of the graph includes both judgements and decisions not to grant leave to appeal, while in the second part of the graph, a selection has been made to the extent that decisions not to grant leave to appeal have been excluded. For instance, judgements from the administrative court of appeal constitute 13 percent of the total number of judgments in the material in 1999, while in 1993, the comparable figure was 32 percent. If decisions on leave to appeal are included, the figures change and cases from the administrative courts of appeal constitute 38 percent of all cases in the material in 1999 as compared to 30 percent in 1993.

ments from the administrative courts of appeal constituted 32 percent of the total number of judgements in 1993, the comparable figure for 1999 is only 13 percent.¹⁹ This situation is illustrated in Graph 19.

¹⁹ For a more detailed account of the selection of cases, see Part II above.

Of key interest is if the different instances differ in their response to the cases in the material. Focus is on cases involving 1) subjective symptoms and 2) cases where it is argued that work should be assessed in relation to work normally available on the labour market. The impact of factors such as age, sex and (presumed) immigrant background is also analyzed.

Due to the introduction of leave to appeal in second instance, comparisons between the legal cases of 1993 and the legal cases of 1999 are more complicated. In the following, a distinction is made between 'judgements', that are the result of a trial in court and 'decisions', that are the result of a more 'simple' procedure when two judges decide whether or not to grant leave to appeal. In the material, 'decisions' are always decisions not to grant leave to appeal. The figures found to be most comparable are those when 'judgements' from 1993 are compared with the sum of 'judgements' and 'decisions not to grant leave to appeal' from 1999. Such a comparison will result in the conclusion that the administrative courts of appeal have more often decided against the claims of the insured in 1999 as compared to 1993 (see previous section, the seventh proposition). Still, a consequence of the system of leave to appeal is that an increased amount of the cases actually tried by the administrative courts of appeal (cases resulting in judgements) are ending in judgements in favour of the insured.²⁰ Graph number 20 will provide the figures for the developments described above.

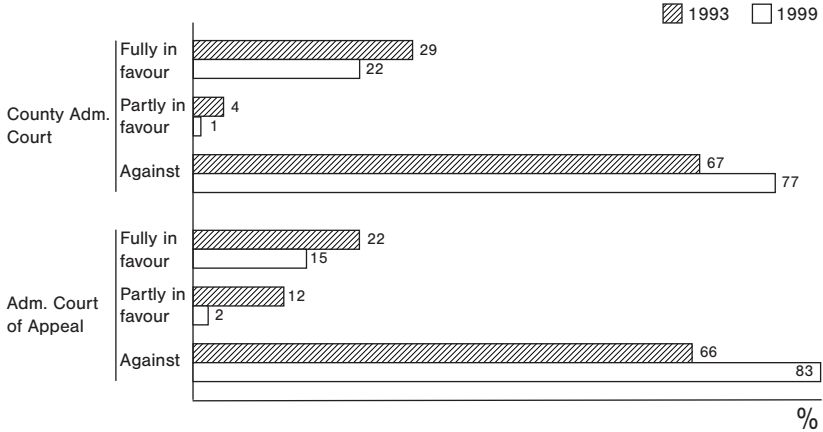
As can be noted below, the proportion of cases decided in favour of the insured has decreased between 1993 and 1999. This is especially true for the administrative courts of appeal, where 66 percent of the complainants are met with a negative decision as compared to 83 percent in 1999, including the complainants who have not been given leave to appeal. In contrast, and as noted above, a result of the reform of introducing leave to appeal in the appeal courts is that a larger share of the cases actually tried end in judgements fully in favour of the insured. In 65 percent of the cases where the appeal courts have granted leave to appeal, they decide fully in favour of the complainant in 1999.

In this study, an interest has been taken in two specific groups of cases: cases related to the problem of symptom diagnosis and cases including arguments that the capacity for work of the complainant should be assessed in relation to 'work normally available on the labour market'. In the graph below, judgements of the courts in three types of cases can be studied: 1) cases including the distinction objective/subjective, 2) cases including pain symptoms, and 3) cases in which it was argued that the complainant's capacity for work should be assessed in relation to work

²⁰ For an account of relevant procedural reforms of the 1990s, see Chapter 3 above.

Graph 20: *How judgements and decisions from different instances relate to the claims of the complainant*

How judgements and decisions not to grant leave to appeal, delivered by county administrative courts and administrative courts of appeal, relate to the claims of the complainants measured in percentage of the total number of such cases. In 1993 the county administrative courts dealt with 66 cases and in 1999 they deal with 133 cases. For the administrative courts of appeal the comparable figures are 32 cases and 88 cases.



Graph 20. The graph shows how the proportion of ‘judgements’ and ‘decisions’ of the different instances relate to the claims of the complainant in 1993 and 1999. For instance, of the cases determined by the county administrative courts in 1993, 29 percent were fully in favour of the claims of the complainant; in 1999, the comparable figure was 22 percent.

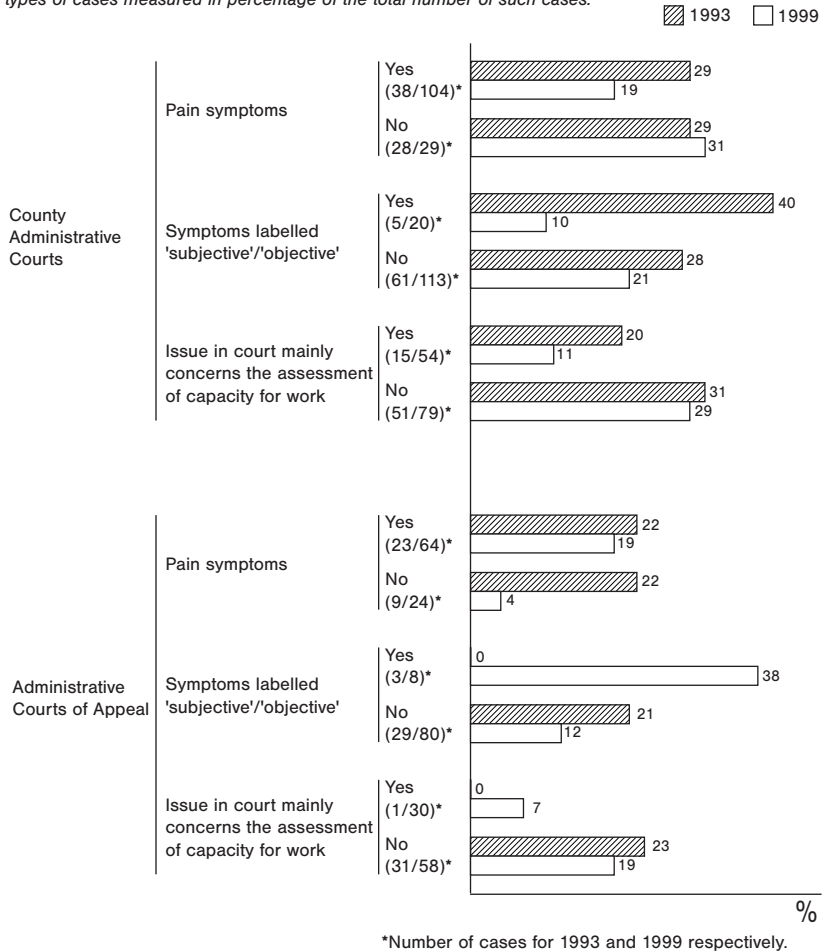
normally available on the labour market. (The first two types relate to the problem of symptom diagnosis, and the third type relates to the assessment of capacity for work.)

Graph 21 shows the proportion of cases, within each type of case, in which the complainant got a decision fully in line with her/his claims. For instance, within the group of cases where symptoms are labelled as subjective and/or objective, the county administrative courts decided in 40 percent of the cases in 1993 fully in favour of the complainant. The comparable figure for 1999 is 10 percent. For cases where this distinction between objective/subjective is not made, the courts decided in favour of the complainant in 28 percent of the cases in 1993 and in 21 percent of the cases in 1999.

As concluded in the previous section, the courts on the whole decided fully in favour of the complainant in 26 percent of the cases in 1993 and

Graph 21: Judgements fully in favour of the claims of the complainant in some different types of cases

Judgements fully in favour of the claims of the complainant from the county administrative courts and the administrative courts of appeal in some different types of cases measured in percentage of the total number of such cases.



*Number of cases for 1993 and 1999 respectively.

Graph 21. The graph shows, within different types of cases, to what extent the complainants received a judgement from the courts that was fully in favour of their claims. For instance, in 29 percent of the cases including pain symptoms, tried by the county administrative courts in 1993, the courts decided fully in favour of the complainants. In 1999, the comparable figure was 19 percent.

in 18 percent in 1999. Compared to the average, the figures above show examples of a fairly distinct divergence from the average.

There is a general trend of fewer cases decided in favour of the insured, and this trend is more marked in the type of cases selected. The most drastic change concerns how the county administrative courts deal with cases where the symptoms of the complainant are described by means of the adjectives subjective and/or objective. In these cases, the county administrative courts used to decide in favour of the complainant in 40 percent of the cases in 1993 compared to 10 percent in 1999. However, it is interesting for the proposition dealt with in this section that the administrative courts of appeal, in these specific cases, deliver judgements in favour of the complainant in a relatively high proportion of cases. In 1999, the administrative courts of appeal formed judgements in favour of the insured in 38 percent of these cases (which in comparison to other types of cases is a very high proportion). If only those cases that have been given leave to appeal and have been tried in court are studied, the administrative courts of appeal decided in favour of the insured in all of these cases (100 percent).

It is also to be noted that, in spite of the introduction of leave to appeal and in spite of the overall decrease of decisions in favour of the insured, cases involving pain symptoms almost keep their ratio of 'decisions fully in favour of the complainant' in the administrative courts of appeal. In 1993, the cases involving pain symptoms ended in 'decisions fully in favour of the insured' in 22 percent of the cases; in 1999, the comparable figure is 19 percent. Thus, although the county administrative courts have become (much) more moderate in deciding in favour of the insured in these cases, the appeal courts do not seem to have changed their practice. This increases the discrepancy between how cases connected to the problem of symptom diagnoses are treated in the first and second court instances.

In the type of cases in which it is argued that capacity for work should be measured against 'work normally available on the labour market', it could also be noted that a stricter approach is taken by the county administrative courts, with the result that a smaller proportion of cases end in decisions fully in favour of the insured (from 20 percent in 1993 to 11 percent in 1999). The administrative courts of appeal will rarely try these cases; only 7 percent of these cases end in decisions fully in favour of the insured (when leave to appeal is given in such a case, still only 50 percent end in decisions in favour of the insured). That no case in 1993 ended in a judgement fully in favour of the insured is mainly due to the fact that only one case of this kind was tried by the administrative courts of appeal in 1993.

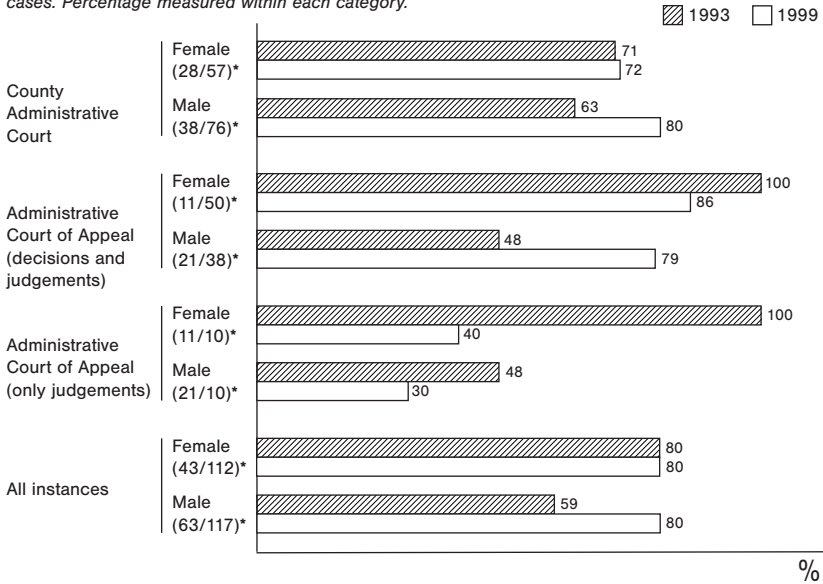
So far, it seems that the data available will support some parts of the proposition but not support it altogether. Thus, the figures indicate that the criterion of 'sickness' is interpreted differently by first and second instance, while there is more of an agreement in cases where the conflict concerns how to assess capacity for work.

An examination of the factor 'sex of the insured', shows that the county administrative courts decided against the complainant in more cases in 1999 than in 1993, at least if cases involving male complainants are studied (80 percent of the cases involving male complainants were decided against the insured in 1999 as compared to 59 percent in 1993). For female complainants the situation between 1993 and 1999 has stayed the same (in 1999, 80 percent of the cases involving female complainants were decided against the insured as compared to 79 percent in 1993). Thus the judgements from the county administrative courts show that cases involving male complainants were decided in favour of the insured relatively more often than for female complainants in 1993. In 1999, the balance between the sexes has shifted and female complainants are relatively more often involved in cases given a positive outcome for the insured. The drastic decline in positive outcomes for the male complainants is somewhat reversed by the appeal courts, as they decided in favour of the insured in 70 percent of the cases involving male complainants, compared to 60 percent in cases involving female complainants.

The factor 'age of the insured' shares some features with the factor 'sex of the insured', dealt with above. Results show a general decrease of judgements in favour of the insured from the county administrative courts, and a general increase in judgements of this kind in the cases from the administrative courts of appeal. Judgements fully in favour of the insured are most rare in the age group 16–25 years old (no judgements in favour in 1993 or 1999). Otherwise, judgements in favour of the insured are most rare in the age group 36–45 years old (in only 23 percent of these cases in 1993 and 16 percent in 1999, the insured received a decision that fully complied with the claims made). An examination of the actions of administrative courts of appeal shows that if the total number of cases dealt with is studied (judgements as well as decisions in 1999), the same age group (36–45 years old) will end up as receiving the smallest number of cases fully in favour of the insured (10 percent as compared with 14, 16 and 18 percent for the other age groups, the youngest age group excluded). In 1993, the administrative courts of appeal treated the 36–45-year-olds more favourably, compensating to some extent for the relatively harsh treatment in the county administrative courts (in 1993, the administrative courts of appeal decided in favour of the insured in 31 percent of the cases involving 36–45-year-olds). In 1999, the adminis-

Graph 22: Court decisions from the different instances not in favour of the (male/female) complainant

Decisions not in favour of the claims of the female/male complainant made by the county administrative courts and the administrative courts of appeal in some different types of cases. Percentage measured within each category.



*Number of cases for 1993 and 1999 respectively.

Graph 22. The graph shows the proportion of cases in which different instances have decided against the claims of the (male/female) complainants during 1993 and 1999. For instance, in 71 percent of the cases involving female complainants tried by county administrative courts, the courts decided against the complainant in 1993; the comparable figure for 1999 is 72 percent.

trative courts of appeal delivered judgements in favour of the insured in 67–70 percent of the cases dealing with the age span 36–55 years old (not counting decisions not to grant leave to appeal).

I have used the data on ‘name of the complainant’ as one source of information to distinguish those with a (presumed) immigrant background from those without this experience. Studying the proportion of cases within these groups (complainants with and without a traditional Swedish name) in which the judgements of the courts were not in line with complainants, results show that in the county administrative courts, complainants with an untraditional Swedish name more often got a negative

judgement (71 percent in 1993 and 78 percent in 1999), although the difference between this group and the one with a traditional Swedish name has decreased between 1993 and 1999 (the comparable figures for complainants with traditional Swedish names were 65 percent in 1993 and 76 percent in 1999). On the other hand, the administrative courts of appeal, in 1993 as well as in 1999, decided less often against complainants with an untraditional Swedish name compared to complainants with traditional Swedish names (see Graph 23 below).

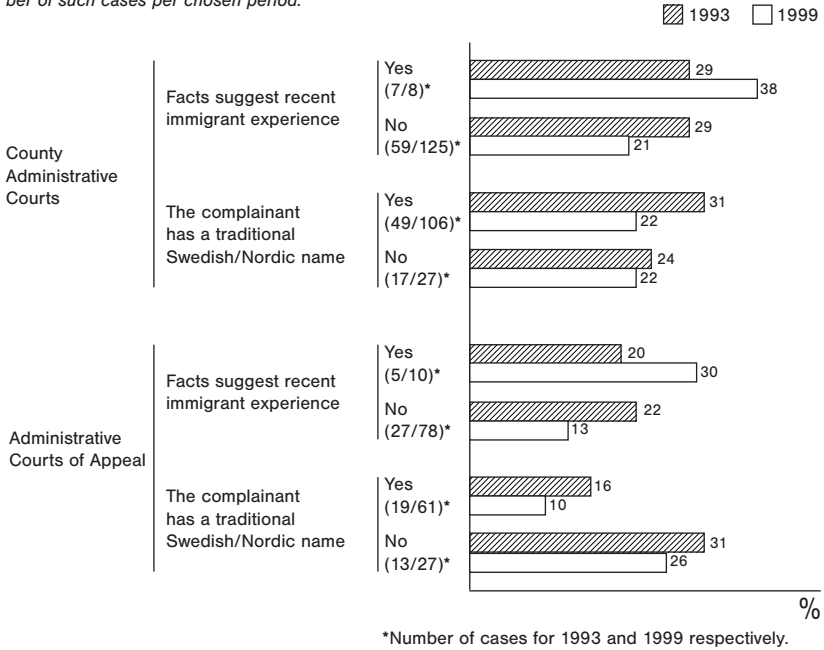
Within the category of cases where several facts point to a recent experience of immigration, it is to be noted that the proportion of cases that received a judgement fully in line with the claims of the complainant increased in the county administrative courts as well as in the administrative courts of appeal. In comparison, the group of complainants that does not have a (presumed) immigrant experience will receive a judgement fully in favour of the complainant less frequently than the (presumed) immigrants. The difference between the two groups has increased between 1993 and 1999. In cases tried at the administrative courts of appeal in 1999, and within the group of presumed immigrants, the proportion of cases receiving a judgement fully in favour of the complainant was 30 percent, whilst the proportion of cases where presumed non-immigrants received a judgement of this kind was 13 percent. These developments are illustrated by the graph below:

Above, focus has been specifically on the different instances of the administrative court system and how they deal with cases related to sickness cash benefit. The proposition tested is that there are multiple criteria of sickness and incapacity for work. It was also proposed that it might be possible, by splitting the notion of 'courts' into the different instances, to find that the courts interpret the criteria differently. The results so far do not in any distinct way support this proposition. It is possible to find comparative shifts and changes between the different years, but no distinct support for the idea that the courts of first instance in any radical way fill the legal criteria with other content than the appeal courts. If only judgements were studied, this might have been expected, as the few cases tried by the administrative courts of appeal in 1999 to a large extent differ from the judgements in the county administrative courts.²¹ If all the cases that are not given leave to appeal are included in the analysis, the result is that courts of second instance, in the main, confirm the practice of the first instance.

²¹ The conclusion will differ on the basis of whether these cases are thought to be precedents or if they are thought of as corrective judgements in a case-by-case analysis.

Graph 23: Judgements fully in favour of the complainant in cases where the complainant has, or has not, a presumed immigrant background

Decisions fully in favour of the claims of complainant, (with or without a presumed immigrant experience) made by the county administrative courts or the administrative courts of appeal measured in percentage of the total number of such cases per chosen period.



Graph 23. The graph shows the proportion of cases in which the courts decided fully in favour of complainants (with or without a presumed immigrant experience). For instance, in cases tried by the county administrative courts involving complainants where several facts suggested a recent immigrant experience, the courts decided in favour of the complainant in 29 percent of the cases in 1993; for 1999, the comparable figure is 38 percent.

Before the eighth proposition is finally discarded, background information on the sexual identity of the judges involved is added to the analysis. This was the second category in which there was information available that would make it possible to split the concept of courts into smaller units. The relevance of the sexual identity of the judges will be tested against the same factors as the different instances above. Initially, the representation of male and female judges in the different years is investigated.

Previous research has shown that sex is a relevant factor when describ-

ing the distribution of social insurance benefits.²² In the present study, data have been registered on the sex of the insured as well as the sex of the insurance physician and the judges in the county administrative courts and the administrative courts of appeal.

In the material, the judges in the county administrative courts were female in 21 percent of the cases in 1993, compared to 39 percent in 1999. It could thus easily be concluded that there is a male dominance among the judges; this is true for 1993 as well as for 1999. There is also a clear tendency that this dominance is getting smaller.

In the administrative courts of appeal, there are three professional judges who evaluate the facts of a case. For these courts, I have registered the judge as female if a majority of judges (i.e. two out of three) are female. The same principle has been used for men when they are in the majority. In 1993, the court was composed of at least two female judges in 22 percent of the cases tried in the administrative courts of appeal; the comparable figure for 1999 is 65 percent. Thus it can be noted that in 1999, a majority of the judgements from the administrative courts of appeal are delivered by courts dominated by female judges.

There is a drastic increase in the representation of female judges from 1993 to 1999, but it has to be kept in mind that fewer cases were actually tried in 1999. Studying the representation of female and male judges in decisions as well as in judgments, the picture is different. As there was no institute of 'leave to appeal' in 1993, this is a situation that only occurs in 1999. For making a decision on leave to appeal, there are two professional judges involved. When one of these judges was female and the other male, the case was registered as 'equal'. In this composition, cases decided by female judges decrease to 6 percent, compared to 62 percent for male judges. The category 'equal' (one female and one male judge) constitutes the remaining 32 percent of the cases.

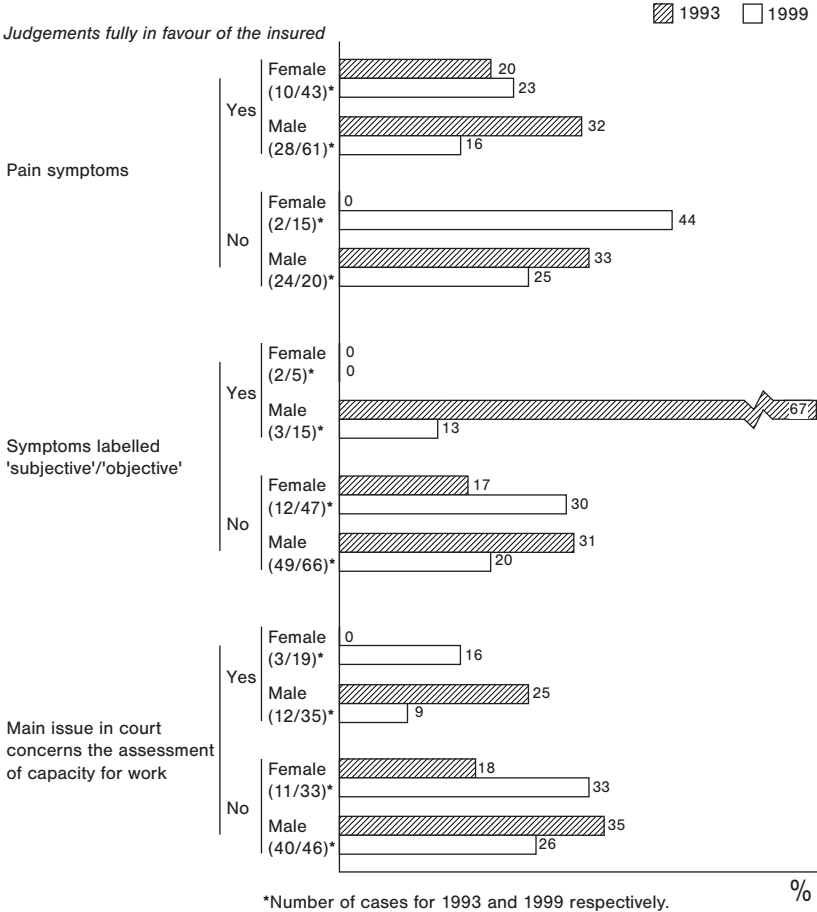
Graph 24 below provides information on the proportion of cases, within each type of case, in which male and female judges respectively have formed judgements fully in favour of the complainant.

To be noted in Graph 24 is the systematic difference between the proportions of cases decided in favour of the complainant depending on the sex of the judge. In 1999, female judges will in all types of cases, except in cases where symptoms are labelled objective and/or subjective, decide in favour of the complainant more frequently than their male colleagues. In 1993, the situation was reversed, although in 1993, the female judges were so few that they are not represented in each type of case, a fact that makes comparisons less interesting.

²² Söderberg, Elsy and Kristina Alexanderson, 2001, p. 68.

Graph 24: Decisions made in the county administrative courts by female and male judges in different types of cases

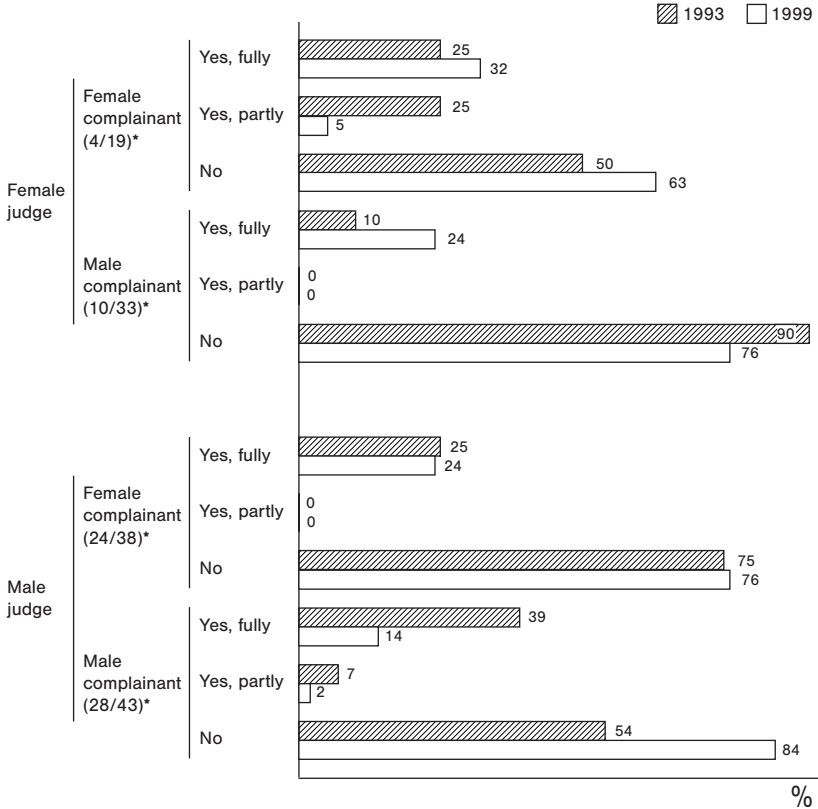
Decisions made by female and male judges at the county administrative courts, fully in favour of the claims of the complainant in some different types of cases measured in percentage of the total number of such cases per chosen period.



Graph 24. The graph shows the percentage within different types of cases in which female/male judges form judgements fully in favour of the complainant in 1993 and 1999 respectively. For instance, within the category of cases including pain symptoms and tried by female judges, the decision made in court was fully in favour of the complainant in 20 percent of the cases; the comparable figure for 1999 was 23 percent. For male judges, the comparable figure are 32 percent in 1993 and 16 percent in 1999.

Graph 25: Judgements related to the claims of the female/male complainants made by female and male judges in county administrative courts

Decisions related to the claims of the female and male complainant, made by female or male judges in the county administrative courts. Percentage measured within respective sex category.



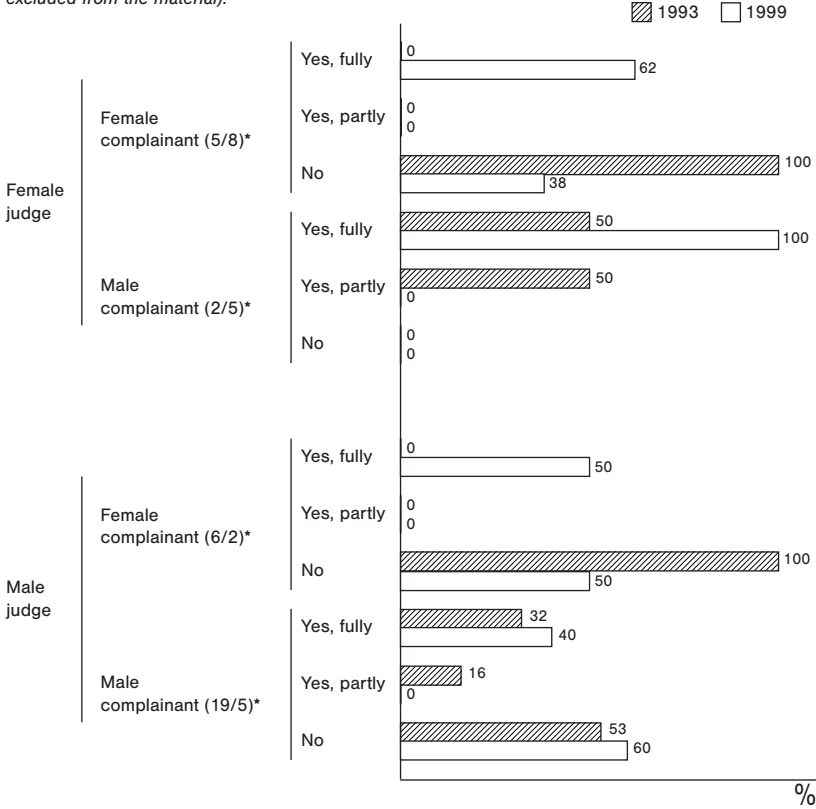
*Number of cases for 1993 and 1999 respectively.

Graph 25. The graph shows to what extent decisions taken by county administrative courts (male and female judges) are related to the claims of the complainants (male and female)

An examination of how the female/male representation in court by professional judges is related to court decisions in favour of the insured, yields the results presented in Graph 25. In this graph, the cases involving female complainants have been separated from those involving male complainants.

Graph 26: *Judgements related to the claims of the female/male complainants made by female and male judges in administrative courts of appeal*

Judgements related to the claims of the female or male complainants, made by female or male judges in the administrative courts of appeal. Percentage measured within respective sex category. (Decisions on leave to appeal excluded from the material).



*Number of cases for 1993 and 1999 respectively

Graph 26. The graph shows to what extent judgements issued by the administrative courts of appeal (male and female judges) are related to the claims of the (male and female) complainants. For instance, in 1999, cases with a female judge and a male complainant resulted in 100 percent of the (5) cases in a judgment fully in favour of the complainant. In the same year, in cases with a male judge and male complainants, 40 percent of the (5) cases had the same result.

Graph 25 shows that in 1993, a male complainant more often received a judgement fully in favour of his claims in cases where the decision was taken by a male judge as compared to a female judge. Female complainants were treated similarly by male and female judges, as long as only judgements fully in favour of the insured are included, but more favourable by female judges if also judgements that are partly in favour of the insured are included. It is noticeable that, in spite of the general trend of being less generous to the claims of the insured, female judges are more generous towards both male and female complainants in 1999 compared to 1993. The male judges have, on the other hand, become more restrictive in delivering judgements fully in favour of the insured when the cases involve male complainants.

Graph 26 portrays a striking difference between the practice of male and female judges at the appeal courts, although it must also be noted that the number of cases used for the comparison is very small. Whatever explanations might be found, the figures above indicate that female judges, when compared to their male colleagues, to a larger extent form judgements that contradict the position taken by the social insurance administration.

As regards the eighth proposition, my conclusion is that there are indications that male and female judges tend to interpret the criteria that should be fulfilled in order for the insured to receive sickness cash benefit in systematically different ways. In the case of female judges, this difference in the interpretation of the relevant legal criteria seems to be to the benefit of both male and female complainants. Still, the number of cases used for this comparison is small, and the tendency noted could be coincidental.

4.2.12 Summing up – propositions six, seven and eight

The last three propositions all deal with the actions of the courts. The sixth proposition stated the increased influence of insurance physicians on the judgements of the courts. This proposition was confirmed. The seventh proposition declared that the position of the complainant had weakened. This proposition was first confirmed and then questioned, to the extent that it could be noted that female complainants always had had a relatively weak position, but that the position of male complainants had weakened drastically between 1993 and 1999.

The eighth proposition proposed the existence of multiple legal criteria. Thus, it was suggested that the entity of 'courts' might not represent a coherent body of institutions but rather institutions that, systematical-

ly, differ in their interpretation of relevant legal criteria. Breaking up the entity of courts in the different instances, this proposition was not confirmed. Overall, including the decisions not to grant leave to appeal, it was found that the administrative courts of appeal, in general, confirmed the practice of the county administrative courts. Still, in a study of the actions of female and male judges separately, discrepancies were found in their judgements, in line with the proposition. It was found that female judges, when compared to their male colleagues, to a greater extent form judgements that contradicted the position taken by the social insurance administration.

4.3 Conclusions to be drawn from the quantitative study

In this chapter, a material consisting of legal cases from the administrative courts has been approached. The material of legal cases has been searched for information that could increase the existing knowledge about how the courts are acting in the decision-making process connected to the distribution of sickness cash benefit.

The material at hand consists of a specific type of cases. Characteristic of the cases in the material is that the insured individual's right to sickness cash benefit is questioned by the authorities, with the argument that the criterion of 'sickness', and/or the criterion of 'incapacity for work', is not fulfilled. The collecting of this specific kind of legal cases turned out to be a challenge. To a large extent, the selection of cases had to be done manually. In practice, this means that the files of the administrative courts had to be searched one by one, book by book. The selection process was done in two steps; first, a more rough selection, in which the different courts identified cases concerning sickness cash benefit, and then a second selection process, in which I discerned the specific cases of interest to this study. Thus, I finally ended up with 106 cases from 1993 and 229 cases from 1999. As it initially was hard to foresee what number of cases would actually be found, and when realizing how much of the work had to be done manually, I limited the investigation. Rather than studying all the relevant cases, in the courts, during 1993 and 1999, I limited the investigation of legal cases from the county administrative courts to a period of four months in each year. The investigation of legal cases from the appeal courts was limited to the extent that even though all judgements during 1993 and 1999 were included, decisions on leave to appeal were only included from a four month-period.

The material of legal cases, thus, represents approximately one third of this specific kind of cases in 1993 and 1999.

What kind of conclusions will this material allow me to form? Is the material representative of how the Swedish administrative courts, in general, in 1993 and 1999, formed their decisions in the specific cases of interest to this study? For my purposes, it is enough to establish that the results indicate certain patterns in the decision-making process related to these cases and that several of the patterns identified are so clear that they provide a firm empirical basis for further analysis.

A number of propositions were elaborated on the basis of my pre-knowledge of the field, and the data extracted from the material at hand has been used in order to confirm or contradict these propositions. My conclusion is that most of the propositions were indeed confirmed, although the study also yielded some unexpected results. In general, the material available and the analysis made have broadened the prevailing understanding of what kind of cases turn up in court and how they are dealt with.

I have in the sections above discussed how the results relate to the different propositions. In summary, it has been found that:

- There is a drastic increase in the number of cases.
- There is an increase of cases involving the distinction between subjective and objective symptoms.
- In cases involving the distinction between subjective and objective symptoms (and thus the sickness criterion), there seems to be a change in the way arguments are presented by the insurance physicians (rather than a change of standpoint). In this type of cases, the courts are relatively more apt to revise the original decision in 1999 as compared to 1993, at least if the cases reach the appeal courts.
- There is a drastic increase of cases involving arguments that capacity for work should be measured against work 'normally available on the labour market'.
- In these cases the courts in general confirm the practice of the social insurance offices, and there seems to be an actual change in how these cases are assessed between 1993 and 1999; a change that in particular seems to affect men in the age span 36–45 years old.
- There is an overall increase, in numbers and in proportion, of female complainants.

- There is an increase in numbers of male complainants – in combination with a less favourable treatment by the courts.
- There is an overall increase in the average age of the complainants.
- There is a distinct increase of cases involving complainants who are receiving some level of disability pension.
- There is an increase of the proportion of unemployed complainants.
- There is a decrease of the proportion of complainants who have a presumed immigrant experience, although the proportion of women within this group has increased.
- The role of the insurance physician has become overall more visible, and it is strongly indicated that this institution has been important for the implementation of the concentration policy.
- The practice of female and male insurance physicians differs (to some extent).
- There is an increase in the use of extra medical experts (experts who are neither the treating physician nor the insurance physician).
- The practice of female and male judges differs (to some extent). Male judges tend to form decisions that more often are in line with the decisions taken by the social insurance offices.
- There is a decrease in the proportion of cases decided fully in favour of the insured. This weakened position of the insured has mostly affected male complainants, as women already in 1993 had a comparatively weak position.

In general, the results indicate that the policy changes of the 1990s, as far as the implementation of the concentration policy is concerned, have been embraced by the social insurance offices, resulting in an increased case load at the courts. The courts in general respond by confirming the interpretation made by the administration. Male judges are more likely to confirm the standpoint of the administration than female judges, but still, the general conclusion is that the courts rarely will form decisions that oppose the original decision taken by the administration.

There is between 1993 and 1999 an increase in the homogeneity in decisions made. Differences between sexes and age groups seem to have been more or less erased in the general tightening of the insurance. The main victims in this process are men; in general, they used to have better chances of receiving a decision in court that would meet their claims. In

1999, men, as a group, are treated less favourably and more in line with how female complainants are treated. The only indicator pointing in another direction is the increase of female judges and the tendency of female judges to form decisions that contradict the standpoint of the insurance administration.

Insurance medicine as a discipline, and insurance physicians as the experts of this field, have a large impact on decisions that are made in court. There are in some cases several insurance physicians involved, expressing their opinions, but in general these experts seem to be working on behalf of the social insurance administration. It is possible for the courts to ask for independent assessments from medical experts, but to what extent this is actually done is unclear. In many of the cases the opinions of the expert (or experts) in insurance medicine are tied to the insurance offices and thus left unchallenged. Given the procedural reforms in the administrative court system, and the obligatory two-party procedure, this dominating position of the administration is problematic. The number of cases in which the complainant has received legal aid or has been given the opportunity of presenting the case in an oral procedure is so small that it is negligible. These are facts that underscore the weak position of the individual in the court procedure.

How is the reluctance of the courts to revise the decisions of the administration to be interpreted? When, all in all, only 13 percent of the cases are decided in opposition to the standpoint of the social insurance offices, this question emerges. Is the quality of the decisions made at the insurance offices of such distinction that there is no need to change them? This could be true. Although the overall increase of the case load might be taken as an indication of the opposite, it could still be that the administration between 1993 and 1999 improved distinctly in their capacity to form fair and correct decisions within the area of sickness cash benefit. It is noteworthy, however, as the National Social Insurance Board has repeatedly provided statistics that point to the difficulties of the social insurance offices to act coherently in a national perspective. Given that the social insurance administrators have had to work with new policies, new legislation, lack of resources and a strained organization, it is surprising that they, according to the courts, almost always come out with a correct decision.

The quantitative analysis has resulted in a number of observations accounted for above; still, there are several important questions that remain to be answered. One of them concerns the justification for the decisions made. How do the courts justify their decisions? Do they use the scope for legal interpretation in their assessment of whether the criteria of sickness and capacity for work are met? Is there such a scope? Or has it be-

come an issue solely for medical experts? If there is a legal scope, why do the courts hesitate to explore it? In the next chapter, I will approach the legal cases again, this time with the ambition to probe further into the judgements produced by the administrative courts by providing examples of how the courts justify the decisions made.

5 Probing further into the material of legal cases in a continued study of legal practices

5.1 Adding qualitative aspects to the quantitative results

The investigation of legal cases presented in the previous chapter was based on written decisions and judgements made by the administrative courts. In the present chapter, the content of a selection of these judgements is studied in order to illustrate and exemplify the findings of the quantitative analysis. The results of the quantitative study are used as a point of departure for an analysis of how the decisions made in court are actually formulated and justified. The analysis in the previous chapter proved to be fruitful in terms of providing indications, on a generalized level, on the characteristics of cases concerning access to sickness cash benefit, and also rewarding in providing answers to the question of how the courts acted in these cases. These results have, in the present chapter, been used as indicators of relevant issues that have guided the selection of a limited number of cases which are studied more in depth.

In order to analyze the function of 'law as a provider of legitimacy', it is necessary to acquire knowledge of what decisions the administrative courts make, but also of how these decisions are justified and how they are communicated. By using a combination of quantitative and qualitative methods, studying the content of decisions made, as well as how they are justified, input is gained for an analysis of how the legal system communicates with society. Thus, an interest is not only taken in the substance of decisions (access or no access), but also in the procedure surrounding the justification and communication of these decisions. The notion of *de facto* legitimacy was introduced in Chapter 2, where I proposed that the capacity of the legal system to provide *de facto* legitimacy was at stake in the routine based production of judgements by county

courts. In the same chapter, I described my concern to find a formula that would allow for a study of how the legal community responds to the challenge of policy reforms in their delivery of judgements in individual cases, given their responsibility to communicate with the rest of society in such a way that their judgements gain respect. Given that judges have the responsibility to ‘... represent a mechanism of peaceful conflict resolution and a medium for the realization of moral norms within a wide area’,¹ it is also essential that they take on this responsibility in their everyday communication with people. For the purpose of this study, an interest is taken in the substance as well as in the procedure of this communication.

As the procedure in the administrative courts is predominantly written, the communication between the courts and the individual complainants is in most cases restricted to the written judgements produced by the courts. Below, extracts from judgements in the case material show how the justification of the decisions made by the courts materialize in written text.

In the previous chapter, the methods used to find overall patterns and general trends also blocked away the individual stories and the complexity of each unique case. There is an instrumentalism in this quantitative approach that, with knowledge of the kind of life stories that hide behind the figures, can be apprehended as inadequate. By using the knowledge gained in the quantitative analysis as a tool for selecting judgements that are in some respect ‘typical’, the generalized knowledge acquired in the previous chapter can be combined with the unique stories told in the present chapter, and thus, to some extent, compensate for the depersonalized account of the tensions between individual needs and social risks provided in the previous chapter.

To find ‘typical’ cases that illustrate exactly the points made in the quantitative analysis is neither possible nor desirable. It is an added value of the qualitative method that the complexities of individual cases are accounted for. In the qualitative account of cases, there is therefore a necessary overlap between different issues. One case could have bearing on several of the different aspects dealt with in the quantitative study, and also carry, in itself, aspects that support as well as contradict the general conclusions presented in Chapter 4. The cases accounted for below have been selected for their quality to illustrate some typical feature, but there is an element of randomness in this selection. Other cases could have been selected, or the chosen cases could have been selected to illustrate

¹ Eriksen, Erik Oddvar and Jarle Weigård, 2000, p. 181. Author’s translation. See also chapter 2.

other typical or atypical features. I have, when selecting the cases, screened the material in order to find cases that are 'typical' in some respect. Effort has also been made to make sure that different categories of complainants (women, men, individuals with a presumed immigrant experience, the main age-groups, individuals in different occupations etc.) are, as far as possible, represented in the examples. The cases may have some atypical features, but are picked out for their quality of being 'typical'.

The results of the quantitative analysis included a number of different observations. A selection of the main observations accounted for in Chapter 5 can be structured around two distinct types of cases: 1) Cases in which the main issue concerned the distinction between objective and subjective symptoms, and 2) Cases in which the main issue concerned whether or not an assessment of capacity for work should be made against the full spectrum of 'work normally available on the labour market'. In this chapter, I will probe further into cases that are typical of the two categories above.

In the quantitative study, the factors sex, age and immigrant experience turned out to be fairly relevant in different aspects. When cases are accounted for below, such data is included, although no further conclusions are drawn as far as these factors are concerned. I have not included data on the sex of the insurance physician or the sex of the judge, in the following account of cases, in spite of indications that this might be relevant. My reason for this is that although the results of the quantitative study pointed at the possible relevance of a gender analysis, the data collected is not sufficient as a base for such a study. Rather the results of the quantitative study, in this respect, can be used as an indicator of a relevant topic for future research.

5.2 The writing of judgements

In the Act of Procedures for Administrative Courts, it is stated that the courts in their judgements should account for the decisive reasons determining the outcome of the trial.² No more detailed instructions are provided in the Act, and it is thus, to a large extent, the responsibility of the individual judge to formulate the motivation that she or he finds suitable to explain the delivered judgements in each specific case. There is an instruction that describes, in some detail, how a judgement should be structured and its general content:

Thus it is prescribed in § 32 in the decree on reports of the proceedings in the administrative courts (1979:575) that in a judgement or other official

² Act of Procedures for Administrative Courts, § 30, section 2.

decision, information should be included on 1) the court and the time and place for making it public, 2) the parties involved and their legal representatives or assistants, 3) a brief outline of the case, and 4) the claims and arguments of the parties. It is also prescribed that a judgement or decision, to the extent that it is required, should contain an account of the judgement or decision which has been appealed.³

In legal doctrine, the demands on how judgements should be written have been described in negative terms as *not* including a demand for detailed accounts of all the different aspects of a case, and as *not* including demands for elaborated reasoning on the legal assessments made.⁴ Still, the decision made by the court should be supported by a distinct motivation and warnings have been pronounced, acknowledging the risk for standardized motivations, especially in cases where the decision is negative from the perspective of the complainant.⁵

It is the duty of the Swedish Parliamentary Commissioner for the Judiciary and Civil Administration (JO) to scrutinize the courts. In an article from 1999, Rune Lavin (acting as JO) makes several critical remarks on the quality of the judgements produced by the administrative courts and he also notes a sharp increase of complaints against the courts from 1993/94 to 1997.⁶

5.2.1 Main components of a written judgement on access to sickness cash benefit

The general structure and content of the judgements differ, as could be expected, given the fairly wide freedom for judges to decide how their decisions should be formulated. Still, almost all judgements in the material consist of four parts. Although the degree of elaboration and the content of the four parts vary, they could, in general, be described as follows:

The first part of the judgement contains formal information: Name, address and social security number of the complainant, name and address of the legal representative (if any), name of the opposite party, date of the decision appealed, and a sentence declaring the main issue dealt with, for instance 'the right to sickness cash benefit'.

The second part of the judgement has usually no heading and is also the part of the judgement that differs most in content when the cases in the material are compared. It usually contains information about the

³ The instruction is referred to by Lavin, Rune, 1999, p. 62.

⁴ Ragnemalm, Hans, 1992, p. 79 ff.

⁵ See Ragnemalm, Hans, 1992, p. 82, for a list of standardized motivations.

⁶ Lavin, Rune, 1999, pp. 64 f. The number of complaints about administrative courts increased from 34 in 1994/95 to 132 in 1999 (ibid, p. 72).

claims of the complainant and the standpoint of the social insurance office, but this said, it may be added that there is a surprising number of cases where it is not obvious what the claims of the complainant actually are. The second part of the judgement sometimes has the heading 'background' and consists not only of the standpoints of the complainant and the social insurance office, but of a general account of the case and the previous decision taken by the social insurance office.⁷

The third part of the judgement is labelled 'Court findings' and it frequently begins with an account of relevant legal paragraph(s). Sometimes, but rarely, there is also an account of what has been written in preparatory work, and, even more rarely, an account of the instructions published by the National Social Insurance Board. 'Court findings' varies in length but is sometimes fairly long, as it usually includes references to all (or a selection) of the different experts involved in the case and their different opinions. The final section of the 'Court findings' is often introduced by the sentence: 'the court makes the following assessment', followed by an account of the decision made by the court. This final section of the 'Court findings' is sometimes lengthy and includes reasoning on how different aspects of the case have been weighed by the court, thus explaining the decision made. In most cases, however, this part of the judgement is only a few sentences long and has a fairly standardized form. It is common that the phrasings of the assessment made by the court are in line with the two examples below:

The Court finds that an overall assessment of the medical investigation and other reports in the present case does not support the claim that XX's capacity for work was reduced by at least a quarter. Therefore, there is no right to sickness cash benefit according to Chapter 3, § 7, in the National Insurance Act. The appeal is to be denied.

In light of the medical investigation and other facts given in the present case, the Court finds that XX has capacity for work in work which is normally available on the labour market. XX thus is not entitled to sickness cash benefit. The appeal, therefore, cannot be granted.

The fourth and final part of the judgement is labelled 'Judicial decision'. This part of the judgement is very short and formal and usually consists of one sentence: 'The Court denies the appeal.' Or, in the rare cases where the complainant is successful: 'The Court grants the appeal, cancels the decision appealed, and refers the case back to the social insurance office for further measures.'

⁷ Quite often, the previous decision made at the social insurance office is added as an appendix.

5.3 Sickness or not?

The investigation of legal cases in Chapter 4 resulted in a number of conclusions, some of which could be linked to the assessment of the sickness criterion. In particular they concern the use of the dichotomy objective/subjective when different symptoms are described and the role of insurance physicians and other medical experts in cases where this dichotomy is important. The issue of subjective/objective symptoms, the role of insurance physicians, and the role of extra medical experts are three different aspects that are approached below in sections 5.3.1–5.3.3. Each section is illustrated by at least one selected case. In section 5.3.4, all the cases and their relevance for the courts' assessment of the sickness criterion are reflected upon.

5.3.1 The distinction between subjective and objective symptoms

One of the conclusions drawn in the previous chapter was that there had been an increase in the number of cases involving the distinction between subjective and objective symptoms. The material also indicated an increase in the use of the dichotomy subjective/objective in the arguments used by insurance physicians in 1999 as compared to 1993. Further, it was indicated that in this type of case, in comparison to the type of case that primarily concerned the assessment of capacity for work, the courts were more apt to revise the decision taken by the social insurance office, at least if the case reached the appeal courts.

Below, the case of MB is used to illustrate the type of case in which it was argued that access to sickness cash benefit was dependent on 'objective' findings that could support the 'subjective' pain experiences. The case of MB is also an example of the discrepancies that can arise within the medical profession when a strict objectivity criterion is used. In the case of MB, the difference in opinion between the treating physicians and the social insurance office is striking, as the treating physicians recommend that MB should be given full disability pension, while the social insurance office makes the assessment that he is not suffering from 'sickness' and thus not eligible for any kind of allowance.

The case of SK also illustrates the problems involved with 'subjective symptoms'. In this case, there is a conflict between the assessments made by experts in somatic medicine and experts in psychiatry.

*The case of MB, December 1999*⁸

The complainant is a man, 57 years old, with an immigrant experience. He had previously worked as a car fitter and as a construction builder, but since 1992 MB worked within the restaurant/hotel sector as a dish washer.

In 1992, MB had an accident where he fell and hurt his left hand badly. While the injury was healing, MB experienced increasing pain in the left arm and shoulder. Because of this pain, he was sick-listed during the period December 1992 until May 1994. In 1993, MB engaged in occupational rehabilitation in order to resume his ordinary work as a dish washer, but the pain interfered with the rehabilitation and work-training programs. In May 1994, the social insurance office decided that he was no longer eligible for sickness cash benefit. In June 1994, he was sick-listed again as he experienced dizziness and had difficulties walking. In 1994/1995, he went through a program of occupational rehabilitation but did not finish this training as his moaning over the pain caused distraction amongst the other patients in the program. In April 1995, there were two senior physicians [at the Work Rehabilitation Centre], one specialist in rehabilitation medicine and one specialist in psychiatry, who made the assessment that MB suffered from a 'neuroto-depressive condition with regressive elements as well as chronic pain in the left shoulder and arm'. Both physicians found that MB had 100 percent incapacity for work, mainly due to mental problems.

The assessment made by the insurance physician contradicted the assessment made by the treating and consulting physicians and is accounted for as follows:

The insurance physician recommended a return to work as from 1 July, 1995. She further stated that there was obviously a considerable discrepancy between the objective findings and the symptomology shown by MB.

MB started working half-time on July 3, 1995, but the social insurance office was contacted by the employer already the first day. MB had been sent home as he had not functioned in his workplace. He had dropped trays, glass had been broken and he had needed resting. After this experience, MB was again sick-listed full-time. In September 1995, he was offered other work assignments (cleaning) by his employer, but declined as he considered his pain and dizziness to be too disturbing. As the employer had no other work to offer, MB lost his job. More medical examinations followed, but in February 1996, the social insurance office decided that MB no longer was considered to be eligible for sickness cash benefit,

⁸ 1999-12-28, Nr 1677-1997, The Administrative Court of Appeal in Göteborg (19).

as it was not 'medically verified' that he did not have capacity for work in work normally available on the labour market. The treating physician, CM, continued to sick-list MB, but the insurance physician did not set any value on these recommendations (and sickness cash benefit was not paid). The standpoint of the insurance physician was that there was no proof that the incapacity of MB had medical causes, and the social insurance office agreed. In October 1996, MB was treated by a second physician, SM, who supported the assessment made by the treating physician CM. This assessment was accounted for as follows:

It is objectively shown that MB is extremely susceptible to pain. He walks with his left arm closely pressed to his body and does not use his left hand. At attempts at an examination he reacts incredibly strongly to any attempt to take his hand. But it is clear that he has quite a severe reduction of flexibility in his left wrist and a marked tenderness across the wrist. The left shoulder is completely rigid [...] According to his physician's (SM) assessment, it is quite inconceivable to rehabilitate MB. He cannot manage either physiotherapy or an operation, if that was to be considered. The physician is of the opinion that he is a case for disability pension as the prognosis is so bad.

The County Administrative Court makes the assessment that MB is not eligible for sickness cash benefit and argues as follows:

It is the opinion of the County Administrative Court that the medical investigation presented at the time of the decision appealed does not support that MB's capacity for work was actually reduced. As the insurance physician ES points out, it has been very difficult to examine MB. Moreover, his treating physician CM has not described how his problems reduce his capacity for work. The results of attempts at rehabilitation must be regarded to be of limited value, because he always uses his pain as a reason for not pursuing treatment and trying on-the-job training. The medical material on which MB himself bases his case shows that an X-ray examination has not yielded findings that can explain why he has such terrible pain in his left shoulder/arm/hand. Doctor SM maintains that MB is a case for disability pension and that rehabilitation is futile. It appears, however, that also this physician has had difficulties carrying out an objective examination of MB. Nor is there any explanation of the symptomology that MB manifests. SM does not state in what way the problems reduce MB's capacity for work. The County Administrative Court also finds that this medical report fails to support the claim that MB's capacity for work was wholly or partly reduced as from the time when the social insurance office withdrew his sickness cash benefit [...], therefore, MB's appeal is to be denied.

MB appealed this decision to the Administrative Court of Appeal and was granted leave to appeal. The social insurance office maintained its

position, claiming that MB was not eligible for any sickness cash benefit during the period February 1996 to March 1997, although a note is made that in October 1997 the social insurance office had granted MB a full disability pension as from March 1997. In December 1999, the Administrative Court of Appeal decides in favour of the claims made by MB. The court motivates its decision as follows:

As is shown in the judgement from the County Administrative Court, MB has been assessed as totally unable to work by physicians at [the Work Rehabilitation Centre] who are specialists in psychiatry and rehabilitation medicine, primarily for psychological reasons. Dr SM, specialist in hand surgery, has also concluded that on medical grounds MB is a case for disability pension. Mainly with regard to these assessments, the Administrative Court of Appeal finds that MB's capacity for work must be considered reduced by 100 percent because of sickness also for the time after February 1996. Therefore, his appeal is to be granted.

One of the typical aspects of the case of MB, and the one aspect rendering it a place in this section, is the usage of a terminology where the dichotomy objective/subjective is important for emphasizing the standpoints taken. In the story of MB, the key word 'objective' is used by different actors making different recommendations. Thus, the insurance physician emphasized the lack of objective findings, arguing that MB is not eligible, while one of the medical experts used his observation that MB suffers from 'objective' pain to support his argument that MB should be given a disability pension.

It is also clear, and typical, that the usage of the 'objectivity' argument as a means to restrict access to sickness cash benefit could be understood as merely a technique to restrict access, used by those actors (the insurance physician and the county administrative court) who do not meet the individual concerned face to face. The assessment made by the Administrative Court of Appeal may be interpreted as an example, supporting the results of the quantitative study, of how the appeal courts are more apt to revise this kind of decision (where the case involves the distinction between objective and subjective symptoms). It should be noted that by the time the case reached the appeal court, the social insurance office had granted MB full disability pension (for the time following the disputed period). Thus, although the appeal court referred to the assessments made by the treating/consulting physicians as decisive for the outcome of the case, it is rare that a complainant in MB's situation, who eventually is 'proven right', and thus assessed to be eligible by the social insurance office, is not given the right to allowances for the in-between periods. More odd is the fact that the social insurance office maintained its position in the appeal court.

In addition, it is to be noted that in the motivation for the decision made, the county administrative court states that one reason to give limited value to the assessment made by the treating physician is that the treating physician has not provided information on how the capacity for work of the complainant is affected. This statement, which is far from unique, opens up for the interpretation that if the treating physician had provided such information, the decision of the court might have become different. Considering that the courts should apply the investigation principle, it is odd that the court lacked access to such possibly important information.

The case of SK, March 1993⁹

The complainant is a man, 51 years old, with a traditional Swedish/Nordic name. SK is described as a previously healthy man working in the real estate sector who went bankrupt and ended up with large debts. He is also described as having experienced threats and persecution. It seems as if SK had been sick-listed during 1996, but in January 1997, the social insurance office decides that he is no longer eligible for sickness cash benefit. SK appeals, but the social insurance office holds on to the decision made. SK appeals to the county administrative court, but in October 1997, the court decides in favour of the social insurance office. SK is not granted leave to appeal.

The symptoms of SK are described as: anxiety, sleeping difficulties, disturbed concentration and depression, but also as knee problems, overweight, hypertension and balance disorders. His treating physician, a specialist in psychiatry, describes his symptoms and diagnosis as 'mental insufficiency, stress reaction, disturbed capacity for adaptation, anxiety and a tendency to paranoia'.

In August 1996, the insurance physician made a statement that is accounted for by the court:

SK ought to manage full-time work in the real estate business. He can also be available for employment on the labour market. The reported knee problems, overweight, and hypertension do not prevent this. Dr SH has examined his balance disorders and concluded that he can manage such work. Nor should his mental insufficiency constitute an impediment to work.

In October 1996, a specialist in general psychiatry, SC, working with occupational rehabilitation, made a statement that the court refers to as follows:

A man, previously in good health, who in connection with a bankruptcy and large debts, where he was threatened and persecuted, developed a dis-

⁹ 1999-03-03, Nr 7408-1997, The Administrative Court of Appeal in Göteborg (151).

turbed capacity for adaptation, with anxiety, sleeping difficulties, disturbed concentration and depression, which at present results in an inhibited capacity for work. There is thus no mental illness or personality disorder but rather a maladaptive reaction to the above mentioned mental stress, resulting in reduced social and professional functioning.

In November 1996, the insurance physician made the assessment that: 'In the medical reports available, there is nothing that supports a need for sick-listing for medical reasons.'

In January 1997, the treating physician, PC, specialist in psychiatry, made the following statement:

In the discussion of SK's sick-listing for a mental disorder, a disagreement has appeared on account of semantic confusion. Dr BE and Dr SC (other specialists) use the term mental illness – which is an obsolete term because of the lack of clarity as to definition and delimitation. In the most commonly used psychiatric classification of mental disorders, the World Health Organization's ICD-10, which is internationally acknowledged, the term mental illness is avoided and replaced by the term mental disorder. Among the psychiatric diagnoses in ICD-10, maladaptive reaction to mental stress is also included, which Dr SC has diagnosed as SK's status. Sick-listing may of course be based on this diagnosis in line with other diagnoses in the ICD-10 classification. Dr PC (the treating physician) does consider this diagnosis correct in SK's case and can add that SK, in addition to other symptoms has also shown tendencies to paranoia. Dr PC maintains that SK has no capacity for work because of the mental disorders reported.

The insurance physician responded that the statement made by PC did not change his previous assessments and recommendations. The court motivates its decision not to grant PC sickness cash benefit as follows:

The County Administrative Court finds, like the social insurance office, that the medical investigation has not supported that SK's capacity for work has been reduced by at least a quarter because of sickness. Consequently, there are grounds for the decision taken by the social insurance office. SK's appeal is to be denied.

5.3.2 The role of the insurance physician

The case of MB above could also have been used to illustrate the typical standpoint of the insurance physician, demanding proof of 'objective' ('strictly medical' or 'somatic') causes for incapacity. The case is also typical in that this position is supported by the county administrative court, in spite of being contradictive to assessments made by several, sometimes highly qualified, treating/consulting medical doctors. Below, the case of HH is used to illustrate how a 'similar' case was handled in

1993. This case is typical to the extent that it illustrates that the issue of subjective/objective symptoms was problematic also in 1993, but also typical in that the court (seemingly) does not necessarily give extra weight to the opinion of the insurance physician, but treats the expertise in insurance medicine as one of several expert opinions. It is striking, and also more typical of a 1993 case than of a 1999 case, that there is no account of what exact assessment of capacity for work the insurance physician makes. It is less remarkable that several of the other medical experts also refrain from doing this. The case is atypical in that the reasoning of the court is long and relatively elaborated.

*The case of HH, October 1993*¹⁰

The complainant is a man, 49 years old, with an immigrant experience. At the time of the trial, HH had lived 20 years in Sweden. Almost immediately after arriving in Sweden (in 1970) he started working full-time as an operator. His sick-listing period started in December 1988.

HH became sick-listed in December 1988 and stayed sick-listed until July 1991 on the diagnosis pain in the back and lumbago, although the primary cause for sick-listing was changed to 'mental insufficiency' in June 1990. During a period in 1990, HH was involved in an occupational training program at his workplace that he did not complete. Based on this uncompleted on-the-job training, the social insurance office decided that HH was no longer eligible for sickness cash benefit. In a decision made by the social insurance court in November 1991, this decision was reversed and HH was granted sickness cash benefit for the period April–May 1990. In August 1991, the social insurance office decided, again, that HH was not eligible for sickness cash benefit as from July 1991. HH appealed and the social insurance office made a reassessment confirming its previous decision. HH appealed again, this time to the County Administrative Court. In October 1991, the court, partly, reversed the decision made by the social insurance office. The standpoint of the social insurance office was that HH had full capacity for work; the standpoint of HH was that he had no capacity for work. The court made the assessment that HH was eligible for 75 percent sickness cash benefit.

The opinions of eight different medical doctors are accounted for in the judgement, including two insurance physicians. The symptoms that are described in these different accounts add up to a list of symptoms and diagnoses including: chronic pain in the back, fainting attacks, de-

¹⁰ 1993-10-04, Nr Ö 906-92, The County Administrative Court in Malmöhus län (111).

pression, unspecified personality disturbances and mental insufficiency. In December 1989, the insurance physician JS made an assessment that is accounted for as follows by the court:

HH shows radiological changes in his back. It is uncertain whether these are the cause of his condition. There are probably psychogenic elements overlying HH's pain condition. There is not much, objectively, in his physical dorsal status.

In March 1990, the company physician communicated with the social insurance office and his assessment was accounted for as follows by the court:

HH is undoubtedly sick and has no capacity for work. A qualified total assessment of the case must be made for future adequate measures to be taken. The decision to withdraw his sickness cash benefit cannot promote constructive rehabilitation. The fact that the occupational training program at his workplace was a failure and cannot continue does not imply that HH has capacity for work. His definite incapacity for work is not only attributable to his orthopaedic symptoms but is just as much a consequence of mental symptoms.

In November 1990 Professor UM communicates the following assessment of the status of HH to the social insurance office:

The pain condition is so inverted (deeply rooted, the county administrative court's translation) that a stay for some time at a rehabilitation hospital cannot be expected to have any tangible effect. From the point of view of treatment, there is nothing more to take recourse to. It is difficult for HH to manage his situation, mainly because of social insecurity. The work prognosis seems very poor, and therefore temporary disability pension appears to be motivated.

In the judgement, there is also an account of the assessment of a senior physician, GW, from March 1991:

HH suffers from chronic pain in the back and from an unspecified personality disorder. In 1975, he had a reactive depression with several psychosomatic elements. Since some years back he has developed a massive psychological fixation with his back symptoms, which is so dominant that any emotional contact with him is impossible. It is reasonable to say that the background lies in a severe personality disorder, but it is not clear what has triggered it. There is also a strong element of embitterment. He does not show signs of depression or other delusions nor signs of pre-senility. No assessment can be made as to how long his capacity for work will be reduced. There are no feasible psychiatric treatments. She suggests temporary disability pension.

In May 1991, the insurance physician, after having assessed the different opinions communicated by the treating/consulting physicians, states that: 'There is neither a dorsal condition nor mental disorder to such an extent that HH can be considered totally unable to work.' In the judgement, there is no account of how much capacity for work the insurance physician thinks that HH has, but the standpoint of the social insurance office is that HH has full capacity for work. In October 1991, Dr GW once again communicates a statement to the social insurance office that is meant to clarify her previous assessment. This statement is accounted for as follows:

HH is hard to assess as it is so difficult to make contact with him. His somatic fixation and defensive attitude are extreme, and she does not regard this as an expression of malingering but rather as a symptom of a deep and severe mental disorder that could be classed in the same category as mental illness as regards his reduced capacity for work.

This addition to her previous assessment does not affect the standpoint of the social insurance office. The County Administrative Court, in an unusually long and elaborated judgement, made the assessment that HH was eligible for sickness cash benefit at a level of 75 percent. The court reasoned as follows:

It is the task of the County Administrative Court to assess, among other matters, whether HH's capacity for work is reduced because of sickness. The demand for a precise diagnosis rises the longer a case of sickness continues. In the National Insurance Act, there is no definition of the concept of sickness. From the preparatory work for the law (SOU 1944:15, p. 162) it follows, however, that in an assessment of whether there is sickness present, one should keep to what is regarded as sickness in common usage and in the opinion of current medical science. Such a starting point leads to a situation where any bodily or mental condition deviating from the normal, which is not connected to the normal process of life, is said to be a sickness. HH's status seems to be difficult to assess. The medical investigation in the case must, however, be taken to prove that the changes in HH's spine shown in X-rays are not of a kind that could explain his back problems. As there is nothing else in the case about HH's dorsal symptoms, it must be considered to have been made clear that his capacity for work is not reduced on account of the back problems that he experiences. However, it appears from the report that HH has a deep and severe mental disorder, which presents as, for instance, faintings and fits and a massive fixation with his dorsal symptoms. This disorder is very likely what has made the planned on-the-job training unfeasible and also in other ways obstructed the assessment. In spite of the fact that it has not been possible to make a clear diagnosis, the County Administrative Court therefore finds that, as regards social insurance, HH's problems should be considered equivalent to mental illness.

The County Administrative Court must also assess whether HH's capacity for work is reduced and, if so, to what extent. In the case, there are contradictory and also somewhat unclear statements on this question. According to JT (company physician), HH is definitely unable to work. According to GW, his mental disorder is severe and comparable to mental illness as concerns its effect on his capacity for work. However, it is not clear to what extent his capacity for work is affected. According to JS (insurance physician), HH does not suffer from sickness to such an extent that he can be said to be totally unable to work. The circumstance that a majority of the physicians involved have maintained that HH ought to be given temporary disability pension because of his incapacity for work, only means that this situation can be expected to last for some time. There is, on the other hand, no clear assessment of the degree of his capacity for work. Still, the County Administrative Court finds that the medical investigation in the case does demonstrate that HH's capacity for work is much reduced because of his mental disorders, but that some capacity remains, although not more so than that his capacity for work can be regarded as reduced by at least three quarters. The Court therefore finds that HH at the time of the insurance office's decision was entitled to a three quarters sickness cash benefit and consequently his complaint is to be approved in some respects.

As noted above, there are similarities between the two cases of MB (from 1999) and HH (from 1993). Both concern men of some age, with an assumed immigrant experience, suffering from pain that lacks the support of distinct 'objective' findings. They differ mainly to the extent that in 1993, the position of the insurance physician is less clear and prominent, and also to the extent that in 1993, the county administrative court decided (partly) in favour of the complainant.

This said, the 1993 case is also atypical in several aspects for cases from this period: The way the court's reasoning is accounted for in the judgement is unusual, the reference to preparatory work linked to this reasoning is very unusual, and the number of experts involved and the fairly generous account of the opinions of these experts would have been more typical for a 1999 case than for a 1993 case.

5.3.3 The role of extra medical experts

The results of the study of legal cases indicated an increase in the use of extra medical experts, especially notable was the increase of extra medical experts in cases involving individuals with a presumed immigrant experience and in cases where symptoms were labelled as objective and/or subjective. It was argued that one possible explanation for this increase could be the existence of a broader scope for legal interpretation in cases where the main issue concerned an assessment of the 'sickness' criterion

(as compared to the criterion ‘capacity for work’). It was also argued that the procedural reform, instituting a two-party court procedure, could have affected the number of experts by stimulating a more active procedural technique. The case of ZF is primarily chosen to illustrate how a case involving many experts developed. The case of ZF also illustrates the strong position of the insurance physician and the use of a ‘subjective’/ ‘objective’ terminology as an argumentative technique to strengthen or weaken the value of different arguments.

*The case of ZF, March 1999*¹¹

The complainant is a woman, 40 years old, with a presumed immigrant experience. She had previously worked in the ‘restaurant sector’, but had been unemployed since 1992.

Since 1992, ZF had been a recipient of either sickness cash benefit or unemployment cash benefit. According to the description of the facts of the case available in the judgement, the relevant sickness period started in September 1994, when she became sick-listed under the diagnosis ‘myofacial pain syndrome’. In June 1995, the social insurance office decided that she was no longer eligible for sickness cash benefit. In August 1996, she was sick-listed again, and stayed sick-listed until November 1996, when the social insurance office again decided that she was not eligible for further payments of sickness cash benefit. ZF appealed this decision, but in April 1997, the insurance office, after a reassessment, confirmed its original decision not to pay her sickness cash benefit. ZF appealed to the County Administrative Court and the case was tried in August 1998. The County Administrative Court decided in favour of the social insurance office, and ZF appealed once again to the Administrative Court of Appeal. In March 1999, the appeal court decided not to give leave to appeal. At the time of the trial in the County Administrative Court, ZF was paid sickness cash benefit, again based on an assessment of her capacity in June 1997. At issue was thus whether the social insurance office made the right assessment when denying ZF sickness cash benefit during the period November 1996 until June 1997. In the case, a number of different experts were involved.

Doctor GW (a specialist in orthopaedics and surgery) described the physical situation of ZF as difficult and supported by clear objective indications. His assessment (in August 1994 and reaffirmed in October 1996) was accounted for as follows in judgement:

After five years of highly repetitive and monotonous piecework, ZF has developed a serious, chronic myofacial pain syndrome. She is severely disabled

¹¹ 1999-03-25, Nr 6088-1988, County Administrative Court in Göteborg (159).

and can hardly carry out any manual work at all. Also very light work would probably be impossible for this patient to carry out.

The assessment (from February 1995) made by another medical expert, Dr RH (a specialist in orthopaedics and working with occupational rehabilitation), is accounted for as follows:

ZF's medical problems are of the subjective type muscular pain. Not much appears in the objective examination. The radiological changes in the back of the neck probably have no bearing on her pain condition. I find in an overall assessment that ZF certainly should have a remaining capacity for work and that measures for work rehabilitation should be started as soon as possible.

In the judgement, reference is also made to an anonymous assessment made by those responsible for the vocational rehabilitation project (in May 1995):

ZF's participation in the project is extremely limited. Her motivation is low and so is her perseverance in most of the assignments. [...] In spite of the difficulties in making an assessment, ZF is still considered to have a capacity for work, at least half-time.

There are two insurance physicians involved in the case. The first insurance physician makes the following assessment according to the court:

He has studied the presentation and the file and finds that a 3:7 condition is not at hand, that is, the capacity for work is not reduced for medical reasons by at least a quarter. In the earlier assessment by (Dr RH), it was stated that ZF had the capacity for full-time work in a suitable occupation. Because of her long-lasting sick-listing, a rehabilitation project was suggested. Now, ZF has completed this but obviously not participated actively. She is not motivated. Inconsistent pain behaviour and poor attendance.

Four statements by the second insurance physician are accounted for in the judgement. This insurance physician, SA, is also described as a specialist in orthopaedics. In the first statement (November 1996), he mainly argued that the assessment made by Dr GW did not provide a basis for reconsidering the decision not to pay sickness cash benefit to ZF. The second and third statements are accounted for as follows by the court:

April 1997: The statements from Dr GW do not lead to a different assessment than before. The subjective deterioration described cannot be seen as proven through findings from an examination. His assessment can be altered when further medical reports have been submitted.

May 1997: In view of earlier decisions about insurance, from a strictly medical viewpoint, reports that prove a (possible) deterioration should be

waited for. From a humanitarian viewpoint, however, a different outcome may be determined.

In the fourth statement accounted for (from August 1997), the insurance physician SA, once again, reaffirms the decision made by the social insurance office and comments on the assessments made by the other experts:

August 1997: Dr GW's sick-listing diagnosis alone (occupational musculoskeletal disorder) does not motivate a change in the assessment made earlier. The report from the Abc-clinic is impossible for him to interpret in a satisfactory way. To him, Dr S's report states that ZF's pain reduces her capacity for work, but he does not grade the reduction. Instead he recommends continued rehabilitation measures. As Dr S's report does not state the degree of the reduction in ZF's functional capacity in June 1997, the statement does not confirm a reduction of the capacity for work by at least a quarter at the time of the social insurance office's decision on 20 November, 1996.¹²

Against this background of shifting opinions and statements, made by 5-6 different experts and accounted for by the court, the County Administrative Court provided the following motivation for its decision not to pay sickness cash benefit to ZF:

Taking into consideration the medical investigation at hand in the case, the County Administrative Court shares the assessment made by the social insurance office that ZF's capacity for work, at the time of the decision of the social insurance office, cannot be regarded as having been reduced by at least a quarter. Thus, there were grounds for the social insurance office's decision to withdraw her sickness cash benefit. [...] ZF's claims cannot lead to a different decision.

The Administrative Court of Appeal did not motivate its decision not to give leave to appeal.

The case above illustrates how the lack of distinct assessments of what level of capacity for work the complainant has can be used as a positive indication that he or she actually has such capacity to quite a significant degree. Thus, in spite of whatever physical difficulties the experts connect to the complainant, these expert opinions can be used to indicate remaining capacity for work, unless otherwise clearly stated. This is especially true in cases that concern the distinction objective/subjective symptoms.

¹² The opinion of Dr S (working at the Abc-clinic) is not accounted for explicitly in the judgement, but is referred to indirectly in the opinion of the insurance physician SA (as unsatisfying), and it is also, somewhat contradictory, referred to by the complainant, as she states that it is on the basis of this opinion that the social insurance office found her eligible for sickness cash benefit in June 1997.

The case of ZF does not only provide an example of the role of extra medical experts in a 1999 case, but can also be used as an example of all the cases where the court uses a typical, short and standardized motivation to support the decision made. As described above in section 5.2.1, this type of motivation, however unsatisfying, is very common in the material of legal cases.

5.3.4 Reflections on how the criterion of sickness is operated by the courts

Although the four cases accounted for above have been presented under three different headings, in order to exemplify different findings of the quantitative study, it is obvious that they are interconnected and to a substantial degree illustrate the same problem nexus: The distinction between objective/subjective symptoms, the role of the insurance physician and the role of extra medical experts.

It is quite obvious that the courts to a large extent are dependent on medical experts when faced with the assignment of determining whether the sickness criterion is met or not. What is also quite obvious is that the medical experts involved in this type of cases rarely make the same assessment. The courts are thus faced with different, and differing, expert opinions and have to decide which of these arguments should become decisive for the outcome of the judgement. How, then, do the courts perform this task?

In the cases from 1999, it would seem as if the courts, in the process of weighing different arguments, presumed that the insurance physicians had made the correct assessments and, unless other circumstances strongly indicated that this might not be the case, confirmed the decision made by the social insurance office. In the case of ZF, the court offered no explanation as to why it made the same assessment as the social insurance office, but seemingly describes this as an obvious conclusion. A possible interpretation of this (common) practice by the administrative courts not to motivate their decisions is to assume that the courts find the prominence of insurance medical expertise so obvious that it is superfluous to motivate the decisions made as long as they are in accordance with the assessment made by the social insurance office. If it is assumed that the insurance physicians and the social insurance offices are awarded such a preferential right of interpretation, this would explain the difficulties for complainants to find support for claims in court even in cases when they can make references to the assessments made by experienced medical experts.

In contrast, the 1993 case of HH is interesting as the court in this case makes explicit reference to preparatory work from 1944, in which it is stated that when judging whether a case of sickness is present or not, one should first of all be guided by what is regarded as sickness in common usage and in current medical opinion. By using this reference, the court explicitly defies the prominence of any specific branch of medical expertise and is free to weigh the different positions as it finds appropriate.

It should be noted that although the procedure in court, in 1999, is a two-party procedure, the insurance physician, who is an expert working on behalf of the social insurance office, is referred to, not only as a prominent interpreter of the sickness criterion, but also as an objective and independent interpreter. His or her association with one of the parties of the conflict is not seen as a problem by the courts. This is not done in 1993, but more surprisingly, there are no indications that the procedural reform implemented in 1996, underlining the conflict situation between the individual and the authorities, has affected the courts' conception of the situation.

The focus in the present work is on the assessments made of the criteria 'sickness' and 'capacity for work', but the three cases referred to above indicate that there is one factor, yet unmentioned, that also carries some weight in the determination of whether someone is eligible for sickness cash benefit. In all the cases referred to above, the complainant had not, at some point, properly fulfilled the demands to participate in different occupational rehabilitation or on-the-job training programs. A study of the arguments accounted for in the cases above, clearly shows that this, although not elaborated, is a fact given weight in the assessment of whether the criteria of sickness and capacity for work are fulfilled.

This chapter is devoted to a description of the communication skills of the administrative courts. I will return to the reflections accounted for above in the concluding Chapter 8, when the practices of the courts are analyzed again, this time from the perspective of their proposed function as providers of legitimacy.

5.4 Capacity for work or not?

The results of the quantitative study showed a large, overall, increase of cases where the main issue dealt with concerned how to assess capacity for work. In most of the cases, the social insurance office argued that the complainant, in spite of her or his physical problems, had a remaining capacity for work in 'work normally available on the labour market'. This type of case existed in 1993 also, but was more rare and mainly in-

volved complainants who had an employment. In 1999, the unemployed dominated these cases.

In the cases from 1999, the remaining capacity for work is assessed against 'work normally available on the labour market'. It is striking that the courts hardly ever discuss what this might mean in the specific case. In the case of KN, referred to below, the complainant claims that he has called a number of unemployment offices in order to find out if there is any work of the kind that the insurance physician recommends. KN receives the answer that there is no such job. The court, however, does not (and this is very typical) provide any reasoning for why it still reaches the conclusion that this kind of work indeed 'normally exists on the labour market'. The case of IK is an exception and provides an example of a case where the court does account for its reasoning, but this case is from 1993. The case of MP is a typical 1999 case, with only a scanty justification provided by the court. The case of PH is typical in another respect, as it illustrates the type of case where the complainant claims to have no capacity for work and has been assessed to be eligible for some level of disability pension (often 50 percent), but where he or she is assessed to have 'remaining capacity for work' in work 'normally available on the labour market'. In the quantitative study, it was concluded that this was a 'new' type of case for 1999. While almost no such cases were found in the material from 1993, they constituted 14 percent of material of legal cases from 1999.

5.4.1 The assessment of capacity for work – 'remaining capacity for work'

The results of the investigation of legal cases indicated a distinct increase in 1999, as compared to 1993, of cases where individuals who were recipients of sickness cash benefit or disability pension were considered to have some level of 'remaining capacity for work' that should be assessed against work normally available on the labour market. The case of PH is used to illustrate this.

The case of PH, December 1999¹³

The complainant is a man, 47 years old, with a traditional Swedish name. PH had worked for many years, first as a garbage collector and later (during a period of 20 years) as a chauffeur and as a crane operator. In 1995, he became unemployed.

¹³ 1999-12-13, Nr 4492-1998 and 4496-1998, The Administrative Court of Appeal in Jönköping (23).

In 1983, PH was involved in a car accident that resulted in a whiplash injury, and he also had a diagnosed occupational injury affecting his right arm. PH became sick-listed full-time in December 1994. In February 1998 (confirmed in June 1998), the social insurance office decided that he no longer was eligible for full sickness cash benefit. All rehabilitation measures had been exhausted and the assessment was made that he had a substantial 'remaining capacity for work' in a job normally available on the labour market, in spite of the undisputed fact that his capacity for work within some trades was non-existent. At this time, PH was granted a disability pension (50 percent), but his claim for sickness cash benefit for the remaining 50 percent was denied. PH appealed this decision to the County Administrative Court, but in December 1998, the court decided in favour of the social insurance office. PH appealed again, and in December 1999, the Administrative Court of Appeal decided that PH was eligible for sickness cash benefit. It should be noted that at this point the social insurance office had changed its position and agreed with the claims made by PH, and thus there was no conflict.

The treating physician made the assessment (in 1997 and 1998) that PH was in need of full temporary disability pension for at least two years. His physical problems were described as chronic pain in the back, arthrosis in the knee joint, wrist disorders, nervous problems, neck/arm difficulties, and numbness in his fingers. Two other medical doctors are referred to in the judgement; both of them described the physical status of PH in line with the findings of the treating physician, but without making an independent assessment of his capacity for work. On the basis of these medical reports, the insurance physician made the assessment (in October 1997 and in January 1998) that PH had 50 percent remaining capacity for work. The assessment made by the insurance physician is accounted for as follows:

The main causes of the insured man's reduced capacity for work are probably the general degeneration of muscles and joints as described in the report from XX. This is manifested in chronic back pain but also in reduced flexibility. The latter circumstance [...] makes it impossible for the insured to carry out tasks above shoulder level. Other tasks, in addition to work above the shoulder level, that the insured cannot manage are work involving repetitive strain. Consequently, work as a driver would clearly be unsuitable. Work that the insured should be able to carry out ought to be unconstrained and flexible (such as simple caretaker tasks?).

The County Administrative Court motivated its decision as follows:

The presentation of the case shows that PH's capacity for work is reduced because of problems in his back, neck and shoulders as well as his knees

and wrists. For the right to full benefit from the social insurance office, the capacity for work must be 100 percent reduced. From the report it is clear that PH has difficulties in carrying out tasks above shoulder level and also work involving repetitive stress. The report does not support the view that PH, on account of his problems, is totally unable to work with simple and flexible tasks. The County Administrative Court does not find that it has been shown that PH is eligible to more than 50 percent benefit from the sickness insurance as from February 1998 and half a disability pension from August 1998. There are no grounds for changing the decision of the social insurance office.

The judgement from the Administrative Court of Appeal is very short and based on (not accounted for) medical reports, dated from April 1999, of two medical doctors (one neuropsychologist and one senior physician) working at a rehabilitation clinic. It must be assumed that they made the assessment that PH totally lacked capacity for work on a permanent basis. Thus, according to the judgement in the appeal court, PH was granted sickness cash benefit during the period August to February 1998, and after 1998 he was granted full disability pension. (As noted above, at the time of the judgement in the appeal court, the social insurance office agreed with the claims made by PH).

5.4.2 Assessment of capacity for work when the complainant is unemployed

Between the years 1993 and 1999, there was a marked increase of cases in which the complainant was unemployed. In many of them, the main issue concerned the assessment of capacity for work and, more specifically, what type of work the capacity should be assessed against. The cases of IK (from 1993) and of BR (from 1999) are accounted for below, as an illustration of this type of conflict and how the courts could deal with it in 1993 and 1999.

The case of IK, April 1993¹⁴

In the case of IK, the complainant was a woman, 34 years old, carrying a traditional Swedish name. Her work experience consists mainly of cleaning jobs. At the time of the social insurance office's decision not to grant her sickness cash benefit, she seems to be unemployed (in the judgement, she is referred to as having informed the social insurance office that she was looking for work as a salesperson; she has left previous em-

¹⁴ 1993-04-19, Nr Ö 108-92, County Administrative Court, Skaraborgs Län (132).

ployments due to her physical problems). She suffers from diabetes, arthrodynia and a knee injury, her difficulties are described as 'fatigue, concentration problems, mental problems expressed as fear of insulin reaction and pain' (typical subjective symptoms) but also as 'chondromalacia patellae' (degeneration of the cartilage of the kneecap), objectively provable through findings made by arthroscopy.

During the period January 1986 to February 1988, IK was sick-listed on the basis of pain in an ankle (the result of a car accident). During the period March 1988 to July 1988, she was sick-listed on the diagnosis myalgia and diabetes. During the period October 1988 – December 1989, she was sick-listed again, this time based on a diagnosis of secondary fibromyalgia, and during the period June 1990 to March 1991, the basis for sick-listing was diabetes mellitus and knee injury. In April 1991, the social insurance office decided that IK no longer was eligible for sickness cash benefit, arguing that she ought to be able to manage 'sedentary work' and that in such work, she would have full capacity for work. IK appealed the decision, but in a decision taken in December 1991, the social insurance office maintained the previous assessment. IK appealed again, this time to the County Administrative Court. She claimed the right to rehabilitation measures (100 percent) and she hoped that these would result, eventually, in a situation where she had regained 50 percent of her capacity for work. The court delivered a judgement in April 1993, deciding fully in favour of the claims made by IK. In this case, the reasoning of the court is unusually elaborated and explicit:

As far as is documented in the case, IK previously worked mainly as a cleaner and also for about a month as a bookshop assistant. It must be considered obvious that, because of her health problems, she cannot return to the occupation from which she has any experience of significance, that is as a cleaner. Her health problems and her lack of experience from other occupational sectors do limit her choices when transferring to another occupational sector, particularly in view of the demands for occupational experience put on those in search of work in the present structure of the labour market. If the demand for adapted work in this case led to an assessment of capacity for work in relation to a fictitious, non-existent occupation, the result would probably be unemployment without any continuing rehabilitation. Rehabilitation measures have also repeatedly been recommended by Dr R (Dr R is not the insurance physician) and, obviously, these are necessary if IK is to obtain and maintain an income from work which corresponds to at least half the income she would have had if she had been well. In these circumstances, the social insurance office cannot be considered to have had grounds enough for deciding, without access to rehabilitation measures, to withdraw IK's sickness cash benefit.

The investigation of legal cases indicated that there had been a shift in approach to cases such as the above between 1993 and 1999 (cases where the issue mainly concerns the assessment of capacity for work and the complainant is unemployed). The case of MA, below, is used to illustrate how such a case was dealt with in 1999.

*The case of MA, October 1999*¹⁵

The complainant is a man, 60 years old, with an assumed immigrant experience. In MA's latest employment, starting in 1987, he worked as a salesman at a big store. Due to company restructuring, the staff at the company was reduced and MA lost his job in 1995.

MA's physical problems started in 1994 and he became sick-listed full-time in May 1997. He received occupational rehabilitation during some weeks in September 1997 and again in March 1998. In July 1998, the social insurance office decided that MA no longer was eligible for sickness cash benefit. MA appealed the decision, but in November 1998, the social insurance office confirmed its previous decision, declaring, again, that MA was not eligible for sickness cash benefit. MA appeals, this time to the County Administrative Court, but the court decides in line with the decision made by the social insurance office. MA appeals to the Administrative Court of Appeal but is denied leave to appeal.

In May 1998, MA is described, by the treating physician, as a man using a cane when walking and unable to manage 'stress, lifting and long periods of sitting, standing or walking'. The symptoms are high levels of pain in the legs, in the lower part of the back, and in the feet. The treating physician is referred to as making the following assessment of MP's capacity for work:

Dr RL considers MA unable to work, even part-time. He is of the opinion that his medical reduction of the capacity for work will remain for several years and recommends full disability pension. He states that there are clear medical findings showing changes in the left SI nerve (earlier described as chronic lumbago sciatica and also disc degeneration throughout the lumbar region) and he does not think that rehabilitation would lead to improvement.

The insurance physician, JS, on the other hand, is referred to as having made the following assessment (June 1998):

... an insured man with very scanty investigation of orthopaedic status. I consider the reduced strength in his big toe and the reduced Achilles reflex to be old findings, the results of a previously diagnosed slipped disc (1995) which has apparently shrivelled and is not clinically present. Moreover, my

¹⁵ 1999-10-15, Nr 2782-1999, Administrative Court of Appeal in Stockholm (296).

colleague MN has made the same assessment. The fact that the person concerned shows an incipient disc degeneration, expressing itself in reduced liquid content and in disc protuberance, is a finding that in the main is normal considering that he is about 60 years old. Thus the only finding present is the severely reduced flexibility in the lumbar region. He (the insurance physician) is not of the opinion that the capacity for work is reduced by at least a quarter in work normally available on the labour market. And he does not consider that it is necessary for the person concerned to be given special treatment or further examinations.

The County Administrative Court motivates its decision not to find MA eligible for sickness cash benefit as follows:

The County Administrative Court does not find that the medical report confirms that MA's capacity for work has been reduced because of sickness in relation to */text missing in the court decision/* to such an extent that he has been eligible for sickness cash benefit. Therefore, the appeal is to be denied.

In the case of MA, some of the key words are lacking in the judgement, but it was probably meant to read 'in relation to work normally available on the labour-market'.

Below, the case of KN is used to exemplify the frustration and bewilderment experienced by the complainant when facing the demands made by the authorities.

*The case of KN, October 1999*¹⁶

The complainant is a man, 51 years old, with a typical Swedish/Nordic name. KN had previously worked as a sheet-metal worker, but was unemployed at the time of sick-listing. He had been sick-listed since January 1996 with the diagnosis 'elbow fracture and pelvis fracture'. His fractures eventually healed but left remaining difficulties with weakness and limited mobility. In January 1999, the social insurance office decided that he was no longer eligible for sickness cash benefit. KN appealed the decision, but in March 1999, the social insurance office confirmed its previous decision. KN appealed to the County Administrative Court, and in June 1999, the court decided in favour of the social insurance office. In October 1999, KN was denied leave to appeal.

The claims of KN, who has a union-connected legal representative, are clear and the court includes a reference to KN's own account of the state of affairs:

In his appeal, KN has claimed that sickness cash benefit should be paid. To support his claim he says, among other things: Because of his occupational injuries from which he has not yet recovered, he cannot be available for

¹⁶ 1999-10-27, Nr 6735-1999, Administrative Court of Appeal in Stockholm (302).

employment on the labour market. The insurance physician is of the opinion that he has a full capacity for work in a job that would be easy on his right arm. To be available for employment on the labour market, one must be in good health and, in principle, be able to accept any work that is offered. He has called several employment offices and asked about work with the job description that the insurance physician suggests. There is no such work.

The treating physician (HT) made several different statements on the complainant's capacity for work. The court provides the following account of these statements:

October 1997: HT does not think that KN can return to his work as a sheet-metal worker. He therefore should undergo rehabilitation measures.

September 1998: HT has stated that KN can clearly manage sedentary work. However, HT does not believe that KN personally wants or is able to manage office work.

October 1998: Among other things, HT has stated that KN can manage light work if such work is available. In case KN cannot be given retraining or light work, HT proposes temporary disability pension.

The insurance physician claims that he has had a telephone conversation with the treating physician, HT, in December 1998 and that the treating physician at that time made the assessment that KN had 100 percent capacity for work in 'light work, such as office work or alternately work as a caretaker that is normally available on the labour market'. The court provided the following motivation for its decision not to find KN eligible for sickness cash benefit:

In view of what the treating physician has stated regarding KN's capacity for work in a light sedentary job, the County Administrative Court finds that the medical investigation in the case does not support that KN's capacity for work, because of sickness, would be reduced in a suitable job to such an extent that he can be considered entitled to sickness cash benefit. Therefore, the appeal is to be denied.

The treating physicians are usually not regarded as experts on assessments of capacity for work in the material of legal cases. In that respect, the case of KN is atypical. In cases where the insurance physician and the treating physician make different assessments of capacity for work, the courts tend to listen to the recommendations of the insurance physician. On the other hand, the case of KN is typical to the extent that the court refrains from discussing whether the complainant's assessed capacity for work does correspond to work 'normally available on the labour market'.

5.4.3 Reflections on how the criterion of capacity for work is operated by the courts

The main reflection to be made is that the courts do not elaborate the legal content of the criterion of capacity for work. Just as with the sickness criterion, the courts, in general, let the experts decide if there is any capacity for work, and also if this capacity, however restrained, might fit with the abstract notion of 'work normally available on the labour market'. There is also, and even more distinctly so than in the case of the sickness criterion, a distinct hierarchy among the experts used in court. The main expert on capacity for work is, in general, the insurance physician.

The reflection could also be made that it is surprising that the courts do not, to a larger extent, find it appropriate to make independent, legal assessments of how to apply the criterion of capacity for work in the individual case. While it is understandable that medical experts have been given an important role in the assessment of sickness, it is less obvious why these experts (insurance physicians and other medical doctors) should have such a dominating impact on the assessment of capacity for work. It is also interesting (and very typical) that no account whatever is made of assessments on whether or not a 'suitable' job really is 'normally available on the labour market'. The courts tend to justify their decisions mainly by making a strict reference to the expertise in insurance medicine.

5.5 Reflections on the courts' production of judgements

The main idea behind the analysis of legal cases, pursued in this chapter, was to illustrate the procedure surrounding the courts' justification of judgements. While focus in the previous chapter was on substance, the close-up study of distinct cases was made to illustrate the procedural aspects of legal practices by studying how courts account for the circumstances of a case and how they justify the decisions made. Eight different cases, typical in some respect, were extracted from the material of legal cases to function as examples. Quite lengthy quotations from these judgements have been provided in order to give a rough and general idea of how decisions made by the administrative courts, when dealing with cases concerning access to sickness cash benefit, are structured and motivated.

In Chapter 2, I made a reference to the distinction sometimes made between a 'context of discovery' and a 'context of justification' when describing the decision-making process performed by judges. As has been

accounted for above, the two concepts are used to describe a process in which judges are alleged to justify the decisions in a way that fits with prevailing legal dogma although the decisions are formed in a broader context. In the present chapter, an interest has been taken in ‘justifications’.

The results must be described as rather poor. In general, there is a lack not only of the transparency that I inquired for in Chapter 2, but also of elaborated legal reasoning in good dogmatic tradition. The typical justification used by the administrative courts is very short, very standardized and mainly says that: since things are as they are, the complainant should not be given access to sickness cash benefit. There are exceptions to this off-hand mode of ‘justification’, but the exceptions are rare (and of shifting quality).

What the standardized justifications signal is that there is *no need* for legal reasoning, or alternately, that there is *no room* for legal reasoning. The first explanation indicates that the issue at hand, the determination of whether an individual is eligible for sickness cash benefit or not, in general is simple and uncomplicated. Thus, it would be a waste of time and resources for the courts to elaborate on their arguments and motives. The second explanation indicates that access to sickness cash benefit is a matter for medical experts (and mainly for experts in ‘insurance medicine’) and not a matter for lawyers. This is an explanation that, in its extreme, evokes the question of why this issue is tried by courts and not by medical boards?

PART III

SOCIETAL CONCEPTIONS OF JUSTICE

In this part of the dissertation, the notion of *'societal conceptions of justice'* is approached through an investigation of 'basic values', 'current discourses' and 'technical solutions' prevailing in Swedish society. Above, in Chapter 2, I have accounted for how this fits into the overall plan of the dissertation. I base my work on a theoretical model where 'law as a provider of legitimacy' is conceived of as a two-sided phenomenon in which '*legal practices*' interact with '*societal conceptions of justice*'. From this follows that for the legal community to be able to function as 'a provider of *de facto* legitimacy', it falls upon the members of this community to provide legal arguments (accepted as legal by the legal community), but also to make sure that these arguments are communicated to the members of society in dialogue with the *societal conceptions of justice*.

Here, I have used a conflict perspective when describing the matter of determining access to social protection. The conflict of interests is one where the interests of the individual and the interests of the collective clash, at least potentially and sometimes definitely. Focus lies on the role of the legal system as a mediator of social conflicts. In Chapters 4 and 5, I have accounted for how the administrative courts *de facto* deal with this conflict. Chapters 6 and 7 are intended to delineate the '*social interface*'¹ that constitutes the arena for conflicts of interests. The knowledge gained through the investigation of this 'social interface' is necessary for the purpose of investigating if, how and to what extent the legal system actually functions as an efficient mediator of the conflict at issue.

¹ See Chapter 2.

The notion of a 'social interface' was introduced in Chapter 2 and is crucial for understanding the aim of the following chapters. Although an interface does not have to be a site for conflict, interface interactions have, according to Long, a 'propensity to generate conflict due to contradictory interests and objectives or to unequal power relations'.² Thus, an interface typically occurs in situations where different actors are faced with problems that need to be resolved in spite of the differing 'social, evaluative and cognitive standpoints' of the actors involved.³ The 'social situation' or 'arena' of interest in this study is the distribution of social protection, specifically sickness cash benefit. This is also, as has been stated before, the arena for potential conflicts of interests between individuals denied access to sickness cash benefit and the collective, conditionally allocating such resources. In order to be able to perform an analysis of how the legal system *de facto* functioned in its role as a mediator in this social conflict during the relevant period, it is also necessary to know the conflict. What is at stake from the perspective of the collective? And what is reasonable to expect from the perspective of the individual? The following chapters respond to these questions, as they provide the necessary, in-depth knowledge of the conflicts of interests that the courts deal with in cases concerning the right to sickness cash benefit.

My aim is to make the notion of '*societal conceptions of justice*' more tangible, an ambition that, even within such a limited area as distribution of sickness cash benefit, is challenged by a range of difficulties. One of these difficulties is to pinpoint what exactly lies behind the idea of '*societal conceptions of justice*'. In legal literature, although it is not unusual to elaborate on the possibility of a prevailing sense of justice; this notion is more rarely focused upon in its own right.

The notion of '*societal conceptions of justice*' is here used to describe the kind of conceptions that determine what, in general, is considered reasonable (fair and just) to expect from the legal system, as a mediator of social conflicts, given the 'basic values', the 'current discourses' and the 'technical solutions' available. A consequence of this description of what constitutes '*societal conceptions of justice*' is that a distinction is made between conceptions of how things 'ought to be' and conceptions of what is 'fair to expect'. The definition used here corresponds to the latter of these 'conceptions of justice'.

I have singled out 'values', 'discourses' and 'technical solutions' as important factors that nourish '*societal conceptions of justice*'. For the purpose of this work important distinctions between the three factors are

² Long, Norman, 2001, p. 69.

³ Long, Norman, 2001, p. 65.

mainly visible along the lines of ‘applicability’. On such a scale, ‘values’ have a broad applicability, in the sense that the presentation of different value nexuses in the Swedish welfare state in Chapter 6 is more general in character compared to the detailed, technical solutions of distinct social insurance schemes displayed in Chapter 7. In Chapter 6 the theme of ‘basic values’ is approached as well as the identification of relevant ‘discourses’. This disposition, dealing with values and discourses in the same chapter, reflects not only the difficulties involved in making a sharp distinction between the two sets of factors, but also my choice to let the presentation of ‘basic values’ become an introduction – a framework – to the more elaborated analysis of ‘current discourses’.

Linked to the issues investigated, the general description of ‘societal conceptions of justice’ provided above can be reframed into the following proposition: In Sweden in the 1990s, important sources generating ‘*societal conceptions of justice*’, relevant in cases where courts acted as mediators in conflicts regarding access to sickness cash benefit, were the following:

The normative foundation, the *basic values*, of the Swedish welfare state. Values that, although they do not necessarily point to different, distinct solutions, and are not even internally coherent, still provide a framework that feeds conceptions of what may be fair to expect from society.

The *current discourses*, indicating the span of strategies possible to voice, given the frame of basic values. Of these strategies, some are implemented and effectuated, others are not. Implemented and alternative strategies together constitute the output of prevailing, current discourses in society.

The different *technical solutions* offered, as an effect of implemented strategies, solutions that constitute intentional legal constructions carrying the objectives of the legislator and other actors involved.⁴

My aim in the following chapters is to present an interpretation of what Swedish society, in the 1990s, expressed through the different factors mentioned above, on the theme of ‘individual economic consequences of sickness causing incapacity for work’.

No simple answers should be expected from the following outline of value nexuses, discourse spectra and insurance catalogues. The image of the modern, pluralistic state, which has been used as a point of departure

⁴ A distinct difference is made between ‘intentional legal constructions’ and ‘applied legal constructions’. While dealing with ‘law as legal practices’ in Part II (Chapters 4 and 5), the subject is ‘applied legal constructions’. In Part III, on the other hand, ‘intentional legal constructions’ are in focus. These concepts are used by Glavå and Petrusson in an article where they propose the implementation of a social constructivist approach to law, and thus, in this process, a reconstruction of the legal profession, see Glavå, Mats and Ulf Petrusson, 2002.

for this dissertation, does not invite simplifications. Thus, ‘values’ are discussed in the plural and they are not necessarily coherent; the same is true for ‘discourses’. Within the frame of ‘technical solutions’, a broad range of different solutions (public, collective and private) are outlined.

The ambition to fill *‘societal conceptions of justice’* with credible contents should be understood in a perspective where the overarching purpose is to analyze the role of the legal system in the implementation of social policy reforms. Thus, the analysis presented in the following chapters contributes one of the necessary building blocks for the final analysis, in which I return to the notion of ‘law as a provider of legitimacy’.

The conclusions to be drawn from the following investigation (Chapters 6 and 7) circle around familiar themes, as the issues approached concern the same conflict that the courts dealt with in Chapters 4 and 5. Examples of conclusions concern, for instance, what basis the ‘new work-line’ or the increased demand for objectivity in assessments of sickness had in the prevailing values, discourses and technical solutions.

Below, the methodological considerations for the following identification of ‘basic values’, ‘current discourses’ and ‘technical solutions’ are elaborated.

Methodological considerations

Methodological considerations relevant for the identification of ‘basic values’

For the purpose of identifying the ‘basic values’ carrying the Swedish welfare state, I have relied solely on the work of other researchers. I have studied legal doctrine as well as the work of scholars in social science and sociology, and of others involved in ‘welfare research’, and I have found the work of Anna Christensen and Bo Rothstein to be especially relevant in this process.

The available literature dealing with different aspects of the welfare state is voluminous. Still, the topic of these studies seldom directly concerns the normative base of the welfare state – be it Swedish or European. Anna Christensen is one of few legal scholars in Sweden who have directly approached the linkages between ‘basic values’ and Swedish ‘social law’, and her work is thus an important source for the discussion that follows. In the field of political science, Bo Rothstein has, in a similar direct way, analyzed the moral logic of the universal (Swedish) welfare state, and his work constitutes another important source providing input for the following analysis of ‘basic values’.

The analysis and the conclusions emanating from the various texts are presented in a subsection of Chapter 6 (6.2). The conclusions thus re-

tried point to a broad and comprehensive normative base for the welfare state, a base potentially embracing a wide range of different welfare state arrangements.

Methodological considerations relevant for the identification of 'current discourses'

The word 'discourses' is used in this section to indicate that what is searched for is a conglomerate of different statements, rooted in diverse ideological positions, that all circle around the topic of how to (best) design social insurance. The main forum I have used for this investigation has been the Swedish national parliament. I have found that the motions and bills, presented in parliament during the 1990s, provide a rich source from which it is possible to identify different social insurance strategies at the time of interest to this study. Thus, the main, initial, sources used to identify 'current discourses' have been preparatory legal work, official reports, political motions, etc. In all such sources, representatives from the political parties argue for different strategies related to the construction of social protection instruments.

In addition to the statements made by political parties I have also studied statements by, for instance, different authorities, labour unions and other interest groups, retrieved from the circulation of government bills. Finally, I have scrutinized articles published on the subject of 'sickness insurance' and/or 'social insurance' during 1991–1999 in *Dagens Nyheter*, the largest daily newspaper in Sweden.

The structure of the following presentation is determined by findings emanating from the initial study of discourses from the Swedish national parliament. The other sources used have provided input to this presentation, and they mainly serve the purpose of underlining that the discourses identified in parliament were spread on a broader arena through public debate as well as through the democratic procedure that allows different non-political actors to comment on official reports. The identification of 'current discourses' is presented in three subsections of Chapter 6 (6.3–6.5).

Methodological considerations relevant for the identification of 'technical solutions'

The contents of Chapter 7 is dominated by the mapping of a broad range of instruments that have in common that they supply individuals with allowances in situations where they cannot provide for themselves. This basic material is presented in a comprehensive 'insurance catalogue'

in the first section of Chapter 7 (7.1–7.2). In the following sections (7.3– 7.4) of the chapter, this material is commented and analyzed.

The sources used for the mapping exercise are mainly legal acts, collective agreements and insurance contracts. In the outline of the instruments five different factors have been selected: 1) Administrative organization, 2) Personal scope of application, 3) Qualifying time, 4) Criteria (with a focus on the concepts ‘sickness’ and ‘capacity for work’), and 5) Level of compensation. The first of these factors, ‘administrative organization’, is included mainly for providing a clear structure to the presentation. The following three factors are included because they all contain essential information that is decisive for determining who is eligible as a recipient of allowances. The last factor is included as the ‘level of compensation’ is decisive for the interaction and interdependency between different types of social insurance schemes as well as between public, collective and private instruments.

The outline is a descriptive and technical overview of different ‘income compensation instruments’ available to inhabitants of Sweden (given they meet the criteria). The outline is structured in a way that facilitates a comparison between the instruments. With the concentration policy followed a focus on demarcations between instruments. The relative character of the concepts of ‘sickness’ and ‘capacity for work’, and the known interdependence between different instruments, make the function of ‘demarcations’ an important theme in Chapter 7.

The outline of ‘technical solutions’ is brought forward as a source for generating *societal conceptions of justice*, that is, conceptions of what is ‘fair to expect’ from the system in response to ‘social risks’ and ‘individual needs’.⁵ The mapping exercise is not meant to deliver an in-depth (legal or other) analysis, but provides, as maps do, an overview of a complex material. Thus, the mapping exercise serves the purpose of illuminating the intentional legal constructions that constitute a safety net against the ultimate risk of poverty.

⁵ See Chapter 1 for a discussion on ‘individual needs’ versus ‘social risks’.

6 Basic welfare state values and current social insurance discourses

6.1 Introduction

In this chapter, my aim is to discuss *basic values* fundamental for the dynamic development of the Swedish welfare state (6.2), as well as to recognize *current discourses* on social insurance strategies (6.3–6.5). The period of interest is, as previously, the 1990s. Still, it is not possible to discuss *basic values* without making reference to a broader historical context, and thus, the time perspective in section 6.2 is more comprehensive.

According to Rothstein: ‘... social welfare programs [...] are not just instrumental arrangements; they are also in a high degree, expressions of definite moral conceptions. They cannot be understood unless their normative foundations are laid bare.’¹ Thus, and in line with this appeal, the investigation strives to expose the normative base of the Swedish welfare state. At the same time, as Rothstein has also noted, if the ambition is to explain welfare arrangements in a specific state, it is not possible to refer to *basic values* alone; the investigation must probe further into the specifics of different welfare arrangements:

A second type of explanations [on how to explain differences in welfare state programs] would point at general norms and values, for example that Scandinavians, for whatever historical and cultural reasons, are more inclined to embrace norms such as equality and social justice. The problem, however, is that comparative studies based on survey data find little, if any, support for this type of explanation. To the contrary, findings from such studies report a striking similarity in such basic values and norms about justice, equality, etc. between countries with very different ambitions in welfare state measures.²

¹ Rothstein, Bo, 1998, p. 2.

² Rothstein, Bo, 2000, p. 217 f. Rothstein makes a reference to Svallfors, Stefan, 1997, ‘Worlds of Welfare and Attitudes to Redistribution – A Comparison of 8 Western Countries’, in *European Sociological Review*, 13, 3: 283–304.

Rothstein's statement above indicates that the normative foundation of the Swedish welfare state probably shares its value base with a broad range of other (welfare) states. This study stays within a national context; still, a parallel assumption is possible. Accordingly, a study of the Swedish welfare state may be expected to reveal a relative coherence in existing values among different actors, although these, simultaneously, could be divided by a marked divergence of preferred policies as reflected in *current discourses*. As the chapter continues, the disposition reflects such a situation, and the presentation of *basic values* provides a general framework for the more elaborated study of *current discourses*.

6.2 Basic welfare state values

This section provides an account of *basic values*, important for understanding the dynamic developments of the Swedish welfare state in the 1990s, and thereby providing input to the analysis of *societal conceptions of justice*. The notion of *basic values* has been described above as follows:

Basic values constitute the normative foundation of the Swedish welfare state. They are values that although they do not necessarily point to different distinct solutions, still provide a framework that feeds conceptions of what may be fair to expect from the society at stake.

To meet this ambition, the work of other researchers has been used to identify some main characteristics of the Swedish welfare state.³ The description in 6.2.1 consists of an exposition of building blocks and features suggested to be constitutive for the Swedish welfare state. Based on this investigation, an analysis of how to conceptualize these characteristics of the Swedish welfare state in terms of *basic values* is presented. For this purpose, the works of Anna Christensen and Bo Rothstein have been utilized. Thus, in 6.2.2, the work on 'normative patterns' by Christensen, as well as Rothstein's analysis of the 'moral logic' of the universal welfare state, are used in the process of identifying the kind of *basic values* that together constitute the normative base of the Swedish welfare state.

6.2.1 Characteristics of the Swedish welfare state

Before starting a discussion on *basic values*, some key features of the traditional Swedish welfare state are focused upon below. In descriptions of the Swedish (Nordic/Scandinavian) welfare state, some recurring factors

³ The quest for an empirical basis for the continued study has directed my search to works published on the Swedish welfare state produced, primarily by researchers representing disciplines such as sociology, economy and political science.

appear that capture the specifics of the Swedish model.⁴ Summarized, the main factors add up to the list below. The traditional Swedish welfare state is characterized by:

- a comprehensive⁵ universal/institutional welfare model with the state as the dominating supplier of – de-commodifying – welfare, centred on a public provision of education and care;
- a strong support for the principle of replacement of lost earnings in social insurance along with a firm work-orientation and an institutionalized commitment to full employment;
- a relatively egalitarian distribution of income achieved by a fair/high degree of redistribution through general taxes that constitute the main source of welfare financing.

The following text circles around this list of characteristics, providing a historical and political context, as well as a review of different opinions on how the crises of the 1990s might have affected the factors above.

The historical roots of the institutions and structures characteristic of the modern Swedish welfare state can be traced back at least a hundred years, to the beginning of the last century. The situation in Sweden before the welfare revolution of the twentieth century has been described as follows:

Throughout the 19th century, Sweden was still one of the poorest and most backward nations in Europe. Nonetheless, it was a fairly egalitarian society, and, in terms of literacy, the population was advanced. Furthermore, the peasantry had never, not even during the 17th century Great Power era, been subjugated by the feudal order; in the 19th century, this made possible a limited degree of political freedom. Industrialization came late, beginning only in the 1870s, at a time when a political-institutional representative reform had abolished the archaic Estate Parliament. At this time, young people in their best working age left the country en masse for North America, and the demographic structure became skewed towards the upper brackets.⁶

⁴ All, or some, of these factors are mentioned as typical aspects of the Swedish welfare state by, for instance, the following authors: Edebalk, Per-Gunnar, 1996; Marklund, Staffan, 1988; Olsson Hort, Sven E., 1993; Björklund, Anders and Richard B. Freeman, 1997; Eitheim Pål and Stein Kuhnle, 2000; Kuhnle, Stein, 2000b; Therborn, Göran, 1991; Westerhäll, Lotta, 2002, and Rothstein, Bo, 1998.

⁵ Swedish welfare research has traditionally defined 'welfare' comprehensively, by arguing that it covers: ... disposition of resources in the form of money, possessions, knowledge, psychological and physical energy, social relations, security etc. by means of which the individual is in charge of and consciously controls her or his living conditions' (SOU 2000:3, p. 12). Author's translation.

⁶ Olsson, Sven E., 1993, p. 43.

Sweden in the nineteenth century was a poor, agrarian, country with an undeveloped social protection system.⁷ A late, but rapid, process of industrialization started in the 1870s and, as more people became dependent on paid wages, the general need for social protection increased.⁸ Before 1910, social protection consisted mainly of a number of voluntary health insurance offices and a limited obligation for employers to compensate for occupational accidents. The municipal poor relief was the last resort for individuals without capacity to make a living.⁹ Poorhouses were institutions that provided for basic needs, but otherwise they were mainly known for the humiliating conditions they offered to those who had to take refuge there.¹⁰

At the turn of century, many municipalities had a difficult economic situation due to the drastic increase of old people in the population, and the situation for those dependent on poor relief deteriorated.¹¹ These circumstances lead to increased demands on the state to introduce reforms aimed at decreasing the burden of poor relief for the municipalities.

At the dawn of the new century, the debate about social insurance was intense. In 1913, the parliament decided to introduce a universal pension insurance; in 1916, a mandatory insurance on occupational accidents was intended based on a principle of replacement of lost earnings and initiatives were taken to create a universal sickness insurance (although it would take until 1955 before a universal sickness insurance was implemented). Still, as the 1920s was reached, the first steps away from a system mainly providing basic poor relief had been taken and, although still undeveloped, the existing social insurance schemes were already marked by some of the characteristics that would later be referred to as specific for the 'Swedish model':

For the emerging social insurance system, there were no models in other countries. In leading countries like England and Germany, the systems were

⁷ For a historical presentation of the Swedish welfare state, see Edebalk, Per-Gunnar, 1996.

⁸ See for instance: Lindqvist, Rafael, 1990, p. 27.

⁹ 'According to the Poor Relief Act of 1847 and 1853, the poor relief boards had to support the poor [...] During the latter part of the 19th century, there was a change towards a more restrictive social legislation ending in the Poor Relief Ordinance of 1871. According to this ordinance, mandatory poor relief was to be restricted to 'insane' people and orphans below the age of 15. What was given in addition was up to the local authority to decide.' See Lindqvist, Rafael, 1990, p. 41. Author's translation.

¹⁰ See Edebalk, Per-Gunnar, 1996, p. 53.

¹¹ Between 1850 and 1900, the number of people above the age of 65 increased from 167.953 to 429.834. During the same period, the share of elderly in the population increased from 4,8 percent to 8,4 percent, see Edebalk, Per-Gunnar, 1996, p. 12. Edebalk makes a reference to Broomé, Per and Pirkko Jonsson 1994, *Äldreomsorgen i Sverige. Historia och framtid i ett befolkningsekonomiskt perspektiv*, (Stockholm, SNS).

constructed differently. Specific for the Swedish model were the universality, the principle of income loss, the public monopoly of the health insurance offices and the total system concept.¹²

The characteristic most frequently mentioned as constitutive for the Swedish welfare state is maybe the universal coverage.¹³ In Sweden (as well as in Norway and Finland), the alliance between the politically organized farm employees, the self-employed farmers and the Social Democrats was, according to Marklund, decisive for an agreement on a high degree of universal access to social insurance as well as a high degree of state intervention in welfare.¹⁴ If universal coverage is described as a pre-World War II construction, based on the alliance between farmers and labour, Marklund argues that after the war, a new political alliance explains why a system of universal coverage, in combination with a principle of replacement of lost earnings, became established in the Swedish society:

After the war, universalism continued to be the basis for welfare reform in that coverage was entitled on the basis of citizenship, but a new element was introduced. This is the idea of social insurance where most welfare transfers were to be grounded on the principle of income loss and occupational capacity. [...] This model was not particularly favourable to small farmers and the rural population, but it was directed to attract workers and salaried employees. A new form of class compromise over welfare was constructed, this time based on the wage earners and salaried employees and the idea of protection against income loss.¹⁵

The result of this compromise between 'blue- and white-collar segments' was the creation in the 1950s of a model of public welfare based on the principle that 'the public welfare system should reach everyone regardless of level of income and protect him or her from the loss of income'.¹⁶

A distinction often made in the comparisons of welfare states has been the one between residual vs. institutional welfare.¹⁷ Some main character-

¹² Edebalk, Per-Gunnar, 1996, p. 11. Author's translation.

¹³ In comparative studies of welfare states and/or social policy regimes, it has proved a fruitful method to distinguish the states observed according to certain criteria and thus to divide them into different groups or models. In most of these comparative classifications, the Swedish welfare state is sorted into a Nordic/Scandinavian group of countries that together end up as a special category of welfare states. This group of countries is characterized by institutional, universal welfare systems where the state is (relatively very) important as a provider of welfare. See Kuhnle, Stein, 2000, p. 210 f.

¹⁴ Marklund, Staffan, 1988, p. 95.

¹⁵ Marklund, Staffan, 1988, p. 95.

¹⁶ Marklund, Staffan, 1988, p. 95.

¹⁷ See Pierson, Christopher, 1991 [1998], pp. 174 ff., for an overview of different typologies of welfare states. See also Olsson Hort, Sven E., 1993, p. 221.

istics of the residual model are limited state involvement and targeted policies focusing on the need of individuals who have not been able to safeguard their social security in other, 'normal', ways. The Nordic countries all belong to the institutional type, and Sweden is often mentioned as *the* prime example of an institutional, or universalistic,¹⁸ welfare state:

... the institutional model ... does not recognize fixed boundaries between market and state for public welfare commitments, and sees individual welfare as the responsibility of the social collective. Furthermore, the institutional model promotes the principle of a 'social minimum' whereby all citizens are equally entitled to a decent standard of living, and considers that full social citizenship rights and equality of status should be guaranteed unconditionally. The institutional welfare state tends to limit and partially supplant ... the market as the primary distributive network of welfare.¹⁹

In response to the crisis of the 1990s, the levels of compensation in different insurance schemes were lowered, waiting periods introduced, stronger emphasis was put on rehabilitation and activation and stricter qualifying conditions were introduced, thus making the welfare state 'less generous'.²⁰ The room for private actors in social insurance stayed limited, but private alternatives and supplements became more common in areas like the provision of education and health care. Still, Sweden (as well as the other Scandinavian countries) continued to consolidate state welfare solutions.²¹ Kuhnle, describing the role of the state in the traditional Swedish (Scandinavian) welfare state as 'paramount', concludes that in spite of the crisis of the 1990s 'the stateness of the [Scandinavian] welfare states was fundamentally preserved'.²² In an analysis of the future viability of the Scandinavian welfare state, Kuhnle returns to the dominant role played by the state, identifying one of the future challenges in increased demands from the middle classes to have recourse to individual choices of welfare solutions:

The affluence of Scandinavian societies and social structures with large, well-to-do middle classes may be factors which in the longer term will limit the demand for state welfare simply because many more people will demand more private and non-governmental welfare to meet their diversified

¹⁸ 'Universal' and 'institutional' are sometimes used as synonyms when social policy models are discussed, but there are also examples of when a distinction is made. See for instance Olsson Hort, Sven E., 1993, p. 232 f, with a reference to Palme, Joakim, 1990, *Pension Rights in Welfare Capitalism: the development of old-age pensions in 18 OECD countries 1930 to 1985*, (Stockholm: the Swedish Institute for Social Research).

¹⁹ Olsson Hort, Sven E., 1993, p. 222.

²⁰ Kuhnle, Stein, 2000b, p. 224 f.

²¹ Kuhnle, Stein, 2000b, p. 218.

²² Kuhnle, Stein, 2000b, p. 211.

welfare needs. Welfare is a high priority for people and affordable for many. The combination of individual welfare priorities, affluence and demand will surely stimulate the supply of non-state welfare provision, both for pension insurance, health insurance and personal and institutional social care.²³

The system with universal coverage, in combination with the principle of replacement of lost earnings, has been described as ‘the selling off of the welfare state to the middle classes and on their terms’,²⁴ but has been defended for its capacity, so far, to respond to the need of social protection for the lower as well as the middle layers of society and thus gaining strong public support and legitimacy.²⁵ In addition, Marklund argues that ‘the most important aspect of the universal model is [...] its capacity to create social cohesion’.²⁶ Thus, while other systems tend to create divisions between taxpayers and beneficiaries of the system, the universal system tends to generate not only a high level of public support but also solidarity between different classes.²⁷

Equality, an egalitarian distribution of income and a very low rate of poverty have been described as yet another set of characteristics of the Swedish welfare state.²⁸ As a societal phenomenon, the very low rate of poverty was something that, before the 1990s, clearly distinguished Sweden (Scandinavia) from other countries:

Sweden has a remarkably egalitarian distribution of income and low rate of poverty. The living standards of the poor are closer to those of the median citizens than in other advanced countries. Until the 1992–1993 rise in joblessness, Sweden combined a narrow distribution of earnings and skill differentials with high employment. Wage differentials rose in Sweden when centralized bargaining weakened in the 1980s, and joblessness jumped in 1992, but the country maintained a low rate of poverty and avoided the

²³ Kuhnle, Stein, 2000b, p. 226.

²⁴ Marklund, Staffan, 1988, p. 99.

²⁵ Marklund, Staffan, 1988, p. 99. Edebalk argues, in contradiction to Marklund, that the system of universal coverage implies a principle of replacement of lost earnings in order to become legitimate. See Edebalk, Per-Gunnar, 1996, p. 176. Also on pp. 104 ff: ‘The accident insurance of 1916 introduced the principle of loss of income: at full injury, compensation should make up for two thirds of the income [...] An unspoken but implicit reason is also that the insurance should cover all employed, that is, include more well-to-do white-collar groups.’ Thus, according to Edebalk it was, not the changing class structure in society after the World War that created the basis for the income compensation policy, but the income compensation policy should rather be understood as a necessary consequence of the comprehensiveness of the universal system (ibid, p. 52.).

²⁶ Marklund, Staffan, 1988, p. 99.

²⁷ Marklund, Staffan, 1988, p. 97.

²⁸ Björklund, Anders and Richard B. Freeman, 1997, p. 33 ff. See also Therborn, Göran, 1991, p. 236 f.

growth of an underclass and homelessness that developed in the United States and the United Kingdom. Indeed, so successful has Sweden's 'war on poverty' been that the statistical concept of poverty rate is not a part of Swedish public discussion.²⁹

Starting in the 1980s, and enforced by the developments of the 1990s, the egalitarian character of the Swedish welfare state has been flawed, as research points to an increased poverty rate and increasing income inequality.³⁰ The explanations for this development can, according to Gustafsson, be referred to as 'changes in the welfare state, both in its provision of benefits and in its collection of resources for this purpose through income taxes'.³¹ Eitrheim and Kuhnle argue that 'values of equality are strong within the Nordic societies' and that the compatibility between egalitarianism and economic efficiency is documented.³² Still, they argue that 'equality' is not strengthened by tendencies of increased income inequality and increased importance of private alternatives to public welfare: 'The development of private insurance and health and other services as complements and supplements to public arrangements are likely to create a new institutional mix of public and private welfare which will entail a socially more unequal distribution of welfare.'³³

As noted above, there has been a historically based, logical bond in Sweden between the acceptance of a comprehensive, universal welfare system and the use of a principle of replacement of lost earnings in social insurance, creating a system with strong public support.³⁴ In order for Swedes to afford this system it is only logical that they have made it 'extremely work-oriented':³⁵

As each individuals' position in the welfare system is largely based on previous or present earnings, he or she is strongly motivated to work and to try to perform as well as possible on the labour market to be able to claim favourable welfare conditions.³⁶

²⁹ Björklund, Anders and Richard B. Freeman, 1997, p. 33.

³⁰ See Halleröd, Björn and Matti Heikkilä, 1999, and Gustafsson, Björn, (et al.), 1999. See also discussion in Chapter 1.

³¹ Gustafsson Björn, et al., 1999, p. 233.

³² Therborn, Göran, 1991, pp. 229–269; Eitrheim, Pål and Stein Kuhnle, 1999, with a reference to Korpi, Walter, 1992, *Halkar Sverige efter?*, Stockholm: Carlssons Bokförlag.

³³ Eitrheim, Pål and Stein Kuhnle, 1999, p. 56.

³⁴ 'Swedish voters prefer a comprehensive welfare state, even to the extent of favouring tax and contribution increases to tax cuts in order to finance social expenditure', Kuhnle, Stein, 2000, p. 222, with reference to Palme, Joakim, 'Recent developments in income transfer Systems in Sweden' in Plough, Niels and Jon Kvist (eds.), 1994, *Recent trends in Cash Benefits in Europe*, Copenhagen: The Danish Institute of Social Research.

³⁵ Marklund, Staffan, 1988, p. 102.

³⁶ Marklund, Staffan, 1988, p. 103.

The active employment policy, in combination with the extensive use of a 'work-line' in social insurance, has provided arguments for labelling the Swedish model a 'workfare' rather than a 'welfare' system.³⁷ Björklund and Freeman define as 'workfare' programs, the programs that 'increase the incentive to work because only people who work can use them', and they give as examples work injury insurance, sickness cash benefit and parental leave payment.³⁸

During the 1980s and 1990s, the need to integrate work incentives into the welfare system was even further emphasized by strengthening the bond between receiving benefits and participation in rehabilitation, training and education programs.³⁹ According to the typology of Esping-Andersen, the Scandinavian social policy regime of Sweden (also labelled 'social democratic' or 'neo-corporatist') is marked by a high degree of 'de-commodification'⁴⁰ and a socialist (redistributive) effect on social structure. The intensified emphasis on work incentives in different insurance schemes has resulted in the analysis that the 'de-commodifying' character of the Swedish welfare state, entailing that 'citizens can freely and without potential loss of job, income, or general welfare opt out of work when they themselves consider it necessary', has weakened, and instead, the new policies have been described as 're-commodifying'.⁴¹

Re-commodification and its consequences, in terms of the increased pressure put on the individual to participate in different activation and rehabilitation programs, resulted in concerns for whether this shift in policy was acceptable:

... it is, however, important to analyze in greater detail the normative rationale for the policy shifts that we have discussed: to what extent and in what way can one justify making income maintenance benefits conditional on participation in designated activity programs, and demand that members of vulnerable groups take part in measures aimed at increased labour market participation, if only a minority of these individuals will actually enter employment afterwards?⁴²

³⁷ See for instance: Freeman, Richard B., et al., 1997.

³⁸ See for instance Esping-Andersen, Gøsta, 1996, p. 14, and Björklund, Anders and Richard B. Freeman, 1997, p. 47.

³⁹ Kuhnle, Stein, 2000b, p. 220.

⁴⁰ Esping-Andersen, Gøsta, 1990b. Critics have challenged this concept and favoured 're-commodification'. Thus, what is actually studied is not to what extent the labour force is de-commodified (to lessen or diminish workers' dependence on market forces), but rather policies that aim at a better functioning labour market, i.e. re-commodification. For a review of the extensive debate following Esping-Anderson's publication of *The three Worlds of Welfare Capitalism*, see for instance Pierson, Christopher, 1991 [1998], pp. 175 ff.

⁴¹ Drøpping, Jon Anders, et al., 1999, p. 157. See also Ryner, Magnus, 2002.

⁴² Drøpping, Jon Anders, et al., 1999, p. 158.

Much in the same spirit, Grape argues that increased emphasis on activation policies along with increased emphasis on administrative control also increases the risk that individuals in weak positions (being dependent on cash benefits from the state for their support) have to accept large infringements into the private sphere as 'he who receives benefit must be willing to be checked, supervised and, if it comes to the worst, be distrusted concerning his sickness, injury or reduced capacity'.⁴³

In summary, the descriptions of the traditional Swedish welfare state call forth an image in line with the initial list of features; it is an image of a universal, inclusive, de-commodifying and redistributive state, characterized by an active employment policy, relatively high labour force participation, a large public sector and high taxes. Still, if the shifts and changes observed during the 1990s are compiled, we end up with another, complementary, list that summarizes what different researchers observed (in terms of distinct changes or possible future trends) when comparing the traditional Swedish welfare state with the Swedish welfare state of the 1990s. They found:

- a less generous welfare state.⁴⁴
- increased income inequality.⁴⁵
- a move towards more active labour measures⁴⁶ followed by a shift from a policy of de-commodification to a policy of re-commodification.⁴⁷
- a possibly more segmented welfare state with an increased plurality of actors providing benefits, a welfare state that might become more responsive to diversified demands.⁴⁸

The above description of features of the Swedish welfare state provides the empirical base necessary for an analysis of values. In order to elaborate the interest taken in basic welfare state values as a source generating societal conceptions of justice, the next section explores the combination of the empirical findings with an analytical framework focusing on the normative foundation of the Swedish welfare state.

⁴³ Grape, Owe, 1998, p. 120. Author's translation.

⁴⁴ Eitrheim, Pål and Stein Kuhnle, 2000. Also Ploug, Niels, 1999, p. 102.

⁴⁵ Heikkilä, Matti, et al., 1999, p. 269 and Esping-Andersen, Gøsta, 1996, p. 25.

⁴⁶ Heikkilä, Matti, et al., 1999, p. 266; Drøpping, Jon Anders, et al., 1999, p. 158; Esping-Andersen, Gøsta, 1996, p. 25.

⁴⁷ Drøpping, Jon Anders, et al., 1999, p. 157.

⁴⁸ Olsson, Sven E., 1993, p. 381; Stephens, John D., 1999, p. 59, Rothstein, Bo, 1998, p. 195.

6.2.2 Social stability, individual freedom and social equality

Grounded in the empirically based observations presented above, and influenced by the work of Anna Christensen⁴⁹ and Bo Rothstein,⁵⁰ an analytical framework containing three different ‘clusters’ of values has been worked out. The three clusters are: ‘*social stability*’, ‘*individual freedom*’ and ‘*social equality*’.⁵¹ Each of them contains interacting, and possibly conflicting, conglomerates of values that are (and have been) important for the dynamic development of the Swedish welfare state.⁵² Below, each of these clusters, and possible tensions between them, are discussed, starting with *social stability* and ending with *individual freedom*.

In Chapter 1 above, social protection was described as corresponding to the social risk of social collapse caused by poverty and human distress.⁵³ Values connected to *social stability* answer to this ultimate social risk. There is a social, collective, value in fighting societal eruptions and preserving the present order, but also individuals, with social positions to defend, have an invested interest that can be protected through the promotion of *social stability*. In Sweden, social protection provides a possibility for those concerned to maintain a relatively unchanged income and status, in spite of events that unattended might have caused poverty and social exclusion.

Values of *social stability*, as described above, relate to what Christensen has described as the basic normative pattern ‘protection of established position’.⁵⁴ The most explicit manifestation of ‘protection of established

⁴⁹ Christensen, Anna, 2000.

⁵⁰ Rothstein, Bo, 1998.

⁵¹ When studying the ‘social dimension’ of Sweden (labour law, tenancy law, family law and social protection law), Anna Christensen finds three main ‘basic normative patterns’: 1) protection of established position, 2) the market functional pattern and 3) just distribution. The affinity between Christensen’s three patterns and the notion of three clusters of values is obvious. There is an overlap between *social stability* and ‘protection of established position’, and the same can be said for *individual freedom* and ‘the market functional pattern’, as well as for *social equality* and ‘just distribution’. The overlap between ‘normative patterns’ and *basic values* is understandable. Christensen takes an interest in the values that permeate the welfare state and enter its legal constructions through codification. In the present work, an interest is taken in the same values, independently of whether they become implemented in law or not. Aim, method and sources differ, but the object of study is the same: the normative foundation of the Swedish welfare state.

⁵² It should be noted that although the three clusters introduced above can be used for an analysis of interactions between a broad range of different values, it is not claimed that the analytical framework is definite or final.

⁵³ See Chapter 1.2.1 above, Berghman, Jos, 1997, pp. 251–255. Also, regarding the concept of ‘reflective damage’, see Viaene, Jos, et al., 1993.

⁵⁴ A basic normative pattern is, according to Christensen, a specific (yet dynamic) arrangement of legal codifications of the moral customs and attitudes of our society. Christensen, Anna, 2000, pp. 288 ff.

position' is, according to Christensen, the right to property. In her analysis, the meaning of the concept of 'property' is extended beyond 'material goods' to include also social positions in society. Accordingly, the 'protection of established position' functions as a normative safeguard for a right to ownership of a social position acquired by honest and lawful means. In Sweden, the fundamental impact of the 'principle of replacement of lost earnings' in social insurance schemes is a striking example of how acquired social positions are protected by the system, at least up to a certain level. Other examples are regulations safeguarding security of tenancy and regulations safeguarding security of employment. These examples emanate from Christensen's study of how normative values linked to 'protection of established position' are manifested in Swedish welfare state laws.⁵⁵

Values of *social stability*, supporting status quo and 'established positions', are characterized by a focus on those who have a position to lose 'and can afford no relief to those who as yet have not achieved a position'.⁵⁶ It is a conservative cluster of values preserving 'the positions and the social constellations which have been achieved, and constitutes therefore a barrier against changes that threaten the established order'.⁵⁷ This conservatism linked to values of *social stability* puts them in a conflicting position to the demands of distribution and redistribution associated with values of *social equality*, but also, as will be elaborated below, in conflict with the demands for dynamic structures linked to values of *individual freedom*.⁵⁸

Christensen's concept of 'protection of established position', manifested in the right to property, provides a valuable analytical tool when extended to include the value inherent in the 'ownership of a social position'. Still, the concept 'protection of established position' emphasizes the individual right or interest in 'the right to property', but reveals less of the collective interest of counteracting social conflicts by promoting *social stability*. In Sweden, the universal welfare programs, based on a 'principle of replacement of lost earnings', have given the Swedish model a large popular support and a strong base of legitimacy, also among the middle layers of society:

... the universal welfare state can only exist if it enjoys support far up the social ladder. The 'poor', the 'underprivileged', the 'working class', or any other such social group is simply too small to constitute a sufficient electoral

⁵⁵ Christensen, Anna, 2000, p. 290.

⁵⁶ Christensen, Anna, 2000, p. 290.

⁵⁷ Christensen, Anna, 2000, p. 291.

⁵⁸ Christensen, Anna, 2000, p. 290 f.

base for a comprehensive universal welfare policy. And conversely, one can only reckon with support for this policy from white-collar groups and the middle class if so formulated as to serve their interests as well (however these are defined).⁵⁹

The values associated with the cluster *social equality* are concerned with the distribution, or redistribution, of wealth, with solidarity, but also (just as the cluster *individual freedom*) with 'equal respect', 'equal consideration' and 'equal concern'.⁶⁰ Both Rothstein and Christensen, as will be seen below, have in their work approached the issue of how the Swedish system combines the protection of the well-to-do with a redistributive capacity to the benefit of the less fortunate.

When discussing the 'political and moral logic of the (Swedish) universal welfare state', Rothstein points out how the universal welfare approach makes it unnecessary to distinguish 'the poor' and 'the maladjusted' from other groups in society.⁶¹ Universalism, in this respect, means the choice of a non-discriminating approach to the treatment of people, thus favouring values of *social equality*.

With a reference to Amartya Sen, Rothstein uses the notion of 'basic capability equality' to help formulate the duties of the universal welfare state. The universal, egalitarian, approach, emphasizing the equal rights of all humans, is faced with a reality of differing capabilities between different individuals and between different groups of individuals. The use of the 'basic capability' notion conveys that (re)distribution is about levelling the injustices caused by differences in capabilities; people should be given access to resources that to some extent – at a basic level – will compensate for the original differences. Through this (re)distribution of capabilities it is possible to create a democratic society constituted of people able to make autonomous decisions. This broad – participatory and democratic – approach to welfare is firmly rooted in the value cluster of *social equality*. For the welfare state project, these values generate an incentive to create a strongly involved state (like the Swedish) with a large capacity to (re)distribute between the 'haves' and the 'have-nots'.

In a comparative study of the redistributive capacity of different welfare states, Rothstein concludes that the universal welfare model (compared to selective models) has a distinctly higher redistributive character.⁶² One of the more technical explanations provided by Rothstein is that 'taxation is largely proportional while most benefits are either flat or have

⁵⁹ Rothstein, Bo, 1998, p. 153.

⁶⁰ Rothstein, Bo, 1998, pp. 31 ff. and Goodin, Robert E. et al., 1999, p. 173.

⁶¹ Rothstein, Bo, 1998, p. 160.

⁶² Rothstein, Bo, 1998, pp. 144 ff.

a ceiling (i.e. they match incomes only up to a certain limit). Another explanation provided is that the willingness to contribute to the system increases if it delivers also to the wealthier layers of society. Rothstein concludes that it is critical for the redistributive capacity of a welfare state that it embraces also these layers of society.⁶³

Against this background, it seems as if the universal system supports values of *social stability* by protecting the acquired social positions of the middle layers of society, at the same time as values of *social equality* are supported due to the high redistributive capacity of the system. A situation of social status quo is accepted by different layers of society as long as the system provides protection against the ultimate risk of poverty and social exclusion. This compromise between different interests and values is confirmed by Christensen's analysis of the normative pattern of 'just distribution'. In Christensen's article, this pattern is commented on rather briefly, but she notes that the techniques chosen for redistribution in the Swedish welfare state seem to have minimized tensions:

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.⁶⁴

It seems, thus, as if values of *social equality* are supported in the Swedish welfare state through an ambition to (re)distribute capabilities (rather than wealth), and the character of this redistribution does not threaten the established social order. According to Christensen, situations in which conflicts occur between established position and redistribution, the protection of established position will always prevail.⁶⁵ Anna Christensen again:

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.⁶⁶

⁶³ Rothstein, Bo, 1998, p. 150.

⁶⁴ Christensen Anna, 2000, p. 295.

⁶⁵ Christensen Anna, 2000, p. 321.

⁶⁶ Christensen Anna, 2000, p. 322.

Not everyone, however, is content with this 'involved' state. The criticism of the encompassing Swedish welfare state, providing centralized solutions, traditionally comes from the right wing of the political spectrum, but there is also a leftist criticism, opposing the idea of an ever-present state intruding in too many spheres of human life.⁶⁷ This criticism, although stemming from different ideological sources, could be described as relating to the values of *individual freedom*. To this third cluster of values I have associated the normative content that Christensen links to the function of market economy,⁶⁸ but also the autonomy demands of a 'new individualism', that Rothstein describes as a main challenge to the traditional Swedish welfare model.⁶⁹

As already mentioned, there is, according to Christensen, a conservative element of the right to property that seeks to 'maintain and protect possession and traditional employment of a certain property'.⁷⁰ There is also, still according to Christensen, a dynamic (and more recent) element of the right to property, and this element 'aims to promote new activities and businesses, a constant redistribution of wealth, and consequently also a continuous shift in achieved positions'.⁷¹ Christensen relates the functional demands of modern market economy rationalities to the dynamic element of the right to property. Based on her analysis of different legal acts, she concludes that protection of established position is fundamental in Swedish social security law (as well as in labour law and tenancy law), but also that there are normative tensions and movements to be found and that the consistent trend is that the rationalities of market economy are gaining ground.

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.⁷²

⁶⁷ For an overview with Swedish references, see Rothstein, Bo 1995, p. 94.

⁶⁸ Christensen Anna, 2000, p. 291.

⁶⁹ Rothstein, Bo, 1998, pp. 209 ff.

⁷⁰ Christensen, Anna, 2000, p. 293.

⁷¹ Christensen, Anna, 2000, p. 291.

⁷² Christensen, Anna, 2000, p. 313.

In Christensen's argument above, it is possible to recognize the analysis made by Dropping (et al.)⁷³ and Ryner⁷⁴ that there is a shift in the Swedish welfare state away from 'de-commodification' to 're-commodification'. The work-line, traditionally applied mainly in labour market policies, has, when strongly enforced in social insurance, and on a new and more open and flexible labour market, become a guiding principle that strengthens the influence of values of *individual freedom* in the Swedish welfare state, as the connection between level of welfare and individual performance on the labour market has increased.

Christensen's analysis supports the conclusion that the developments in the Swedish welfare state indicate a shift that makes values of *individual freedom* relatively more influential, and values of *social stability* relatively less influential, in the continuous construction of the welfare state. Historically, Christensen says, the determination of the individual's social relations has shifted from being predominantly defined by inherited social status to being defined by contract. Individuals can, increasingly, by entering into contractual relations, change their social position and affect their social relations. This shift has increased the potential for individuals to influence their lives according to individual choices.

According to Rothstein, 'there is much to indicate that demands for autonomy among Swedish citizens have sharply increased'.⁷⁵ A 'new individualism' has appeared that, although not necessarily ideologically linked to the neo-liberal minimal state ideal,⁷⁶ still creates a challenge for the traditional universal welfare state:

In a society where citizens accept centrally prescribed models, where cultural differences are small, where demands for individually adapted services are as good as non-existent, and where 'alternative' lifestyles are scarcely to be met with – in such a society, the 'high-quality standard solution' [offered by the traditional universal welfare state] can work rather well. In the present situation, however, cultural differences are increasing, growing numbers of citizens view their life as an individually planned project and their lifestyle as a matter of individual choice, and citizens' level of knowledge is high and their capacity to safeguard their interests advanced. In such a society, the 'high-quality standard solution' risks becoming more of a problem than a solution.⁷⁷

Most of the social policy reforms of the 1990s were presented as a response to a difficult economic situation, but the introduction of market

⁷³ Kautto, Mikko, (et al.) p. 159, see also previous section, 6.2.1.

⁷⁴ Ryner, Magnus, 2002. See also Chapter 1.

⁷⁵ Rothstein, Bo, 1998, p. 192.

⁷⁶ Rothstein, Bo, 1998, p. 198.

⁷⁷ Rothstein, Bo, 1998, p. 195. See also Kuhnle, Stein 2000b, p. 226.

economy rationalities in traditional areas of welfare state services also answered to the demands of the well-educated 'new individualists'. Still, although this might be a win-win situation as far as provision of services is concerned,⁷⁸ it is more difficult to interpret the introduction of market rationalities into social insurance as a response to the autonomy demands of the well-to-do, especially as the individuals directly affected by this reform rarely fit into the above description of the 'new citizen'.

To summarize, three broad value clusters have been presented: values linked to *social equality*, values linked to *social stability* and values linked to *individual freedom*. The notion of *social stability* is used to describe a key set of values in the Swedish welfare state that favours status quo. Within the scope of the value cluster labelled *individual freedom*, the 'laissez-faire' dynamics of Christensen's 'market functional pattern' tend to be favoured and individual responsibility for risk management is enhanced.⁷⁹ One could also describe this set of values as values that promote a wide span of autonomy for the individual. A third set of values is centred round the concept of *social equality*. The meaning of *social equality* refers to the distribution, or redistribution, of goods and services, but is also used to describe the equal value of all humans, visible for instance in demands for 'equal respect', 'equal consideration' and 'equal concern'.⁸⁰ (Re)distribution is also of relevance in this second meaning of the word, but in a more indirect and broader sense, as in providing access to education or housing – 'distribution of basic capabilities'. In this latter sense, (re)distribution is instrumental to the object of achieving 'participatory democracy'.⁸¹

The universalistic approach of the Swedish welfare system created, at least for a certain period in history, an interaction between the value cluster of *social equality* and *social stability* (at the expense of *individual freedom*) and gained in the process a strong popular and political support from broad layers of the population. In the 1990s, there were developments that indicated a shift in the previous balance between these clusters, in which values of *individual freedom* were favoured while increased poverty, less egalitarian structures as well as increased demands on social flexibility indicated that values of *social equality* and *social stability* were given less prominent positions.

⁷⁸ Rothstein's conclusion is that there is no necessary conflict between the increased demands for freedom of choice and the universal welfare policy, see Rothstein, Bo, 1998, p. 214.

⁷⁹ Christensen, Anna, 2000.

⁸⁰ Goodin, Robert, E. et al., 1999, p. 173.

⁸¹ Rothstein, Bo, 1998. For a discussion on the interdependence between democracy and the so-called 'economic and social human rights', see Beetham, David, 1999.

The two value clusters, *individual freedom* and *social equality*, have common traits, such as a shared emphasis on equality (by emphasizing the equal value of all human beings) and a support for the principle of equal treatment. Still, for the welfare state to be able to distribute 'basic capabilities' and thus make it possible for all (or as many as possible) of its inhabitants to take part in the political discourse, a strong state is needed. This means a state with a comprehensive redistributive capacity and with involvement in many of the life spheres of its inhabitants. There is, thus, between the cluster *individual freedom* and the cluster *social equality* also a conflict of values that is difficult to bridge. In addition, as has been described by Christensen, there is a conflict between the dynamic forces linked to market economy and the conservative forces linked to the protection of established position. Thus, the increased emphasis on values of *individual freedom* into the construction of the welfare provisions challenges both values of *social equality* and values of *social stability* – the two clusters that have dominated the normative base of the traditional Swedish welfare state.

In the following sections of this chapter, discourses surrounding these developments are outlined. Against the background of this description of conflicting value clusters, the sharp intensity of the welfare debate of the 1990s should not come as a surprise.

6.3 Discourses on social insurance in the 1990s

As another source, apart from *basic values*, generating 'societal conceptions of justice' I have elaborated on a notion of *current discourses*. Previously, this category has been described as follows:

Current discourses indicate the span of strategies possible to voice, given the frame of basic values, in a given society at a given point in time. Some of these strategies are implemented and effectuated, others are not. Implemented and alternative strategies together constitute the concretized output of prevailing, current discourses in society.

In order to explore the actual content of 'current discourses' in Sweden during the 1990s, linked to social insurance in general, and to sickness insurance specifically, I have studied the varying political solutions offered by the political parties represented in parliament at this time.

The balance between different political parties represented in parliament during the relevant period shifted between the elections. Thus, between 1991 and 1994,⁸² there was a coalition minority government

⁸² Elections are held in September and until 1994 elections took place every third year. After 1994, elections are organized every fourth year.

consisting of the four 'established' non-socialist parties: The Moderate Party, the Liberal Party, the Centre Party and the Christian Democratic Party. In the 1991 elections, the Green Party lost their seats in parliament as they did not reach the four percent threshold. In the same elections, a new right-wing populist party, the New Democratic Party, for the first time gained representation in parliament. In opposition, during 1991–1994, there were three parties: The Social Democratic Party, the Left Party and the New Democratic Party. After the elections in 1994, the Social Democrats formed a minority government (co-operating at first mainly with the Left Party and later with the Centre Party). In the 1994 elections, New Democracy collapsed and the party lost their seats in parliament, while the Green Party regained and strengthened their representation. After the elections in 1998, the Social Democrats once again formed a minority government, this time supported by the Left Party and the Green Party.

The non-socialist minority government of 1991 had grand plans to accomplish 'a change of systems' and to 'give Sweden a new start'. These plans were interrupted fairly soon, as signals of what was to become the worst recession in Swedish economy since the 1930s began to show.⁸³ The emergency of the situation became obvious in the fall of 1992, with a crisis in the banking and real estate sector, and in the same year, the Swedish crown was subjected to speculation.⁸⁴ In 1993, the unemployment figures reached 10 percent, and in parliament the government and the Social Democrats collaborated in different 'crisis agreements'. These agreements had a direct impact on different social insurance schemes,

⁸³ For an account of the economic crisis in Sweden during the 1990s, its pre-history and how it affected the welfare system, see Gould, Arthur, 1996 or Huber, Evelyne and John D. Stephens, 2001.

⁸⁴ The following figures illustrate the extent of the crisis: For 15 years, real estate prices had risen continuously and reached a peak in 1989; during the following five years the prices fell by 75 percent. Three fourths of the real estate companies registered on the Stockholm Stock Exchange went bankrupt or had to be restructured. Between 1980 and 1989 the Stockholm Stock Exchange rates went up by 1144 percent compared to a global average of 333 percent. During the following three years the rates fell by 50 percent. Three large banks went bankrupt and the rates in the two largest banks fell by 80 percent. The total credit losses in 1990–1993 are estimated at about 200 billion SEK. The Swedish crown was vigorously defended but after a number of inefficient crisis measurements, including short term rates at 500 percent in November 1992, the defence was given up and the crown was left floating. After a couple of months the crown had fallen by 25 percent against the D-mark and by 40 percent against the American dollar. Open unemployment rose from 1.1 percent in June 1990 to 9 percent in 1993. GDP fell every year in 1991–1993 by a total of 6 percent. The effect on state finances of the crisis was that the public sector by 1994 experienced a budget deficit of 12 percent, see Kokko, Ari, 1999.

and for sickness insurance they meant the introduction of a waiting day as well as the introduction of employee contributions to the sickness insurance.⁸⁵

An analysis of government bills and political motions presented in parliament, makes it possible to identify some turning points where the different political parties propose solutions that can be found along one or the other of (more or less) distinctly different routes. Such a turning point is the distinction made between social insurance based on 'a principle of compensation for income loss' and social insurance based on 'a principle of basic security'. While this specific distinction might be the most profound in the political debate on social insurance in the 1990s, there are also other counter positions that deserve to be highlighted. In the list below, six important areas are summarized where debaters of different political colours clashed:

- 1) The principle of replacement of lost earnings *versus* the principle of basic security.
- 2) An active, pro-rehabilitation work-line within social insurance *versus* the argument that the work-line must be applied with some caution. (The extreme counter position (passive payments of benefits) had no proponents in the debate).
- 3) The creation of a more efficient 'insurance-like' social insurance *versus* a defence of an insurance based more strongly on a principle of solidarity paid over the state budget.
- 4) Specialized, distinct, 'concentrated' social insurance schemes *versus* co-ordinated (or united), coherent, uniform, social insurance schemes.
- 5) The creation of efficient administrative tools that could be used to control the (more or less) emphasized problem of deceit and excess usage of benefits *versus* protection of individual integrity and legal certainty, along with arguments that excess usage is an overrated problem best handled by increasing the legitimacy of the insurance schemes.
- 6) A strengthening of the position of insurance physicians as a means to control usage of sickness insurance *versus* an expressed fear that the position of individuals in need is becoming too weak in the process.

As this chapter proceeds, discourses on the first three counterpositions in the list above are approached in more detail in section 6.4, under the

⁸⁵ For an account of Swedish politics during the 20th century, see Hadenius, Stig, 1997.

heading '*diverse identifications of primary social risks and urgent individual needs*', while the latter three are presented in section 6.5 as '*the concentration policy in a discursive context*'.

The arguments presented in section 6.4 are important for deciding the overall design of social insurance. Issues intensely discussed among the debaters were not only 'the principle of replacement of lost earnings' versus 'the principle of basic security', but also related questions such as the proposed value of an active work-line and arguments for and against the need to import 'market thinking' into social insurance by, for instance, making the insurance more 'insurance-like' (that is, increasing the link between fees and benefits).

The arguments presented in section 6.5 are particularly focused on the kind of issues and themes that carried the 'concentration policy'. The different arguments for 'concentrated' social insurance schemes versus arguments in favour of creating a comprehensive, uniform social insurance are presented. Linked to this issue is the debate on deceit (one of the arguments in support of concentration was that it would be efficient as a means to control not only usage but also deceitful usage). Thus, when studying the arguments in favour of and against 'concentration', an interest is also taken in the arguments (pro and con) for creating better sharpened tools for administrative control of (excess) usage, such as the strengthened role of experts (mainly insurance physicians) in the process of determining access to sickness cash benefit.

6.4 The diverse identifications of primary social risks and urgent individual needs

6.4.1 Founding principles for the design of social insurance

The design of Swedish social insurance schemes is usually described as inclusive in character. The dominating social democratic social policy has favoured general, public welfare solutions. The guiding principle in the design of different insurance schemes has been marked by 'the principle of replacement of lost earnings' (providing a fixed percentage of lost income) rather than by 'the principle of basic security' (providing the same basic amount to everyone), but the levels of guaranteed allowances in the insurance schemes have been very low. Thus, although 'inclusive' to the extent that the personal scope of application was comprehensive, the social insurance schemes were during the 1990s criticized for excluding those without an established position on the labour market. For individuals with low wages, the decreased levels of income compensation in-

troduced during the 1990s meant that the principle of replacement of lost earnings was undermined. The high levels of unemployment, in combination with the 'workfare' character of the insurance, increasingly forced individuals without an established position on the labour market to take refuge in social assistance.⁸⁶

Although 'the principle of replacement of lost earnings' and 'the principle of basic security' on one level represent distinct, and polarized, positions, the spectrum of arguments presented in parliament during the 1990s revealed a more varied field of different standpoints. On the one hand, there was the established system, carrying the signature of the Social Democratic Party that had dominated the political scene for decades, a system clearly based on a principle of replacement of lost earnings. In the opposite corner, the Green Party, most pointedly, argued for a social insurance solution influenced by the principle of basic security; thus, a system in which all members of society are entitled to an allowance, the same for all, on a basic level, independently of previous (un)employment and income.⁸⁷ A third principle, introduced in the debate in 1994, was linked to a system of obligatory 'welfare accounts', combining, ideally, some of the characteristics of the obligatory social insurance with the advantages of private savings.⁸⁸ Although this idea was much debated for a while, it never made its way into a distinct political program.

In parliament, the Left Party and the Liberals marked their clear support for the principle of replacement of lost earnings.⁸⁹ The Centre Party, the Moderate Party and the Christian Democrats favoured diverse solu-

⁸⁶ In Prop. 1996/97:124 the increased usage of 'social assistance' becomes a basis for characterizing it as a 'general income guarantee'. For further analyses see Salonen, Tapio, 1999 or Westerhäll, Lotta, 2002a, pp. 169 ff.

⁸⁷ In the debate, the Centre Party and the Green Party were both regarded as strong supporters of social insurance constructions influenced by the principle of 'basic security'. Still, neither of them suggested solutions that abided strictly by this principle. The Centre Party suggested a (relatively low) ceiling in the insurance and no compensation for incomes above that ceiling. Below the ceiling, allowances were to be calculated according to a principle of replacement of lost earnings. The Centre Party also wanted to introduce a 'floor' in the insurance (the basic security), a minimum compensation available independent of previous income. In 1995 the Green Party suggested a solution with a 'broken ceiling', where incomes above a certain level were less compensated for; thus, the level of income compensation was 80 % below the ceiling and 40 % above the ceiling. See Schlaug, Birger, *Dagens Nyheter*, 951125, p. A04.

⁸⁸ The notion of a 'welfare account', most frequently referred to, was originally presented by Stefan Fölster (Fölster, Stefan, 1994). See also: Fölster, Stefan, *Dagens Nyheter*, 970217.

⁸⁹ Although the Left Party experienced some internal disagreements on how to relate to the demand for increased basic security. See: *Dagens Nyheter* 940708, p. A07, and *Dagens Nyheter* 940712, p. A07.

tions, borrowing ingredients from both principles, and at least for the two latter parties, the 1990s included a political process in which the standpoints were not clear from the beginning. The Centre Party clearly favoured a solution marked by the principle of basic security, while the other two parties leaned towards the principle of replacement of lost earnings – although they were less enthusiastic in their acclamations than for instance the Liberals. Thus, the issue of how to design social insurance gave rise to intense arguments among the four political parties that formed the non-socialist minority government during 1991–1994. These in-depth disagreements were also visible in the form of fierce inputs to the public debate all through the 1990s.⁹⁰

The issue of what should be the guiding principle for social insurance also raised a debate among the affiliates to the Social Democratic Party, although the principle of replacement of lost earnings was never abandoned. To the contrary, this principle was strongly defended by key representatives of the party.⁹¹ The objections can be exemplified, for instance, by articles written by Kjell-Olof Feldt (social democratic Minister of Finance 1982–1990), in which he argued against the traditional social democratic position and in favour of social insurance based on a principle of basic security.⁹² And Feldt was not alone. Other debaters, with a social democratic background, argued along the same line, challenging previously uncontested social democratic milestones.⁹³

A study of the diverse political suggestions on how to design social insurance in detail shows that the polarized positions become more blurred. For instance, it is possible to declare a positive attitude to the principle of replacement of lost earnings, but if the suggested levels of

⁹⁰ Hökmark, Gunnar, *Dagens Nyheter*, 930808, p. A4; Carlgren, Andreas, *Dagens Nyheter*, 930823; *Dagens Nyheter* 940320; *Dagens Nyheter* 940314; *Dagens Nyheter* 950504.

⁹¹ See for instance: Larsson, Allan and Ingela Thalén, *Dagens Nyheter* 930623, p. A4. Six years later, according to *Dagens Nyheter*, the Minister of Social Affairs, Lars Engqvist argues in favour the principle of basic security and is immediately criticized by his colleague, assistant Minister of Social Affairs, Maj-Inger Klingvall, see *Dagens Nyheter* 981115, p. A10. In 1999, two social democratic members of parliament (Berit Andnor, Minister of Health after the elections in 2002, and Susanne Eberstein) defend the principle of replacement of lost earnings while simultaneously suggesting the creation of a new social insurance scheme for those who are not able to qualify on the open labour market – thus responding to the critique against the excluding effects of a strict income compensation principle; see Andnor, Berit and Susanne Eberstein, *Dagens Nyheter* 990916, p. A4.

⁹² Feldt, Kjell-Olof, *Dagens Nyheter*, 930120, p. A2; Feldt, Kjell-Olof, *Dagens Nyheter*, 930210, p. A2; Feldt, Kjell-Olof, *Dagens Nyheter*, 950413, p. A2. See also Feldt, Kjell-Olof, 1994.

⁹³ See for instance: Isaksson, Anders, 1994; Lindbeck, Assar, 1997; Södersten, Bo, *Dagens Nyheter* 930307, p. A4; Södersten, Bo, *Dagens Nyheter* 940105, p. A4.

compensation are relatively low or very low, it may be argued that the principle loses some of its basic features. Below, additional examples of how the political parties formulated their arguments in 1997 are accounted for.

The arguments for shifting the principle of replacement of lost earnings to one of basic security is formulated as follows by the Centre Party:

Compensation based principally on the loss of income in public welfare politics leads to a situation where the state awards varying degrees of social security; those who are already quite secure are given most and nothing is given to those who have not been able to or have not had the time to qualify. When the social security systems take individual employment as a starting point, the result is that groups who have not managed to get established on the labour market also find themselves outside the universal social security. To exclude groups from universal social security in this way is deeply unjust.

The goal of the Centre Party is to combine social security and freedom. Welfare is to give social security to all citizens as well as personal responsibility for their own lives and actions. Basic social security means that the role of the state is limited to financing basic needs.⁹⁴

When the Green Party argues for a radical reform of the established social insurance schemes, some of the arguments are similar to the pro-reform motives put forward by the Centre Party above, but there is additional emphasis on the negative aspects of an unsustainable lifestyle connected to high incomes/high consumption. The Green Party provides the following arguments for a shift from income compensation to basic security:

The basic outlook of the Green Party is that all people have equal value and share the same basic needs. People are active and creative and they can and want to be responsible.

The basic outlook, of course, has an impact on our proposal for the construction of the social security systems. Society must guarantee basic economic security when people cannot support themselves. But it is not the responsibility of society to guarantee that everybody can keep the higher standard of living they may have attained earlier. It must be everyone's duty to assess her or his own need for insurance protection above the basic level.

People have rights as well as responsibilities. The right to have basic social security stems from our being members of society, not primarily from our position in working life. This means that those who are unemployed, sick, disabled or other groups who cannot support themselves, also should be able to rely on their not being excluded. At the same time, all who can sup-

⁹⁴ 'Motion till riksdagen 1996/97:Sf224'.

port themselves should do so. In solidarity with those who cannot, we must help them. [...]

The Green Party model for basic social security is universal. On the other hand, it has little or in many cases no relation to the level of income. The basic social security systems are not based on any testing. And they do not give rise to poverty traps (which does happen in many of today's income related systems, for instance the pension system).⁹⁵

In both arguments reproduced above, the existing social insurance system is criticized for functioning in a way that excludes individuals who are in 'real' need. At the time (in 1997), unemployment was very high (8,6 percent) and it was difficult for an increasing number of individuals to get access (or hold on) to the labour market.⁹⁶ For instance, young people, immigrants and refugees are mentioned as examples of groups that the prevailing social insurance system systematically excluded from sickness insurance due to their difficulties to find work on the open labour market.⁹⁷

The arguments in favour of shifting to a principle of basic security in the design of social insurance schemes were fiercely criticized by the proponents of the principle of replacement of lost earnings, and the arguments of the Social Democrats, the Left party and the Liberals echo distrust in the logic of their contenders' analysis. When voiced by the Left Party, this criticism could be formulated as follows:

Our welfare model is based on a high level of economic growth and full employment. A prerequisite for sustaining the social security systems is that only a small part of the population needs economic support in the form of income security. A large part of the population must safeguard their income through paid work. Social allowance is the last mesh in the safety net.

If the principle of loss of income is our compass, every change in the system must be analyzed so that we do not by way of a detour find ourselves in a basic social security system, with a consequent change of systems. A system built on solidarity must be founded on the participation and interests of the majority of people, that is, a social contract between classes. The social contract presumes, for instance, that the middle class in solidarity and progressively pay taxes and social fees and then get a fair share as a fulfilment of the contract. This reduces the interest in and the importance of collective insurances and private solutions.⁹⁸

⁹⁵ 'Motion till riksdagen 1996/97:Sf225', p. 4 and 9.

⁹⁶ The unemployment figure is found at www.ams.se/admin/Documents/ams/arbdata/arblos/arb8003h.pdf (030909).

⁹⁷ 'Motion till riksdagen 1996/97:Sf225', p. 12 ff.

⁹⁸ 'Motion till riksdagen 1996/97:Sf241', p. 7.

The Liberal Party argues along the same lines, although using a different terminology:

Sometimes in the debate, a so-called basic social security is proposed as an alternative to income security. The technical solutions in the proposals for basic social security may vary, but they have one thing in common: the principle of income security is abandoned.

Another model for social security based on an assessment of needs and/or some other form of basic security must largely build on the individual's own saving money for what may later come to be needed, as sickness compensation, the old age of parents, unemployment, etc. [...]

International experience shows that it is difficult, next to impossible, to maintain reasonable levels of social benefits in the type of system where the well-to-do groups are excluded and must safeguard their social security through private solutions. There is an imminent risk that this would lead to a situation where there is a large group who mainly must rely on their basic social security and one group who have some kind of VIP lane, with private or collective insurances with lower risks, to lean against in case of sickness, occupational injury, etc.⁹⁹

Apart from the above argument, emphasizing that the generosity, comprehensiveness and success of a system of general welfare is dependent on to what extent the middle classes are included as beneficiaries, the liberals also put weight on more strict economic arguments. It was claimed that a system of basic security, and/or (other) drastic cuts in the welfare systems, in which individuals themselves would have to secure an income compensation above basic levels, would damage public finances and disrupt the interaction between the public and private sectors necessary for economic growth.¹⁰⁰

A comparison between the different arguments pro/contra the principle of replacement of lost earnings and pro/contra the principle of basic security, as illustrated by the examples above, demonstrates the dividing line between the two principles. However, there are positions in the political debate that do not let themselves be easily sorted into one or the other of these pro/contra groups. The Christian Democratic Party and the Moderate Party both seem to describe and confirm the principle of replacement of lost earnings as a leading component of social insurance, but when these parties, along with the Centre Party, argue that the level of compensation in social insurance always should be distinctly below

⁹⁹ 'Motion till riksdagen 1996/97:Sf242', p. 17 f.

¹⁰⁰ 'Motion till riksdagen 1996/97:Sf242', p. 17 ff.

the actual loss of income – this becomes an argument in the borderland between the more clearcut positions accounted for above.¹⁰¹

It is evident that ‘the principle of replacement of lost earnings’, in its most distinct form, is undermined by decreasing levels of compensation and an increasing number of waiting days in the insurance. In Chapter 3, I presented an outline of the major changes introduced in the sickness insurance during the 1990s, from which could be concluded that cuts in compensation levels shifting the rules for calculating income, as well as the introduction of a waiting day, were all reforms that little by little cut out the qualities of a ‘pure’ principle of replacement of lost earnings. In the implementation of the concentration policy it was stated that in the assessment of an individual’s capacity for work, previous levels of income should not be taken into account, which is another example of the fact that the insurance did not guarantee the level of standard/income once obtained.¹⁰²

6.4.2 The hegemonic work-line

As mentioned above, the Swedish model is sometimes described as a ‘workfare’ rather than a ‘welfare’ model and there are strong incentives in the Swedish system for individuals to engage in paid work. The main policy providing this incentive to work is labelled the ‘work-line’. The Swedish ‘work-line philosophy’ has a long history, but it was still a radical change of the late 1980s and the early 1990s to introduce the work-line into social insurance schemes that focused on sickness.¹⁰³ Moreover, rather than providing ‘passive’ contributions in case of sickness, there was a massive emphasis on the need for rehabilitation measures. To enter into a rehabilitation scheme became a condition for obtaining cash benefits. As an individual, you had to show that you were actively trying to change your situation in order to secure your ‘right’ to sickness cash benefit. The work-line has also, due to reforms implemented in 2000, been strengthened in the unemployment insurance. One could say that the aspect of obligation in social insurance has become more emphasized during the 1990s.¹⁰⁴

Since the rehabilitation reform in 1992, it has been repeated over and over again, in reports from governmental committees and in other official documents, that sustainable welfare is fundamentally linked to the

¹⁰¹ ‘Motion till riksdagen 1994/95:Sf 230’.

¹⁰² Prop. 1996/97:28.

¹⁰³ Lindqvist, Rafael, 1996, p. 19 f.

¹⁰⁴ Grape, Owe, 1998, p. 105 f.

work-line policy. On the political scene, the notion that everyone with a capacity for work also should work for a living had strong support, so strong that it is justifiable to describe the pro-work-line position as 'hegemonic'. All political parties active in the social insurance debate pronounced their support for the work-line during the 1990s, although some of the harmony surrounding this issue could be explained by the fact that, at least to some extent, different aspects of the work-line were emphasized by the different political parties.

According to the Moderate Party, the 'work-line' concept indicates that '... it should always be more profitable to work than not to work',¹⁰⁵ while the Green Party prefers to describe the work-line as a guiding principle with the purpose '... to stimulate the individual to work rather than receive benefits'.¹⁰⁶ Although the difference between these two statements might not seem to be remarkable at first sight, there is a clear difference in how the work-line principle will be effectuated in the policy suggestions of the two parties. The Moderate Party chooses to talk of the importance of the work-line in a context where it is argued that the level of compensation should be lowered and more waiting days introduced in social insurance. The Green Party, on their part, proclaim their support of the work-line, as well as of government policies, in a context where the issue in focus is rehabilitation. Thus, the Green Party in this case, along with government, makes reference to the work-line when it emphasizes the importance of clarifying the employers' responsibility for rehabilitation as well as the importance of increasing the quality of the co-operation between all parties who are involved in rehabilitation (employers as well as authorities). The Centre Party uses the work-line concept to support the argument that there is a link between a social insurance system based on the principle of basic security and a system that puts pressure on the individual to support him- or herself through paid work:

The principle of basic social security and citizenship in social security systems does not imply permissiveness. The basic social security of the Centre Party strengthens the work-line. He who after several offers is not prepared to accept the work assigned is to be excluded. However, he who from no fault of his own is outside the labour market, is sick or in some other way is temporarily or at some length unable to work for a living should be covered by the universal system.¹⁰⁷

¹⁰⁵ 'Motion till riksdagen 1996/97:Sf254', p. 7.

¹⁰⁶ 'Motion till riksdagen 1996/97:Sf 40', p. 38 and p. 43. Author's translation.

¹⁰⁷ 'Motion till riksdagen 1996/97:Sf224', p. 19. Author's translation.

According to the Centre Party, 'work' should not be a criterion used as a *de facto* gatekeeper for access to the insurance, as it would exclude those without an established position on the labour market. Still, the *ambition to work* and to be self-providing should be a criterion for receiving benefits. Recipients of social insurance should make themselves available to the open labour market and actively search for work. They should also, according to the Centre Party, participate in different rehabilitation and activation programs in order to be eligible for allowances.¹⁰⁸

One conclusion to be made from the above is that the work-line, as a principle used in social insurance, is vague enough to be used for diverse policy suggestions. These pro-work-line positions have in common a critical view on a social insurance system that provides passive payments of allowances and does not stimulate the individual recipient to return to work. As 'stimula', the spectrum of suggestions delivered by the political parties vary between different combinations of sticks and carrots.

'Work' as such is by the Social Democratic Party, the Left Party and the Liberal Party explicitly described as the very basis for the general welfare policy they all propose. The Liberal Party expresses the value of work in general, and the connection between work and welfare, as follows:

Work is the basis for the resources required to make a policy of universal welfare viable. Work is also a prerequisite for an independent life. By working, the individual can support himself, control his life, and create opportunities for growth. The chance to work is the most important prerequisite for the welfare of people and the foundation of the welfare state.¹⁰⁹

The Left Party argues in a similar way, emphasizing the fundamental connection between work and welfare, adding the conclusion that the overarching policy must be the fight against unemployment and the striving for full occupation:

Work is the basis of all welfare. If an increasing number of people are outside the labour market, in the long run our entire welfare system is threatened. It will prove more difficult to maintain a qualitatively good level of the activities in municipalities and county councils. We will have problems with the financing of our social insurance and our system of social benefits. Mass unemployment is the greatest threat against our welfare. [...]

An economic policy where full employment is the primary goal is a prerequisite for universal welfare. A well-functioning public sector is a means to

¹⁰⁸ 'Motion till riksdagen 1996/97:Sf224', p. 20.

¹⁰⁹ 'Motion till riksdagen 1996/97:Sf242', p. 16. Author's translation.

a fair distribution of welfare. Through the public sector, market power is spread out – something which is hard to accept for the adherents of the powerlessness of ‘the perfect market’.¹¹⁰

The Moderate Party is very critical of the established (mainly social democratic) structure of the Swedish welfare state, and this criticism is specifically aimed at the alleged intrusive involvement of the state in the lives of individuals and families. Thus, the Moderate Party does not pay any tribute to the general welfare system in its Swedish design, nor does it suggest a system founded on basic security. Still, although the Moderate Party emphasizes that the social security systems should be mainly for those who have a wide range of problems, and that the responsibility for creating a ‘welfare society’ should be split between the state, the family and civil society, the concrete policy suggestions do not favour the third type of basic principle – means tested allowances. Rather, the suggestions presented by the Moderate Party indicate reformed general welfare solutions, although distinctly less comprehensive and less generous than the existing schemes. The responsibility to work for a living is obviously present in the Moderate proposal, although mainly as a necessity, as the state offers no other option for subsistence, unless the individuals’ difficulties are ‘considerable’.¹¹¹

The only party that has a radically different attitude towards the value of ‘work’ as such is the Green Party. Since 2000, when the long-term aim to create a system offering a ‘citizen’s wage’ was written into the party program, the Green Party favours an alternative, making citizenship instead of work the criterion for earning an income from the state, and thus also denouncing that there is a fundamental ‘human duty’ to work for a living. The ideas and values connected to the notion of a citizen’s wage can be traced back into the analyses made by the party in the 1990s. In 1996, the party proposed a reform that made it possible for employees to have a ‘free-year’. Another proposal supported by the Green Party in the 1990s, as well as later, was to lower the normal working hours from 40 to 30 hours per week. This reform, as well as the ‘free-year’ reform, serves the double purpose of giving more people access to the labour market and an opportunity for people within the labour market to work less. The party also wanted to increase the lowest level (the floor) in the insurance and decrease the ceiling (for those with higher incomes).

Primarily due to the high level of unemployment, the work-line policy was under pressure during the 1990s. It became questionable how

¹¹⁰ ‘Motion till riksdagen 1996/97:Sf241’, p. 5. Author’s translation.

¹¹¹ ‘Motion till riksdagen 1996/97:Sf 254’, p. 2 f.

much force could be put on individuals with a more or less fractured capacity for work to re-enter an almost non-existing (and increasingly demanding) labour market. A variety of ideas on how to solve the problem flourished in the debate. Different political solutions were proposed. The 'pro-work' arguments dominate some of these proposals, others are variations on a 'freedom-from-work' theme. The 'American model' was presented as an option that did not question the fundamentals of paid work. In essence, this argument stated that the United States had solved the problem of unemployment by increased flexibility in wage setting in combination with a deregulation of the labour market.¹¹² Thus, the underlying problem connected with unemployment was not analyzed as a 'lack of work', but rather as an effect of too much state intervention on the market. Other, alternative proposals had in common that they were based on the notion that 'full employment' was no longer seen as a possible (or wanted) goal. Examples of solutions based on that analysis are, apart from the citizen's wage, work-sharing and variations on that theme, for instance: sabbaticals, recurrent time-off periods for studies, flexible retirement age, and shortened working hours.¹¹³

The work-line is based on a conception of 'work', where work (as in paid work) is considered to provide the individual with much more than just an income. During the 1970s, this positive vision of work was framed by a – mainly social democratic – idea of the 'good work'. Work was, and is, apprehended as a means to a good life. For an individual, access to work 'structures time, provides new social horizons and experiences of co-operating with other people, it defines an individual's position in society and gives the individual the satisfaction of creating something, of making a difference'.¹¹⁴ Consequently, unemployment is connected with sickness, crime, suicide, resignation, passivity and loss of self-respect.¹¹⁵ The work-line, in its social democratic form, is interrelated with the overarching political goal of providing work for everyone. It was when the possibility of eventually reaching full employment was questioned during

¹¹² For a critical analysis of this argument see Rosenberg, Göran, 1997/98.

¹¹³ Rosenberg, Göran, 1997/98 p. 40. In France, Germany, Denmark and the Netherlands 'work-sharing' in different forms has been seriously discussed and (at least) in France, it has also been implemented. See also Kildal, Nanna, 2000, for an elaboration of different political and philosophical arguments surrounding the idea of an unconditional citizen's wage.

¹¹⁴ Meidner, Rudolf, 1998, p. 10 f.

¹¹⁵ Meidner, Rudolf, 1998, p. 10.

the 1990s that the work-line became a target for a new kind of criticism.¹¹⁶

Full employment¹¹⁷ has been an overarching goal for the Swedish labour movement since the Second World War. In an important document, 'the Post-War Labour Movement Program', it was clearly stated how fundamentally important full employment was considered to be as a political goal:

The whole nation at work is the first goal of our economic politics. The monetary system, public finances, price politics and wage politics, private and public enterprise – all are to accomplish full employment for the labour force and the material means of production.¹¹⁸

When Rudolf Meidner in 1998 writes a manifesto for full employment he stresses the risks connected with apprehending unemployment as something normal. It will not only destroy our solidarity with the unemployed, but also undermine the basis of the welfare state.¹¹⁹ The Swedish Trade Union Confederation chose in 1998 to describe unemployment as a revolutionary force – lessening equality, eroding the financing of the welfare system, and diminishing the strength that full employment gives to the employees.¹²⁰

As noted above, a radical alternative to the work-line, as regards the value of work, is the notion of citizen's wage. In such a wage system, all inhabitants of a society are given a basic wage, not as compensation for work performed, but as a citizen's right. This wage should, according to most advocates, be high enough to get by on, but not give room for any extras. To enter into paid work would thus become a free choice for the individual, not a life necessity. The idea is usually criticized from two aspects; one is a moral criticism – you should earn your living. The other is of an economic nature and simply states that it would be much too expensive. It is not considered an alternative but rather a (dangerous) utopia.¹²¹

¹¹⁶ For analyses arguing that due to modernity, globalization etc, access to traditional, paid work is no longer what it used to be (and will never be again), and that we thus need a new work philosophy for the future, see Offe, Claus, 1996 and Bauman, Zygmunt, 1998.

¹¹⁷ The meaning of 'full employment' was, at least originally, that everyone should have a full-time job with a wage that was sufficient to live on.

¹¹⁸ Meidner, Rudolf, 1998, p. 13. Author's translation.

¹¹⁹ Meidner, Rudolf, 1998, p. 9.

¹²⁰ LO, 1998, p. 7.

¹²¹ The concrete proposal presented by the Green party in June 2000 implied a basic wage of 8 000 SEK to all adults, and of 3 000 SEK to all children, to the estimated cost of between 70–195 billion SEK per year.

As mass unemployment became an empirical fact in the 1990s, there was a growing fear that certain groups in society would develop an 'unemployment culture'.¹²² The unemployment insurance was no longer only a safety net between one job and another; for many, it became a more or less permanent way of securing an income. It was argued that the moral necessity of working for a living was undermined as unemployment reached broader sectors of society and became more 'normal'. The general image of 'the unemployed' would often be in line with the ideas presented by Rudolf Meidner above: they were considered to be frustrated, unhappy and feeble.¹²³ As time passes, there is also another kind of answer. In a study of the situation of long-term unemployed persons published in 1997, the image of unemployment is no longer just an image of misery:

The investigators find that the unemployed as a rule regard themselves as fully occupied with various activities; yes, they are actually quite busy. Other occupations and other work fill the void of wage earning. It is true that some time is spent on looking for a job or in taking part in activities preparing for work or other ways of keeping up appearances, but several of the interviewed persons are engaged in non-profit work, take care of ageing parents or relatives, help them with cleaning and gardening; others say that they have found 'time to live' and show another view of life, work and wages than the traditional one. What creates problems for these people is not the unemployment as such, but the stigmatization and depreciation that unemployment gives rise to in a society which takes for granted that everybody can and should have paid work.¹²⁴

The above description of being unemployed echoes the arguments of the citizen's wage proponents. Maybe we should not be surprised that changes in the unemployment insurance, implemented in the late 1990s, have made it considerably more difficult to make unemployment an alternative lifestyle.¹²⁵

To sum up, during the 1990s, the work-line was strongly emphasized in social insurance. At the same time as this policy became the target of a new kind of criticism, the work-line was not only maintained, but expanded into sectors where it traditionally had not been applied. When many individuals experienced an alarming absence of available work op-

¹²² In the debate, as well as in government reports, the notion of an unemployment culture was often used to describe an undesirable situation existing in other countries that should be combatted. See for instance: *LO-tidningen*, 1999-03-26; Ds 1999:58.

¹²³ Andersson, Maria, 1997, pp. 218 ff.

¹²⁴ Rosenberg, Göran 1997/98, with a reference to Berg, Jan O., (et al.), 1997. Author's translation.

¹²⁵ Ds 1999:58.

portunities, new policies were enforced, and laws were enacted, which increased the obligation of the individual to participate actively on the labour market. There was a political and ideological battle in the 1990s where the conception of how to define and appreciate 'work' was at stake. For a while, the unemployment insurance functioned as a citizen's wage for some people, and there was an increased potential for a viable alternative to the 'pro-work ideology'. Still, by the end of the 1990s, social insurance schemes have less ideological affiliation with a 'citizen's wage' strategy than it had before. In the legal structure of social insurance, it is hard to find any crack in the official work-line strategy. It should be noted, however, that in the justification of the work-line, the political aim of eventually creating 'full employment' is changed to a political goal of reaching 'full occupation'. No longer do people need paid work in order to be fulfilled as human beings; to be in training, education or rehabilitation is sufficient. This could be interpreted as a step in the direction of a 'freedom-from-work' position, but that would be a questionable analysis. The 'citizen's wage' is based on the ideological position that people will only be liberated, and thus able to reach their full potential, when they are no longer forced to work for a living. There was nothing in the 'new' work-line that supported the idea that people should use the security given by social insurance schemes in order to freely develop their lives. The dominating 'pro-work ideology' in social insurance regulation enforces that social insurance schemes, providing income compensation, should be apprehended as temporary solutions.

6.4.3 Economizing social insurance

The early 1990s was marked by a general, overall 'down-sizing' of the social insurance instruments, making them less generous. Linked to this development were arguments that emphasized efficiency and the importance of making social insurance more 'insurance-like'. To a shifting degree, the political parties argued for or against solutions that stressed market based rationalities, such as insurance principles and privatization.

The Moderate Party argued in favour of minimizing state involvement (low levels of compensation and more waiting days), thus providing the market with an option to enter the scene, but the party found very weak support for this policy, even among the traditional non-socialist parties. As part of the crisis agreements in 1992, the Social Democrats suggested that sickness insurance, instead of being part of the national insurance, should be separated and handled by the parties on the labour market. The idea of disconnecting the sickness insurance from the national insurance did not gain sufficient support from the party members

at the Social Democratic Party conference in 1993, and it eventually vanished from the debate.

More viable was the suggestion to introduce individual fees as a way to finance the insurance, an idea presented by the Social Democrats in 1992.¹²⁶ Consequently, sickness insurance should not be part of the state budget but financed through employment taxes and individual fees. All political parties, except the Left Party and the Green Party, emphasized the importance of creating a more 'insurance-like' social insurance. The liberal argument for a more 'insurance-like' social insurance also favoured a development in which the different insurance schemes were separated from the state budget. When the Liberal Party argued for occupational injury insurance, separated from sickness insurance, the following aspects were emphasized in order to obtain a more 'insurance-like' social insurance: 1) Separation from the state budget, 2) Framework and levels of compensation to be decided by government and parliament, and 3) Revenues and costs must balance.¹²⁷

The 'insurance character' of social insurance was discussed in connection with reforms directed at the financing structure of social insurance. From 1993 to 1997, the proportion paid to the sickness insurance in the form of individual fees increased and the proportion paid in the form of specially designated employment taxes decreased. The reforms were introduced at a time when there was a large surplus in the sickness insurance. Although the non-socialist parties were in favour of a system with a 'direct pipeline' between fees and benefits, the reforms introduced by the Social Democrats were intensely criticized by the non-socialist parties. This policy of introducing and increasing the importance of individual fees, at a time when the insurance had a big surplus, and then using them for undesignated means elsewhere in the state budget, was criticized and interpreted as a (not very well) disguised increase in taxation. Also critic-

¹²⁶ General individual fees were introduced in 1993. During 1996–97 the general sickness insurance fee and the general pension fee were included in the general individual fees. Since 1998 the general pension fee makes up the general individual fee and in 1998 it equalled 6.95% of earned income. At the same time (1998) there was no longer a general individual fee for the sickness insurance (Act 1997:936). The fees are deductible from earned incomes up to a certain level (www.scb.se). As from 1999 five types of insurances are financed wholly or in part from general individual fees (sickness insurance, occupational injury insurance, old age pension insurance, pension insurance for bereaved and parental insurance). The share to be covered by fees varies and has changed over the years (www.rfv.se). See also *Dagens Nyheter* 930920, p. A6. The introduction of individual fees, as well as an increased emphasis on creating an 'insurance-like' social insurance was suggested by the National Social Insurance Board in 1993 in an appendix to SOU 1993:16.

¹²⁷ Motion till riksdagen 96/97:Sf242, p. 20 f.

ized (by the Moderate and the Liberal Parties) was the fact that fees were also extracted on incomes above the ceiling in the insurance, a construction mainly functioning as a means to create an increased redistribution of incomes.

The liberal criticism mainly focused on the questionable policy of raising money in the form of individual fees in sickness insurance and then using the surplus thus collected to cover undesigned deficits in the state budget, thus undermining the 'insurance character' of social insurance:

It is unacceptable that individual fees in the sickness insurance are used for purposes which are not embraced by the sickness insurance. This undermines the insurance character of the system and is wrong in principle.¹²⁸

The Green Party (along with the Left Party) belonged to the critics of the system with individual fees as such. They concluded that the reforms affected the tax base of the municipalities in a negative way (making way for further reductions on the municipal level), while at the same time favouring individuals with wages above a certain level (as individual fees – contrary to employment taxes – were not paid for the part of the income that exceeded 7.5 base amounts).¹²⁹ According to the green criticism, the introduction of individual fees resulted in a decreased element of solidarity in social insurance:

Today many people talk about making the social security systems more 'insurance like', that is, as far as possible you should get back what you have paid into the system. This is often a cover for excluding groups and for making the systems less based on solidarity.¹³⁰

The government was thus criticized from two directions. The 'traditional' four non-socialist parties wanted the government to increase the insurance character of social insurance by furthering the introduction of individual fees and strengthening the bond between fees and benefits. The Green Party, along with the Left Party, was of the opinion that social insurance had become too 'insurance-like' already, and thus too excluding and not sufficiently based on solidarity.

When the issue of complementary insurance (private and collective insurance alternatives) was discussed, the Green and the Liberal Parties, once again, ended up criticizing the government from opposite sides, although, in this issue, the Liberal Party was accompanied by the Left

¹²⁸ 'Motion till riksdagen 1995/96:Sf36', p. 24. See also Motion till riksdagen 1995/96:Sf6, p. 7. Author's translation.

¹²⁹ 'Motion till riksdagen 1996/97:Sf225', p. 31 f., and 'Motion 1995/96: Sf 33', p. 14. See also 'Motion till riksdagen 1995/96:Sf 31', p. 10.

¹³⁰ 'Motion till riksdagen 1996/97:Sf225'. Author's translation.

Party and the Green Party was accompanied by the Moderate Party and the Centre Party.

When the government in October 1995 proposed a bill suggesting that the level of compensation should be lowered to 75 percent in several schemes, and thus end up at the same level of compensation as sickness insurance, the Liberal Party reacted by defending the principle of replacement of lost earnings and argued for a minimum compensation level of 80 percent:

What happens in Sweden now shows that our fears have been justified. The demand for private complementary insurance has risen sharply. And the need for collective complementary insurance administered by the trade unions is also widely debated. An increasing number realize that it is hard to live on 75 percent of the regular income. Should these tendencies be allowed to continue, gaps in society will grow and the difference between the privileged who have work and a good income and those who in various ways are outside will be sharper.¹³¹

The Green Party ends up in the opposite corner on the issue of complementary insurance. The green analysis of how to create the best circumstances for increased sustainability in society leads to the conclusion that those with medium and high wages should provide for their own security through different insurance alternatives, and thus decrease their consumer capacity:

People with average incomes or above, through their lifestyle and consumption, generally contribute more to the use of resources and environmental harm than people with a low income. Therefore, it should not be a duty of the state to guarantee such a lifestyle through full compensation for loss of income. If people with higher incomes must take that responsibility themselves, they may, if they wish, use some of their income on insurance premiums. This will have a restrictive impact on the rest of their consumption.¹³²

The sharp line in the debate (on whether or not, and to what extent, social insurance should be made more efficient, more insurance-like, and more influenced by market rationalities) is to what extent social insurance is apprehended as a means for (extended) redistribution. In 1995, two years after the economist Jan Bröms had participated in an ESO report¹³³

¹³¹ 'Motion till riksdagen 1995/96:Sf6'. Author's translation.

¹³² 'Motion till riksdagen 1996/97:Sf225', p. 5 f. Author's translation.

¹³³ Ds 1994:81, presented by ESO (Expertgruppen för studier i offentlig ekonomi) at the Department of Finance. The report was severely criticized by Tapio Salonen in 1994 as representing outdated, 1980-ish, neo-liberal, economic opinions and for spreading unfounded myths on the effects of the generous welfare state, see Salonen, Tapio, p. A4.

favouring a more 'concentrated' social insurance with an increased insurance character, he published a 'disillusioned' article in *Dagens Nyheter*, in which he makes the following analysis:

What has given rise to this article is the clear tendency that the political system is dodging the problem of discussing the real questions that high unemployment and recurring old views on sickness should raise, instead of constructing its frontlines around old ideas about financing and the redistributive effects that can be obtained within the social insurance systems. It is all about fees above and below the ceiling, the shifting of costs between the municipalities and the state, instead of about what we really want to achieve within the frame of the welfare systems and what is a rational division between, for instance, the municipalities and the state from the point of view of efficiency.

It will be a foolish debate if all politicians in all situations are underlining the redistributive aspects rather than the qualitative aspects of their particular areas. To effect a levelling of incomes between upper and lower middle class groups can hardly be the most important function of the social insurance system. For this, there are other systems. In the long run, it is not of much use to anybody if every minister carries out his own redistributive policy in every single question that lies beside general taxation policies. There is also a definite risk in the area of social insurance that through all the Robin Hood ambitions you will lose the grip on and legitimacy for what should be the main target of the systems.¹³⁴

On the other hand, in spite of the political 'Robin Hood' voices of the 1990s, this was a decade when the problem of a rising 'new poverty' was discussed and the once so significant egalitarian character of the Swedish model was questioned.¹³⁵

6.4.4 Individual needs and social risks

The severe economic crisis of the 1990s laid bare the basic functions of the welfare state. The individual need of income compensation in case of lacking self-support became urgent for many in a situation characterized by high unemployment figures and a 'closed' labour market. The individual need for insurance allowances as well as payments from social assistance expanded drastically and during parts of this period the system was under severe pressure.

¹³⁴ Bröms, Jan, *Dagens Nyheter*, 951218, p. A4. Author's translation.

¹³⁵ Articles on growing poverty were more frequent by the end of the decade, see for instance: *Dagens Nyheter*, 981115, p. A10; *Dagens Nyheter*, 990821, p. A17; *Dagens Nyheter*, 990916, p. A4.

Although the ultimate design of social insurance was at the front of an intense public and political debate, it is still possible to find common ground, basic requisites, that a large majority of the debaters agreed upon. There is an overall support for a general welfare system with mandatory insurance protection, based on a – more or less clear-cut – principle of replacement of lost earnings, stressing the importance of an active work-line. Still, the debate also reflected a clear disconsensus on how to comprehend the ultimate social risks and what strategies best served the Swedish society.

The Green Party was alone in favouring a ‘non-growth’ ideal and, thus, they became fairly isolated in the debate, representing one extreme position on the political scale, a position that eventually, by the end of the decade, resulted in a proposal for a citizen’s wage. Another ‘extreme’, most clearly represented by the standpoints of the Moderate Party, disclosed a general distrust of the comprehensive – interfering – welfare state. Still, and maybe more specific for the time period, was the friction within the Social Democratic Party, caused by different opinions on how to best construct social insurance.

When the principle of replacement of lost earnings was questioned, in the debate as well as *de facto* through different reforms, this could be interpreted as a weakening of support for the values of ‘social stability’. When Hans Zetterberg, in 1995, describes the ‘principle of replacement of lost earnings’ as a brilliant social invention, he does this emphasizing the simultaneous support for values of social stability and values of individual freedom:

The principle of replacement of lost earnings is a brilliant social invention. Carrying this along, you can always compete freely for a better job and a higher salary. The level you reach at a certain stage is guaranteed by the state up to a certain percentage. All the time, after accidents and misfortunes, you can come back and get a higher salary which, in turn, will be guaranteed by the state. Thus it is always possible to retain your position fairly well, as in a conservative society, that is, the standard of living you have reached, and, as in a liberal society, you can always improve that standard. When a misfortune occurs you can keep your habitual standard of living fairly well via the income guarantee, whether your standard was high or low. Thereby, the risk of depression and discouragement is counterbalanced.¹³⁶

Zetterberg’s argumentation supports the conclusion that the principle of replacement of lost earnings is compatible with values of ‘*social stability*’ and values of ‘*individual freedom*’ simultaneously. It is true that in the 1990s, some of the criticism against the principle of replacement of lost

¹³⁶ Zetterberg, Hans, *Dagens Nyheter* 951020, p. A2. Author’s translation.

earnings came from an economic, liberal standpoint, along with arguments of increasing and activating market rationalities within social insurance. Still, the criticism voiced from the Green Party and the Centre Party emerged from a concern that the redistributive capacity of the system did not work as more people were excluded from the labour market and were threatened by poverty. Thus, in a situation where social insurance construction no longer managed to support values of *'social equality'*, by supporting values of *'social stability'*, the previous manifest support for the system began to break down and unholy alliances were formed as ideological opponents were united in their criticism of the principles behind the prevailing schemes.

6.5 The concentration policy in a discursive context

The 'policy of concentration' and, thus, the aim to create (more) 'concentrated' social insurance schemes, was launched by the social democratic government in the mid 1990s, as one strategy among others intended to result in decreased public spending. In Chapter 3 above, the main official arguments put forward in favour of this policy have been outlined.

The 'policy of concentration' was primarily implemented through the decisions by parliament to accept the two government bills in which the policy was formed.¹³⁷ The first bill, presented to parliament in February 1995, included the following major changes of relevance to the distribution of sickness cash benefit: 1) A so-called 'clarification' of the sickness concept, 2) The introduction of a mandatory in-depth assessment after four weeks of sick-listing, in which the 'insurance physician' (previous to the 1995 reform called 'appointed (confidence) physician')¹³⁸ was obliged to participate, and 3) The abolishment of a special regulation which made it easier for individuals above the age of 60 to receive disability pension.¹³⁹ In the second bill, presented in parliament in September 1996, the aim to 'concentrate' social insurance was distinctly formulated, as was the ambition to make all causes for incapacity for work except the

¹³⁷ Prop. 1994/95:147 and Prop. 1996/97:28.

¹³⁸ The title 'physician of confidence' is a literal translation from Swedish. The origins of this expression are unknown to me but the title was used solely for the distinct group of physicians who worked on behalf of the social insurance offices.

¹³⁹ This was possible as the assessment of capacity for work allowed for a consideration of non-medical circumstances too, for instance, the situation on the labour market.

‘strictly medical’ ones irrelevant in sickness insurance. In this second bill, it was also proposed that the assessment of capacity for work was to be performed according to the previously described ‘step-by-step method’.

Below, the two bills and the response they generated in parliament, form the basis for an analysis of the discursive context surrounding, and to some extent emanating from, the policy of concentration.

6.5.1 Several concentrated schemes or one ‘working life insurance’?

As is obvious from the above, the position taken by the government, as it embraced the strategy of ‘concentration’, was not based on a broad political consensus across the political party boundaries. Quite to the contrary: different proposals suggesting a comprehensive ‘working life insurance’ or a ‘loss-of-income insurance’ were presented in parliament during the 1990s.¹⁴⁰ Thus, several political parties would have preferred social insurance solutions that, in sharp contrast to the concentration policy, did not emphasize the different causes for incapacity for work, such as sickness, unemployment and occupational injuries, but rather focused on the common traits: lack of capacity for work or lack of income. Even among individual social democratic representatives in parliament, one could detect some concern and caution sprung from fear of the possible effects of an implemented policy of concentration.¹⁴¹ Overall, the issue of how to best design social insurance evoked an intense and sometimes high-pitched debate.

Still, when the government proposed the two bills, that were the basis for an implementation of the ‘concentration policy’, these did not generate a distinct criticism from the Moderate Party, the Centre Party or the Liberal Party. Nor is any such pointed criticism towards the idea of concentration as such to be found in other motions by these parties during the relevant period. Although both the Centre Party and the Moderate Party belonged to those in favour of a more coherent ‘working life insurance’, these parties chose not to criticize the idea of more concentration explicitly.¹⁴² The fourth of the ‘traditional’ non-socialist parties, the Christian Democrats, by and large gave the government their active support, echoing some of the official arguments for the concentration policy.

¹⁴⁰ See for instance ‘Motion till riksdagen 1996/97:Sf224’; ‘Motion till riksdagen 1996/97:Sf225’; ‘Motion till riksdagen 1996/97:Sf254’.

¹⁴¹ See ‘Motion till riksdagen 1996/97:Sf248’.

¹⁴² ‘Motion till riksdagen 1996/97:Sf224’.

In 1996, in response to government bill 1996/97:28, the Christian Democrats made the following statement:

It is a positive thing that the systems now are changed according to the government report (SOU 1995:149) in the direction towards concentration and clarification. They give more positive incentives to the insured. Of the total cost, a somewhat larger part will reach those who are most in need. It is right from the point of view of redistribution policies and is consistent with Christian Democratic views.

The picture of our society's costs for problematic areas will be more fair. By accounting various cost centres correctly, the basis for future decisions on welfare politics will be improved. The possibility for the individual to get accurate help should also improve.¹⁴³

The Green Party, along with the Left Party, were the most fierce critics of the government policy. The Greens sharply rejected the 'trend' of concentration, claiming that it lacked connection with reality and that it was a social democratic construction revealing mainly a 'fiscal striving for entering the costs into the correct account!'¹⁴⁴ The Green alternative favoured more co-ordination between existing schemes, as well as a fusion of distinct schemes into one, more comprehensive and coherent, social insurance covering sickness but also disability and unemployment.¹⁴⁵

The Green Party and the Left Party developed their criticism of how the concentration policy was doomed to fail (or even worse, succeed at a high cost of human suffering and increased social exclusion).¹⁴⁶ The Green Party argued as follows:

To divide a person into one part who has bad health, another with a weak position on the labour market and a third part who has social problems – this does not work in practice and is, moreover, inhuman. We suggest instead that the qualification for the common, long-lasting insurance is based on an assessment of the total situation of the insured.

For someone who has health problems, of course, the medical assessment carries much weight. But it cannot be the only decisive factor. You must also take into account the person's age, psychological health problems and the possibility to get work with the residual capacity for work that he/she possesses. Possible social problems must also be included.¹⁴⁷

¹⁴³ 'Motion till riksdagen 1996/97:Sf 4'.

¹⁴⁴ 'Motion till riksdagen 1996/97:Sf225'.

¹⁴⁵ 'Motion till riksdagen 1996/97:Sf225'. The Moderate party and the Centre party also elaborate on different technical solutions of a more encompassing, comprehensive, character.

¹⁴⁶ 'Motion till riksdagen 96/97:Sf241', p. 7 f.

¹⁴⁷ 'Motion till riksdagen 1996/97:Sf225', p. 19 f., see also 'Motion till riksdagen 1996/97:Sf6', p. 13.

When the first bill (1994/95:147) was presented in 1995, the different political parties in opposition revealed a concern mainly for the effects of the abolition of the 'elderly regulation'. The Moderate Party was in favour of this change, but makes the following remark as to the possible consequences of its implementation:

At the same time as the regulations for the elderly are abolished, there is a clear risk that the costs for people above the age of 60, who are not being employed in regular working life and are not qualified to get an early retirement pension, will be laid on the social services of the municipalities. It is remarkable, to say the least, that the government in its proposal does not in any way comment on this fact and the problems that may arise in relation to the abolishment.¹⁴⁸

This concern for the elderly was also expressed by the Christian Democrats, who wanted safeguards to be elaborated in advance, before implementation, to make sure that this group would not be hit too hard by the proposed changes.¹⁴⁹ The Green Party and the Left Party were both critical of the abolishment of the elderly regulation, but the Green Party alone expressed this criticism by arguing that the work-line should not be as applicable for people above the age of 60 as for those below. Thus, the difference in opinions was no longer just on a level of timing, but revealed a more far-reaching clash of standpoints.¹⁵⁰

At this early stage, spring 1995, the Green Party stands alone in its elaborated criticism of some of the basic building blocks of the concentration policy. The 'clarification' of the sickness criterion is questioned and described (with a reference to the opinion of the National Social Insurance Supreme Court) as discriminating, unclear, contradictory, and as a step backward in our understanding of what is sickness and what is health.¹⁵¹ The bottom line, according to the Green Party, was that the reform was mainly a charade put on to save money and that it would have been more suitable if the government had presented it as such.¹⁵²

In response to the second government bill (1996/97:28), that included a proposal to introduce the 'step-by-step method', several of the traditional non-socialist parties expressed a concern for how the application of this model in the assessment of capacity for work would affect the situation for small entrepreneurs.¹⁵³ The Green Party was consistent in its criti-

¹⁴⁸ 'Motion till riksdagen 1994/95:Sf13'.

¹⁴⁹ 'Motion till riksdagen 1994/95:Sf16'.

¹⁵⁰ 'Motion till riksdagen 1994/95:Sf17'.

¹⁵¹ 'Motion till riksdagen 1994/95:Sf17'.

¹⁵² 'Motion till riksdagen 1994/95:Sf17'.

¹⁵³ 'Motion till riksdagen 1996/97:Sf3'; 'Motion till riksdagen 1996/97:Sf5'; 'Motion till riksdagen 1996/97:Sf7'.

cism of the concentration policy as such, and distinctly expressed a concern for how the reform would hit 'people with a complex mixture of ill-health combined with a weak position on the labour market' of whom many are women:

... it /is/ frightening to read in the government bill, even in the introduction, the statement that the bill hits women hard, but that the government does not feel that special solutions can be constructed for 'special sickness groups'. Women are not a special sickness group and therefore we can only reject the bill in its entirety and ask the government to come back with a bill about the right to early retirement pension and sickness cash benefit, which is not said to be discriminating even before it comes into force.¹⁵⁴

The Left Party is by now just as indignant and accuses the government of cynicism and of representing the politics of a brutal society:

The government takes no responsibility whatsoever for people who cannot continue in their work because of being worn out by their work tasks. The government writes: 'If there is no opening for another job with the employer or if such a job requires rehabilitation activities over too long a period, the insured person's capacity for work should be assessed against other work normally available on the labour market.' There is not a word about what will happen to the person whose capacity for work has been assessed to be enough for managing another job 'normally available on the labour market' if this job does not exist. There is no hint that the government cares or intends to take on any responsibility by, for instance, commissioning the Ministry of Labour to prepare a proposal for a solution.¹⁵⁵

In summary, the political spectrum shows a set of political parties that propose social insurance solutions which, contrary to the concentration policy's streamlining of distinct schemes, are more comprehensive, resulting in a 'working life insurance' or a 'loss-of-income insurance'. Such parties are the Moderate Party, the Centre Party and the Green Party. Still, when the concentration policy is launched, there is only one party that objects distinctly and consistently on a level of principles – the Green Party. Other parties are more or less critical of the proposed changes, not least the Left Party, but their criticism tends to stay on a technical and nitty-gritty level. The government receives the strongest support for the idea of 'concentration' from the Christian Democrats. The Liberal Party is surprisingly silent on the matter.

Concentration, pursued by emphasizing the difference between the various insurance schemes, was a way of getting on top of escalating de-

¹⁵⁴ 'Motion till riksdagen 1996/97:Sf6', p. 12. Author's translating.

¹⁵⁵ 'Motion till riksdagen 1996/97:Sf8', p. 17 and 18. Author's translating.

ficits. An insurance construction where an emphasis on strict criteria defines a sharp border between those included and those excluded in the system might not reflect the complexity of the actual social needs of individuals, but such a system is, at least on an abstract level, easier to control. The alternative to the concentrated schemes, voiced in the 1990s, was to create some version of a coherent and comprehensive 'loss-of-income insurance'. Such a construction, it was argued, would better correspond to acquired knowledge and a multifaceted reality. The concentration policy would, according to its critics, only touch the surface of the problem, and by avoiding to deal with complexity, the reform would only result in increased problems somewhere else. This would, according to the critics, result in fewer beneficiaries in sickness insurance but more in unemployment insurance and/or on social assistance. The departmental report that preceded the government bill 1994/95:147 was sent out for comments to a large number of different institutions, such as, for instance, different social insurance offices spread over the country. It is interesting to note that among these offices it is possible to detect the same spread of opinions, as accounted for above. Thus, the actual first-hand experience of dealing with decisions on access to insurance benefits did not necessarily result in similar attitudes towards the reform.¹⁵⁶

6.5.2 Excess usage and administrative control mechanisms

The question of excess usage, abuse and deceit is a recurring theme in the Swedish social insurance debate. Although no political party trivialized the problems connected to abuse in Sweden in the 1990s, there was a noticeable difference as to whether abuse was considered to be a paramount problem or not. In 1997, this question was directly approached in a government bill, in which the government suggested a number of quite far-reaching changes, with the official aim to combat abuse and deceit.¹⁵⁷ The bill, and the response it received, reveals not only shifting interpretations of the *de facto* situation, but it also reveals how the different political parties diverge in terms of suggested strategies. The bill included, for instance, a highly criticized proposal that the social insurance offices were to be allowed to make unannounced house calls in order to check if the recipients of allowances were indeed rightful recipients of

¹⁵⁶ One of the most critical responses is provided by the insurance office in the County of Stockholms (1994-09-08, AD 1994.867:02), an example of positive response is provided by the insurance office in the County of Örebro (1994-09-12).

¹⁵⁷ Prop. 1996/97:121.

allowances.¹⁵⁸ On a more general level, visible in the overall debate on sickness insurance, the perceived high levels of excess usage resulted in demands for more efficient administrative control mechanisms (mainly argued by the government) as well as for reforms to make the insurance less attractive (mainly argued by the Moderate Party).

When the government argued in favour of a more concentrated social insurance and introduced the concentration policy, this was also motivated by the need to combat deceit. Stricter and more precise criteria, as well as a strengthened role for the insurance physician, were tools that would provide the administration with more forceful control mechanisms to be used against excess usage. By reacting against deceit with more control and/or less attractive schemes, it was argued that the legitimacy of the social insurance system would be strengthened. As part of this analysis, the role of medical experts was debated. Along with the social democrats, the Moderate Party also argued for the need to increase the level of objectivity in the medical assessments of the insured individuals. One way to do this, it was argued by the Moderate Party, was to introduce an element of 'peer reviewing' in the assessment process:

By requiring certificates from two physicians, you avoid a situation where the treating physician acts as 'the patient's lawyer.' Then you can get a more objective assessment of the patient's condition. The second physician should be a specialist in an area that corresponds to the diagnosis that the treating physician has issued for his patient. Even today, a patient has to go through a rehabilitation assessment before the insurance office will accept an early retirement pension. This can become an imperative demand.¹⁵⁹

The Green Party provides the most explicit critical arguments in response to the above analysis, as well as in response to the recommended policies following the analysis. The underlying assumption of excess usage and deceit is criticized as such. The government is accused of introducing reforms that violate the integrity of citizens in a way which 'legitimizes prejudices and misconceptions about the scope of deceit and people's right to support' and 'the government thus helps to create a situation where people turn against each other in suspicion or even become informers as a consequence'.¹⁶⁰

Following this position, where deceit and excess usage is not perceived as core problems, there is a concern that reforms which increase the con-

¹⁵⁸ Criticism can be found in the following motions: 'Motion till riksdagen 1996/97:Sf29'; 'Motion till riksdagen 1996/97:Sf31'; 'Motion till riksdagen 1996/97: Sf30'; and 'Motion till riksdagen 1996/97:Sf28'.

¹⁵⁹ 'Motion till riksdagen 1994/95:Sf205'.

¹⁶⁰ 'Motion till riksdagen 1996/97:Sf29'.

trol mechanisms of the administration threaten to drastically weaken the position of the individual. In response to the first bill linked to the concentration policy, (prop.1994/95:147), the Green Party is concerned that the overall impact of the suggested reforms is that the role of the insurance offices is strengthened in relation to both treating physicians and patients.¹⁶¹ In direct response to the suggested 'in-depth investigation', to be conducted after four weeks of sick-listing and with the obligatory contribution of the insurance physician, the Green Party writes:

We partly agree with the argument that an assessment by more than one physician may be relevant and with the need for a deeper examination of the right to sickness cash benefit. But when the assessment of the social insurance office is given more weight relative to the physician's certificate, at the same time as the individual is indirectly required to take part in the additional examinations suggested by the social insurance office, then the individual's integrity is weakened in two steps.¹⁶²

A concern for the weakened position of the individual, in line with what the Green Party expressed in the above reference, resulted in a number of different political motions during the second half of the 1990s. It was, for instance, suggested that an 'ombudsman' should be instituted that could guard the interests of the individual.¹⁶³ It was also argued that the position of the individual should be strengthened by increased access to legal assistance, in cases related to social insurance which result in conflicts to be resolved by the courts.¹⁶⁴

In summary, the issue of deceit was not controversial as such. All political parties agreed that the legitimacy of the social insurance system was dependent on a low level of tolerance against excess usage and deceit. Still, the discrepancies between the political parties were manifest when it came to how the actual situation in the mid-1990s was to be described and as regards the strategies to be used against the alleged problem. The reforms implemented at this time are based on the apprehended need to increase the efficiency of the administrative control mechanism. The cost for this is a weakened position for the individual in the process of determining access to sickness cash benefit.

¹⁶¹ The strengthened position vis-à-vis the treating physicians is noted and welcomed by several of the insurance offices in their response to Ds 1994:91.

¹⁶² 'Motion till riksdagen 1994/95:Sf17'.

¹⁶³ 'Motion till riksdagen 1994/95:Sf17'. This proposal was also supported by Siv Persson (fp), who was responsible for a number of motions in reflecting a concern for the individual's legal position versus the administration and the insurance physician, see: 'Motion till riksdagen 1996/97:Sf203'; and 'Motion till riksdagen 1996/97:Sf204'.

¹⁶⁴ 'Motion till riksdagen 1994/95:Sf220'. See also 'Motion till riksdagen 1995/96:Sf20'.

6.5.3 From ‘appointed (confidence) physicians’ to ‘insurance physicians’

The government bill from 1995 included, as previously noted, a proposed change of terminology and, when implemented, the former ‘appointed (confidence) physicians’ became ‘insurance physicians’.¹⁶⁵ This change is carried out in a context where the government argues that the function of the medical experts working at the social insurance offices needs to be clarified. It should be made clear, according to the government, that the insurance physicians work on behalf of the social insurance offices and that their function is to scrutinize the medical material available to the social insurance offices and provide the social insurance officials with medical advice.¹⁶⁶

In the same process as the title ‘appointed (confidence) physician’ was changed to ‘insurance physician’, the role of insurance physicians in the decision-making process was formalized. Before 1995, the officials at the social insurance offices could decide when, and if, to consult the ‘appointed (confidence) physician’ (although there were certain guidelines). After 1995, the participation of the insurance physician became compulsory in connection with a so-called ‘in-depth investigation’ that should take place after four weeks of sick-listing.¹⁶⁷ Further it is noted that after 1995 the medical expert used by the social insurance offices (the insurance physician), increasingly is referred to as an expert in ‘insurance medicine’.

A close study of the developments surrounding the function of the medical expertise used by the social insurance offices reveals a shift that reaches beyond a mere change of terminology. In order to lay bare the development of ‘insurance medicine’ as a field of knowledge and expertise in its own right, it is necessary to look back in time. The origins of the concept of ‘insurance medicine’ can be traced to the beginning of the 1980s or maybe the end of the 1970s. ‘Insurance physicians, or their predecessors, the ‘appointed (confidence) physicians’, have a much longer history, but the concept of ‘insurance medicine’ seems to have come into use during this period.

Each social insurance office was to have one or more medical experts at their disposal.¹⁶⁸ This was regulated in the National Insurance Act as

¹⁶⁵ Prop. 1994/95:147.

¹⁶⁶ Prop. 1994/95:147, p. 37.

¹⁶⁷ Prop. 1994/95:147, p. 30 f.

¹⁶⁸ For a long time, there has been a recognized need by the authorities administering social allowances to have access to medical expertise of their own. In 1913, a first ‘old age’ insurance was introduced in Sweden, and not long after that the ‘Royal Pension

early as 1962.¹⁶⁹ In a government report from 1960, discussing the organization of social insurance, a suggestion was made on how decisions regarding disability pensions should be made and also on the role of medical expertise in these cases:

Considering that the medical assessment of the cases will be particularly important, two physicians should be part of every delegation. Here, it should be taken into account that in every case concerning disability pension there will be a physician's report at hand, as it does now. If there is only one physician in the delegation and he is of another opinion than the physician who gave the report, one physician's opinion will stand against the other's in the delegation's examination, which cannot be regarded as fortunate. For an insured person, and surely also for his physician, it will then be harder to accept an adverse decision, whereby the authority of the delegation may be flawed. One of the physicians in the delegation should, it seems, be the appointed (confidence) physician who is appointed by the insurance office. The other physician should be appointed by the National Medical Board. As the 'confidence physicians' also are appointed by the National Medical Board, the department will influence the appointment of the two medical members.¹⁷⁰

Board' decided to institute health care facilities that would provide a medical foundation for decisions regarding access to social allowance. In 1916 and 1918, two hospitals were acquired. These two hospitals would eventually become hospitals of the National Social Insurance Board. Apart from the initial function to provide a basis for decision-making, the hospitals also provided some rehabilitation programs. In the mid-1990s, the parliament took an interest in the activities of the hospitals and requested the government to start inquiries that would clarify and analyze the future role of these institutions. In December 1997, an official report was presented to the government, and on the basis of this report, a government bill was proposed suggesting that the hospitals should be phased out and replaced by 'Centres of Insurance Medicine'. Thus, apart from the medical experts working at, or for, the local social insurance office, there are also other experts available to the administration.

¹⁶⁹ National Insurance Act, chapter 18, § 12. According to this paragraph one or two appointed (confidence) physicians were to be employed by the insurance office. 'The confidence physician is to assist the insurance office in matters that require medical expertise and is to try to promote co-operation between the insurance office and the physicians working in the relevant area.' (1964). In 2002, this paragraph corresponds to National Insurance Act chapter 18, § 15, in which the function of insurance physicians is described as to: '... assist the insurance office with medical expertise and work for good co-operation between the insurance office and the physicians working in the relevant area.' According K.G. Scherman, former director-general of the National Social Insurance Board, there were medical doctors working as experts for the social insurance offices already back in the 1930s. In the 1960s, there were a few dozen physicians working as appointed (confidence) physicians in the whole country; in the beginning of the 1980s, there were 300. See *Försäkringsmedicin 1984. Referat och minnesanteckningar*, p. 33. In 2000 there the comparable number was 427, see Wendel, Lotta, 2002, p. 246.

¹⁷⁰ SOU 1960:35, p. 105.

Already at this early stage there is a clear emphasis on the role of medical experts in the decision-making process, but so far the medical expertise of the social insurance administration is not described as experts in 'insurance medicine'. They are medical experts, physicians, working on behalf of the social insurance officials, and thus, they do not differ in their expert knowledge of medicine from the treating physicians.

The fact that the insurance physicians do not meet the insured but make an assessment on eligibility on the basis of available medical documentation in the case, has been the cause of a lot of criticism.¹⁷¹ In 1983, a member of parliament suggested that the 'appointed (confidence) physician' should make a clinical investigation on the status of the insured.¹⁷² In response the Social Insurance Committee in parliament argues that the 'appointed (confidence) physician' does not make decisions. The role of the 'appointed (confidence) physician', the committee underlines, is strictly to provide guidance; they should, on the basis of the medical certificates written by the treating physician, help the official at the social insurance office understand the medical material:

As has been maintained by the National Social Insurance Board, the task of the appointed (confidence) physician is primarily to clarify and explain, on the basis of the treating physician's certificate, the status of the insured to the responsible official and, if needed, require additional information from the treating physician. The aim of the system of appointed (confidence) physician is, however, not that he should take the place of the treating physician and after an examination of his own give the insurance office advice on what should be decided. If that should happen, there is a definite risk that the relation between the patient and his physician as well as the relation between this physician and the appointed (confidence) physician will be negatively affected. [...] In the committee's opinion, it is of advantage for the case, when it is taken to the regional insurance courts, that it is examined by people who are independent of the insurance office. The committee therefore cannot agree with the proposer of the motion that the insurance office's appointed (confidence) physician in these cases should be required to examine the insured, thereby influencing the judgement of the appeal courts.¹⁷³

In this response from the Social Insurance Committee, it is to be noted that 'insurance medicine' is not a concept used. Nowhere in the text is

¹⁷¹ For a critical analysis of the function of insurance physicians in the decision-making process, in which several problematic aspects linked to this institution are highlighted, see Wendel, Lotta, 2002. Wendel's analysis focuses on the implications for legal certainty given the strong position of the insurance physician. Criticism of this kind has also been voiced in the public debate, see for instance Nyström, Sune, 1999.

¹⁷² SfU 1983/84:1.

¹⁷³ SfU 1983/84:1, p. 4.

there a reference to a special field of 'insurance medicine', and it is not maintained that the role of the 'doctors of confidence' should be to secure that decisions made are screened through this professional knowledge.

In 1984, when the concept of 'insurance medicine' is used by one of the directors of the National Social Insurance Board, Göran Smedmark, it is stated very plainly that the concept is new and not very clear as to its meaning.¹⁷⁴ Traditionally, according to Smedmark, medical questions relating to social insurance have been treated as part of the medical discipline 'social medicine', but according to Smedmark, the National Social Insurance Board would like to introduce a concept of 'insurance medicine' that is not linked to any specific medical sub-discipline. Instead Smedmark argues that there is an aspect of 'insurance medicine' in all medical disciplines and what is added, (and thus specific for 'insurance medicine'), is 'the legal conceptual framework of social insurance with the restrictions, determined by regulation and implemented in legal acts, preparatory work and court practice, which are not always in concordance with the opinions based on strictly medical experience'.¹⁷⁵

In the 1980s, there was an increased emphasis on the role of insurance physicians as educators. It was argued that future physicians should be trained in 'insurance medicine' during their education, and the National Social Insurance Board produced a 'textbook' in 'insurance medicine'.¹⁷⁶ Education in 'insurance medicine' was at this time provided to students of medicine under the umbrella of social medicine. There were also courses offered to physicians after they had finished their medical studies.¹⁷⁷ It seems, although it is not clearly stated, that this education was not primarily for future insurance physicians. On the basis of the structure and content of the textbook, it may be concluded that the courses included an introduction to social insurance legislation and that emphasis is put on the technique of writing efficient sickness certificates. The aim of the education apparently was to increase the awareness among treating physicians of the importance (and complexities) involved in the writing of sickness certificates, and they were not courses for students/physicians with an ambition to become insurance physicians themselves.

¹⁷⁴ Smedmark, Göran, 1984, p. 41.

¹⁷⁵ Smedmark, Göran, 1984, p. 41.

¹⁷⁶ Riksförsäkringsverket, 'Försäkringsmedicin, allmän försäkring', Försäkringskassförbundet, 1983. At this time, in 1993, there was apparently no regular education in insurance medicine offered at the medical faculties, although, the National Social Insurance Board had started offering a course for medical students in Göteborg. This course consisted of two parts; a 2–4 day course during the students's fifth term and a 3–4 days course that occurred later during their education, as they were practicing medicine. See: Försäkringsmedicin, 1984, p. 75.)

¹⁷⁷ SOU 2000:121, p. 54 f.

A year later, in 1984, the National Social Insurance Board organized a conference on the theme of 'insurance medicine'.¹⁷⁸ The conference documentation includes a handbook regulating the working practices of the social insurance offices. In this handbook the role of the 'appointed (confidence) physician' is described as follows:

The role of the appointed (confidence) physician in the examination should be medical and not concerned with aspects of insurance. The questions should be as direct as possible. That increases the opportunities for the appointed (confidence) physician to make assessments which clarify the medical status of the insured and on which the insurance officials can base their insurance decisions. Examples of such questions may be the following:

- Is the sickness (diagnosis) of the insured clarified?
- Which treatment is the insured being given for his sickness?
- What does the reduced function involve?
- Which work tasks can the insured carry out with his reduced function?
- Is there a need for on-the-job training to clarify the functional reduction of the insured?¹⁷⁹

Again, it may be noted that although the term 'insurance medicine' is now used, the 'appointed (confidence) physician' is not asked to synthesize knowledge of medicine with knowledge of social insurance regulations. The role of the 'appointed (confidence) physician' is still to clarify the concrete consequences of the medical diagnoses presented by the treating physicians. It is the social insurance officials who are supposed to know the regulations and make the final analyses. It is the social insurance official who should '... assess the medical information along with other factors, such as social reports and insurance legislation'.¹⁸⁰

In contrast to the debate on the function of 'the appointed (confidence) physicians' that took place in the 1980s, the debate of the 1990s, underlines the specific competences embedded in the profession of insurance physicians and thus also points to a specific field of knowledge: the discipline of 'insurance medicine'. In the 1980s, the 'appointed (confidence) physician' was still basically a treating physician who, on a part-time basis, also acted as an adviser to the officials working at social insurance offices. The role, as it was described in the 1980s, was primarily to 'interpret' the specialist language of medical diagnoses provided by the treat-

¹⁷⁸ *Försäkringsmedicin 1984. Referat och minnesanteckningar* and *Försäkringsmedicin 1984. Förhandsdokumentation*.

¹⁷⁹ *Försäkringsmedicin 1984. Förhandsdokumentation*, p. 9.

¹⁸⁰ Sheerman K.G. 1984, p. 34.

ing physicians, making them comprehensible to a layman in medicine. In the 1990s, the insurance physician is more often described as an expert in 'insurance medicine', holding on to an expertise that consists of the capacity to combine knowledge of medicine with knowledge of legal requirements.

In a booklet published in 1998, an effort is made to structure and analyse, in a scientific way, what exactly should be understood as an investigation based on the principles of insurance medicine. In this booklet, a distinction is made between 'documentation on an insurance medical basis' and 'investigations based on insurance medicine'. 'Documentation' is the normal assignment for an insurance physician working at the social insurance office. That is, the written procedure described above, where the insurance physician makes an assessment of the medical information provided by treating physicians in a specific case and writes a report of her or his findings. 'Investigations', on the other hand, are clinical investigations where different specialists work in a team and make assessments in direct contact with the insured. These kinds of assessments used to be performed at the National Social Insurance Board's hospitals, but are since 2001 performed at 'centres of insurance medicine'.

In conclusion, it is suggested that when the 'appointed (confidence) physician' disappeared in 1995 and was replaced by the 'insurance physician', this was not a mere change of terminology but an indication that a new kind of expertise was needed at the social insurance offices. Since the mid-1990s, 'insurance medicine' has quickly evolved into a platform of knowledge in its own right. Previously representing traditional medical knowledge and functioning as a 'translator' between treating physicians and social insurance officials, the expert in insurance medicine instead came to add distinct professional knowledge to the assessment process, rather than 'just' translating. By the end of the decade, more education in 'insurance medicine' is called for and there are suggestions to install academic positions to safeguard research in what has now evolved into a distinct field of knowledge.¹⁸¹

6.5.4 The values of the concentration policy

When the choice was made to pursue the policy of concentration, in spite of the known weaknesses of the reform, it also followed that values of '*social stability*' were challenged as sickness insurance no longer was as in-

¹⁸¹ It is symptomatic for this development that in 2002 a new textbook in insurance medicine was published. The book is intended to be used by students in medicine during their education. See Järholm, Bengt and Christer Olofsson, 2002.

clusive as previously. Groups of insured individuals who previously had received allowances from the insurance were no longer eligible. Still, as the reform was directly focusing on extracting groups in society from the insurance who were already in a weak position (individuals with a mix of medical and social problems, individuals with diffuse symptoms, and individuals above the age of 60), it could be argued that the insurance still provided protection for those with an established position in society and on the labour market. Thus, the reform mainly set aside values of *'social equality'*. It could be argued that the reform was in line with values of *'individual freedom'* or, put differently, individual responsibility – another aspect of individual freedom. At least, the reform gained support due to the credibility it obtained by arguments emphasizing increased efficiency, increased control capacity and, in the end, increased responsibility for individuals to provide for her or his own subsistence.

One could also interpret the concentration policy as an effort from the state (representing the interests of the collective) to take command over a situation in which the demand for social protection was escalating to such an extent that the system was threatened. As part of a strategy to take command, the strong position of the individual was weakened. One example of this process is the weakened position of the treating physician (affiliated with her or his patients) as a medical expert in the decision-making process, and the simultaneous creation and support of new expertise in the field of *'insurance medicine'*.

6.6 Concluding summary

The present chapter began with an overview of typical features identified by different researchers and aimed to capture the specific characteristics of the Swedish welfare state. The traditional Swedish welfare state was described as being, for instance, universal, redistributive, inclusive and de-commodifying. It was concluded that in spite of the crisis of the 1990s, these traditional qualities were still recognizable, although observations were made that identified changes and trends which to some extent challenged this portrayal of the Swedish welfare state. Such observations talked of diminishing generosity, increased income inequality, a shift from de-commodifying to re-commodifying policies and of a system more responsive to diversified demands.

These empirically based observations were supported by the analysis made of the normative foundation. The *'traditional'* Swedish welfare state, described as normatively based on a *'successful'* interaction between the value cluster of *social stability* and the value cluster of *social equality*, gained,

at least during a certain period, strong popular and political support. Still, during the 1990s, the winning concept of a system that at the same time protects 'established position' and manages to support the redistribution of 'basic capabilities' was under pressure. In response to the crisis, the system was tightened; the demand on individuals to become more flexible and adaptive increased, and, at the same time, the individual demand for a more diversified offer of services increased. Values linked to the cluster of individual freedom gained influence, but there is no sign (as of yet) of a new mutually reinforcing 'pact' between different clusters of values, similar to the one described above. Instead, there are indications of increased tension as the system fails to deliver, not only what it once used to, but also what would be a new model of welfare. Although the normative base for the traditional universal Swedish style of welfare state is still comprehensive, the tensions in the system, stemming from different and contradictory normative positions, open up for criticism from all directions.

Against this background of different value clusters, the discourses surrounding the social insurance reforms in the 1990s were penetrated, and, as could be expected, the tensions previously identified reappear in the bills and motions presented in parliament at the time, as well as in the surrounding political debate. It is to be noted that the idea of 'concentration' was not uncontested. Several of the political parties represented in the parliament favoured the idea of a comprehensive 'working life' insurance. Still, as the relevant bills were presented, they did not meet much resistance (except from the Green Party). Against the background of a critical budget situation and escalating deficits, the access to insurance was tightened, the need for control was emphasized and the position of the individual weakened. In order to secure the implementation of the reform, the position of insurance physicians was strengthened and the status of 'insurance medicine' as an independent and distinct discipline was enforced. These reforms were not actively supported by a political consensus, but the objections made were quite weak.

7 Technical solutions providing income coverage to those unable to work for a living

As a third source generating *societal conceptions of justice*, I have studied *technical solutions*. Previously, *technical solutions* have been described as ‘solutions that constitute intentional legal constructions carrying the objectives of the legislator’. In this chapter my aim is to provide an outline of the different instruments available for risk protection in case of inability to provide for oneself in Sweden during the 1990s. The outline serves the purpose of giving input to a description of the interface situation that occurs when *law as a provider of legitimacy* is used as a tool for mediating conflicts regarding access to social protection.

When *technical solutions* were introduced as a source generating *societal conceptions of justice* in Chapter 2, it was underlined that the different instruments are perceived as ‘intentional’, as opposed to ‘applied’ legal constructions – two concepts introduced by Glavå and Petrusson to replace the traditional legal preoccupation with *de lege lata*.¹ The following outline of insurance schemes and collective agreements should, accordingly, not be confused with dogmatic analysis, nor should it be understood as a description of applied law, but as an indicator of *intentions*. Technical solutions in the form of statutory law and contractual agreements, carrying the ambitions of the legislator and other actors, are presented as important sources for feeding conceptions of what is fair to expect in case of inability to provide for oneself. Although, admittedly, many individuals have an imprecise knowledge of the available technical solutions, and even less knowledge of all the details linked to different specific instruments, it is proposed that the complex web of instruments, communicating the intentions of different actors, is an important factor generating *societal conceptions of justice*. In modern welfare states, such as Sweden, the fact that obligations and commitments responding to indi-

¹ For a discussion on the importance of separating ‘intentional legal constructions’ from ‘applied legal constructions’ see Glavå, Mats and Ulf Petrusson, 2002.

vidual needs and social risks are legally protected, is not only generally known but also the source of a circulated public knowledge that generates notions of what is fair to expect in case of emerging need.

There is a 'mapping' ambition in this chapter where not only those instruments that are overtly focused on incapacity for work caused by sickness are included, but also the instruments created to confront the social risks of disability, occupational injury, unemployment and 'inability for other reasons'. It is well-documented that different social protection schemes interact to the extent that demarcations made in one instrument often affect the others.² It has also been noted that periods with a high level of employment (with a large share of the adult inhabitants in work) are often accompanied by excessive usage of sickness cash benefits.³ The results of the 'mapping' is presented as text in the 'insurance-catalogue', but also graphically – in the form of a recurring figure that summarizes the main descriptive and analytical observations made. By using a circle, with the individual imagined in the centre, I want to illustrate how the expectations fed by the intentional legal constructions can be understood, in general, as well as by those who are confronted with distinct practices in a specific case

In this study, an interest is taken in the scope of the criteria 'sickness' and 'capacity for work' when used as demarcations in sickness insurance. One important aspect of the concentration policy is that demarcations between those eligible for compensation and those not eligible were tightened. In order to get an overview of the implications of such a tightened policy, it is necessary to include in the outline of technical solutions also those instruments that are interconnected with sickness insurance, to the extent that if an individual is denied access to sickness insurance, she or he is likely to turn up as a recipient of some other allowance. It is this situation that has led to the decision to include all instruments intended to respond to the overarching social risk situation of inadequate self-support, in the mapping exercise. There are laws instituted to address the risk of individuals running into periods of income loss, but there are also private and collective contractual agreements confronting the same phenomenon. The total picture, including all the relevant instruments, is

² The interaction between these instruments for income compensation has been highlighted in official reports as well as in research. See for instance: SOU 1994:148, a report that includes several researchers' approach to the theme of interacting systems. See also: Roos, Carl Martin, 1990. Insight in this field is also one of the causes for the emphasis put on co-operation between the different administrative units responsible for the instruments providing income compensation as well as other services. See p. 101 above.

³ See Lindqvist, Rafael, 1987, p. 66. Lindqvist has even concluded that the existence of a sickness insurance system can, to some extent, be seen as an alternative to unemployment (ibid. p. 37.)

complex and includes public, private and collective instruments responding to a variety of situations of need and risk.

The chapter is structured as follows: Initially, the logic of the mapping exercise is presented (7.1). This section is followed by an account of the mapping exercise, i.e. the ‘insurance catalogue’ (7.2). While in 7.2, the different instruments are described one by one, focus in section 7.3 is on the overall protection system, all the various instruments included. The chapter ends with an analysis of technical solutions as a source for societal conceptions of justice (7.4).

7.1 Income coverage in situations of inadequate self-support – the mapping exercise

There are many reasons why an individual may lack ability to earn a living. In the Swedish welfare state, inability to earn a living will not force an individual into extreme poverty, starvation or begging. Depending on the cause of the inability, different social protection measures are available that will provide different levels of income compensation (or an income substitute) and they will also put different kinds of demands on the individual. The scheme below gives an overview of various causes for why an individual may be unable to earn a living:

Figure 7.1. *Different causes for inadequate self-support*

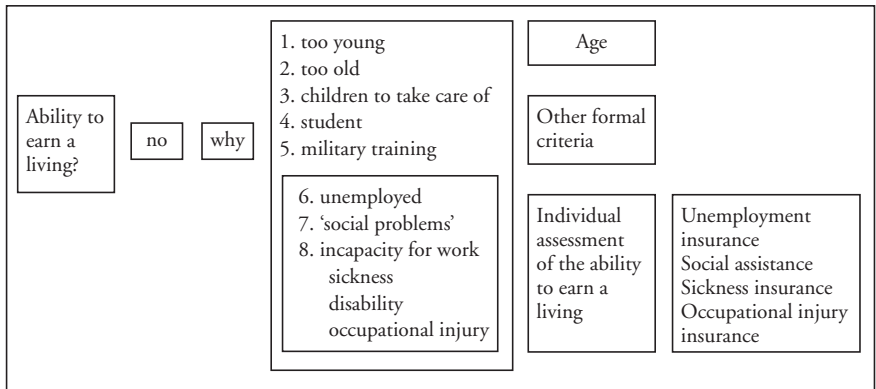


Figure 7.1. A scheme describing different causes for lack of ability to earn a living and the kind of criteria that the social protection instrument demands in order for the individual to receive of some kind of income substitute (in the last box of the figure, there are examples of statutory instruments providing such compensation/substitute).

Above, some of the possible causes for why an individual could be lacking ability to work are listed. There is in the model a distinction made that separates the social risks where the individual, in order to receive support from some kind of social protection measure, will be the object of an assessment of her or his individual ability to earn a living. From the model, it is also possible to conclude which are the main statutory social protection instruments provided in case there is inability to earn a living due to unemployment, incapacity for work or social problems. It is between these different instruments that potential interaction between schemes is most evident.

In the mapping exercise, an interest is taken in the specific instruments where the criteria to obtain an allowance are dependent on an individual assessment of causes and abilities. By this delimitation of the study, I am not suggesting that there is no interaction between, for instance, the parental insurance and the unemployment insurance, or between early retirement and incapacity for work. It is, to the contrary, reasonable to suppose that individuals in their calculation of how to manage at different periods in their lives also elaborate with instruments of social protection that are met with formal criteria. Still, I have chosen to include in the mapping exercise only social protection instruments where there is an individual assessment of the abilities of the individual to work for a living, as I find it reasonable to suppose that the interaction between these instruments is, or can be, occurring more frequently. Thus, although formal criteria also can be relative to some extent (the politicians can, and do, for instance, change the age of retirement as well as the age for how long a child has a right to be supported by the parents), formal criteria are still not relative neither in their everyday practice nor on an individual basis. To the contrary, the criteria of sickness and capacity for work (in sickness insurance), 'occupational injury' (in occupational injury insurance), 'fit for work' (in the unemployment insurance) and 'need' (in social assistance) are all dependent on an individual assessment.

One of the difficulties in the execution of the mapping exercise has been to determine how detailed the account of data should be. Too many details might lead astray, away from the overall purpose of this exercise. On the other hand, if too rudimentary, the description of technical solutions might not provide the material necessary for the analysis. As an example, it may be noted that in this weighing of how much technical data to include, the specific situation of the self-employed and of the cross-border workers, have been indicated, but not fully accounted for.

I have, as mentioned above, made an outline of available income protection provided in case of sickness (7.2.1), long-term or permanent loss of capacity for work (7.2.2), occupational injury (7.2.3), unemployment

(7.2.4), and in cases where there are no other alternatives (7.2.5). An overview of the different instruments (schemes and agreements) of relevance is presented in the table below:

Figure 7.2. *Different instruments of importance in case of inability to provide for oneself*

	Law:	Collective:	Private:
Sickness	Act on Sick Pay National Insurance Act	AGS AGS-KL ITP ALFA agreement AB agreement (AB-01) General Wage and preferential agreement	Private sickness insurance Group insurance
Long term of permanent loss of capacity for work	National Insurance Act	AGS AGS-KL ITP PA-91	Private sickness insurance Group insurance
Occupational injury	Occupational Injury Insurance Act	TFA TFA-KL PSA	Life, sickness and accident insurances
Unemployment	Unemployment Insurance Act	AGB AGE TA-agreement AGF-KL	Private 'income insurance' offered by insurance companies and unions.
Last resort	Act on Social Service		

Figure 7.2. An overview of the different instruments providing income compensation in case of inability to provide for oneself.

When studying the above instruments (public, collective and private), I have in particular looked at the following five factors:

- 1) The administrative organization.
- 2) The personal scope of application.
- 3) Qualifying time.
- 4) The criteria to be eligible for benefits, especially the interpretation of 'sickness' and 'capacity for work'.
- 5) The level of income compensation.

The selection of the factors above has primarily been determined by their capacity to influence the range of coverage offered in the different in-

struments. It is obvious that the factors ‘personal scope of application’, ‘qualifying time’ and ‘criteria’ are decisive for determining who is covered and who is not, but the factor ‘level of compensation’ also carries information about the actual scope of the instrument in focus. For an individual with a large income, the ceiling in an insurance scheme can drastically decrease the extent to which the ‘principle of replacement of lost earnings’ is effectuated. For an individual with a small income, a low level of income compensation can be insufficient for self-provision.

Thus, the level of income compensation or the existence of a ceiling are incentives that from an individual perspective might make it more rational to describe the causes of the experienced inability according to one instrument rather than others. From a state perspective, factors such as qualifying time, criteria and personal scope of application might be used to control the state budget. Different administrative actors, with their own budget responsibility, might have an interest in the demarcation of the limits of their responsibility. This might be true of the administrators of public, collective and private instruments respectively, but also of different public administrators and between the state and the municipalities.⁴

7.2 An ‘insurance catalogue’

As the actual account of insurance instruments is approached, it should be remembered that the content of this outline is a description of ‘intentional legal constructions’, an entity not to be confused with ‘applied legal constructions’. Accordingly, the following outline describes constructions, formed by basic values and current discourses documented in the previous chapter, carrying the objectives of the legislator and other actors involved. The importance of these legal constructions in the present work

⁴ An example of such practices was provided in the TV program ‘Uppdrag granskning’ (SVT1, ‘Uppdrag granskning’, 030304, 08.00 pm). One of the individuals (KL) interviewed in the program had been sick-listed full-time for severe pain symptoms. The insurance physician claimed that KL had full capacity for work and was thus not eligible for either sickness cash benefit or rehabilitation measures. While KL had been sick-listed by his treating physician, the unemployment office, on their side, claimed that he was not fit for work and thus not eligible for unemployment benefit. In this locked situation, where KL claimed he had no capacity for work and where the authorities did not find him eligible for any insurance allowances, his economy was drained. The different compensation systems are interconnected to the extent that if an individual is denied compensation in one of them, he or she will be likely to turn up as a recipient of one of the others. In a worst case scenario, as in the example above, the demarcation between different categories of income compensation can lead to situations where the individual does not fit anywhere and will thus find her- or himself in an in-between-situation.

is based on my view that they constitute an essential source for generating societal conceptions of justice at a critical point of intersection between individual and collective interests, an intersection characterized by conflicting positions, based upon discrepancies in values, interests, knowledge and power. Here this intersection, or interface, concerns the determination of access to social protection.

The outline includes not only traditional ‘insurance’ schemes but also social assistance, therefore the use of citation marks around ‘insurance’. There are two reasons for this. The first reason is that, whatever other differences there might be, insurance schemes as well as social assistance are sources of cash allowances that help individuals to provide for themselves when their ability to do so by working is failing. The second reason for the inclusion of social assistance is that during the 1990s, there were an increasing number of recipients of social assistance who needed this contribution, as the allowance received from the social insurance schemes was not enough to give adequate support. Thus, individuals became recipients of social assistance although the cause for the inadequate self-support was one that usually is thought of as covered by social insurance: sickness, disability or unemployment.

In the following ‘catalogue’, an account is provided of important developments in the different insurance instruments and agreements during the 1990s and, if linked to the period, also developments that proceeded into 2002–2003. The more specific and detailed data is, in general, updated to January 2002. The reform of the statutory protection in case of long-term or permanent disability is marked by discussions carried out in the 1990s, and thus, I have decided to include the results of this reform (implemented in January 2003). When necessary, I have included specific figures representing the amounts of different allowances. In the choice of currency, I have chosen to account for these in both Swedish crowns and in euros.⁵

7.2.1 Income compensation in case of sickness

The different instruments dealt with in this section are the following: sick pay (Sick Pay Act), sickness cash benefit (National Insurance Act), collective insurance instruments (AGS, AGS-KL, ITP, the ALFA agreement, the AB agreement and the General wage and preferential agreement), and private insurance instruments (income compensation insurance in case of sickness). These instruments are described in order, starting

⁵ The sums accounted for in euros have been rounded off; the exchange rate is given for August 2003 (also for historical figures).

with the instruments provided for in statutory law and ending with the voluntary private insurance instruments. In Chapter 3, I provided a detailed account of the major developments in the sickness insurance during the 1990s.

Income compensation based on statutory law

The Sick Pay Act was implemented on January 1, 1992, and is thus a product of the 1990s. Between 1992 and 2002 a number of changes were made in legislation. The most radical change was to increase the sick pay period from 14 to 28 days. In force from January 1, 1997, the reform was pulled back again on April 1, 1998.⁶ Apart from the paragraph regulating the length of the sick pay period, the paragraph most frequently in focus during the 1990s was the one determining the level of compensation. When introduced, sick pay equalled 75 percent of the wage and other emoluments during the first three days of sickness and 90 percent of the wage and other emoluments the remaining 11 days. On April 1, 1993, a waiting day was introduced, but levels of compensation remained the same. On January 1, 1996, the level of compensation was lowered to an overall 75 percent, and the waiting day stayed intact. Two years later, on January 1, 1998, the level of compensation was raised to 80 percent, but the waiting day remained. The other factors of interest to this study – personal scope of application, qualification time and the criteria to be eligible – did, apart from some smaller adjustments, stay the same during this period. The small adjustments made were to the benefit of individuals with irregular employments.

The **administration** of the sick pay rests with the employers. It is the employer who should be informed in case an individual is absent from work due to sickness and it is the employer who is responsible for payments. The employer should inform the social insurance office if an individual is still sick when the period of sick pay has ended.

Those who are ‘employed’ have a right to sick pay; thus, the **personal scope of application** in general covers the employees. There are special rules for those who are employed for a short period of time (see below under ‘qualifying period’). Those not considered to be ‘employed’, but still eligible (for instance the self-employed), can be paid sickness cash benefit during the same period.

In general, all employees have a right to sick pay from the first day of work and there is no **qualifying period**, although there are special rules for those who are employed for a short period. If the agreed period of employment is less than a month, the employee has a right to sick pay

⁶ Since July 1, 2003, the sick pay period is 21 days.

only if she or he has worked continuously during a period of fourteen days before absence. If someone is employed for several short time periods by the same employer, the period of employment should be added up if the periods between employments are not longer than 14 days.⁷

The **criteria** that should be fulfilled in order for an individual to be eligible for sick pay are regulated in law:⁸

Sick pay is paid in case of sickness which reduces capacity for work. Also counted as sickness is a condition of reduced capacity for work caused by sickness for which sick pay has been paid according to this law or sickness cash benefit according to the National Insurance Act (1962:381), the Occupational Injury Insurance Act (1976:381), The State Personal Injury Protection Act (1977:265) or according to equivalent older legislation, and which still remains when the sickness has ceased.

In the assessment of whether and to what extent the capacity for work is reduced, particular attention should be paid to whether the employee because of the sickness is totally or partially incapable of carrying out his ordinary or some comparable work.

In order to fill the necessary criteria to obtain sick pay, capacity for work should be reduced because of sickness. As a certificate from a medical doctor is not required until the 8th day of absence, it is in most cases the individual who makes this assessment.

The law specifies that the assessment of capacity for work should be done in relation to the employee's ordinary, or comparable, work. *De facto*, it could be concluded that apart from the obligation to present a certificate on the 8th day of sickness, there are few control mechanisms at this early stage of sickness.⁹ It is not until the period of sickness has been longer than the demand on the individual increases and the criteria of sickness and capacity for work function as demarcations for those who are allowed into the system and those who are not.

The **level of compensation** during the sick pay period is, after a waiting day with no compensation at all, 80 percent of the wage and other

⁷ Sick Pay Act, § 3.

⁸ Sick Pay Act, § 4.

⁹ To affect short term sick-listing, economic incentives have been widely used. Compensation levels have been elaborated and made progressive. The introduction of a waiting day is also one of these measures, making it expensive to be sick-listed especially the first days of sickness. The fact that an employee has to inform the employer directly about the fact that she or he is sick, has also been mentioned as a factor discouraging 'unnecessary' sick-listing.

emoluments.¹⁰ The employer will pay sick pay until and including the fourteenth day.¹¹

From day fifteen of a sickness period, the social insurance office pays **sickness cash benefit**.¹² During the period 1992–2002, changes were made in the National Insurance Act on 191 different occasions (and many of these occasions concerned different reforms and affected several chapters in the Act and a number of different schemes). Of these 191 occasions, 72 directly concerned the specific chapter that regulates sickness cash benefit. All five different factors focused upon in this overview were in focus of the reforms during the 1990s, although some were more drastically changed than others: The *administration* of sickness cash benefit was greatly affected by the sick pay reform, since the administrative responsibility for almost all cases of short-term sickness (less than 15 days), from 1992 and onwards, was shifted from the social insurance offices to the employers. The *personal scope of application* may not have changed so much in terms of the daily experience of the majority of individuals covered by the insurance, but the introduction of a new Social Insurance Act in 1999 was an important adaptation to the new situation in which Sweden, as member of EU, had to comply with the demands put on social insurance schemes through the policy of free movement of labour. Still, the two factors involved in most changes in the 1990s are *criteria* and *level of compensation*. The shifts and changes related to the assessment of ‘sickness’ and ‘capacity for work’ have been presented in Chapter 3 above. The shifting levels of compensation during 1992–2002 follow the levels of the sick pay accounted for above. During the relevant period, the rules for how to calculate the ‘income qualifying for sickness allowance’ were elaborated to the effect that the compensation paid to the insured was lowered.¹³

The **administration** of sickness cash benefit is handled by the social insurance offices and supervised by the National Social Insurance Board.

¹⁰ Sick Pay Act, § 6.

¹¹ The length of the sick pay period has been debated intensely. As mentioned above, the sick pay period was extended to 28 days during 1997, and then it was changed back to 14 days. In an official report published in the beginning of 2002, it was suggested that the sick pay period should be extended again, this time to a period of 60 days. Since 1 July, 2003, the sick pay period is 21 days (SOU 2002:5, Part 1).

¹² Since July 1, 2003, sickness cash benefit is paid from day 22 and onwards.

¹³ Prop. 1995/96:209. The stricter principles of how to calculate ‘income qualifying for sickness allowance’ were in force from 1 January, 1997. On 1 July, 2003, the calculation of ‘income qualifying for sickness allowance’ was tightened again for budget reasons; the sum calculated should since then be multiplied by 0.97 before applied, see prop. 2002/03:100.

The **personal scope of application** is regulated in the Social Insurance Act.¹⁴ Sickness cash benefit is a work-based insurance and covers, as a main rule, those who are working in Sweden. To be ‘working’ is defined as being in gainful employment in the country.¹⁵ It is sometimes possible to be eligible for sickness cash benefit even if you are not working, thus those who are unemployed, on parental leave or studying, can also be eligible for sickness cash benefit.¹⁶

There is no **qualifying period** in the statutory sickness insurance. There is a minimum requirement in the insurance that has to be met in order for the insured to be eligible for remuneration, but this requirement is not related to a period of time in work or employment. It is required that the insured has a minimum yearly income that reaches 24 per cent of the price base amount.¹⁷

In Chapter 3 above, the **criteria** that have to be met in order for someone to receive sickness cash benefit were discussed in some detail. To be eligible your capacity for work must be reduced (by a certain degree) due to sickness. The assessment of capacity for work should be performed according to the step-by-step model. Below, the relevant paragraph is quoted:¹⁸

Sickness cash benefit is awarded if sickness reduces the insured person’s capacity for work by at least a quarter. In the evaluation of the possible presence of sickness, one should disregard labour market, economic, social and other circumstances. As sickness is also counted a condition of reduced capacity for work caused by sickness for which sickness cash benefit has been awarded and which remains when the sickness has ceased.

If the insured person lacks capacity for work, full cash benefit is awarded. If capacity for work is not fully lost but is reduced by at least three quarters, a three quarters sickness cash benefit is awarded. If capacity for work is reduced to a smaller degree but at least by half, half a sickness cash benefit is awarded. Otherwise, a quarter of a full cash benefit is awarded.

In the assessment of whether the capacity for work is reduced by 100 per cent and if the insured person can be supposed to go back to his or her or-

¹⁴ The Social Insurance Act was implemented in 2001 and it was created as part of a Swedish adaptation to EC-regulation. Whether or not an instrument is work-based, or based on settling, has consequences for those individuals who, for instance, are settled in Sweden but work in another country. See Erhag, Thomas, 2002, p. 331 f.

¹⁵ Social Insurance Act, chapter 2, § 7, and chapter 3, § 4.

¹⁶ National Insurance Act, chapter 3, § 5.

¹⁷ National Insurance Act, chapter 3, § 1. In 2002, the price base amount was 37,900 SEK (4,169 euro).

¹⁸ National Insurance Act, chapter 3, § 7.

dinary work, it should be specifically considered whether the insured, because of the sickness, is unable to carry out his or her ordinary work or other suitable work temporarily offered by the employer. If the insured, because of sickness, has to refrain from working for at least a quarter of his or her normal working time on a particular day, his or her capacity for work should be regarded as reduced by at least the corresponding degree that day.

If the insured person cannot be expected to go back to his or her ordinary work or to other work with the same employer, the assessment of the capacity for work should specifically include a consideration of whether the insured can earn a living after the measures accounted for in § 7b or chapter 22.

If it is decided, after a Section 4 assessment, that the insured person cannot return to work with his or her employer, nor earn a living through other work normally available on the labour market, the assessment of capacity for work should specifically include a consideration of whether the insured, after a measure according to § 7b or chapter 22, can earn a living through work normally available on the labour market or other suitable work that is available to the insured.

If there are special reasons, the assessment of capacity for work may also include a consideration of the insured person's age, household situation, education and training, earlier occupation and other similar circumstances. The assessment of capacity for work according to Sections 4 and 5 is to be carried out in relation to a full-time employment, at the most.

The **compensation** paid from the sickness insurance is a percentage of the 'income qualifying for sickness allowance'. If the income is low, the compensation will also be low. If the income is high, there is a ceiling in the insurance lowering the compensation. In 2002, the level of income compensation in the public sickness insurance was 80 percent.¹⁹ There is a ceiling with the effect that sickness insurance will not compensate for loss of income that climbs above the ceiling. There is no formal limitation on the time period that sickness cash benefit will be paid. The period ends either because the individual is no longer sick, or because sickness is determined as permanent. In the latter case, the individual concerned will be paid compensation through sickness compensation (see below,

¹⁹ Compensation is 80 % of the 'income qualifying for sickness allowance', divided by 365. When determining the 'income qualifying for sickness allowance' of an individual, the income above 7,5 price base amounts is not taken into account. In 2002, this ceiling in the insurance affected incomes above 284,200 SEK/year (31,262 euro). The price base amount was 37,900 SEK (4,169 euro) in 2002. On 1 July, 2003, the calculation of 'income qualifying for sickness allowance' was tightened for budget reasons; the sum calculated was to be multiplied by 0.97 before applied.

section 7.2.2, 'Income compensation in case of long-term or permanent loss of capacity for work'). The self-employed are not covered by the sick-pay system but can receive sickness cash benefit during the equivalent period.

There is a possibility for the insured to be paid **rehabilitation cash benefit** instead of sickness cash benefit.²⁰ The **criteria** to obtain rehabilitation cash benefit are that the insured, with a reduced capacity for work due to sickness, participates in work-related rehabilitation with an aim to shorten the sickness period or prevent and/or abolish the reduction of capacity for work.²¹ In certain periods, this reward has been higher than the sickness cash benefit, but in 2002, the **level of compensation** was the same in both instruments.

Income compensation from collective insurance schemes and agreements

To supplement statutory sickness insurance, agreements have been made by the different actors on the labour market to the effect that on top of the sickness cash benefit an employee can receive extra remuneration in case of incapacity for work because of sickness. This allowance could be either a supplementary sick pay based on agreement or a payment from a collective insurance. The gap filled in this way is the gap between 80 and 90 percent of the 'income qualifying for sickness allowance', and for those with an income above the ceiling also the gap between 90 percent of the 'income qualifying for sickness allowance' and 90 percent of the wage.

The instruments created to provide this economic supplement in case of sickness are different for different groups on the labour market. The Swedish labour market is often described as divided into four main categories, and these categories are covered by different insurance instruments and collective agreements. The four categories and the relevant instruments are: 1) Blue-collar workers organized by the Swedish Trade Union Confederation (AGS insurance), 2) White-collar workers employed in the private sector (supplementary sick pay regulated in the 'General wage and preferential agreement' and ITP insurance), 3) Those employed by the state (the ALFA agreement), and 4) Those employed by the municipalities (AB agreement and AGS-KL insurance).

The **administration** of the AGS insurance is handled by AFA Insurance Centre and Fora Insurance Centre.²² Compensation from the ITP

²⁰ National Insurance Act, chapter 22.

²¹ National Insurance Act, chapter 22, § 7.

²² Fora Insurance Centre is owned by Svenskt Näringsliv and LO and is a meeting-place for the employer as regards collective insurance agreements (www.fora.se). Fora is the

insurance is administered by Alecta (previously SPP). The ALFA-agreement is not an insurance but a collective agreement on 'supplementing sick pay'. The administrators of this supplementing sick pay are the various employers.²³ White-collar workers in the private sector usually have a supplementary sick pay that provides 90 percent of the wage during day 15 to 90 of the sickness period. This applies also to those with a wage above the ceiling. Those employed by the municipalities receive supplementary sick pay based on an agreement (AB-01) that is administered by the employers.

The coverage of the collective agreements and the collective insurances providing income compensation for sickness is broad, but not quite as comprehensive as the coverage of the sickness insurance. There are different rules at work regulating the **personal scope of application** in the various instruments. Those employed by public authorities are covered by the ALFA agreement, with the exception of those who have been assigned work with the support of labour market policies (with one exception).²⁴ In the AGS insurance, there are no such limitations in the personal scope of application; all employees are covered by the insurance.²⁵ For white-collar workers employed in the private sector, there is, during the first 90 days, a supplementary sick pay for all those covered by the collective agreement. The ITP insurance (relevant after the initial period of 90 days of sickness) covers all employees during their employment.

For the AGS insurance, there is a **qualifying period** of 90 days. These 90 days do not have to be with the same employer but must have been with an employer who has signed an insurance contract on AGS or ITP. You can combine different employments to fulfil the qualifying period of 90 days, but previous employments must, at least partly, have taken place during the previous two years. There is a post-employment protec-

administrator of the so-called AFA insurance, which are AGB (insurance concerning severance pay), AGS (agreement on group insurance for illness), TFA (compensatory occupational injury insurance) and TGL (group life insurance). AFA Trygghetsförsäkringsaktiebolag is also in charge of the adjustment of compensation according to the PSA insurance, although the PSA board makes decisions on claims for compensation. For more information, see: www.afa.se.

²³ 'Since 1 July, 1994, the government has delegated employer policy responsibility to the Swedish Agency for Government Employers (SAGE). The government and the parliament no longer directly influence the content of collective agreements on pay or other conditions of employment for staff in the central government sector. Instead, SAGE acts on behalf of instructions from its members, which are all public administrators in the central government sector.' (<http://www.arbetsgivarverket.se>).

²⁴ 'ALFA agreement', chapter 1:1, (Arbetsgivarverket Cirkulär 2001:A).

²⁵ 'Gemensamma villkor för AFA-försäkringarna', § 7. (2001-01-01).

tion in AGS covering 180 days after employment has ceased. If the insured individual becomes unemployed, the insurance covers a maximum of two years after the employment ceased. The same goes for those employed who are on parental leave with full parental benefit. For those covered by the ALFA agreement, there is no qualifying period. In order for the insured to get compensation from the ITP insurance, his capacity for work must be reduced by at least a quarter for a period of 90 days in a row (or a period of 105 days during the last 12 months).

The **criteria** for being eligible for compensation from the ITP insurance include, according to the insurance terms, that the assessment of capacity for work should be made in accordance with the following guidelines:

The degree of disability shall be assessed according to the reduction in the insured person's ability to work that the sickness or injury can be considered to have caused with consideration taken to the objectively evident symptoms. This assessment shall take into consideration not only the insured person's regular work assignments, but also to any normal occupation. However, if the insured requires changed or different work assignments in order to regain the ability to work in whole or in part, the assessment may be based, during a reasonable transition period, on the insured person's regular work assignment.²⁶

In the ALFA agreement, there is no similar definition of either sickness or capacity for work or the relation between these two concepts. The criteria mentioned in the AGS insurance are directly linked to the definition of sickness and capacity for work used for regulating access to sickness insurance in statutory law.²⁷

The **level of income compensation** is directed by a legal construction in the sickness insurance making it impossible for the individual to receive income compensation beyond the level of 90 percent of the income.²⁸ Any kind of supplementary income protection provided by the employer (as sick pay or as remuneration from an insurance based on collective agreements) beyond this level will result in a lowered compensation from the public insurance, to the effect that the total compensation will not be higher than 90 percent of the total income. Compensation from the collective agreements or collective insurances will be paid after the first 14 days of sickness (that is, the waiting day and the 13 days of

²⁶ 'Insurance conditions for Alecta', 2001, Section B, § 6 (the English version is a translation made by Alecta).

²⁷ 'Försäkringsvillkor för AFA-försäkringarna', 2001-01-01, §12.

²⁸ National Insurance Act, chapter 3, § 4a.

sick pay according to law, paid by the employer).²⁹ After this time, the collective insurance or the collective agreement in general add to the level of compensation, on top of the public insurance, an extra 10 percent, to the effect that the insured person gets 90 percent of her or his 'income qualifying for sickness allowance'.³⁰ This added protection remains for sickness lasting up to 90 days.

For workers employed by a company that has signed a collective agreement with the Swedish Trade Union Confederation, the AGS insurance supplements income compensation based on statutory law during the periods when sickness cash benefit or sickness compensation is paid to the insured. The level of income compensation during the first 360 days is 12.5 percent of the compensation paid by the social insurance office (during a period when sickness cash benefit is 80 percent of the 'income qualifying for sickness allowance').³¹

In the sector of white-collar workers and managers (privately employed officials), the comparable protection is a right to 'sick pay according to agreement', an extended sick pay period regulated in the 'General wage and preferential agreement'. The sick pay according to agreement is paid from day 15 to day 90 and fills both gaps earlier identified: the gap between 80 and 90 percent compensation and also compensation for loss of income above the ceiling in the public insurance. After day 90, the ITP sick pension will be paid. ITP (the industry and trade supplementary pension for officials) is the name of the collective insurance agreement for white-collar workers regulating supplementary pensions. The sick pension does not supplement the sickness insurance for the part of the wage below the ceiling, but gives some compensation for the part of the income above it.³²

For those employed by the state, the protection in case of sickness has the same construction as for privately employed white-collar workers: a 'sick pay according to agreement' during the period between day 15 and

²⁹ Since the reform in July 2003, in which the sick pay period was extended from 14 to 21 days, the collective agreements are in a process of being re-adjusted and re-negotiated.

³⁰ 'ALFA agreement', 2001:A8, 6:7.

³¹ 'AGS insurance', §§ 15–16, insurance terms from 2001-01-01.

³² On the part of the wage below 7.5 base amounts, it will not add anything above the 80 percent compensation given by the public insurance. If the wage exceeds 7.5 base amounts but not 20 price base amounts, the compensation from the insurance will be 65 percent on this part. If there is a part of the wage between 20 and 30 price base amounts, that will be the base for a remuneration of 32.5. ('ITP-planen', chapter 8:2).

day 90 of sickness, supplementing the sickness cash benefit.³³ There is also a protection for income levels above the ceiling, set by the public insurance, with the result that if the different insurance instruments are added together, the individual will be compensated with 90 percent of the income between days 15 and 90 of sickness. For those employed by the state, the income protection for incomes above the ceiling is extended beyond day 90, so that 'sick pay according to agreement' will be paid with 80 percent of the income above ceiling.

Those covered by the ALFA agreement, and with wages above the ceiling in the public insurance, have an extended protection to the effect that this group is also compensated with 90 percent of their full income.³⁴ For those employed by the state, this high income protection is extended beyond day 90 of the sickness period, but for this extended period the compensation is lowered to 80 percent of the wage³⁵.

For those employed by the municipalities, the agreement (AB-01) will provide the insured with 90 percent of the income (also for income above the ceiling) during the period 15–360 days. The AB agreement also provides 80 percent income compensation during days 2–14 for part of the income above the ceiling.

Income compensation from private insurance companies

The area between 80 percent and 90 percent income coverage is an area that the private market for sickness insurance is focused on. A private sickness insurance can be constructed in different ways depending on what is agreed upon; for instance, there is a choice of how long the waiting period should be. The different companies will handle the elaboration of the criteria of sickness and incapacity for work in different ways and some examples are provided below.

Folksam elaborates the meaning of the criterion of capacity for work used in the insurance agreement in the following way:

The assessment of capacity for work is based on symptoms that can be objectively determined.

During the first two years of a sickness period – or of the total time of repeated periods of sickness with shorter intervals than a year – the assess-

³³ For those employed by the state, the relevant agreement is the 'ALFA agreement' (1998 and 2001).

³⁴ 'ALFA agreement', Chapter 6:7.

³⁵ 'ALFA agreement', Chapter 6:7.

ment should take into account the competence and training of the insured as well as the type of his regular work. However, if the insured during the period has had an income from other work, this should be regarded in the assessment.³⁶

On the other hand, this insurance company will, when describing the criterion of (in)capacity for work in relation to the sickness section of the group insurance offered by the company, say that the assessment of capacity for work made by the company will normally follow the assessments of the social insurance office.³⁷

In the insurance terms elaborated by *Skandia*, another private insurance company, there is also a distinct demand for an objective basis for making the assessment of incapacity for work. It is to be noted that the insurance company reserves the right to demand of the insured that she or he will take part of medical examinations and follow prescriptions that *Skandia* and a medical physician, in collaboration, give to the insured. In the sickness insurance offered by *Skandia*, there are restrictions introduced to the effect that if the insured within 18 months after having signed an insurance agreement becomes sick in some specifically named sicknesses, the insured is not reimbursed. The specific sicknesses or diagnoses mentioned are: depressive conditions, exhaustion, pain in the back, joints and muscles related to wear and age, fibromyalgia.³⁸ This could be understood as the introduction of an extraordinary qualifying time for some specific sicknesses or diagnoses.

If the terms of the sickness insurance provided by *Skandia* in 2001 are compared with the equivalent terms for 1996, there are some distinct changes to be noted. Apart from the restrictions mentioned above (that have no comparison in 1996), there is also in 2001 a new formulation on how the insurance company will assess capacity for work. While the paragraph that used to regulate this issue in 1996 was fairly short, and as a main rule made it clear that capacity for work should be assessed by the same criteria as those used by the social insurance offices, this has changed in 2001. The paragraph is now much longer and there is no reference made to the assessments made on the basis of the statutory law or the administrative authorities. Instead, as mentioned above, there is a distinct demand for a connection between reduced capacity for work and symptoms or disabilities that can be established objectively.

³⁶ 'Folksam, sjukförsäkring, villkor nr 610'. Author's translation.

³⁷ 'Folksam, Villkor grupp-försäkring'.

³⁸ 'Skandia, Sjukförsäkring, Allmänna villkor av 2001'.

Figure 7.3. A schematic overview of different insurance instruments and agreements available in case of inability to support oneself in case of sickness

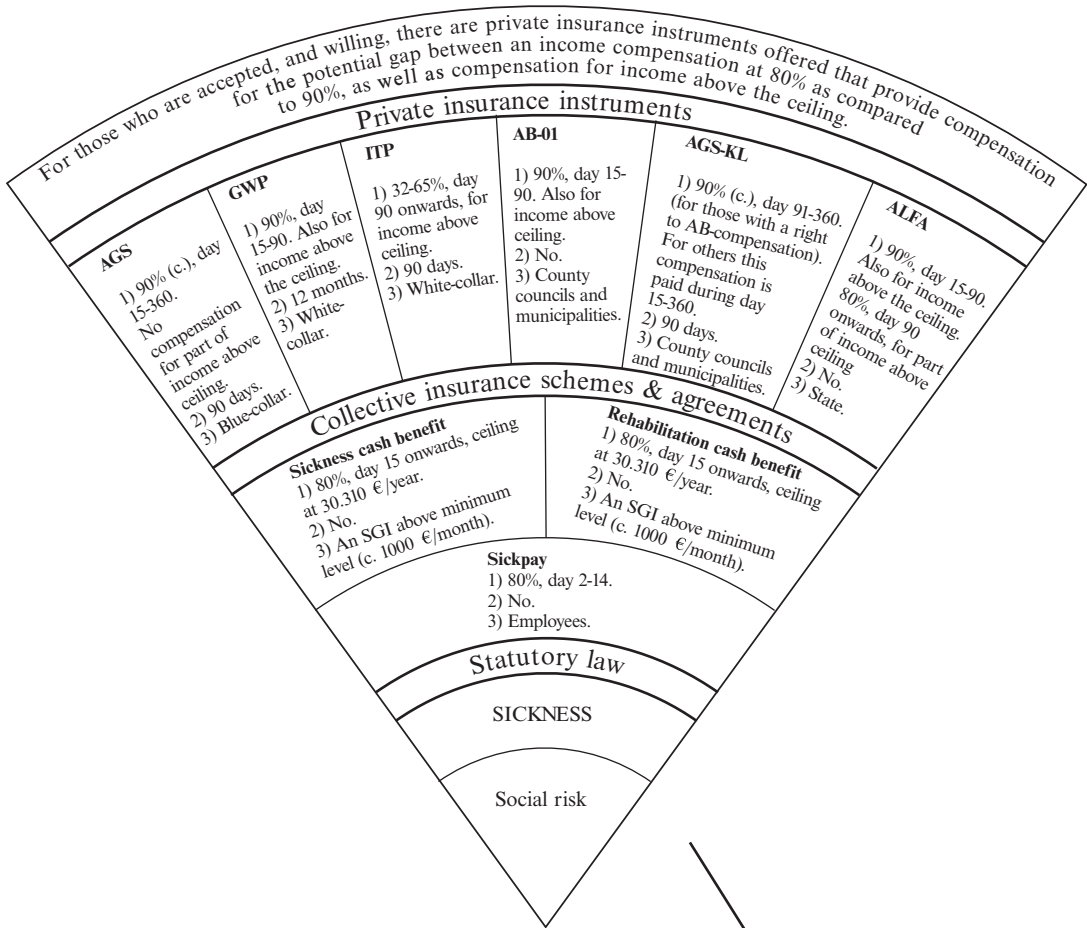
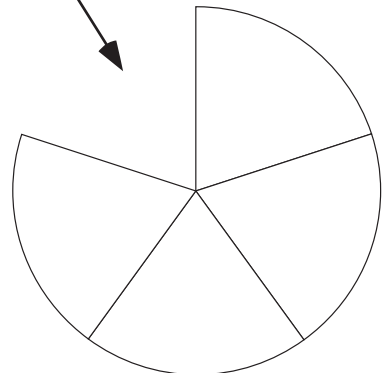


Figure 7.3. The figure contains general information about the income protection available in the form of statutory, collective and private insurance instruments and agreements in case of *sickness*. More detailed information is found in the text above. From the rough summary above, it appears that large segments of Swedish employees receive income compensation in case of sickness, all in all, at a level of 90 percent of SGI (income qualifying for sickness cash benefit), at least during the first 90 days of sickness. 1) Compensation level, 2) Qualifying period, 3) Personal scope of application. Data as of 2002-07-01. Exchange rate as of 2003-08-22 (sums have been rounded off).



7.2.2 Income compensation in case of sickness resulting in long-term or permanent loss of capacity for work

The developments during the 1990s, within the field of income compensation in case of long-term or permanent loss of capacity for work, are marked by a clear ‘concentration’ ambition, an ambition to exclude the possibility for individuals to receive allowances from the insurance for reasons other than ‘strictly’ medical ones. There is also an ambition, apparent already in the early 1990s but not fully pronounced until 2003, to increasingly emphasize the work-line and reduce the actual, as well as the literal, similarity to a pension.

Viewed in a longer perspective, it is clear that the changes of the disability pension in the 1990s to some extent resulted in a re-establishment of the pre-1970 situation. While previous to 1970, the regulation of the disability pension had been strictly based on medical causes for incapacity for work, the 1970s initiated a period of broadening the base for disability pensions. On July 1, 1970, a new paragraph was introduced in the Act regulating disability pensions, according to which special consideration was to be taken for individuals who had reached a certain age. This so-called ‘elderly paragraph’ was directed towards those who were 63 years old (at this time, the retirement age was 67) and who were considered to have difficulties in asserting a position on the labour market. In 1972, the reform was reinforced by a change that made it distinctly clear that for those considered to be ‘older’, it was possible to get a disability pension strictly on the basis of labour market reasons (i.e. unemployment). For this category of insured, there did not have to be a medical basis for the decision to grant a disability pension. In 1976, the retirement age was lowered to 65 years and the ‘elderly paragraph’ became applicable for those between the age-span 60–65. The elderly paragraph was abolished in 1991 as part of the concentration policy.³⁹

In January 2003, after a long political process and several volumes of analytical work presented by a governmental committee as well as a working group at the Department for Social Affairs, the disability pension and the temporary disability pension were reformed and re-named.⁴⁰ The

³⁹ SOU 1994:148, p. 12 ff. See also Chapter 6.

⁴⁰ The 2003 reform is presented in Prop. 2000/01:96. The reform is a consequence of the introduction of a new pension system implemented in 1998 and fully in force in January 2001. See the Income-Related Old Age Pension Act and the Guarantee Pension Act. The disability pension was based on calculations linked to the old pension system and thus the reforms of the pension system necessitated a reform also of the disability pension. It should be noted that different analyses of how to handle the social risk of ‘sickness causing long-term or permanent incapacity for work’ had been presented by a

new names ('sickness compensation', 'temporary sickness compensation' and 'activity compensation') are an indicator of the distinct emphasis on the work-line that is one of the characteristics of the reform.

Income compensation provided by statutory law

The social insurance protection providing income compensation in case of long-term or permanent disability consists of the three instruments mentioned above: 1) sickness compensation 2) temporary sickness compensation and 3) activity compensation. The economic compensation that is paid to the insured in all of these three instruments can be of two different kinds: a) an income-related compensation and b) a guarantee compensation.

All three instruments mentioned above are **administered** by the social insurance offices under the supervision of the National Social Insurance Board.

The **personal scope of application** is regulated in the Social Insurance Act. The income-related compensation and the guarantee compensation (tied to all three instruments) have different scopes of application. The income-related compensation is a work-based insurance and covers those who are working in Sweden and have been earning a pensionable income for at least a year during a certain time frame the year before incapacity for work occurs.⁴¹ The guarantee compensation is an insurance based on settling and available to those not covered by the income-related compensation (or where compensation from the income related insurance is below a certain level).⁴² The guarantee compensation is dependent on a **qualifying time** period. To be considered as 'settled' according to the law, an individual should have his or her actual place of residence in Sweden. An individual who arrives in Sweden and 'can be assumed' to stay for a longer period than a year, should also be considered as 'settled'

governmental committee in 1997 (SOU 1997:166 and SOU 1997:189) as well as by a working group at the Department of Social Affairs in 2000 (Ds 2000:39 and Ds 2000:40), and thus, the reform of the disability pension was also guided by ambitions separate from the mere technical adjustment related to the new calculation of old age pension. Such ambitions were, for instance, to create a connected insurance that dealt with all types of cases where sickness caused incapacity for work (short-term and long-term) and, in the spirit of the 'work-line', to stimulate the insured to re-enter the labour market.

⁴¹ The time frame is 5 years for those who are 53 years of age or more at the time of a demand for compensation from the insurance, 6 years for those who are 50 but not yet 53 years of age, 7 years for those who are 47 but not yet 50 years of age and, finally, 8 years for those who are 46 years old or less when a demand for compensation from the insurance occurs. See National Insurance Act, chapter 8, §§ 1 and 2.

⁴² See also comment in footnote 14 above.

(unless there are strong reasons to the contrary). An individual living in Sweden but who is leaving the country should be considered as settled in Sweden if the period abroad could be assumed to last for a maximum of one year.⁴³

The **criteria** that should be fulfilled in order for the insured to be eligible for sickness compensation or activity compensation are that she or he has a capacity for work that is reduced by at least 25 percent for medical reasons, and that this reduction is assumed to last for at least a year.⁴⁴ To be eligible for 'sickness compensation', the insured has to be within the age-span 30–65 years, and capacity for work should be assumed to be reduced permanently. For 'temporary sickness compensation', the same age criteria are applicable, but capacity for work should be assumed to be reduced temporarily, not permanently. Apart from the difference in the assumed prolongation of the incapacity for work, no difference is made between these two instruments.

To be eligible for 'activity compensation' the insured should be in the age-span 19–30 years. The right to activity compensation is granted for three years in a row, at the most. After that period, the need for prolonged compensation will be examined again.

The criterion of 'capacity for work' is formulated as follows in the National Insurance Act:

In the assessment of the degree of reduction of capacity for work, attention should be paid to the insured's ability to provide for himself through work that is normally available on the labour market or through other suitable work available to the insured. The assessment should follow the same principles irrespective of the kind of reduced capacity that is present. The value of household work in the insured's own home should, to a reasonable degree, be considered comparable to income from work.

If there are specific reasons, the assessment of the reduction of capacity for work may also take into account the insured's age as well as the insured's household conditions, education, previous occupation and other similar circumstances. The assessment of capacity for work according to the first section should be related to full-time work.

If the insured is subjected to a measure of the type stated in Chapter 3, § 7b, the capacity for work should be assessed to be reduced during the period that the measure lasts if the insured cannot work for a living because of this measure.⁴⁵

⁴³ Social Insurance Act, chapter 2, § 1.

⁴⁴ National Insurance Act, chapter 7, § 1.

⁴⁵ National Insurance Act, chapter 7, § 3, to be compared with the similar wording of chapter 3, § 7, regulating access to the sickness cash benefit. Both paragraphs were changed

The equivalent paragraph regulating access to sickness cash benefit is longer and more detailed. The step-by-step method that should be applied in the sickness insurance is for natural reasons not applicable any more – the decision on whether or not to give someone sickness compensation is, so to speak, the final step. Otherwise, the wording that defines the scope of capacity for work and also the possible exceptions is almost identical. The criterion of sickness is not distinctly elaborated in the paragraphs regulating the sickness compensation.

The shift from sickness cash benefit to sickness compensation is made after an assessment of the capacity for work in each specific case. There is no sharp time limit that separates one type of instrument from the other.

The criteria that have to be fulfilled in order to obtain temporary sickness compensation are the same as above, with the difference that capacity for work can be assumed to be reduced for at least a year, if not permanently.

The **level of income compensation** is dependent on whether the insured is eligible for an income-related compensation or for a guarantee compensation. The guarantee compensation will provide those who have no, or a very low, income-related sickness compensation with an allowance up to the level of 2.4 price base amounts. For insured individuals below the age of 30 receiving activity compensation, the guarantee level is dependent on their age. For instance, the level of compensation for those below the age of 21 is 2.1 price base amounts, while it is 2.35 price base amounts for those who are 29 years old.⁴⁶

The level of the income-related compensation is 64 percent of the 'assumed income' in case of full incapacity for work.⁴⁷ The 'assumed in-

in 1997 as part of the concentration policy, with the explicit aim to create a situation where the criterion 'capacity for work' should become the same in both instruments. See Prop. 1996/97:28, p. 10. This is also the reform where it is emphasized that the assessment of capacity for work should be executed more strictly on the basis of medical criteria. The wording of chapter 7, § 3, was not changed in the reform, shifting from a system with disability pensions to a system with sickness compensation, but previous to the 1997 reform, the assessment of capacity for work was based on the following phrasing of chapter 7, § 3: 'In the assessment of the degree of reduction of capacity for work, account should be taken of the insured's ability, with the actual reduction of capacity, to get an income through work that corresponds to his strength and competence and that can be reasonably demanded in view of his education and previous occupation as well as age, household conditions and other comparable circumstances.'

⁴⁶ National Insurance Act, chapter 9, § 8. In 2002, the price base amount was 37,900 SEK (4,169 euro).

⁴⁷ National Insurance Act, chapter 8, § 3–8, in combination with the Income-Related Old Age Pension Act, chapter 2. The assumed income for sickness compensation is calculated on the basis of the pensionable income. In the calculation of pensionable income, all taxable income is included (except income from capital).

come' is calculated as an average of the three years, during a certain time frame (see above), in which the insured has had the highest yearly income. There is a ceiling in the insurance to the extent that incomes above 7.5 price base amounts are not included in the calculation of the 'assumed income'.⁴⁸

Income compensation provided by collective insurance schemes and agreements

The labour market agreements that are pertinent in case of long-term or permanent lack of capacity for work are AGS for blue-collar workers, AGS-KL for those employed by the municipalities, ITP for white-collar workers and PA-03 for those employed by the state.⁴⁹

The **administrative organization** of the AGS insurance schemes (AFA and Fora) and the ITP insurance (Alecta) has been described above. PA-03 is administered by the National Government Employee Pensions Board (SPV).

The **personal scope of application** of the ITP sick pension insurance covers, in general, those employed in companies where there is a collective agreement between the Confederation of Swedish Enterprise and the Federation of Salaried Employees in Industry and Services. Employers within this area of collective agreements who wish to enter the ITP plan will enter into an agreement with Alecta. In order for an employee to be covered by the ITP, she or he must be at least 18 years old.

A basic prerequisite in order to be covered by PA-03 is to be employed by the state (or to have an employment that is covered by collective agreements in which the Swedish Agency for Government Employers is a party).⁵⁰ PA-03 provides income compensation in case of long-term or permanent lack of capacity for work for medical reasons. In order to be covered by the disability pension and the short-term disability pension included in PA-03, the insured has to be at least 18 years old (and not

⁴⁸ National Insurance Act, chapter 8, § 5.

⁴⁹ See <http://www.spv.se>. PA-91, the collective agreement regulating, for instance, income compensation in case of long-term or permanent incapacity for work for state employees has been substituted by a new agreement, PA-03. The changes instituted in the new agreement, that concern disability, are mainly an adjustment to the previously described reforms of the disability pension and the old age pension (compensation levels stayed the same). See 'Pensionsavtal för arbetstagare hos staten m.fl. (PA-03) Bilaga 1 till förhandlingsprotokollet 2002-02-01', chapter 4 (on benefits-related old age pension) and 5 (on disability pension) as compared to 'Pensionsavtal PA-91', chapter 3 (on pensionable income and basis for pension) and chapter 7 (on disability pension).

⁵⁰ PA-03, chapter 1, § 1. There are some exceptions in the agreement, excluding for instance: employees who have been assigned sheltered employment, employees who are locally employed outside the country and employees in the national defence reserve.

yet reached retirement age).⁵¹ According to the AGS (and AGS-KL) insurance, all employees are covered by the insurance.⁵²

If you work as a substitute, trainee or have an appointment on a temporary basis, there is a six month **qualifying period** if your employer has entered the ITP plan. If you are a part-time employee, in the same type of company, you have to work at least 16 hours a week in order to be covered by the insurance.⁵³

According to PA-91, employees with an employment that was limited in time would not be covered by the insurance unless the employment had a duration of at least 6 months in a row. If the employee had been working limited periods of the year on a recurring basis, the employee was covered if the employment, all in all, had a duration of 6 months. This restriction does not exist in the new agreement PA-03.⁵⁴ For employees covered by AGS and AGS-KL, there is a qualifying period of at least 90 days of employment.⁵⁵

The **criteria** that should be fulfilled in order to receive remuneration from the ITP disability pension insurance are that the insured should have an incapacity for work of at least 25 percent and that the insured has been sick for at least 90 days in a row (or for a period of totally 105 days during the last 12 months).⁵⁶ There are no specific terms in the insurance concerning the assessment of sickness and incapacity for work in the ITP plan. However, in section B (Defined benefit insurance policies), the issue is addressed:

The degree of disability shall be assessed according to the reduction in the insured's ability to work that the sickness or injury can be considered to have caused with consideration taken to the objectively evident symptoms. This assessment shall take into consideration not only the insured's regular work assignments, but also to any normal occupation. However, if the insured requires changed or different work assignments in order to regain the ability to work in whole or in part, the assessment may be based during a reasonable transition period on the insured's regular work assignment.⁵⁷

There is also an insurance term for the ITP insurance, stating that the insurance coverage '... will be approved if the person in question, at the

⁵¹ PA-03, chapter 1, § 2.

⁵² 'Gemensamma villkor för AFA-försäkringarna', § 7. (2001-01-01) and 'Gemensamma villkor för AGS-KL, TFA-KL och avgiftsbefrielseförsäkring', § 9.

⁵³ 'ITP-planen', Chapter 2, §§ 2 and 3.

⁵⁴ 'PA-91', chapter 1, § 2, as compared to PA-03 chapter 1, § 2.

⁵⁵ 'Försäkringsvillkor för AGS-KL', § 4.

⁵⁶ 'ITP-planen' Chapter 8, § 1.

⁵⁷ Alecta, Insurance conditions, 'B. Defined-benefit insurance policies', § 6, Translation made by Alecta.

time when the insurance or change in insurance comes into force, is fully fit for work in the position on which the application for insurance is based'.⁵⁸

For those covered by PA-03, the criteria to obtain compensation from the insurance follow the regulations in statutory law. Thus, an employee will receive income compensation from PA-03 if she or he has been granted sickness compensation or temporary sickness compensation (former disability pensions) from the public insurance.⁵⁹ There is in the insurance terms no elaboration of the criteria of sickness or capacity for work. The criteria mentioned in the AGS (and AGS-KL) insurance are directly linked to the definition of sickness and capacity for work used for regulating access to sickness insurance in statutory law.⁶⁰

The **level of income compensation** according to the ITP disability pension was mentioned above. If the insured becomes sick for a long-term period and receives compensation from the public insurance in the form of sickness compensation or temporary sickness compensation, the level of remuneration from ITP is as follows: For the part of the income below 7.5 price base amounts the level of remuneration is 15 percent of the pensionable income, for the part of the income between 7.5 and 20 price base amounts, it is 65 percent, and, finally, for the part of the income between 20 and 30 price base amounts, the remuneration is 32.5 percent.⁶¹

The income compensation provided by PA-03 will add to the remuneration from the public insurance for incomes below 7.5 base amounts as well as for the part of the income above this ceiling. The percentage of compensation will differ depending on what section of the pensionable amount the remuneration will compensate for.⁶²

The AGS insurance will give those who have a disability pension or a temporary disability pension in the public system a monthly income compensation that is decided on the basis of the insured's 'income quali-

⁵⁸ Alecta, Insurance conditions, 'A. General terms and conditions, § 7'. Translation made by Alecta.

⁵⁹ 'PA-03', chapter 5, §§ 23 and 24.

⁶⁰ 'Försäkringsvillkor för AFA-försäkringarna', § 12.

⁶¹ 'ITP-planen' Chapter 8, § 2. It is to be noted that the basis for calculating the remuneration from ITP and the basis for calculating the remuneration from the statutory insurance are not identical (although fairly similar).

⁶² The pensionable amount is calculated according to principles in PA-03, chapter 4. The level of compensation was, in 2002, 21 percent of the pensionable amount below 7.5 income base amounts. It was 81 percent of the pensionable amount between 7.5 and 20 income base amounts and it was 40.5 percent of the pensionable amount between 20 and 30 income base amounts. See 'PA-03', chapter 5, § 25.

fyng for sickness allowance' at the time of falling ill. The level of compensation is tabled in different groups depending on the level of income. Roughly, the remuneration from the insurance is between 14–16 percent of the income.⁶³ There is a gap in the AGS insurance; no compensation is paid to the insured if 360 days pass and the insured is still a recipient of sickness cash benefit. It is not until the insured is assessed to fulfill the criteria for sickness compensation or temporary sickness compensation that remuneration from the collective insurance is paid again. During the in-between period, the insured has to rely solely on the statutory insurance. The AGS insurance only provides compensation on incomes below the ceiling (7.5 price base amounts) in the public insurance, while AGS-KL (for those employed by the municipalities) provides compensation also above the ceiling.⁶⁴

Income compensation provided by private insurance companies

The insurance instruments provided by the private insurance companies do not in general make a distinction between short-time sickness and permanent/long-term reduction of capacity for work. Thus, the comments made when describing income compensation provided by private insurance companies in case of sickness are to a large degree also applicable in this section.

The steep increase in absence due to sickness during 1999–2001 made some of the private insurance companies react and introduce changes in their conditions for private sickness insurance (individual insurance as well as group insurance). The fear connected to this development is not linked to short-term sickness but to long-term sickness and to the costs connected to permanent reduction of capacity for work. Thus, the limitation in the insurance offered by *Skandia*, described above, where certain diagnoses are surrounded by special qualification periods, was a reaction to the overall increase of long-term sickness in society. In the fall of 2001, *Skandia* changed and limited its time period for their group sickness insurance, with the effect that the insurance will cover a maximum period of 36 months and that the right to compensation from the insurance is limited to those individuals whose incapacity entitles them to a disability pension at a level of at least 50 percent. The company

⁶³ 'Försäkringsvillkor för AGS från 2001-01-01', § 18 and 'Försäkringsvillkor för AGS-KL', §18.

⁶⁴ For the part of the income that is between 7.5 and 20 price base amounts, the monthly compensation from AGS-KL is 65 percent, for the part of the income that is between 20–30 price base amounts, the compensation is 32.5 percent. See 'Försäkringsvillkor för AGS-KL', §19.

also indicated that some of their products in this area would be phased out during a period of two years.⁶⁵ The actions of *Skandia* are an example of a more widespread trend among private insurance companies to delimit not only access, but also the products as such, linked to the risk of sickness causing long-term or permanent incapacity for work.

7.2.3 Income compensation in case of occupational injury

In this section, different legal and contractual constructions specifically aimed to answer to the social risk of occupational injuries are described. The different insurance schemes and agreements constructed to answer to the risk of occupational injuries signal that employees who have suffered an acknowledged occupational injury should be fully compensated for their loss of income. Accordingly, the level of income compensation is higher in cases of incapacity for work caused by an occupational injury as compared to, for instance, incapacity for work caused by sickness. In the debate, two main reasons are often provided for this differentiating, depending on the type of cause for incapacity. Firstly, it is argued that employees are in extra need of protection as they are exposed to specific risks in their working environment that they have very limited possibilities to influence. Secondly, the construction of a separate occupational injury insurance is described as a strategy to make visible these kinds of injuries and to put pressure on the employers to create a better working environment.⁶⁶ It is noteworthy that this often defended principle of keeping victims of occupational injuries indemnified was challenged during the 1990s. During this period, as will be described below, it was often argued that the traditionally strong emphasis on a link between ill-health in the working population and their working environment declined, as access to compensation from the occupational injury insurance was tightened.

The different instruments interacting in the field of income compensation in case of occupational injury are: The statutory occupational injury insurance (regulated in the Occupational Injury Insurance Act, LAF) and different collective insurance schemes and agreements (the labour market no-fault liability insurance schemes TFA and TFA-KL, and

⁶⁵ http://www7.skandia.se/forsakringsguiden/2_4_nyheter_artiklar/html/index.html, (2002-03-13).

⁶⁶ The functional separation of sickness insurance and occupational injury insurance, although uncontested for the moment, has not always been evident. For an overview of the debate, see Petersson, Gunilla, 1995, p. 88 ff.

Figure 7.4. A schematic overview of the different insurance instruments available in case of long-term or permanent inability to support oneself

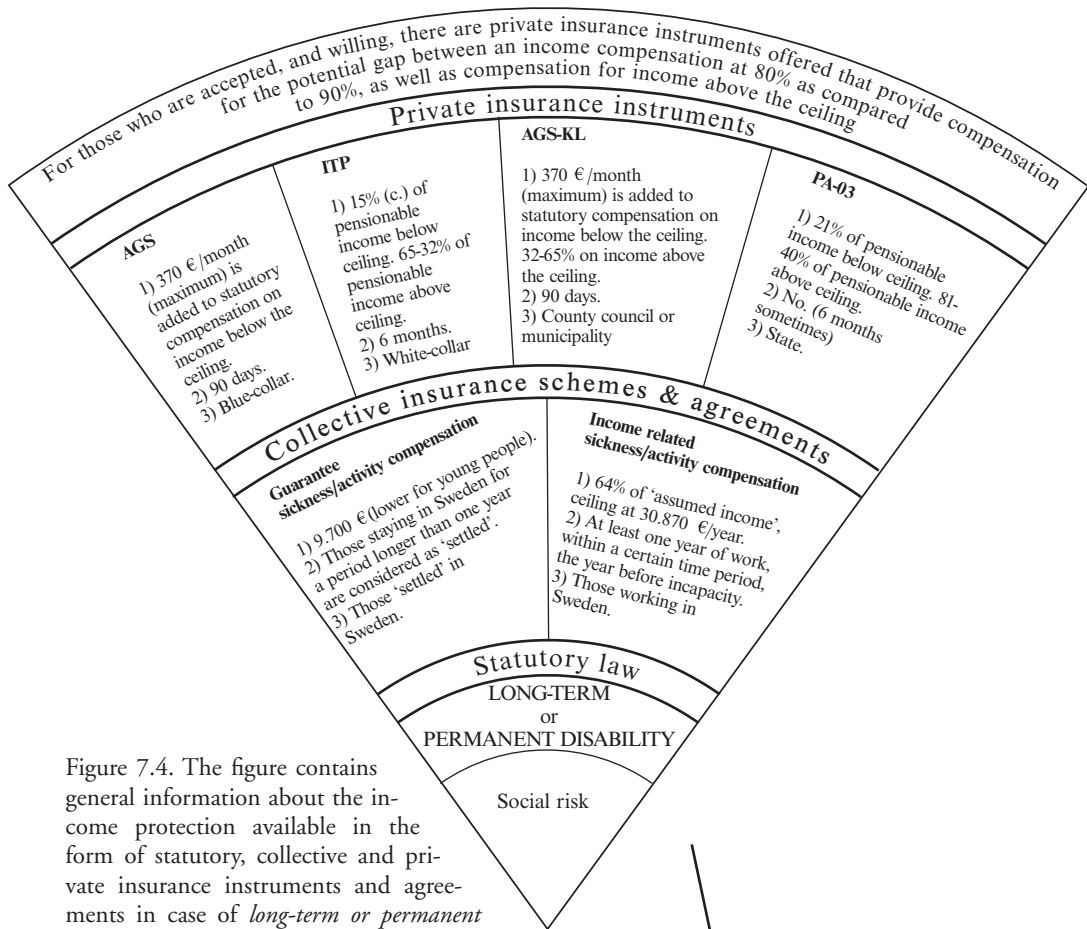
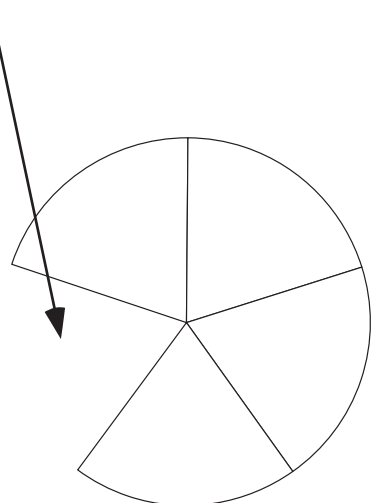


Figure 7.4. The figure contains general information about the income protection available in the form of statutory, collective and private insurance instruments and agreements in case of long-term or permanent disability. More detailed information is found in the text above. From the rough summary above it appears as if the protection offered to those facing long-term or permanent disability is fairly comprehensive. Although the level of compensation is lower than in case of sickness, statutory and collective insurance added together should in many cases provide the insured, if well established on the labour market, with approximately 80 percent of lost income. It should be noted though that the criteria to be met in order to be eligible for compensation tend to be stricter in case of disability. 1) Compensation level, 2) qualifying period, 3) personal scope of application. Data as of 2003-01-01. Exchange rate as of 2003-08-22 (sums have been rounded off).



the PTA agreement).⁶⁷ Developments in this field during the 1990s are dominated by a far-reaching reform of the Occupational Injury Insurance Act, implemented in 1993, in which access to allowances was drastically tightened. The tightening was acquired mainly by 1) sharpening the burden of proof for employees claiming the right to compensation due to an occupational injury, and 2) by taking away the occupational injury cash benefit and thus also the right to full compensation in cases where the injury did not result in a permanent reduction of capacity for work. The 1993 reform caused, or coincided with, a drastic cut in granted compensations from the insurance.⁶⁸

Before the reform in 1993, there was a clear incentive from the perspective of the insured to have a physical injury defined as an occupational injury. The occupational injury cash benefit secured full (100 percent) income compensation, while the allowance paid in case of sickness only provided a lower level of compensation (how much lower depends on what year is taken as a comparison). As the occupational injury insurance in 1993 *de facto* became an insurance providing annuity only in case of permanently reduced capacity for work, the incentive to have an injury classified as an occupational injury was lowered, unless permanent damage was a fact.

The reform of the Occupational Injury Insurance Act reflected on the collective insurance schemes and agreements to the extent that the burden of proof for employees claiming the right to full income compensation increased. After 1993, an employee suffering an occupational injury had to prove that the employer was responsible for having caused the injury in order to receive full compensation for loss of income, and thus, the 'no-fault' character of the collective insurance schemes became less distinct.⁶⁹

⁶⁷ The 'no-fault' character of the insurance means that an employee 'who suffers an injury covered by the conditions of the agreement may be awarded full compensation even if the employer, or somebody else, is not liable for damages. In this way, trying and protracted claims disputes are avoided and there is a speedy solution to the question of compensation'. Björkman, Tomas, 2001, p. 105.

⁶⁸ The number of reported cases dropped from a maximum of 250,000 to 108,000 in ten years. The number of acknowledged occupational injuries was 67 000 in 1992 and 48,800 of them were (occupational) diseases. In 1997, there were 7300 acknowledged cases and 2700 of them were diseases (SOU 1998:37, p. 18). The number of acknowledged occupational injuries (approved claims for compensation) dropped from 79,000 in 1991 to about 11,000 in 1999. 'PM 2001-03-20', Department of Social Affairs, p. 22.

⁶⁹ According to LO (The Swedish Trade Union Confederation), the parties on the labour market did not consider themselves to have the means to take on the responsibility for the compensation that was no longer available from the statutory insurance when it 'deteriorated' in 1993. See also Randquist, Madeleine and Lennart Stéen, 1999, pp. 41 ff.

The 1993 reform was analyzed and debated in several official reports during the 1990s,⁷⁰ and, eventually, in 2001, a government bill was presented that aimed to recreate some of the impact of the insurance that was lost in the 1993 reform.⁷¹

Income compensation provided by statutory law

Income compensation in case of occupational injury is regulated in the Occupational Injury Insurance Act that came into force in 1977.⁷² The regulation of the occupational injury insurance is, thus, laid down in a separate Act and not as a chapter in the National Insurance Act.⁷³

The occupational injury insurance is **administered** by the social insurance offices and supervised by the National Social Insurance Board.⁷⁴

The occupational injury insurance is defined as a work-based insurance in the Social Insurance Act. For the **personal scope of application**, this means, as a main rule, that those who are working in Sweden are covered by the insurance.⁷⁵ To be 'working' is defined as being in gainful employment in the country.⁷⁶ There are some specifications made to include students in risky environments, the self-employed as long as they work in Sweden (and those working abroad in some cases). However, people who work in Sweden for a foreign employer, in work that lasts less than a year, are explicitly excluded.

Employees are covered by the insurance from the first day of employment and there is thus no **qualifying period**. Others (freelance and self-

⁷⁰ See SOU 1996:113 and SOU 1998:37.

⁷¹ Prop. 2001/02:81. The changes proposed in the bill came into force on July 1, 2002 (changes affecting §§ 1 and 2), or on January 1, 2003 (changes affecting other paragraphs).

⁷² The Occupational Injury Insurance Act.

⁷³ Although the above mentioned official report discussed the possibility of including the occupational injury insurance in the structure of the National Insurance Act, the committee decided not to recommend such a change.

⁷⁴ The Occupational Injury Insurance Act, chapter 1, § 2. There is also an added possibility in this paragraph that allows the government to decide if 'other local authorities' should be involved in the administration of the insurance. In Prop. 2001/02:81, p. 79, it is suggested that the administration of the occupational injury insurance should be concentrated to a limited number of local social insurance offices. The arguments provided in favour for such a development were, for instance: increased efficiency, increased productivity, less need of labour (less costs), and increased protection for values connected to legal certainty. In the bill, there are, however, no suggestions on concrete changes of the law in this direction; instead, it is suggested that the issue is to be further investigated.

⁷⁵ Social Insurance Act, chapter 3, § 5.

⁷⁶ Social Insurance Act, chapter 2, § 7.

employed) will be covered by the insurance from the first day of actual work.⁷⁷

The concept of ‘occupational injuries’ in the occupational injury insurance covers injuries of four categories: occupational accidents, accidents during transport to or from work, occupational diseases and infections caused by work. The **relevant criteria** that have to be met in order for the insured to be eligible for income compensation differ somewhat, depending on which of the four categories of occupational injuries that is at hand and on for how long a period capacity for work is reduced. In all four categories of injuries, the first criterion that has to be met is that the injury is possible to define as an ‘occupational injury’. The criterion of ‘occupational injury’ was defined as follows between the years 1993 and 2001:

In this Act, by occupational injury is understood an injury that results from an accident or other harmful effect of work. By other harmful effect is understood an effect from a factor which is highly probable to cause such an injury that the insured person has got.⁷⁸

According to the law cited above, an occupational injury could be either an injury caused by ‘accident’ or an injury caused by ‘other harmful effect’ of work. The following paragraph of the Occupational Injury Insurance Act determined the sifting of evidence. During the period 1993–2001 this paragraph was formulated as follows:

If an insured person has been exposed to an accident or other harmful effect while working, the injury he has suffered shall be considered to have been caused by the harmful effect, if predominant reasons indicate this.⁷⁹

The concept of ‘other harmful effect’ covered effects that with a high degree of probability could have caused the injury that the insured had been exposed to. *Occupational disease* belongs to the category of injuries caused by ‘other harmful effect’, while *occupational accident* belongs to the category of injuries caused by accidents. It is usually relatively uncomplicated to determine whether an *accident* is caused by work or not,

⁷⁷ Social Insurance Act, chapter 3, § 6.

⁷⁸ Occupational Injury Insurance Act, chapter 2, § 1. In the same paragraph, an exception is made for an injury of psychological or psychosomatic character that is caused by the closing of a company, labour dispute, lack of appreciation, lack of satisfaction with work assignments, colleagues/fellow workers or work. In the third and fourth section of the paragraph, accidents during transport to and from work and injury due to contagion are defined.

⁷⁹ Occupational Injury Insurance Act, chapter 2, § 2.

while it has proven to be more difficult to find a legal criterion that distinctly determines the assessments of occupational diseases. The technique of using a list of approved sicknesses was abolished in statutory law in 1977, and since then, the general criterion cited above has been used. As the general criterion excludes the possibility to restrict the interpretive scope of occupational diseases by making reference to listed 'approved' sicknesses, other techniques to legally delimit the scope of the criterion have been used. Such alternative techniques have been to elaborate 1) the level of the demand for (proven) causal linkage between the injury and the work situation and 2) the degree of burden of proof.

From 1993 until 2001, the assessment of whether an occupational injury was at hand was (at least theoretically) made in two steps.⁸⁰ The first step included an assessment of whether there had been a 'harmful effect' of work, and step two focused on whether there was a causal connection between the established 'harmful effect' and the injury of the insured. Different criteria were used for the sifting of evidence in the two different steps. In the first step, it was demanded that there was a factor in the work situation that with a high degree of probability could be assessed to have caused the harmful effect.⁸¹ In step two, it was demanded that if the insured had been exposed to a harmful effect in the work situation, there had to be predominant reasons supporting a causal linkage between the harmful effect and the injury in order to conclude that an occupational injury was at hand.⁸² In 2002, the paragraphs decisive for the assessment of occupational injuries were changed again.⁸³

In the occupational injury insurance, the most important distinction to be made is between injuries that are related to the work situation and injuries that are not. The preparatory work emphasizes the need to make

⁸⁰ Whether the administration and the courts actually did apply this two-step procedure is less clear. According to a memo produced by the Department of Social Affairs, some of the criticism against the 1993 reform was pointed against the complicated procedure for assessment involving not only two steps but also different levels of proof in the different steps ('PM 2001-03-20', Departement of Social Affairs, p. 5).

⁸¹ Previous to the 1993 reform, it was enough if a 'probable' link between the harmful effect and a factor in the work situation could be proven, in order for the insured to be eligible for compensation.

⁸² Previous to the 1993 reform, there was a presumed linkage between the established harmful effect and the injury.

⁸³ In 2002, the previously cited paragraphs were replaced by a new paragraph describing a one step assessment of determining occupational injury: 'In this Act, by occupational injury is understood an injury or other harmful effect from work. An injury is to be considered to have resulted from such a cause if predominant reasons indicate this.'

this delimitation as distinct, non-discriminating and predictable as possible. In the determination of the scope of the criterion 'occupational injury', an important role is played by medical science, in general, and by insurance medicine, in particular. The sickness concept is not of direct interest for determining the scope of the occupational injury insurance, but indirectly, the same arguments used in the medical debate on sickness insurance recur when medical experts discuss harmful effects of the work environment. Behind the concept of 'muscular bone disease', many complicated pain diagnoses are hidden, and just as these diagnoses are troublesome to handle within the sickness insurance, they are also troublesome to handle within the occupational injury insurance.

It has been suggested, in a memo produced by the Department of Social affairs in 2001, that 'guiding descriptions of different illnesses and their relation to work should be produced by the National Social Insurance Board in co-operation with other public authorities'.⁸⁴ In 1992, the 'Occupational Injury Insurance Committee' suggested a differentiated treatment of occupational diseases that did not cause problems in the application of the law. Such diseases were:

... illnesses caused by substance, radiating energy, shakings, vibrations, mechanical bumps, noise, contagion or disease in a tendon or the tendon area, disease in the tissue around the epicondyles of the upper arm, inflammation of bursa and peripheral paralysis.⁸⁵

For other sicknesses, such as 'pain in back or joints, illnesses and injuries in muscles, and mental or psychosomatic illnesses', a stricter level of proof should prevail.⁸⁶ The reason given for this suggestion was that medical science did not provide a satisfactory basis for decisions, in these latter cases, that would uphold a strict delimitation between injuries related to occupation and other injuries.⁸⁷ However, this suggestion was not implemented in the 1993 reform. Still, the changes decided upon in 1993 did change the principle that had been ruling since 1977, namely that the loss of a legal right that could be the consequence of the imperfection of

⁸⁴ 'PM 2001-03-20', Departement of Social Affairs, p. 6. This idea is also mentioned in Prop. 2001/02:81, p. 40, with the concluding remark that the issue needs to be further investigated.

⁸⁵ 'PM 2001-03-20', Departement of Social Affairs, p. 17, with a reference to SOU 1992:39.

⁸⁶ PM 2001-03-20, Departement of Social Affairs, p. 17.

⁸⁷ SOU 1992:39 se även 'PM 2001-03-20', Departement of Social Affairs p. 17.

medical science should be carried by the insurance rather than by the insured.⁸⁸

Income compensation in case of an occupational injury is paid to someone who has lost all or part (at least 1/15) of his or her capacity for work. The assessment of **capacity for work** should be made according to the following criteria:⁸⁹

The insured person's ability to get an income through work is to be assessed in relation to what can be reasonably demanded from him, considering the occupational injury, his education and previous occupation, household conditions and other comparable circumstances.

In the case of an older insured person, account is primarily to be taken of his capacity and ability to continue getting an income from such work as he has carried out previously or other suitable work that is available to him.

Thus, the criterion of capacity for work is distinctly elaborated in the occupational injury insurance, but the criterion of sickness is not. The criterion of capacity for work is more generous from the perspective of the insured compared to how the criterion is framed in the sickness insurance. This reflects the acknowledged aim to provide full compensation to the insured suffering from an occupational injury. From the fact that the sickness criterion is less visible does not follow, however, that the debate surrounding the 'sickness' concept is not relevant for the application of the insurance.

⁸⁸ 'PM 2001-03-20', Department of Social Affairs, p. 17. It may be added that the important role given to the discipline of medical science has provided the medical practitioners with an influential position in the decision-making process of determining whether an individual is suffering from an occupational injury. The memo from the department of social affairs comments on the role of the medical practitioners as follows: 'If the physicians arrive at different conclusions in a case, their statements should be considered one against the other. The fact that two physicians have different opinions should not by itself lead to a decision that an occupational injury does not exist. A survey of various decisions made by the administrative courts of appeal implies that this often seems to be the case today' (p. 36) ... 'In this connection, it should be emphasized that a physician's statement on a medical issue is only a means of assistance in the insurance office's evaluation of an occupational injury case, and the task of the insurance office is to make an independent evaluation. The sole reason that physicians are making statements and arrive at different conclusions on the presence of harmful effect does not necessarily mean that harmfulness is considered non-existent in the occupational injury evaluation (p. 43).

⁸⁹ Occupational Injury Insurance Act, chapter 4, § 3. A third section was added to this paragraph in 2002 (Prop. 2001/02:81), in which it is emphasized that decisions regarding annuity are not necessarily permanent and that the social insurance office should make an assessment of at what point a renewed examination of the insured person's capacity for work should be carried out.

The **level of compensation** depends on whether the injury is permanently reducing the capacity for work or whether the reduction is temporary. A decision on whether a specific injury in a specific case really is to be determined to be work-related, will not be made unless the matter develops into an injury of a permanent (long-term) character.⁹⁰ As long as it is unclear whether the injury will cause a long-term reduction of capacity for work, the individual in question will get income compensation in the form of ordinary sickness cash benefit, and at ordinary levels.⁹¹ If it is established that capacity for work is reduced on a long-term basis, and if an occupational injury is established, the individual will instead of sickness compensation get a life annuity.⁹² The occupational injury life annuity will, as a main rule, fully compensate for lost income, although there is a ceiling in the insurance to the extent that when the level of the annuity is decided, the basis of calculation will not include amounts above 7.5 price base amounts. The life annuity is made stable through a system were it is upgraded each year according to the price base amount.⁹³ The wanted effect is to secure the life annuity against inflation. The life annuity is more favourable in economic terms than sickness compensation.⁹⁴ One of the important changes in 1993 was to abolish the specific occupational injury cash benefit and replace it with the sickness cash benefit, a reform that reduced the compensation for the insured and increased the efficiency of the administration.⁹⁵

⁹⁰ Decisions on whether annuity from the occupational injury insurance will be paid to the insured are in most cases made in connection with an assessment of whether the insured is eligible for sickness compensation (after 2003) or disability pension (before 2003) instead of receiving sickness cash benefit. Other occasions when this assessment becomes important are when the insured changes work or starts an education.

⁹¹ In 2003, a special occupational injury compensation will be introduced in order to cover loss of income due to the waiting days in the sickness insurance.

⁹² Annuity is paid if the reduction of capacity for work is considered to be permanent or existing for a period of at least a year. Occupational Injury Insurance Act, chapter 4, § 1.

⁹³ Prop. 2001/02:81.

⁹⁴ A problem in the late 1990s was that the inflation was low and the wages in different areas in the labour market developed more rapidly than the increase in the price base amount. In this way, the economic compensation given through the annuity was impaired. See Randquist, Madeleine and Lennart Stéen, 1999, p. 41.

⁹⁵ In earlier regulation, the insured would receive compensation from the occupational injury insurance when sick-listing was longer than 90 days; in 1992, this period was prolonged to 180 days. In 1993, the time limit was abolished and remuneration from the occupational injury insurance became restricted to cases where the injury had caused permanent reduction of capacity for work.

Income compensation from collective insurances and agreements

In the case of occupational injuries, there are collective insurances and agreements that supplement the occupational injury insurance.⁹⁶ The important collective insurances in this area are TFA, for blue- and white-collar workers in the private sector, and TFA-KL, for those employed by the municipalities and county councils. Those employed by the state are covered by PSA, an agreement that to a large degree corresponds to the TFA and TFA-KL insurance schemes. When the first collective insurance schemes were created in the 1970s, one of the purposes was to avoid time-consuming trials, in which compensation to the employee was made dependent on a difficult process of sifting of evidence, thus giving the collective insurance schemes a no-fault character.⁹⁷ The insurance schemes were, thus, until 1993, constructed in a way that made it possible for an employee to obtain income compensation from the insurance regardless of whether the employer was deemed to have caused the injury or loss of capacity. However, as mentioned above, since 1993 the insured has to prove that the employer caused the injury according to ordinary liability principles in order to receive full income compensation from the insurance schemes.⁹⁸

The **administration** of the different insurance instruments mentioned above is handled by AFA Insurance Centre and Fora Insurance Centre, but decisions regarding compensation from PSA are taken by the PSA Board.⁹⁹

The insured party, according to the TFA insurance, are employers who have signed a collective agreement on TFA, but it is also possible for an employer who is not bound by collective agreements to sign a separate agreement on TFA. The **personal scope of application** of the TFA insurance schemes is such that all the employees (blue- and white-collar workers) of the employer who has signed a collective agreement, or a sep-

⁹⁶ The occupational insurance schemes and agreements can provide compensation for costs, and also compensation for 'pain and suffering', but in this outline, an interest is only taken in compensation for loss of income. Therefore, I will not describe the details of other provisions of the collective work injury insurances. There are, however, possibilities to receive compensation for pain and suffering, disfigurement and harm, for funeral costs and for extra costs related to the occupational injury.

⁹⁷ It should be noted that an employee cannot bring a suit for damages against an employer who has taken out TFA. Since 1974 (in TFA, TFA-KL and PSA), it is not possible for a victim of occupational injuries to bring a suit for damages against an employer who has signed any of the above-mentioned schemes or agreements. See Randquist, Madeleine and Lennart Stéen, 1999, p. 44 ff.

⁹⁸ 'Statutory and collective insurance schemes on the Swedish labour market 2001', Confederation of Swedish enterprise, April 2001.

⁹⁹ See above footnote 22.

arate insurance agreement, are covered.¹⁰⁰ Defined as blue-collar workers are those covered by collective agreements between the Confederation of Swedish Enterprise and different divisions within the Swedish Trade Union Confederation. White-collar workers are those covered by collective agreements between the Confederation of Swedish Enterprise and divisions within the Federation of Salaried Employees in Industry and Services.¹⁰¹ Specific rules have been instituted for business owners, freelance workers and employees stationed abroad.¹⁰² The personal scope of application of the PSA covers, as a main rule, those employees for which the Swedish Agency for Government Employers has the right to reach collective agreements.¹⁰³

Just as was the case in statutory law, there is no **qualification period** before the insured is covered by the collective insurance. All employees covered by collective agreements, or separate insurance agreements, are immediately covered by the no-fault liability insurance schemes providing protection in case of occupational injuries.

The basic **criteria** that should be met for an employee to receive income compensation from the collective instruments are that the injury must be defined as (some kind of) occupational injury and that capacity for work must be reduced. The possibility to receive income compensation from the collective instruments differs depending on whether the injury is established to be permanent or whether the effects of the injury are temporary. Eligibility to income compensation also differs depending on whether the injury is classified as an occupational accident or as an occupational disease. As a main rule, the relevant criteria in the collective insurance instruments are the same as the criteria in statutory law.¹⁰⁴ Thus, the definition of ‘occupational injury’ in the Occupational

¹⁰⁰ Thus, also employees who are not union members are covered by the insurance as long as their employer is insured.

¹⁰¹ ‘Gemensamma försäkringsvillkor för AFA-försäkringar och avtalspension SAF-LO’, §§ 7 and 8.

¹⁰² ‘Gemensamma försäkringsvillkor för AFA-försäkringar och avtalspension SAF-LO’, §§ 9–11.

¹⁰³ ‘PSA’ (2001-05-01), § 1. Exceptions are specifically made for: 1. employees who have been assigned public relief work, specifically youth employment or sheltered work, 2. employees who are locally employed outside the country, 3. employees who are stationed abroad but who are not during this period covered by the occupational injury according to Occupational Injury Insurance Act, 4. employees working at a social insurance office.

¹⁰⁴ On a practical level, the actual assessment of whether or not the criteria are met are mainly made by the social insurance offices: ‘The time-consuming assessments of whether, for instance, someone is incapacitated or if an illness is to be compensated as an occupational injury, are determined within the national social security system. In the labour market insurance, these decisions are accepted at face value, and, consequently, it is mainly

Injury Insurance Act is repeated in the different collective insurance schemes and agreements. There are some deviations that could be mentioned though. The PSA agreement adds an extra category of injuries to be included in the definition of 'occupational injury', and specifically mentions that violence or abuse that the employee has been the target of due to her or his employment is considered an occupational injury. In these specific cases, there is also a shifted burden of proof, so that the injury should be considered as caused by the work situation unless there are predominant reasons to believe otherwise.¹⁰⁵

In order to receive income compensation from the collective instruments, the injury must have resulted in reduced capacity for work. The different collective insurance schemes and agreements all have paragraphs describing how capacity for work should be assessed and, similar to the criterion used to determine 'occupational injury', there is a marked correspondance between the criterion used for determining capacity for work in the collective instruments as compared to the criterion used in statutory law.

As mentioned above, as long as an injury is assessed to cause only *temporary* reduction of capacity for work, the social insurance offices do not investigate the possibility of a right to compensation from the Occupational Injury Insurance Act, and the insured receives income compensation as in case of 'ordinary' sickness. After 90 days of sickness (until 2001) compensation from TFA, TFA-KL and PSA complemented the sickness cash benefit in cases of *occupational accidents*, in order to safeguard that the level of compensation remained at a 90 percent level.¹⁰⁶ For *occupational diseases*, no similar provision was made. In case of an occupational disease, there is normally no income compensation provided from the collective insurance instruments, unless the employee can prove that the employer has caused the injury. In order to receive income compensation in case of an occupational disease, it is also required that the disease has lasted longer than 180 days and that the incapacity has been assessed to be caused by an occupational disease. This assessment can be

a matter of calculating and distributing the compensation.' See Roos, Carl Martin, 1990, p. 80. Still, AFA can also make independent assessments of whether an injury has been caused by an accident and whether an injury meets the criteria of an occupational injury according to the standards of ILO. See Randquist, Madeleine and Lennart Stéen, 1999, p. 22.

¹⁰⁵ 'PSA (2001-05-01)', § 2.

¹⁰⁶ After May 2001, income compensation from the collective instruments are paid for occupational accidents that cause more than 14 days of incapacity for work. Full income compensation will then be paid from the first day of absence until capacity for work is regained. 'Statutory and Collective Insurance Schemes on the Swedish Labour Market 2001', p. 49 f.

made either by the social insurance office according to the criteria in the Occupational Injury Insurance Act or by AFA, making an independent assessment according to the criteria in the ILO Employment Injury Benefits Convention.¹⁰⁷

If an injury is determined to have caused *permanent* reduction of capacity for work, the social insurance offices will investigate whether or not the incapacity is to be assessed as caused by an occupational injury. In cases of an established occupational injury that permanently reduces the capacity for work, income compensation is paid from a combination of different statutory instruments, such as sickness compensation based on the National Insurance Act and annuity from the Occupational Injury Insurance Act. Previous to 2001, income compensation from the collective insurance schemes and agreements was paid only if the employee could prove that the employer had caused the injury by being negligent or by taking the wrong action.¹⁰⁸ After 2001, this is still an accurate description of the terms applicable in case of an *occupational disease*, but in case of an *occupational accident*, the insured is eligible to full income compensation from the collective insurance schemes for all accidents that have caused incapacity lasting longer than 14 days.

The **level of income compensation** from the collective instruments is, in case of an *occupational accident*, such that the remuneration covers the whole loss of income during the waiting day and for time thereafter with 20 percent of the loss of income calculated on the basis of the insured's 'income qualifying for sickness cash benefit'. Income compensation is not paid if the insured receives annuity based on the Occupational Injury Insurance Act.¹⁰⁹ In short, the collective insurance schemes and agreements provide, in combination with statutory regulation, as a main rule, full income compensation in case of an occupational accident.

If *permanent reduction* of capacity for work is caused by an *occupational accident*, compensation will be paid according to liability principles in the form of an annuity from AFA. The condition is that it can be presumed that a future loss of income will arise that would not be covered by the annuity paid from the statutory occupational injury insurance.¹¹⁰ In case of an *occupational disease*, the insured will receive income compensation from the collective insurance schemes and agreements, as above, but only if it can be shown that the employer has caused the injury.

¹⁰⁷ 'ILO Employment Injury Benefits Convention' (nr 121).

¹⁰⁸ 'Försäkringsvillkor för TFA-KL (2001-05-01)', § 22a; PSA (2001-05-01), § 30.

¹⁰⁹ 'Försäkringsvillkor för TFA (2001-01-01)', § 6. This paragraph deals with injuries that occurred from 1 May, 2001, or later. For earlier cases, the paragraph is worded differently.

¹¹⁰ 'Försäkringsvillkor för TFA (2001-01-01)', § 13.

Income compensation from private insurance companies

The instruments provided by the private insurance companies, applicable in case of incapacity for work for medical reasons, have been discussed above in the account of instruments providing income compensation in case of sickness or disability. There are no special private insurance instruments offered that provide income compensation in case of occupational injuries. This is not surprising, as the annuity provided by the occupational injury insurance in combination with collective insurance and agreements should fully compensate those with an approved occupational injury. Those having an injury that is not approved as an occupational injury but still have reduced capacity for work, are referred to the sickness insurance, and thus also to the complementary insurance offered in case of sickness or disability.

7.2.4 Income compensation in case of unemployment¹¹¹

There is a mix of different private, collective and public actors involved in the risk of unemployment – more of a mix if we approach this social risk with a broad definition, less if we focus on income compensation. Although the statutory unemployment insurance is of dominating importance, a full picture of available measures compensating for income loss in case of unemployment should include agreements concerning redundancy payment, collective insurance and maybe, to an increasing extent during the 1990s, also private insurance.

The system used in Sweden, where the administration of the unemployment insurance is run by independent unemployment insurance funds tied to labour unions, in combination with state funding and state regulation, is sometimes labelled the ‘Gent-system’.¹¹² If an unemployment insurance fund makes decisions that are not in accordance with the law, the State can withdraw the funding. In case of conflicting interpretations of the regulations, the issue will be dealt with in the administrative courts. The State has a formal control over the unemployment insurance that is comparable with the state control of other social insurance schemes regulated in the National Insurance Act.

The statutory unemployment insurance is so closely related and interlinked with labour market policies that it is sometimes called an ‘adjust-

¹¹¹ Section 7.2.4. in this chapter is based on a section in an article written and published previously, see: Erhag, Thomas and Sara Stendahl, 2001.

¹¹² The system is practiced in several Nordic countries (Denmark, Finland, Sweden and Iceland), countries that share a comparatively high unionization rate. See Holmlund, Bertil and Per Lundborg, 1999, pp. 397–415.

Figure 7.5. A schematic overview of the different insurance instruments available in case of occupational injury

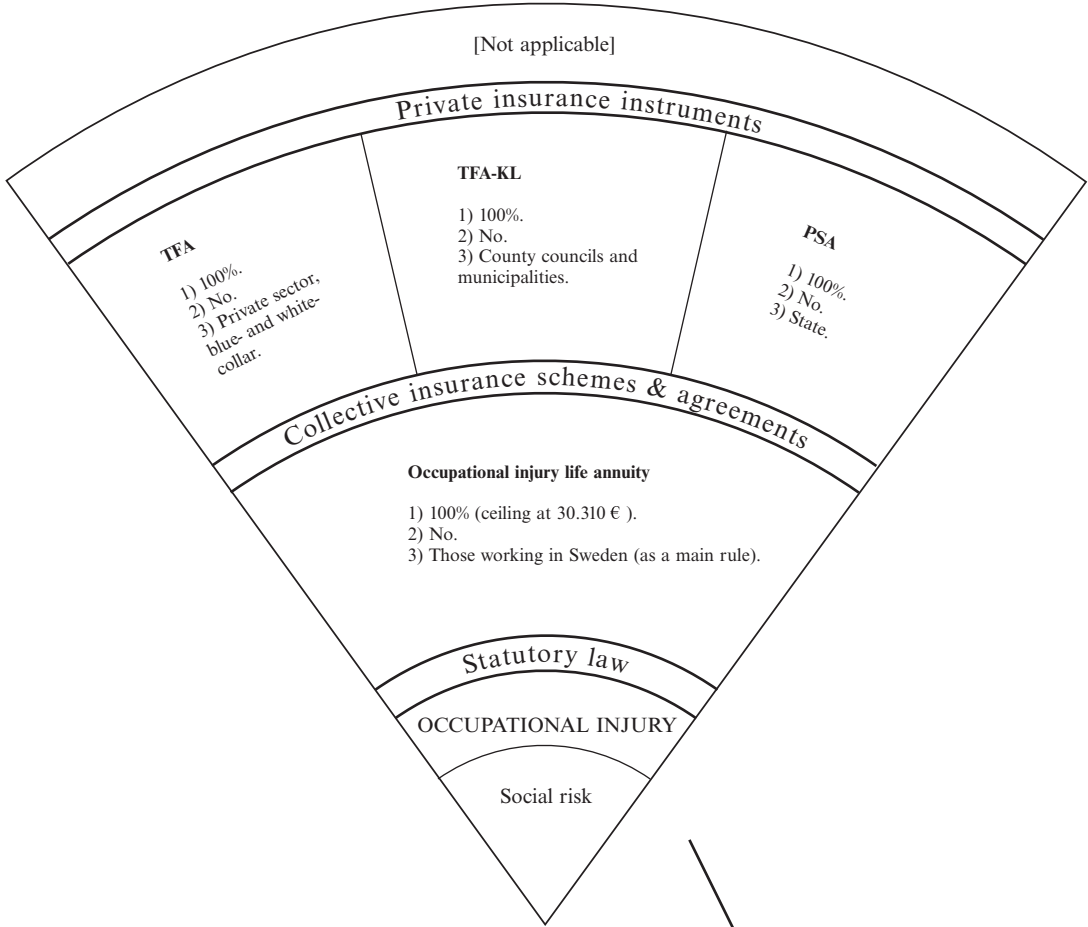
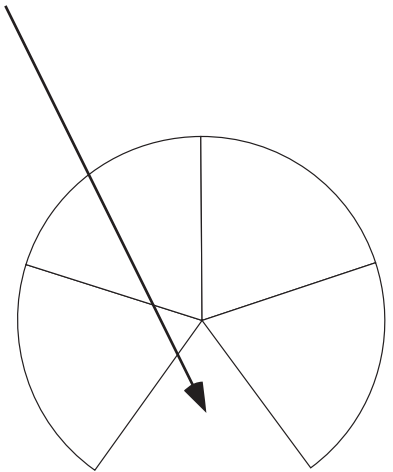


Figure 7.5. The figure contains general information about the income protection available in the form of statutory, collective and private insurance instruments and agreements in case of *occupational injury*. More detailed information is found in the text above. From the rough summary above, it can be concluded that the insured, in case an occupational injury has been established, is well provided for. Although there is a ceiling in the statutory insurance, the collective insurance fills this gap for all categories of employees. 1) Compensation level, 2) qualifying period, 3) personal scope of application. Data as of 2002-07-01. Exchange rate as of 2003-08-23 (sum has been rounded off).



ment insurance' rather than unemployment insurance. The unemployed is expected to actively participate in labour market activities in order to shorten the period during which she or he is dependent on remuneration from the insurance. The State and the unions provide training and education and other services to ease this process of re-entrance to the labour market. In 1995 a government committee was appointed with the assignment to bring forth a proposal for a new unemployment insurance, and in 1998 a new Unemployment Insurance Act was implemented. The new insurance consisted of two parts, one obligatory and one voluntary, and covered a larger number of individuals than the previous insurance. At the same time, the demands on the insured increased; it became more difficult to meet the criteria for the income related part of the insurance, and those who were thought to refrain from available 'suitable', work by the authorities, were excluded from the insurance for an increasing length of time.¹¹³ In 2001 new changes were implemented in the insurance, new demands on activity from the part of the insured were introduced and the importance of the work-line was further emphasized.¹¹⁴

Income compensation based on statutory law

The statutory-based unemployment insurance in Sweden is universal and consists of two components: A basic mandatory insurance that will provide the insured with a basic fixed sum, and an optional income-related insurance covering, to some extent, loss of earnings.

During the 1990s, quite extensive reforms of the unemployment insurance were implemented. The unemployment insurance was reformed in 1997 (in force 1998) to the extent that the flat rate basic benefit (earlier labelled KAS and administered separately from the unemployment insurance) was included in the unemployment insurance. As a consequence of this reform, the administration of this flat rate benefit was turned over to the existing unemployment funds. Also a new fund, independent of the state, was created for new entrances and for uninsured persons. As the unemployment funds are closely tied to the unions, this reform has been interpreted as strengthening the role of the trade unions, as their responsibility has increased with the assignment of administering the basic benefits.¹¹⁵ Levels of compensation were eventually adjusted

¹¹³ Previous to 1997 this period was 28 days, after 1997 it was 45–60 days. In 2001 a new change was implemented and rather than to withdraw the allowance during a certain period, the amount was reduced. For an account of these developments in relation to the autonomy of the insured, see Bendz, Anna, 2003.

¹¹⁴ Prop. 1999/2000:139.

¹¹⁵ See Palme, Joakim and Irene Wennemo, 1997.

upwards, but only after the 1990s had passed. There was much discussion on the risk for individuals to be excluded from the insurance, as the compensation period was limited. Less discussed was the fact that people were excluded as they did not fulfill the conditions for entitlement.¹¹⁶

The insurance is regulated in the Unemployment Insurance Act, in which the unemployment insurance funds are identified as the **administrators** of the insurance. The unemployment insurance funds are entities that come under private law. There are 40 funds and most of them are affiliated to particular branches of employment. One of these funds handles the basic compensation that is offered to those who do not have a membership in any of the funds. The state regulates the activities of the unemployment insurance funds in the Unemployment Insurance Funds Act.¹¹⁷ The insured individual will apply for remuneration at one of the funds and it is the fund, in collaboration with the Employment Services, that examines whether the individual is qualified or not according to the criteria laid down in the Unemployment Insurance Act. Ultimately, it is the fund that decides whether or not to pay benefits to the insured.

The **personal scope of application** for the basic insurance is fairly comprehensive. The insurance is obligatory and everyone who meets the basic conditions (to be at least 20 years of age, unemployed, available for the labour market and to have some connection to the labour market through individual experience of work) is covered by the insurance. You do not have to be a member of any insurance fund.

The income-related insurance is voluntary and you have to be a member of an unemployment insurance fund to be eligible for remuneration. As the insurance is voluntary everyone is not necessarily covered. However, in 1999 approximately 90 percent of the working force had membership in an unemployment insurance fund.¹¹⁸

For the income-related insurance, as well as the basic insurance, there are **qualifying times**. To be eligible for compensation the insured has to meet the 'work condition'.¹¹⁹ It is sometimes possible to be eligible for the basic compensation without having fulfilled the work condition if

¹¹⁶ See Tolonen, Tapio, 1999.

¹¹⁷ Unemployment Insurance Funds Act.

¹¹⁸ In 1970, the comparable figure was slightly more than 50 percent. See: Ds 1999:58, p. 26.

¹¹⁹ Unemployment Insurance Act, § 12. The work criteria: Those are eligible who, during a period of 12 months previous to unemployment, have been in gainful employment during at least 6 months at least 70 hours/month or have been in gainful employment at least 450 hours during a period of 6 months or at least 45 hours during each of these months.

the 'study condition' is met instead.¹²⁰ The self-employed are covered by the insurance, and it is also possible, to some extent, to count time spent in military service or on parental leave as part of the 'work condition'. In order to be eligible for income-related compensation, the insured must have been a member of an unemployment insurance fund for at least 12 months (the membership condition).

The general **criteria** that have to be met in order for the individual to get compensation from the insurance are: 1) The applicant has to be fit for work and have capacity to work at least 17 hours/week, 2) The applicant has to be prepared to accept suitable work offered. 3) The applicant has to be registered as applying for work at the public employment office, 4) The applicant must co-operate in creating an individual action program in consultation with the public employment office, 5) The applicant must actively look for suitable work, without succeeding to find such work.¹²¹ For this study, a special interest is taken in the criteria 'fit for work' and 'capacity for work'.

In 1997, a government committee suggested a reform where sickness insurance and disability pension should be more interlinked within the same system.¹²² There was also a discussion on 'a uniform assessment of capacity for work'. In this section, the report elaborates the arguments for a concentrated social insurance and how this insurance should interact with the labour market policies and the concepts used in the unemployment insurance. The committee states:

The clarification in the report of the concept of capacity for work, of course, does not mean that a common concept of capacity for work is introduced into social insurance and labour market politics. According to the committee, it is neither desirable nor feasible to have a common concept of capacity for work in view of the different aims of social insurance and labour market politics. However, in the area of social insurance, a clarification of the concept of capacity for work will more distinctly mark the line between areas of responsibility of social insurance and labour market politics. Through a clarification, there is an increased possibility to reach consensus on the difference between having capacity for work according to the regulations in the unemployment insurance and hopefully also to be employable on the labour market, that is, to be able, also, to get work.¹²³

¹²⁰ Unemployment Insurance Act, § 18. The study criteria: Those are eligible who have been actively searching for gainful employment, or worked, during at least 90 days during a period of 10 months in connection with having finished a full-time, at least one year long, education that has entitled to public study grants.

¹²¹ Unemployment Insurance Act, § 9.

¹²² SOU 1997:166.

¹²³ SOU 1997:166, p. 199.

The committee continues with a reflection on the risk that an individual ends up between the different areas of responsibility. Thus, an individual may be denied compensation from the sickness insurance as he or she is assessed to have capacity for work, but the same individual could still be denied unemployment benefits for the reason of not being 'fit for work'. The conclusion made by the committee is that in these cases, a close co-operation is needed between the unemployment agencies and the social assistance offices.¹²⁴

When an assessment of capacity for work is made, it is necessary to know what kind of work the capacity should be measured against. In the unemployment insurance, the criterion of 'capacity for work' is not elaborated, but there is a demand on the insured to accept 'suitable work'. In order to increase the uniformity in the application of this concept, a new paragraph was added to the Unemployment Insurance Act in 2001. In this new paragraph it is specified that during the first 100 days of receiving unemployment benefits it is permitted for the insured to limit the search for a new job within her or his occupation and within a nearby area. When this period is over, the insured should be prepared to accept 'suitable work'. According to the law, work should be considered suitable if:

1. within the scope of available work, reasonable account has been taken of the applicant's qualifications for the type of work in question and other personal circumstances,
2. employment emoluments are compatible with the emoluments which are given to employees who are employed according to collective agreements or, if there is no collective agreement, emoluments that are reasonable in relation to employees with equivalent work tasks and qualifications at comparable companies,
3. the employment is not at a workplace where there is an ongoing labour dispute caused by actions allowed in law and collective agreements, and
4. conditions in the workplace correspond to what is stated in law or regulations of public authorities about measures preventing ill-health or accidents.¹²⁵

In addition to this specification of the criterion of 'suitable work' made in law, there are also comments elaborated by the National Labour Market Board, used by the unemployment agencies in their application of the law. In these comments, the National Labour Market Board specifies

¹²⁴ SOU 1997:166, p. 199.

¹²⁵ Unemployment Insurance Act, § 11.

some of the personal conditions that could be taken into consideration in the assessment of what constitutes 'suitable work', for instance: family situation, age, health, communications, work elsewhere and expected work.¹²⁶

The **level of compensation** in the basic insurance is low in relation to the level of cost of living in Sweden.¹²⁷ It is possible to complement the basic insurance with social assistance benefit. Although the optional income related insurance is said to provide 80 percent of lost 'daily income'¹²⁸, there is a ceiling in the insurance that substantially decreases the number of insured who will actually receive this level of protection from the statutory insurance.¹²⁹ Due to the ceiling, the maximum benefit paid from unemployment insurance was (in March 2002) 730 SEK (80.30 euro), paid five days a week, the first 100 days and then 680 SEK (74.80 euro).¹³⁰ The length of the compensation period is 300 days. When 300 days have passed, a new compensation period (of maximum 300 days) can be initiated.

Income compensation provided by collective agreements

There is, for most employees, some kind of collective insurance protection in case of unemployment (when unemployment is caused by scarcity of work). The terms of this insurance are often very detailed, but for the purpose of this mapping exercise, I have excluded some of the particularities. The present account of the available protection is, thus, not com-

¹²⁶ Prop. 1999/2000:139, p. 31.

¹²⁷ In 1996, the equivalent to the basic insurance (KAS) was 230 SEK/day (25.3 euro). In March 2001, the sum was raised to 240 SEK/day (26.4 euro), paid five days a week; in July 2001 and July 2002, it was raised again, to eventually reach the present level of 320 SEK/day (35.2 euro).

¹²⁸ The 'daily income' is 1/5 of the weekly income, or 1/22 of the monthly income, received by the insured previous to unemployment, see Unemployment Insurance Act, § 29.

¹²⁹ According to an article written by Mari-Ann Krantz (President of Sif) and Sture Nordh (President of TCO), the situation in 2001 was such that 'Almost two of three full time employees, 62 percent, receive less than 80 percent of their income in case of unemployment also during the first 100 days with a higher ceiling. Only every third man working full-time and every other women working full-time can expect full compensation from the insurance during this period. 50 percent of the full-time working LO-members, over 500,000 people, have an income above the new, raised ceiling. The same is true for an additional 500,000 TCO-members. Among the full-time working members of SACO, a minority, approximately one out of ten, have an income below the raised ceiling'. See http://www.sif.se/pdf/debattartikel_misstro_av_akassan.pdf. Author's translation.

¹³⁰ Regulation (1997:835) on unemployment insurance. In 1996, the maximum amount was 564 SEK/week (62 euro) and compensation could not be larger than 75 percent of the normal salary.

plete, but it should still provide a quite comprehensive overview of the main characteristics of the protection offered.

For individuals employed within the sector covered by agreements between the Confederation of Swedish Enterprise and the Swedish Trade Union Confederation, the AGB insurance is relevant for an individual who loses her or his job before retirement age. For white-collar workers, the instrument available is a severance payment, AGE. Those employed by the municipalities or county councils have some protection in the AGF-KL insurance, and state employees are covered by the TA agreement.

The AGB insurance is **administered** by AFA. The AGE compensation and the TA compensation are administered by 'Trygghetsrådet'. AGF-KL is administered by KPA.

Personal scope of application and qualification periods: Compensation from the AGB insurance is given as an 'A amount' and as a 'B amount' and eligibility is dependent on what has caused the unemployment. A difference is made between three types of cases: 'the company case', 'the business case' and 'the health case'.¹³¹ In the first two of these three cases, the employee, in order to be eligible for the A amount, has to have worked consistently for the same employer for at least three 'AGB years'¹³² (if above the age of 40) or for seven 'AGB years' if below 40. While the sum of the A amount is dependent on age, the sum of the B amount is dependent on the length of the unemployment. To be eligible for the B amount, the insured has to be 40 years old at the time of unemployment, and, to be eligible for the maximum amount, he or she must not have been able to find new work for five years in spite of actively searching for it.

To be eligible for AGE compensation, as well as for the TA compensation and AGF-KL compensation, the insured should have been given notice because of scarcity of work and then become unemployed. For the AGE compensation, it is further required that the insured should be at least 40 years old and have been employed continuously at the same

¹³¹ In the 'company case', the insured loses her employment due to changes in the company which result in a consistent decrease in the number of employees. In the 'business case', the insured has been employed in a business where time limited employment is frequent and the insured has not within a period of 6 months been able to find new work within this branch of business. Examples are construction, painting and shipping. In the 'health case', the insured is 50 years old and must according to a physician terminate his or her employment. The medical difficulties must, however, not be harsher than that the insured is able to get a new job somewhere else. See 'Försäkringsvillkor för AGB (2001-01-01)', §4 and §15.

¹³² One 'AGB year' equals at least 832 hours of work/year. See 'Försäkringsvillkor för AGB (2001-01-01)', §§ 17-18.

company for at least five years.¹³³ State employees are also covered if they have a time-limited employment, but in those cases, the employee must have had one or more employments in a row during a period of five years. To be eligible for the one-time compensation from AGF-KL, the insured must be at least 25 years old, have been employed for at least 36 months and be covered by the collective pension system. To be eligible for periodic compensation, the requirements are set higher and the insured must be at least 45 years old and have had an employment that had lasted at least 17.5 years before she or he was given notice. The TA agreement covers those employed by the state. For state employees with a time-limited employment, the requirement is that the insured should have had one or more employments in a row during a period of at least 5 years in order to be covered by the agreement.

Level of compensation. The compensation provided from the AGB insurance can be paid as a one-time 'A amount' (which varies depending on the age of the insured), and as a 'B amount' (which varies depending on how long the employee has been actively looking for a new job). The compensation paid is not set in relation to the previous salary.¹³⁴

AGE compensation should, in general, provide the insured with 70 percent of the previous salary (in combination with statutory compensation). Compensation is limited to 25 percent on that part of the previous salary which goes beyond 20 base amounts. Compensation from the TA agreement, in combination with statutory compensation, provides the insured with 80 percent of her or his previous salary. Compensation from AGF-KL is paid as a one-time payment, but also, to those eligible, as a periodic compensation. The one-time compensation is equivalent to one third, per year of employment, of the normal monthly salary previous to unemployment. The periodic compensation corresponds, in general, to retirement compensation minus 10 percent.

¹³³ See 'Omställningsavtalet mellan arbetsgivareförbund i svenskt Näringsliv och Privat-tjänstemannakartellen (PTK)', in a version valid (1998-01-01), § 8.

¹³⁴ A amount: 5,700 SEK, an additional 300 SEK for every year from 41 to 54 years of age and an additional 400 SEK for each year from 55 to 62 years of age. A maximum of 13,100 SEK can be paid to the insured in the form of an A amount. (If the insured regains employment and then again loses her or his job, an A amount can be paid again if at least five years have passed since benefits were paid the last time). The B amount is provided to the insured with a minimum of 3,000 SEK and a maximum of 27,000 SEK. If the employee has turned 60 years old at the time of the notice, she or he could get an extra 12,000 SEK. See 'Försäkringsvillkor för AGB från 2001-01-01', §§ 8–14. See also, for a more accessible overview: 'Försäkringar på arbetsmarknaden enligt lag och kollektivavtal 2002'.

Income compensation from private insurance companies

Maximum total compensation in case of unemployment is limited (by law) to 80 percent of the individual's normal income. There are voluntary instruments offered to individuals, by unions and insurance companies, which serve the purpose of filling the allowed gap between the compensation paid from statutory and collective insurance and 80 percent of the wage earned previous to unemployment.

Compensation from this kind of insurance is limited in time (the insurance company 'Accept' offers an insurance that is limited to 280 days, the insurance made available by the unions Sif¹³⁵ and Saco¹³⁶ have a limited payment period of 100 and 240 days respectively).¹³⁷ The qualifying period and the personal scope of application differ between the instruments offered by the various unions/companies. Regularly, the qualification criteria are stricter than in the instruments accounted for above, and thus, the protection offered is not accessible for those who only qualify for basic unemployment insurance. 'Accept', Sif and Saco all demand that the insured is, and for a considerable time has been, a member of an insurance fund. Voluntary (private) unemployment insurance instruments were introduced by 'Accept' in 1998. Saco and Sif introduced their insurance in 2000 and 2001 respectively.

7.2.5 Income support (when there are no other alternatives)

The Social Service Act regulates, among other things, the right to social allowance (income support). There is, according to the Social Service Act, a right to economic support for those who cannot get by on their own and who cannot get help in any other way.¹³⁸

The instrument of social allowance is distinctly different in kind from the social insurance instruments analyzed above. Social allowance is not technically constructed as a social insurance, and thus, the 'right' to social allowance is not derived from the conception that there is an insured individual who by working and paying fees has qualified for insurance benefits in the form of income compensation. Although there are criteria

¹³⁵ Sif is a white-collar union that works 'in the technology- and knowledge-based sectors of the labour market'. It is affiliated to TCO (the Swedish Confederation of Professional Employees), see www.sif.se.

¹³⁶ Saco (the Swedish Confederation of Professional Associations) is the central organization for university graduates.

¹³⁷ See 'Allmänna försäkringsvillkor i Sifs inkomstförsäkring', 'Allmänna villkor från SACO inkomstförsäkring' and 'Försäkringsvillkor, försäkring mot inkomstbortfall vid arbetslöshet'. The insurance terms from 'Accept' can be found at <http://www.acceptforsakring.se>.

¹³⁸ Social Service Act, chapter 4, § 1.

Figure 7.6. A schematic overview of available income protection provided by statutory, collective and private insurance instruments, and agreements in case of unemployment

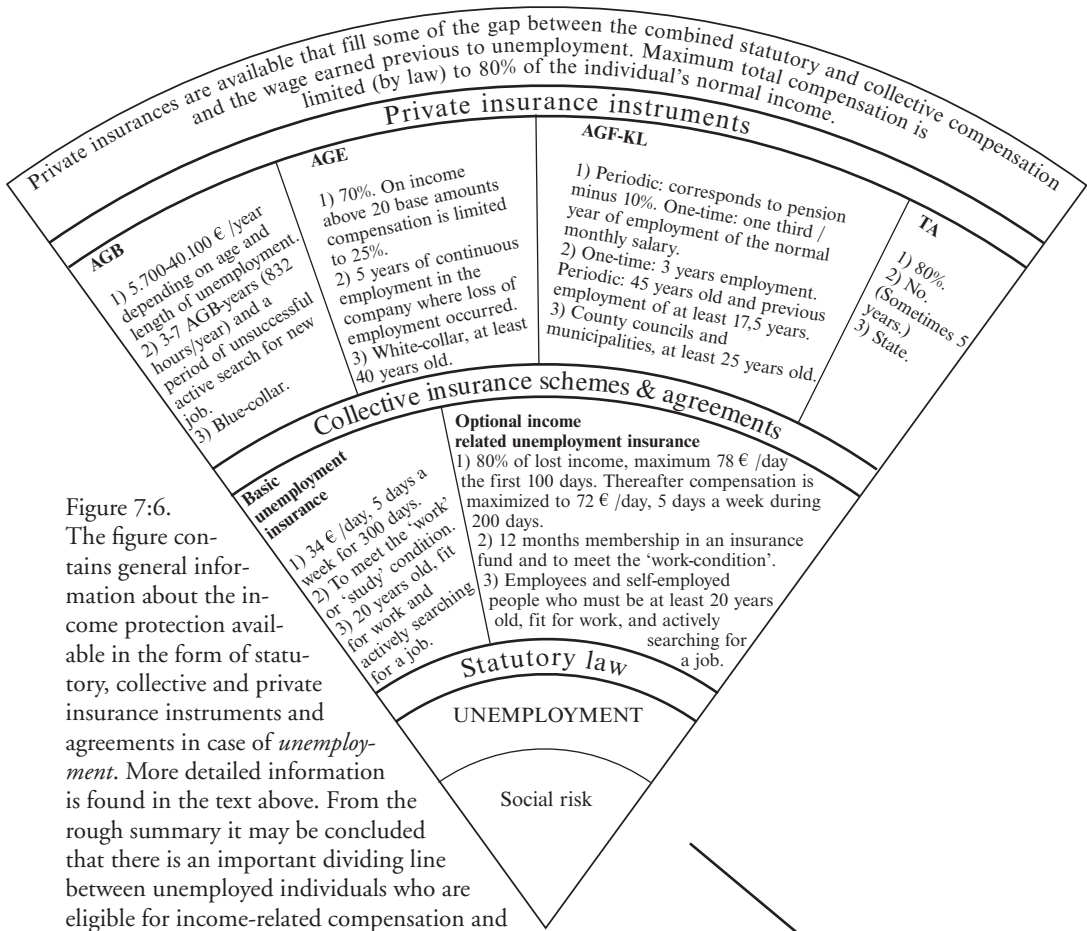
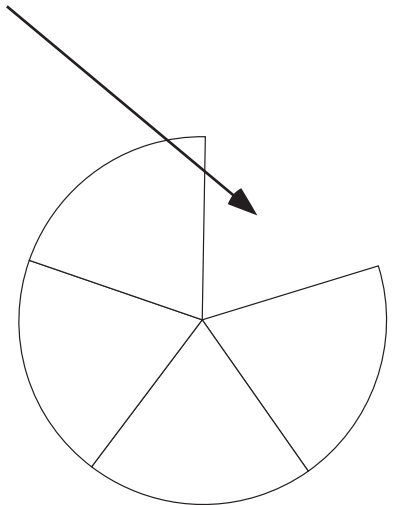


Figure 7.6. The figure contains general information about the income protection available in the form of statutory, collective and private insurance instruments and agreements in case of *unemployment*. More detailed information is found in the text above. From the rough summary it may be concluded that there is an important dividing line between unemployed individuals who are eligible for income-related compensation and those who are not. For those who are eligible for income-related compensation, statutory and collective instruments will, at best, provide 80 percent of the previous salary. Still, as the ceiling in the statutory insurance is not fully compensated for by most of the collective insurance instruments, large groups of unemployed individuals have to calculate with a compensation below 80 percent. Regularly, the qualification criteria in the private instruments are stricter than in the statutory and collective instruments and, thus, the protection offered is not accessible for those who only qualify for basic unemployment insurance. 1) Compensation level, 2) qualifying period, 3) personal scope of application. Data as of 2002-07-01. Exchange rate as of 2003-08-23 (sums have been rounded off).



to be met, also in order to obtain social allowance, individuals do not earn the 'right' to social allowance. The 'right' to social allowance is rather derived from a conception that society has an ultimate responsibility for those who cannot provide for themselves.

In the 1990s, 'At a time when the individual experienced the sharpest need' the law regulations were changed. The previous comprehensive legal right to get support was curtailed. The group of people entitled to assistance grew smaller as more pressure was put on the individual to earn his own living'.¹³⁹ Thus, the work-line, previously discussed in relation to the social insurance instruments, increasingly also affects the distribution of social allowance in the 1990s. The obligations of the recipients were emphasized during the period, the disciplinary character of the allowance increased, as did the risk of potential intrusion into the sphere of individual integrity

In contrast to national social insurance instruments, which are financed through fees but also over the state budget, social assistance (including social allowance) is a last resort, financed by the municipalities.

In each of the different municipalities, there is at least one local government committee responsible for social services. It is possible for the municipality to make agreements with other actors for the distribution of services that fall within the sphere of the municipalities' responsibility for providing social services. Still, it should be noted that it is not possible to involve other actors in assignments that include the exercise of public authority. Thus, the municipalities are always directly responsible for the distribution of social allowance.¹⁴⁰ Depending on the size of the municipality, the number of 'social service offices' will differ, but the **administrative organization** is such that the individual will contact a social service office in her or his municipality in order to obtain social allowance.

The **personal scope of application** is regulated in law and states that the municipality has the ultimate responsibility to make sure that those who are staying within the municipality are provided with the support and help that they need.¹⁴¹ There is no **qualifying time** to fulfil in order to become eligible for social allowance.

The **criterion** which has to be met in order to obtain social allowance is that it has to be clarified that there is an actual individual need that

¹³⁹ Westerhäll, Lotta, 2002, p. 182.

¹⁴⁰ The non-Socialist majority in Stockholm tried in 2001 to introduce private actors in social services by using private companies and consultants in making social reports. This initiative gave rise to not only headlines in the media but also criticism from the Parliamentary Ombudsman and from the County Administrative Court. For an overview, see Dagens Nyheter 2002-04-25.

¹⁴¹ Social Service Act, chapter 2, § 2.

cannot be solved in any other way than by social allowance. The individual cannot have resources available that could be used for her or his subsistence and still be considered to be in need. There is also a primary responsibility for the individual to be available to the labour market. It is not a criterion spelled out in law, but it is still quite clear from the preparatory work and established practice that there is a demand on the individual to try to find work and also to participate in 'labour market measures' in order to receive social allowance. He or she must actively look for work, be registered at the employment office and/or participate in activities that will improve his or her capacity for work.¹⁴²

The **level of income support** is decided, within a certain framework, by the different municipalities and can (and does) differ between different municipalities.¹⁴³ For certain kinds of needs, there is a national norm, a guaranteed minimum level. The national norm should cover costs for food, clothes and shoes, sports and leisure, health and hygiene, consumer goods, fees for television and telephone and a daily newspaper. The level of the national norm depends on how the household is constituted and on the age of the household members.¹⁴⁴ Social allowance is also supposed to cover costs for housing, household electricity, home insurance, travel to and from work, medical treatment, medicine, glasses, emergency dental service, and fees to the union and to the unemployment insurance fund. Each municipality decides what total sum the individual should receive as compensation for the above costs.¹⁴⁵

¹⁴² The pressure on the individual to take responsibility for his or her own self-support increased quite considerably during the 1990s. An example of this is a judgement by the Supreme Administrative Court from 1995, in which the court stated that it was the duty of an unemployed individual to participate in job-searching activities arranged by the unemployment office and the social service office, in order to be eligible for social allowance. For an elaborated description of the developments of the right to social allowance during the 1990s, see Westerhäll, Lotta, 2002, p. 169 ff.

¹⁴³ According to Gunnarsson municipalities with a large number of individuals in the risk zone of being recipients tend to become more restrictive in their assessments. She also notes that there has been a tendency among the municipalities to introduce a 'waiting period' before approval of costs linked to, for instance, the purchase of furniture and television or non-emergency dental care, see Gunnarsson, Åsa, 2003, p. 191.

¹⁴⁴ In February 2002, the national norm for a single adult individual was 3,140 SEK/month (345 euro), see 'Regulation on Social Service', chapter 2, § 1.

¹⁴⁵ According to figures presented by Socialstyrelsen, the average size of social allowance per year and household during 2001 was 42,900 SEK (4,719 euro) in urban areas and 15,100 SEK (1,661 euro) in rural areas. One explanation provided for the discrepancies between urban and rural areas is that social allowance in urban areas more often is received for a longer period (6.6 months as compared to 3.5 months), another explanation provided by Socialstyrelsen is that it is more common in rural municipalities that allowances are paid from the social insurance system. See 'Jämförelsetal för socialtjänsten år 2001', <http://www.sos.se/FULLTEXT/125/2002-125-16/sammanfattning.htm>, 2003-08-24.

Figure 7.7. A schematic overview of the available protection in case of insufficient self-support (when all other options have been exhausted)

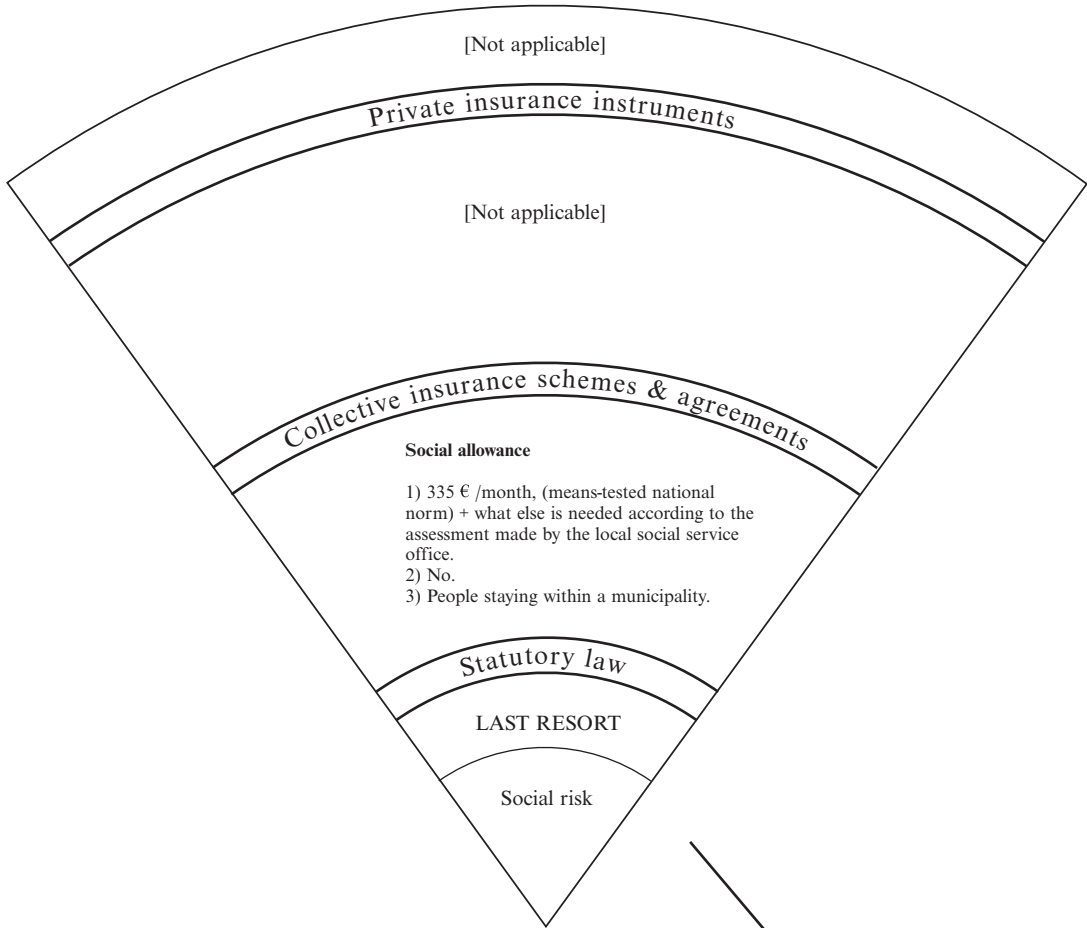
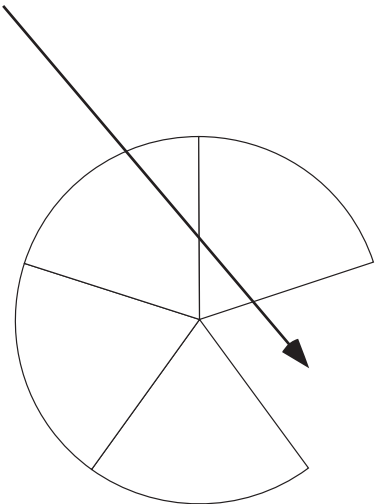


Figure 7.7. When no other options are available, recourse can be found in the distribution of social allowance. The instrument of social allowance differs a great deal from the social insurance instruments described previously; not only by being means tested and administered by the municipalities, but also by interacting with other actors than unions and insurance companies. In the field of 'last resort', important actors, apart from the authorities and the statutory regulation, are churches, non-governmental organizations and families (none of them visible in the figure above). 1) Compensation level, 2) qualifying period, 3) personal scope of application. Data as of 2002-07-01. Exchange rate as of August 2003 (sum has been rounded off).



7.3 The full picture

If the five figures (7.3–7.7) accounted for above are added together to form one full circle, what appears is an illustration of the ‘concentration’ idea. A system emerges that, however complex in its details, still has a distinct structure in which each social risk is dealt with in its own right, according to its own (politically estimated) rationalities. At a close look, the system is almost overwhelmingly intricate, but studied at some distance, it appears to be fairly comprehensive and predictable.

Figure 7.8. Concentration (I)

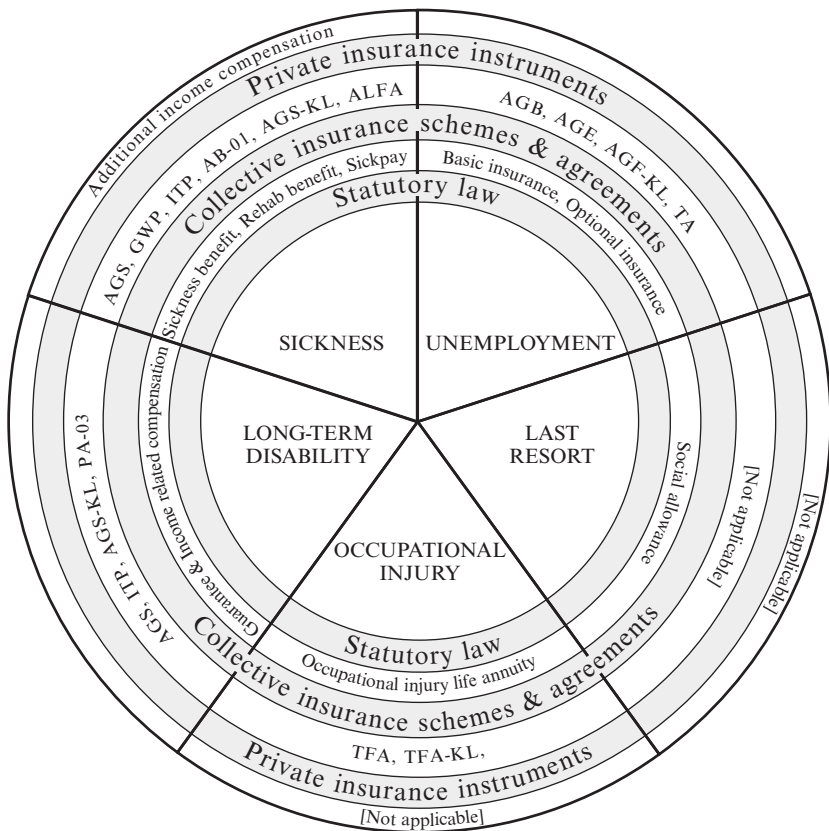


Figure 7.8. An overview of the different instruments involved in case of inability to self-provision.

For an individual living in the midst of this system, the social risks covered are well-known, be it short-term or long-term sickness, unemployment, occupational injury or 'last resort' – the categorization that is at the base of the system is dressed in a familiar vocabulary. The individual who, for instance, loses her or his job will approach the sector of the system that deals with unemployment, and the idea is that the following course of events will be guided by the rationalities linked to this specific sector. When adding the compensation offered by statutory, collective and sometimes private insurance instruments, the level of protection is, in general, pending between c. 80–100 percent of the previous income depending on the social risk (with exception of 'last resort'). The system thus signals inclusiveness and security as long as the individual need for income compensation is based on 'sickness' or 'unemployment'. As an outcome of the different rationalities present, compensation levels vary depending on the cause of lacking self-provision, but the variation is not extreme, for those well-embedded in the system.

In the name of increased efficiency and predictability, the 'concentration policy' aimed at an accentuation on the differences between some of the sectors illustrated above. By emphasizing how important it was that individuals entered the system in the distinct sector that was specifically designed for dealing with their type of problem, the concentration policy sharpened the lines of demarcations between sectors (at the same time as increased weight was put on the importance of co-operation between authorities concerned).

During the 1990s, the demarcations between the three social risks 'sickness', 'unemployment' and 'last resort' were accordingly sharpened, but in this process, it is also to be noted that the three instruments dealing with 'sickness' (sickness cash benefit, disability pension and occupational injury cash benefit) were merged.

The integration of the former disability pension into the sickness insurance (implemented in 2003) is a change in line with the concentration policy, as it underscores the connection between the insurance instruments that deal with sickness in contrast to other instruments dealing with other social risks. The understanding of the criteria of 'sickness' and 'capacity for work' has been harmonized, and in that process, the (former) disability pension has lost the once explicit function of being a 'safety valve' for labour market policies.

It is also evident that the 'work-line' became more emphasized in case of long-term or permanent disability during the 1990s, and most clearly so for the younger and for the older. With the new 'activity compensation', individuals below the age of 30 will have their income support re-evaluated every three years, while individuals above the age of 60, on

the other hand, have lost the possibility to use the disability pension as an opt-out from an increasingly demanding labour market.

The importance of the occupational injury insurance has shifted drastically during the 1990s. From a situation where the insurance was considered as one of the cornerstones of the social insurance system, it became supplementary.¹⁴⁶

While the changes in the sickness insurance in 1995 and 1997 were based on the principle of distinguishing between the diverse aims and functions of different social insurance instruments, this idea was not prominent in the 1993 reform of the Occupational Injury Insurance Act. Instead, sickness insurance and occupational injury insurance were even further merged during an initial period of incapacity for work, and the specific characteristics of the different instruments were played down.

The insured will, in case of an occupational injury, since 1993 receive sickness cash benefit until the social insurance office has decided whether the injury has caused permanent reduction of capacity for work. Thus, the possibility to get income compensation is made dependent on whether the injury is of a kind that complies with the sickness criterion and whether the reduction of capacity for work is of a kind that complies with the criteria in the sickness insurance. When the criteria in the sickness insurance were tightened in 1995 and 1997, this also affected those who had suffered an occupational injury.

The definition of the criteria 'sickness' and 'capacity for work' are strangely out of focus in the debate on the occupational injury insurance, especially if compared to the intensive attention these criteria have been given in the reform of the sickness insurance. Instead, a comparable focus is found on efforts to elaborate the criterion of 'occupational injury'. However, the arguments put forward in the elaboration of an 'occupational injury' criterion have much in common with the arguments used in the reform of the sickness insurance. Such similarities are for instance: a strong emphasis on (medical) science as a base for delimitations; a strong emphasis on insurance medicine; and a strong support for the work-line.

It seems, thus, as if 'concentration' lead to an emphasis on some dividing lines but to a loosening of others. The sharp borders seemingly exist between the social risks of sickness, unemployment and last resort, while some of the specifics of disability pensions and occupational injuries have been played down.

¹⁴⁶ Then again, at the end of the decade, when sickness absence has re-escalated, the occupational injury insurance has attracted increased attention in combination with a new strategy to approach the rising figures by (again) focusing on the relationship between work situations and ill-health.

If an individual is put in the middle of the circle above (figure 7.8), one reflection, already made, is that of embedment. The individual is surrounded by protection measures that will provide a safety net against the ultimate risk of poverty and exclusion. The circle can also be used to illustrate that some of these protection measures are more central and basic (the statutory instruments), while others are peripheral and complementary (the collective and, even more so, the private instruments). For an individual in the centre, with a need for economic support and with access to the system, it should thus be possible to approach the relevant sector and proceed from a point in the centre towards the arc, as far as his or her eligibility stretches.

Hypothetically, one could have expected an increased interest in the collective and private insurance instruments during the period in focus. As the public insurance became more tight and less allowing, this might have created gaps to be filled by collective agreements and private insurance. This did not happen to any substantial degree. In the beginning of the 1990s, as the occupational injury insurance was drastically reformed, the employers did not consider it a possibility for the collective insurance to compensate for the consequences of the tighter state policy, nor were the other actors in the field interested in filling the gap created by a more restricted assessment of sickness and capacity for work in the public sickness insurance. In the collective and private insurance instruments, there is, if anything, a tendency to go further in the demand on the individual to produce objective symptoms and to be 'flexible' in relation to the present demands of the labour market. If social insurance was made tighter at the expense of those who, for various reasons, are not so attractive on the labour market and whose lack of well-being is not easily transformed into exact medical diagnoses, there are no other actors in the field ready to take over.

The content given to the criteria of 'sickness' and 'capacity for work' within the public sickness insurance will echo in the contractual agreements on the labour market and on the private market, as well as in other public insurance instruments dealing with incapacity for work. It is an echo that is slightly distorted in the sense that the interpretative space provided in law (although tightened) is even more formalized and detailed in the contractual agreements. The word 'objective' cannot be read anywhere in the legal acts regulating the right to statutory-based income compensation, but it is quite frequent in the private, and also in some of the collective, agreements. The law does not set out a specific period of time that determines for how long the capacity for work of an individual should be assessed against the kind of work she or he is trained for, and from which she or he has experience. In the contractual agree-

ments, it is not unusual to find specific time limits for this kind of assessment.

Thus, as will be further elaborated below, it is to be noted that everyone is not allowed to enter the system; there are those who, for various reasons, will find themselves unable to get access to the different sectors when a situation of need arises.

7.4 Technical solutions as a source generating societal conceptions of justice

Leaving the level of detailed data, I want to raise the question of what impact these technical solutions might have on the generally held conceptions of available risk protection? It is reasonable to assume that most members of society lack detailed knowledge of the requirements in the different regulations and agreements, applicable in case of loss of ability to self-provision. Still, the concrete paragraphs communicate the objectives of the legislator and other actors involved and feed images of what is reasonable to expect. The ambition in this final section is thus to shift focus from the complex and confusing level of technical constructions to the generalized features of risk protection that can be extracted from them.

The investigation shows that large groups of employees will receive income compensation at approximately 90 percent of their previous income in case of (short-term) sickness, without initiating any individual precautionary measures. In case of long-term sickness, the conditions are sharpened and the insured is, in general, provided with a compensation between 80–85 percent on the part of the income that is below the ceiling; for white-collar workers, in a varying degree, compensation for income reaches also above the ceiling. In case of occupational injury, full compensation is offered. In case of unemployment, compensation is 80 percent (although, in reality, distinctly lower for many recipients). If recourse has to be taken to ‘last resort’, the allowance paid is means-tested and slim. The system for income compensation in case of inadequate self-support is dominated by universal social insurance instruments, which are complemented by collective agreements covering large parts of the labour force. It could thus be argued that the overall system signals inclusiveness and generosity in its contributions. There is not much room left for private insurance instruments, especially as the possibility to fill the gaps that do exist in the universal and collective systems have been restricted by law; what remains is not very attractive from a market-based position.

The encompassing system has its weak spots; weaknesses that from the perspective of the individual make the safety net less reassuring. Members of the labour force are included in the generous system, but members of society who have not entered the labour market, or for various reasons slipped out, receive substantially lower levels of compensation. Although, in line with the concentration policy, some demarcations have been emphasized and others have been erased, there are still substantial differences, in terms of compensation, depending on whether inability is due to: 'occupational injury', 'sickness', 'disability', 'unemployment' or 'inability for other reasons'.

The figure of a circle, neatly divided into different sectors and used previously in this chapter, could be criticized for reinforcing the conception of an efficient, concentrated system that provides income support to those in need. The choice of illustration would thus, in itself, support the communicated objective when delivering an image of a system that seems to be not only comprehensive and inclusive but also predictable and rational. Still, the mapping exercise also resulted in information of another kind. Another circle can be drawn and imaginatively placed on top of the first one. In this second circle, focus is on the forces which push individuals back and forth between different sections and which also regulate access to the system.

In contrast to the image of a concentrated, distinct system, with clear demarcation lines between different instruments and different social risks, the above illustration can also be used to describe the more complex and less predictable encounter that is experienced by many of those individuals who turn up as complainants in the courts.

The criteria of 'sickness' and 'capacity for work' are in focus in the present study. The tightening of the sickness criterion and the massive emphasis on the work-line, push individuals out from the sickness section to unemployment or social allowance (unless, of course, they are able to find gainful employment). To be eligible for unemployment cash benefit you have to be 'fit for work', and those assessed not to fulfil this criterion might end up in the sickness section or in 'last resort'. When the capacity for work of individuals who have been long-term sick is reassessed, they might (if remaining or regained capacity is found) be transferred to unemployment or social allowance. In order to be eligible for social allowance, individuals have to respond to the demands of the social offices and he or she must be willing to actively search for work. An effect of the strong emphasis on the work-line is, as noted in the previous chapter, that individuals must be prepared to rehabilitate and re-educate themselves.

Individuals with low incomes are more sensitive to the decided level

Figure 7.9. Concentration (II)

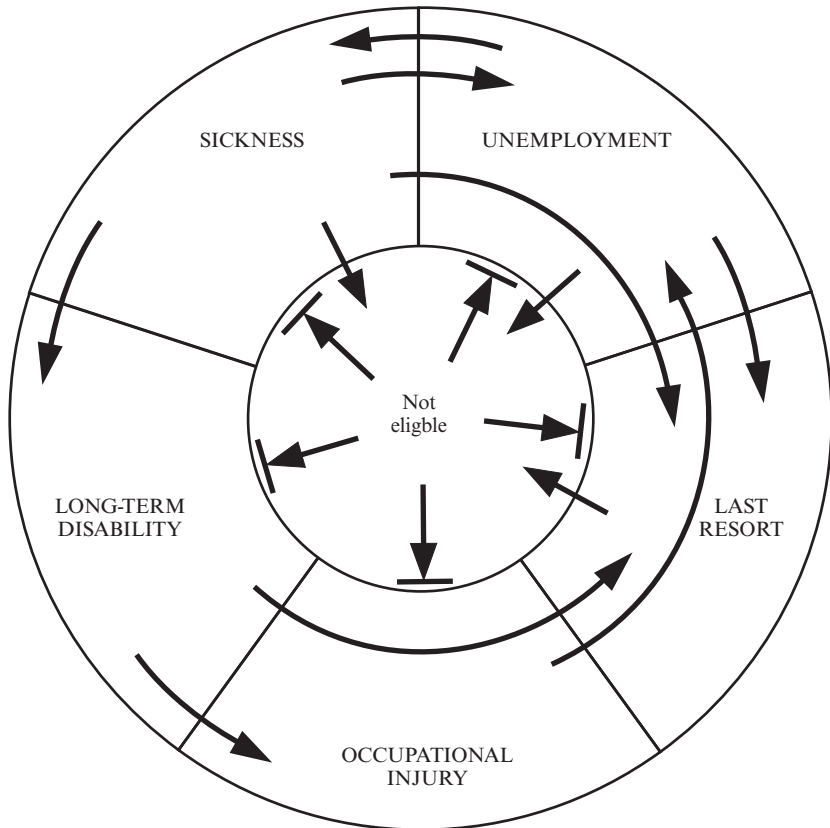


Figure 7.9. Access to the different parts of the system, as well as to the system itself, is dependent on many variables. Access to the system is controlled by how the personal scope of application and qualification periods are defined. Important key variables for those who have entered the system are: the assessment of material criteria such as 'sickness' and 'capacity for work', the level of compensation offered and the docility towards different pro-'work-line' rehabilitation and readjustment measures. The arrows indicate that for the individual who has gained access, the way through the system might not be as straightforward, from centre to arc, as indicated in the previous figure. Depending on the interpretation of key variables such as those mentioned above, individuals in vulnerable positions might find themselves pushed sideways in the system. As the criteria defining access were tightened during the 1990s, the protection system became increasingly hollow and the inner circle of non-eligible individuals grew larger.

of income compensation and the basis for its calculation. Social allowance is used (also) as a complement to those who are unemployed and sick but who cannot live on the insurance allowances that they are eligible for. When access to the system is restricted by tighter qualification criteria, the available protection becomes increasingly exclusive. In the tightened, concentrated, system the transfers of people 'sideways' increased. The arrows in figure 7.9 indicate some typical movements previously discussed (obviously other movements are possible too).

The image that appears of the available protection is dual. On the one side, it is comprehensive, generous and predictable, but on the other, it is, to the contrary, non-predictable, disciplinary and excluding. Both images are 'correct', and it is obvious that the dual character of the existing system is a cause for conflict. While the first image is the one that is officially communicated and popularly expected, the second is less obvious, except for potential recipients in vulnerable positions.

PART IV
CONCLUSIONS

8 Conclusions

It was stated in the introductory part of this work that the overarching problem of the study is to assess the role of the legal system in mediating social *conflicts* in an era of societal *change*. It was also claimed that in the modern, pluralistic state, additional stress is put on the legal system to deliver 'legitimacy' to society in the form of a unique procedure for efficient conflict resolution and mediation. Beneath this staging of the present study lies the unarticulated assumption that the legal system is, or at least could be, of fundamental importance for the successful governance of modern welfare states. This assumption is further underlined by the emphasis put on the responsibility of the members of the legal community to practice law using the full potential of dogmatic legal methods; a task necessitated by the proposed function of law to provide efficient conflict mediation. At the end of this concluding chapter, the questions raised concern this basic assumption, as it is discussed whether or not it is reasonable (and/or accurate) to lay this assignment on the legal system by using a notion of *de facto* legitimacy for evaluating its efficiency.

In Chapter 2, two questions were raised that would facilitate the exploration of the role of the legal system in mediating social conflicts in the modern, democratic welfare state of Sweden:

- 1) What is the legal content of the two criteria of 'sickness' and 'capacity for work' – when these criteria appear together – as determined by the legal practices of Swedish administrative courts in the late 1990s, compared to the practices of the early 1990s?
- 2) What explanations can be found – either for change or lack of change – given that the question above is studied in the nexus of interactions between 'legal practices' and 'societal conceptions of justice'?

In section 8.4, I reflect, as indicated above, upon the basic assumptions behind the present work, but in 8.1 and 8.2, I am faithful to the building blocks of the study. Consequently, the first two questions are regarded from a position where the proposed unique role of the legal system, as well as the stated fundamental responsibility of the members of the legal

community, constitute a point of reference against which the efficiency and the capacity of actual performance is discussed.

The first question, approached in 8.1, brings about a discussion of the 'legal content' of practiced law as well as a discussion on the role of experts in the courts. In 8.2, as the practices of the courts are discussed in the light of societal conceptions of justice, the issues approached concern: the courts' acceptance of a work-line and their hesitation at accepting an objective sickness criterion, the low-key court positioning, and the demarcation functions of legal criteria. In 8.3, the results are reflected upon in the light of the contextual and theoretical framework, as the notion of law as a provider of legitimacy is approached once again.

8.1 First question – the legal content of the criteria 'sickness' and 'capacity for work' as determined by the legal practices of Swedish administrative courts

In order to answer the first question, an extensive investigation of legal cases was carried out. The results of this investigation have been accounted for in Chapters 4 and 5 and the question has, thus, been partly answered already. A quick recollection of the results of the empirical study gives at hand that the courts only rarely elaborate their distinct interpretation of the relevant criteria in the written judgements and decisions produced. The material used for the analysis of the 'legal content' of the criteria 'sickness' and 'capacity for work' is, thus, largely restricted to the combined information of the court decisions made (access or no access) and the different kinds of data (symptoms, diagnosis, sex, age, assessments made by experts etc.) available in the description of the legal cases.

In short, the results indicated that the concentration policy had been thoroughly implemented by the social insurance offices and that the courts, to a very large extent, accepted the assessments made by them. Even if it was proclaimed, as the concentration policy was implemented, that no change was intended in how the criterion of sickness should be apprehended, the results indicate a tightening in the practice of the insurance offices during the late 1990s, to the detriment of individuals with subjective symptoms who claimed a right to sickness cash benefit. This was a tightening of practice that, by and large, was accepted by the county administrative courts. There are signs, however, that point to the fact that the administrative courts of appeal were somewhat more scept-

ical to a line of reasoning where the proposed dichotomy between subjective and objective symptoms was made a determinant for decisions on access or no access. The results also indicated that the introduction of the step-by-step model for the assessment of capacity for work was effectively implemented by the authorities, and that the courts, as compared to the practice of 1993, increasingly supported the assessments made by the social insurance offices. These were assessments that stressed the obligations of the individual to adapt to new circumstances as capacity for work increasingly was assessed against the unspecified criterion 'work normally available on the labour market'.

In the following three subsections, I will probe further into what consequences these general developments had for the 'legal content' of the two criteria *sickness* and *capacity for work*, but before proceeding, something should be said about how the quest for 'legal content' should be perceived. The 'legal content' of interest is the content of the *de facto* assessments of the two criteria of sickness and (in)capacity for work made by administrative courts when facing the assignment of deciding on access to sickness cash benefit. The task is to pinpoint whether there are any distinct types of cases where the courts find that the individual in question is or is not to be considered as 'sick' according to the law, and whether there are typical types of cases where the courts find that, although sickness is uncontested, this condition is, or is not, considered to affect the individual's capacity for work (in relation to 'work normally available on the labour market').

8.1.1 Courts opting out?

Based on the results of the investigation of legal cases, an initial response to the first research question seems to be that the legal content of the concepts of *sickness* and *capacity for work*, according to the practice of the administrative courts, does not differ from the practice of the social insurance offices. This is particularly the case if the decision on the administrative level is based on the recommendation of an insurance physician. In an overwhelming majority of the cases brought to court, and especially in the kind of cases that can be linked to the concentration policy, the insured individual who is not considered to be sick by the local insurance office is not considered to be sick by the courts either, and the individual considered to have capacity for work by the social insurance office is also considered to have capacity for work by the courts. If a few cases had not been granted leave to appeal, the consistency between the assessments made by the judges, and the assessments made by officials at the local social insurance offices, would have been almost total.

In Chapter 4, it was argued that a possible explanation for this state of affairs could be that the quality of the decisions made at the social insurance offices is high and consistent (and also that the quality of decisions has increased between 1993 and 1999). Another possible explanation for the coherence in the assessments is that the importance of the medical expertise available at the social insurance offices (the insurance physician) grew during the relevant period, as the insurance physician achieved a strengthened position as a key actor in the decision-making process. The weight of the recommendation of the insurance physician is, it could be argued, by the end of the 1990s so influential that it seems as if the administrator at the social insurance office, as well as the judge in the administrative court, opt out from making independent assessments. This interpretation is strengthened by the lack of a legal reasoning in the judgments made by the administrative courts (see Chapter 5), as well as the, quite frequent, direct references to the assessment made by the insurance physician as crucial for the decisions.

There seem to be at least two possible explanations for the situation at hand, explaining the almost 90 percent consistency between decisions made by courts and decisions made at the administrative level. The first explanation is that the overlap is reasonable, as argued above, considering the quality of the decisions made at the local insurance offices. This explanation then indicates that the issue as such, the assessment of *sickness* and *capacity for work*, is not tremendously complicated from a legal perspective (if it were, it would be reasonable to expect more shifting assessments). The second explanation is that the social insurance offices and the courts form their decision based on the same expert opinion, the expert in 'insurance medicine' working on behalf of the social insurance office. This latter explanation indicates that the issue of making an assessment of sickness and capacity for work is considered to be a medical issue rather than a legal issue. The answer to the question of whether an individual has a right to sickness cash benefit is thus put into the hands of medical experts, among which the expert in insurance medicine has precedence. As there is only one expert in insurance medicine involved in a large majority of the cases, the courts, just as the social insurance offices, do not have to weigh different insurance medical opinions against each other but can follow the one expert available. This inevitably leads to a situation where decisions made at different levels are repeated. From the perspective of the individual, this second explanation of the coherence in results is, needless to say, not a very satisfying one.

8.1.2 Legal content according to the practice of the courts

This said, there is reason to modify the argument somewhat, as the investigation of legal cases also provides input to a more nuanced observation. According to the results presented in Chapter 4, the courts seem to fully accept the increased emphasis on the work-line in sickness insurance. It was less clear, however, at least as far as the appeal courts were concerned, that the courts as whole-heartedly accepted an ‘objective’ sickness concept. This difference – how the courts dealt with the sickness criterion, versus how they dealt with the criterion of (in)capacity for work – is something that I will come back to when approaching the second research question, but it is worth a comment here as it could be interpreted as an indicator contradicting the proposal that the courts are – solely – a stage for combat between medical experts.

The empirical results strongly indicate that the assessment of *capacity for work* was tightened between 1993 and 1999, in line with the ambitions of the concentration policy. Concretely, this meant that the insurance to a lessening degree made it possible for the insured to hold on to a specific kind of trade or employment, as allowances from the insurance increasingly were granted on the basis of an assessment of capacity for work in relation to (any suitable kind of) work ‘normally available on the labour market’. There was a general, overall increase of this type of cases between 1993 and 1999 (from 15 percent to 38 percent). The increase was particularly emphasized in cases involving: unemployed, men, individuals in the age group 36–45 years old, and individuals working in sectors such as nursing, caretaking, building, restaurants, or transport. Examples of such cases, along with the reasoning of the courts, have been provided in Chapter 5.

What then does this say about the ‘legal content’ of the criterion (in)capacity for work? In the material analyzed, there is a substantial number of cases that are very specific; these cases carry information that is difficult to generalize. Still, there is also in the material some recurring types of cases, typical cases where it is possible to discern a general pattern in the practice of the courts:

- Unemployed individuals are almost always considered to have capacity for ‘suitable work normally available on the labour market’ (thus, the unemployed rarely have a right to sickness cash benefit).
- Age is not considered a reason for individuals not to retrain or re-educate (thus, if there was no capacity for work in the acquired trade, the courts often make the assessment that there is capacity for other work, and there is usually no right to sickness cash benefit).

- Sex is not a reason that you could not re-train or re-educate (thus, also men in traditional male occupations have to be prepared to shift trade, and there is usually no right to sickness cash benefit. For women this seems to have been the case already in 1993.)
- For those (men and women) with an occupation within a physically demanding trade (such as nursing, building, driving, cooking and waiting) and where the employer cannot offer rehabilitation – the courts frequently make the assessment that there is probably capacity for work in another trade, and there is usually no right to sickness cash benefit.
- Some degree of acknowledged disability is not considered to be a reason why the remaining capacity for work should not be used, and it is very difficult for an individual to get a positive response to the argument that capacity for work has further decreased since the assessment was made that constitutes the basis for the disability decision (thus, it is very difficult to add 50 percent sickness cash benefit to a 50 percent disability pension, and there is hardly ever a right to sickness cash benefit in these cases).

In 1999, the courts decided fully in favour of the insured in 9 percent of the cases in which the main issue concerned the assessment of capacity for 'work normally available on the labour market' (compared to 19 percent in 1993). Many of those who received a negative response from the courts belonged to the groups above. For the unemployed, the assessments so often resulted in a decision that no right to sickness cash benefit existed that, from the perspective of the individual, a not too far-fetched conclusion would be that unemployed individuals were no longer included in sickness insurance. The practice of the courts has tightened; still, there were also exceptions. The cases of BS and GD say something about the limits of this tightened practice for unemployed:

BS was 56 years old when the social insurance office decided to reduce her right to sickness cash benefit. BS had limited education and she lived in a small village. She was unemployed at the time of her sick-listing and had previously mainly worked with cleaning. BS had been fully sick-listed for three months on the diagnosis myalgia at the time of the social insurance office's decision to reduce her allowance to 50 percent. In court, BS claims the right to full sickness cash benefit and the social insurance office claims that she is only entitled to 50 percent. The insurance physician makes the assessment that BS is 'not totally without capacity for work', and her treating physician makes the assessment that it is 'doubtful if she manages to work 50 percent'. The court justifies its decision as follows:

At the time of the decision made by the social insurance office, BS was 56 years old. The medical report shows that her functional level was considerably reduced and that her problems were expected to be permanent. It is certified that BS has very low vocational training and that the range of work opportunities in her home district is limited. Mainly with regard to the medical report, but also on account of other circumstances in the case, the Administrative County Court finds, on the basis of a comprehensive assessment, that BS's capacity for work is permanently reduced by three quarters, but not more than that.¹

This is one of few cases in the material where the courts explicitly use the possibility to include also other reasons than those that are 'strictly medical' in the assessment of capacity for work. The court does not explore what kind of suitable work 'normally available on the labour market' that BS should be expected to find, given that she should explore her remaining 25 percent capacity for work.

A more typical example of a case where the claims of the complainant is accepted is the case of GD.² This case concerns a man who had previously worked as a taxi-driver but who had been unemployed for two years when he first became sick-listed for problems with his stomach, back, shoulders and knees. He was described by his treating physician as having medical difficulties that made it hard for him to walk as well as to sit or stand for any length of time. He was also described as being incapable of lifting various objects. After six months of full sick-listing, the social insurance office made the assessment that GD, being unemployed, had full capacity for 'suitable work normally available on the labour market' and decided that GD had no right to sickness cash benefit. Ten days later, GD became sick-listed 100 percent on the diagnosis 'depression'. In court, he claimed that he had a right to full sickness cash benefit also those ten days when the social insurance office had decided he did not qualify. The social insurance office claimed that no such right existed. The insurance physician claimed that GD had full capacity for 'suitable' work. The court decided in favour of the demands made by GD. What makes the case of GD more typical as a case where the court decides in favour of the insured, is that GD, at the time when his case was tried, was assessed by the social insurance office to have no capacity for work. Thus, if individuals who claim the right to sickness cash benefit for a period when it has been denied them, at the time of the court procedure have again become sick-listed or given a disability pension, they will have fairly good chances to win their case.

¹ LR i Östergötlands län, mål nr 2823-97, dom 1999-11-12. Case 85.

² LR i Stockholm, mål nr Ö 7408-98, dom 1999-04-19. Case 233.

My overall impression when examining the empirical material is that quite a few of the complainants with an acknowledged reduction of physical capacity are bewildered and offended, not by the opinion that they are expected to primarily work for a living, but due to the assessment of their capacity for work against, what they consider to be, an abstract (non-realistic) notion of available and suitable work (see for instance the example of KN in Chapter 5). When the social insurance office tells these individuals that they have no right to sickness cash benefit because they have capacity for work in 'suitable work normally available on the labour market' – and the individual cannot imagine what kind of work this should be – there is a risk of creating a deep credibility gap. Still, in the majority of the cases, the practice of the courts indicate that they accept such an approach to the assessment of capacity for work.

The empirical results also indicated that the distinction between 'objective' and 'subjective' symptoms became more important in the arguments presented at the courts in 1999 as compared to 1993. Compared to cases where the main issue concerned an assessment of capacity for work, the appeal courts, in the cases that mainly concerned the sickness concept, were found to be more apt to revise the original decision and form a decision in favour of the insured. Thus, it is possible to distinguish a pattern where in this specific type of case the appeal courts have a tendency to refute the expertise in 'insurance medicine' and decide in favour of the individual.

Still, from the reasoning above it can be concluded that, in the cases of relevance for this study, the medical aspects do create a situation where external experts seem to have a great impact on the outcome of the court procedure. The role of experts in the court procedure is a question of broader relevance, beyond the scope of determining access to sickness cash benefit, a question that will be approached below.

8.1.3 Medicalization and scientization – two different processes affecting the content of legal criteria

The developments described above bring to the fore the connection between political and judicial decision-making, on the one hand, and medical science (expert knowledge), on the other. In Chapter 6, it was concluded that the 1990s was a period when the 'appointed (confidence) physician' changed function, from being primarily a 'translator' between treating physicians and officials working at the social insurance offices, to become an 'insurance physician' representing a distinct field of expertise. This is a development that by the end of the 1990s resulted in a dis-

cussion about establishing academic positions and platforms for the new discipline of 'insurance medicine'. Confronting the issue of 'problems in research policy', Eirikur Baldursson states that:

The highly industrialized and scientized society, where political decision-making and the actions and exercising of power by the authorities are increasingly based on scientific reports, has initiated a fairly new kind of research, which by nature is politicized. This politicized research falls back on the relations between those governing and those who are governed, between the power machinery in all its ramifications on one side and the citizens on the other.³

In the field of social policy, the importance of scientific experts and their potential to relieve political decision-making by participating in the development of social policy measures has been discussed by, for instance, Claus Offe in terms of a process of 'scientization of state social policy'.⁴

The concept of 'medicalization' is used to describe a process in which an increasing amount of different phenomena, affecting the overall social situation of individuals, are approached as medical problems that can be diagnosed and treated within the framework of the professional competence of medical experts.⁵ Thus, describing a development in which the science of medicine has become an important factor for the way society apprehends and looks for solutions to different phenomena, medicalization could be viewed upon as an example of the process of 'scientization', as described by Offe. Examples of physical conditions that were in a process of 'medicalization' in the 1990s were for instance: '... pain condition in muscles and joints, injuries caused by stress and wear, psychosocial problems, dyslexia, infertility, menstrual complaints.'⁶

There are many different aspects of medicalization, but of key interest for this study is what is sometimes called 'the institutional level of medicalization' – when the communication of professional knowledge of medicine becomes the basis for administrative, legal and socio-political decisions.⁷ When social insurance instruments, such as sickness insurance and disability pensions, were introduced in society, medical doctors were given the role of 'gatekeepers'. Questions that earlier were defined as work-related (dealing with work presence and work discipline) at this time became medical questions.

³ Baldursson, Eirikur, 1984, p. 213.

⁴ Offe, Claus, 1984, pp. 112 ff.

⁵ Lindqvist, Rafael, 1997, p. 48, with a reference to Zola, Irving (1975). 'Medicine as a System of Social Control', in Cox, Caroline and Adrienne Mead (eds.), *A Sociology of Medical Practise* (London).

⁶ Lindqvist, Rafael, 1997, p. 48.

⁷ Lindqvist, Rafael, 1997, p. 49.

As long as access to insurance instruments are based on the criteria of sickness and capacity for work, the following two questions are at the core: Who should be defined as sick, of all those who feel unwell in our society? And who should decide on the definition?⁸

At least from a historic point of view, the scientific, biological understanding of sickness has been that sickness is a deviation from what is normal. That is to say, there exists a normal, healthy body that can be determined on the basis of specific criteria. Deviations from these criteria are sickness. The scientific approach in the formulation of these normality criteria has, however, been closely intertwined with cultural notions. Also, medical science has a sad past to account for, as a tool for a variety of ideological aspirations.

One example is the construction of the gender-, race-, and class-specific body from the second half of the 19th century. With the aid of science, ideas about differences could be firmly established on seemingly neutral ground: biology. It was about man/woman, European/savage, middle class/lower class. It was at this time that medicine launched a specific female biology, which formulated the need of a patriarchal society for a subordinated female body. The thesis of race biology legitimated a greedy colonialism. The degeneration theme reflected an intensified class struggle.⁹

In scientific medicine (as opposed to, for instance, folk medicine or alternative medicine), the body is approached from a scientific and biological point of view. 'The eye is fixed on organs, tissues, cells, micro structures and not on the body as a social system.'¹⁰ This leads to a narrow concept of sickness, where the medical profession has been given the right of interpretation above the experience of the sick person. Johannisson has approached the topic of how 'sickness' has been defined in different periods of time, including our own:

Modern definitions of sickness rest on the strict criteria of biomedicine. Sickness is a deviation from a specific biological norm, which can be measured, taken hold of, and fixated by scientific language. But when they are applied to the social scene of the body, such descriptions are insufficient. Sickness is transformed from something that is experienced and lived into an inner landscape that only the physician controls. If sickness is regarded as an experience or a life event, the story becomes more ambiguous, wilful, and unreasonable.¹¹

⁸ The question has been analyzed by a number of researchers, and Lindqvist provides a broad review of theoretical standpoints with a major impact on our contemporary understanding of 'sickness' as a social phenomenon.

⁹ Johannisson, Karin, 1997, p. 202.

¹⁰ Johannisson, Karin, 1997, p. 199.

¹¹ Johannisson, Karin, 1997, p. 182.

Lindqvist argues that there are strong incentives for an increased process of medicalization in society when we can note the simultaneous occurrence of 1) a common experience by many individuals that their total life situation is marked by high and increased demands, and 2) the fact that social insurance instruments are based on concepts such as 'sickness' and 'capacity for work'.¹² The possible consequences of these developments are also discussed by Lindqvist:

The medicalization may have far-reaching consequences outside the medical sphere: the governing of society risks becoming de-politicized, social control becomes a function of experts, which in turn will change our mutual social relations. In this lies what looks like a paradox. Social policy in its Scandinavian form has grown out of an ambition, not least on the part of the Labour movement, to give citizens – through political decisions – a greater influence over the allocation processes in society. These political decisions have been formulated in such a way that their implementation calls for the participation of experts who consequently gain a very substantial influence on the outcome of the reform policy.¹³

The strong emphasis on the work-line, characteristic of the reforms of the 1990s, can be described as a countermove, a response to the effects of a medicalization process. The growth and strengthening of the discipline of insurance medicine can also be interpreted as part of the de-medicalization ambitions and linked to the 'new' work-line. Still, the heavy leaning on insurance medical expertise in the decision-making process reinforces (rather than counteracts) the process of scientization that characterizes the administration of the insurance.

8.2 Second question – explanations of change, or lack of change, in the legal content of sickness and capacity for work

From the above may be concluded that the results indicate that the courts during the period 1993 to 1999 adopted a stricter, tightened, approach to individuals who claimed a right to sickness cash benefit. Or, with a change of perspective, the courts seemed, during the relevant period, to have become increasingly more prone to listen to the arguments of the collective, represented by the social insurance offices and the insurance physicians. The implementation of the concentration policy seems to have been successful in this respect.

¹² Lindqvist, Rafael, 1997, p. 8.

¹³ Lindqvist, Rafael, 1997, p. 8.

In this process of 'tightening' access to the insurance, the results do not indicate that the practice of the courts is discriminating. The new policy of the courts affected men, women, different age groups and individuals with a possible non-Swedish ethnic background, all alike. It is to be noted, however, that 'equal treatment' in this situation meant the loss of a former more favourable position for men. In 1999, as compared to 1993, the forecast of receiving a favourable decision in the courts was equally difficult for everyone concerned – although it should be noted that 'everyone' does not end up in court in a conflict regarding access to sickness cash benefit. For instance, in the material studied, very few of the complainants had an academic degree or a managerial position.

When working with the case material, I came to realize how extremely difficult it was, from the perspective of the individual, to convince the courts to solve the conflict at hand in a way that his or her claims were supported. From the side of the collective, the situation might appear reasonable, but it is more doubtful if the situation could be described as satisfying for the individual concerned.

In light of the theoretical model outlined in Chapter 2, the striking coherence, already commented on, between the assessments made by the social insurance offices and the administrative courts, in combination with a lack of explicit legal reasoning in the judgements, is problematic. It was emphasized in Chapter 2 that the judges, having a different mandate and representing the legal community, differed from the other actors involved in the decision-making process. The courts were presented as representing 'a mechanism of peaceful conflict resolution and a medium for the realization of moral norms within a wide area', and the judges, representing the legal community, were described as having a great responsibility, not only in the decision-making process, but also in how the results of this conflict resolution are communicated to the inhabitants of the society. But if this mandate is not used, or if it is used but no major difference can be identified when the courts and the social insurance offices are compared, is it possible then to evaluate the capacity of the legal system to mediate social conflicts? This dilemma will be dealt with below as the second research question is approached.

The second research question asked for explanations for changes, or lack of changes, in the legal content of the criteria sickness and/or capacity for work. Considering the answers to the first question above, what needs explanation is the overall tightening of access to the insurance, a change that is in accordance with the concentration policy and visible in the comparison of cases from 1993 and 1999. What also needs to be explained is the tendency of the courts to hesitate at adopting a more 'objective' sickness criterion.

8.2.1 The courts' acceptance of the work-line while remaining hesitant towards the introduction of an objectivity criterion

Above, the large overlap in the assessments made by the social insurance offices and by the courts was described as a possible dilemma for the theoretical building blocks of this study. As elaborated above, one explanation, among a set of possible explanations, is that courts 'opt out'. The dilemma for this study is that, had the above interpretation of the situation reflected what is actually taking place, then the courts do not really act as courts, and if the courts do not act as courts, but as a stage for medical experts, there is, if the theoretical model is taken to its extreme, no material left to analyze. It would still be possible to criticize the courts for not 'providing legitimacy' and to criticize the judges for not taking their responsibility, but it would be pointless to analyze their decisions in terms of a communicative process involving *law as legal practices* and *law as societal conceptions of justice*.

Still, there are other explanations than the opting-out theory available. The concordance between assessments could be coincidental, or maybe it could even be interpreted as an indication of how well-functioning the system is – a situation in which legal and medical assessments harmonize almost perfectly. The sign of hesitation to adopt an 'objective' sickness criterion could be understood as a counter-indication to the opting-out theory. This sign of independence in the courts is a sign that they do make legal assessments of the issue at hand, in which the opinions of experts are treated as parts of a material to be weighed according to legal method. If the courts actually make legal assessments related to the sickness criterion, the probability increases that they also make legal assessments of the criterion capacity for work. Thus, the second research question might be relevant after all: Are there any explanations to be found 'in the nexus of interactions between legal practices and societal conceptions of justice' that would explain the described developments of the courts' assessments of sickness and (in)capacity for work during the relevant period?

Starting with the assessment of (in)capacity for work, it could be concluded that the basis for the assessment of capacity for work is strongly linked to the attitude towards the work-line, as the assessment of available capacity for work to a large extent is relative to what kind of work the assessment is made against. From the sources proposed to generate societal conceptions of justice (values, discourses and technical solutions), it was possible to form an image of the welfare state of the 1990s that included a decreasing protection of an established position and increasing demands

on the individual to be flexible and dynamic in line with the demands of the modern labour market. Different analyses suggested a shift in character of basic Swedish welfare provisions, away from basically de-commodifying functions and in favour of re-commodifying policies. For the individuals concerned, such a shift in emphasis meant an increased pressure to adapt, to retrain, rehabilitate and re-educate themselves. The effect of a strong emphasis on a work-line in social insurance also meant that social insurance became less of a protection of a specific social position, such as an acquired trade or profession, and more of a temporary solution, facilitating transfer from one social position to another.

In discourses emerging in the relevant period, there was a strong overall support for the work-line approach, although there were also some hesitant voices during this period, claiming that the work-line, in its extreme, would result in no cases of incapacity for work at all. (If an individual can lift an arm, stand up or sit down, or use one hand, there is, at least potentially, some kind of 'normal' work that this individual could perform – as long as 'normal' work is only an abstract notion.) The criticism thus underlined that at some point a strictly enforced work-line becomes inhumane (and this dilemma is also at times acknowledged among the supporters of a more far-reaching work-line). Still, the dominant impression of current discourses during the relevant period is that the work-line, and its entry into the social insurance system, was fully accepted. The increased emphasis on the work-line is visible in most of the technical solutions presented in Chapter 7. Whether or not your inability to work is defined as based on sickness, unemployment or 'other reasons', the pressure on the individual to adapt, retrain, re-educate and rehabilitate is inescapable.

In light of the above, the confirmation of a strict work-line, present in the material of legal cases, seems to be justified in a perspective where law is approached as a provider of legitimacy and thus supposed to be 'responsive to public experience'. But it should be noted that the legal assessment to be made does include, in each and every individual case, the responsibility to be a barrier against inhumane practice. A far-reaching formalistic approach to law could in a worst case scenario lead to a situation where the pressure put on individuals to re-commodify themselves goes beyond what is reasonable. In the material, there are a few examples to be found where courts have taken such a position (see for instance the judgement from the appeal court in the case of PH in Chapter 5). Still, in this conflict between individual claims for the protection of an established position and the interest of the collective (represented by the social insurance offices) for increased flexibility, the courts do seem to firmly, and increasingly, support the position of the collective.

The material also indicates that this shift in where to draw the line has affected the situation of male individuals more than female. To find explanations for why this is the case, further studies must be made. Still, a possible analysis is that for women working with cleaning, caretaking or in other service-related female-dominated trades (trades that are frequently represented in the material), their work identity has not been considered a 'social position' with a value to be protected to the same extent as the trades traditionally associated with men, such as chauffeurs, carpenters, construction workers etc. (also trades frequently represented in the material). Thus, also previously, when the insurance to a larger extent might have protected the established position, this protection did not include typically female-dominated trades. Women, it seems, were expected to adapt and retrain to a large extent even in 1993. In 1999, on the other hand, both men and women, young and old, (lacking higher education and/or managerial positions) faced these demands.

The assessment of the sickness criterion, on the other hand, is an issue in the midst of the 'medicalization' debate. The efforts made to distinguish between objective and subjective symptoms, as a way to create a more 'strictly medical' sickness concept, the promotion of 'insurance medicine' as a field of expertise in its own right, as well as the strong emphasis on the work-line, could all be interpreted as parts of a strategy to control and force back a process of 'medicalization'. The results of the present study indicate that of these three measures, the first one, involving the elaboration of the sickness concept, was the least successful in terms of how the courts transformed the concentration policy into legal practice. This said, it must be added that there are a number of cases in the material in which the dichotomy between 'objective' and 'subjective' symptoms is used by experts, and where the courts, for whatever reason, will decide in line with the assessment made by these experts.

The effect of a stricter interpretation of the sickness criterion would have been that among the large group of individuals who do not 'feel well', a more limited number than before were considered to be eligible for allowances from the insurance. If we accept that sickness is a relative concept and not an absolute status, the determination of scope for eligibility is mainly a political decision, not a medical one.

Trying to look into the future, Anthony Giddens has once forecasted a possible development where the line of demarcation between those whom a society will be willing to pay social allowances, and those excluded, will be drawn between 'self-inflicted' symptoms and others.¹⁴ Thus, sickness presumed to be caused by (for instance) smoking or an otherwise

¹⁴ Giddens, Anthony, 1995.

unhealthy lifestyle would not be a basis for allowances (however objective the symptoms). It would thus, at least theoretically, be possible to draw the line of demarcation between those who are eligible and those who are not by using an objectivity criterion. Another technique would be to make a list of 'approved diagnoses'. It would also be possible to decide that the important factor is capacity for work rather than medical status, and then, the basis for the involvement of medical expertise in the decision-making process would be drastically undermined.

What happened during the 1990s was a combination of these processes. The position of the traditional medical expertise, the treating physicians, was undermined in the court procedure, to the benefit of the insurance physician, representing an expertise in 'insurance medicine'. And when the arguments of the insurance physician emphasized the capacity for work of the specific individual in the specific case, this argument was often in line with the final decision of the court. On the other hand, if the argument forwarded by the expert in insurance medicine emphasized that the reason to deny sickness cash benefit was based on the fact that there was no objective basis for the 'not feeling well' status of the individual, the courts would less consistently decide in line with the recommendation. How come?

The explanation offered by the proposed understanding of law as a provider of legitimacy would be that although the available *technical solutions*, the different insurance instruments, increased their emphasis on a demarcation between objective and subjective symptoms, there is no basis for this shift in how to perceive of sickness neither in *current discourses* nor in *basic values*. With no support for enforcing a shifting demarcation between who is sick and who is not in the *societal conceptions of justice*, the courts would either have to use a dynamic legal method in order to find an interpretation of law that is more in tune with existing values and discourses, or they would have to enforce the shift, along with the pedagogical responsibility to explain why. As the word 'objective' is not to be found in the relevant paragraphs of the National Insurance Act, and as the 1995 reform was marked by ambiguity (the emphasis on a strict medical concept and the message that this did not involve a change), it should not have been difficult for the courts to disregard the objectivity argument if they saw this to be a reasonable position.

Using the notion of *law as a provider of legitimacy* and analyzing the actions of the courts in the nexus of interactions between *legal practices* and *societal conceptions of justice*, one possible conclusion is that the courts have implemented the concentration policy, as far as concrete decisions are in focus, in a way that is marked by a sensitivity (conscious or not) towards the importance of law to be 'responsive to public experience'.

The effect of this is, in short, that it has been found acceptable by the courts to form decisions with the content that ‘sick’ people should work (within the scope of their ability), while the courts have shown hesitation to decide that individuals with subjective symptoms should not be regarded as ‘sick’.

More problematic for the notion of ‘law as a provider of legitimacy’ is that another possible explanation for the actions of the courts is that they, by and large, refrain from making legal assessments, allowing the courts to be a stage for experts in other disciplines. However unjust, or preposterous, this explanation might be, the remarkable lack of legal reasoning in the judgements opens up for this kind of thoughts. From the perspective of the individual, it is clear that many experience a Kafka-like situation, where they perceive that their arguments, supported by treating physicians, are not listened to and where the authorities are evasive as to explanations why. If taken seriously, this might be the main point of criticism from a perspective where law is supposed to provide legitimacy.

8.2.2 The low-key court positioning

First, it must be said that a comparison of the judgements and decisions delivered by the courts in 1993 with those delivered in 1999 shows a clear and qualitative change in how elaborately the issues at stake are described. Still, while the judgements and decisions from 1999 are more detailed and include elaborated descriptions of the arguments of the medical experts involved, the part where the courts argue for their decision is, in an overwhelming majority of cases, still very lean (and sometimes even briefer than in the cases from 1993). It is, at least from the perspective of this study and the proposed understanding of law as a provider of legitimacy, very unsatisfying that there is such a lack of legal reasoning. The lack of an account of how the courts perceive the conflict of interests and a presentation of the arguments for why they decide as they do is disturbing, as it invites guesswork of the kind that has been accounted for above. Do the courts use the legal scope for interpretation of the concepts of sickness and (in)capacity for work? There are indications that support the theory that they do not (the opt-out theory), but there are also indications that they do (as this would explain the courts’ acceptance of the work-line and their hesitation at accepting an ‘objective’ sickness concept).

One possible theory that could explain the behaviour of the courts is that they, in general, do not share the very core idea of this work – that the overarching function of the courts is to provide legitimacy through

efficient conflict resolution. The courts are *effective* – they do form decisions in favour of one or the other of the two parties involved in the conflict – but it could be questioned if their conflict resolving activity is *efficient* enough. Is a conflict resolved if the parties of the conflict do not understand, and even less agree with, the reason for the outcome?

One indication that there is such lack of understanding is the insufficient number of experts on ‘capacity for work’ involved in the court procedure. In the material, it was noted that there was an increase of extra medical experts (not treating physicians and not insurance physicians) in the court procedure, and it was concluded that one possible explanation for this development was the procedural reform that introduced a two-party procedure in this type of cases. The point made is that if the individuals involved in these conflicts, or their representatives, had been more aware of the distinction between the assessment of the criterion of ‘sickness’ and the criterion of ‘capacity for work’, this would have marked their strategy in court. To meet the argument put forward by the side of the collective, it is not enough to use extra medical experts as a source to provide counter-arguments to the insurance medical assessment. Even the assessment of a very high-ranking ‘senior physician’, active at a highly ranked hospital, will only in exceptional cases outweigh the assessment made by the expert in insurance medicine, as their expertise differs and as the courts seem to thoroughly support the introduction of a work-line in social insurance. Still, this is done in case after case. My impression is that the individuals involved in these conflicts find support for his or her argument in the assessments made by treating physicians and medical experts, they bring this ‘evidence’ to court and often come out through the procedure totally bewildered as to why these assessments are not enough to grant them sickness cash benefit.

The courts’ unwillingness to articulate and clarify the nature of the conflict of interests, as well as their inability to show the reasons behind their conclusions, could thus be interpreted as a sign of inefficiency. The conflicts regarding access to sickness cash benefit are handled, but not resolved. This conclusion is supported by the fact that the individuals involved in the conflicts do not seem to fully realize either the issues at stake, nor how to best argue for their own position.

8.2.3 Demarcation functions

Do the various changes of the sickness insurance, accompanied by concentration arguments, exclude specific groups from obtaining sickness cash benefit? And if so, which ones? At the time of implementation, a fear was voiced that the changes related to the sickness concept would,

for example, hit women to a larger extent than men. Women were described as more often suffering from diagnoses that could be labelled 'symptom diagnoses', and thus, the emphasis on objectivity and a strict medical basis for the sickness insurance could be expected not to be neutral in a gender perspective. The results of the quantitative study do not support the proposition that women were distinctly more affected by the tightened policy. What was indicated was that women, in physically challenging occupations, were indeed affected, but so were men in the same situation. The group we do not meet in court are those with higher education and in managerial positions.

Part of the reform distinctly excluded 'non-medical' causes for incapacity for work, such as economic, social and labour market aspects. This 'clarification' could be expected to make it more difficult to get access to the insurance for those whose sickness symptoms are interlinked with a complex and difficult life situation. The introduction of the step-by-step method made a distinction between those with a well-functioning bond to the labour market and those who are unemployed. Thus, the emphasis on the work-line in the sickness insurance, in combination with the responsibilities of the employers to take an active part in the rehabilitation process, could be expected not to be neutral in relation to the categories employed/unemployed. The results indicate, through an increase of cases in which unemployed individuals and individuals with a complex overall life situation were involved, that the reform did hit those hardest who were already in a weak position.

It is important to know who is covered by sickness insurance, but to fully understand the scope of the protection provided one should also ask who is not covered. Eva-Maria Svensson has taken an interest in the silences of law, using 'the principle of delimitation'¹⁵ to describe the way in which law can operate as a 'facade' protecting a given hierarchical structural order. As the 'principle of delimitation' works in law, it could become an invisible justification for the specific legal order at hand. The way sickness insurance in Sweden is constructed today, a demarcation is necessary between those who are 'sick' and those who are not. As has been accounted for, it was a characteristic of the concentration policy to put an emphasis on this demarcation. The view of law as fair and predictable

¹⁵ Svensson, Eva-Maria, 1997b. According to Svensson, the principle of delimitation can be used to explain those processes in which complex (irrational and disturbing) aspects are made harmless through the creation of distinctions in which the disturbing aspects are made invisible. In our time, science has an important role to play in the determination of what is important and legitimate (and thus also in the determination of what is unimportant and illegitimate). See pp. 97 ff.

demands that the division between those who are sick and those who are not is 'natural', or at least could be regarded as clear. As described by Svensson, the principle of delimitation works in two directions: from society to law but also the other way around.¹⁶ When policy reforms are implemented in law, the principle of delimitation works in a direction from society to law. When distinctions and divisions are legitimized by law, this reinforces the existing order and makes invisible the normative values protected, thus reinforcing the principle of delimitation in a direction from law to society. It could be argued that a process of delimitation, working in two directions as described above, is possible to identify when it comes to the recent developments in the Swedish sickness insurance.

Changes in the definition of the legal criteria 'sickness' and 'capacity for work' are decisive for determining who is to be covered by the right to paid sick leave. Here, the function of the definition is to screen. It may concern drawing the line between legally relevant and legally irrelevant facts, but it may also be a matter of sorting out people who have certain rights from those who do not.

A fundamental idea behind sickness insurance is that sickness cash benefit should compensate for lost income for a person who cannot work because of sickness. In the Act regulating sickness insurance, the criteria 'sickness' and 'incapacity for work' are meant to define who has the right to receive sickness cash benefit. There are also other criteria in social insurance that in a corresponding way distinguish between those who have a right from those who do not. Maija Sakslin has written about the concepts 'employed'/'unemployed', and 'citizen'/'non-citizen'. Sakslin underlines that the function of the terms is to include and exclude, and she fears that a layered society is being created, where one group is given rights while another is marginalized.¹⁷

Moreover, Sakslin points to the risk of confusing legal terms with 'reality'. That is to say that the strict categorization of different groups in society may be taken as evidence that this also gives a correct picture of the real situation, although the concepts are changeable, relative and dependent on the political and cultural context:

We may still believe that we need to draw a distinction between workers and non-workers in social security systems. We also assume that old age, sickness and invalidity are facts to be found in the real world, and not merely legal concepts created with the help of medicine. We do not always realize that the borderline between worker and non-worker, active and in-

¹⁶ Svensson, Eva-Maria, 1997a, see also Svensson Eva-Maria, 1997b, pp. 53 ff.

¹⁷ Sakslin, Maija, 1997, p. 6.

active, is not permanent, but relative or sliding. If social marginalization is a central risk today, let us avoid creating marginalization and exclusion with social security concepts. We should not create margizens!¹⁸

Westerhäll has, in a similar way, pointed out the legal-technical character of the criteria of sickness and capacity for work in Swedish sickness insurance. Westerhäll maintains that the criteria are sensitive to economic fluctuations and that they over time have been used for varying policy aims.¹⁹

A confusion of criteria and reality is also present in the aim to attain increased concentration in the sickness insurance, as when the importance of using a 'strictly medical' criterion is stressed in the assessment of someone's capacity for work. This standpoint becomes problematic when representatives of medical research maintain that there is neither a simple medical concept of sickness nor is there a simple connection between sickness and capacity for work.²⁰ Lars Englund writes: 'We lack definitions for this [the borderline between sick/not sick] and the only reasonable definition when it comes to sick-listing is that the person who is declared sick by the physician is sick.'²¹ The basis for the physician's decision to sick-list someone rests, according to Englund, largely on non-medical considerations. The clear-cut line between sickness and non-sickness that the legal regulation is based on, is not present in real life as seen by many medical experts.

Also the second part of the National Insurance Act's criterion for the right to sickness cash benefit – that a causal connection can be established between sickness and capacity for work – is challenged; 'One wants to believe that there is a normal period of time for the healing and rehabilitation from every sickness and that this is related to a normal period of time of reduced capacity for work, which can be linked to the normal course of the sickness.'²² But, there are no scientifically proven connections between degree of sickness and degree of capacity for work.²³ Instead, the degree of capacity for work is determined by a number of non-biomedical factors, such as anxiety, insecurity, depression, poverty, pessimism, lack of belief in the future, dissatisfaction with the workplace, etc.²⁴

¹⁸ Sakslin, Maija, 1997, p. 7.

¹⁹ Westerhäll-Gisselsson, Lotta, 1983, p. 212.

²⁰ Thörn, Åke, 1997, p. 3007 f.

²¹ Englund, Lars, (et al.), 1997c, p. 27.

²² Englund, Lars, (et al.), 1997b, p. 19.

²³ Englund, Lars, 1997a, p. 6.

²⁴ Englund, Lars, 1997a, pp. 6, 8, 16, 18.

As early as 1986, Svallfors and Marklund described Sweden as a 'dualistic welfare state' in which the citizens were divided between a core group of employed individuals (well-provided for by the existing social protection system) and a marginal group with a loose connection to the labour market and very low compensation levels from social insurance.²⁵ Ove Grape discusses this dualistic tendency in the Swedish model by focusing on the connection between allowances provided by the state and the force executed by the same state in the form of demands put on the individual for her or him to be eligible. Enforced by the rehabilitation reforms, as well as the concentration policy, these developments are described as follows:

In case an individual applies for support, the increasingly strict conditions of the work-line must be followed. The principle of what is called a generalized exchange means that the state's support is exchanged for the right to the work of the individual. In that exchange a more strict implementation of the conditions for receiving support and a wider definition of the concept of capacity for work have strengthened the right of the state to the applicant's possible capacity for work, and at the same time greatly limited the individual's right to receive support. In that sense the individual's autonomy has diminished in comparison to what was valid about ten years ago.²⁶

From the perspective of Grape, it is not the autonomy of individuals in general that has been lowered, but the autonomy of individuals and groups in vulnerable positions: '... citizens from weak societal groups have to submit to increased force in the form of control and discipline, at the same time as strong societal groups with a firm connection to the labour market can themselves decide over their life conditions'.²⁷

From the government it has been argued that the introduction of a step-by-step model, as well as the introduction of a more concentrated sickness concept, are consistent with an ambition to create a more efficient social insurance. In the light of the above discussion on 'demarcation principles', we have to ask, however, not only who is getting an allowance from the sickness insurance in the post-concentration policy time, but also who is not. In the dualistic welfare state, where there is a line of demarcation between the employed and the unemployed, we should be concerned about how the reforms of the 1990s hit people who have a loose connection to the labour market.

²⁵ Grape, Owe, 1998, with a reference to Marklund, Staffan and Stefan Svallfors (1986) 'Välfärd efter prestation', *Nordisk Socialt Arbeid*, 6:17–32.

²⁶ Grape, Owe, 1998, p. 119. Author's translation.

²⁷ Grape, Owe, 1998, p. 106.

8.3 Law as a provider of legitimacy

This study was in the initial chapter situated in a context emphasizing ‘conflict’ and ‘change’. The structural conflict between individual need and social risk was highlighted and it was proposed that in a situation marked by economic crisis and global structural change, the welfare state solution to the conflict between the individual and the collective was under pressure. Reports on increased poverty and social exclusion were, moreover, presented as indicators of an aggregated conflict level. In this situation, it was also proposed that the function of the legal system to mediate social conflicts should be brought to the fore and scrutinized. Below, the empirical conclusions reached are reflected upon from a perspective where the contextual and theoretical framework is put to work again.

8.3.1 The changing welfare state

The concentration policy implied increased emphasis on demarcations and tightened criteria for eligibility. As has been accounted for above, these changes reduced access to the insurance, and as a consequence, need situations that had previously been covered by the insurance ceased to be a base for eligibility. Individuals who previously were included as beneficiaries of the insurance found themselves in a situation where they were denied access. The characteristics of the concentration policy – the enforcement of the ‘new’ work-line and the efforts made to strengthen a proposed dichotomy between ‘legitimate’ objective sickness (rendering access) and other sickness (not rendering access) – correspond well to the more general observations on trends and developments in the Swedish welfare state accounted for in Chapters 1 and 6.

The crisis of the 1990s did not result in a sudden breakdown of the traditional welfare state, but the concern expressed by, for instance, Esping-Andersen and van Kersbergen about the viability of the generous welfare state in a longer perspective, is confirmed by the results of the present study. Stephens and Kuhnle (in 1996 and 2000 respectively) predicted a more differentiated welfare state, van Kersbergen feared rising poverty amongst specific groups, Grape emphasized the differentiation made between those with a firm position on the labour market and those without such a position, acknowledging the aspect of control and discipline that those in a weak position have to submit to in order to gain access, while Halleröd and Heikkilä described an increased risk of social exclusion. The individuals who turn up as complainants in the legal cases of this study rarely have much of an established position to protect. They

are often unemployed, they often have experience of physically straining work, they have a long history of repeated periods of sickness, they have a self-experienced sickness identity confirmed by the medical profession, they lack higher education and they are middle-aged or older. In a large majority of cases, the complainants are denied access to sickness insurance as they are assessed to have capacity for work in a type of work that is described as normally available on the labour market, although this statement does not imply that such work actually exists, and they are expected to re-educate and/or retrain in order to find gainful employment.

When reflecting on this trend of 'creeping disenfranchisement', the question arises if the individual need for protection against the risk of poverty and social exclusion is still, to the same extent as previously, apprehended as a social risk (to be covered by social protection). In Chapter 1, social risk was described as the constitutive element of social protection; the welfare state and its different social protection measures were described as a response primarily to collectively estimated risks. Could it be that in Sweden, in 2000, it is not considered a social risk to exclude those from social insurance who do not manage to conform and adapt to the (increasing) demands of the labour market? Is there a growing acceptance of a less egalitarian society in which the 'non-competitive', the 'poor', to borrow Bauman's terminology, are 'recast as flawed consumers'?

The characteristics of the unsuccessful 1999 complainant, demanding a right to sickness cash benefit in the administrative courts, confirm the image of a welfare state less generous towards those who already are in a weak position. Still, although empirical facts points to a tightening, I would like to refute a description of the normative foundations of the Swedish welfare state as sustaining solutions that exclude vulnerable groups from social insurance and thus provide a moral base for the growth of Offes' and de Sousa Santos' 'two-third society'. In Chapter 6, three dominating clusters of values were used to describe the normative base of the Swedish welfare state: social equality, social stability and individual freedom. Although the technical solutions constructed to carry the ambitions of the welfare state sometimes lean heavier on one or the other of these clusters, there is no support in either of them for a forceful, mechanic and formalistic implementation of a non-empathetic work-line that strongly contributes to an abuse of vulnerable groups. Nor can support be found for a legalistic sickness concept that mechanically excludes eligibility for individuals suffering from subjective symptoms. In the account of current discourses (Chapter 6), the need for tightening was widely acknowledged, but from almost all political parties it was also emphasized that such a tightening must be implemented with caution in order not to result in inhuman consequences.

8.3.2 Increasing the capacity of the courts

In Chapter 1, it was claimed that courts in Sweden, in general, act as guardians of *de facto* legitimacy by producing legal decisions reached in a process where legal practices interact with societal conceptions of justice. The figure of 'law as a provider of legitimacy', presented in Chapter 2, is thus the result of an effort to illustrate the basic components of an already existing process for reaching legal decisions; a process based on the practice of 'legal method'. Further, I argued that the need for mediating structural conflicts between individuals and the collective has increased, given the context of conflict and change previously described and that the exploration of the full potential of the administrative courts, in this context, could become essential for the future of the welfare state project.

At this point, it is important to know not only whether or not the courts scrutinized in this study do manage to provide *de facto* legitimacy, but also to reflect upon to what extent it is possible to increase the capacity of the courts to act as providers of legitimacy.

An attempt to answer the first of these two questions has already been made, and the results cannot, no matter what one would like, be described as very flattering for the administrative courts. In a perspective emphasizing the function of courts to act as providers of legitimacy, the administrative courts, in general, do fail in the relevant type of cases; the level of transparency varies on a scale between low and non-existent, the account of legal arguments and legal assessments are scarce and lean, and although, in general, the decisions actually made (in terms of access or no access) can be described as being within the legal framework (justified on basis of law), it is more of an open question to what extent they are also responsive to societal conceptions of justice (justified on basis of values). The overall impression is further darkened by the mere suspicion that the courts have opted out. In section 8.4, I will discuss these results further, but below an interest is taken in the possibility for the courts to keep up, or rather establish, a more important role in the interface situation that occurs when individual needs clash with estimated collective risks as access to cash benefits is determined.

Here is a situation where the legal system is conceived of as a mediator in a structural conflict involving, on the one hand, the macro-ambitions of the welfare state and, on the other hand, the individual expectations reflected in meso-level institutions (such as the social insurance offices). At this interface, individual expectations and collective ambitions meet (or collide), policies at meso- and macro-level are connected, and the legal actors are expected not only to resolve the actual conflict at hand, determining if the complainant is eligible or not, but also, in the process, to

mediate in the aggregated structural conflict. The courts could, through increased emphasis on reflection, transparency and communication, counteract processes of distrust and alienation, and strengthen the legitimizing procedure, and thus enhance the legal system as one of the fundamental cornerstones of the democratic (welfare) state.

For the administrative courts to increase their capacity in this field, it is of utmost importance that the profession adopts a critical and self-reflective attitude towards the work performed that includes the ambition to take on this intermediary role. In order to genuinely resolve conflicts (and not only execute judgements), a conflict awareness is essential, and in order to increase the courts' communicative potential, a number of reforms could be wished for. This is not a task for the courts alone, nor for individual judges. A debate is needed on a more general political level on the desirable functions of the administrative courts, and reforms should involve not only the courts but also, for instance, the legal faculties and the education they provide.²⁸ On the list of desiderata are costly reforms, such as oral hearings and legal aid, but also more moderate wishes, such as judgements that include a transparent elaboration of the legal assessments made, judgements that clarify the nature of the conflict at hand and accounts for the balancing of different interests made, written in a format and language that is accessible and understandable to the ordinary complainant.

8.3.3 Discursive governance or scientization and the end of politics?

The problem of law and governance in an era of change (see Chapter 1) is a theme that invites some final reflections. The empirical results indicate a situation marked by scientization and depoliticization combined with a low-key positioning by the courts. From the perspective of those who find themselves defined as non-eligible, the evasiveness of the exercised authoritative power must stand out as a main cause for nagging uneasiness; the written procedure, the faceless power, the non-accountability for decisions taken. In the modern state, previously described as 'complex, differentiated and pluralistic', in which ethics has been privatized and politics have come to an end – who can be made accountable for the moral implications of the daily exercise of authoritative power? Through one small everyday decision after the other, a less generous, less

²⁸ For suggestions on how to reform the education of future lawyers, see for instance Sandgren, Claes, 1995/96b, p. 1054.

egalitarian, re-commodifying and segmented welfare state is created, but on what mandate?

A response to the problem of law and governance, based on the paradigm of ethical discourse and in the spirit of Habermas, emphasizes the need to maximize the potential for all individuals to participate, on equal terms, in constant democratic discussions, exchanging arguments for the purpose of establishing a discursively grounded consensus for how to live their (our) lives together. What is aimed for, in light of this, is an open democratic society in which the inhabitants are encouraged, but also enabled, to take part in such an exchange of arguments. When the welfare state, as described by Sen and Rothstein, manages to level inequalities in basic capabilities, by safeguarding values of social equality and redistribution – such enabling is enhanced and the values of participatory democracy are strengthened. According to the chosen paradigm, the legal system, and its actors, should contribute to this process.

A moral viewpoint is in this study, with a reference to Habermas, used to describe a perspective marked by ‘equal respect for each person and equal consideration for the interests of all’. Moral principles are associated with universal justice and solidarity that emanate from discursive processes, and demand from all of us to act justly and fairly to the benefit of common goods. The concept of ‘governance’, on the other hand, is used to make a distinction between centralized decision-making (as in ‘government’) and multilayered, process-oriented ways of regulating and controlling society (as in ‘governance’). The concept of governance emphasizes, just as the concept of discourses, an approach to the controlling of (modern, complex and differentiated) societies based on an idea of participatory democracy. On a macro-level, the role of the legal system is to enforce legitimate governing by securing that legal norms (however particular) abide by moral (universal) principles, and thus, by keeping legislation responsive to public experience, provide *normative legitimacy*. Still, if an interest is taken in the possibilities of legitimate governance, discursive practices and participatory democracy, focus cannot rest solely on a macro-level.

For the purpose of this study, the notion of *de facto* legitimacy was introduced as a conceptual tool on a lower level of abstraction than the notion of *normative* legitimacy. While normative legitimacy can be used for an analysis on an aggregated macro-level, *de facto* legitimacy has been used for an empirical analysis of legal practices on a meso-level. Likewise, the notion of ‘societal conceptions of justice’ was introduced, and it was proposed that ‘law as a provider of legitimacy’ was dependent on a two-sided understanding of law where ‘legal practices’ and ‘societal conceptions of justice’ interrelate. The study is problem-oriented in ap-

proach and explorative in performance, and the results illuminate vital intersections connecting law and society, meso- and macro-practices, and individual needs and social risks.

The rationality of (discursive) communication could be approached as an anti-depoliticization strategy, a last resort grasped at in fear of a development characterized by alienation, disillusioned individuals and legitimation crisis.²⁹ My approach to law as a provider of legitimacy could, thus, be interpreted as a countermeasure to scientization, as an effort to revive (or revitalize) macro-level politics by proposing a procedure that makes visible the normative foundations as well as the balancing of interests that meso-level decisions are based on.

8.4 Final reflections

Has it been useful to introduce a notion of *de facto* legitimacy for an analysis of legal practices in the administrative courts in Sweden? I am tempted to answer yes and argue that the results gained from such an analysis have proved to be interesting. Still, maybe the question should not be so quickly dealt with. By emphasizing the structural conflict between the individual and the collective and the fundamental role of the legal system to mediate in this conflict, and by describing it as a duty of the community of legal actors to interact with societal conceptions of justice and thus provide legitimacy, I have admittedly expanded the platform from which the Swedish administrative courts traditionally perform their task. Below, in section 8.4.1, I reflect upon the lack of a conflict perspective in the administrative courts, and in 8.4.2, the question is: What should the administrative courts provide, if not *de facto* legitimacy?

8.4.1 A common interest rather than conflicting interests?

In Chapter 1, the point of departure of this work was situated in a context of 'conflict' and 'change'. One way of understanding the procedural practices of the administrative courts is to assume that they, by and large, do not regard themselves as mediators in a conflict. A study of the judgments made by the administrative courts (see examples in Chapter 5), shows that the conflict perspective is not present, or at least that it does not have a prominent position. The Swedish Parliamentary Commis-

²⁹ Habermas, Jürgen, 1997, see also Eriksen, Erik Oddvar and Jaarle Weigård, 1999, pp.15 ff.

sioner for the Judiciary and Civil Administration (JO) has criticized the administrative courts, as their judgements (too often) lack a distinct account of the claims of the complainants and also of the reasons that have been crucial for the decisions made.³⁰ The reading of the cases used in the present study, confirms the observations made by JO, and the list of possible criticism could be made longer. The suggestion that the courts do not conceive of their function as one of being a mediator in social conflicts, and that they do not see the conflict between the complainants and the social insurance offices as a conflict of contradicting interests, could, at least to some extent, explain these shortcomings.

What is suggested is, that if a conflict perspective had been applied more stringently by the courts, an increased precision in the account of the standpoints of the two parties of this conflict would seem probable. Also, a conflict awareness would make the courts more inclined to elucidate the arguments made by the different parties and to account for who makes a reference to which expert and why. From this would also follow that it would be difficult for the courts not to motivate how they weigh the different arguments when determining the outcome of the conflict.

In Chapter 3, it was noted that the procedure in Swedish administrative courts differs in several aspects from the procedure in public courts. Thus, the administrative proceedings are predominantly written, the courts (should) apply the 'investigation principle', and as the cases supposedly concern 'down-to-earth circumstances in which the individuals can understand the points at issue satisfactorily', the complainants are rarely eligible for legal aid and seldom represented by a solicitor.

The conflict perspective has not traditionally been the prevailing paradigm in the administrative courts. As has been remarked previously, the procedure in the administrative courts was (mainly) a one-party procedure until 1996, and it is questionable if the introduction of a two-party procedure has in any decisive way changed the prevailing paradigm. At least, this study does not indicate such a shift.

If the situation in court is not perceived as a conflict between the individual and the collective (represented by the state and the insurance offices), how then could it be understood? In the building of the Swedish welfare state, the metaphor of the good state, the 'people's home', was important. The Swedish 'people's home' is a good home and the institutions built to create this welfare state have, basically, no interests that contradict those of the inhabitants. In accordance with the para-

³⁰ Lavin, Rune, 1999, pp. 64 ff. According to Lavin, JO received an increasing number of complaints against the administrative courts (from 34 cases in 1994/95 to 132 cases in 1997/98), *ibid.* p. 72.

digm linked to the 'people's home', the situation in court might more accurately be described as a procedure characterized by different interpretations of a complex situation, but not primarily as a conflict of interests. The role of the courts within this paradigm would be to provide authoritative answers, but not primarily to solve conflicts. Accordingly, the administrative courts are perceived to function as superior administrative authorities, but not as 'courts' parallel to the public courts.³¹

8.4.2 What should the administrative courts provide if not *de facto* legitimacy?

If the administrative courts are perceived as superior authorities rather than as 'courts', and if their function is to provide authoritative answers rather than to provide legitimacy, the usefulness of introducing a notion of *de facto* legitimacy in a study of their practices could well be questioned. It could be argued that the current system is functioning fairly well, that it is quite effective, not too expensive, and even that values are imbedded within this paradigm that are worth being protected. The results indicate that the practices of the courts reflect an efficient implementation machinery in which social policies are effectuated promptly. It could also be argued that an analysis of this system, from a point of view where the legal system is asked to primarily provide legitimacy rather than authoritative decisions, undermines the weight of its conclusions.

My answer to these objections is found in the arguments presented in the introductory chapter, and is supported by the analysis in Chapter 6. As modern societies are increasingly characterized by value pluralism and globalization processes, some basic prerequisites for the welfare state are changing and it might possibly be threatened to its core. At a time when the capacity of the welfare state to perform its main objectives is questioned, when poverty increases and when the issue of social exclusion is urgent, it might not be good enough for old institutions to abide by old procedures. When the egalitarian structure of the Swedish society is weakened and when the future of the welfare state is described in terms of a 'creeping disentanglement', the legal system is meeting new challenges. When demands for increasing individual autonomy are raised by increasingly well-educated inhabitants with an increasing awareness of the necessity to safeguard their interests and with a capacity to do so, the authoritarian approach to solving contradicting positions may not be sustainable. In this situation, there is a strong need for high quality conflict

³¹ The historical explanations for this situation has been reflected upon by Peterson, Olof (et al.), 1999, and analysed by Lavin, Rune, 1972.

resolution, and for the enhancement of both state, regional and system legitimacy. The courts could be the fora for such activity.

Admittedly, there is a value-based aspect built into the very structure of the presented analysis. It is my conviction, however, that the legal system and, especially, the administrative courts have a potential capacity to practice law in a way that could increase the sustainability of the welfare state project. It is also my conclusion that this potential is not fully exploited at present.

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- Motion till riksdagen 1994/95:Sf17 av Ragnhild Pohanka (mp) med anledning av prop. 1994/95:147 'Rätten till förtidspension och sjukpenning samt folkpension för gifta'.
- Motion till riksdagen 1994/95:Sf205 av Gullan Lindblad m.fl. (m), 'Förtidspensioner'.
- Motion till riksdagen 1994/95:Sf220 av Ulla Hoffman m.fl. (v) 'Rättsligt stöd i vissa ärenden om allmän försäkring'.
- Motion till riksdagen 1994/95:Sf230, av Sten Svensson m.fl. (m, c, kd), 'Socialförsäkringen'.
- Motion till riksdagen 1995/96:Ju5 Alice Åström m.fl. (v).
- Motion till riksdagen 1995/96:Sf6 av Sigge Godin m.fl. (fp) med anledning av prop. 1995/96:69 'Vissa socialförsäkringsfrågor'.
- Motion till riksdagen 1995/96:Sf20 av Ulla Hoffman m.fl. (v) med anledning av prop 1995/96:128 'Följdändringar till reformen om tvåpartsprocess vid de allmänna förvaltningsdomstolarna samt vissa registerfrågor inom socialförsäkringsadministrationen'.
- Motion till riksdagen 1995/96:Sf31 av Ulla Hoffman m.fl. (v) med anledning av prop. 1995/96:209. 'Försäkringsskydd vid sjukdom m.m'.
- Motion till riksdagen 1995/96: Sf33 av Ragnhild Pohanka med anledning av prop 1995/96:209.
- Motion till riksdagen 1995/96:Sf36 av Sigge Godin m.fl. (fp) med anledning av prop. 1995/96:209 Försäkringsskydd vid sjukdom m.m.
- Motion till riksdagen 1996/97:Sf3 av Gullan Lindblad m.fl. (m) med anledning av prop. 1996/97:28 'Kriterier för rätt till ersättning i form av sjukpenning och förtidspension'.
- Motion till riksdagen 1996/97:Sf4, av Rose-Marie Frebran m.fl. (kd) med anledning av prop. 1996/97:28 'Kriterier för rätt till ersättning i form av sjukpenning och förtidspension'.
- Motion till riksdagen 1996/97:Sf5 av Eva Eriksson (fp) med anledning av prop. 1996/97:28 'Kriterier för rätt till ersättning i form av sjukpenning och förtidspension' (enskild motion).
- Motion till riksdagen 1996/97: Sf6, av Ragnhild Pohanka m.fl. (mp) med anledning av prop. 1996/97:28, 'Kriterier för rätt till ersättning i form av sjukpenning och förtidspension'.
- Motion till riksdagen 1996/97:Sf7 av Birgitta Carlsson (c) med anled-

- ning av prop. 1996/97:28 'Kriterier för rätt till ersättning i form av sjukpenning och förtidspension' (enskild motion).
- Motion till riksdagen 1996/97:Sf8 av Ulla Hoffman m.fl. (v) med anledning av prop. 1996/97:28 'Kriterier för rätt till ersättning i form av sjukpenning och förtidspension'.
- Motion till riksdagen 1996/97:Sf28 av Ulla Hoffman m.fl. (v) med anledning av prop 1996/97:121 'Systembrister och missbruk inom socialförsäkringen'.
- Motion till riksdagen 1996/97:Sf29, av Ragnhild Pohanka och Thomas Julin (mp) med anledning av prop 1996/97:121 'Systembrister och missbruk inom socialförsäkringen'.
- Motion till riksdagen 1996/97:Sf30 av Roland Larsson m.fl. (c) med anledning av prop 1996/97:121 'Systembrister och missbruk inom socialförsäkringen'.
- Motion till riksdagen 1996/97:Sf31 av Sigge Godin m.fl. (fp) med anledning av prop. 1996/97:121 'Systembrister och missbruk inom socialförsäkringssystemen'.
- Motion till riksdagen 1996/97:Sf40 av Ragnhild Polhanka och Thomas Juhlin (mp) med anledning av prop. 1996/97:63 'Samverkan, socialförsäkringarnas ersättningsnivåer och administration, m.m'.
- Motion till riksdagen 1996/97:Sf203 av Siw Persson (fp) 'Fristående patientombudsman'.
- Motion till riksdagen 1996/97:Sf204 av Siw Persson (fp) 'Granskning och möjlighet till prickning av försäkringsläkare och försäkringstandläkare'.
- Motion till riksdagen 1996/97:Sf224 av Olof Johansson m.fl. (c), 'En ny arbetslivsförsäkring'.
- Motion till riksdagen 1996/97:Sf225 av Birger Schlaug m.fl. (mp), 'Helhetssyn och grundtrygghet i socialförsäkringar'.
- Motion till riksdagen 1996/97:Sf241 av Gudrun Schyman m.fl. (v), 'Generell välfärd'.
- Motion till riksdagen 1996/97:Sf242 av Lars Leijonborg m.fl. (fp), 'Socialförsäkringar för frihet och trygghet'.
- Motion till riksdagen 1996/97:Sf248 av Anders Ygeman m.fl. (s) 'Uppföljning av de ändrade reglerna för förtidspensionering och sjukpenning'.
- Motion till riksdagen 1996/97:Sf 254 av Gullan Lindblad m.fl. (m), 'Socialförsäkring'.

PM 2001-03-20, Bevisregler i arbetsskadeförsäkringen, Department of Social Affairs.

- Prop. 1977/78:20, med förslag till ändrad organisation för besvärspörning inom socialförsäkringen m.m.
- Prop. 1985/86:73, om ökat förtroendemannainflytande i försäkringskassan m.m.
- Prop. 1989/90:62, Om insatser för aktiv rehabilitering och arbetslivsfondens verksamhet m.m.
- Prop. 1990/91:141, Om rehabilitering och rehabiliteringsersättning m.m.
- Prop. 1992/93:50, Om åtgärder för att stabilisera den svenska ekonomin.
- Prop. 1994/95:25, Vissa ekonomisk-politiska åtgärder, m.m.
- Prop. 1994/95:147, Rätten till förtidspension och sjukpenning samt folkpension för gifta.
- Prop. 1995/96:22, Tvåpartsprocess m.m. i de allmänna förvaltningsdomstolarna.
- Prop. 1995/96:209, Försäkringsskydd vid sjukdom, m.m.
- Prop. 1996/97:9, Ny rättshjälpslag, Appendix 1.
- Prop. 1996/97:28, Kriterier för rätt till ersättning i form av sjukpenning och förtidspension.
- Prop. 1996/97:63, Samverkan, socialförsäkringens ersättningsnivåer och administration m.m.
- Prop. 1996/97:121, Systembrister och missbruk inom socialförsäkringssystemen.
- Prop. 1996/97:124, Ändring i socialtjänstlagen.
- Prop. 1997/98:111, Systembrister och missbruk inom socialförsäkringssystemen.
- Prop. 1997/98:41, Socialförsäkringens administration, m.m.
- Prop. 1999/00:139, En rättvisare och tydligare arbetslöshetsförsäkring.
- Prop. 2000/01:96, Sjukersättning och aktivitetsersättning i stället för förtidspension.
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Court practise

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FöD, mål nr 519/92:11, dom 1993-11-02. Case 315.
FöD, mål nr 798/92:14, dom 1993-04-06. Case 311.
KR i Göteborg, mål nr 1055-1999, dom 1999-03-05. Case 164.
KR i Göteborg, mål nr 10586-1992, 11036-1992, dom 1993-04-02.
Case 224.
KR i Göteborg, mål nr 1207-1998, dom 1999-03-18. Case 154.
KR i Göteborg, mål nr 1610-1992, dom 1993-10-14. Case 222.
KR i Göteborg, mål nr 1677-1997, dom 1999-12-28. Case 19.
KR i Göteborg, mål nr 1752-1992, dom 1993-10-26. Case 223.
KR i Göteborg, mål nr 1966-1999, dom 1999-09-30. Case 169.
KR i Göteborg, mål nr 2251-1998, dom 1999-03-22. Case 155.
KR i Göteborg, mål nr 2617-1999, dom 1999-09-29. Case 170.
KR i Göteborg, mål nr 2737-1998, dom 1999-03-25. Cas 156.
KR i Göteborg, mål nr 2798-1998, dom 1999-03-10. Case 157.
KR i Göteborg, mål nr 3133-1999, dom 1999-09-29. Case 190.
KR i Göteborg, mål nr 3205-1998, dom 1999-11-16. Case 165.
KR i Göteborg, mål nr 3233-1999, dom 1999-11-02. Case 171.
KR i Göteborg, mål nr 3274-3276, 1997, 1999-12-28. Case 18.
KR i Göteborg, mål nr 3544-1992, dom 1993-10-24. Case 225.
KR i Göteborg, mål nr 3774-1998, dom 1999-04-23. Case 158.
KR i Göteborg, mål nr 3777-1998, dom 1999-12-30. Case 21.
KR i Göteborg, mål nr 389-1998, dom 1999-04-09. Case 152.
KR i Göteborg, mål nr 4017-1999, dom 1999-11-15. Case 172.
KR i Göteborg, mål nr 411-1998, dom 1999-02-19. Case 153.
KR i Göteborg, mål nr 414-1999, 15-1999, dom 1999-12-23. Case 22.
KR i Göteborg, mål nr 4255-1999, dom 1999-11-08. Case 173.
KR i Göteborg, mål nr 4679-1999, dom 1999-10-14. Case 174.
KR i Göteborg, mål nr 4742-1993, dom 1993-10-18. Case 230.
KR i Göteborg, mål nr 5226-1999, dom 1999-10-26. Case 175.
KR i Göteborg, mål nr 5251-1992, dom 1993-11-16. case 226.
KR i Göteborg, mål nr 5513-1992, dom 1993-10-18. Case 227.
KR i Göteborg, mål nr 5586-1998, dom 1999-11-18. Case 166.
KR i Göteborg, mål nr 5920-5921-1999, dom 1999-10-29. Case 176.
KR i Göteborg, mål nr 6088-1998, dom 1999-03-25. Case 159.
KR i Göteborg, mål nr 624-1999, dom 1999-03-18. Case 162.
KR i Göteborg, mål nr 7054-1998, dom 1999-03-15. Case 160.
KR i Göteborg, mål nr 7257-1992, dom 1993-10-27. Case 228.
KR i Göteborg, mål nr 7408-1997, dom 1999-03-04. Case 151.
KR i Göteborg, mål nr 7443-1998, 7444-1998, dom 1999-11-22.
Case 167.
KR i Göteborg, mål nr 7644-1997, dom 1999-11-29. Case 20.

KR i Göteborg, mål nr 7678-1998, dom 1999-09-21. Case 168.
KR i Göteborg, mål nr 7684-1992, dom 1993-10-27. Case 229.
KR i Göteborg, mål nr 786-1999, dom 1999-02-24. Case 163.
KR i Göteborg, mål nr 8158-1998, dom 1999-04-21. Case 161.
KR i Jönköping, mål nr 11008-1992, dom 1993-03-23. Case 216.
KR i Jönköping, mål nr 11124-1992, dom 1993-03-31. Case 217.
KR i Jönköping, mål nr 11151-1992, 11537-1992. Case 219.
KR i Jönköping, mål nr 11493-1992, dom 1993-10-11. Case 218.
KR i Jönköping, mål nr 11945-1992, dom 1993-10-04. Case 220.
KR i Jönköping, mål nr 1309-1997, dom 1999-03-12. Case 189.
KR i Jönköping, mål nr 15277-1992, dom 1993-11-17. Case 221.
KR i Jönköping, mål nr 1569-1998, dom 1999-11-19. Case 181.
KR i Jönköping, mål nr 1598-1999, dom 1999-10-18. Case 182.
KR i Jönköping, mål nr 1780-1997, dom 1999-09-30. Case 177.
KR i Jönköping, mål nr 1980-1997, dom 1999-03-12. Case 187.
KR i Jönköping, mål nr 1982-1984-1997, dom 1999-04-06, Case 188.
KR i Jönköping, mål nr 2190-1997, dom 1999-11-10. Case 178.
KR i Jönköping, mål nr 3285-1997, dom 1999-10-06. Case 179.
KR i Jönköping, mål nr 3896-1997, dom 1999-10-13. Case 180.
KR i Jönköping, mål nr 4419-1997, mål nr 1999-03-12. Case 186.
KR i Jönköping, mål nr 4492-1998, 4496-1998, dom 1999-12-13.
Case 23.
KR i Jönköping, mål nr 4731-1997, dom 1999-03-31. Case 185.
KR i Jönköping, mål nr 5144-1997, dom 1999-02-26. Case 184.
KR i Jönköping, mål nr 5145-1997, dom 1999-03-25. Case 183.
KR i Stockholm, mål nr 10600-1992, dom 1993-03-03. Case 204.
KR i Stockholm, mål nr 11443-1992, 11444-1992, 11445-1992, dom
1993-03-15. Case 206.
KR i Stockholm, mål nr 1192-1998, dom 1999-11-15. Case 27.
KR i Stockholm, mål nr 12579-1992, dom 1993-04-15. Case 205.
KR i Stockholm, mål nr 14257-1992, dom 1993-11-02. Case 210.
KR i Stockholm, mål nr 1894-1997, dom 1999-10-05. Case 191.
KR i Stockholm, mål nr 2084-1999, dom 1999-11-30. Case 24.
KR i Stockholm, mål nr 2449-1992, dom 1993-03-02. Case 203.
KR i Stockholm, mål nr 2585-1993, dom 1993-11-15. Case 212.
KR i Stockholm, mål nr 2782-1999, protokoll 1999-10-15. Case 296.
KR i Stockholm, mål nr 2996-1998, protokoll 1999-02-18. Case 293.
KR i Stockholm, mål nr 3201-1992, dom 1993-11-11. Case 214.
KR i Stockholm, mål nr 3235-1998, protokoll 1999-11-11. Case 305.
KR i Stockholm, mål nr 3317-1998, dom 1999-12-30. Case 26.
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KR i Stockholm, mål nr 4094-1999, 1095-1999, protokoll 1999-10-29.
Case 297.

KR i Stockholm, mål nr 43-44-1999, protokoll 1999-09-21. Case 298.
KR i Stockholm, mål nr 4859-1999, 4868-1999, beslut 1999-11-24.
Case 144.

KR i Stockholm, mål nr 4894-1992, dom 1993-03-05. Case 208.
KR i Stockholm, mål nr 4929-1999, protokoll 1999-10-27. Case 303.
KR i Stockholm, mål nr 4933.1997, protokoll 1999-03-02. Case 294.
KR i Stockholm, mål nr 5047-1998, dom 1999-04-14. Case 194.
KR i Stockholm, mål nr 5375-1999. protokoll 1999-10-08. Case 300.
KR i Stockholm, mål nr 5454-1992, dom 1993-03-25. Case 207.
KR i Stockholm, mål nr 5959-1997, protokoll 1999-02-24. Case 292.
KR i Stockholm, mål nr 628-1998, dom 1999-10-22. Case 28.
KR i Stockholm, mål nr 6513-1997, 6514-1997, dom 1999-04-20.
Case 195.

KR i Stockholm, mål nr 6735-1999, protokoll 1999-10-27. Case 302.
KR i Stockholm, mål nr 6778-1999, protokoll 1999-11-10. Case 295.
KR i Stockholm, mål nr 6843-1997, protokoll 1999-04-14. Case 291.
KR i Stockholm, mål nr 701-1997, dom 1999-04-20. Case 196.
KR i Stockholm, mål nr 7323-1996, dom 1999-10-25. Case 193.
KR i Stockholm, mål nr 7598-1993, dom 1993-10-20. Case 209.
KR i Stockholm, mål nr 7781-1996, dom 1999-10-28, case 192.
KR i Stockholm, mål nr 8000-1993, dom 1993-11-08. Case 211.
KR i Stockholm, mål nr 801-1999, dom 1999-11-08. Case 25.
KR i Stockholm, mål nr 8371-1997, protokoll 1999-03-18. Case 290.
KR i Stockholm, mål nr 8491-1997, protokoll 1999-04-14. Case 289.
KR i Stockholm, mål nr 8600-1997, protokoll 1999-04-14. Case 288.
KR i Stockholm, mål nr 8699-1991, dom 1993-10-28. Case 215.
KR i Stockholm, mål nr 8702-1998, protokoll 1999-10-28. Case 304.
KR i Stockholm, mål nr 8832-1998, protokoll 1999-11-04. Case 301.
KR i Stockholm, mål nr 9033-1997, dom 1999-10-25. Case 29.
KR i Stockholm, mål nr 9363-1998, protokoll 1999-10-08. Case 299.
KR i Sundsvall, mål nr 11157-1992, dom 1993-03-04. Case 200.
KR i Sundsvall, mål nr 11517-1992, dom 1993-11-05. Case 201.
KR i Sundsvall, mål nr 12349-1992, dom 1993-04-05. Case 202.
KR i Sundsvall, mål nr 1397-1998, protokoll 1999-04-16. Case 147.
Kr i Sundsvall, mål nr 1580-1999, protokoll 1999-11-16. Case 306.
KR i Sundsvall, mål nr 1875-1999, dom 1999-10-28. Case 197.
KR i Sundsvall, mål nr 2164-1998, dom 1999-10-22. Case 198.
KR i Sundsvall, mål nr 2615-1998, protokoll 1999-04-15, Case 148.
KR i Sundsvall, mål nr 2628-1999, protokoll 1999-10-21. Case 146.
KR i Sundsvall, mål nr 2960-1998, protokoll 1999-04-30. case 307.

KR i Sundsvall, mål nr 3505-1997, protokoll 1999-11-01. Case 145.
KR i Sundsvall, mål nr 7003-1992, dom 1993-04-30. Case 199.
KR i Sundsvall, mål nr 835-1999, protokoll 1999-03-17, Case 150.
KR i Sundsvall, mål nr 910-1998, protokoll 1999-03-31. Case 149.
LR i Blekinge län, mål nr 1176-98, dom 1999-03-02. Case 74.
LR i Blekinge län, mål nr Ö 42-93, dom 1993-03-25. Case 126.
LR i Dalarnas län, mål nr 2207-99, dom 1999-10-08. Case 34.
LR i Gotlands län, mål nr 87-97, dom 1999-03-08. Case 17.
LR i Gotlands län, mål Ö 87-91, dom 1993-04-16. Case 102.
LR i Gävleborgs län, mål nr 1449-99, dom 1999-10-28. Case 30
LR i Gävleborgs län, mål nr 1829-97, 902-98, 1897-98, dom 1999-04-
23. Case 31.
LR i Gävleborgs län, mål nr 2577-97, dom 1999-03-27. Case 32.
LR i Gävleborgs län, mål nr 2724-97, dom 1999-03-30. Case 33.
LR i Göteborg, mål nr 1163-99, dom 1999-04-07. Case 326.
LR i Göteborg, mål nr 4980-99, dom 1999-10-20. Case 325.
LR i Göteborg, mål nr 4991-99, dom 1999-10-21. Case 324.
LR i Göteborg, mål nr 5184-98, dom 1999-03-09. case 329.
LR i Göteborg, mål nr 7534-98, dom 1999-04-06. Case 327.
LR i Göteborg, mål nr 816-99E, dom 1999-03-22. Case 328.
LR i Göteborgs och Bohus län, mål nr 275-93, dom 1993-10-28.
Case 283.
LR i Göteborgs och Bohus län, mål nr Ö 2207-93, dom 1993-10-22.
Case 286.
LR i Göteborgs och Bohus län, mål nr Ö 3041-93, dom 1993-11-12.
Case 284.
LR i Göteborgs och Bohus län, mål nr Ö 3063-93, dom 1993-10-22.
Case 285.
LR i Göteborgs och Bohus län, mål nr Ö 4170-92, dom 1993-11-25.
Case 287.
LR i Hallands län, mål nr Ö 1308-93, dom 1993-11-26. Case 119.
LR i Kronobergs län, mål nr 363-99, dom 1999-04-13. Case 106.
LR i Jönköpings län, mål nr 1859-98, dom 1999-03-04. Case 81.
LR i Jönköpings län, mål nr 2334-98, dom 1999-03-12. Case 82.
LR i Jönköpings län, mål nr 2874-98, dom 1999-04-12. Case 83.
LR i Jönköpings län, mål nr 547-99 E, dom 1999-11-19. Case 84.
LR i Kalmar län, mål nr 1155-98E, dom 1999-04-07. Case 331.
LR i Kalmar län, mål nr 1206-98, dom 1999-04-30. Case 94.
LR i Kalmar län, mål nr 2276-97, 22-98, dom 1999-04-19. Case 91.
LR i Kalmar län, mål nr 620-98, dom 1999-03-29. Case 92.
LR i Kalmar län, mål nr 634-98, 11-99, dom 1999-03-11. Case 93.
LR i Kopparbergs län, mål nr Ö 266-93, dom 1993-11-25. Case 121.

LR i Kronobergs län, mål nr 1333-98, dom 1999-03-19. Case 96.
LR i Kronobergs län, mål nr 158-93, dom 1993-03-26. Case 138.
LR i Kronobergs län, mål nr 1738-98, dom 1999-10-13. Case 98.
LR i Kronobergs län, mål nr 1889-98, dom 1999-04-23. Case 97.
LR i Kronobergs län, mål nr 639-99, dom 1999-10-18. Case 99.
LR i Kronobergs län, mål nr 66-99, dom 1999-03-15. Case 95.
LR i kronobergs län, mål nr Ö 1195-92, dom 1993-03-22. Case 134.
LR i Kronobergs län, mål nr Ö 1305-92, dom 1993-03-22. Case 135.
LR i Kronobergs län, mål nr Ö 45-93, dom 1993-12-27. Case 143.
LR i Kronobergs län, mål nr Ö 555-92, dom 1993-05-11. Case 139.
LR i Kronobergs län, mål nr Ö 640-92, dom 1993-03-26. Case 136.
LR i Kronobergs län, mål nr Ö 786.93, dom 1993-10-20. Case 140.
LR i Kronobergs län, mål nr Ö 946-92, dom 1993-03-26. Case 137.
LR i Kronobergs län, mål nr Ö 952-92, dom 1993-06-07. Case 141.
LR i Kronobergs län, mål nr Ö 960-92, dom 1993-06-07. Case 142.
LR i Malmöhus län, mål nr Ö 154-93, dom 1993-04-14. Case 104.
LR i Malmöhus län, mål nr Ö 252-93, dom 1993-11-15. Case 107.
LR i Malmöhus län, mål nr Ö 308-93, dom 1993-10-29. Case 109.
LR i Malmöhus län, mål nr Ö 5823-92, dom 1993-11-02. Case 108.
LR i Malmöhus län, mål nr Ö 600-92, dom 1993-04-30. Case 103.
LR i Malmöhus län, mål nr Ö 791-93, dom 1993-10-06. Case 110.
LR i Malmöhus län, mål nr Ö 906-92, dom 1993-10-04. Case 111.
LR i Malmöhus län, mål Ö 4710-92, dom 1993-04-14. Case 105.
LR i Mariestad, mål nr 2903-97, dom 1999-04-26. Case 80.
LR i Mariestad, mål nr 351-99, dom 1999-03-24. Case 79.
LR i Norrbottens län, mål nr 208-99, dom 1999-04-07. Case 38.
LR i Norrbottens län, mål nr 2377-98, dom 1999-04-29. Case 40.
LR i Norrbottens län, mål nr 2500-98, dom 1999-10-01. Case 39.
LR i Norrbottens län, mål nr 269-99, dom 1999-04-29. Case 37.
LR i Norrbottens län, mål nr 2775-97, dom 1999-03-05. Case 43.
LR i Norrbottens län, mål nr 2932-97, dom 1999-04-19. Case 42.
LR i Norrbottens län, mål nr 316-99E, dom 1999-03-01. Case 36.
LR i Norrbottens län, mål nr 538-99E, dom 1999-03-29. Case 35.
LR i Norrbottens län. Mål nr 1966-98, dom 1999-04-26. Case 41.
LR i Skarabergs län, mål nr Ö 311-92, dom 1993-03-10. Case 131.
LR i Skaraborgs län. Mål nr Ö 108-92, dom 1993-04-19. Case 132.
LR i Skåne län, mål nr 10999-97, dom 1999-04-14. Case 333.
LR i Skåne län, mål nr 11353-98, dom 1999-04-09. Case 55.
LR i Skåne län, mål nr 11669-98, dom 1999-03-29. Case 54.
LR i Skåne län, mål nr 12602-98, dom 1999-11-12. Case 65.
LR i Skåne län, mål nr 13935-98, dom 1999-03-29. Case 53.
LR i Skåne län, mål nr 15276-97; 9724-98, dom 1999-11-15. Case 60.

LR i Skåne län, mål nr 15423-97, dom 1999-04-21, Case 59.
LR i Skåne län, mål nr 15470-97, dom 1999-03-09. Case 58.
LR i Skåne län, mål nr 16080-97, dom 1999-03-09. Case 57.
LR i Skåne län, mål nr 2244-99, dom 1999-11-17. Case 64.
LR i Skåne län, mål nr 2289-98, dom 1999-03-09. Case 56.
LR i Skåne län, mål nr 3818-98, dom 1999-11-10. Case 66.
LR i Skåne län, mål nr 5021-99, dom 1999-11-26. Case 63.
LR i Skåne län, mål nr 6619-97, dom 1999-04-14. Case 62.
LR i Skåne län, mål nr 8043-97, dom 1999-03-10. Case 61.
LR i Skåne län, mål nr 9594-97, dom 1999-03-09. Case 334
LR i Stockholms län, mål nr Ö 4030-93, dom 1993-10-08. Case 278.
LR i Stockholm, mål nr 6779-1999, dom 1999-11-10. Case 332.
LR i Stockholm, mål nr Ö 7408-98, dom 1999-04-19. Case 233.
LR i Stockholms län, mål nr 11092-99, dom 1999-11-08. Case 257.
LR i Stockholms län, mål nr 11321-99, dom 1999-11-26. Case 259.
LR i Stockholms län, mål nr 11583-99, dom 1999-11-17. Case 242.
LR i Stockholms län, mål nr 12637-99, dom 1999-10-06. Case 232.
LR i Stockholms län, mål nr 12788-99, dom 1999-11-10. Case 247.
LR i Stockholms län, mål nr 13413-99, dom 1999-11-18. Case 243.
LR i Stockholms län, mål nr 13628-99, dom 1999-10-25. Case 250.
LR i Stockholms län, mål nr 13719-99, dom 1999-11-29. Case 265.
LR i Stockholms län, mål nr 14735-99, dom 1999-10-27. Case 239.
LR i Stockholms län, mål nr 14737-99, dom 1999-11-25. Case 241.
LR i Stockholms län, mål nr 15532-99, 15360-99, dom 1999-11-25.
Case 258.
LR i Stockholms län, mål nr 1893-99, dom 1999-11-19. Case 264.
LR i Stockholms län, mål nr 1897-99, dom 1999-10-11. Case 253.
LR i Stockholms län, mål nr 4402-99, dom 1999-11-12. Case 260.
LR i Stockholms län, mål nr 4574-99, dom 1999-10-14. Case 249.
LR i Stockholms län, mål nr 4996-99, dom 1999-10-08. Case 251.
LR i Stockholms län, mål nr 5027-99, dom 1999-11-10. Case 246.
LR i Stockholms län, mål nr 5290-99, dom 1999-11-19. Case 244.
LR i Stockholms län, mål nr 6578-99, dom 1999-10-18. Case 240.
LR i Stockholms län, mål nr 8790-99, dom 1999-11-08. Case 256.
LR i Stockholms län, mål nr 8822-92, dom 1993-10-01. Case 275.
LR i Stockholms län, mål nr Ö 10308-98, dom 1999-04-20. Case 261.
LR i Stockholms län, mål nr Ö 10674-92, dom 93-11-25. Case 280.
LR i Stockholms län, mål nr Ö 11084-92, dom 1993-10-08. Case 277.
LR i Stockholms län, mål nr Ö 1496-92, dom 1993-03-22. Case 269.
LR i Stockholms län, mål nr Ö 15300-98, dom 1999-04-14. Case 231.
LR i Stockholms län, mål nr Ö 15887-98, Ö 2335-99, dom 1999-04-15.
Case 232.

LR i Stockholms län, mål nr Ö 16678-98, dom 1999-04-19. Case 234.
LR i Stockholms län, mål nr Ö 2142-99, dom 1999-04-30. Case 236.
LR i Stockholms län, mål nr Ö 2760-92, dom 1993-10-07. Case 276.
LR i Stockholms län, mål nr Ö 288-99, dom 1999-10-12. Case 255.
LR i Stockholms län, mål nr Ö 2959-92, dom 1993-11-02. Case 279.
LR i Stockholms län, mål nr Ö 3086-99, dom 1999-10-11. Case 254.
LR i Stockholms län, mål nr Ö 3969, dom 1993-04-16. case 271.
LR i Stockholms län, mål nr Ö 4010-99, dom 1999-10-13. Case 248.
LR i Stockholms län, mål nr Ö 4347-92, dom 1993-04-29. Case 272.
LR i Stockholms län, mål nr Ö 5455-93, dom 1993-10-04. Case 335.
LR i Stockholms län, mål nr Ö 6424-92, dom 1993-04-30. Case 274.
LR i Stockholms län, mål nr Ö 6603-92, dom 1993-04-30. Case 273.
LR i Stockholms län, mål nr Ö 6914-93, dom 1993-11-23. Case 281.
LR i Stockholms län, mål nr Ö 7110-92, dom 1999-03-22. Case 270.
LR i Stockholms län, mål nr Ö 7408-98, dom 1999-04-19. Case 233.
LR i Stockholms län, mål nr Ö 8047-98, dom 1999-10-11. Case 252.
LR i Stockholms län, mål nr Ö 8398-98, dom 1999-11-10. Case 245.
LR i Stockholms län, mål nr Ö 8505-92, dom 1993-11-23. Case 282.
LR i Stockholms län, mål nr Ö11827-92, dom 1993-03-01. Case 266.
LR i Stockholms län, mål nr Ö2993-92, dom 1993-03-19. Case 268.
LR i Stockholms län, mål nr Ö4629-92, dom 1993-03-16. Case 267.
LR i Stockholms län, målnr 8350-99, dom 1999-10-27. Case 238.
LR i Stockholms län, Ö 12116-98, dom 1999-04-07. Case 263.
LR i Stockholms län, Ö 16075-98, dom 1999-04-21. Case 262.
LR i Södermanlands län, mål 1131-99, dom 1999-10-25. Case 8.
LR i Södermanlands län, mål nr 1332-98, dom 1999-04-23. Case 5.
LR i Södermanlands län, mål nr 137-98, dom 1999-04-14. Case 4.
LR i Södermanlands län, mål nr 1453-98, dom 1999-10-05. Case 6.
LR i södermanlands län, mål nr 2153-99, dom 1999-10-25. Case 9.
LR i Södermanlands län, mål nr 2316-98, dom 1999-11-04. Case 11.
LR i Södermanlands län, mål nr 286-99 E, dom 1999-10-25. Case 7.
LR i Södermanlands ään, mål nr 1378-98, dom 1999-10-27. Case 10.
LR i Uppsala län, mål nr 53-97, dom 1999-03-11. Case 1.
LR i Uppsala län, mål nr 800-97, 1458-97, dom 1999-04-21. Case 2.
LR i Uppsala län, mål nr 908-98, dom 1999-10-13. Case 3.
LR i Vänersborg, mål nr 1173-98, dom 1999-03-04. Case 67.
LR i Vänersborg, mål nr 1261-99, dom 1999-11-11. Case 69.
LR i Vänersborg, mål nr 3284-98, dom 1999-03-17. Case 68.
LR i Vänersborg, mål nr 38-99, dom 1999-11-25. Case 70.
LR i Värmlands län, mål nr 1117-99, dom 1999-11-22. Case 73.
LR i Värmlands län, mål nr 1857-98, dom 1999-03-03. Case 71.
LR i Värmlands län, mål nr 2168-98, dom 1999-03-10. Case 72.

LR i Värmlands län, mål nr Ö 388-92, dom 1993-04-19. Case 120.
LR i Västerbottens län, mål nr 1097-98, dom 1999-11-23. Case 46.
LR i Västerbottens län, mål nr 1491-98, dom 1999-11-23. Case 47.
LR i Västerbottens län, mål nr 227-98, dom 1999-11-02. Case 45.
LR i Västerbottens län, mål nr 267-97, 267-99, dom 1999-10-07.
Case 48.
LR i Västerbottens län, mål nr 403-97, dom 1999-03-20. Case 44.
LR i Västerbottens län, mål nr 763-92, dom 1993-10-06. Case 123.
LR i Västerbottens län, mål nr Ö 167-93, dom 1993-04-06. Case 122.
LR i Västernorrlands län, mål nr 3184-97, dom 1999-04-27. Case 52.
LR i Västernorrlands län, mål nr 3185-97, dom 1999-03-10. Case 50.
LR i Västernorrlands län, mål nr 55-98, dom 1999-03-12. Case 15.
LR i Västernorrlands län, mål nr 985-98, dom 1999-03-29. Case 51.
LR i Västernorrlands län, mål nr 986-98, dom 1999-03-04. Case 49.
LR i Västernorrlands län, mål nr Ö 1072-93, dom 1993-11-04.
Case 125.
LR i Västernorrlands län, mål nr Ö 1376-92, dom 1993-03-30.
Case 124.
LR i Västmanlands län, mål nr 1826-97, dom 1999-03-22. Case 13.
LR i Västmanlands län, mål nr 1926-97, dom 1999-03-12. Case 12.
LR i Västmanlands län, mål nr 2657-97, dom 1999-03-25. Case 14.
LR i Västmanlands län, mål nr 735-98, dom 1999-10-28. Case 16.
LR i Västmanlands län, mål nr Ö 1525-92, dom 1993-04-01.
Case 101.
LR i Västmanlands län, mål nr Ö42-93, Ö942-92, dom 1993-04-01.
Case 100.
LR i Älvsborg län, mål nr Ö 1077-92, Ö 1077-92, dom 1993-03-29.
Case 113.
LR i Älvsborgs län, mål nr Ö 1021-92, dom 1993-11-04. Case 116.
LR i Älvsborgs län, mål nr Ö 1154-92, Ö1546-92, dom 1993-03-15.
Case 112.
LR i Älvsborgs län, mål nr Ö 1240-93, dom 1993-11-17. Case 118.
LR i Älvsborgs län, mål nr Ö 297-93, dom 1993-04-30. Case 115.
LR i Älvsborgs län, mål nr Ö 54-92, dom 1993-04-07. Case 114.
LR i Älvsborgs län, mål nr Ö 601-92, dom 1993-11-17. Case 117.
LR i Örebro län, mål nr 1326-98, dom 1999-10-13. Case 75.
LR i Örebro län, mål nr 2171-92, dom 1993-03-23. Case 128.
LR i Örebro län, mål nr 2217-98, 2716-98, dom 1999-04-28. Case 76.
LR i Örebro län, mål nr 2224-98, dom 1999-11-24. Case 77.
LR i Örebro län, mål nr 3310-98, dom 1999-10-20. Case 78.
LR i Örebro län, mål nr Ö 1066-93, dom 1993-10-12. Case 129.
LR i Örebro län, mål nr Ö 325-92, dom 1993-03-23. Case 127.

LR i Örebro län, mål nr Ö 88-93, dom 1993-11-12. Case 130.
LR i Östergötlands län, mål nr 2758-99 E, dom 1999-10-12. Case 90.
LR i Östergötlands län, mål nr 2822-97, dom 1999-03-10. Case 86.
LR i Östergötlands län, mål nr 2823-97, dom 1999-11-12. Case 85.
LR i Östergötlands län, mål nr 2823-97, dom 1999-11-12. case 85.
LR i Östergötlands län, mål nr 3738-97, dom 1999-10-05. Case 89.
LR i Östergötlands län, mål nr 410 99, dom 1999-04-28. Case 87.
LR i Östergötlands län, mål nr 762-99, dom 1999-04-28. Case 88.
LR i Östergötlands, mål nr 3695-97, dom 1999-03-18. Case 330.
LR Östergötlands län, mål nr Ö 1091-93, dom 1993-10-08. Case 133.
RR, mål nr 8552-8553-1998, beslut 1999-03-02. Case 318.
RR, mål nr 1080-1998, beslut 1999-11-05. Case 322.
RR, mål nr 3852-1996, beslut 1999-04-19. Case 316.
RR, mål nr 6367-1998, beslut 1999-03-29. Case 317.
RR, mål nr 666-1997, dom 1999-10-06. Case 319.
RR, mål nr 6942-1997, beslut 1999-10 29. Case 320.
RR, mål nr 8-1998, beslut 1999-11-23. Case 321.
RR, mål nr 924-1999, beslut 1999-11-03. Case 323.
RR, mål nr 5606-1999, dom 2002-12-30.

Index

- Administration of justice 91, 92,
115, 117–119, 124 (128)
- Alternative realism 57
- Applied legal constructions 89, 129,
249, 308, 313
- Appointed (confidence) physician
292, *passim*
- Basic capability 270, 398
- Basic capability equality 265
- Basic normative pattern 263, 266
- Basic values 54, 75, 77, 83, 86, 88,
250, *passim*
- Bauman, Zygmunt 48, 50, 395
- Berghman, Jos 27, 32–34, 40
- Bureaucratic administration of law
81
- Capacity for work 28, 35, 39, 101,
102, 105, 108–113, *passim*
- Christensen, Anna 81, 96, 250,
263–270
- Clusters of values 88, 263, 269,
270, 307
- Collective risk, (see social risk)
- Concentration policy 25, 28,
101–104, 114, *passim*
- Conflict mediation 27–29, 115
- Conflict of interests 27, 34–36, 87,
88, 121
- Conflict perspective 32, 99
- Conflict resolution 27–29, 63, 68,
74, 75
- Context of discovery 76, 84, 98,
114
- Context of justification 84, 98, 114
- Contextual legal certainty 116
- Creeping disentitlement 44, 395,
401
- Crisis agreements 271, 286
- Critical analysis 32, 56, 173
- Critical legal positivism 57
- Critical realism 57
- Current discourses 75, 77, 86, 88,
89, 251, *passim*
- Dalberg-Larsen, Jørgen 60–62
- De facto legitimacy 65, 69, 72–78,
84, *passim*
- Deacon, Bob 48, 50
- De-commodification 33, 34, 46,
261, 262, 268
- Deepened assessment 104
- De-ethicalization 63
- Democracy 45, 46, 48, 65, 68, 70,
71, 269, 398
- Descriptive legal sourceology
- Discourse ethics 29, 63, 69–73, 77
- Dogma (see legal dogmatics)
- Dogmatics (see legal dogmatics)
- Doublet, David Roland 30, 55, 59,
60, 76, 79–81
- Dynamic legal method 75, 387
- Dyzenhaus, David 67–72
- Economic crisis 49, 271, 290

- Eek, Hilding 93–96
- Empirical legitimacy 72–74, 77
- Esping-Andersen Gøsta 33, 37, 43–47, 261, 262
- Ethical perspective (see ethics)
- Ethics 33, 37, 43–47, 63, 69, 71, 88, 97, 116, 397
- Formal legal certainty (see legal certainty)
- Functional approach to legal studies 60
- Giddens Anthony 44–46, 58, 386
- Glavå, Mats 55, 57, 85, 89, 249, 308
- Globalization 43–45, 47–50, 284
- Governance 398, *passim*
- Gustafsson Björn 42, 260
- Gustafsson, Håkan 61, 97, 100, 116
- Habermas Jürgen 29, 52, 63, 66–74
- Heikkilä, Matti 32, 40–42, 260
- Halleröd Björn 32, 40–42, 260
- Human damage 34
- Individual freedom 88, 263–265, 267–270, 291, 306, 307, 395
- Individual need 27, 31–33, *passim*
- Insurance medicine 300–307, *passim*
- Intentional legal constructions 89, 249, 252, 308, 309, 313
- Interface 74, 75, 86–88, 247, 248, 308, 314
- Investigation principle 121–124, 126
- Judicial application of law 81, 82
- Juridification 52, 128
- Kuhnle, Stein 37, 255, 257–262, 268
- Law as a provider of legitimacy 29, 62, 64, 65, 75, 77, 85, 86, 128, *passim*
- Legal certainty 92, 95, 97, 100, 113, 116, 121
- Legal community 63–65, 75, 176–86, 90, *passim*
- Legal culture 76, 79–83
- Legal dogmatics 50, 59–61, 64, 76, 79–83, *passim*
- Legal method 50, 59, 63, 75, 83, 115
- Legal pluralism 61–62
- Legal polycentricity 61
- Legal sourceology 91, 92, 98–100, 105, 114
- Legality 66, 69, 70, 97
- Legitimacy 65–77, *passim*
- Lindqvist, Rafael 38, 46, 256, 279, 309
- Long, Norman 86–88
- Medicalization 379, 380, 382, 386
- Moral 29, 57, 62, 63, 71, 397, 398
- Moral perspective (see moral)
- Negotiation principle 121–124
- New individualism 267, 268
- New poverty 290
- New social risk 37, 43
- New work-line 38, 47
- Normative legal sourceology (see sourceology)
- Normative legitimacy (see legitimacy)
- One-party procedure 121, 123
- Petersen, Hanne 61–63
- Petrusson, Ulf 64, 89, 249, 308

- Principle of basic security 272
- Principle of delimitation 390, 391
- Principle of replacement of lost earnings 255–257, 259, 264, 272–279, *passim*
- Qualification norm 78–80, 83
- Rawls, John 63, 66–71
- Rechtsstaat 70, 71
- Re-commodification 46, 48, 261, 262, 268
- Re-ethicalization 63
- Rothstein, Bo 250, 253–255, 262, 263, 265–269, 398
- Ryner, Magnus 34, 45–47, 261, 268
- Scandinavian legal studies 30
- Scandinavian realism 55–57, 60, 64
- Scientization 379, 380, 382
- Social equality 88, 263, 265, 395, 398
- Social exclusion 39–43, 263, 266, 294
- Social insurance 32, 39, 251, 255, *passim*
- Social protection 31–34
- Social risk 27, 31–33, 35, 50
- Social security 31, 32, 34
- Social stability 88, 263, 264, 266, 268–270, 291, 292, 305, 306, 395
- Societal conceptions of justice 54, 62–65, 67, 75–78, 85–88, 247–250, 252, *passim*
- Sourceology 91, 92, 98–100, 105, 114
- Step-by-step method 104, 110, 111, 114, 295, 318, 330
- Strömholm, Stig 56, 66, 91, 93, 98, 105, 114
- Structural conflict 27, 31–33, 394, 396, 399
- Substantial approach to legal studies 60
- Substantial legal certainty 97, 116
- Svensson, Eva-Maria 30, 85, 390, 391
- Symptom diagnosis 140, 144, 154–155, 184, 191, 200, 201
- Symptoms 141, 144, 145, *passim*
- Technical solutions 77, 89, 248–252, 308–310, *passim*
- Third way 44–46
- Töllborg, Dennis 63, 64
- Transparency 64, 67, 75, 76, 85, 396, 397
- Triangulation 58
- Tuori, Kaarlo 57, 64, 69, 72, 73, 76, 78, 80
- Two-party procedure 121–124, 141, 186, 216, 233, 237
- Two-sided understanding of law 54, 62, 64, 65, 84, 247, 398
- Two-third society 48, 395
- van Kersbergen Kees 44, 394
- Welfare state crisis 31, 42, 43–47
- Westerhäll, Lotta 71, 81, 82, 94–97, 99, 100, 105, 106, 114, 122, 145, 274, 359, 360
- Work normally available on the labour market 111, 112, 140, 296, 319, 374, 376–379, *passim*
- Work-line 38, 140, 185, 272, 279–286, 295, 373, 376, 382, 384–386, 388, 389, 390, 395