To each one's due

at the borderline of work

Toward a theoretical framework for economic, social and cultural rights

by

Vivan Storlund

Academic Dissertation

To be presented with the permission of the Faculty of Law of the University of Helsinki, for public examination in Auditorium XIII, University Main Building on 22 November 2002, at 12, noon.

ISBN 952-91-5223-X
ISBN 952-10-0762-1 (PDF)

Cover Vivan Storlund

Helsinki University Printing House
Helsinki, 2002

Abstract

Art and entertainment are fast growing sectors of the economy today, reflecting significant social change. The new conditions of the information society have in important ways contributed to a diversification of working life and to the increased use of so called 'atypical' work formats. As a general trend, the share of atypical work has, since the 1970s, increased from a few per cent to some 20 to 30 per cent in western countries.

To continue to regard work that deviates from the old standard of permanent full-time employment as atypical, despite its magnitude, indicates that law has not kept up with the factual change in society. This can have severe repercussions for persons adversely affected, i.e. in the form of discrimination or deprivation of the basic prerequisites of a legal order, predictability and legal certainty.

To come to grips with these changes requires a new approach that reveals a person's factual situation and allows for an assessment of how it relates to human rights standards, particularly economic, social and cultural rights.

Artists are professionals for whom there are no proper categories in labour and social security legislation. This makes their status a fruitful object of scrutiny, as artistic work requires a changed perception of work, to include also other values than purely economic ones. Also human and social aspirations need to be considered, as they are articulated in cultural policies.

The nature of artistic work also assists in displaying the changing makeup of the information society. Part of this new makeup is that a person has come to assume, or is expected to assume, a role as an active player in working life. Within a span of a few decades, people have been expected to transmute from passive men and women by the assembly line, subdued to cost-effectiveness in time and movement, to a person who is supposed to be one's own architect of fortune.

This investigation departs from the question why economic, social and cultural rights have been so ineffective in protecting persons who have been adversely affected by structural changes during the past decades. Explanations are, at a practical level, sought by contrasting economic and social conditions. At a theoretical level, explanations are sought in the history of ideas, whereas remedies are offered relying on criteria provided by contemporary theories of social justice and ethics.

Preface

"Life is what happens to you when you're busy making other plans".[1] This is something life itself caters for, but in addition, many people have experienced this after structural changes set in since the 1970s. From an average unemployment rate of some 2 per cent within the OECD area before the oil crises, unemployment exceeded 7 per cent in the early 1990s, when gloomy scenarios succeeded the speculation wave of the 1980s. Despite a subsequently revitalised economy, the employment rate has not increased at the same pace. In addition to this people who have a job increasingly find themselves as so called atypical workers. In Germany, which can be seen as a trendsetter in Europe, experts predict that within a decade half the German population of working age will either work in 'atypical' work formats or be unemployed.

It is an exception rather than a rule that a person is unemployed or 'atypical' by one's own choice. Instead this is something that has happened to this person whilst she or he was busy making other plans. Because of inadequate legal regulation of atypical work and irksome rules in social security, serious questions arise about the basic prerequisites of a legal order, that is, predictability and legal certainty. If one third to half the working population is deprived of these fundamentals of a legal order, we have reason critically to assess the way we go about regulating working life and its appendix, social security. This is what the present research is about.

This work is a journey in time and space, in search of explanations to the question where and how the western legal traditions falls short in securing predictability and legal certainty. I feel greatly indebted to many persons and institutions for having assisted me along the research path that is documented in this work. This preface is a tribute to them all. This research endeavour started at an optimal watch-post, when the effects of the oil crises became felt in working life. At that time I was working with the World Confederation of Organisations of the Teaching Profession, WCOTP. From this position I could see how ill suited our legal tools were, when trying to come to grips with the legal problems that arouse when changes set in in working life. This I experienced, when assisting member organisations to file complaints to the Committee on Freedom of Association of the International Labour Organisation, against alleged violations of trade union rights. Through the General Secretaries of WCOTP, the late John Thompson and his successor Norman Goble, I wish to thank all colleagues and teachers around the world that conveyed a classroom experience and their experience of union work to promote the conditions of teachers. This point of departure makes the present work firmly grounded in practical working life. It is a bottom up approach.

International labour standards provided a point of repair when unions were faced with policies and actions that prevented them from carrying out their mandate, to defend the conditions of their affiliates. As the aim of the ILO is to promote social justice, ILO standards involve a value element, a direction that is often wanting in national legislation and practices. Through William R. Simpson, then Chief of the

[1] John Lennon.

Freedom of Association Branch of the International Labour Office, I wish to thank all persons that I encountered at the ILO, who endured my curious mind, piloting me towards a greater understanding of the problems that I subsequently set out to research. I saw a discord between ILO standards and national legislation that triggered my interest in finding out, what it was all about.

I could never have imagined what a black hole would open up when I gradually formulated the question: "What is required for trade union rights to materialise?" What was intended as a short research break, turned out to become more of a life-project. As there were no easy answers to the questions I put, I found myself doing extensive excursions in many directions. As a consequence, there are many persons who have assisted me in my pursuit to try to understand legal problems from my bottom up perspective. Here I particularly want to express my warm gratitude to the late Anna Christensen and to Reinhold Fahlbeck, professors of labour law at the University of Lund, who crossed my path at an early stage of my research. In different ways they have both been most central to my work, as will also be reflected in these pages. Through them I also wish to thank the Faculty of Law for the year I spent there, and the Nordic Council of Ministers for a scholarship that made this possible.

Likewise I wish to thank the Academy of Finland for the scholarships that allowed me to launch my research altogether. Back in Finland, I was reintroduced to the Finnish legal scene at the Faculty of Law of the University of Turku. Through Martti Kairinen, professor of labour law, I whish to thank my former colleagues there for long and animated discussions in the coffee room. At this time, the late 1980s, I was able to follow seminars and lectures at the Department of Philosophy at the Åbo Akademi University. This launched a new kind of journey, a journey into the history of ideas that has placed its hallmark on this work. For this my sincere thanks goes to Lars Hertzberg, professor of philosophy, who also took me on board a project 'Ethics and the economy', of which this thesis is a product. In this context I was acquainted with the writings of Elizabeth Wolgast, professor of philosophy at the California State University, Hayward, and had subsequently the exiting opportunity to meet the person, whose thinking I admired. This first short contact has now been resumed, when she accepted to act as a pre-examiner of this thesis. I am greatly indebted to Wolgast for her generous advice and comments that allowed me to see some aspects of our theoretical heritage more clearly.

By the early 1990s I had pursued my journey in the world of ideas for so long that I feared having lost touch with the social reality that had compelled me to start researching law’s problem. A solution to that problem presented itself when, lacking research funding, I resumed a former professional activity, journalism. As opposed to research, where I move the pen, journalism is a medium that allows a person to convey one's own experiences. In this way I was able to capture peoples conditions of life in a world (of work) that had been radically transformed during the time I was searching the world of ideas. Working as a freelance journalist, in other words as an atypical worker, I have equally been able to see from the inside the insensitivity of the legal system for any kind of work that does not fit the ideal type underpinning labour law. Through Ingeborg Gayer, my first producer at the Finnish Broadcasting Company, I wish to thank all producers and editors, who have made this dual stance of empirical research and dissemination possible.

I gradually turned my focus of attention to a professional group for whom there is no standing in our legal categories, artists. For my efforts to make sense of the work of artists and the significance of art for society at large, my sincere thanks go to art promoters and artists that I have met in Malta. On a general note, however, I first want to thank Peter Serracino Inglott, professor of philosophy and former rector of the University of Malta, and through him his colleagues for having so generously offered me the opportunity to acquaint myself with the Mediterranean culture, past and present. Second, it was through Serracino Inglott that I became aware of a Summer School on the role of art in the third millennium. If I have at all managed to convey the role of art, and to make sense of the problems associated with the status of artists, this effort has been greatly enhanced through that Summer School, and subsequent events and contacts. Among them I wish to address my thanks to Richard Demarco, Director of the Demarco European Art Foundation, a longstanding activist at the Edinburgh festival, and Miha Pogacnik, Director of the International Institute for the Development of Intercultural Relations Through the Arts. How the business culture could be enhanced with the aid of art, is one of the many topics through which Pogacnik wants to make art permeate all aspects of human life. Many deep reflections about art conveyed through such contacts, coupled with my opportunity to share the experience of artists, allowed me to relate my theoretical reflections to the factual conditions under which artists work. Again, I am greatly indebted to the multinational group of artists whose work and experience I have been able to share. To all of them I wish to express my sincere thanks through the Maltese artist Cecil Herbie Jones.

Finally, I return to my starting point, the Faculty of Law of the University of Helsinki. During my initial studies, I already had an uneasy feeling that there was some fault in the design of the legal system. It is to this university I now return to present this work as a doctoral thesis. I wish to express my thanks to the University for a scholarship that allowed me to finalise this work, which for a long time has had to wait its turn. I feel greatly indebted to my tutor Lars D. Eriksson, professor of public law. This work does not conform to standard legal research for the simple reason that a bottom up approach is no standard in legal research. The research process has therefore been a stubborn pursuit, and I am grateful for the open mind, with which Eriksson has endured this. So, in addition to stimulating discussions and advice that has brought this work forward, he has, at the same time, allowed me to pursue my research in the way I had to do it. So wherever I fall short, I am to blame.

Further my thanks go to Reinhold Fahlbeck and Elizabeth Wolgast for having assumed the task of pre-examiners for this thesis, and to Otto A. Malms Donationsfond and Oskar Öflunds Stiftelse for the funding they granted.

What has come out of this journey is a first phase of a theoretical framework for economic, social and cultural rights that also brings to the fore questions of predictability and legal certainty.

Esbo, 11 September 2002

Vivan Storlund

Contents

Chapter II

sets the scene through an economic and a social scenario

Chapter III locates problems in the history of ideas

Chapter IV bridges theory and practice

Chapter V recaptures lost clusters

Chapter VI

looks at working life and social security in a social justice perspective

Chapter I

considers law and social change

Introduction

> "In a perfect society the citizen would enjoy the benefit of law (assuming there is still a law...) without recourse to the courts". André **Tunc**.[1]

This work is concerned with people's access to justice, and justice of a kind that would minimise the role of courts. *What* impedes access to justice? Explanations to this question are sought in this work. The findings of this investigation point towards a need to empower human beings in those areas that human rights and the welfare state are aimed at protecting. This is an indication that there is a problem in the way in which human rights standards adopted during the 20th century were incorporated in western legal systems. If these rights had been taken seriously, it would have brought us one step towards the utopian notion of the benefit of law without courts. This challenge still lies ahead.

1 The problem

The problem I address and seek an explanation to is why law appears to be such a powerless tool in providing protection for human beings, for defending a human point of view, against strong currents in economic life. The 20th century was characterised by efforts to enhance the position of human beings through human rights standards, particularly economic, social and cultural rights. But for some time now, we appear to be increasingly at odds in defending these rights.

The question addressed is thus, how are we to defend a human and social point of view in face of the strong economic trends that set in in the late 20th century, and the social change that went along with it. This is a topical question, but at the same time, it is a symptom of a more general problem that runs deeper than economic trends and fluctuations. Problems associated with the economy are indications of features in the deep structures of the theoretical tradition that steer our perception of the human being and society. The theoretical tradition influences us in multiple ways; it affects

[1] The context in which Tunc presents this thought is a conference report summing up an extensive project concerned with access to justice in the welfare state. This project was conducted by the European University Institute, Florence. The follow up conference of the project is reported in Cappelletti, Mauro (ed.) Access to justice and the welfare state, 1981. Tunc, André, The Quest for Justice, p. 316.

our way of looking at social issues, and as a consequence of this, the technique of legal regulation and legal administration.

2 Methodological considerations

This work is concerned with methodological considerations about how to allow an assessment of the fairness of institutions, legislation and legal practices in line with the aims of theories of social justice. Although different theories of (social) justice have held a central position on the research agenda since the 1960s and 1970s, legal research has not abounded in attempts to introduce the evaluative element that is characteristic of such theories. John **Rawls** notes that "[j]ustice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust... Being first virtues of human activities, truth and justice are uncompromising."[2] Rawls advances principles of social justice as the set of principles through which rights and duties in the basic institutions of society should be assigned and the benefits and burdens of social cooperation distributed.[3] The concern of this work is *what theoretical tools we need to make Rawls' observation relevant for a legal system*.

The aim of this work is thus to introduce an evaluative element that will allow an assessment of how fair different legal arrangements are. My point of departure is how a piece of legislation affects identifiable human beings in their specific context. I am thereby concerned with access to justice at a personal level,[4] where focus is placed on how a piece of legislation works in practice, whether it aims at a fair distribution and if these aims materialise.

3 A changed social reality

The need for the approach proposed here is evidenced by research done by the Finnish National Research Institute of Legal Policy. A study scrutinising the drafting of laws, revealed that in more than 85 per cent of the bills drafted in 1998, analysed by the researchers, the law drafters had not assessed the possible effects of the bill for individual households, despite deliberate efforts to develop the drafting of laws in this direction.[5]

---

[2] Rawls, John, A theory of Justice, (1978), pp. 3- 4.
[3] Rawls, (1978), p. 4.
[4] as opposed to measures aimed at enhancing the position of specific groups.
[5] Ervasti, Kaijus, Tala, Jyrki, Castrén, Elina, Lainvalmistelun laatu ja eduskunnan valiokuntatyö (summary: The Quality of Law Drafting from the Viewpoint of Parliament Committee Work), (2000), p. 152.

This need for assessing the effects of a piece of legislation is particularly important today considering the structural changes western industrialised societies have gone through since the oil crises of the 1970s. One decisive effect of these changes, largely attributable to new technology, is that the individual person has come to assume, or is expected to assume, a role as an active player, particularly so in working life. Within a span of a few decades, the human being has been expected to transmute from a man and woman by the assembly line, subdued to cost-effectiveness in time and movement, to a person who is supposed to be one's own architect of fortune. Provided, though, that this person is not relying on social security associated with working life. As matters now stand in the sphere of social security, the structures that should empower people are designed in such a way that they often subdue rather than empower. What room of manoeuvre people are allowed at the borderline of work, in atypical work formats and social security, is therefore a crucial question to consider in efforts to make use of the potentials information society holds.

This increased emphasis on identity in social and political organisation, is not yet sufficiently recognised and consequently neither reflected in the drafting of laws nor in legal practices. Because of the nature of the structural changes and the means available through new technology, identity has, notwithstanding, become a primary organising principle, as Manuel **Castells** notes in his comprehensive and penetrating analysis of the changes that have lead to the raise of the network society.[6] Identity is for Castells the process through which a social player primarily perceives oneself and how meaning is formed out of given cultural attributes.[7] Our challenge today, as **Calderon** & **Lasegna** have formulated it, is how, in a world simultaneously characterised by globalisation and fragmentation, to combine new technology and collective memory, universal knowledge and a culture of community, passion and reason.[8] These are central ingredients in our responses to structural change, in our way of seeking new venues for our projects of life, that differ from a society dominated by large scale industrial production. This change requires recognition of the human being as a spiritual individual as well as the material aspect of people's means of subsistence. At a legal level these questions primarily actualise in the fields of labour and social security law.

First, a brief illustration of the most challenging part of this work. During the year 2000 when Helsinki was a European cultural capital, the city practically speaking exploded with art and cultural activities, involving the work of thousands of artists. What categories do we have in our legal and theoretical schemes to capture and give recognition to artistic activities? What legal means do we have to remedy problems that an artist may encounter in one's artistic activity, if an artist is, say, confronted with the social security system? The problem here is that artistic work is invisible, non-existent in our legal categories. Professional activity is either seen as entrepreneurship, salaried employment - typical or atypical - or a person is considered

[6] Castells, Manuel, Nätverkssamhällets framväxt, Informationsåldern, Ekonomi, samhälle och kultur, Band 1 (1999), p. 35.
[7] Castells, (1999), p. 35.
[8] Castells, (1999), p. 35.

as unemployed, independently of the factual (artistic) activities a person is engaged in. This leaves a considerable amount of activities outside the recognised categories of economic activity or work, with repercussions for the extent to which persons engaged in such activities can rely on social security. This problem has become accentuated with the structural changes that have taken place in society in general and in working life in particular. Equally, the (nonexistent) status of artists stand in blatant contrast to the factual role art and culture play in society, and in the way art is perceived at a policy level.

3.1 An alarming discrepancy

There is an alarming discrepancy between human rights standards, particularly economic, social and cultural rights and the way law recognises, or rather fails to recognise human conditions and activities involving these rights. I will in this work use artists as a group of persons that in a caricatured way highlight problems associated with the legal tradition. A closer look at the problems people encounter at the borderline of work will reveal how different groups of people, often because of circumstances outside their own control, have become submitted to evaluation and disciplining, precisely at the point where economic, social and cultural rights should empower them. Teuvo **Raiskio** has in an article 'Oppressive evaluation at the borderline of work in post-war Finland' lucidly pointed to the human tendency to classify and evaluate people.[9] This he identifies as traits from the Judea-Christian perception of work, further reinforced by Lutheranism. In addition to this, we need to be aware that to find a philosophical tradition that takes human beings in a communitarian context as a point of departure we have to go all the way back to the ancient Greek philosophers. This caters for a challenging search of our own mental landscapes, to assist us to properly perceive what is involved and what is required, if we want to make sense of, and seize the opportunities that present social development and the individualising trend offer.

4 Legal personality wanting

When focus is placed on identifiable persons, we enter a much-neglected field in legal theory. One major difficulty in coming to grips with the research questions formulated in this work is that there is no unifying notion of a legal person. On the contrary, this is a 'grossly undertheorized' field as pointed out in Harvard Law Review (HLR) Notes. These notes consider the lack of theoretical attention paid to the notion of legal personhood under the heading 'What we talk about when we talk about persons: The language of a legal fiction'. These notes display the ambiguities surrounding legal personhood and the implications of this.[10] The metaphor of a legal person reflects and

[9] Raiskio, Teuvo, Oppressive evaluation at the borderline of work in post-war Finland, (2001), p. 72.
[10] Harvard Law Review, volume 114, April 2001, number 6, pp. 1745-1768.

communicates who 'counts' as a legal person for the purpose of law. Even without explicit reference to a person, laws signal this by including or excluding certain categories of individuals, either explicitly or through judicial interpretation.[11] What is at stake is the social meaning of law; revealing that law does more than regulate behaviour, it also signals social values and aspirations.[12] In addition, law shapes behaviour by creating social norms that people use to measure morality and worth of their actions.[13] This phenomenon is particularly visible in social security legislation, as will be revealed in this work.

The legal personality of corporations is one of the categories, with which the HLR Notes are concerned,[14] that is central for this work. It is noted that "grants of legal personality to corporations may cheapen the social meaning of humans' legal personality", making thereby status a zero-sum game. Although there is no social consensus regarding the effects of increasingly monolithic business entities (on American society) "there appears to be no abatement to the expansion of freedoms granted corporate actors."[15] This reveals a tension between a desire to stimulate the economy and the risks involved in unchecked corporate growth that can have socially detrimental effects. "Courts' treatment of legal personhood communicates anxiety not only about divisive social issues, but also about the operation of law itself.... The law of the person, and especially courts' ambivalence about it, exposes the uncomfortable but inescapable place of status distinctions in even the most progressive legal systems."[16]

In seeking an understanding of the problems we face when dealing with economic, social and cultural rights, it is instructive to be aware of the role and significance of the legal metaphors used. Or, as formulated in the HLR Notes: "Hence, the very project of the law, which depends on metaphors to make sense of its rules and to justify its use of force, is as unstable as it has ever been." This lack of a universal notion of a person is fraught with troubling normative implications, it is noted.[17] If more attention were paid to legal personhood, this would facilitate an understanding of the scope and meaning of the law's use of the fiction 'person' to define its object. Because of the implications of how legal personhood is granted, attention to this question would also make law more apt to contribute more fully to social dialogue about what it means to be human.[18]

The HLR Notes point to a crucial shortcoming in legal theory. In the present work, the implications of this are pointed out by looking at the ideal-type that underpins different legal disciplines. By juxtaposing economic law, labour law and social law the ambiguities surrounding legal personality are revealed. In order to pin down the ambiguities associated with personhood, attention is placed on how different

[11] HLR, Notes, (2001), pp.1746-1747.
[12] HLR, Notes, (2001), p. 1760.
[13] HLR, Notes, (2001), p. 1760.
[14] In addition to slaves and foetuses.
[15] HLR, Notes, (2001), pp. 1764-1765.
[16] HLR, Notes, (2001), p. 1766.
[17] HLR, Notes, (2001), p. 1767.
[18] HLR, Notes, (2001), p. 1768.

laws and practices affect the autonomy of identifiable persons. By taking the degree of autonomy a person enjoys as a point of departure human beings become the organising factor on equal terms, irrespective of legal discipline. This also assists in bringing forth the individualising trend that Castells points to. To grasp the new conditions of information society requires a reconsideration of many aspects of life and social arrangements. A test case in this work will be the role of art and the status of artists, as the status of artists requires perhaps the most profound change of perception in a legal tradition that is based on standards such as industrial mass production and wage labour.

4.1 Perception - the starting point

Focus in this work lies on gaining an understanding of the way the theoretical tradition influences our perception of the matters we regulate through legislation. Emphasis is placed on areas where human rights, particularly economic, social and cultural rights are involved.

This investigation has been a constant consideration of method, how to gain an understanding of, and lay bare those features that impede the materialisation of human rights standards, introduced during the 20th century. These questions have gained increasing topicality since the oil crises of the 1970s, which was a launching point for considerable structural changes in western industrialised countries. The introduction of new technology and the deregulation of capital markets are the most outstanding features of these changes that have had decisive effects both on society at large and particularly so on working life and thereby on people's means of subsistence. In this process we have witnessed increasing social marginalization. This is an indication that neither labour nor social security legislation have been able to live up to the obligations they have been assigned through international labour standards and standards of economic, social and cultural rights.

4.2 How to go about it?

Thomas **Wilhelmsson** notes, reflecting on his research method that it is the object of research and the way a research question is formulated that will determine through what means a researcher approaches one’s research.[19] This research is concerned with people's access to justice. It is concerned with the fact that despite human rights standards and a host of legislation aimed at pinning these rights down, we witness that an increasing number of people do not have access to the good a piece of legislation is aimed at securing, manifested in increasing social marginalization. My research question is thus *why is this so, what is it that impedes a person’s access to justice? What is required for economic, social and cultural rights to materialise?*

[19] Wilholmsson, Thomas, Sosiaalisen siiviilioikeuden metodiset lähtökohdat, (1997), p. 339.

A research topology presented by Lars D. **Eriksson** assists in pinning down the research process, as it is reported in this work. Eriksson notes that legal researchers need to *understand* the problem they are researching. What does this mean? First, they have to gain a general view of the area they are researching. They have to mark positions on the research map they are drawing. They have to know the locations (*topoi*), from which they start their research path. The first location Eriksson terms a 'topological demarcation'. Through this topological demarcation the researcher is able to draw a more detailed map that indicates the specific connections that exist between different locations on the map.[20]

My research map displays the following topological locations: I depart from social reality and map the changes that have occurred during the past decades, transforming western societies from industrial societies into information societies, IT societies. In this account I pinpoint problems that occur because of insufficient legal protection for those adversely affected by these changes. This I do in the form of an economic and a social scenario, in which I use particular countries, Sweden and the Netherlands, and specific illustrations of general features, speculation and poverty, through which I point to features that are common to western (post) industrial societies (Chapter II).

With questions that have accumulated through the economic and social scenarios, I turn to the history of ideas with the purpose of scrutinising the theoretical tradition that underpins legal perception, legal regulation and its administration.

Focus is placed on how the worldview has changed since the enlightenment, by tracing how some central thinkers of modernity perceived law and ethics. In this analysis attention is paid to the historical environment in which these thinkers developed their theories, why they said what they said, and how we in a totally different historical phase and social context rely on their thinking (Chapter III). After this, I look at the theoretical tools that were used, when the new phenomenon of large-scale industrial production, in the early 20th century, required a new kind of legislation, a new labour law that transformed the relationship between employer and worker from status to contract (Chapter IV).

Having identified problems associated with perception, I join current philosophical and legal attempts at enlarging the scope of inquiry, from the very narrow focus of the utilitarian and positivist orientations. Theories of (social) justice have been central, but also many other contemporary orientations contribute to painting a fuller picture of human beings and society. In this context I elaborate upon the notion of personal autonomy as a way of bringing forth a human perspective that facilitates an assessment of institutions, legislation and action. (Chapter V).

Equipped with the notion of personal autonomy as qualified by considerations of justice and ethics, I return to my starting point and analyse the changed nature of working life and its effects for labour law and social security, in a social justice perspective. I indicate how law has failed to adapt to factual changes and how we, with a change of perception, easily could remedy a number of problems. Finland here

[20] Eriksson, Lars D, Mina metoder (1997), p 70.

offers specific illustrations (Chapter VI). The closing chapter (VII) draws conclusions from what has preceded for theory and practice, indicating the direction for a new theoretical framework for labour and social law.

4.3 A shift of 180 degrees

One effect of the perspective chosen here is that I have to open up a number of questions as I go along, because they are all present in our existence as persons and members of a society. I cannot stop my pursuit to consider definitions of notions such as justice, fairness and so on. As a matter of fact, I must not do so. I strongly endorse Peter **Serracino Inglott's** observation that we must not start with a definition,[21] because then we might exclude important aspects from our inquiry. This work aims at spelling out what it implies when we talk about justice, fairness, autonomy, economic and social rights, etc, the whole bundle of characterisations we use to position human beings and different states of affairs. At a common sense level we understand these notions, and it is at this level that this work starts.

The point of departure for this investigation, the topological demarcation, to use Eriksson's characterisation, is legislation as it works in practice. My *point of departure* is thus the same as *the object of study* of lawyers or sociologists pursuing empirical studies of law. To resume Wilhelmsson's observation that it is the research question that will determine the method and Eriksson's observation that we need to understand the phenomenon with which we are concerned, my research position and questions can be formulated as follows:

I have in practice[22] seen that legislation aimed at securing economic, social and cultural rights does not work in the way it was intended; that legislation often impedes rather than enhances access to justice. Where am I to seek explanations to my observations? At an early stage of the research process I realised that I would not be able to find satisfactory answers to my questions by analysing and interpreting existing legislation, that is, through a 'law-internal' perspective. Alternative jurisprudence helped me along my research path, but not all the way. I had to exit the field of legal research and make this an external object of study. My topological position was then philosophy and more precisely a multidisciplinary project 'Ethics and the economy'.[23] From this position I have analysed the deep structures of the theoretical landscape that operate beneath legal perception, conditioning thereby the drafting of laws and their administration.

As this research is focussed on instances where legislation does not work in a satisfactory manner, there will be criticism voiced against legal positivism and its corollary, legal dogmatics, throughout these pages. This does, however, not mean to

[21] Serracino Inglott, Peter, Beginning Philosophy, (1987), pp. 11-17.
[22] Working with international labour standards at the World Confederation of Organisations of the Teaching Profession, Switzerland.
[23] Led by Lars Hertzberg, Åbo Akademi University, Department of philosophy / Academy of Finland.

deny the role and importance of legal positivism. What my criticism aims at, is to indicate where a legal positivist approach runs short and other research orientations have to step into the picture. There is thus an important division of labour between different research orientations, and they should therefore be seen as complementary rather than mutually exclusive.

4.4 The conceptual tool illustrated

I will briefly illustrate the conceptual tool I employ, which consists of *an autonomy test*. I here rely on a central notion in the theoretical tradition of the enlightenment - autonomy. What I do is to make the notion of autonomy qualified, by relating it to identifiable persons in their specific context. This represents a shift of 180 degrees from the way the enlightenment tradition has been relied upon in individualistic theories, where autonomy is *assumed* rather than investigated or explicated. What in individualistic theories is an assumption, a premise, turns through the application of an *autonomy test* to an *assessment* of whether different laws and arrangements enhance autonomy for identifiable human beings, or not. This entails a shift from autonomy as a premise associated with an abstract notion of individuals that meets the requirement of generality, to a substantive notion of autonomy for a specific person, placed in one's life context. This change does not signify that generality is lost. Generality now lies in the requirement that laws should strive to enhance the autonomy of persons, allowing them to act as autonomously as a particular situation permits. This also makes the notion of autonomy relational, bringing human action into the picture, linking thereby ethics to law.

Through the evaluative criteria that an assessment of a person's autonomy signifies we are able to see a person in his or her context. We will equally catch sight of the fact that a number of laws representing different disciplines may clash, with the effect that the aim of one law can be jeopardised because of the application of another piece of legislation. To apply a 'human perspective' affects the conditions of research in multiple respects. In this perspective different legal disciplines or pieces of legislation cannot be neatly put in separate boxes, which are studied in dept, one by one. The law-external perspective that a human perspective implies, is thus diametrically opposite to a law-internal one, which constitutes the hard core of legal research, legal dogmatics.[24] In a law-internal perspective, laws and institutions are the point of departure, which are analysed and systematised. In a human perspective, disciplinary borders that are constructions of the human mind collapse like a house of cards. The legal system, which in a legal dogmatics perspective is regarded as a coherent body of laws, is from the perspective chosen in this work revealed as a mismatch of conflicting and contradicting laws.

[24] For a mapping of different research orientations, see Ervasti, Kaijus, Empirisk forskning, rättsvetenskap och rättens dynamiska element, (2000), pp. 567-584.

5 Recapture lost clusters

Within practically speaking the whole academic filed there has, since the 1960s and 70s, been attempts, on a broad front, to enlarge the focus of research from the very narrow world view that ensued from the way thinkers of modernity were relied upon in the positivist and utilitarian orientations. Scrutinising how ethics has been perceived, Kirill Ole **Thompson** notes that reactions arouse because theoretical reflection became seen as a "voyage to Laputa", a self-absorbed project, tragically out of touch". Ethical theory could not provide expected moral perspective and counsel. Instead it lost considerable lustre for its aloofness making many disappointed students turn away from philosophy. This Thompson notes in an article 'How to rejuvenate ethics'[25] where he points out the effects of ethics being considered at a meta-level, "'meta-ethics', which proudly proclaimed its aloofness from the moral issues tearing at the seams of the social fabric."[26]

Charles **Taylor**, again, notes in his criticism of what he calls fundamentalist epistemology, that the key is perception. He illustrates this with the notion of freedom, pointing out how certain connected notions are historically closely associated with the epistemological construal. One of them, relevant for this work, is the picture of a human being as a disengaged, free and rational person, who has fully distinguished himself from his natural and social worlds. His identity is no longer to be defined in terms of what lies outside him in these worlds.[27] In the legal field, we have a reflection of this epistemological construal in the frequent view of a person, as being reduced to a contracting partner in the field of private law. When we move to the field of social security there is, however, a decisive twist in the epistemological construal, albeit hardly articulated. The view of a person emerging in some social security schemes, such as unemployment compensation, does not presuppose a free, rational and disengaged individual. Instead people are supposed to be at the disposal of working life for fulltime employment, although it is an exception rather than a rule that this form of employment will be offered today. Submissiveness is an attitude presupposed in many social security schemes, while people simultaneously are expected to be the architects of their future. Raiskio notes that "there is a stigmatising classification, when a person lives at the borderline of work, the transference of anguish: shame and guilt. During good economic times, there is some ease in these attitudes and values, but during hard times they tighten, and mystical licences and gloomy scenarios are generated to support the dominating trend."[28]

In his analysis of the transformation towards the network society and the social divisions that have followed in its wake, Castells notes in regard to working life, that society has again became divided. So it has been during most part of human history, a division between winners and losers in an endless process of individual negotiations

[25] Thompson takes his departure in Chu Hsi, and gives a succinct account of the western ethical tradition in his article 'How to rejuvenate ethics: suggestions from Chu Hsi', (1991).
[26] Thompson, (1991), p. 493, including footnote 2.
[27] Taylor, Charles, Overcoming Epistemology, (1987), p. 471.
[28] Raiskio, (2001), p.107.

between unequal partners. But what is specific in the present process is that never before has the work of an individual been more central in the value creating process. But independently of qualifications, the worker is, as never before, submitted to the mercy of the organisation as it now operates, with 'slimmed' individuals, contracted out in a flexible network.[29] Castells emphasises that this development is not due to any 'inherent necessity'. This trend is not an expression of any structural logic, inherent in the informational paradigm. It is an expression of a process of a changing relationship between capital and labour. Castells points to the fact that information technology holds the potential of increased productivity, a higher standard of living and increased employment, if only certain technical choices were made.[30] The informational paradigm is socially open; it is a politically administered paradigm, the most important common elements of which are technical.[31] The present development is thus the result of economic and political choices, through which business and governments have opted for an easy way out in the transformation towards the new informational economy. This stands in sharp contrast to the potentials inherent in the informational paradigm, Castells notes.[32]

The borderline between working life and social security is a crucial field to critically assess in order to allow us to make use of the potentials inherent in present developments. As things now stand, the attitudes permeating social security legislation and also labour law, to some extent, prevent us from both seeing and seizing the potentials that IT society offers. Examining Finnish labour legislation from the point of view of new work formats that have occurred, particularly in the third sector, Seppo **Koskinen** points out that hardly any attention has been paid to these changes in legal research.[33] An effect of this is that both labour and social security legislation are out of touch with factual developments.

We therefore have reason to critically assess both institutions and legislation, but equally our own mental landscapes. Because, as Raiskio notes, "[p]rejudices and emotional factors such as envy, instigate the need to label and classify, entailing a need for assessment - from the dishonourable to the honourable". In addition, the present ideal of the free market forces has provided a basis for today's order of values, infusing people living at the borderline of work to feel anguish and guilt for their station in life.[34]

Law is a central partaker in present transformations. If justice and economic, social and cultural rights had been taken seriously, there would have been room for the human potentials inherent in the informational paradigm. And there still is if we focus on identity.[35]

---

[29] Castells, (1999), p. 286.
[30] Castells, (1999), p. 280.
[31] Castells, (1999), p. 238.
[32] Castells, (1999), p. 247.
[33] Koskinen, Seppo, The third sector and labour law, (2001), p. 256.
[34] Raiskio, (2001), p. 108.
[35] Castells, (1999), p. 35.

The research process illustrated

A propelling question in this research has been why a piece of legislation does not work. Focus is thus placed on aspects of legal regulation that do not keep up to the central aims of a legal system, such as fairness, predictability and legal certainty. This problem is frequently revealed in areas were economic, social and cultural rights are involved, such as labour and social security law, or in areas of activity that, from a legal point of view, are invisible such as artistic work, third sector activities and work in the household.

6 Division of labour

There is an important division of labour between different research orientations concerned with law. These different orientations are needed in order to gain an understanding of the complex relationship that exists between law and the social environment in which it operates. The social environment is in itself extremely complex and, in addition, changing at an eye-catching speed. I will start by offering a couple of illustrations of this need for multiple research approaches to complex social issues and social change.

In the late 19th century and early 20th century, when labour law was in its ascendancy, the academic community was faced with the challenge to make sense of what happened in the world of work and to incorporate this into the legal arsenal. The collective agreement constituted such a challenge. Hugo **Sinzheimer**, who was influential in shaping the German law of collective bargaining, formulated the following research agenda in an article entitled 'The development of labour law and the task of legal theory'.[36]

"1. The importance of the subject matter. The number of persons who are dependent on a contract of service grows ever greater, and for these people Labour law forms the very basis of their lives. Labour law is the heart of their social existence.

2. The special nature of the subject matter. There is no other area of law in which public and private law are as closely intertwined as Labour law. In general, legal theory separates public and private law. Labour law can only be perceived as the unity of public and private law.

[36] The first paragraph of Article 165 reads as follows: "Manual workers and salaried employees are called upon to participate, on equal terms and together with the employers, in the regulation of wages and working conditions as well as in the general economic development of the productive forces. Organisations on both sides and the agreements between them shall be recognised.", Hepple, Bob, Ed, The making of Labour Law in Europe, A study of Nine Countries up to 1945, (1986), pp. 8-9, Sinzheimer, H. The fortentwicklung des Arbetisrechts und die Aufgabe des Rechtslehre, Soziale Praxis, 1910-11 vol. 20, p. 1237. This passage is based on Storlund, Trade union rights - what are they?, (1992), pp. 35-58.

3. The special treatment which Labour law demands. This must adhere to social principles which permit one to discover the present state of the law and to shape its future. Prevailing legal theory is dogmatic and concerned only with positive statements. The theory behind Labour law must also be concerned with sociology and matters of legal policy.

4. The necessity of specific auxiliary sciences. These include sociology, social policy and the theory of business organisation. Legal theory must cover all these subjects. A theory of Labour law which tied the study of Labour law to the study of other areas of law could not do this.

5. Finally, the unity of the goal! This is based on the prevailing principle of the unity of human labour as the embodiment of the human personality and of the special function of the law which governs it as the guardian of human beings in an age of almost unrestrained materialism. In our time this is uniform Labour law, based purely on the needs of the employment relationship, rather than on the law of property or commerce. "

These observations formulated about a century ago, have lost none of their topicality. We need them to the same extent today, to make sense of the changes in working life brought about by new technology and a global economy.

A flavour of the problems encountered in the industrialisation process is given in the introductory part of an extensive ILO study on 'Conciliation and Arbitration in Industrial Disputes', published in 1933: "It is, indeed, only gradually that the special nature of labour law is being generally recognised. The civil law of most of the important States of the world, often framed entirely for the individual and his needs and thus strongly influenced by Roman law, is not capable of dealing with the new legal problems arising out of the change in the conditions in important industrial countries with their huge masses of workers."[37]

No, Roman law would not be of great assistance in capturing the rationale of working life and the social dynamics inherent in industrial relations systems as they emerged. J. **Huston** gives such an illustration in the case of Australia: "Mix together two State arbitration systems which have some similarity, two similar State Wages Board systems which are different in some respects, and a Commonwealth arbitration system which has some similarity to the state arbitration system. Drop in an assortment of associated tribunals both State and Commonwealth, such as Coal Industry Boards etc,... Season with Departments of Labour, both State and Commonwealth, a Tariff Board, State Trade Union Acts, and special State legislation to cover such things as compensation, apprenticeship, equal pay, long service leave and adjustment to the basic wage. Throw in some common law, sprinkle with the legal fraternity, flavour with the suggestion of lunacy, and simmer the mixture well on a hot plate of employer-employee relationships. And there is a dish rich enough to give mental indigestion even to the strongest mind."[38]

---

[37] ILO, Studies and Reports, Industrial Relations, Series A, no 34/1933, p 4.

[38] Huston, J, Penal Colony to Penal Powers, p 17, cited in the International Encyclopaedia of Labour Law and Industrial Relations / Australia, pp. 11-12.

A problem inherent in legal positivism and its corollary, legal dogmatics is that the field of scrutiny, at its starting point, excludes the social environment in which law operates. This becomes particularly problematic in times of profound change, like the industrialisation process as well as the period to be looked at here, that is, the transition from a typically industrialised society to a high-tech society, the IT society. If account is not taken of factual social change, the legal remedies that are sought to adjust to these changes easily become counterproductive of their aims.

6.1 'New work' project - an illustration

That people's reality, as well as the functioning of social institutions, can be captured and made relevant for law, is well illustrated in a project, 'New work'. Three major organisations in the third sector made one of the many third sector projects aimed at enhancing employment, the object of careful scrutiny through research.[39] This project, originating in the third sector, has by consequence human beings as a natural point of departure. Thereby, the research findings bring forth the factual conditions of long-term unemployed persons, and their encounter with the administration of social security and working life.

The research object of the New work project was a subsidy, the combined labour market subsidy, designed to employ long-term unemployed persons. A multidimensional and multi-disciplinary approach to this topic conveys an abundant picture of human beings, laws and institutions in operation. "From a methodological point of view the research task is challenging", Petri **Kinnunen** notes.[40] Through methodological triangularity, including material, method, theory and researchers, the research topic is approached through a variety of constellations. Kinnunen describes the method as an aspiration to present several different pictures of the reality of the researched objects that complement each other. In this way, awareness can be enhanced by locating complicated chains of responsibilities and obligations that are often hidden.[41]

In this context Koskinen gives an account of labour legislation that is relevant for the practical employment endeavours that were carried out in the project, as well as new employment trends in the third sector. He points to the remarkable diversification that has taken place in working life. The new network economy that has emerged, with a high degree of mobility, has accentuated many problems in labour law. In many instances where work is performed it is, today, difficult to distinguish the status of the employer as well as the employee. Notwithstanding this, as Koskinen notes, there has hardly been any attention paid to labour law issues in the third sector in legal literature**.**[42]

---

[39] See Harju, Aaro, New Work project - Enhancing employment, A research and development project, pp. 15-60, in Harju, Aaro, Backberg-Edvards, Kristiina, (Eds), Towards new work, Helsinki 2001.
[40] Kinnunen, Petri, Employment in the third sector - the research agenda, (2001) p. 65.
[41] Kinnunen, (2001), p. 65.
[42] Koskinen, Seppo, The third sector and labour law (2001), p. 256.

Yet, we are here concerned with a not negligible amount of work carried out in the third sector. According to research done by the international Johns Hopkins university, some 82 000 persons were employed in the third sector in Finland in 1997, out of whom 25 000 worked part- time. Compared to overall employment in the whole service sector, this amounts to some 10 per cent. When compared to employment in the public sector, employment in the third sector amounts to 13.5 per cent. If voluntary work is also considered, the shares are approximately doubled.[43] Notwithstanding this, labour law has for a long time been concerned with the standard worker (a male industrial worker), as a point of departure in any assessment of labour law issues.[44]

7 The debate goes on

Kaijus **Ervasti** has in an article, where he advocates the need for empirical research in law, mapped the current discussion about the need for and legitimacy of different research orientations. This account reveals that legal dogmatics still holds a hegemonic position, against which other orientations have to fight for their legitimacy. Around the 'core' of legal dogmatics, different research orientations perform their complementary tasks of placing law into context. The agenda has not changed during the past century from the one Sinzheimer spelled out above. Unfortunately, the complementary nature of different research orientations is not always conceived of as a positive thing. Over this subject many intellectual fights have been fought over time, and continue to do so.

In Finland, a discussion about different research orientations has rekindled since the 1990s. What sometimes was an aggressive debate among different research orientations has now, in the Finnish academic landscape, turned into more constructive considerations about how to combine and draw advantage of different orientations.[45] One central aspect of contemporary research, both in legal dogmatics and interdisciplinary research, is an attempt at capturing the dynamic elements of law. Here legal dogmatics is faced with a problem, as the object of scrutiny is the legal system, as it is at the time of research. This renders a static picture of law. Juha **Häyhä** points out that although we agree that law is a product of societal power constellations, the dynamics involved in the lawmaking process tends to be frozen. To a legal researcher, law turns out as static. If we say that law is dynamic, it is a process in which nothing happens.[46]

In a mainstream legal dogmatic view legal dogmatics is normative, whereas research orientations that incorporate other aspects, in addition to law itself, are seen as auxiliary sciences, implying that the auxiliary orientations do not hold this normative character. Kevät **Nousiainen**, among others, questions this view, noting

[43] Harju, Aaro, (2001), p. 17.
[44] Koskinen, (2001), p. 256.
[45] See Ervasti, (2000), p. 575.
[46] Ervasti, (2000), p. 577, Häyhä, Oikeus (2000), p. 38.

that it is not satisfactory to consider 'general sciences' merely as auxiliary sciences to legal dogmatics. In her view the theoretically most challenging and politically and morally most pressing questions concerning law are thereby excluded from legal science.[47] There are research orientations that from a law-internal perspective enlarge the normative field, such as the social orientation in civil law developed by Wilhelmsson, and Kaaro **Tuori's** critical legal positivist orientation.[48] These orientations remedy important shortcomings in mainstream legal dogmatics. There is, however, a limit to how far such orientations can reach. A law external perspective is also needed to reach beyond a piece of legislation to the context that generated this legislation and the law drafting process as well.

8 The drafting of laws

Jyrki **Tala** points to a need to be aware of what perspective is taken in the law drafting process and in assessing the (possible) effects of a piece of legislation. His specific concern is law drafting, but this equally applies to the assessment of any piece of legislation. Tala notes that different agents look at legal regulation from different perspectives, reflecting also different interests. For each distinct agent the effects of a piece of legislation will equally involve different kinds of concerns. These can be reduced to two major perspectives, regulation as an instrument for the exercise of power versus legal regulation that protects the individual from this very exercise of power. In research concerned with legal implementation, these two perspectives have been crystallised into a top down model and a bottom up model.[49]

There are problems associated with both approaches, Tala notes. If one departs from the decision-maker's perspective, it is easy to subsume and thereby accept the way in which the decision-maker has defined a problem, and thereby also the means through with this problem should be solved. In a top down approach interests and the information sought might lead to a focus that is limited to certain features only, or it may solely focus on partial questions, which are the object of regulation. An assessment of the effects of any legislation will, perhaps unconsciously, be tied to the perspective, from which the law-drafter has approached society and the matter to be regulated. Another problem associated with the top down approach is that the legislation that has been passed by the lawgiver will be assumed to be unambiguous and clear, notwithstanding the fact that public decision-making in reality is complex, conflicting and imprecise.[50] The problems Tala here point to are endemic to the legal positivist orientation, as it does not attain the competing rationalities inherent in the legislation regulating economic life versus working life, and working life versus social security. But there are also advantages with the top bottom model, Tala notes.

[47] Ervasti, (2000), pp. 569-570, Nousiainen, Metodini? Esitys? Minun metodini, (1997), pp. 220-221.
[48] See Ervasti, (2000), pp. 577-578.
[49] Tala, Jyrki, Lakien vaikutukset, Lakiuudistusten tavoitteet ja niiden toteuttaminen lainsäädäntöteoreettisessa tarkastelussa. Oikeuspoliittinen tutkimuslaitos, no 177, (2001), pp. 37-38.
[50] Tala, (2001), pp. 38, 40.

Through this perspective emphasis is placed on the aims of a decision that should steer the assessment of its effects. This perspective emphasises the responsibility of the decision-makers for the effects of their decisions, supporting thereby basic principles in democratic decision-making. From this perspective, it is also possible to

identify and gain a greater understanding of causes and effects for the materialisation of legal norms.[51]

The bottom up perspective, which is applied in this work, assists in bringing out the competing rationalities and interests embedded in legislation. This perspective assists in identifying the principal agents, their internal relations and above all the factual context in which a law is implemented. One important advantage that Tala assigns the bottom up approach is that through this perspective it is easier to discover and locate unintended effects of a piece of legislation.[52]

Tala's conclusions concerning these two approaches, is that an extensive and versatile investigation would normally require the use of both approaches. He warns against an attitude that would exclude one for the benefit of the other, as being the only viable alternative.[53]

8.1 An autonomy test blends top and bottom

An autonomy test blends the two approaches. The autonomy test becomes relevant in instances where the room of manoeuvre, the autonomy, of a person or group of persons is jeopardized. The bottom up approach is an implicit starting point for an autonomy test, revealing how a piece of legislation or an action taken by a decision-maker affects identifiable human beings, conditioning thereby their conditions of life.

This brings human conduct into the picture, displaying motives both intended and unintended that easily go unnoticed in a top to bottom approach. It equally reveals the problem associated with the top down model, that consideration easily becomes confined to one singular question or partial problem, or confined solely to one administrative sector. The autonomy test will thereby display the competing interests that are involved, and assist in the difficult task of weighing competing interests, the basic principle of democracy. In this exercise the different criteria advanced by theories of social justice will assist in differentiating policy issues, legislation and their effects in a way that takes account of the values represented by economic, social and cultural rights, and constitutional provisions aiming at justice. The top down model again, indicates the standards confirmed in the constitution and the aims of a piece of legislation, introducing thereby a norm hierarchy that should prevent technical rules from superseding constitutional provisions aimed at empowering a person.

A citation by **Aristotle** may be in place to close these introductory reflections

[51] Tala, (2001), p. 38.
[52] Tala, (2001), p. 41.
[53] Tala, (2001), p. 41.

on different research orientations and to prepare for what is to come next. "Investigation of reality is in a way difficult, in a way easy. An indication of this is that no one can attain it in a wholly satisfactory way, and that no one misses it completely: each of us says *something* about nature, and although as individuals we advance the subject little if at all, from all of us taken together something sizeable results - and, as the proverb has it, who can miss a barn-door."[54]

9 A changing context

Since the 1970s industrialised societies have undergone decisive changes. Hallmarks in these changes will be reported throughout this work, as they emerged, 'real time'. With this real time accounting I wish to point at how changes take place peace-meal, and how the totality of such singular changes, suddenly makes up a new order.

In order to facilitate a perception of the problems we encounter, and possible solutions to the challenges facing law in a changed societal context, it is instructive to see how we got where we are today, having moved into the third millennium. The spur in technological innovations, witnessed since the 1970s has influenced western societies in multiple and decisive ways. The fundamental nature of this change can be compared to the change that accompanied industrialisation around a century ago. Although present changes constitute a continuation of the industrialisation process, the refinement of production processes has, in a decisive way, come to challenge the whole rationale that has influenced or conditioned the shape of an industrialised society. Alongside new technology, we have a new kind of economy, both the global one and a new network economy. In combination, new technology and a new economic culture cater for new challenges, but also new opportunities, by which both human beings, the state and public institutions are affected.

Parallel with these changes, there has also been a change in forms of life and individual preferences, for which existing institutions and regulations are conceived of as increasingly inappropriate. This has, in part, to do with the above-mentioned material changes, which have affected the conditions of life of human beings. But we also have a reflection of the interaction there is between the material context and the available space for human self-realization. For this I find the use of old industrial facilities, the factory, as a sublime symbolic illustration of the factual changes that have taken place in society, with which law has not caught up. When the assembly lines were halted, and there was no longer a need for the monotonous movements of workers at the assembly line, what happened? Art and culture moved in to the facilities, filling up the silenced emptied spaces with colour, form and sound. This is a very natural development. When basic needs are satisfied - as we know from **Marslow's** need hierarchy - the human being aspires towards self-actualisation. When today so much less human effort is needed for producing the necessities of life, it is but natural that human energy is released for more spiritual aims.

[54] Cited in Barnes, Jonathan, Aristotle, (1985), p. 17.

Castells points to one interesting aspect of IT society. He notes that through new technology, it is the first time in human history that written, oral and audio-visual expressions blend in human communication. This also implies a new kind of coordination between the two brain halves, the rational and the creative.[55] To make full use of this potential requires, however, a considerable change of perception. We need to be aware that within the lifespan of one generation, we have arrived at the present situation from a worldview borrowed from the natural sciences, for which B. F. **Skinner** stands as a portal figure. In his book 'Beyond Freedom and Dignity' (1971), Skinner argues that concepts of freedom and dignity may lead to self-destruction. His model was to apply a technology of behaviour, comparable to that of the physical and biological sciences. In this worldview man should became one with the assembly line, where each movement is calculated to be as simple and short as possible with no cross flow or backtracking.[56]

In addition to the way theory influences our perception, we also have this other legacy to which Raiskio pointed, that is, the human tendency of disciplining and projecting shame.[57] We need to rid ourselves of the deeply ingrained urge for control, planning and social engineering, and instead allow people the space they need, once there is such space today for people's projects of life. This is particularly the case for people who rely on social security. Anna **Christensen** has in a captive way pointed to the tensions inherent in the wage-labour society. Writing in the context of future studies, she notes that changes have to emerge from the cracks and the paradoxes inherent in a society build on wage labour. This change will come about among groups that refuse to adapt themselves to the value order of society, among women, part-time workers, among young people outside the wage labour system that refuse to be miserable and to accept the oppression and humiliation of 'employment enhancing measures'. What the new order will look like, nobody knows, it can only grow through practice, Christensen notes.[58] The central question therefore is to allow for the space that is there, for a sound development of today's potentials.

Some decades back future researches talked in positive terms about the potentials of new technology, which would allow personal self-realisation and increasing leisure. Today the material conditions are there, but since the internationalisation of capital, there has not been much sign of this discussion, because national economies have been strained because they increasingly function at the mercy of international capital markets. This reveals a tension between the internationalised economy and national economies. In this context law appears to leave us empty-handed when it comes to defending a human or social point of view against the dominance of the economy. To pin these changes down, I will give an account of the changes that occurred in labour law and industrial relations when structural changes, associated with the oil crises of the l970s, set in. This information is compiled in the midst of this process of change, illustrating how changes come

[55] Castells, (1999), p.334.
[56] Encyclopaedia Britannica, (1996).
[57] Raiskio, (2001).
[58] Christensen, Lönearbetet som samhällsform och ideologi (1983), s 23.

about piecemeal. It also reveals the time it takes to perceive the overall effects of multiple isolated instances of legal change.[59]

9.1 New trends in industrial relations - a new rationale

Since the 1970s industrial relations research reported what appeared to be an endless stream of new measures, both political and legislative, which affected the industrial relations systems as they had, more or less, evolved since world war II, or previous practices were altered, resulting in an increasingly conflict-prone atmosphere on the labour market.

It was the economic recession associated with the two oil crises of the 1970s, and different attempts at coping with the economic crisis that caused considerable deterioration in labour relations in many a western industrialised country. An outstanding feature of this period is the call often heard by governments away from the interference of the state and back to the free play of market forces. In order to liberate the market forces, these same governments intervened to a degree never before seen in peacetime. Principal options in a situation of crisis, is either to seek cooperation among major groupings in society, or to clear the way for a naked power play. In many countries the latter was a striking feature in the late 1970s and early 80s.

The way governments tried to deal with the economic crises, has by Oliver **Clarke** been described in the following way: Governments have enacted incomes policies, often though and general ones, but sometimes also with varying degrees of flexibility. They have sought to persuade unions and employers to cooperate in a policy of wage restraint. They have sometimes also - particularly in recent economic conditions (early 1980s) - used monetary and fiscal policies on their own, to restrain bargaining behaviour. But, in many countries, efforts to ensure complementarity rather than conflict between bargaining outcomes and economic needs have commonly had neither long-lasting nor entirely satisfactory results. In referring to the relationship between collective bargaining and government economic policies, the author notes, "as recession deepened, as order books and profit declined and unemployment rose, workers' bargaining power was widely weakened. Yet governments found it necessary to intervene in the wage determination process more than ever before in peacetime."[60]

The ways in which governments intervened in industrial relations took different forms. Although these measures were taken through parliamentary procedures or as part of a governmental programme, respecting formal procedural requirements, these measures were often in violation of a number of principles

[59] This material was, in the mid-1980s, assembled for my licentiate work 'Trade union rights - what are they?' In that work, the effects of change were assessed from the point of view of the industrial relations systems, and thereby of the ability of trade unions to defend the interests of the working population.

[60] ILO, Collective Bargaining: A response to the Recession in Industrialised Market Economy Countries, (1984), p. 247.

governing the democratic interplay in society and labour relations more specifically. Such measures have ranged from legislation putting the labour relations system temporarily out of play or under the dictate of the government, through unilateral imposition of a wage freeze, or other forms of limitations on collective bargaining or industrial action, to deregulation of protective labour legislation and nibbling at social security provisions. Either these measures have disarmed unions and individual workers of their ordinary means of defending their interests, or they have had the effect of tipping the balance between the labour partners in favour of the employer. In an ILO study surveying how industrial relations responded to the challenges of the economic recession, it is noted that "[w]e are not sure whether the current recession will give rise to fundamental changes in industrial relations systems, though there is little doubt that it has led to some rethinking about the nature and orientation of certain systems, affecting the role played by the parties and their relative bargaining power, and altered the priorities attached to traditional arrangements."[61]

9.1.1 Unilateral imposition of measures

Different forms of unilateral governmental intervention limiting the regular mechanisms for negotiating salaries and conditions of work were taken in a number of countries. Such measures will here be illustrated through cases brought before the ILO Committee on Freedom of Association concerning Australia, Belgium and Canada.[62]

In *Australia* a Salaries and Wages Pause Act was introduced in 1982, suspending for l2 months the powers of certain authorities in relation to the remuneration of certain persons and certain other purposes. The act was meant to have effect notwithstanding anything in any other law, or any award, determination, order, industrial arrangement or contract. The power of salaries tribunals and of remuneration-fixing authorities, were suspended during the prescribed period. With the change of government in March 1983 this piece of legislation was repealed. The new government convened a National Economic Summit Conference of representatives of unions, employers, government and community groups to devise a programme of national reconstruction.[63]

In *Belgium* the government assumed special powers through legislation passed to that effect in February 1982. Through this act the government would be free to introduce a number of measures which normally would require an act of Parliament, an agreement with the social partners or other forms of external check. Under the competence provided by the Special Powers Act the government issued orders

[61] ILO, Collective bargaining : A response ... This publication gives in 1984 an extensive survey of collective agreements covering different solutions to the economic crisis in different sectors of the economy.
[62] These measures have been studied as case studies in Storlund, (1992) pp. 142-205.
[63] See ILO complaint, case no 1180, 230th Report, Dabscheck, Niland, Recent trends in collective bargaining in Australia, pp 642-643.

imposing unilateral provisions in regard to salaries, to the effect of prohibiting wage increases and providing for total or partial de-indexation of wages.[64]

In *Canada* the Federal Government imposed control on wages and collective bargaining for its own employees and for workers in all its Crown corporations in 1982. Six out of the ten provinces quickly followed the example. Thus the provincial governments of Alberta, British Columbia, Newfoundland, Nova Scotia, Ontario, Prince Edward Islands and Quebec adopted similar policies and the remaining four provinces imposed administrative control on negotiators.[65]

Although the format of the measures taken in Canada varied from one province to another, the trust was everywhere the same. Employees affected were to receive wage increases below the expected rate of inflation. Another feature of these measures was attempts to reduce the size of the public sector.[66]

Thompson and **Ponak** have evaluated these measures in the following way: "Governments naturally chose to implement these policies in ways which caused them the least political damage. In times of rising unemployment it was relatively easy to put the burden of reduced government spending on public employees who purportedly enjoy greater security of employment than their counterparts in the private sector". Collective bargaining in the conventional sense of the term had ceased to exist, and was transferred to the political arena, it is noted in the case of Quebec.[67] Thompson's and Ponak's assessment of the situation is that in some provinces and in the private sector bargaining has coped relatively well notwithstanding the difficulties posed by deteriorating economic conditions. They observe that the risks of resorting to unilateral measures are too great when measured against the gains such policies produce, and they conclude, "[w]ise governments will use the tools collective bargaining provides to deal with current economic problems; governments which continue to intervene in industrial relations will face new confrontations with their workers, especially when the economy improves."[68]

9.1.2 Changed scope of bargaining

In countries where free collective bargaining was maintained alterations in the scope of bargaining and changing emphases could be noticed. Where governments had sought cooperation with the social partners the scope of matters on which negotiations were carried out tended to be enlarged. Australia is an illustration of this, as indicated above. Yet there was also a reverse trend, where governments, without infringing on the bargaining process, through their economic policies *de facto* limited the scope of collective bargaining between unions and employers. For the Federal Republic of

[64] See ILO complaint, case no 1182, 230th Report, Blanpain, Recent trends in collective bargaining in Belgium, pp. 322-325. Orders no 11, 179 and 180.
[65] Thompson, Ponak, Industrial relations in Canadian public enterprises, (1984), p.648.
[66] Thompson, Ponak, (1984), p. 660.
[67] Thompson, Ponak, (1984), pp. 660, 662.
[68] Thompson, Ponak, (1984), p. 662.

Germany it is noted that the introduction by the government of general economic measures such as those aimed at stimulating investment obviously limited the scope for collective bargaining on wages.[69]

A general trend noted in Germany, Belgium and Italy, to name a few, was a transfer of bargaining on specific issues from the trade union centres or individual federations to plant level. At this level it is not necessarily the unions that negotiate, but works councils, which in some countries are organisationally separate from the unions. In Germany the competence to deal with such questions as partial lay-offs and intra-plant wage fixing through the application of payment-by- results schemes, especially for piece rates, was transferred to the works councils. This has come about through an enlargement of the areas for co-determination, for which the work councils are the appropriate bodies. Thus statutory enlargement of the area of co-determination had the effect of reducing the influence that central unions formally have exercised.[70]

In Italy, national agreements were loosing ground on questions relating to work organisation, which implies more freedom of action for the employers, leaving trade unions confined to defensive activities at the level of undertakings.[71]

Through its competence under the Special Powers Act the Belgian government dictated negotiations and agreements at plant level concerning particular issues, such as a reduction of working time. By an order introduced in October l983, works councils were given the task of monitoring the implementation of collective agreements on job creation and working time.[72]

This decentralisation of collective bargaining is one illustration of the pressures on the labour market for measures advocated by employers and promoted by many governments, allowing more flexibility in labour relations. The growing number of unemployed was the incentive for introducing more flexibility. In the name of flexibility employers favour individual labour relations and regulation rather than collective settlements. This trend has, since the 1970s and 80s, been particularly visible in sectors where new technology is introduced, where union control and restrictions are seen as undesirable by employers, and where a new type of profession has emerged, without the usual trade union tradition. These pressures have lead to a deregulation of protective provisions in labour legislation, particularly in regard to working time.[73]

---

[69] Fürstenberg, Friedrich, Recent trends in collective bargaining in the Federal Republic of Germany, ILR, (1984), p. 619.
[70] See Fürstenberg, ILR (1984), pp. 619-620.
[71] Giugni, Gino, Recent trends in collective bargaining in Italy, ILR, (1984), p. 609.
[72] Blanpain, ILR (1984), pp. 322-323.
[73] See documentation from the IIRA European Regional Conference, Wienna, Austria. This and subsequent IIRA meetings have provided valuable fora for an overall assessment of the state of affairs in industrial relations.

9.1.3 New working time arrangements

Through Order no l79 the Belgian government provided for the possibility of departing, through collective agreements, from binding labour standards under certain circumstance. The aim was to provide for experimental flexible working time arrangements, designed to create additional employment, on condition that the parties concerned consented to this. Such agreements had to be approved by the Minister of Labour. Management and workers were obliged to negotiate working time reductions and the hiring of new employees, in an attempt to increase employment. The parties had to agree on ways and means of reducing working time by five per cent, and on hiring a number of new workers. If the parties were not able to reach an agreement, a sum equal to the income forgone by workers as a result of wage restraint, had to be paid to a Central Employment Fund.[74]

In Germany so called capacity oriented working time (KAPOVAZ) gained importance. According to this system the factual working time was dependent on the actual needs of the employer at any given time. In retail industry in particular, shop assistants and cashiers concluded such contracts. The legal problems relating to such work arrangements had then not been sufficiently studied or settled through legislative provisions, Wolfgang **Däubler** notes in 1985. Another feature involving working time was an increased use of part-time work.. The factual effect of this is a shortening of working hours without financial compensation. Flexible working time is another striking feature. Workers are to complete the work as best they can within the hours allotted to them. With fluctuations in the supply of work this means flexible - not fixed - working hours. This work format has gained importance and has been given the form either of fixed-term employment of individual workers, or, when the employment situation is good, temporary employment contracts or the recruitment of supply workers. There is no job security attached to such contracts (a state of affairs reported in 1985).[75]

As noted by Däubler, labour legislation and collective agreements are no longer a guaranteed safeguard. Also courts have relaxed in their positions in regard to the protection of workers' interests. Numerous amendments to different statutes, affecting employees are under preparation, Däubler notes (in 1984). The underlying motive for relaxing protective legislation is to induce employers to engage new workers. Even keeping intact what has been achieved means, in present circumstances, a step backwards. Numerous loopholes in labour legislation, which in the good years hardly were of any significance, are today of utmost importance, Däubler notes.[76] An illustration of this is that when the big ARGED steelworks in the Saar were saved from bankruptcy by substantial government aid, a condition was put

[74] Blanpain, ILR (1984), pp. 323-324.
[75] See Däubler, New Technologies, Employment and Legal Regulation of Working Hours, (1985), pp. 16-17.
[76] Däubler, (1985), p. 12.

that employees accept a reduction in their annual bonus payment. The steel workers' union interpreted this as a breach of their collective agreement.[77]

In Italy, too, agreements in l983 and 84 aiming at an active employment policy, contained provisions providing greater flexibility and effectiveness in the utilisation of manpower. The possibilities for part-time work and fixed term contracts were increased and the employer was granted freedom of choice in hiring less skilled workers. Reduction in working hours was also part of these agreements, but in the Italian case, contrary to the two previous countries cited, the state compensated part of the pay lost. Contrary to previous practices in Italy, provisions were now introduced for flexible schedules, taking into account variations in the activity of the undertaking. Negotiated restrictions on overtime were relaxed and the practice of part-time work spread. In l977 seven of the l7 paid public holidays were abolished.[78] Also in Italy, courts relaxed in their positions. Gino **Giugni** notes in his account, in 1984, of the then recent trends in industrial relations in Italy that "[s]ome years ago the relationship both between collective agreements and between collective bargaining and the law was governed by the rule that no departure from the law was permitted, unless it meant an improvement for the workers. In the event of a conflict between two standards (whether both originated in a negotiated agreement or one was negotiated and the other was laid down by legislation), it was the one most favourable to the workers that prevailed. In recent years, however, Giugni notes, "the recession - political developments and the content of legislative standards or the negotiated provisions have encouraged even the courts to relax the principle guaranteeing the workers an improvement whatever the case". Courts have decided that a collective agreement could contain provisions that were less favourable to workers than those that were founded solely on previous agreements.[79] These changing features on the labour market eventuated in a succession of complaints to the ILO Committee on Freedom of Association.[80] The ILO was able to deal with such complaints in a way that was true to the spirit and rationale of industrial relations and trade union rights. But referred back to a national legal context this rationale lost its effectiveness. This displays the inability of western legal traditions to capture the essence of ILO standards that are expressions of social justice. This reveals a problem originating in the legal premises. Where we stand today, and how we should go about the challenges we are faced with are questions to be resumed in chapter VI. In order to prepare for this, extensive excursions will be made both in the economic and social reality, the history of ideas, and the contemporary research landscape. The aim of these excursions is to assist in approaching contemporary societies with fresh eyes that will allow us to remedy present day crumbling structures.

[77] Fürstenberg, ILR (1984), p. 626.
[78] Giugni, ILR (1984), pp. 607, 609-610.
[79] Giugini, ILR (1984), p. 611.
[80] As these events and changes unfolded I was working with international labour standards in an international trade union context.

10 Crumbling structures

In the early third millennium we still have institutional structures that were devised to meet the needs of the industrial society. But now changes in production techniques since the latter part of the 20th century, have in a decisive way altered the fabric of working life, and as a consequence of this, the role of full-time salaried employment as the basis for people's material subsistence. This, again, has repercussions for societal arrangements, which were constructed in order to meet the needs caused by the transition from a mainly agricultural economy to an industrial one. In today's international economy, we appear as powerless in defending a human point of view, as 100 years ago, notwithstanding all the structures created for this purpose.

Today we have an economic trend that appears to invade the perception of most aspects of human life and human and social relations.[81] A new kind of accommodation is therefore needed, because of changes in economic life. In a situation of high employment, there is interdependence between the interests of ordinary men and women and the economy, because needs and interests are *mutually supportive*. Because of changes in production techniques, a significant number of people no longer have this material basis. When the individual no longer is part of an economic activity that produces goods or services, interdependence is today increasingly substituted by *dependence* because of the design of social welfare schemes. A situation of dependence thus occurs when a person finds oneself outside salaried (full-time) employment because of unemployment, personal preferences, age or incapacities.

Since the 1970s, a shift in focus can be discerned in the process of accommodating competing interests, from a policy aimed at social welfare to an emphasis on competitiveness.[82] This shift was first justified by the economic recession associated with the oil crises of 1973-74 and 1979-80. Despite intervening upswings in the economy since then, there was no reversal of this trend. Now, the preponderance of economic interests is justified by arguments of competitiveness in international markets.

There has thus been a general change in priorities, from one aimed at social justice, which coexisted with concerns for economic performance, to one where economic performance has gained the upper hand. Now policy is primarily geared towards economic competitiveness, more often than not at the cost of social welfare earlier introduced. Yet again, one of those mystical licences, to cite Raiskio. "The forces of nature and the world as ordered by God, was in part substituted by a new international "market divinity". Leading politicians alleged that they, in the right way, could interpret the requirements of this "mystical" superior power - in other words, they used this mystical licence as a political tool. This aspiration, to seek support from

[81] The invasion of an economic view in human and social relations are assessed from different perspectives in Eriksson, Ralf, Jäntti, Markus (eds.) Economic Value and Ways of Life, (1993). This book sums up a project 'Ethics and the economy', from which also this present work originates.
[82] I have traced this trend in Storlund (1992).

these faceless phenomena that are conceived of as "superior", is also a sign of genuine anxiety and helplessness. Tough decisions require the backing of an idea of the inevitable, even of compulsion, in order to explain this as being for the best, both for oneself and for the citizens", Raiskio notes.[83]

10.1 Capital versus human beings

What does the above accounted development mean for ordinary people? A high level of unemployment and a curtailment of previously introduced standards in working life and social security has become an established pattern. This phenomenon is in no way new, and the one who, in my opinion, best has illustrated the 'mechanism' of the accumulation of wealth and property is Aristotle. He notes that there are two kinds of property, one that is needed for the household economy, to enable a good life, and the other that is accumulated for its own sake. Household property is now increasingly under strain at the cost of that other kind of property, which is accumulated for its own sake.[84]

In our theoretical schemes, we do not make this distinction between a household economy and business for its own sake. Instead the utilitarian tradition, as invoked today in economic and political discourse, obscures Aristotle's distinction because of the utilitarian postulate of the greatest happiness of the greatest number.

One major criticism that I advance in this work is that the theoretical tradition is both insensitive to, and even misrepresents human relations and social conditions. So, before entering into a scrutiny of our thought structures, we need a frame in order to place the theoretical considerations into context.

In the perspective chosen here, the human being is the point of departure and it is from a human point of view that economic life and social institutions are assessed. This change of perception displays how disciplinary distinctions evade from view the combined effects of different systems and measures. Or to put it differently, this change of focus has the effect of transform human beings from statistical numbers to living persons in their particular contexts; quantitative knowledge is replaced by qualitative knowledge.

This change of focus caters for extensive considerations, which for the purpose of this work can only be sketchy and thereby susceptible to criticism. It should, however, be noted that when I move between different disciplines, particularly economics and history, this is done merely as an auxiliary tool in order to be able to pinpoint the effects for identifiable human beings of present day features. At a theoretical level, however, the aim is to be able to tackle the question of human empowerment, which in this context means how to accommodate human needs and aspirations with that of the economy.

---

[83] Raiskio, (2001), p. 97.
[84] See Aristotle, The Politics, (1987) 1256b40, p. 81.

The problems I raise are endemic to western (post) industrialised societies. Reference will therefore be made to whatever country that offers a good illustration of an issue under scrutiny. In order to anchor issues of a general nature, a closer look will be taken at the Netherlands, Sweden and Finland.

I have two reasons for choosing the Netherlands and Sweden as illustrations. Historically their economic structures have differed radically, which is reflected in different social organisation and culture. Another aspect is the difference in mentality, where the Dutch people have developed an individualistic tradition in their defence against external influences. Sweden again is characterised by a 'collective consciousness', which in the early part of the century was formulated as the Swedish 'folk home' ideology, reflected in the Swedish welfare state. In my view the Dutch have, through an individualistic tradition, arrived at the same end result as the Swedes. Common for both countries is that they developed one of the best systems of social security. Notwithstanding this, both countries have been under the same pressure for a partial dismantling of their welfare schemes. Finland is a fairly obvious choice, being my native country. However, this country has also something to add to the picture that I wish to convey through this work, that is, a legalistic culture.

In order to link the economic and social spheres I will use scenarios as a method. The way in which I use scenarios here, is to allow an economic and a social perspective, present and past, to be contrasted. This will allow us to see more clearly the nature of the problems we face today, because as Raiskio notes, "[p]henomena surrounding social development can remain very similar, although we apply different terminology. Independently of ideological emphasis, societal structures tend to repeat themselves, and evaluate productive participation in very similar ways."[85]

[85] Raiskio (2001), p. 68.

Chapter II sets the scene

through an economic and a social scenario

An economic scenario

What is the bearing of the internationalisation of capital, a new economic culture, new working methods with corresponding changes in the fabric of working life and increasing unemployment? As work traditionally has constituted the principal means of subsistence for a major part of the population, the above mentioned changes have implications for the prospects of life of people, whose conditions are affected by these changes. And what are the overall implications of these changes for democracy and institutional arrangements?

We have difficulties in answering these questions, because of the disciplinary divisions between economic life, working life, social security, people's private spheres, and so on. This difficulty in linking different aspects of people's lives has impeded the present research task, but at the same time fuelled the quest for an understanding of the effects of these features on human and social conditions. This is therefore an attempt to make cross-disciplinary horizontal links, from a human perspective. This stands in contrast to prevailing theoretical schemes, above all mainstream economic theories, where the premise is economic activity and the research object how to act in order to make this activity more efficient. And implicitly or explicitly efficiency means more efficient for the capital owners. It is a question of efficiency in an economic sense without regard to moral values, social utility, 'use value' etc. As Philip G. **Cerny** notes "in mainstream economic theory itself, the search for more efficient markets is the key to maximizing utility, and the development of increasing price sensitivity is the key to making markets more efficient in the economic sense."[86] The implications of this premise I place under critical scrutiny.

The present effort to bring forth a human and social perspective, in the form of scenarios will by necessity be a sketchy endeavour. The purpose is to link different spheres, mainly the economic, historical, social and legal spheres within one frame. This is done in order see more clearly the consequences of economic and technological change for 'ordinary people' and social arrangements, which thus is my premise. A first indication of how people have been affected by these changes was given in the account of changes in industrial relations and labour law that have been introduced since the oil crises of the 1970s (I.9).

[86] Cerny, Philip G, The dynamics of financial globalization: Technology, market structure, and policy response, (1994), p. 332.

1 Toward an internationalised economy

Let us first turn to the economy. During the 1980s most western governments deregulated the flow of capital and currencies. This was in many quarters regarded as a practical necessity, because new technology allowed for a transfer of capital by electronic means, anyway, which could not be controlled by national authorities. The pressure for a free flow of capital corresponded to the needs of big corporations operating in different parts of the world.[87]

The big corporation has paved the way for the internationalisation of the economy, which we have been able to witness in peace-meal steps since the early part of the 20th century. The United States was leading this process[88] and by the time of world war II the big corporation had established itself in Europe.[89]

The trend witnessed since the 1970s is one further step in the internationalisation of economic life, fuelled by perceived needs in the economic field. This development has become increasingly at odds with national economies and human needs. Initially governments had introduced regulations concerning capital and currency flows in order to enhance overall national considerations, often of a social character. But in business life these regulations were seen as obstacles for an efficient operation of their economic activities.

This competition between national interests and the interests of business life has today resulted in a victory for business. Today capital and currencies move without much restraint by national regulation. This has resulted in a considerable restructuring of economic life, with a host of problems left in its wake at a national level, and particularly so in the social field. Since the 1990s we have a 24-hour globally integrated financial market, where transactions in currencies in 1994 were close to 40 times the daily value of trade across borders. So Eric **Helleiner** notes that international finance can no longer be seen as a kind of "passive servant of the 'real' world economy of trade and production". Instead it has become more of a mastering force, exerting a powerful and profound influence on economic life around the globe.[90]

The Netherlands and Sweden may here stand as an illustration. The Netherlands is fairly well established in the international market, with the joint Dutch-English venture Koninkelijke Olie/Shell as its biggest multinational corporation. This corporation was number one in size in a European context and number three on the world scene in 1977. Unilever rated third in Europe and 12th on a worldwide scale.

---

[87] For an account of the raise of the modern industrial enterprise, see Chandler, A.D. and Daems, H., (eds) Managerial Hierarchies, (1980).

[88] Path-breaking in drawing attention to this were Adolf A. Berle and Gardiner C. Means, with their book Modern Corporation and Private Property in the thirties, see Chandlers, , Daems, (1980), p 1.

[89] See Chandler, Daems, (1980), p. 3.

[90] Helleiner, Eric, Editorial: The world of money: The political economy of international capital mobility, (1994), p. 295.

Fifth came Phillips in Europe, whilst 17th in a global context, according to figures from 1977.[91]

One could say that the Netherlands has a long experience of an international economy. The 17th century was for this country the golden era, when Dutch ships sailed the seven seas. The ensuing colonial period continued to provide the country with an international or rather overseas' dimension in trading and maritime activities. Trading has always been a central part of Dutch economic life, also on the domestic market, in addition to craft and agriculture.

Here the Swedish scene differs. Around 1870 Sweden entered the international markets on a larger scale with the breakthrough of industrialisation.[92] Since then international markets have increased in importance making the country increasingly dependent on them. In the 1970s Sweden's export represented 1/4 of its production, whereas this had increased to 1/3 by the 1990s. This change can in part be explained by increasing investments by Swedish firms abroad. The major part of investments abroad, 3/4, was made by 17 Swedish industrial concerns.[93] These companies have, during the 1980s, expanded more abroad than in Sweden. By 1985 these companies employed half the number of their work force in establishments abroad. By the end of the 1980s their number had increased to 60 per cent. Investments by Swedish firms were greater abroad than in the domestic scene in the 1980s.[94]

The domestic scenes, again, offer the following picture: In the Netherlands of the 1990s, 4 per cent of the population produced agricultural products, which exceed the needs of the population of over 15 million (in 1994). Agriculture and fisheries represented 3,8 per cent of the gross domestic product, GNP, in 1992. From 1947 to 1979 the number of people employed in agriculture was reduced from 20 to 7 per cent, with a further decrease to 3,8 per cent in 1992. Industry accounted for 29.7 per cent of the GNP in 1992, employing 24.6 per cent of the work force. Here we have a decrease in the number of people employed from 37 per cent in the late 1970s.[95]

In the 1990s we have the following picture for Sweden: Agriculture[96], constituted 2,5 per cent of GNP in 1992 employing 3,5 per cent of the work force in 1993. This represents a decrease of almost 50 per cent since the late 1960s, when some 6 per cent of the working population was engaged in agriculture. In 1979 some 25 per cent of the working population was employed in manufacturing industry, of which metalwork and engineering constituted the major part.[97] The number of people employed in manufacturing had remained rather constant, contributing 29.9 per cent

[91] These figures are cited in WRR, V 7/1978, Internationale macht en interne autonomie, Een verkenning van de Nederlandse situatie, Voorstudies en achtergronden, p 57. Original source for Europe Vision, October 1977 and for the worldwide context Fortune, 95, 1977.
[92] Ehrenkrona, Olof, Nicolin, En svensk historia, (1991), p. 21.
[93] Rättvisa i vågskålen, (LO 1991), pp. 63- 64.
[94] LO (1991), pp. 64- 65.
[95] Industry mainly represented processing industry entailing foodstuff, chemicals, petroleum products, metallurgy, machinery and electrical engineering. The figures are given in The Europa World Year Book, 1979 and 1994.
[96] including hunting, forestry and fishing.
[97] This includes machinery, vehicles, electronics, telecommunications and shipping.

to the GNP in 1992. Statsföretag, which groups many state-owned companies, was in the late 1970s one of the largest industrial concerns in Sweden.[98]

By the mid 1990s big exporting industries were faring well in Sweden, whereas increasing budget deficits and increasing unemployment burdened the national economy. Sweden was able to maintain a high level of employment until the early 1990s. In 1991 the unemployment rate was 2.7 per cent, but by 1993 Sweden had come closer to the OECD average, with an unemployment rate of 8,2 per cent. In the Netherlands, again, the unemployment rate was 7,5 per cent in early 1994.[99]

The above figures convey a picture of vital changes. A central contributing factor to these changes is an increasingly international economy, and with it we can see increasing tensions between a globalized economy, the national economy and the conditions of life of people. What are the implications of this? How can it be managed? It took some time before these features became the object of research. Helleiner notes in 1994 that despite the dramatic nature of the liberalisation trend in finance, it took some time before scholars in the field of international political economy started to direct attention to this development. No questions - no investigations - no answers. One question to be addressed is why states have been more willing to liberalise capital than to lift trade restrictions. Helleiner proposes four factors that explain this development. First we have the pressures from economic life for competitive liberalisation and deregulation. Another factor is the growing recognition of the difficulties involved in controlling finance. As a third factor Helleiner indicates the special enthusiasm of the US and Britain for financial liberalisation, and finally the growing prominence of coalitions favouring financial openness across the advanced industrial world.[100]

2 The purpose of regulation

For an understanding of this new order, it can be instructive to consider why there was regulation concerning the flow of capital and currencies in the first place, what circumstances have promoted deregulation, and what the effects of deregulation are for the different parties concerned; the movers of capital, state finance and the population at large. The regulation of capital and currency flows has its origins in the Bretton Woods Conference in 1944, which also laid the foundation for the International Monetary Fond, IMF, and the World Bank. The purpose of this exercise was governmental cooperation in the monetary field in order to achieve stable currencies and to counteract devaluation for competitive purposes. The architects of the Bretton Woods Agreement were aware of the difficulty in controlling finance. The formula they outlined for controlling monetary flows consisted in exchange controls and cooperation initiatives, by which controls were enforced an both ends, that is, both

[98] See The Europa Year Book, 1980.
[99] The Europa World Year book, 1994.
[100] Helleiner, Eric, Freeing money: Why have states been more willing to liberalize capital controls than trade barriers? (1994a), p 300.

in the country from which capital was sent and in the receiving country.[101] The purpose of this scheme was to suppress destabilising capital movements.[102]

The 'constitution' of the post-war economic order was never fully articulated, Louis W **Pauly** notes. Focus was, however, placed on domestic macro economic policies that would promote equilibrium in national current accounts. Or, that imbalances should not exceed the volume of stabilising capital flows available to accommodate them.[103] The exchange rates should be realistic and stable, but still adjustable, as long as this was not done with the aim of unfair competitive advantages in external markets. As to other international capital flows than those related to trade, restrictions were permitted especially in the case of 'desequilibrating' flows.[104]

Cooperation in the monetary field was coupled by aims at trade liberalisation.[105] The reason why governments felt a need to regulate capital and currency flows, was the negative experiences of previous deregulation, which has been seen as one reason for the speculative mood in the 1920s and the ensuing great depression in the 1930s. Maynard **Keynes** considered financial markets too easy to play on and too much divorced from the 'real economy', and the needs of socially or economically necessary production.[106]

But changes in economic life created increasing pressure for a deregulation of the standards agreed upon in Bretton Woods, which subsequently broke down in 1971-73.[107] At an intergovernmental level a liberalisation of capital and currency flows was conceived of as desirable in quarters such as the Organisation of Economic Cooperation and Development, OECD, the European Communities, later the European Union, EC/EU and the General Agreement on Tariffs and Trade, GATT. Achievements in this field are, among others, the Code of Liberalization on Capital Movements, of OECD. This code was adopted in 1961, with the aim of a limited liberalisation, but in 1989 it was extended to cover all financial movements.[108]

The creation of the internal market of the European Communities was another instance of concerted governmental action. The free movement of capital, one of the four freedoms of the EC/EU was evidently an incentive when EC officials, in the mid 1980s, started to put increasing pressure on member states to deregulate and fully liberalise their financial markets in order to create a single European financial space.[109] Pressures from economic life, responding to the needs created by the open US markets for global capital and financial business and the expanding South East Asian markets, strengthened these activities in the governmental field. So, by 1988 all

[101] Helleiner, (1994a), p. 304.
[102] Williamsson, John, The Open Economy and the World Economy, (1983), p. 341.
[103] Pauly, Louis W., National financial structures, capital mobility and international economic rules: The normative consequences of East Asian, European, and American distinctiveness, (1994), pp. 344, 345.
[104] Pauly, (1994), p. 343.
[105] See Helleiner, (1994a), p. 299.
[106] Cerny, The dynamics of financial globalization, (1994), p.329.
[107] Cerny, (1994), p. 329.
[108] See Helleiner, (1994a), p. 314, footnote 1.
[109] Helleiner, (1994a), p. 302.

EC members had agreed to remove their post-war capital controls within a four-year period, followed closely by the Nordic countries.[110] Thus all western governments deregulated the flow of capital and currencies during the 1980s.

We are here faced with an interesting paradox. The political decision- makers of the Bretton Woods Agreement wanted regulation in the financial field and liberalisation in trade. By the end of the 1980s capital markets were deregulated, while it would take some years before an agreement could be reached on tariffs and trade in the Uruguay round of GATT, with the subsequent creation of the World Trade Organization. What explains this twist in priorities? Here we have to direct attention to the players and interests involved.

At a regulatory level the new deregulated standards are demonstrations of concerted actions aimed at liberalising the financial market. But, as always, measures like these are not taken in a vacuum. An interesting feature of this scenario is that intergovernmental cooperation for the deregulation of currency and capital flows was fuelled by the lack of cooperation by the USA and Britain in the Bretton Woods scheme, the very countries that engineered the Bretton Woods conference. This raises the question: Why this interest by the US and Britain for liberalisation in the financial field? Helleiner's explanation is the hegemonic position held by the US in global finance. The position of the US in trading was diminishing, but in the financial world it still held a hegemonic position. From the 1960s onwards, US officials recognised that this dominant position would induce foreign capital, which in turn would finance the current account and fiscal deficits of the US. Such external inflow of capital would thereby bear some of the burden of adjustment required to reduce these deficits. And, Helleiner notes: "The US 'hegemonic' interest in financial openness, thus, stemmed less from a 'benevolent' goal of wanting to provide an international collective good than from a more 'predatory' objective of using the emerging open, liberal international financial order to maintain US policy autonomy in the face of growing internal and external constraints."[111]

For Britain, again, the interest in liberalisation stemmed from an aspiration to save what could be saved of her previous hegemony in the financial world. This has its origin in the 19th century 'Bank of England-Treasury-City nexus' in the days, when Britain was the leading financial power. After the period of regulation prompted by the crisis of 1931 and the great depression, there was pressure for a liberalisation in the 1950s and 60s in order to promote London's international position on a new basis.[112]

Here an example of the rat race, which this new trend triggered. The British strategy was to introduce the Eurodollar market in London, which would allow London's international business to be preserved independently of sterling's declined status as an international currency. But this strategy could be successful only as long as other states, in particular the US, retained capital controls. In 1974 the US removed

[110] Helleiner, (1994a), p. 302.
[111] Helleiner, (1994a), pp. 306, 307.
[112] Helleiner, (1994a), pp. 308-309.

its capital controls and launched a broad deregulatory programme. This compelled Britain to integrate its euromarket with its domestic financial markets through the abolition of capital controls in 1979 and the Big Bang of 1986.[113]

While this liberalisation was going on, there were efforts by other governments to re-establish capital controls. However, this turned out to be difficult because such efforts were vetoed by the US and Britain. A first attempt was made in the early 1970s, when growing speculative financial flows threatened the stable exchange rates system of the Bretton Woods. Some western European governments and Japan then tried to press for cooperative controls. A frustrated attempt was made to extend the IMF order, so that states could cooperate in controlling financial movements. This would have meant a control not only in sending and receiving countries, but also in 'throughflow' countries, where euromarket activity was located. This effort was frustrated because of opposition from the US and Britain.[114]

In 1976 the British labour government contemplated the reintroduction of controls and so did the French government in 1983. The end result in each instance was that the governments rejected the regulatory option and were forced to accept the discipline of the international markets. This defeat in face of the international market was due to the high costs it would have implied, to reintroduce regulation. The integration of the French and British economies with the world economy had gone too far to allow such individual efforts. Possible foreign trade retaliation was one such cost factor to be considered.[115] But there were also political costs to be considered. The then British Prime Minister, James Callaghan, later noted that introducing exchange controls could have caused serious implications for British relations with the GATT, the European Community, NATO, and the US as well.[116]

Helleiner noted above that, although it was the aim of governments to liberalise trade, this has not materialised with the same ease as the liberalisation of capital and currency flows, which was not the aim, but rather the opposite. So what mechanisms were at play to explain this development? Helleiner notes that the financial liberalisation trend took place in a period when the post-war trend of trade liberalisation slowed and governments showed increasing resistance to a further removal of trade barriers.[117]

The main purpose of currency regulation was a concern for the economic and social implications, at domestic level, of the flow of capital and currencies. And here we appear to have the most decisive effect of the deregulation process, a decreasing ability to prevent speculative capital flight from undermining domestic expansionary Keynesian economic programmes. Sweden, with its 'folk home' ideology may stand as an illustration. Sweden was one of the last countries to let the last currency regulations go in 1989.

[113] Helleiner, (1994a), p. 309.
[114] Helleiner, (1994a), p. 304.
[115] See Helleiner, (1994a), p. 305.
[116] Helleiner, (1994a), p. 305.
[117] Helleiner, (1994a), p. 299.

Restrictions on currency transfers were introduced in Sweden in 1939, through a currency act (Valutalagen, 22/6) as part of wartime regulations. Transactions were either allowed after application to the national bank, the Riksbank, or prohibited. The rules allowed variations in order to respond to economic cycles. The act contained a prohibition on portfolio investments, dealings in security, foreign loans and loans issued abroad. Banks had to be licensed to deal with foreign transactions, and permission was needed for individual transactions. With some changes this act was in force until 1990.

Until 1974 currency regulations were used in Sweden as a means of balancing economic cycles. Both the export and import of capital was strictly regulated. With the raise in oil prices in 1974 and the bridging policy[118] in regard to currency, this policy was somewhat altered.[119] After this period a balance was no longer sought in the current account, and the deficit was financed through foreign loans. This change made the currency reserve important, leading to more specified requirements in order to attract foreign capital and to avoid the flight of capital. Direct investments were subordinated to an assessment of their effects on employment and economic policy.[120]

As noted above, a theoretical assessment of these developments in the economic sphere had been wanting for quite some time. This can partly be due to the seemingly technical nature of financial matters. As Helleiner puts it: "The role played by domestic advocates of financial openness reveals the importance of the relatively obscure nature of international financial politics in allowing interested domestic groups to press successfully for liberalization in finance."[121]

Here it would appear that financial quarters have been able to push things their own way, because of the power and potentials they hold. In part it can also be accounted to the difficulties in assessing the effects of these changes. Helleiner notes that financial liberalisation provides direct benefits to specific internationally mobile groups, while the potential costs for this liberalisation are dispersed at the macroeconomic level and relatively difficult to understand. And he cites Raymond **Bertrand**, who points to the difference between liberalisation in trade and in finance: "The reason is that trade restrictions have quick and visible effects on jobs and profits, whereas the impact of restrictions on capital flows is invisible to the public, and quite often a matter of great uncertainty for the specialists."[122]

Helleiner also points to the difficulty states face in maintaining liberal practices in trade and finance at the same time. This would appear to explain a tension in the economy between the productive and financial sectors, of which we hopefully will catch sight in the ensuing considerations of speculation. As matters now stand, governmental power has to a considerable extent been substituted by an international financial economy.

---

[118] överbryggningspolitiken
[119] Whilborg, Clas, Valutapolitiken, (1993), pp. 246-249.
[120] Whilborg, (1993), p. 249.
[121] Helleiner, (1994a), p. 300.
[122] Helleiner, (1994a), p. 311, where he cites Bertrand, Raymond (1981) 'The liberalization of capital movements: An Insight', Three Banks Review 132: 3-22.

2.1 The effects of deregulation

The confidence, which the government should enjoy by the electorate in a democracy, has in some vital respects been transferred to an anonymous international capital market and rating agents. Michael C **Webb** notes that, as financial capital now moves quickly and in large volumes across national borders in response to investors' perceptions of monetary and fiscal policies, "governments must be extremely sensitive to investors' and foreign exchange traders' sentiments." So with few exceptions, national policy making autonomy has eroded dramatically.[123]

This state of affairs poses problems at different levels. Timothy J **Sinclair** points to the social dynamics involved in the allocation of capital. In an analysis of the role of rating agents in the case of municipal borrowing, he shows how rating agents have assumed a role of governance, a non-state means through which authority is exercised in markets. And this has the effect of changing the ways in which major features of economic and political life are arranged.[124] In an article published in 1994, Sinclair notes that for a long time researchers' focus on this change has been on where to get the best rating rather than on the collective consequences of these activities. Sinclair argues that bond rating agencies are being transformed into private makers of public policy, because of the factual power and authority rating institutions have acquired within the context of a global economy of mobile financial resources. In this globalisation process governments appear to have been downgraded to, and rating agents advanced to 'transmission belts' in economic processes.[125]

Also the traditional position held by banks has changed in this development. Traditionally, banks have provided capital. It was the bank that made decisions, and assumed the risk, that the borrower would repay on time with interest. The development of the 1980s and 90s has changed the role of banks and increased the importance of other institutions in capital allocation. In this process the very nature of allocation itself has changed. What is this disintermediation process, why has it occurred and what are its implications, Sinclair asks, explains and illustrates with examples from the US (in 1994). In this development, the 'middleman' has been removed on both sides of the balance sheet. Mutual funds, which sweep depositors' money directly into securities and money markets now contain US $ 2 trillion in assets, which comes close to the $ 2.7 trillion deposited in US banks. On the borrowing side the change is just as significant. In 1970, commercial lending by banks in the US represented 65 per cent of the borrowing needs of corporations. By 1992 the banks' share had fallen to 36 per cent, with the balance made up by securities of various types.[126]

In Sweden this same development can be sketched as follows: In 1989 Sweden

[123] Webb, Michael, C, Capital mobility and the possibilities for international policy coordination, (1994), p 395.
[124] Sinclair, Timothy J, Between state and market: Hegemony and institutions of collective action under conditions of international capital mobility, (1994), p. 447.
[125] See Sinclair, (1994), p. 448.
[126] Sinclair, (1994), p 449.

took the last step in liberating capital and currency flows. However, this was the last step in a development that had started in a spontaneous manner in the 1960s, with gradual deregulation. These processes and the ingenuity in creating new financial instruments - a global phenomenon - altered the financial scene in a decisive way. The two 'winners' in this process, to cite Lars **Werin**, were foreign capital and 'other financial institutions'. Foreign capital means that 'subjects' in other countries have profited from the assets issued to Swedish borrowers. Werin notes that this does not mean that the Swedish net foreign debt would have increased in proportion, because Swedes have also filled their portfolios with foreign assets. This he sees as an indication of the internationalisation process. The other winner, 'other financing institutions' are made up of mortgage companies, financial institutions, stockbrokers and investment companies of different kinds. These two sectors increased their share on the market, from a few percentages to almost a third of the available capital in Sweden.[127]

Dutch business life gives the following picture for companies noted on the Dutch stock exchange. In 1965 the average relation between own capital and foreign capital was 54 to 46. In 1970 this ratio had changed to 44 to 56. In 1981 again the relationship between domestic and foreign capital was 32 to 68. In 1982 and 83 the solvency increased to a ratio 34 to 66 and there was yet another increase in 1984 to 37/63.[128]

H.G. **Eijgenhuisen**, J. **Koelewijn** and H. **Visser**, who have studied investment and the financial infrastructure in the Netherlands, note that the change that took place in 1985 reveals an increased need for foreign capital since the period of financial restructuring.[129] There had thus been a decrease in solvency during the period 1969-75. Explanations for this decrease in solvency was the failure of an expected lever effect (hefboomeffect) to be brought about through the financing of foreign capital, changes in the fiscal regime and the increasing readiness of banks to provide long term foreign capital. After 1975 there were considerable problems in the Dutch economy. Profit had gone down whereas the interest rate rose considerably, with the result that many enterprises were deprived of the lever effect. There was also a change in the attitudes of external financiers. They became less inclined to put up risk capital because of great credit losses.[130]

In the Netherlands, there had been a long-standing bad climate on the stock market until 1982. With increased returns in business life, the situation improved, with better access to external finance. Above all in 1985, there were great emission activities, during which time the financial sector, above all the banks, held a central position. So money mainly circulated through financial intermediaries.[131] After 1982 big enterprises profited from the recovery and were able to strengthen their own capital, through profit. This trend first occurred in the export sector and could, after

[127] Lars, Det finansiella systemet i omvandling, (1993a), pp. 93-94.
[128] WWR, Investeringen en de financïele infrastructuur (60/1987), p. 19.
[129] WWR, (60/1987), p. 80.
[130] WRR, (60/1987), p. 35.
[131] WWR, (60/1987), p. 79.

1984, also be seen in sectors oriented towards domestic markets.[132] For relatively small Dutch enterprises the situation was different. They experienced difficulties in getting access to credits. Because of the greater risks involved for small enterprises, financing agencies place greater demands, and transaction costs are relatively high. Small enterprises further have the disadvantage of being dependent on long-term use of suppliers and short-term bank credits. Thereby they became more vulnerable because of higher financing costs.[133]

3 A tentative balance sheet

How are the above developments to be understood? Sinclair sees the following explanation to this general scenario: Competition has increased because of a lower average growth and fewer barriers to trade. In this situation borrowers are much more concerned to reduce their costs in whatever form, including the cost of capital. This cost-reduction impulse has been stimulated in borrowers just as the average cost of bank intermediated loans has risen due to the Basle capital adequacy standards, which mandate banks to hold a certain ratio of reserve assets to outstanding loans. Sinclair asks what the probable implications of this development are. And his answer is a changed role for the banks. "They will change roles. Increasingly, they will give up the business of being intermediaries in wholesale capital. Instead, they will take on the role of active market participant: they will trade, package loans into securities, and devise new types of financial products", Sinclair notes. There will also be a blurring of the distinction between commercial banks and brokerage firms, as commercial banks seek new sources of fee and arbitrage income. Sinclair points to a recent example of this transformation at the time he is writing (1994), the explosion of bank interest in derivatives. The significance of this process is that banks are being forced to abandon their role as authorities in the financial markets. "Contrary to the image of a dichotomy between state and market exchange, banks represent a fusion of these roles."[134]

This has also lead to a transformation where rating agencies can be seen as private makers of global public policy. This being the case, a central question is what criteria they use in their rating. Sinclair notes that rating agencies disavow any ideological content to their rating. It is financial flexibility that is in focus, and government policy flows from this, according to a spokesman of a rating agency. Sinclair notes that the way rating agencies view management and policy seem to change with the prevailing view of economic and financial orthodoxy. He refers to Lichten's (1986) study of New York City's fiscal crisis of the 1970s and cites him as follows: "Austerity has become the policy of the 1980s, and no mainstream American politician has mounted a campaign against it. Instead, conventional political 'wisdom' now asserts the historical inevitability and absolute necessity of an austere public

[132] WWR, (60/1987), p. 35.
[133] WWR, (60/1987), p. 35.
[134] Sinclair, (1994), p. 450.

sector. Austerity, which is the underlying ideology of scarcity and Social Darwinism, goes unchallenged...(Lichten, 1986, p 2)."[135] Sinclair further notes that this trend in thinking seems to have had two major implications for rating agencies' views of government; to re-establish a connection between remuneration and productivity in the public sector and to privatise services.

4 Privatisation

Privatisation is another important aspect of the development during the past decades, part of this neo-liberal trend, which Rodney **Lord** has depicted in an article 'Privatization - the boom goes on'. One of the biggest business opportunities of this century is how he labels the global movement towards economic liberalisation and privatisation, the scenery of the early 1990s. He notes that in the past three years governments worldwide have sold assets worth close to $ 100 billion. This has created big investment opportunities. It has also meant that governments have given access to private business in areas, from which they have previously been barred.[136]

This new outlet for private business has also had its spill over effects on services, with increased demands for investment banks, tax accountants, pension consultants, insurance brokers, public relations companies and many other services for which they had little use in the state sector. This means new big markets, for which multinationals are the ideal players. Lord notes: "Often multinationals are best placed to exploit these opportunities.... Multinational companies with their global reach can follow the trail of liberal economics as it leads on from market to market and use their financial muscle to take advantage of new opportunities as they arise."[137]

Lord notes that this refocusing of economic aims and enormous transfer of economic power between different sectors creates a multitude of opportunities for business. Even the least far-reaching changes from the point of view of the public sector can revolutionise the shape of an industry and create billions of dollars of new business for private sector firms.[138] In principle, the author notes, privatisation should be good investment opportunities: "Given political stability, an efficient private sector company operating in a competitive market place should be able to extract significantly more profitability from a state enterprise than its public sector owners who are subject to all kinds of political pressure (*for instance to maintain employment* (emphasis added)), are often starved of capital and who do not have such strong incentives."[139]

This scenario thus reveals a tension between national economies, banks, other financial institutions and business. So what do these changes mean for ordinary people and for household economies? Werin notes that the households have been the losers.

[135] Sinclair, (1994), p. 459.
[136] Lord, Rodney, Privatization - the boom goes on, (1991), p. 1.
[137] Lord, (1991), p. 1.
[138] Lord, (1991), p. 3.
[139] Lord, (1991), p. 6.

But at the same time, he expresses a doubt, whether one can talk about loosing shares when we deal with growing resources. Werin notes that in the last resort households are the final beneficiaries of all assets, wherever they are.[140]

In an indirect way, households have been beneficiaries or at least partakers of this new scenario. A scientific advisory body to the Dutch government, the *Wetenshappelijke Raad voor het Regeringsbeleid*, which guides the government in policy questions, undertook a study about social inequalities in 1977.[141] In their report the authors note that there has not been any significant levelling of property relationships. What has occurred, however, is a considerable trend of depersonalisation of capital. In earlier days there was a strong link between the physical and financial aspects of property. Until world war II, property could be identified as such and such a part, belonging to an identifiable person, a shareholder. This picture has changed. One interesting aspect of this development is the emergence of big collective and depersonalised capital pools. These are pension and insurance funds, to which the population at large has contributed, without having an identifiable part in it. It is the collective property of an identifiable group rather than the property of a group of identifiable persons. In 1974 the savings of such entities constituted almost 10 per cent of the national income.[142] The *Raad* also discusses other forms of property, which cannot be attributed to identifiable persons. And they make the interesting observation that when property is approach in the way they did, no further information is available. This illustrates the role of the premise, what is made visible and what is not. And it would appear that there is a multitude of new questions to be asked, in order to make present trends comprehensible.

In the present effort to link different aspects of the economic scene to one another, we will turn back to the general financial scene in Sweden. In the restructuring process, which followed in the wake of the deregulation and internationalisation of capital, banks and insurance companies lost some of their position and so did the state and the social insurance system, which until the 1970s had experienced a slow growth. If we look at loans, the banks were big losers, whereas foreign capital and 'other financial institutions' had made headway.[143] Werin notes that if we look at the development from 1945 to 1990 the financial institutions were very stable. During the period 1945 to 1991, which he researched, no financial institutions had met with serious problems. This was a period of extraordinary stability in Sweden. Closing his research in 1991, he notes that at that point in time, it is still not possible to assess the effects of the problems, which some financing institutions faced in 1990, problems that spread to banks and some intermediary institutions with a considerable raise in interest rates.[144]

The problems to which Werin refers are those, which occurred in the

[140] Werin, (1993a), p. 94.
[141] WWR 16/1977, Over social ongelijkheid, Een beledisgerichte probleemverkenning, Rapporten aan de Regering, Wetenshappelijke Raad voor het Regeringsbeleid.
[142] WWR (16/1977), p. 93.
[143] Werin, (1993a), p. 94.
[144] Werin, (1993a), p. 95.

speculative wave of the late 1980s. Today we know the effects, and to them we will now turn, to see what can be learned.

5 Speculation - a lesson never learned

In the last week of December 1991 there was a flow of capital of 3,7 billion crowns out of Sweden. This was the first time that capital begun to flow out of the country after a staggering raise in interest rates at the beginning of the month. This was a surprise, we read in the newspaper Dagens nyheter, DN, on 8 January1992. It was surprising because it was expected that capital would continue to flow into the country with the same amount of some six billion crowns, as the week before.[145] This is one illustration of the working of the invisible hand, when currency flows had been liberated from national restrictions.

This example of the flow of capital is part of the biggest speculation wave since the late 1920s, made possible by the freeing of the flow of capital and currencies. These were turbulent times, and a play-writer expressed his frustration that reality constantly exceeded the most imaginary scenarios. This is a scenario that repeated itself in a number of countries, and Sweden will here have the doubtful pleasure of illustrating the working of a speculative mood and its consequences.

During 1991 the ground for the financial merry go round started to crumble in Sweden. By the end of 1991, a balance sheet could be made for the economic development sketched above. In its review of the year 1991 Dagens Nyheter illustrates the economic scenario with the heading 'Money the suicidal precipice, heads are rolling in the financial world'.[146] The artificially boosted prices in real estate had slumped, and Thorbjörn **Spängs** lyrically notes that securities, which ultimately rested on these artificially boosted values of real estate, were gone like autumn leaves. At the same time interests on these loans were like ticking time bombs in the accounts of the enterprises. Now, the loans of a number of speculators could not be paid back, loans of a magnitude which a salary-earning person hardly could dream of gaining in a lifetime.[147]

For the first time in 70 years an insurance company, Njord, faced bankruptcy, accompanied by many others. Spängs notes that soon the list of bankruptcies was as long as the listing on the stock exchange. Yuppies were replaced by bankruptcy administrators, executor commissioners and collection recovery commissioners. Bankruptcy administrators were in such demand, that some could have more than 300 bankruptcy cases on their table, and there was talk about a need to place a limit on the number of cases lawyers could take.[148]

In 1991 banks made record losses. Nordbanken was one of the big losers with

[145] Dagens Nyheter, (DN), 8.1.92, Utflöde av valuta på 3,7 miljarder, p. C 2.
[146] DN, Pengastupan, Huvuden rullade i finansvärlden, 29, 12. 1991, p. C 7.
[147] DN, 29.12.91, p C 7.
[148] DN, 29.12.91, p C 7.

10 billion crowns in credit losses, to which taxpayers had to contribute with five billion crowns in order to prevent bankruptcy. Equally bad was the situation for the biggest savings bank, Första Sparbanken. This bank faced over four billions in credit losses when the day of reckoning came.[149] The situation for the other major banks were the following: Handelsbanken, which for a long time had been the most successful bank, had a loss of 3,2 billion crowns, the deficit of S-E-Banken was 4,8 billion crowns and for the whole banking system the losses amounted to 25 billion crowns according to an estimate by the Financial Supervisory Authority. And this, DN notes[150] affects all, not only stockholders and borrowers, but the whole credit market, as this will mean that the banks will get a more unfavourable rating, making loans more expensive.

In early 1992 it was revealed that the market in real estate had became the heaviest burden for the banks. But the most reckless and relatively speaking biggest losses were made by financial institutions, and in the last resort the banks that had provided financing, by transmitting the trade in certificates that the financial institutions had emitted. As noted above Swedish banks had, until 1986, regulations restricting their lending and the fixing of interest rates. This restriction on the operation of banks, had offered financial institutions a profitable niche, from which they had profited by generously offering credits with high interest rates. And they made money. But from 1986 onwards, when restrictive regulations were abolished, the banks could become players in the same game. Thereby the financial institutions lost their golden position.[151]

Among the big losers we therefore also find financial institutions, as a result of speculation. Of several hundred financing institutions on the market in the late 1980s, most had disappeared by the early 1992 whereas the ones left were owned by banks and big corporations. As a consequence of this, the big players had been able to conquer markets and strengthen their position while others had to go out of business. Well-consolidated construction and real estate enterprises gained an exquisite market for buying cheap, Jaques **Wallner** notes.[152] The biggest losses caused by the speculative climate in the 1980s derived from speculation in real estate. The bank S-E-Banken estimated that the greatest losses stemmed from three real estate projects Avena, Gamelstaden and Reinhold, which accounted for 30 per cent of the losses. 60 per cent of the losses derived from small and middle size enterprises. The common denominator for these losses was the relatively small share of own capital possessed by these enterprises.[153]

If profit and the value of property falls and enterprises go bankrupt, it is first the stockholders' capital which is affected, next come the debtors. If this is not enough the bank has to face the losses. This is why banks, since 1993, are obliged to have a

[149] DN, Pengastupan, 29.12.91.
[150] DN, 28.2.1992.
[151] DN, 28.2.92, Bankerna förlorar pengar, Kreditförlusterna handlar om mer än misslyckade fastighetsaffärer, p. A 2.
[152] DN, 28.2.92, Banker tvingas ta över företag, p. C 2.
[153] DN, 28.2.92, Bankerna förlorar pengar, p. A 2.

reserve of capital as a buffer. When banks take the losses, this means that borrowers and savers contribute to the financing of these losses.[154] The ultimate payer is the taxpayer.

When an enterprise faces insolvency, the banks have to take over the assets before new buyers are found. By 28 February 1992, one big enterprise had in its entirety been taken over by a bank. This was the Nobel Industries, the leading chemical corporation, which the financier Erik **Penser** had to give up to Nordbanken.[155] On 23 August1991 Nordbanken bought the empire Penser had created for a symbolic sum of one Swedish crown. By that time Penser's debts to the bank amounted to billions. This is financial robbery Penser noted after having been deprived of all his assets.[156] Penser was a major speculator of high visibility in mass media.

The author of a leading article in Dagens Nyheter, 'Banks lose money', notes that if a historian had been consulted, he could for a modest fee have told that both the price of real estate and the rate of stocks have fallen before, and many times.[157] Or, even less expensive, they could have read John Kenneth **Galbraith's** books, 'The Big Crash 1929' and 'A Short History of Financial Euphoria'.

5.1 Financial euphoria

Galbraith wrote his book 'The Big Crash 1929' in the 1950s because he felt that we could learn something from the past. He has changed his mind since then. In the introduction to the first edition of 'A Short History of Financial Euphoria' that he wrote in 1990, Galbraith expresses his hope that "business executives, the inhabitants of the financial world and the citizens of speculative mood, tendency or temptation might be remembered of the way that not only fools but quite a lot of other people are recurrently separated from their money in the moment of speculative euphoria." When writing the foreword to a 1993 edition of the short history he says that he is now less certain of the social and personal value of such a warning. Now he is persuaded that recurrent speculative insanity and the associated financial deprivation and larger devastation are inherent in the system.[158]

I find it intriguing that practically no attention was paid to speculation as a phenomenon, by researchers and mass media, when speculation was in full swing. And this all the more so, because of the ample evidence there is, in the past, of the effects speculation has. The effects not only concern the players themselves, but other people and society at large as well. I join in Galbraith's view that this speculative insanity is inherent in the system, even largely legitimised by it. It is the economic

[154] DN, 28.2.92, Bankerna förlorar pengar.
[155] DN, 28.2.92, Banker tvingas ta över företag, p C 2
[156] DN, 29.12.91, Pengastupan, p. C 7.
[157] DN, 29.2.92, Bankerna förlorar pengar, p. A 2.
[158] Galbraith, John Kenneth, A Short History of Financial Euphoria, (1993), p. viii.

rationale upon which legislation is based that, in my view, explains this and also the difficulties in producing a legal assessment and verdicts when 'the party is over'.

What has not been sufficiently analysed are the features common to these episodes, Galbraith notes. Regulation and more orthodox economic knowledge do not protect the individual and financial institutions when euphoria returns. This can only be found in a clear perception of the characteristics common to these flights into what Galbraith calls 'mass insanity'.[159] He summarises them as follows: "The euphoric episode is protected and sustained by the will of those who are involved, in order to justify the circumstances that are making them rich. And it is equally protected by the will to ignore, exorcise, or condemn those who express doubts."[160] Galbraith remarks that there can be few fields of human endeavour in which history counts for so little as in the world of finance, and for this statement his short history of financial euphoria gives ample evidence.

Inherent in the speculative episode there is a mass escape from reality that excludes any serious contemplation of the true nature of what is taking place, Galbraith says. To that I would add what I conceive of as one of the biggest shortcomings in classical economics - that there is no link between economic processes and what is needed or what people want or prefer. Galbraith refers to estimates of the amount of real estates constructed, especially for business purposes, which was perhaps the most outstanding feature of the speculative euphoria in the 1980s. According to these estimates, it will take an average of twelve years before empty commercial real estates will be absorbed. The 'excessive capacity' of business real estates in Boston will persist some 26 years, 46 years in New York and 56 years in San Antonio, Texas - a provision for the future, as Galbraith puts it.[161] No wonder the construction industry faced problems after the speculative wave. This demonstrates, in my view, the economic rationale, where it is an expected profit that is the driving force, not the need of the products produced.

Then there is also the extreme brevity in the financial memory. Thus, when the same or similar circumstances occur, they are greeted "by a new, often youthful and always supremely self-confident generation as a brilliant innovative discovery in the financial and larger economic world", Galbraith notes.[162] Another factor that Galbraith sees as contributing to "speculative euphoria and programmed collapse" is the specious association of money and intelligence.[163] "Money is the measure of capitalist achievement. The more money, the greater the achievement and the intelligence that supports it."[164] It is not easy to question this 'intelligence'. Galbraith notes: "On no matter is the mental inferiority of the ordinary layman so readily and abruptly stated: "I'm afraid that you simply don't understand financial matters.""[165] The problem here

[159] Galbraith, (1993), pp. 1,2.
[160] Galbraith, (1993), p. 11.
[161] See Galbraith (1993), pp. ix, x.
[162] Galbraith, (1993), p. 13.
[163] Galbraith, (1993), pp. 12-13.
[164] Galbraith, (1993), p. 14.
[165] Galbraith, (1993), p. 14.

is that we associate the leadership of the great financial institutions - the large banking, investment-banking, insurance and brokerage houses with unusual intelligence. The larger the capital assets and income flow, the greater is the belief in financial, economic and social perception.[166]

Furthermore we have the idea of innovations in the economic field. In the speculation wave of the 1980s, that Galbraith characterises as a 'mergers-and-acquisitions mania', there were such presumed innovations as the issuing of bonds in great volume against the credit of the companies, which were being taken over. Or the managements that were threatened by a take over issued bonds to buy and retire the stock of their own companies in order to retain control. Once again, it was a period of presumed innovation and adventure, but in reality, Galbraith notes, it was again only the reappearance of leverage - not even the terminology was new.[167]

The bonds that were issued for the above purposes entitled high interest rates, to cater for the risks involved. Junk bonds, as they were named, were also seen as a major new discovery, which Galbraith in his usual expressive way, illustrates as follows: "Michael Milken of the investment house of Drexel Burnham Lambert, sponsor beyond equal of junk-bond issues, was hailed as an innovator in the field of finance. His income of $ 550 million in 1987 was thought appropriate compensation for so inventive a figure, one of Edisonian stature."[168]

Time and again, throughout history, the idea of an innovation in the financial sphere has turned out to be an illusion. Galbraith considers that financial operations do not lend themselves to innovation. "What is recurrently so described and celebrated is, without exception, a small variation of an established design, one that owes its character to the aforementioned brevity of the financial memory. The world of finance hails the invention of the wheel over and over again, often in a slightly more unstable version."[169] And the wheel invented in the case of junk-bonds Galbraith considers to be of an especially fragile design. When the crash comes, as a result of the deficient construction of the wheel, the same scenario repeats itself. Then all kinds of external explanations are sought, except the phenomenon of speculation itself, and scapegoats have to be found.

Galbraith notes that the aftermath of the 1987 debacle on Wall Street saw an especially notable exercise in evasion, even by the formidable standards of the past. Former Secretaries of the Treasury, professional public spokesmen and chef executive officers of major corporations sponsored a New York Times advertisement, where they attributed the crash to the deficit in the budget of the federal government. This deficit, Galbraith notes, had persisted for the preceding six years of the Reagan administration, and had been seen by fiscal conservatives to be of an alarming magnitude.[170] Notwithstanding, this deficit had apparently not affected the speculation wave in the early part of the decade. "But then, on that terrible October morning,

[166] Galbraith, (1993), p. 15.
[167] Galbraith (1993), pp. 20, 21.
[168] Galbraith (1993), p. 21.
[169] Galbraith (1993), p. 19.
[170] Galbraith (1993), pp. 98, 99.

realization was thought to have dawned. The financial markets suddenly became aware. Again the ability of those in high financial positions to provide a cloak, in this case one extending to absurdity."[171]

In a search for explanations to the fall, one commission succeeded another, investigating causes and remedies, neglecting the fact that speculation and its aftermath are recurrent and inherent, unfortunate characteristics, which are there to be studied over the centuries. Legislation on certain casino effects was considered in the US but none passed, and Galbraith notes: "Perhaps some inner voice advised the legislators that these measures did not have any central relevance. The recurrent and sadly erroneous belief that effortless enrichment is an entitlement associated with what is thought to be exceptional financial perspicacity and wisdom is not something that yields to legislative remedy."[172]

The idea that there is no basic problem in the system itself is also conveyed by assessments in Swedish mass media. Per **Afrell** makes, in an article in Dagens Nyheter, the construction industry the scapegoat. To him it was the galloping prices in the construction industry that caused the fall in Sweden, making the banks mere accomplices. He notes that 1991, the fatal year for Sweden, was a year when the stocks neither rose, nor fell. When considering the whole year, the changes were marginal, and this despite the fact that this year was the most dramatic since the 1930s.[173] Afrell notes that the crash in real estate has dominated the stock market during the last two years and he concedes that the economic crisis has caused a crisis for many enterprises. But, he notes, there is a difference between crisis and crash. We survive crises, whereas crashes are points of no return. So, he observes that if we exclude the crash in real estate, 1991 was in fact a rather good year for the stock exchange.[174]

5.2 The day of reckoning - a way of reckoning?

Afrell’s account of the results on the stock exchange over the year, does not wipe out big losses with devastating effects for a number of 'third persons'. And it does not wipe out a sense of injustice, which causes public opinion to demand justice to be rendered. Here, however, we are faced with a problem in the legal tradition. The economic rationale presupposes risk and that is what speculation is about, to risk and win or lose. Is it then bad luck, which makes you responsible, whereas if you are lucky, there is no blame? This is a fragile basis for verdicts - right or wrong, legal or illegal. Trials in speculation cases display a decisive legal uncertainty, which has to do with problems in the legal tradition itself.

The highly visible speculator, Erik Penser, was one of the big losers, thus responsible. That there is an ambiguity in singling out responsibility is also illustrated

[171] Galbraith (1993), p. 99.
[172] Galbraith (1993), p. 101.
[173] DN, 29.12.1991, Byggbranschen får betala kraschen, p. A 14.
[174] DN, 29.12.91, Byggbranschen får betala kraschen, p. A 14.

by the case of Oscar **Rydbeck**, who had to carry the legal consequences after Ingvar **Kreuger's** fall in 1932. Kreuger solved his problem by taking his own life. So it was the executive director of Skandinaviska banken, Oscar Rydbeck, who had to pay the price. Jan Magnus **Fahlström** notes that the harsh verdict Rydbeck had to face - 10 months imprisonment - must be seen against the psychosis, which the fall of Kreuger unleashed, with enormous property losses, ruined families, suicides and misery. Rydbeck's case has in many quarters been conceived of as a miscarriage of justice.[175] But scapegoats appear to be needed in order to satisfy people's sense of injustice, deprivation and frustration. The difficulty in meting out verdicts has to do with Galbraith's point that the problem resides in the very phenomenon of speculation, and this has spill over effects for law, and law's incapacity to answer to people's sense of justice. If we then turn to the winners, their success appears to be attributable to them acting 'just in time'. And then there is no need for scrutinising their behaviour.[176]

Galbraith clearly shows in his books the 'Great Crash 1929' and 'A Short history of financial euphoria' that speculation has devastating effects for the economy and consequently also for a large part of the population, who have not been partakers in the speculative euphoria. Comparing the crashes 1929 and 1987 Galbraith notes that the latter crash did not have such devastating effects as that of 1929, because of the changes, which had taken place in society since then: "A welfare system, farm-income supports in what was no longer a predominantly agricultural economy, trade-union support to wages, deposit insurance for banks... and a broad Keynesian commitment by the government to sustain economic activity - things all absent after the 1929 crash - had lent a resilience to the economy. There was, in consequence, a lessened vulnerability to serious and prolonged depression."[177]

These very provisions, which Galbraith points out as factors that alleviated the effects of speculation, are features which in the economic world are conceived of as impeding sound economic processes. This latter view, which has carried great weight in political quarters, should be contrasted to the fact referred to above, that the amount of financial transactions across borders exceed the corresponding transactions in trade up to 40 times in that period, according to Helleiner.[178]

Henry **Ford** also had his views about production and speculation. The time at which he makes his assessments about economic life is interesting. He is a person actively involved in productive life in the hey-days of a consolidated industrialisation, but before the speculative euphoria in the late 1920s. However, the potentials were there for, a 'mass escape from reality', to borrow Galbraith's expression. Ford notes that the basic factor of the economy is work, and its moral foundation the right of human beings to the product of their labour.[179]

Writing in the 1920s, Ford notes that everything has become too easy-going

---

[175] See DN, 24.11.91, Oscar Rydbeck - dömd utan grund, A 18.
[176] For an account of winners in the Swedish speculation wave, se ND 28.10.1991, Vinnarna bland alla förlorarna, p C 1.
[177] Galbraith (1993), p. 98.
[178] Helleiner, (1994), p. 295.
[179] Ford, Henry, Mitt liv och mitt arbete, (1922) p. 14.

and the principle is neglected that there should be an honest connection between value and price. There does not appear to be a need to consider the public at large. Some people call this abnormal situation 'prosperity', but it is a meaningless chase after money and to chase after money is not business. The purpose of business life is to produce for consumption, not for money or speculation. Ford's major objection against the monetary system of his time is that it tends to become a thing of its own and does thereby not promote production.[180]

Ford thus points to the tension between production and finance, for which the Swedish scene may offer an illustration. Some Swedish economists assess economic development since 1945 in a book 'From interest regulation to inflation norm'.[181] A summary of the findings of the different authors gives a perspective on the financial development. In 1945, when their analysis starts, there were rather few forms of financial instruments, and only a few of them served as object for trade. Industry, trade and other non-financial sectors possessed financial means mainly for transaction purposes. They were thus not particularly active in the financial field. The financial links abroad were scarce. This was a natural and direct effect of the war.[182]

In 1991, when the analysis ends, the players on the financial market and their roles have changed in a decisive way. There has been a mushrooming of financial institutions; finance companies and pension funds.[183] Agents, for whom financial activities were a means towards a 'substantive' aim, have become players in the financial field. Insurance companies are no longer passive administrators of rather moderate assets from life- and commodity insurances. The lending of mortgage banks is no longer linked to new investments in real estate. Non-financial enterprises have broadened their register of financial assets in such a way that they can no longer be regarded as customers in the financial system but also active players in it. To some extent this also holds true for households.[184] The expansion in financial instrument is immense.[185] What is remarkable about this development is that it really took off around 1975, and has from then on developed with an amazing speed.[186]

Looked at from a national point of view Sweden offers the following development from 1945 to 1990: In 1945 total Swedish borrowing amounted to 5 per cent of the GNP, at the end of 1990 it was close to 75 per cent. In 1990 the banks had close to half their lending and about one sixth of their borrowing denominated in foreign currencies. In 1945 the foreign part was probably zero, Werin notes.[187]

What part has the state played in this process? The purpose of Werin's study

[180] Ford, (1922), pp. 16-17.
[181] Translation of the Swedish title Från räntereglering till inflationsnorm, Werin, Lars, Englund, Peter, Jonung Lars, Wihlborg, Clas.
[182] Werin, Inledning (1993), p. 11.
[183] Finansbolag, fondkommissionsbolag, aktie- och avkastningsfonder, ATP-systemet med AP-fonderna.
[184] Werin, (1993), p. 11.
[185] certifikat, statsskuldväxlar, 'deposits' handlande på interbankmarknader, optioner, terminer, fondandelar, swappar, and the list can be continued.
[186] Werin, (1993), p. 12.
[187] Werin, (1993), p. 12.

was to analyse the financial system and the policy of the Central Bank. It aimed at describing the development, to explain it, and to determine the effects of the policy of the Central Bank. Werin notes that all three tasks proved difficult, but probably the most difficult task was to determine the role of the Central Bank and the impact of its policy.[188] Werin puts the question whether the bank and responsible authorities on the whole have been able to control the spontaneous forces in the increasingly sophisticated financial system. He tends to consider the spontaneous forces as supreme, and that this impression increases towards the end of the period, whereas the effects of political decision-making appear to have decreased. His assessment of the role of public policy is that it was rather weak already in the 1940s and -50s.

Werin notes that the deregulation process in the 1980s did not to any essential degree expand foreign financial relations, but that this expansion had occurred as a continuous development from the mid 1960s onwards.[189] The effect of these spontaneous forces is that the government has had increasing difficulties in achieving its basic aims of allocation and stability. So their research showed for Sweden, and so it is for most western industrialised countries.

5.3 Parties and interests involved

What has preceded, has been an attempt at highlighting different aspects of the economic world, that have repercussions for the conditions of life of human beings. Looked at in isolation the different parts and actors in economic life can be studied, analysed and assessed. This is the kind of intellectual activity we ordinarily purse. But how do these different parts relate to one another? What purpose is served, and how, by different aspects of the economic scenario sketched above? What are the combined effects of these factors and actors for social and human affairs?

A crude attempt will here be made at relating what has preceded about the economic world with a corresponding social scenario. For, parallel with the economic scenarios run the story of how the changes in the economic world affect human beings and household economies. On the same page that we read about speculation in a Swedish newspaper, we read about a statement by the Swedish minister of finance, Anne **Wibble**, where she ordains the country a sour medicine in order to save 9 billion crowns. This medicine entails postponed child allowances and higher costs for housing. These measures are coupled with a reduction in taxation on capital, and an introduction of value added tax on food.[190]

[188] Werin, (1993), p. 19.
[189] Werin, (1993), p. 20.
[190] DN, (årsöversikt) Pagels, Bo Viktor, p C 7.

A human and social scenario

6 Social policy and the economy contrasted

A scour medicine is what the minister of finance ordained Sweden in 1992, in the aftermath of the speculation wave of the late 1980s and early 90s. Postponed child allowances and higher costs for housing were means to this end. This is just one illustration of measures affecting the material existence of 'ordinary people' that run parallel to changes in the economy from the 1970s onwards.

Technological advancements in the late 20th century has generated so efficient means of production that welfare could be shared, at least in the affluent part of the world. But since the early 1990s economic scarcity is a topical concern at a national level in many countries. We have a high level of unemployment in most countries, which has the effect of marginalizing a number of people both materially and socially. We are talking about the emerging two-third society, and this in a period, when the material prerequisites are there and could be shared.

Scarcity, a favoured notion among economists, acquires a peculiar ring when taking a broader view, by considering the degree to which money circulates around the globe, disassociated from its primary function as payment for transactions. Neither are products in scarce supply. It is money available in state budgets and many households that is in short supply. A widespread remedy for these shortcomings is a 'sour medicine' for household economies and for those relying on social welfare provisions. This illustrates how perception is conditioned by the premises of any particular discipline. Susan **Charles** and Adrian **Webb** give a lucid picture of this by juxtaposing social policy and economics. Social policy they define as follows: "Social policy springs from observations and ideas about the nature of the good society, or, at least, the nature of a better society."[191] The social policy view of the human condition is that it is faced with more problems and hardships than need be. This is an optimistic view, which leaves room for improvements. In contrast to the social policy view, economists start from the pessimistic message that resources are everywhere limited.[192] By contrasting theory and reality, we catch sight of the availability of resources and their distribution. The building of the 20th century welfare states gave a promise of something better than what the majority of people had experienced in the past. But if we look beyond words, to factual practices, there have, since the 1990s, been disturbing signs of severe shortcomings in factual practices. This indicates that there is something wrong in the design of the social welfare schemes.

The aim here is to identify instances where the institutions and practices devised to provide better facilities for people, run short of their promises. The economic scenario above should have conveyed the message that economic scarcity is not a major explanatory factor. So explanations to the scarcity of resources we see in

[191] Charles, Susan, Webb, Adrian, The Economic Approach to Social Policy, (1986), p. 9.
[192] Charles & Webb, (1986), p. 9.

household economies and national economies have to be sought elsewhere than in economic theory. It is a question of the distribution of benefits and burdens in society. One central questions in this regard is law's role as an instrument for accommodating human and economic needs. A question that needs to be addressed is why people become poor and this question should be considered parallel with considerations about wealth and success.

In order to assess law's role, which is the task of the concluding part of this work (Chapter VII), we need further explorations around human conditions and social arrangements, and illustrations of the role theory and law play in this context.

So, to the economic scenario depicted above we need to add a human and social dimension. In addition to economic conditions that can influence people's living conditions in decisive ways, we also have a change in people's preferences and ways of life. These appear today to come closer to the enlightenment ideals than ever before, a great trend of individualisation. But at the same time there is a growing concern about ethical questions, a search for ways of coming to grips with what is conceived of as a value-void. There is an intricate relationship between external material conditions, people’s preferences and value aspects. At this stage material aspects of people’s lives will be considered.

7 Human conditions in the late 20th century

Netherlands and Sweden will also here offer illustrations of trends of a more general nature. During the period between 1950 and 1990 the Swedish population grew with 22 per cent from 7 million to 8,5 million. During this period the number of households increased by some 60 per cent, from 2 400 000 to 3 850 000.[193] This increase points to a considerable individualisation in ways of life. This development also has considerable repercussions for household economies, the national economy and markets, working life and institutional arrangements.

We here have a combination of external changes in economic life and production, and at least in part conditioned by this, a greater room of manoeuvre for people to choose their own way of life. One decisive factor in the choice of different forms of life is how the societal structures allow for people's subsistence and ways of life in new conditions. First industrialisation tore apart existing social settings and networks, which social security subsequently was aimed at remedying. Now these structures have become problematic because of a diversification of working life. These changes and a high level of unemployment have in multiple ways altered people’s conditions of life. It would appear that whilst the economic development deprives a not negligible part of the population of its former means of subsistence, the social arrangements, which were designed to protect people against this deprivation easily works in a counterproductive way. Social welfare was introduced as a safeguard against destructive effects of economic development, but in practice these systems

[193] See LO, Rättvisa i vågskålen, (1991), pp. 32-34.

have left human beings in a web of regulations, which easily obstruct constructive human energies, and often even bar people from the material safeguards intended by the social security system.

We have to look for explanations to these problems in the perception of work and its extension in social security. The perception governing the view of work was industrial production. So the whole society was perceived and became regulated according to a factory model. From the start this model ignored the specific nature of a variety of activities. And with the development of economic and social life in the latter part of the 20th century, this model has become increasingly cumbersome. Thus people working in different forms of services, social workers, journalists, artists, researchers, have to promote and defend the conditions in which they carry out their work, as were it a factory.

Anna Christensen has in an illuminating way brought the industrial rationale to the fore in her paper 'Wage Labour as Social Order and Ideology'. She shows how profoundly industrial production and its appendix, wage labour, has permeated 20th century societies. It is wage labour, rather than the market economy or political democracy or the family, which gives shape to the type of society in which we live today, she notes in the article written in the early 1980s. She points to how the basic pattern of contemporary wage labour is subordinated to centralised planning, which constitutes a compelling material structure. It creates its own social structure and its own way of life. "Wages cannot be linked to the final product, partly because it is impossible to distinguish a result that can be attributed to a particular wage-earner, and partly because the wage-earner does not control his own input. Rather, wages are paid to the wage-earner for conforming to the system and for his subordination to central planning and control over a certain period of time."[194]

This rationale also extends beyond active employment. The idea is that all those who *de facto* occupy dependent and subordinate positions in society's work organisation, should also enjoy the special privileges associated with wage labour, namely security and certain economic benefits. But this extension also means that a growing number of people, in order to enjoy the security and special economic benefits, are being incorporated into the wage-labour system.[195] To enjoy this 'privilege' requires a subordination, which constitutes an impediment to today's challenges to find new ways of productive activities and subsistence.

Christensen’s analysis assists in explaining problems associated with social security systems, when looked at from the point of view of the autonomy people enjoy in welfare schemes. There are different kinds of explanations, but a major one is that social security is largely designed according to the rationale of wage labour and *for* wage labour, that is, as an appendix to economic activity, and not with the primary aim of empowering a person. This also explains the difficulty we have in perceiving or in according a value to activities such as artistic work or to activities carried out in the third sector or the household, which all contribute to social and cultural life.

[194] Christensen, Anna, Wage Labour as Social Order and Ideology, (1984), pp 7-8.
[195] Christensen, (1984), pp. 10-11.

Through her empirical research on exclusion from unemployment benefits, Christensen has shown that married women with children often are victimised by the system. This is the case in instances where they decline to take up a new job, because working hours or the distance to the job makes it difficult to combine work with family responsibilities and childcare. Christensen's analysis has been confirmed by Staffan **Marklund** and Stefan **Swallfors**. They have pointed out how the linkage of social security to wage labour has lead to a duality in the social security system.[196] The system discriminates against people who do not hold salaried employment, or who work only for short periods. They observe that "the dividing line in the dual welfare structure goes between stable labour market participants and the non-working or irregularly working reserve-army of house-wives, students, handicapped and old."[197] A consequence of this is that if a person for some reason does not want to, or is unable to sell his or her labour on the market, this person will belong to the marginal welfare system as a result.[198]

On the basis of their empirical research, Marklund and Svallfors conclude that contrary to common opinions about the Swedish system as an all- encompassing welfare state, there are in fact large parts of the population, who do not quality for the core welfare system. The size of this marginal group varied between 10 and 40 per cent in the welfare programmes they had researched, retirement pension, sickness insurance, family insurance and unemployment insurance. Thus they confirm Christensen's analysis that wage labour is the major determining factor in the Swedish welfare system, and not political democracy or any ideology of charity or solidarity.[199]

Marklund's and Swallfors' study was published in 1987, before the disintegration of industrial work patterns set in in a visible way. As long as social security schemes continue to be based on the wage-labour criteria, there is a danger that an increasing number of persons may disqualify for the intended security, in Swedish as well as in any other country.

The design of social welfare systems echoes the disciplining exercises against the poor, which we have witnessed since the 16th century; the very thing social welfare in fact was aimed at remedying. Therefore, we need to look for explanations why social welfare has not empowered individuals as aspired.

We live with public regulations and institutions that have evolved over centuries, to which the majority of the population has been subordinated. Despite an aim to the contrary, as expressed in the notion of human rights, and particularly economic, social and cultural rights, this state of affairs still appears to subsist.

---

[196] Marklund, Staffan, Svallfors, Stefan, Dual Welfare - Segmentation and Work Enforcement in the Swedish Welfare System, p 14, Research Reports from the Department of Sociology, University of Umeå, No 94, Umeå 1987

[197] Marklund, Svallfors, Dual Welfare, p 17

[198] Marklund, Svallfors, p 18

[199] They have, however, not been able to determine, on the basis of the empirical material available, whether this marginal population is the same in the different schemes. As eligibility criteria are very similar for the different schemes, they assume that there can be a high degree of overlapping between the different social security systems. Marklund, Svallfors, Dual Welfare, p 39

In the Netherlands, the policy guiding body of the government, the *Wetenshapplijk Raad voor het Regeringsbeleid, WRR,* has assessed the effects of economic and social change on people's conditions of life. In 1985 this body presented a report that assesses changes in Dutch society since the present welfare systems were introduced. Changes in economic life and changing ways of life were central determining factors for the problems the committee identified in these systems and their modes of operation. It is noted that primary forms of life are, in a variety of ways, of importance for how social security is institutionally organised. Problems occur because the basic structure of the present system was developed in a socio-economic and a socio-cultural context that in considerable ways differ from the present.[200]

The Dutch report offers a comprehensive assessment of changes that have taken place during the last decades. The social security systems introduced in the 1950s and -60s are the focus of their concern. These systems have become problematic in view of increasing unemployment as well as changing structures in working life. In the early 1980s the Netherlands experienced an economic crisis associated with the second oil crisis. From 1980 to 1984, unemployment rose from 7,4 per cent to 17,3 per cent. In 1984 the unemployment rate for women was 18,9 per cent.[201]

The institutional structure for social welfare provisions has in the Netherlands been based on the family, with the concept of one breadwinner for the family's income. This structure has been prevailing in the Netherlands, as in many other parts of Europe outside the Nordic countries. In this scheme the wife is expected to care for the household and children. This pattern is today increasingly at odds with factual practices, as women are increasingly working outside the home. In addition, an increasing number of people work part-time. Disintegration of the family structure, with divorces and cohabitation are other indications of changing ways of life. These changes have had considerable effects on the division of tasks and responsibilities.[202] This again has repercussions for social security provisions, which would have to be reassessment in order to correspond to factual practices.

For women, the one breadwinner concept, on which the Dutch social security system is based, is problematic, as social security is linked to the head of the family as the principal breadwinner. The institutional structures have also become problematic because of an increase in the number of households, to which a person belongs during his or her lifetime. In addition, the number of households has increased out of proportion to the growth in the population.[203] All these changes have repercussions for the design of the welfare system.

Other problems are the increasing proportion of part-time work and flexible work patterns. Since the 1960s the proportion of part-time work has increased considerably. This is particularly the case in service sectors, and concern above all

[200] WRR, 26/1985, Waarborgen voor zekerheid, p. 98.
[201] WRR, 26/1985, p. 19.
[202] WRR, 26/1985, p. 98.
[203] WRR, 26/1985, p. 103.

women. In the mid 1980s part-time work in the service sectors amounted to some 40 per cent, whereas the overall proportion of part time work was 21,8 per cent in 1983.[204] A major problem associated with part-time work is the lack of protection, which employees in full-time employment enjoy. This applies to the protection against dismissal, social security, pension rights and trade union rights. So despite the fact that part-time work has become an integral feature of the labour market, part-time work is still not considered on pair with full-time work, the committee reports in 1985.[205]

In regard to flexible working formats, the committee notes that the social security system has to recognise the changes on the labour market, and take account of the fact that an increasing number of people are going to pass through the system of social security.[206]

8 What is atypical work?

With a diversification of work patterns, it has became commonplace to talk about atypical work formats. So, in addition to substantive activities of a considerable magnitude, which are invisible in the wage-labour model of society, we are faced with an increasing number of work constellations which we today call 'atypical' employment relationships, because they do not conform to the long-term full-time employment model. There are thus a number of activities, both outside conventional working life, and in areas such as the service sector, which never fitted the paradigm of wage labour. With the development in economic life, particularly since the 1970s, we have an increasing diversification of working life, which make a decreasing number of employment relationships 'typical'. This again is an illustration of our fixation with structures of thought and institutional models that do not reflect factual circumstances. If an increasing number of activities do not fit the model, these 'deviations' cannot be considered atypical, but should instead be regarded as new categories. We therefore must change our perception so that we are able to consider different forms as they exist in people’s reality, and adapt our theoretical schemes and institutional arrangements to allow them to reflect the social reality of human beings. This question will be resumed in chapter VI.

9 A problematic design

A major obstacle for perceiving and remedying social problems is the tendency to look in isolation at economic law versus labour law and labour law versus social law. Thus we easily fail to see how these fields of law interact and how problems could be remedied by taking this into account, such as the observation by the Dutch committee that an increasing number of persons are going to pass though the system of social

[204] WRR, 26/1985, pp. 162-163.
[205] WRR, 26/1985, pp. 162-164.
[206] WRR, 26/1985, pp. 164-167.

security. A decisive question is how these systems are able to cater for people's factual conditions in a context that no longer corresponds to those when the systems were introduced. Theses aspects are pinpointed and assessed by the committee, as they are reflected in the Dutch system of social security. The committee poses the question, what kind of relations there should be between the situation of the household, sources of income, care functions of the partners or ex-partners and their children?[207]

What the committee has pointed out illustrates deficiencies in social security systems that by no means are particular to the Netherlands. On the contrary, it is a general problem that at a practical level will be illustrated with Finnish conditions in chapter VI.14. We are here faced with the wage labour ideology, as depicted by Christensen, with echoes from the disciplining of the poor from past centuries, in the basic design of social security schemes. In order to be able to count on benefits of a social security system a person is normally supposed to be available for full-time employment on the labour market. With the disintegration and diversification of the labour market, and increased part-time work, a considerable number of people find their security jeopardised, or people may feel compelled to choose certain arrangements or act in some strategic manner, in order to secure their subsistence. This is a feature that the WRR committee pointed to in its scrutiny of the Dutch system. The question is put, what the relation should be between a respect by the public sector for personal privacy and the need for trustworthy information. It is noted that people's choices of ways of life easily become dependent on calculative aspects, because of the way in which rules are designed.[208] Where rules are conceived of as impeding human action and personal choices, the tendency to use rules in a strategic manner or to abuse them becomes general.

This illustrates an increasing tension between the two sources of income, salaried employment and social security. The task the WRR committee had placed before itself, was to present a formula that would allow this tension to be unleashed.[209] The formula they proposed was a partial basic salary.

Problems associated with the legal and practical organisation of working life and its extension in social security, represent universal tendencies. On the one hand, such problems have their origin in legislation and organisational structures that have not been adapted to changes in the economy and working life. On the other hand, new needs have lead to a continuous amending of the welfare schemes in a way that has made them increasingly complex and cumbersome both for those who are dependent on these arrangements for their subsistence, and for those who administer these schemes. The Dutch advisory committee called for a rethinking and discussion of these questions in order to ensure that the goals of what was constructed in the course of the 20th century, is not jeopardised because of lack of adaptation to present day circumstances.[210]

[207] WRR, 26/1985, pp. 98- 99.
[208] WRR, 26/1985, p. 99.
[209] WRR, 26/1985, p. 7.
[210] WRR, 26/1985, pp. 7, 13.

10 Social law - problem as well as solution

Despite the best intentions, public policy aimed at social welfare has not always materialised, neither the way the framers of such legislation planned, nor the way those it was intended to serve expected it to materialise. When we move from the world of work, to the sphere of social welfare we are faced with a rationale that suddenly alters the whole perception of the individual. This is best brought to the fore when approached from the perspective of what autonomy people enjoy in social security schemes. There is a basic ambivalence in the role of law in this field, which makes it as much the root of social problems as the instrument for the solution of these same problems.[211]

In all fields of law, law itself can be a problem as well as a solution. In the world of work law often plays a subordinate role for those actively engaged in working life, because there is interdependence between the two agents in working life, employers and employees. When a person is outside working life, interdependence is often turned into dependence, because of the way in which the social security system is designed and administered. One could say that discrimination capacitated through law creates a need for new legislation in order to remedy social wrongs that have followed in its wake, such as slavery, serfdom, discrimination against ethnic and religious minorities and women.[212] Today the problem is subtler. We have a multitude of legislation aimed at remedying social wrongs, but what is at stake is a latent discrimination, because of law's insensitivity to factual differences, which exist in any human context. Rita **Süssmuth** observes that this was not only a problem specific to the formative stages of the building of a welfare state. "Passive discrimination is just as readily found in the course of the development of the welfare state. It could even be said to be a specific problem of the developed welfare state, based on the rule of law, as it is a system, which constantly produces new forms of inequality. Paradoxically, the danger of new social inequalities would appear to increase in proportion to the tightening of the network of social regulation - be they norms to protect the weaker members on the labour market, in the education system, or in the compensation of social disadvantages through social benefits."[213]

Why is this so? Perhaps because the social and economic environment in which we live in a globalized economy is different from that in which the social welfare systems were created, with a different constellation of interdependencies and dependencies in social and economic life. Matti **Mikkola** has put this phenomenon in quite strait forward words: "Now that the welfare state is losing its strength as a policy, the decisive factors become purely economic. The most important factor is the competition for markets with the USA, Japan and the emerging industrial countries. In the face of this competition, the European is becoming too expensive to invest in."[214]

---

[211] This was one theme of the 24th International Conference on Social Welfare (ICSW), Berlin (West), 31.7-5.8.1988. Report Deutscher Verrein für öffentliche und private Fürsorge, 1989.
[212] see ICSW Report, (1989), p. 65.
[213] ICSW Report, (1989), p. 66.
[214] ICSW Report, (1989), p. 84.

And the same goes for the other countries and continents because they all compete for the same markets. As a derivation of this, Mikkola notes that this change can also be seen in the administration. The cohesion and legitimation of society no longer call for a strong state or for shared responsibility and efforts to promote services in the interest of welfare. Consumption and the availability of commodities have become the legitimation of society.[215]

What we lack is a perspective on human beings, which would allow for their empowerment. This would imply recognition of and respect for a person's own choices. This, again, requires factual circumstances and the particular context of a person to be displayed. As long as this is lacking all kinds of preconceived perceptions about human beings are allowed to operate under the surface. Benjamin **Barber** has pointed this out in a colourful way in his discussion about the notion of need, operating behind social security schemes. "To identify liberal man as governed by need is to portray him as small, static, inflexible, and above all prosaic - as a greedy little varmint unable to see, for all his ratiocinating foresight, beyond his appetites. A creature of appetite, or of reason indentured to appetite, liberal man is seen as incapable of bearing the weight of his ideals. Freedom becomes indistinguishable from selfishness and is corrupted from within by apathy, alienation, and anomie; equality is reduced to market exchangeability and divorced from its necessary familial and social contexts; happiness is measured by material gratification to the detriment of the spirit."[216]

Barber here portrays the American scene, and he notes that perhaps the above mentioned perceptions are why the miracle of American democracy has produced dropouts as well as beneficiaries, malcontents as well as successes, lost souls as well as millionaires, terrorism as well as abundance, social conflict as well as security, and injustice as well as civility.[217]

We are here stuck with a problem of perceiving human beings in their own right. This places challenges on legislation and administrative structures, to reflect public policy aimed at social justice and human rights in a more appropriate way. A conclusion that plausibly can be drawn regarding social welfare since the late 20th century is that democracy, human rights and social security have not been sufficient to empower individuals in a way that would correspond to the spirit of democracy, human rights and social welfare. Democracy was the form of government, which would remedy wrongs in the past. Having moved into the third millennium, we still have democracy as the professed best form of government. But the polarising trend we witness between an internationalised economy, strained national economies and a high level of unemployment and increasing social marginalization, indicates some fault in design and practice.

In order to remedy a problem, we need to be aware of where and how we went wrong. Here we have to move at two different levels, that of what really happened and

[215] Mikkola, Matti, ICSW Report (1989), p. 85.
[216] Barber, Benjamin, Strong democracy. Participatory Politics for a New Age, (1984), p. 24.
[217] Barber, (1984), p. 24.

that of how our thought structures conditioned our perception of reality and its reflection in legal regulation and institutional arrangements. The next step in this endeavour is to look at the social dimension in a long time perspective, with focus on poverty.

11 Poverty in perspective

Up till now a panorama has been painted of late 20th century societies, both from an economic, and a human and social perspective. This displays a tension between the economy on the one hand and human and social concerns, on the other. For an understanding of these tensions it is instructive to take a long- term perspective on the social side to economic development.

The social side has not been very visible for the obvious reason that history is generally written by the strong and victorious party or parties. What is done, is legitimised by the interests of those holding power. And here theory plays an important role, as one way of legitimising the aspirations of an ascendant group or the maintenance of *status quo* of those holding factual power. A complement to the history told by the powerful, we receive through disciplines such as social anthropology or mental history. Here we catch sight of human beings, as opposed to the history of nations or economic history. The 'conventional' history of Europe is one of successive successes, a story of the accumulation of wealth until European offsprings in North America took the lead in the 19th-20th centuries.

But behind the success stories, there runs a parallel story of those who have had to pay the price for these successes. This story is not without relevance at the turn to the third millennium. It is in this perspective that C. **Lis** and H. **Soly**, in the 1970s, note that poverty in western society is not a thing of the past; that social inequality appears to be increasing rather than diminishing. So when we are confronted with urges for cutting down on existing social provisions, the following account of poverty can be illuminating for the assessment of present scenarios and trends. It also offers an elucidating background for the ensuing scrutiny of the history of ideas.

How do we conceive of poverty? Lis and Soly note that generally speaking research has not been concerned with the fundamental causes of poverty. In social sciences much effort is directed towards the definition, measurement and description of 'marginal' groups and sub-groups, who, once defined, measured and described, are conveniently labelled 'minorities'.[218] Among sociologists, again, more attention is paid to matters such as the value system of the poor than to the economic and political structures, which underlay social inequality and cultural segregation.[219] Historians, for their part, are inclined to analyse poverty as an external phenomenon, and to represent its external manifestations as characteristics of the poor themselves. The most important questions concerning poverty still remain unanswered, Lis and Soly note,

[218] Lis, C. & Soly, H. Poverty and Capitalism in Pre-Industrial Europe, (1979) Foreword, p. xi.
[219] Lis & Soly, (1979), p. xi.

and these are questions which apply to present day societies as well as to the pre-industrial society they have researched. So they put the questions:"[W]hy was poverty a 'structural feature' throughout the *ancien régime*? Why was the extent of destitution in regions, which were economically backward similar to that in areas, which were economically advanced, and in periods of both population growth and stagnation? Why was poverty not everywhere paired with capitalist development? Why, in some parts of Europe and at certain times, were large-scale reorganizations of poor relief carried out, while in other regions or periods everything remained as it was? Why did the majority of the supported poor consist at one moment of the young and healthy adults, at another moment of infants, the aged, the infirm?"[220]

Lis and Soly note that we need a holistic approach and comparative studies in order to answer these questions.[221] The question is thus, how the position of the common man and women relates to the economic sphere and the state apparatus, throughout time. Here there are, in my view, strong similarities between the present and the past, notwithstanding the standards concerning human rights and social welfare, introduced during the 20th century. In order to perceive this, focus will here be placed on what preceded human and social conditions of the 20th century.

Peter **Englund** has in an analysis of the history of poverty noted that perhaps is it so that we do not stumble over the problem first and then look for the solution. Perhaps is it rather so that when we can vaguely spot the Solution at the horizon, then we are able to see the Problem.[222] And it is high time to try to formulate problems we face today, against the background of the preceding economic scenario, when they are considered in relation to the ensuing account of poverty as a parallel story to that of 'property'. Could possible aspirations and conditions today allow us to formulate the problem of perception, which has undermined human and social aspirations of the past century?

Englund's analysis of the history of poverty may here set the scene in order to illuminate today's social problems. He notes that although poverty has always existed, it is not until fairly recently that it has been conceived of as a social problem. This was during the latter part of the 18th century, when a new perception of poverty emerged, linked to the emerging industrialisation. Industrialisation brought along a new wave of impoverished and marginalized people, who soon were stiffen into a ragged slum, which was larger in number and more miserable than in previous periods.[223]

There comes a point, when the rationale of a certain social order reaches a breaking point, which is manifested in social revolts or unrest. There are periods, Englund notes, when mentality and ideology are shaken in their foundations. At a surface we see dramatic events like the Black death, the 30-year war, the French revolution or the first world war. These spectacular events are evidently not without

[220] Lis & Soly, (1979), p. xiii.
[221] Lis & Soly, (1979), p. xiii.
[222] Englund, Peter, Förflutenhetens landskap, Historiska essäer, (1991), p. 171.
[223] Englund, (1991), p. 170.

importance, he notes, but they are often surface appearances of big and obscure movements at a much deeper level.[224]

The social developments that will be pointed to here represent universal trends, but they will be illustrated through the Dutch scene. As Sweden had the doubtful pleasure of illustrating the anatomy of a speculative euphoria, the Netherlands will have the same doubtful pleasure of portraying the conditions of the poor and of labouring men, women and children in the past. To look at this country for practical examples is illuminating because of its wealth, particularly in the 17th century, the Golden Era of the Netherlands or the Low Countries.

In the high middle ages one can see the effects of the agricultural revolution. A wave of destitution of a great number of people occurred with changes in agricultural techniques. Around the year 1300, 40-60 per cent of western European peasants disposed of insufficient land to maintain a family. In 1289 almost 58 per cent of the tenants in the region of Namur possessed only three hectares or less. Nearly 19 per cent had less than one hectare. According to Lis and Soly, five hectares was conceived of as a minimum, sufficient to support a family.[225] In the region of Ghent more than half the peasants had three hectares in the first decade of the 14th century.[226] Available evidence shows a trend of concentration of wealth in the hands of a minority. In the wake of the agricultural revolution, a number of peasants were deprived of their land, because they had insufficient means to support themselves, or their situation became untenable when they were denied access to common lands for stockbreeding. This forced them to rely on causal work. With the concentration of land, we have a growing number of extranei or vagrants, landless paupers "trekking here and there in search of work", growing at a sharp pace from the 13th century onwards.[227]

The nobility that had the necessary means to make use of technological improvements wasted the vast bulk of the surplus, while the peasantry rarely could accumulate sufficient means to improve their production. Another feature that frustrated the situation of small holders was the use of common land. From the 12th century onwards both landlords and the well-off peasantry attempted to deny small holders access to commons and wasteland. Pretending to protect commons and wastes, many seigneurs usurped the right to control the use of these lands.[228] This was a hard blow to small holders, who could not subsist without the use of commons for their stockbreeding. They were forced to take usurious loans, which eventually resulted in them losing their lands to their creditors. This deprived many peasants of their land, and forced them to move to the towns.[229]

In towns, with their afflux of landless people, we find a parallel development in economic activity and thereby a stratification of the population. During a century after the Black death there was a redistribution of wealth and economic activity from one

[224] Englund, (1991), p. 168.
[225] Lis & Soly, (1979), p. 57.
[226] Lis & Soly, (1979), p. 15.
[227] Lis & Soly, (1979), p. 16.
[228] Lis & Soly, (1979), p. 28.
[229] Lis & Soly, (1979), p. 21.

region to another, where one area gained ground at the cost of others. There was also tension between towns and rural areas.[230] International competition made old manufacturing centres such as Flanders, Brabant and northern Italy increasingly concentrate on the production of luxury goods, expensive cloth. This trend, which occurred in the first half of the 14th century, required highly skilled workmen. It thereby consolidated the position of guild masters, which resulted in a stratification of the workforce.[231] The consolidation of guilds in the towns pushed merchants into the countryside. This division between guilds and merchants represented, in broad terms, a demarcation between the old aristocracies and the ascendant commercial class.

Here we witness competition between towns and the countryside. There was an antagonism between the urban and rural communities, which in Bernard H.M. **Vlekke's** view was damaging to the general welfare. Villages fought the industrial monopolies of the towns. In the villages entrepreneurs were outside the jurisdiction of the guilds, with their price regulations. They were equally outside the city's power of taxation. Here merchants manufactured goods and sold beer and wine, supported by the gentry. The towns responded by buying up the suburban seigneuries and enforcing their repressive economic policy in the capacity of feudal lords. An eyewitness of that scene in Groningen notes "the city and its Ommelanden lived in such violent mutual dislike as had never been heard of either among the Turks or among mankind."[232]

Lis' and Soly's assessment is that merchants tried to compensate for their declining margins of profit by recruiting cheap labour in the rural areas. The cost of living was lower in the countryside than in the towns, and since guilds could not exercise their influence, relatively low wages could be paid to rural workers. And here there were many small farmers who sought to supplement their income.[233] 'Social dumping' we would call it today.

The policy of the magistratures again was aimed at protecting the industry. A glimpse from Leiden shows that many statutes issued during the 15th century were meant to strengthen the town's competitive position, ensure the quality of the cloth, preserve the existing economic relations in the town and stimulate employment for the townspeople.[234]

The competition between guilds and merchants did not enhance the position of the majority of the population. By way of illustration tax collectors in Brabant labelled no less than 30 per cent as 'poor' in 1437-38. The criteria used, was families without landed property and with an income insufficient to pay taxes. In the area of Antwerp there were some 21 per cent poor hearths, and in the northern part of Brussels, 26 per cent. In the county of Flanders, there were in 1469 an average of 25 per cent poor people. As this was not a period of crisis, it shows that even in 'normal' years, at least 20 per cent of the peasantry in one of the most prosperous areas of the mid-15th

[230] See Lis and Soly, (1979), p. 33.
[231] Lis & Soly, (1979), pp. 34-35.
[232] Vlekke, Evolution of the Dutch Nation, (1963) p. 113.
[233] Lis & Soly, (1969), p .36.
[234] Brand, Urban policy or personal government: the involvement of the urban élite in the economy of Leiden at the end of the Middle Ages (1992), p. 27.

century western Europe were poor according to fiscal definitions.[235] In towns the socio-economic contrasts were even sharper. Again as an illustration, tax collected at Brugge in 1394-96 shows that some 83 per cent of the inhabitants belonged to the lowest taxed category. The upper class, scarcely one per cent of the population was made up of 59 per cent merchants and bankers and 41 per cent master craftsmen, while 87 per cent of textile workers fell into the lowest tax division. According to Lis and Soly, all studies concerning the division of urban wealth in the Low Countries have shown a more or less equivalent result.[236]

Hanno **Brand**, who has researched Leiden as a centre of textile production in the 15th century notes that poverty was widespread and affected a considerable part of the population. This included people from the surrounding agricultural areas, for whom conditions were worsening in the Rijnland countryside. Many rural people hoped to find a new future in the new drapery production. Brand gives a picture of the troubled years of 1438-39, when war, wheat shortage and a plague epidemic ravaged the county. "[T]he distress among Leideners increased to such a degree that the Holy Ghost Organization, responsible for the town's charity, began to run short. For weeks the masters of the Holy Ghost had to resort to collecting money from the more prosperous burghers to be able to come to the aid of the poor."[237]

It should, however, be noted that despite poverty, serfdom did not really occur in the Netherlands, and neither in Sweden. One reason why feudalism never gained ground in the Netherlands, is its urban character. This was particularly the case along the coastline. The traditional freedoms of the Dutch people is, according to Vlekke, one explanation for the early development of small communities of traders and craftsmen, and in some cases there also was a continuation of ancient Roman-Germanic towns, such as Nijmegen and Maastricht.[238]

Cities enjoyed a highly independent status, which they had attained as a result of the rebellion against the centralisation and state-building policies of the Habsburg Empire. Cities like Amsterdam, Haarlem, Leyden, Delft and Rotterdam were administrative islands, all of which had their particular laws, charters, weights and measures. Any serious attempts to enhance the central power of the fragmented Republic were effectively obstructed.[239]

Although conditions were hard for a great number of people, everything was not misery. Vlekke gives the following glimpse of Dutch life in the 16th century: "Life in towns was monotonous, and the citizens spent so much of their time in the taverns within and without the city walls, and drank such amazing quantities, that the taxes on beer and wine provided the towns with a most important source of income. [240]

---

[235] Lis & Soly, (1979), pp. 44-45.
[236] Lis & Soly, (1979), pp. 45, 46.
[237] See Brand, (1992), p. 20.
[238] In Maastricht the churches of Saint Servatius and the Holy Virgin, with their monasteries, represent a direct link with Roman times. Vlekke, (1963), p. 48.
[239] Wagenaar, Michael, From hidden hand to public intervention: land use and zoning strategies in the liberal and post-liberal city (1875-1914), (1992), p. 165.
[240] Vlekke, (1963), p. 113.

But the 16th century was no rosy scene in Europe in general. There had been an exceptionally long time of crop failure in the early 16th century and Englund notes that the misery, which followed tore the mask from a continent that up till then appeared to have experienced some degree of equilibrium, displaying in its stead a fatal lack of balance. There were several reasons for this disequilibrium. There was a population explosion, which exceeded the growth in food production. Traditional agricultural structures started to disintegrate without yet displaying the structures that were to develop into present day industrial capitalism. Along the way many small farmers lost their lot of land and were transformed into day-labourers and crofters. For the large masses this development meant deteriorating conditions.[241]

12 Attitudes towards the poor

The developments briefly sketched above, first the 'agricultural revolution' and later the 'commercial revolution', lead to social destitution for large groups of people. A reflex of this development was social unrest, of which there were frequent signs in the 14th century, reaching a peak in the early 16th century.

With the development in the 1520s the attitude towards poverty changed. Before this time, there had not really been an opposition between rich and poor, they were each other's condition. Poverty was there as a natural thing, and the poor could be ignored, despised or revered. But it was not a social problem. Neither was the demarcation between rich and poor so clear. A person could be poor and still not regarded as having a low status. Poverty could be a path to God. Also chivalry virtues contained aspects of asceticism. In that way the real poor could profit from some spill over effects from those who chose poverty and asceticism as a means towards higher aims. That is why even reverence could be showed towards the poor.[242] Charity was a matter of duty, which gave the poor a function in society as alms served several functions. Besides giving food to the poor, it was a good Christian act that held the giver at a distance from purgatory. Poverty reinforced the notion of a hierarchical order, and it allowed the rich to stand out with their riches. Charity thus came to justify the riches, paradoxically as it may seem, Englund notes.[243]

The idea that poverty was something shameful first became discernable in the 13th century, in towns, in big commercial centres such as Flandern and northern Italy. Here the conditions for poverty to be seen as a social problem were at hand, the values, the abundance of money and the contrast between rich and poor. This notion is reinforced and experiences its break-through in early modernity.[244]

With the crisis of the 1520s, the old notion of the almost virtuous poor beggar disappeared. He is transferred into the vagrant, a nasty and dangerous figure, a potential danger to the established order, who causes feelings of fear in the

[241] Englund, (1991), pp. 166- 167.
[242] Englund, (1991), pp. 164-165.
[243] Englund, (1991), p. 165.
[244] Englund, (1991), p. 166.

bourgeoisie. Now poverty becomes a stigma and receives new connotations, such as lack of morality. The vagrant becomes a problem, although at this stage a problem for the police rather than a social problem. Poor laws were enacted all over Europe, and these were enacted not for the poor, but against them. In Sweden laws against begging were enacted in the 1520s and 1540s.[245]

Englund gives us the following short panorama of changing attitudes towards the poor: The generous charity is substituted by a collection of oppressive tools that became increasingly severe as time went by. Now the poor are defined, counted, registered, marked, educated, reformed, discriminated against, threatened, fined, expelled, whipped, jailed or hung. The development went like this: During the 16th century the foreign poor were given food, and after that they were shown out of the town walls; during the 17th century their heads were shaven, they were whipped and then they were shown out of the town walls, in case they were not taken into one of the newly established weaving or spinning houses. Englund remarks that this was a great time for locking people up: the poor, the mad, the disabled and many more were locked up. The weaving and spinning houses were in many instances a clever way of getting labour for the emerging industries. And with this the modern notion of poverty emerges entailing low social status, lack of power and exclusion.[246]

This development was not just another illustration of the sad nuisances of the past, Englund notes. It is important in European history, because it was in this war against the threatening poor that the repressive machinery of the modern state took form. It was to a great extent out of the closed spinning and weaving houses that the modern factory emerged as a system.[247] Behind this development we have the consolidation of royal power, with the ambition of total control, of exploiting its citizens to the full.[248]

Poor laws and labour statutes were the instruments through which public power contributed to keeping the destitute labourers poor. As a general trend in Europe, a structural shortage of labour occurred by the mid 14th century. This could have been the opportunity for poor labourers to increase their lot, had public power not intervened to prevent this. The aim of labour statutes was to secure labour, freeze their wages and limit their claims for relief.[249] Lis and Soly note that:"[t]hus with a stroke of the pen states attempted to crush the hopes of the poor for better living conditions and to remove the sole benefit bequeathed by the millions of cottars, servants and day labourers mowed down by epidemics. Princes, who had never before been concerned

[245] Englund, (1991), pp. 168-169.
[246] Englund, (1991), p. 169.
[247] Englund, (1991), p. 169.
[248] Duby, Georges, Preface, p xi, in Ariès, Philippe, Duby, Georges, A History of Private Life, II, Revelations of the Medieval World, (1988).
[249] see Lis & Soly, (1979), p. 48.

with such matters, coordinated a system of social control designed to protect the interests of a rich minority."[250]

There is a limit to how much people can accept to be coerced, and attempts to make the poor pay the costs of the 14th century crisis resulted in disturbances and often in revolts. But a decisive change of perception had dawn. The duty to work was the harbinger of a new ethic, Lis and Soly note. "Thus the basis was laid for the appearance of a coordinated system of social control directed by public authorities in place of private persons."[251]

Part of this change of attitude is also attributable to the dissolution of religious orders. Whereas voluntary ecclesiastical alms had had a humanist connotation, the aim of this new poor relief was twofold. Economic relief and penal reform united in ambitious correctional programmes designed to reform the malefactor as well as punish him for his past sins and crimes.[252]

And much of the cumbersome rules, with which people dependent of one or the other form of social welfare or unemployment benefit are faced with today, are remnants of this new kind of discipline. Discipline was part of modernity and large-scale production. Perception had changed. Along with disciplining and rules, we have stigmatisation for circumstances with more often than not are outside the control of the person concerned. This applied to the poor in the past, and so it also does for many persons who are forced to rely on social security today.

The above should also have indicated that economic success is not something from which everyone stands to profit. This can be seen when we approach the golden era that the Dutch experienced in the 17th century, when they were masters of the seas. After this period the country established itself in another important economic field in the 18th century, finance. "The last decades of the XVIIth century saw the busy Netherlands world of traders and shopkeepers, of artists and craftsmen, transformed into a new one of bankers and merchant princes."[253]

So how did the ordinary man and women fare in this national environment of riches? Simon **Schama** gives in his book 'The Embarrassment of Riches' a thorough account of the life of the less fortunate during the golden era of the country in the 17th century. "This was not a dietary democracy, much less a culinary utopia, a sort of Cockaigne of the north. But it was at least a society in which the "unfortunate" poor (as distinct from able-bodied vagrants) were supplied with fare meant to approximate to the diet of the more fortunate rather than stigamitze their wretchedness with a regime of didactic meanness. Happily, the nineteenth-century utilitarian principle of "least eligibility" with its accompanying terror of the workhouse gruelpot did not yet

[250] Lis & Soly, (1979), p. 50.
[251] Lis & Soly, (1979), p. 51.
[252] Schama, Simon, the Embarrassment of Riches, An Interpretation of Dutch Culture in the Golden Age (1987), pp. 16, 17.
[253] Vlekke, (1963), p. 242.

operate within the homelier culture of Dutch humanism. Not that the poorhouse food was exactly festive."[254]

Schama notes that for the rest of the Dutch population it seems safe to conclude that in the 17th century the majority enjoyed the ample but not opulent diet that the humanist divines and doctors believed good for the soul as well as the body. "The dietary regime, like the society it fed, did not follow the pyramid shape of most of early modern Europe." Schama does, however, express a note of caution, that it would be naive to ignore the vast differences in fortune, education and social behaviour, which marked differences between the various ranks and groups. But still, "the fact that they all sat down at more or less the same time to a breakfast consisting of more or less the same ingredients - bread, butter, cheese, fish, pasties, beer and/or buttermilk and whey - suggests a community in which the bonds of shared habit tied together those whom economic conflict would otherwise have sundered."[255]

The picture conveyed of the Low Countries during its period of great prosperity, is that the situation of the poor was perhaps alleviated, but no decisive social levelling occurred among the social groups. Vlekke gives the following picture of the 19th century: "Of two million inhabitants, 700 000 were dependent upon charity, if contemporary reports are reliable. Societies were founded to take the destitute of the cities back to the countryside. Colonies were started in the peat districts of Friesland and Groningen. These methods proved only palliative for the needs of the masses."[256]

In the 19th century there was for the first time mass emigration from the Netherlands to America. Poverty and religious persecution were major reasons for this emigration. Vlekke notes that the Dutch immigrants arriving in America were never so completely destitute as many of the Irish and Germans. But he remarks that the departure of more than 30 000 persons in forty years presents a striking contrast to the 17th century, when it was difficult to find a few thousand settlers for New Netherlands.[257]

Behind this transformation there was also a change in the Netherlands' relative position in economic life. Although Dutch trade did not diminish in absolute numbers, they lost their market positions both in shipping and in textile manufacturing to England, France and Germany. Textile had been the major basis for Dutch trade from the 12th until the 19th century.[258]

Notwithstanding diminishing market positions, the Netherlands became increasingly important as the money market of Europe. The bankers of Amsterdam played a primordial role both in the maintenance of Netherlands' commerce and in foreign quarters. Their financial resources and wide connections were indispensable to foreign merchants shipping goods abroad, who could rely on having their drafts paid

[254] Schama, (1987), p. 174.
[255] Schama, (1987), p. 174.
[256] Vlekke, (1963), p. 293.
[257] Vlekke, (1953), p. 293.
[258] van Houtte, J.A., An Economic History of the Low Countries 800-1800, (1977), p. 35.

promptly in Amsterdam. For decades Amsterdam was the clearing-house of all Europe. In Amsterdam governments could also find funding for their warfare. So Britain's expenditures for her armies on the continent during the seven years' war were largely met by loans from Amsterdam bankers.[259]

Money could also be used for domestic public purposes, of which we find an example in the city of Groningen. In the 19th century, Groningen had an oligarchy of allied distinguished families, who formed the local government. In 1850 the number of members of the Council was extended with ten, giving access to new circles.[260] Until 1850, the Municipal Council was dominated by people, who were either paid by the local or the central government. After 1850 there was an increase in representation from trade and industry. Notwithstanding, 18 out of the 25 members belonged to the highest class in 1870, and fourteen of them were extremely wealthy.[261]

The elite had a special interest in the creation of public utilities and town planning. Initiatives for the creation of public utilities came from trade and industry, which were in need of such facilities. The interest of the governing elite for such investments was that they could provide the loans needed for creating a new infrastructure.[262] There was a long tradition of borrowing in Groningen. By the end of the Napoleonic era Groningen had a debt of 1 139 992 guilders, accumulated since 1630, whereas many other cities began to take loans only after 1851. These loans had, as such, been used for communal purposes, such as buying and exploiting vast areas in the Province of Groningen. And with the need for an infrastructure in the 19th century, there was a positive attitude towards facilities in this municipality.[263]

There was thus a community of interest between trade and industry and the old aristocracy. The latter had interests in loans, as private persons and as administrators of orphanages, of homes for the old and infirm, and other institutions. These bodies then became important creditors. But whereas the lenders profited, loans could became a burden for the municipality. Whenever the mayor and his aldermen proposed to convert old loans into loans with a lower interest rate, there was of course opposition from the lenders. However, the elite did not have scruples about withdrawing their money when the rate of interest rose. This happened for instance in 1864, when 75 per cent of the 3 1/2 - 4 per cent terminable debt, dating from the *ancient régime*, was withdrawn. The ruling elite then decided to issue a new loan at 4 1/2 per cent interest, which could not be withdrawn.[264]

A community of interest between the old elite and trade and industry appears to have constituted a favourable blend in Groningen, from which even the poor appear to have been able to profit. This throws some light on the 'public' concern for an

[259] Vlekke, (1963), p. 262.
[260] Judges had the strongest position in the Council in 1816, but their position was gradually taken over by lawyers and some notaries. See Kooij, Pim, A Dutch city in the nineteenth century, (1992), p. 106.
[261] See Kooij, (1992), pp. 107-108.
[262] See Kooij, (1992), p. 121.
[263] See Kooij, (1992), p. 114.
[264] Kooij, (1992), p. 116.

infrastructure in Groningen. In other locations, such public interference would have been seen as an interference with the invisible hand. This Haarlem may here illustrate. The City Council of Haarlem was in the 19th century controlled by prominent judges and solicitors, rich bankers, wealthy merchants, gentlemen of leisure and some entrepreneurs. All 25 councillors belonged to the town notability with the highest incomes, and the Council constituted a conservative-liberal stronghold, set against every from of government interference in the economic field."[265]

And so we have reached the phase, when large scale industrialisation and the mobilisation of 'the silent majority' created constellations that gradually led to the introduction of a democratic form of government, and later one of the best social welfare systems.

Industrialisation challenged many old orders and established views, such as the invisible hand and the inviolability of property rights. Industrialisation meant a recovery for the western provinces, many of which had experienced stagnation or decline for almost a century. Industrialisation also brought along rapid urban growth, which was difficult to master because of the liberal view of the inviolability of property.[266] The Housing Act of 1901 constituted a decisive breach against the attitude that private property is inviolable, and that government involvement would be a violation of the invisible hand. The act obliged major cities with a certain growth rate to set up a town plan. It also foresaw expropriation for the sake of public housing.[267]

The other major element of the 19th century, which followed in the wake of industrialisation, was the organisation of workers into trade unions. In 1872 the prohibition on organisation was abolished, leaving the way open for the formation of trade unions. The state played a central part in the process of regulating the dealings between employers and workers. This, at the time, was a matter of great controversy. Legislation in this area meant interference in what was seen as an area of forbidden access, *Verboden Toegang* as, A.Ph **Jaspers** notes.[268] The government was told that the protection of workers intended by the act will cost the entrepreneurial leaders of society their heads, which consequently will act as a boomerang on the workers.[269]

This, of course, was one version of the scenario, which repeated itself in all countries, when a solution had to be found to the inevitable; to adapt perceptions and practices towards organising workers and the introduction of general franchise, which was to come.

The Dutch government continued to play a central role in industrial relations in the very particular setting of Dutch politics, the tradition of accommodation. This form of politics is, as Arend **Lijphart** notes, a paradox to the social scientists. The political tradition of accommodation, *verzeuiling*, has its background in deep religious

[265] de Vries, Boudien, The city council and the economic élite: Haarlem 1890-1920, (1992), p. 151.
[266] Wagenaar, (1992), p. 167.
[267] Wagenaar, (1992), p. 173.
[268] Jaspers, A.Ph. Betekenis en funktie van de arbeidsovereenkomst in haar maatschappelijke context, (1982), pp. 531- 532.
[269] 'ondernemende lid van de maatschappij de kop kosten' Jaspers, (1982), p. 532.

and class divisions.[270] But instead of harbouring conflict, the Dutch people made an art out of the politics of accommodation. The divisions between social groups and classes have developed into separate and self-contained population groups, with their own ideology and own political organisations. Thus there are political parties, labour unions, employers' associations, farmers' groups, mass media and educational institutions formed on religious or social grounds. Lijphart notes that such a socially and ideologically fragmented system would appear to be highly conducive to dissension and antagonism, but instead it has turned out to be one of the most notable examples of a successful democracy.[271]

It would appear that the large autonomy of different groupings in the Netherlands has had the effect of giving the government a central coordinating role. At least this has traditionally been the case in the field of industrial relations. John P. **Windmuller** notes that government intervention in the first phase "approached at times the uttermost limits permissible in a non-authoritarian society."[272] After world war II a system of centralised wage determination was practiced, a 'guided wage policy', which worked reasonably well during 15 years. It is in this period that the Dutch social welfare schemes were created.

In the field of industrial relations Sweden offers a reverse picture. The labour partners have traditionally avoided governmental interference or legislation regulating their internal dealings. In 1906 the labour partners laid the foundation for the labour relations system through the December compromise. It was not until the 1970s that a more comprehensive legal regulation was introduced. This tradition is in line with the strategy adopted in the building of the Swedish 'folk home'. Per Albin **Hansson**, the leader of the social democrats, worked hard to achieve consensus solutions in order to carry through his reform programme. The Swedish folk home was the aim of his work. Equality was a central ideal, towards which the government aimed through high progressive taxation, which would allow a redistribution of resources in order to help people with a low income.[273]

Sweden has come to stand out as a model country in regard to human concerns in working life and social welfare. This is part of the ideology of a 'folk home', which was coined in the early part of the century, and has exercised a strong influence in Sweden at least up till the 1990s. The folk home idea reflected aspirations about what kind of a society to create when industrialisation, from the late 19th century onwards, had brought material wealth to the country.

I feel that the account of poverty is instructive in locating the problems inherent in the present trend of cutting down on social welfare provisions. We could

---

[270] Lijphart, Arend, The Politics of Accommodation: Pluralism and Democracy in the Netherlands, (1968), p. 1.
[271] Lijphart, (1968), pp. 1, 2.
[272] Cited in the International Encyclopedia of Labour Law and Industrial Relations, (IELL), the Netherlands, p 19.
[273] Åberg, Vår svenska historia, (1989), p. 516.
[273] Lis, C. & Soly, (1979), Foreword, p xi.

see above that poverty in the Netherlands did not differ fundamentally from that of other countries, despite its riches. If there was a difference, as there appears to have been, it was in degree rather than in kind. Thus to the questions posed by Lis and Soly, why poverty was a structural feature throughout the *ancien regime*, notwithstanding differences between locations and the nature of economic activity, the above account of poverty would indicate that there was no direct link between prosperity and the position of people outside the power structures. I think we can see disturbing signs of that trend again in present day societies. This lays bare some fundamental problems concerning our perception of people outside the power structures. This power structure today largely concurs with the wage labour rationale, which Christensen depicted. If a person has full-time employment, he or she enjoys a certain autonomy, which is lacking outside the wage labour model. And with changes in working patterns, an increasing number of people stand the risk of falling outside the power structure, if fundamental changes are not made in the notion of economic activity and human and social needs. As things now stand, the disciplining of the poor in the past still to a high degree permeates social welfare.

It was not until industrialisation created demands for human labour on a grand scale, that the great majority of labouring men and women became partakers in society in any real sense of the word. And this was the case thanks to the bargaining position workers had gained by organising in trade unions as well as in political parties. It would appear that it was this balance of power, stemming from interdependence that offered a ground for the introduction of standards concerning social welfare and human rights. When this interdependence is weakening, we get the pressures for cutting down or dismantling protection earlier introduced, while leaving persons in a dependent position in a web of regulations.

One reason why we appear to be back at 'square one' is that no fundamental revisions were made to the 20th century theoretical schemes, which would have reflected the aim of public policy intended to empower human beings. For this reason we have to direct attention to the theoretical currents operating beneath the legal traditions, and to the way in which provisions aimed at enhancing the position of people, have been implemented.

Chapter III

locates problems in the history of ideas

Law - a reflection of the economic rationale

The dramas in the economic world, encountered since the oil crises of the 1970s and abundantly so in the speculative waves in the 1980s, are served piecemeal. Only gradually a picture of a new rationale is emerging. Part of this new rationale is a new emphasis on economic affairs, which conveys the impression that we are all participants in a process, which earlier was confined to the inner circles of business life. Economic news has a certain excitement attached to it. How will this or that enterprise or businessman fare in this or that bargain or struggle? We often fail to accord equal importance to the fact that these enterprises and other institutions constitute people's workplaces, on which they are dependent for their living. When we are concerned with the human aspect we move, in the field of law, to the sphere of labour law and social law, and there appear to be no functional links between the economic and human or social spheres. As long as civil and commercial law are approached separately from labour and social law, all is fairly well on the western front. It is when they are contrasted that a number of problems are revealed. In order to better perceive these problems, it is instructive to direct attention to the underlying rationale of the western legal traditions, to see what causes these problems of perception. It is then to the mother of all sciences we should turn - philosophy.

An illuminating starting point for scrutinising the role of philosophy is offered by Olof **Ehrenkrona**, who considers the rule of law from an economist's point of view. When the *Rechtstaat* or rule of law emerged, he notes, the most important conditions for industrialisation had been attained.[274] This occurred when the crown had substituted wilful exercise of power by a judiciary. It was far from perfect, but the judiciary represented some efficiency, creating thereby the right conditions for economic life, Ehrenkrona notes. Risk-taking became meaningful. This meant that citizens could conclude contracts with each other, bring their agreements before an impartial judge, and enjoy the fruits of their investment. The rule of law offered certainty and thereby conditions for long term economic commitments. Entrepreneurs, be they industrialists, craftsmen or businessmen, became their own masters within the limits of the law. With the *Rechtstaat*, the civil legal order, with the right to private property and freedom of contract as its cornerstones, was consolidated and economic activities were given good protection.[275]

In the general description Ehrenkrona gives of economic development and its

[274] This Ehrenkrona does when painting a background to economic development to accompany his account of the Swedish industrialist Curt Nicolin in Nicolin, En svensk historia, (1991), p. 17.
[275] Ehrenkrona, (1991), p. 17.

conditions he starts by paying tribute to Francis **Bacon** as the personification of the scientific revolution - a precondition for industrialisation. This is because his thinking was directed towards science as a means of general progress. Bacon's investigations about the causes of things had a clear purpose - to create new things. Ehrenkrona suggests that to Bacon could be attributed a theory of 'added value' for intellectual processes, and he notes that with Bacon the dream was genuinely formulated about the domination of the intelligent, rational man over nature.[276] True it is, that Bacon advocated this, but much else of what he said has not received the same attention by posteriority.

1 Methodological challenges for modernity

Bacon lived in the 17th century, the century when natural sciences advanced on a large scale. In much 17th century writing there were signs of a loss of confidence. People found it increasingly hard to offer rational justifications for traditional beliefs, both secular and religious ones.[277] The theoretical challenge thinkers of that period were confronted with, was to divorce philosophy from religion and to devise theoretical schemes through which to account and explain different phenomena in terms of natural causes, rather than as an expression of providence. Doubt and confusion characterising this paradigmatic change, eventually gave way to the assumption - unprecedented in the Christian era - that man was to a great extent the master of his own destiny and that the earth was designed for man's terrestrial happiness, Norman **Hampson** notes.[278] Bertrand **Russell** also observes that "[a]nyone might still believe that the heavens exist to declare the glory of God, but no one could let this belief intervene in an astronomical calculation. The world might have a purpose, but purposes could no longer enter into scientific explanations."[279] This change of perception required a reassessment of knowledge on a grand scale. What the enlightenment philosophers and their followers said will therefore be looked at in this chapter with focus on law and ethics.

To enhance the conditions of business, trade and later large-scale industrial production were central concerns among the thinkers of modernity. This has made the movers of capital a central focus of concern, with the consequence that the movers of capital, rather than the population at large, have come to inhabit the paradigm of modernity. It is in this very respect that the perception of the rule of law is problematic today, because there is no genuine place for persons who find themselves outside what today is perceived of as economic activity. It is in this respect we need to seek an explanation to problems facing those who are not movers of capital, but rather its active (employees) or passive (unemployed) 'servants', and the increasing number

[276] Ehrenkrona, (1991), p. 15.
[277] Hampson, Norman, The Enlightenment, An evaluation of its assumptions, attitudes and values, (1990), p. 31.
[278] Hampson, (1990), pp. 35, 81.
[279] Russell, Bertrand, History of Western Philosophy, (1982), p. 523.

of so called atypical workers in the intersection between entrepreneurship, employment and unemployment. This is because the western legal traditions became permeated by a view of the human being as a *homo economicus*. Another associated problem is that the *Rechtstaat* idea is equally permeated by a picture of the human being as the omnipotent individual who is able to go about one's project of life in an autonomous manner. This state of affairs reflects, in part, a selective use of the thinking of modernity that can be related back to the big challenge enlightenment thinkers faced - the structure and validity of scientific concepts and arguments. As Hampson notes, "[s]cientific evidence can only answer the questions that scientists think fit to ask."[280] It is therefore important to keep in mind what motivated the enlightenment thinkers, and what relevance the challenge they faced has for present-day concerns, theirs being to find a criterion of truth, a system by which the reliability of evidence could be checked and a new model of the universe gradually assembled.[281]

The separation of philosophy from theology that this process was about gradually resulted in a comparable blend between philosophy and natural sciences, where focus became placed on the origins and functions of scientific concepts and the structure and validity of scientific arguments.[282] In the field of law this trend reached a pinnacle with the trend set by John **Austin** in the former part of the 19th century and modified by Hans **Kelsen** through his pure theory of law in the 20th century. This scientific orientation has made issues central to law, such as justice and ethics problematic, because values were divorced from the study of law. It does not eliminate values, but assign them a separate sphere.[283] One purpose of this chapter is therefore to bring forth aspects of thinking that has received less attention because of the way this theoretical heritage has been relied upon. Another purpose is to point out how the legacy of enlightenment thinkers was relied upon when large-scale law reform during the 19th century laid the foundation for today's rule of law or *Rechtstaat*, in many countries influenced by Napoleon's codifications. With the law reform movement certain views and constellations were cemented, that shed some light on the difficulties in handling economic, social and cultural rights today. It is therefore instructive, when alternative venues are sought to today's neo-liberal culture, to be aware of what these philosophers said, in contrast to how their legacy is at work today.

The role and implications of a certain paradigm is central, a pivotal question being what matters enter into focus, in other words, where attention is directed, and reversibly, what matters are left without attention. The paradigm will determine *how* we approach different phenomena and *what* questions become the object of theoretical scrutiny, and what is of equal importance, *what is taken on trust* from previous thinkers. Theories, therefore, have to be assessed against the background of major preoccupations of their time. And here, of great importance is also, what the *effects*

---

[280] Hampson, (1990), p. 21.

[281] See Hampson, (1990), p. 35.

[282] See Philosophies of the Braches of Knowledge, The Renaissance and after: from manifesto to critique, Encyclopaedia Britannica CD, 1997.

[283] For an account of this orientation, see Friedmann, Wolfgang, Legal theory, (1967), Chapters 21-25.

are of that, which is taken on trust from previous thinkers, when applied to new social settings. This can often have the effect of transforming the intentions of the original thinker, because their ideas are applied in a different context. However, what serves prevailing views and interests will easily be taken on trust, notwithstanding decisive social change, with the effect that some issues are not questioned although the way we rely on different thinkers runs counter to their intentions.

2. A new person emerging

Knowledge, freedom and happiness are central attributes in the thinking of modernity. Law, again, became an important tool for implementing the program of these thinkers. Also ethics had to be reconsidered, furnished with another foundation than the scholastic one.

Bacon was in the forefront in the paradigmatic shift that occurred in the transition from scholasticism to the enlightenment, making man a central player. Ehrenkrona's characterisation of Bacon's legacy is symptomatic of the focus posteriority has placed on the enlightenment project. Bacon was the founder of modern inductive method and a pioneer in the attempt at logical systematisations of scientific procedure.[284] These are aspects that have been taken well on trust. But much else of what Bacon said has largely gone unnoticed, because of the subsequent scientific orientation in law. Bacon's considerations about law and ethics will here be brought to the fore, to complement the legacy of Bacon as reflected in Ehrenkrona's description.

3 Bacon's aim – the 'relief of man's estate'

By separating the political and religious spheres, Bacon ceases to look for final courses. Man is the centre of the world and what man makes of himself becomes the central problem of philosophy.[285] The approach is here the same as with some Greek philosophers, but instead of the emphasis among the Greeks on virtues and justice, Bacon's attention is directed towards the 'relief of man's estate'. Bacon considered that by far the greatest obstacle to scientific progress is despair. In the '*Novum Organum*', Bacon deals less with the reasons for hope than with the need for it. The disposition of Bacon's persons, in their utopia, is one of confidence in the relief of man's estate. It is necessary to arrive at this hope in order to overcome what strains progress.[286]

Bacon does not only study appetites, he creates them, Howard **White** notes. Light and growth are central elements in his thinking. Light may show what already is

[284] Russell, (1979), p. 526.
[285] White, Howard, Peace among the Willows, The Political Philosophy of Francis Bacon, (1968), p. 14.
[286] White, (1968), p. 18, Bacon, (1858), Novum Organum, XCII, p 90/Works 4.

but has been hidden by darkness, that is, by Aristotle and scholasticism. Growth may bring forth what is not but will be. Growth is not, however, mere natural, because philosophy can also include growth, which Greek philosophy did not. Growth then may include inventions, which means that while light may help us to see growth, growth may help us to construct finer telescopes and bring more light. White observes that it was enough for philosophy to convince mankind that light and growth were joined.[287]

3.1 Bacon and the law

What Bacon said about law and ethics, has not received the same attention by posteriority as his scientific considerations. In '*De Augmentis Scientiarum*', Bacon presents a proposal for the 'amendment' of English law, which in the 19th century still was considered the most comprehensive authority on statute reform in England. David **Lieberman** points out that Bacon's contribution to the development of law has largely been neglected after the rise of Jeremy **Bentham's** law reform ideology, making scholarly consideration of law unduly narrowed and distorted.[288]

In view of how the perception of law is going to develop, and how ethics gradually is lost in a legal positivist context, Bacon's views on law are interesting. His focus lies on justice and equity rather than legislation as an instrument for the omnipotent individuals, (**Locke's** paradigm), and the liberating function of law (Bentham). But the traits are discernable. Bacon sees it as a shortcoming that only philosophers and lawyers concern themselves with the law. Philosophers, he notes, "lay down many precepts fair in argument, but not applicable to use". Lawyers again, who are "subjected and addicted to the positive rules", be they domestic law, Roman law or Pontifical law, "have no freedom of opinion, but as it were talk in bonds". Bacon notes that the consideration of law surely should belong to statesmen who have the best understanding of the condition of civil society, welfare of the people, natural equity, customs of nations and different forms of government. They should be able to determine laws by the rules and principles both of natural equity and policy.[289]

Law as a means of policy appears more in passing, whereas the quality of law is the focus of concern for Bacon. He treats law under the heading 'Example of a Treatise on Universal Justice or the Fountains of Equity'. Here he makes the following distinction between good and bad laws: "In Civil Society, either law or force prevails. But there is a kind of force, which pretends law, and a kind of law, which savours of force rather than equity. Whence there are three fountains of injustice; namely mere force, a malicious ensnarement under the colour of law, and harshness of the law itself."[290]

---

[287] White, (1968), p. 28..
[288] Bacon, De Augmentis Scientiarum (1858), Book 8, Lieberman, David, The province of legislation determined, Legal theory in eighteenth-century Britain, (1989), p. 182.
[289] Bacon, (1858), Works V, p. 88.
[290] Bacon, (1858), Aphorism 1, V, p. 88.

The primary quality that Bacon assigns law is that it should offer certainty: "Certainty is so essential to law that law cannot be just without it...It is well said also "That that is the best law which leaves least to the discretion of the judge; and this comes from the certainty of it.""[291] Despite Bacon's urge for certainty and a desire to see the discretion of judges eliminated, he was aware of the limits to the extent positive rules could secure fairness and justice. This is how he sees the end and scope of law: "The end and scope which laws should have in view, and to which they should direct their decrees and sanctions, is no other than the happiness of the citizens. And this will be effected, if the people be rightly trained in piety and religion, sound in morality, protected by arms against foreign enemies, guarded by the shield of the laws against civil discords and private injuries, obedient to the government and the magistrates, and rich and flourishing in forces and wealth. And for all these objects laws are the sinews and instruments."[292]

4 Hobbes' focus: preservation

Thomas Hobbes, who for a time was Bacon's amanuensis, offers an interesting illustration of the different directions in which thinking went, along paths paved by natural sciences. Hobbes does follow Bacon's view that law should be a matter for statesmen, but with a different emphasis and with equally different end results. In Hobbes thinking, there is not much sign of Bacon’s qualifying criteria for law, such as the happiness of the citizens and a requirement of a sound morality. His focus lies elsewhere; his concern is preservation.

What motivated Hobbes’ thinking and his theoretical creation, the Leviathan, was the tension and turbulence of his time. The general European context was one of continued struggle among the three power centres, royal power, church and aristocracy. War, economic dislocation, constitutional dispute and religious passion were principal destabilising forces in early modern Europe. For Hobbes the civil war in England in the 1640s, provided an immediate incentive for his thinking on the state. This made him convinced of the overwhelming importance of state authority to be embodied in an absolute ruler.[293] This did appeal to his contemporaries, particularly rulers, who strove to assume absolute power, as a general feature in Europe.

Hobbes combines in his thinking a number of currents of his time, the social contract idea, which relates him to a new orientation in natural law; he was an empiricist, and he exposes a scientific method, for which de draws strong influence from Galileo.[294] Power and contract combine in Hobbes' scheme. It is through power that contract and equilibrium is maintained. To this end, the citizens should submit themselves before the sovereign, who also represents them in relation to foreign

[291] Lieberman, (1989), p. 79, Bacon, (1858), Book 8 chap 3,
[292] Bacon, (1858), Book 8, aphorism 5, Works 5, p 89.
[293] Friedman, (1967), p. 120, Hobbes, Leviathan, or The Matter, Forme, & Power of a Common-wealth, Ecclesiasticall and Civill (1651), p. 2, (1986), p. 82.
[294] see Friedmann, (1967), p. 120, Russell, (1982), p, 531.

powers. Here we see no standards, to which human conduct and that of the sovereign could be related.

"The sovereign is immune from criticism; his position as "personator" of the citizenry allows them no room for complaint or dissent", Elizabeth **Wolgast** notes. True, she says, "his function is to secure their persons and property from threats among themselves, but he has wide latitude in how to do this, and since his actions belong to the citizens, their criticism has no purchase, no basis."[295] Wolgast's observation about this construction is that the Hobbesian citizens have the worst of both worlds: "they are treated like incompetent children but are fully responsible for whatever government does."[296]

4.1 Moral implications of Hobbes' legacy

Hobbes has made man an object of external study, explaining what he is and how he acts. In this way Hobbes sets out to construct his Common-wealth, by assembling, first man out if his parts; thereafter he proceeds from a single individual to people 'in Trayne', out of which he constructs his commonwealth, the Leviathan, as one form of artificial person.[297]

To Hobbes, the most important thing the state should offer is security. It is

[295] Wolgast, Elizabeth, The Ethics of an Artificial Person, (1992), Introduction, pp. 1-2.

[296] Wolgast, (1992), p. 18. According to the American Bar Association code, a lawyer is not culpable in her pursuit of a client's interest so long as no law is violated. The lawyer acts for the client, not for himself. This makes the client detached from the factual act, for which he stands to benefit or suffer. p. 20. In the corporate word responsibility is just as diffuse, Wolgast notes, and points to how this has the effect of evoking a strategy whereby responsibility is diffused to avoid victimisation. One strategy is to avoid putting things clearly in writing. Group decisions equally make responsibility less clear to define. Wolgast points to how the need to hold someone responsible when corporate deeds are criticised may lead to a curious perversion of attitudes towards moral responsibility, pp. 29, 30.

[297] Hobbes, Part I, Chapter, I, (1651), p. 3, (1986), p. 85. This is how he pictures the state, the Leviathan:

"For by Art is created the great LEVIATHAN called a COMMON-WEALTH, or STATE, (in latine CIVITAS) which is but an Artificiall Man; though of greater stature and strength than the Naturall, for whose protection and defence it was intended; and in which, the *Sovereignty* is an Artificiall *Soul*, as giving life and motion to the whole body; the *Magistrates*, and other *Officers* of Judicature and Execution, artificiall *Joynts*; *Reward* and *Punishment* (by which fastned to the seate of the Soveraignty, every joynt and member is moved to performe his duty) are the *Nerves*, that do the same in the Body Naturall; The *Wealth* and *Riches* of all the particular members, are the *Strength*; *Salus Populi* (the *peoples safety*) its *Businesse; Counsellors*, by whom all things needfull for it to know, are suggested unto it, are the *Memory*; *Equity* and *Lawes*, an artificiall *Reason* and *Will*; *Concord*, *Health*; *Sedition*, *Sicknesse*; and *Civill war*, *Death*. Lastly, the *Pacts* and *Covenants*, by which the parts of this Body Politique were at first made, set together, and united, resemble that *Fiat*, or the *Let us make man*, pronounced by God in the Creation." The book Leviathan consists of a description of this artificial man. And this is how Hobbes presents his approach: "To describe the Nature of this Artificiall man, I will consider first, the *Matter* thereof and the *Artificer*; both which is *Man*. Secondly, How and by what *Covenants* it is made; what are the *Rights* and just *Power* or *Authority* of a *Sovereign*; and what it is that *preserveth* and *dissolveth* it. Thirdly, what is a *Christian Common-wealth*. Lastly, what is the *Kingdome of Darkness*."

men's passion that causes this need. Passion brings people into a condition of war with each other "when there is no visible Power to keep them in awe, and tye them by feare of punishment to the performance of their Covenants, and observation of (the) Lawes of Nature."[298] Hobbes developed the notion of an artificial person to explain how government represents citizens, but how, Wolgast asks “can such a model apply to modern relations between fully competent and equal humans, professionals and their clients, government and the citizens?” Wolgast analyses this question in her book ‘The Ethics of an Artificial Person’. She there looks at Hobbes’ legacy in present-day institutions, as it is displayed in the notion of legal agency. She observes that the most curious feature of the various forms of artificial persons is that somebody else than the person that performs an act in a physical sense is considered to have performed that act. Wolgast points to the problematic moral character of this legacy because of the diffuse nature of responsibility that it involves.[299]

5 Locke lays the foundation for rights

"Political power...I take to be a right of making Laws with Penalties of Death, and consequently all less Penalties, for the Regulating and Preserving of Property, and of employing the force of the Community, in the Execution of such Laws, and in the defence of the Common-wealth from Foreign Injury, and all this only for the Publick Good."[300] In this somewhat drastic way John Locke sets out his considerations of government in his ‘Second Treatise of Government’**.**

Locke is an outstanding representative of those thinkers who put effort into dismantling the absolute power of the sovereign, for which Hobbes' theories had provided a legitimation. Aspirations for freedom and recognition of the individual as a rational and independent agency reflect thinking in Locke's time. Continuous growth in commerce, an accumulation of wealth to which colonisation had contributed, improved agricultural techniques, and an optimism about the quantity of natural resources, all combined to strengthen the position of the merchant and manufacturing middle class. They had thus achieved a factual power position in society, for which there was no corresponding recognition in the political order.[301]

Both Hobbes and Locke operate with the notion of the contract, but instead of seeing the contract as personified in the sovereign as Hobbes does, the contract is in Locke’s thinking seen as an expression of the will of the people,[302] paving the way for the rights of citizens. According to Locke political power is derived from the state of nature, which is a “State of perfect Freedom” for men to order their actions and dispose of their possessions, and persons, as they see fit “within the bounds of the

[298] Hobbes, Part II, Chapter 17, (1651), p. 85, (1986), p. 223.
[299] Wolgast, (1992), pp. 1, 2.
[300] Locke, John, Two Treatises of Government, (1965), Book II, Chap. I paragraph 3, p 308.
[301] See Ylikangas, Varför förändras rätten - lag och rätt som en del av den historiska utvecklingen, (1983), pp. 131-133.
[302] See Tolonen, Stat och rätt, En studie över lagbegreppet, (1986), pp. 38-40.

Law of Nature, without asking leave, or depending on the will of any other man."[303] To Hobbes the legitimation of political power was a compact coming out of everybody's war against everybody. Locke again sees the seizure of absolute power of one man over another as placing men in war with one another "it being to be understood as a Declaration of a Design upon his Life."[304] Where passions were a legitimating ground for state power for Hobbes, for Locke it is natural rights. "The *State of Nature* has a law of nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty and Possession."[305]

5.1 The role of property

Property rights are a central legacy of Locke. He considers them essential to individual rights and freedom. The right to property he bases on natural reason, which tells us that man has a right to preservation, for which he needs, beside food, also other things which nature affords for his subsistence.[306] Locke pursues an argumentation in favour of private property as against communal property. He sets out to show how men could gain possession of that which God gave mankind in common, without an explicit agreement of the whole collectivity.[307] Locke begins this argument by noting that "[t]hough the Earth, and all inferior Creatures be common to all Men, yet every man has a *Property* in his own *Person.*"[308] From this premise he develops the right to property as man's labour of his body and the work of his hands, which only he is entitled to. "The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property"*. In this way the rights of others are excluded, but with a qualification "at least where there is enough, and as good left in common for others."[309]

At this stage of argumentation Locke considers that there is a limit to the amount of property a man can appropriate from nature. In addition to the requirement that enough and as good be left to others, he introduces a further limit, the extent to which property can be enjoyed. "The same Law of Nature, that does by this means give us Property, does also *bound* that *Property* too... how far...? To *enjoy*. As much as any one can make use of to any advantage of life before it spoils; so much he may by his labour fix a Property in". So, "[w]hatever is beyond this, is more than his share

[303] Locke, (1965), paragraph 4, lines 1-7, p. 309.
[304] Locke, (1965), paragraph 17, lines 1-4, p. 320.
[305] Locke, (1965), paragraph 6, lines 7-11. p. 311
[306] Locke, (1965), paragraph 25, lines 1-4, p. 327.
[307] Locke, (1965), paragraph 25, lines 18-21, p. 327
[308] Locke, (1965), paragraph 27, lines 1-3, p. 328.
[309] Locke, (1965), paragraph 27, lines 4-15, p. 329.

and belongs to others."[310] Locke also sets a limit to landed property. "As *much Land* as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his *Property*. He by his Labour does, as it were, inclose it from the Common."[311] We here find a 'natural' limitation to property, which shares features with the distinction Aristotle makes between the means needed for the household, as distinct from wealth accumulated for its own sake. There is, however, a certain difference in focus in these qualifications. Aristotle's criterion is that a natural limit is what is needed for the self-sufficiency of the household, for a good life, whereas for Locke it is as much as a person can consume.

The limit to property that Locke here appears to set is soon to be substituted by another notion. Locke observes that this rule would hold "had not the *Invention of Money*, and the tacit Agreement of Men to put a value on it, introduced (by Consent) larger Possessions, and a Right to them."[312] From here on Locke turns property into a utilitarian 'Publick Good'. He, who appropriates land to himself by his labour, does not lessen but increase the common stock of mankind. “For the provisions serving to the support of humane life, produced by one acre of inclosed and cultivated land, are (to speak much within compasse) ten times more, than those, which are yielded by an acre of Land, of an equal richnesse, lyeing waste in common. And therefore he, that encloses Land and has a greater plenty of the conveniencys of life from ten acres, than he could have from a hundred left to Nature, may truly be said, to give ninety acres to Mankind."[313]

Russell notes that the emphasis, the worship of property to which Locke and his followers inclined, has had a great political defect. But here it is important to read Locke in his context. It was not only the old structures, which impeded commerce, to which Locke objected. Involved in this was also a different kind of perception. Russell notes that most opponents of Locke's school had an admiration for war and military virtues and contempt for comfort and ease. Military virtues thus clashed with the self-interest which Locke and his followers advocate. "Enlightened self-interest is, of course, not the loftiest of motives", Russell notes, but "those who decry it often substitute, by accident or design, motives which are much worse, such as hatred, envy and love of power."[314]

Locke responded to needs in his time. The crucial point is how his thinking has been relied upon. Agreement was Locke's means of introducing laws, and agreement or contract was the means through which persons regulated their internal dealings, which law should protect with the aid of penalties against transgression. Individual freedoms and property were prerequisites that the government should protect. These were wanting in Locke's time because of power vested in monarchs and the impediment the middle class felt from old social structures. There was thus a social command for Locke's thinking in his own days. But the cementing of property rights,

[310] Locke, (1965), paragraph 31, lines 4-12, p. 332.
[311] Locke, (1965), paragraph 32, lines 5-8, p. 332.
[312] Locke, (1965), paragraph 36, lines 41-44, p. 335.
[313] Locke, (1965), paragraph 37, lines 1-22, pp. 335-336.
[314] Russell, (1982), p. 622.

central to classical rights and liberties, to which Locke's thinking strongly contributed, poses a problem for the subsequent development of rights in the form of economic, social and cultural rights.

6 A new moral foundation

It is instructive at this stage to direct attention to the kind of persons emerging from the theoretical schemes and the ethical schemes associated with them, in the transition from scholasticism to the enlightenment. Original sin is out. With Locke, man is also liberated from Hobbes' tutelage. Religion is still there as a foundation, but now of a very different kind than in the scholastic paradigm. Hampson observes about this changing perception of human nature that it was, in fact, "the very basis for optimism about the moral validity of all that tangle of relationships that went by the name of "nature"… It confirmed the benevolence of Providence, prescribed his duty to the citizen and ensured the harmonious concordance of individual self-interest and a universal moral order."[315] This observation sheds some light on the narrow perception of man in Locke's time. The man Locke talks about is not a woman, neither is he a man who serves other people, such as labourers and serfs. When Locke talks about freedom and liberty, it does not include the whole population. So when general franchise was introduced during the 20th century, freedom and equality was extended in form, but largely void of substance. In David **Hume's** thinking we do, however, get a differentiation of the pattern of thought Locke represents.

7 Hume differentiates Locke's picture

Hume considers the role and function of law and property in 'An Enquiry concerning the Principles of Morals' under the heading 'On Justice'. "If we examine the *particular* laws, by which justice is directed, and property determined; we shall (still) be presented with the same conclusion. The good of mankind is the only object of all these laws and regulations. Not only is it requisite, for the peace and interest of society, that men's possessions should be separated; but the rules, which we follow, in making the separation, are such as can best be contrived to serve farther the interests of society."[316] It would appear that Hume here gives a solid support for the 'sanctity' given property rights in the western legal traditions. But we need to be aware of Hume's intentions. Hume's aim was to gain an understanding of social phenomena, and his concerns were human and moral. He considered that human psychology is basic to other studies, such as politics and morals. His 'empirical method' was introspection and the application of strict reasoning.[317] Thus, in order for property, like

[315] Hampson, (1990), p. 106.
[316] Hume, David, An Enquiry concerning the Principles of Morals, (1966), p. 25.
[317] I thank Elizabeth Wolgast for clarifying this point.

the laws, to direct justice, they should serve the *good*, peace and the interest of society.[318] On this score, Hume is in search of those rules of justice and property that would best promote the public interest. He advances the idea of merit as a legitimation for possessions, but notes that "so great is the uncertainty of merit, both from its natural obscurity, and from the self-conceit of each individual, that no determinate rule of conduct would ever result from it.[319] He also discusses equal distribution of property, which he considers useful but impracticable.[320] His conclusion is that in order to establish laws for the regulation of property, "we must be acquainted with the nature and situation of man; must reject appearances, which may be false, though specious; and must search for those rules, which are on the whole, most *useful* and *beneficial*. Vulgar sense and slight experience are sufficient for this purpose; where men give not way to too selfish avidity, or too extensive enthusiasm."[321]

Hume takes a practical approach towards property that follows the lines of thought of Locke, and reflects, without doubt, generally held views: "Who sees not, for instance, that whatever is produced or improved by a man's art or industry ought, for ever, to be secured to him, in order to give encouragement to such *useful* habits and accomplishments? That the property ought also to descent to children and relations for the same *useful* purpose? That it may be alienated by consent, in order to beget that commerce and intercourse, which is so *beneficial* to human society? And that all contracts and promises ought carefully to be fulfilled, in order to secure mutual trust and confidence, by which the general *interest* to mankind is so much promoted?"[322]

Here we see pictured the rationale of a society preoccupied with business and manufacturing, and later industry. We see a confirmation of an approach to property and industry as central promoters of the good of society and mankind, well taken on trust in later times. But Hume also stresses that principles of humanity must enter a consideration of the public interest.

What Hume intended by ethical considerations associated with the good of society, he expresses as follows: "We surely take into consideration the happiness and misery of others, in weighing the several motives of action, and incline to the former, where no private regards draw us to seek our own promotion or advantage by the injury of our fellow-creatures. And if the principles of humanity are capable, in many instances, of influencing our actions, they must, at all times, have *some* authority over our sentiments, and give us a general approbation of what is useful to society, and blame of what is dangerous or pernicious. The degrees of these sentiments may be the subject of controversy; but the reality of their existence, one should think, must be admitted in every theory or system."[323]

---

[318] Hume, (1966), p. 25.
[319] Hume, (1966), p. 26.
[320] Hume, (1966), pp. 26-28.
[321] Hume, (1966), p. 28.
[322] Hume, (1966), p. 28.
[323] Hume, (1966), p. 61.

8 Bentham's utility formula

To Bentham nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. This is the starting point of his theory of utility to which the question of pleasure or pain, the standard of right and wrong, and the chain of causes and effects relate.[324] Utility is "that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness. I say of every action whatsoever; and therefore not only of every action of a private individual, but of every measure of government."[325]

Through his utility formula and law reform program, Bentham acts as a midwife in emancipating man and society from old structures. The context is the advent of industrialisation, which had further strengthened the prosperous middle class. Bentham stroke a central cord, when he advanced his utility formula, because he articulated aspirations in society, which were held back by the conservative Blackstonain tradition, to which his thinking provides an alternative He advocates an assessment of political institutions with utility as a practical moral guide, whereas law is the means through which to reform society.

To Bentham, the community is a fictitious body composed of the individuals of which the community is constituted. The interest of the community is in his construction the sum of the interests of the several members who compose it.[326] The legislator should therefore seek to maximise the happiness of the entire community, by creating an identity of interest among the members of society. Penalties for mischievous acts would make it unprofitable for a man to harm his neighbour.[327]

In ‘A Fragment of Government’ Bentham paves the way for his theory of utility, which he conceives of as having universal applicability. The principle of utility is to Bentham both normative and moral. "Of an action that is conformable to the principle of utility one may always say either that it is one that ought to be done, or at least that it is not one that ought not to be done. One may say also, that it is right it should be done; at least that it is not wrong it should be done: that it is a right action; at least that it is not a wrong action. When thus interpreted, the words ought, and right and wrong, and other of that stamp, have a meaning: when otherwise, they have none."[328]

[324] Bentham, An Introduction to the Principles of Morals and Legislation, (1907), Chap I, I.
[325] Bentham, (1907), chapter I, II.
[326] Bentham, (1907), chap I, III.
[327] Western Philosophical Schools and Doctrines, Growth of classical English Utilitarianism, Encyclopaedia Britannica, (1997)
[328] Bentham, (1907), I.X.

8.1 Legal reform

In 'The Theory of Legislation' Bentham presents principles that are to govern legislation, instead of 'the quicksands of prejudice and instinct', upon which he considers that legislation up till then has to a great extent been based.[329] He suggests that we need a 'moral thermometer' to make us perceive all the degrees of happiness and misery; that legislation "ought at last to be build upon the immoveable basis of sensations and experience."[330] For this purpose we need a pathological perception of law equalling that, which is used in medicine. "It has not been introduced into morals, where it is equally needed, though in a somewhat different sense."[331]

Bentham states that all objects that the legislator is called upon to distribute among the members of the community may be reduced into two classes *rights and obligations.* Although rights and obligations are distinct and opposite in their nature, they are, at the same time simultaneous in their origin and inseparable from one another. "The legislator ought to confer rights with pleasure, since they are in themselves a good; he ought to impose obligations with reluctance, since they are in themselves an evil. According to the principle of utility, he ought never to impose a burden except for the purpose of conferring a benefit of a clearly greater value."[332] Retrenchments on liberty are inevitable, Bentham notes, but these retrenchments must be measured against the sentiment of pain associated with this. From this follows that "no restrictions ought to be imposed, no power conferred, no coercive law sanctioned, without a sufficient and specific reason."[333] "What does simple reason tell us?", he asks and presents the following propositions: "The only object of government ought to be the greatest possible happiness of the community. The happiness of an individual is increased in proportion as his sufferings are lighter and fewer, and his enjoyments greater and more numerous. The care of his enjoyments ought to be left almost entirely to the individual. The principal function of government is to guard against pains."[334]

In the distribution of rights and obligations, where happiness thus constitutes the guiding principle, Bentham advances four subordinate ends: subsistence, abundance, equality and security. He thereby assigns law a function of providing subsistence, producing abundance, favouring equality and maintaining security.[335] Among these prerequisites, Bentham singles out security as the principal object of law. "Of these objects of law, security is the only one which necessarily embraces the future. Subsistence, abundance, equality, may be considered in relation to a single

---

[329] Bentham, Jeremy, The Theory of Legislation, (2000), p. 324, in Selected Writings on Utilitarism

[330] Bentham, (2000), p. 324.

[331] Bentham, (2000), Part I – Objects of the Civil Law, p.325.

[332] Bentham, (2000), p. 313.

[333] Bentham, (2000), p. 314

[334] Bentham, (2000), p. 315

[335] Bentham, (2000), p. 316.

moment of present time; but security implies a given extension of future time in respect to all that good which it embraces. Security then is the pre-eminent object."[336] Security is associated with expectation. "It is hence that we have the power of forming a general plan of conduct; it is hence that the successive instants which compose the duration of life are not like isolated and independent points, but become continuous parts of a whole. *Expectation* is a chain which unites our present existence to our future existence, and which passes beyond us to the generation which is to follow. The sensibility of man extends through all the links of this chain."[337]

When Bentham advanced this theory of utility, it offered a means of reforming the society of his day against vested interests of the upper strata in society. This idea of utility, as it has been commonly applied, particularly so for improving economic competitiveness, has come to constitute a disadvantage for persons in a vulnerable position, whose position have been sacrificed for 'the greatest happiness of the greatest number'. This is a standard scenario in economic life, the effects of which are clearly discernable in working life. This was, however, not what Bentham had in mind. Commenting on the opposition mounted against his utility formula, by an outstanding officer in his time, who alleged that the principle of utility is a dangerous principle, Bentham notes: "Saying so, he said that which, to a certain extent, is strictly true: a principle, which lays down, as the only right and justifiable end to Government, the greatest happiness of the greatest number - how can it be denied to be a dangerous one? Dangerous it unquestionably is, to every government which has for its actual end or object, the greatest happiness of a certain one, with or without the addition of some comparatively small number of others, ... Dangerous it therefore really was, to the interest - the sinister interest - of all those functionaries, himself included, whose interest it was, to maximise delay, vexation, and expense, in judicial and other modes of procedure, for the sake of the profit, extricable out of the expense".[338]

9 Mill combines different orientations

Mill's thinking about rights and ethics is of interest here because of his attempt to synthesise outstanding features in philosophy during the past 200 years. In his work 'Utilitarianism', Mill investigates the relations of justice, utility, individual interests and general interest.[339] In this exercise he takes Bentham's utility formula as a point of departure.[340]

Mill notes regarding morals and law that "though in science the particular truths precede the general theory, the contrary might be expected to be the case with a practical art, such as morals or legislation. All action is for the sake of some end and

[336] Bentham, (2000), p. 317.
[337] Bentham, (2000), p. 332.
[338] Bentham, (1907), footnote to I. XIII.
[339] Friedmann, (1967), p. 320.
[340] Bentham, (1907), p. 2.

rules of action, it seems natural to suppose, must take their whole character and colour from the end to which they are subservient."[341]

Although Bacon, Hume and also Kant noted that ethics involved practical matters, none of them have, to my knowledge, made such a clear distinction between science and morals as part of practical knowledge, and drawn the conclusion of this difference at a level of method. This is a distinction that Aristotle also made, which for paradigmatic reasons disappeared after his time. This distinction is central in regard to law as well, a distinction that will disappear anew with the legal positivist orientations.

Mill initiates his discussion on utilitarianism by pointing to the connection between justice and utility. He notes that in all ages of speculation the idea of justice has constituted a major obstacle to the doctrine that utility or happiness is the criterion of right and wrong. He draws the conclusions that "the idea of justice supposed two things; a rule of conduct, and a sentiment which sanctions the rule. The first must be supposed common to all mankind, and intended for their good. The other (the sentiment) is a desire that punishment may be suffered by those who infringe the rule". This sentiment Mill pictures as the "animal desire to repeal or retaliate a hurt or damage to oneself, or to those with whom one sympathises, widened so as to include all persons, by the human capacity of enlarged sympathy, and the human conception of intelligent self-interest. From the latter elements, the feeling derives its morality; from the former, its peculiar impressiveness, and energy of self-assertion."[342]

To have a right, means to Mill to have something that society ought to protect. "If the objector goes on to say why it ought, I can give him no other reason than general utility. If that expression does not seem to convey a sufficient feeling of the strength of the obligation, nor to account for the peculiar energy of the feeling, it is because there goes to the composition of the sentiment, not a rational only, but also an animal element, the thirst for retaliation; and this thirst derives its intensity, as well as its moral justification, from the extraordinarily important and impressive kind of utility which is concerned. The interest involved is that of security, to every one's feeling the most vital of all interests."[343]

Mill closes his considerations of the connection between utility and justice by noting that "[j]ustice remains the appropriate name for certain social utilities which are vastly more important, and therefore more absolute and imperative, than any others are as a class (though not more so than others may be in particular cases); and which, therefore, ought to be, as well as naturally are, guarded by a sentiment not only different in degree, but also in kind; distinguished from the milder feeling which attaches to the mere idea of promoting human pleasure or convenience, at once by the more definite nature of its commands, and by the sterner character of its sanctions."[344]

---

[341] Mill, John Stuart, Utilitarianism, On Liberty and Considerations of Representative Government, (1984), p. 2.
[342] Mill, (1984), p. 55.
[343] Mill, (1984), p. 56.
[344] Mill, (1984), p. 67.

In his essay ‘On Liberty’, Mills draws a demarcation between individual freedom, and the nature and limits of the power, which can be legitimately exercised by society over the individual.[345] His stance is that both the individual and society will receive its proper share, if each is entitled to those matters that particularly concern them respectively. Thus, the individual should be entitled to that part of life, in which the individual is interested, and society to that which chiefly interests society.[346] Along these lines he supported proposals that were radical in his time, such as women's suffrage, state-supported education for all. On utilitarian grounds he also advocated freedom of speech and expression and the non-interference of government or society in individual behaviour that did not harm anyone else.[347]

10 Kant separates law and morals

For the legal tradition on the European continent, Immanuel **Kant’s** thinking is central. Kant makes a clear distinction between law and morality. His scheme presupposes a law (legislation) satisfying certain fundamental rights of the individual. The problem, in a legal positivist perspective, is that his scheme pictures law as it ought to be, and Kant does not discuss the discrepancy between law as it is and as it ought to be. His postulates are thus addressed to the legislator. The function of the state again, is essentially that of the guardian of the law. "When the sovereign limits himself to his proper task of maintaining the state as an institution of the administration of justice, and interferes with the welfare and happiness of citizens only so far as is necessary to secure this end, when, on the other hand, the citizen is allowed freely to criticize acts of government but never seeks to resist it - then we have this union of the spirit of freedom with obedience to law and loyalty to the state, which is the political ideal of the state."[348]

Legality is a matter of action in conformity with an external standard set by the law.[349] Law Kant defines as follows: "Law is the aggregate of the conditions under which the arbitrary will of one individual may be combined with that of another under a general inclusive law of freedom."[350]

Morality is for Kant a matter of the internal motives of the individual. He analyses critically the commonly accepted 'good' things like health, wealth and friendship, noting that these are not good in all circumstances, but only insofar as they are conjoined with something that is unqualifiedly good and this he singles out as a good will. To Kant, good will represents the effort of rational beings to do what they ought to do, rather than to act from inclination or self-interest. The traditional virtues

[345] Mill, On liberty, (1984), p. 69.
[346] Mill, (1984), p. 143.
[347] Enecyclopaedia Britannica (1997)
[348] Cited by Friedmann, (1967), p. 161.
[349] Friedmann, (1967), p. 159.
[350] Friedmann, (1967), p. 159.

of intelligence, wit, judgement and other talents of the mind such as courage, resolution, perseverance, good and desirable as they are they do, however, in many respects not guarantee 'goodness' if the character is not good. This equally applies to what is called fortune or happiness.[351] A good will is not good because it achieves good results. Even if it were unable to attain the ends it seeks, it would still be good in itself and have a higher worth.[352]

Reason alone is, in Kant's view, a very inefficient instrument for the achievement of happiness. What one can observe, he notes, is that the more people cultivate their reason, the less likely they are to find happiness. He concludes that reason is not intended to produce happiness, but to produce a good will. Good will and happiness are complementary; a person of good will deserves happiness. The supreme good (virtue) when conjoined with happiness in proportion to it constitutes the greatest good *(summum bonum*).[353]

The relationship between a good will and duty Kant pictures as follows: a good will is one, which acts only for the sake of duty. Human actions have inner moral worth only if they are performed from duty. Actions that result from inclination or self-interest may be praiseworthy if they happen, for whatever reason, to accord with duty, but they have no inner worth. Those who fail to understand properly the concept of duty may be tempted to act from motives, which may be in accordance with duty or may be contrary to it. But even action in accordance with duty is not enough; only respect for duty gives an action inner moral worth.[354]

10.1 Kant's categorical imperative

Kant's first formulation of the categorical imperative requires an individual to obey a maxim that can, without contradiction, be willed to be a rule for everyone. This means that the essence of morality lies in acting on the basis of an impersonal principle that is valid for everyone, including oneself. There is therefore but one categorical imperative: Act only on the maxim whereby you can at the same time wish that it should become a universal law.[355]

Kant’s categorical imperative is a twofold test. It requires first, that maxims for moral action be universalised without logical contradiction, and second, that they be universal directives for action, which do not bring the will into disharmony with itself by requiring it to will one thing for itself, and another thing for others.[356]

The social implications of Kant's categorical imperative is that it requires us to treat all human beings as ends in themselves and never as merely means to other ends.

---

[351] Albert, Ethel M, Denise, Theodore C, Peterfreud, Sheldon P, Great traditions in Ethics, (1988), p. 181.
[352] Albert & al., (1988), p. 182.
[353] Albert & al., (1988), p. 184.
[354] Albert & al., (1988), pp. 184-185.
[355] Albert & al., (1988), pp. 190-191.
[356] Albert & al., (1988), p. 191.

We should respect all human beings impartially and avoid exploiting anyone. Ends that are ends only because they are desired give us hypothetical imperatives, but if there is an end in itself the imperative to seek it is independent of desire and is therefore a categorical imperative.[357]

According to Kant, every empirical element is not only quite incapable of being an aid to the principle of morality. It is even highly prejudicial to the purity of morals, for the proper and inestimable worth of an absolutely good will consists just in this, that the principle of action is free from all influence of contingent grounds, which alone experience can furnish.[358]

Kant deduces his legal philosophy from certain fundamental principles, discovered through an inquiry into the human mind.[359] He holds an individualistic conception of society, seeing the social contract as a hypothesis of reason.[360] Endowed with reason, man is at the same time distinct from nature and capable of dominating it. He thereby substitutes the psychological and empirical methods by a rationalistic and critical one, attempting to base the rational character of life and world, not on the observation of facts and matter, but on human consciousness itself.[361]

That human consciousness can be deceptive W **Friedmann** illustrates by pointing out how prejudice sets in when Kant talks about equal liberty, and at the same time proclaims wide patriarchal rights of the head of the household over the family.[362] In the field of law, Kant follows Rousseau's tradition in that in order to be just law must satisfy certain fundamental rights of the individual. The challenge today is to extend these rights to every member of the society.

11 A differentiation of the legal positivist paradigm

Locke and Kant were influential in setting the path for legal positivism in their common law and continental law traditions respectively. Here we have an indication of the lines of thought onto which the ideas of the rule of law and the *Rechtstaat* idea were developed in the 19th century. In this order equality before the law and the separation of judiciary and executive functions constitute basic principles.[363]

Locke and Kant also stand as 'founding fathers' for classical rights and liberties. Both Locke's and Kant's schemes had the effect of cementing certain states of affairs which could not be questioned within that same scheme. For Locke it was the right to property, for Kant it was what the law said. Law thereby becomes a primary factor in the dealings among individuals, and in the relation between individuals and the state.

[357] Albert & al., (1988), p. 193.
[358] Albert & al., (1988), p. 195.
[359] Friedmann, (1967), pp. 157-158.
[360] Friedmann, (1967), p. 128.
[361] Friedmann, (1967), pp. 157-158.
[362] Friedmann, (1967), p. 160.
[363] See Friedmann, (1967), p. 422.

In the *Rechtstaat* or rule of law, the requirement that all be equal before the law, formal equality, tells us nothing about whether individuals are equal in a factual sense. An implication of this is that the process of accommodating competing interests, which precedes legislation, is not extended to the stage of implementation. We are thus faced with a situation where a focus on formal equality in reality may lead to unfair situations, without means of correcting this in the process of legal administration.

A legal positivist approach also hides from view the different nature of different rights and the fact that they more often than not come into conflict with one another. The logic, according to which law is designed, makes law incapable of dealing with competing rights with a view of their accommodation. The dichotomy legal/illegal makes law a zero-sum game, because in a clash of interest one will be the winner, having the right on his side, at the cost of the other, instead of an accommodation between the competing rights in question. Here resides part of the problem concerning economic, social and cultural rights, because classical rights and liberties are so solidly based on property-rights, with all the liberties that go along with them. In addition, a utilitarian calculus as often applied in practice, hides from view the fact that a utility calculus and rights do not 'meet'. If it is in the general interest that industry be competitive or public administration cost-effective, a consideration of the rights and interests that are sacrificed in the process do not receive a hearing on equal terms.

12 'The architect of fortune'

Francis Bacon set the path for different theoretical orientations of modernity. What he said about man as the architect of one's fortune may assist in locating problems and remedies. As a novelty in his time, Bacon had allocated moral philosophy to the knowledge of man segregate. Moral knowledge is concerned with the will of man. "The will is governed by right reason, seduced by apparent good, having for its spurs the passions, for its ministers the organs and voluntary motions."[364] Bacon divides moral knowledge into two principal parts 'The *Exemplar* or *Platform* of Good' and 'the *Regiment* or *Culture of the Mind*' (*Georgics of the Mind*). The first category describes the *nature* of good the other *rules how to accommodate the will of man thereunto*."[365]

The scheme Bacon advances for man in society is knowledge of man congregate, civil knowledge. This is his scheme of the 'architecture of fortune', which consists in the knowledge of conversation and negotiation or business.[366] Inquiring into civil knowledge Bacon notes that "[f]irst, therefore in this, as in all things which are practical, we ought to cast up our account what is in our power and what not; for the one may be dealt with by way of alteration, but the other by way of application

[364] Bacon, (1858), Book VII, chap 1, p 3.
[365] Bacon, (1858), B 3.
[366] See White, (1968), pp. 29-30.

only."[367] Three things are to be considered, the different characters of dispositions, the affections, and the remedies. Of these, Bacon notes, only the last, the remedies, is in our power, the two former not. Yet, he notes, "the inquiry into things beyond our power ought to be as careful as into those within it; for the exact and distinct knowledge thereof is the groundwork of the doctrine of remedies, that they may be more conveniently and successfully applied."[368] Bacon observes that this part of knowledge for the most part is omitted in Morality and Policy, and that this knowledge could "shed such a ray light on both sciences."[369] This distinction we need today as well, partly because of the view of human beings as omnipotent, a legacy of Bacon, which today as well, tend to conceal from view a number of problems facing human beings, affecting thereby the search for appropriate remedies.

In regard to matters which are within man's own command, Bacon points out the need to inquire into the strength and energy of custom, exercise, habit, education, imitation, emulation, company, friendship, praise, reproof, exhortation, fame, laws, books, studies, and the like. "For these are the things that rule in morals; these are the agents by which the mind is affected and disposed."[370]

Bacon concludes his consideration of the culture of the mind "with that remedy, which is of all other means the most compendious and summary; and again the most noble and effectual to the reducing of the mind unto virtue, and placing it in the state nearest to perfection; which is, *the electing and propounding unto a man's self good and virtuous end of his life and actions; such as may be in a reasonable sort within his compass to attain*."[371]

13 Problems and remedies

Bacon's characterisations can shed some light on the nature of the problems we face today and their remedies. We need, first, to broaden the perception of a human being from the narrow focus of man as a *homo economicus*, to other forms of good and virtuous ends of life and actions that are within a person's reasonable compass to attain. The notion of personal autonomy serves this purpose. To direct attention to the degree of autonomy a person enjoys is one way of giving persons form, shape and intentions. In this way a person's project of life is displayed, allowing attention to be directed towards self-realization in addition to the well cemented focus on the self-interested person, whose aims primarily are conceived of as economic. By also focussing on a particular context, it is possible to catch sight of what is in a person's power to attain and what is not, when persons in today's neo-liberal culture are supposed to be their own architect of fortune.

[367] Bacon, (1858), 7th book, Chap. III, p. 20.
[368] Bacon, (1858), pp. 20-21.
[369] Bacon, (1858), p. 21.
[370] Bacon, (1858), p. 24.
[371] Bacon, (1858), pp. 27-28.

As Bacon proposes, it is equally vital to carefully scrutinise things beyond our power, because, as he notes, this is the groundwork of the doctrine of remedies, that they may be more conveniently and successfully applied. And here we need to be aware of what it is that influences our perception, those elements that rule in morals, to put it in Bacon's words, because they condition our perception. The legacy of Locke and Hobbes are central in this regard. Locke has contributed to a cementation of property rights, as part of the classical rights and liberties. This legacy is firmly cemented in economic life, but equally so in the regulation of working life, because property right are embedded in the employer prerogative.

The legacy of Hobbes again, is visible in different walks of life. Investigating his construction of legal agency, Wolgast contrasts the organisation of agency in different institutions and professions to morality, with its paradigm of an autonomous and responsible person.[372] She notes that "the power to speak and act for another makes responsibility problematic, for common sense wants to ask who *really* did what was done, who is responsible. The answer is difficult to find."[373] The institutional arrangements for the administration of social security, is one field that in different respects actualises the problematic nature of legal agency, as is also the perception of persons as clients in social welfare schemes.

Having encircled issues relating to the perception of law and ethics during modernity, it is time to see what happened in the 'real world', when these theories were put into practice in the world of work.

[372] Wolgast, (1992), Introduction, p. 2.
[373] Wolgast, (1992), p. 19.

Chapter IV

bridges theory and practice

Theory and labour law

1 From outlaws to atypical...

What where the effects on ordinary men and women of the way the theoretical tradition changed during modernity? This is best revealed in working life, because working life is the lieu where an economic and a social dimension meet in a tangible way. How working life is legally regulated reveals how a philosophical tradition is put to play at a practical level, in legal dogmatics. We shall therefore next take a look at how working life was transformed during modernity, with the purpose of identifying factors that today hamper the materialisation of economic, social and cultural rights.

As noted in the introduction, the ideal type that still underpins the regulation of working life is a male industrial worker, the standard being full-time employment. This perceptional point of departure caters for many problems, and can largely explain why the protective aspirations behind labour law could not prevent increasing marginalization in working life and also in society at large.

The purpose of the preceding scrutiny of the history of ideas was to point out how the philosophical tradition steers our perception of matters that we regulate through law. This will now be illustrated by looking at the environment in which present-day labour law was born, as a product of the industrialisation process. By paying attention to the interaction between theory and practice, it will be easier to perceive, first, that we need a new theoretical departure for the regulation of working life, and second, how to go about it.

2 From status to contract

The move towards large-scale manufacturing and later industrialisation deeply influenced the groundwork of society, bringing about structural change and new power constellations with competing interests to be accommodated.[374]

In medieval societies all the principal elements of an individual's status had been treated as bound together, with a reciprocal relation of personal loyalty 'for better or for worse'. This was a feature running through the whole hierarchy from lord to

[374] See Fox, Alan, History and Heritage: The Social Origins of the British Industrial Relations System, (1985), p 20.

vassal, labourers and serfs in the feudal setting.[375] In the cities, again, these bonds were expressed through the corporate structures. The artisan was a small master employing perhaps a few journeymen and apprentices. The apprentices could expect to become a master one day. The running of the city was a joint venture "large enough to be prolific of associations and small enough for each man to know his neighbour". Ethical considerations and mutual aid were part of this order, and it is in the light of such conditions that the guild system is to be interpreted, the most characteristic of medieval institutions.[376] Within this system, the members strove towards a rough equality among the 'good men of the mastery'. There was a check on economic egotism through the insistence that every brother shall share his good fortune with another and stand by his neighbour in need. There was resistance against the encroachments of a conscienceless money-power. Professional standards of training and craftsmanship were scrutinised, through corporate discipline, against those taking advantages to the injury of all. Economic conduct was part of, and not divorced from personal conduct, the individual was related to the kinship group and society.[377] Alan **Fox** summarises the characteristics of medieval societies as "requiring the exercise of discretion and the readiness of men to trust each other when they exchanged commitments."[378]

When we enter the industrial era, the scene is briefly the following, as pictured by E.J. **Hobsbawm**. The industrial revolution 'took off' in England in the 1780s and can be seen to have been consolidated with the building of the railways and the construction of a massive heavy industry in the 1840s.[379] Hobsbawm notes that the advance England had over other countries was not due to any scientific or technological superiority, but because the right conditions were at hand. The most decisive factor was the English solution to the agrarian problem. A handful commercially-minded landlords had almost monopolised all land, which was cultivated by tenant farmers employing landless or small holders.[380] The agrarian solution, coupled with sufficiently large markets and export surplus, had generated a considerable volume of social overhead capital to allow the entire economy to move smoothly ahead. Politics were already geared to profit. Business demands still met with resistance from other vested interests, but on the whole, "it was accepted that money not only talked, but governed", Hobsbawm concludes.[381] In other countries both the structure of the economy (small farmers) and the vested interests of the aristocracy held the industrialisation process back.

Whereas it was England that stood as a model for economic development in the 19th century, it was France that through its revolution came to offer models for politics and ideology. In Hobsbawm's words: "France provided the vocabulary and the issues of liberal and radical-democratic politics for most of the world. France

[375] Fox, Alan, Beyond contract, (1974), pp. 153-154.
[376] Fox, (1974), p. 155.
[377] See Fox (1974), pp. 155-156, Berman H J, Law and Revolution, (1983) pp 391, 393.
[378] Fox, (1974), p. 157.
[379] Hobsbawm, The Age of Revolution, (1988) p. 44.
[380] Hobsbawm, (1988), pp. 45- 46.
[381] Hobsbawm, (1988), p. 47.

provided the first great example, the concept and the vocabulary of nationalism. France provided the codes of law, the model of technical organization, the metric system of measurement for most countries. The ideology of the modern world first penetrated the ancient civilizations which had hitherto resisted European ideas through French influence. This was the work of the French Revolution."[382] The profoundness of the French revolution is explained by the fact that the revolution occurred in the most powerful and populous state of Europe (besides Russia). Further, it was a mass social revolution, which, in Hobsbawm's estimate, was more radical than any comparable upheaval before or after. In comparison the American revolutions represent "countries carrying on much as before, only minus the political control of the British, Spaniards and Portuguese."[383]

When other countries joined England in the industrialisation process, they did not have the same reservoir of labour as the concentration of land ownership had catered for in England. Neither did they have the same amount of immigration. What they had were ideas and law. Through the French revolution the victorious moderate bourgeoisie, acting through the Constituent Assembly, set about the gigantic rationalisation and reform of France. Again, in Hobsbawm's words: "Economically the perspectives of the Constituent Assembly were entirely liberal: its policy for the peasantry was the enclosure of common lands and the encouragement of rural entrepreneurs, for the working class, the banning of trade unions, for the small crafts, the abolition of guilds and corporations. It gave little concrete satisfaction to the common people, except, from 1790, by means of the secularization and sale of church lands (as well as those of the emigrant nobility) which had the triple advantage of weakening clericalism, strengthening the provincial and peasant entrepreneur, and giving many peasants a measurable return for their revolutionary activity."[384]

By the latter part of the 19th century, the economies of other countries had equally changed from a dominantly small-scale production to large-scale industrial production. Germany and the USA first advanced as important industrial nations,[385] taking measure on England. Along their side Belgium, Switzerland, the Czech lands entered the world economy, soon to be accompanied by Scandinavia, the Netherlands, northern Italy, Hungary, Russia and Japan.[386]

These socio-economic factors that conditioned the industrialisation process, and the lessons that latecomer could learn from those who had been in the forefront, shed some light on similarities and differences in the product that the industrial relations system constitutes, of this process. Aspects of interest here are that England mainly exercised an influence in economic terms, whereas France exercised a strong influence when it comes to ordering society, through law, to allow for the new economic rationale. Industrial relations systems were thus formed as a blend between the frame set by the socio-economic conditions, the way the legal system was used to

[382] Hobsbawm, (1988), pp. 73- 74.
[383] Hobsbawm, (1988), p. 74.
[384] Hobsbawm, (1988), p. 85.
[385] See Hobsbawm, The Age of Empire 1875-1914, (1989) p. 47.
[386] Hobsbawm, (1989), p. 49.

advance political, read economic, aims and the way in which organising workers were able to respond to the challenges posed by this process.

Fox has depicted these features in an investigation into the social origins of the British industrial relations system. He points to how the legacy of the 'Free-born Englishman' came to influence the rules of the game in the relationship between 'master and servant' allowing for a certain reciprocity despite the asymmetrical relationship between the two parties. This has its background in the expectations inherent in paternalism, when employers abused the standards presupposed by paternalism. The rationale behind this feature was the longstanding tradition of the ruling classes to restrain royal power. The mechanisms in operation were instrumental rather than substantive. "The stance of the common Englishman was not so much democratic, in any positive sense, as anti-absolutist. The Englishman felt himself to be an individualist, with few affirmative rights, but protected by the laws against the intrusion of arbitrary power. There was a consciousness of limits "beyond which the Englishman was not prepared to be 'pushed around'"."[387] This tradition also worked to the advantage of the dominated class. Food riots, the most common precipitant of social conflict in 18th century England illustrate this. According to the people, it was legitimate to take direct and unofficial action in order to ensure that justice would be done and that the proper procedures for the marketing of food would be duly observed. Food riots aimed primarily at seizing supplies and imposing 'just' and 'reasonable' prices. Fox notes that "the character of this collective behaviour was vitally determined by custom, inherited expectations and moral evaluations; its objectives, usually, though not always, selective and clearly defined and pursued in a disciplined and reasonably discriminating manner. At its heart lay 'a keen sense of justice - a sense of correct morality being violated, and of injustice tolerated or encouraged'."[388] Fox notes that "[t]he ability of subordinated groups to sustain an independent set of moral and social criteria which they brought to bear upon the behaviour of their masters was a central factor not only in food riots, pro-smuggling activities, anti-game law tensions, enclosure disturbances and resistance to turnpike tolls, but also in the emergence of robust and spirited collective action in the world of work."[389] These actions reflected both traditional English freedoms and a wider body of popular culture. "The popular culture of the plebs was in many important ways 'substantially independent of the culture of polite society, but in important ways drew upon it'."[390] Custom provided a critical source of self-defence in a highly unequal society. It was one of the normative weapons of the weak against the strong, one of the ways in which power was disciplined and concession enjoyed. Customary practices, in short, were vital components of the people's cultural repertory.[391] This characterisation by Fox, which illuminates certain characteristics of British industrial relations, also demonstrates social dynamics of a more general nature. It points to the driving force that people's sense of justice constitutes, and at the human tendency to

[387] Fox, (1985), pp. 39, 41.
[388] Fox, (1985), p. 43, citing Malcolmson, pp. 116-122.
[389] Fox, (1985), p. 43.
[390] Fox, (1985), pp. 43-44.
[391] Fox, (1985), p. 44.

react against injustices, which is the basic logic inherent in the emergence of trade unions, and equally inherent in their ensuing mandate.

The changing social constellations that emerged with industrialisation lead to new kinship groups representing new sets of interests. After 1750, the changing class structure, which resulted from the investment in industry by landowners, and the purchase of land by wealthy merchants, brought about a change in former protective attitudes towards artisans. As the old system of wage regulation broke down, there was increasing repression of combining workers, which in many European countries led to the banning of associations. These acts marked an entirely new principle of labour legislation. Previously, combinations of workers had been illegal in certain trades in England because they challenged the state's monopoly of industry. After 1800 the law sought to protect the monopoly of employers and not of the state.[392] So Bob **Hepple** notes "[l]abour law upheld, for the first time, the unilateral power of the individual employer to fix wages and conditions of employment. The liberal state had emerged."[393]

A development comparable to the industrial revolution in England did not occur in other countries until much later, and its social repercussions, in Hobsbawm's estimate, not until 1830s, and probably not before the 1840s, when literature and arts begun to be overtly haunted by the rise of the capitalist society, "that world in which all social bonds crumbled except the implacable gold and paper one of the cash nexus."[394]

Urbanisation was an important aspect of this development, cutting deep into the social fabric, which in 1887 caused Ferdinand **Tönnies** to form the distinction between *Gemeinschaft* (community) and *Gesellschaft* (a society of individuals) and Sir Henry **Maine** to characterise the development as one 'from status to contract'.[395] Anna Christensen has pictured the difference between status and contract as two different normative structures, which she identifies as follows: The contractual relationship is characterised by an agreement with accompanying rights and obligations. This is a normative relationship between two autonomous parties, with their recognised and legitimate interests. In a historical perspective the contractual relationship related to dealings between strangers, even enemies, between different families or competing groups. The normative structure within a kinship group, again, was altogether different. The normative relations were associated with the common good, where obligations were paramount to individual interests.[396]

[392] Hepple, Introduction, p 16, in Hepple, ed The Making of Labour Law in Europe, (1986).
[393] Hepple, (1986), p. 16.
[394] Hobsbawm, (1988), pp. 42-43.
[395] Hobsbawm, The Age of Capital, 1848-1875, (1988a), p. 246.
[396] Christensen, Anna, Konflikt eller harmoni, (1988) p. 39.

3 Deregulation and new regulation

Expanding trade and industry thus lead to a depersonalisation of human relationships. This new order of classical liberalism viewed the individual as self-contained, able to maximise one's happiness. For the state as a potential source of social good there was not much room left. Its role was now to suppress force and fraud, keep property safe, and aid men in enforcing contracts."[397] This is thus the setting into which a new type of labour and a new type of legal regulation emerged. This period constituted a de-regulative process of a magnitude that at least equals present-day trends.[398] And here Fox offers, with the eyes of a sociologist, the distinction between situations where the pattern of roles and relations is legitimised by both parties, and situations where it is actively imposed by one party against very different preferences held by the other - differences which can result in a variety of responses ranging from forced passive compliance to periodic collective revolt.[399]

A resolution of this tension between the old order and a new, between two different rationalities, in favour of the individualistic creed was facilitated by thinking of its time, to which many contributed by articulating different aspects of the new rationale. Locke drew the demarcation line between state and individual, marking a sphere of liberty for the individual, which the state was expected to secure. Hume's thinking about property came in handy for efforts to consolidate property rights. As the economists such as Adam **Smith** were read, they delineated society and an economic sphere in which the rational pursuit of self-interest was the predominant motivation of every individual. In this new world view, individuals related to one another through free and fair market mechanisms which eventuated in contracts and supposedly asserted that the outcome of this individualistic competition was beneficial to all.[400] Bentham and his followers refined this picture in his formula of utility, which was to guide both human action and public policy in order to arrive at the greatest happiness of the greatest number. These same ideas still exercise their influence on the present day scene, in its neo-liberal outfit. In view of this, it is important to be aware of the incentives for these ideas in their contemporary context. These were, in the 18th century, the then existing privileges of the feudal aristocracy and mercantilism, against which these new ideas provided an attack. Fox notes that "when they formulated the new philosophy, the obvious abuse was not the power wielded by the owners of capital over populations unable to work without their permission; it was the network of customary and legal restrictions which impeded the entrepreneur of relatively modest size who sought to exercise his abilities. 'The grand enemy of the age was monopoly. its ideal was a society where each man had free access to the economic opportunities which he could use and enjoy the wealth which by his efforts he had created'."[401] The implications of these ideas, as they influenced the view of

[397] Hobbhouse, cited in Fox, (1974), p. 165.
[398] Credit for this observation goes to Anna Christensen.
[399] Fox, (1974), p. 176.
[400] Fox, (1985), p. 47.
[401] Fox, (1985), pp. 47-48.

different states of affairs, did not for all correspond to the intentions of their authors. The following incident from the hey-days of economic liberalism of 19th century England may illustrate: A programme of public works had been inaugurated in Ireland as a rescue operation because of a crop failure. Such an endeavour was in violation of the prevailing principle that the poor should never be helped. When it was the most needed, it was abandoned on the grounds that there was no way of distinguishing between those who wanted a job because of the crop failure and those who, as always in Ireland at the time, needed a job as a normal thing. This Galbraith tells in his book 'The age of uncertainty', as an illustration of the role theories play in shaping our view of reality.[402] He draws our attention to the fact that "[p]eople have an enduring tendency to protect what they have, justify what they want to have. And their tendency is to see as right the ideas that serve such purpose. Ideas may be superior to vested interest. They are also very often the children of vested interest."[403]

By the 19th century, the line of demarcation had changed. Now the threat was not mainly monopoly and other old impediments, now it was the body of combining workers. Both theoretical and legislative activity became now directed towards regulating these conditions. It was thus a powerful resistance that both trade unions and labour and socialist parties encountered in their revolutionary or reformatory aspirations, for which Karl **Marx** and his disciples offered theoretical support. But through the combined effect of the economic rationale and the new theoretical landscape, both labour and socialist parties and trade unions were 'forced' into the capitalist rationale.

What initially had been a very diversified proletariat became gradually more uniform when an increasing number of workers came to work with large firms, in plants ranging from hundreds to many thousands, particularly so in heavy industry.[404] But these were only a minor part of the working population. A majority of people still worked in small workshops, rural cottages or city back-rooms. "How much was there in common between, say, the exclusive male boilermakers and the...mainly female cotton weavers" Hobsbawm asks.[405] But the factory model was one of considerable factual force. So Hobsbawm notes that the growing tendency among trade unions, especially socialist ones, to organise workers into comprehensive bodies covering a single national industry, reflected this sense of the economy as an integrated whole.[406] This identification with the factory, together with the fact that factory workers were those who could put pressure to bear on individual employers, made the factory stand as a model for the legal regulation of working life and the emerging industrial relations systems, independently of the nature of the activity. This is a legacy that we still live with today, in an increasingly diverse working life. It is at this point that a major change of perception is required, to review this ideal type of the male factory worker underpinning labour law, in order to allow for a new departure.

[402] Galbraith, J K, The Age of Uncertainty, (1977), p. 38.
[403] Galbraith, (1977), p. 11.
[404] Hobsbawm, (1989), p. 116.
[405] Hobsbawm, (1989), p. 119.
[406] Hobsbawm, (1989), p. 128.

4 Statutory regulation

In the conceptual schemes of the new industrial order, contract was the technical device for the regulation of dealings among individuals, with sole focus placed on freedom of contract. An extended use of contract both reflects and provides a device for profound changes in the social fabric from medieval societies, with their communitarian settings, to an era characterised by individualism, business and industry. Yet reality did not follow the patterns pictured in theories. Paternalism was to maintain a considerable stronghold, which for some time operated according to certain patterns of reciprocity. Paternalism was in a continental context expressed in protective legislation, which can be seen as a certain kind of reciprocity. In the Anglo-Saxon tradition 'reciprocity' was less explicit and discernable mainly through a sociological analysis of the interacting forces and ideologies, as Fox illustrated above.

Now, for a consideration of the nature of the employment contract, as it was to crystallise with the industrial revolution, it is instructive to be aware of the changing status of different categories of persons involved in these structural changes. Fox depicts the development as follows: "As yet, all these groups - the small craft masters, the larger masters who were drawing the smaller into dependent status, the larger yeoman farmers and the small peasant family farmers - were still categorised, along with shopkeepers, as 'the middle sort of people' they were considered, and certainly considered themselves, to be fundamentally superior to labourers, servants, beggars, those without a trade and with no independence and no prospect of any. Independence of some kind or description was the key to positive status."[407]

The notion of independence carried a special weight in England because the courts interpreted the statutes relating to work as not applying to those who were under no obligation to 'serve', such as chaplains, knights and 'gentlemen'. The notion of dependence is thus an aspect that sheds light on the development of the employment contract in England, as this was to be interpreted by the courts. A line can here be traced back from the Ordinance and Statute of Labourers of 1349 and 1351, and the Statute of Artificers of 1563. These statutes regulated the wages and mobility of labourers in specific employments, namely agricultural labourers, servants and artisans. Later statutes also adopted this approach of regulating particular occupations rather than applying uniform standards for different occupations with a uniform category of contract of service. It was only when the Master and Servant laws had to be applied to the new industrial employments in the mid-19th century that a general concept evolved, and this was done by judicial interpretation and not, as was to be the case on the continent, through the formulation of general concepts of the employment relationship.[408]

The courts held that the essential criterion was that the servant should be under the power and coercion of the master during the whole time and that the master had a residual right to demand service at any time of the day or night. Although this position

[407] Fox, (1985), p. 21.
[408] Veneziani, Bruno, The Evolution of the Employment Contract, p 60, in Hepple ed, (1986).

was later modified and the notion of exclusive service disappeared, the criterion of control or subordination became the legal basis of the contract of service. The conception of subordination was to be applied without distinction to manual and non-manual workers.[409] This position held sway until the 1950s when the element of control came to be severely criticised because of its inadequacy in dealing with modern relationships between professional workers and the managers of corporations.[410]

In the English setting the courts contributed to breaking down the 'paternalist heritage'. The common law courts pursued their long-standing disposition to regard all guild and statutory regulations as unacceptable hindrances to freedom of individual contract and enterprise.[411] So for instance a judgement of 1756 described the Statute of Artificers as a "penal law in restraint of natural right and contrary to the common law of the kingdom."[412] We here see a selective application of the original notion of paternalism. Subordination of the worker was maintained, but the protective aspect was disposed of for the 'greater good' of freedom of contract. Growing capitalism made each trade in turn feel the effect of the new capitalist competition. Redress was frequently sought by workers demanding the prohibition of the new machines, the enforcement of a seven years apprenticeship or the maintenance of the old limitation on the number of boys to be taught by each employer. Where men considered that the authorities neglected their duties they felt justified to take matters into their own hands and exert direct collective pressure on the masters.[413]

4.1 The employment contract

The way the employment contract evolved came to follow different routes on the continent and in England. A major reason for this is the stronger influence of Roman law on the continent in general, and the codifying activities which since the French *Code civil* became a general feature in continental European countries.[414] Here the employment relationship came to be viewed as a contract based on the concept of *locatio conductio operis faciendi*, that is, an agreement to make something or to do a job for a person in relation to materials belonging to another.[415] A distinction was drawn between the *locatio* of things as opposed to services, the worker being said to let his working power. The old Roman model of *locatio conductio* was replaced by a definition, which was only nominally like the Roman one, while the underlying economic relationship was completely different. It had undergone a radical substitution of content, since it now indicated a free exchange between 'equal'

[409] Veneziani, (1986), p. 60.
[410] Veneziani, (1986), p. 60.
[411] Fox, (1985), p. 45.
[412] Fox, (1985), p. 46.
[413] Fox, (1985), p. 46.
[414] See Veneziani, (1986), p. 61.
[415] Veneziani, (1986), pp. 31-32.

individuals who were exerting their own free will over the letting and hiring of the workers' services.[416]

The incorporation of the contract of employment offers an illustration of theoretical ingenuity. The idea of the contract of employment did not easily fit a social system based on the concept of status. To overcome this anomaly, the employment relationship was regulated by the law of things.[417] To understand how this was managed at a theoretical level we need to turn to the codifications of the early 19th century, particularly that of the French Code of 1804, and the new world-view it expresses. The idea of the employer-worker relationship, as one of an exchange between free and equal contracting parties, was linked to the political and economic phenomena of the previous decades, in particular the French Revolution. As opposed to the *ancien régime*, which was based on a society differentiated into social classes, the new order was conceived of as one of equality of citizens, of a community founded on the 'social contract' or common will, capable of the widest possible expression of freedom of choice. This turned into a notion of the formal equality of citizens.[418] The legal relation was expressed through the freedom of economic initiative (freedom of trade) and freedom of contract, which became articles of faith. The freedom of the parties was affirmed in the French Loi le Chapelier (Arts 2 and 4) while the civil code made contract between the parties supreme (Art 1134 of the French Civil Code). Contract was the only legal device that could give effect to the formal freedom and equality of the parties, and at the same time make it possible for the liberal bourgeoisie to plan and oversee its accumulation of capital.[419]

In Germany the employment relationship had, before the German Code of 1896, been systematised under the three categories of *Persones*, *Res*, and *Actiones*. Under the category of *Persones*, the employment relationship was pictured as a status relationship, and the worker was placed in the family sphere with a status similar to minor children, from which subordination followed as a natural thing.[420] Human labour, again, was located under the category of *Res* and viewed as one category of exchangeable and transferable legal objects. Under the category of *Actiones*, which covered legal transactions, such as contracts, the employment contract was viewed as a contract of rent, *locatio conductio operarum*.[421]

The German Code of 1896 defined the employment contract as a contract of exchange under the heading of 'single obligatory relations', but, again, along with sale, location and rent. Also here the '*locatio conductio*' model was adopted, but to it was added the idea of social protection, especially in case of illness and incapacity. This was embodied in the principle of the domestic relationship, according to which the master was obliged to care about the servant whose work was not to be considered as a commodity. The employment relationship was thus considered as an authoritative

[416] Veneziani, (1986), p.32.
[417] Veneziani, (1986), p. 54.
[418] Veneziani, (1986) p. 55.
[419] Veneziani, (1986) p. 55.
[420] See Kairinen, Oikeusjärjestelmä ja työoikeus, (1984), pp. 51-52.
[421] Kairinen, (1984), p. 52.

relationship of civil law, a category which included the relationship of parents vis-à-vis their children.[422]

This is how Bruno **Veneziani** comments on these theoretical constructions: "It is interesting to note the legal fiction to which the codes resorted in applying this model, which is the same as the old *locatio conductio* in name only."[423] Despite differences in the way in which the employment contract was theoretically constructed, its trust was the same, subordination of the worker to one's employer. Because the point of departure and theoretical focus was solely placed on the *freedom* of contract, the contract could be loaded with whatever notions, which in practice nullified its point of departure. This transition from status to contract did not, as Veneziani notes, mean that the individual worker gained control over the content of the contract. "The individual worker, released from the spider's web of police regulation on the Continent and the Master and Servant laws in Britain, was now subject to the employer's power to regulate his working life under the guise of contract."[424]

5 The role of contract in the liberal scheme

One of the cornerstones in this liberal scheme was freedom of contract. Everyone was free to conclude such contracts as one pleased, and this was accompanied by a strict adherence to the fulfilment of contractual obligations. In the law of contract of the time, there was no room given social equity aspects. Labour contracts where thus treated under the same conditions as a contract between merchants or manufacturers. In the United States where the liberal scheme existed in about its purest form, legislation designed to strengthen workers' position against the employer by providing protection against coercive measures by the employer, were for a long time viewed as unwarranted deprivations of liberty and property, and disturbances of equality of rights. This view equally applied to provisions aimed at protecting workers' rights and their right to belong to a union. Rulings of the US Supreme Court offer interesting illustrations of the thinking in the early 20th century. The court was faced with a number of cases in which it assessed the constitutionality of protective statutes. The reasoning could go like this: "[T]he right of the employee to quit for any reason he saw fit was the same as the right of the employer to discharge for any reason... In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."[425]

There was thus neither room for considerations of social fairness in the construction of the law of contract of the time, nor was there any critical revision of

[422] Kairinen, (1984), p. 59.
[423] Veneziani, (1986), p. 32.
[424] Veneziani, (1986) p. 54.
[425] Justice Harlan, in Adair v. United States, 208 UL 161, 1908, cited in Hale, Robert, Freedom through Law, (1952), p 390.

the prerogative of the employer in the contractual relationship. In practice freedom of contract was coupled by a requirement of submission by one of the parties to the contract.

6 Combination of labourers

The mobilisation of workers into trade unions was yet another challenge for the theoretical legal landscape. Albert Venn **Dicey** offers an interesting account of the development of the right of workers to organise in France and England. As a background for the insights Dicey displays, it can be mentioned that this authority on British constitutional law, also served as principal of the Working Men's College in London in 1899-1912.

Dicey notes that in almost every country some forms of association force upon public attention the practical difficulty of regulating the right of association in a way, neither to trench upon each citizen's individual freedom, nor shake the supreme authority of the state. And here he has in mind, not only the emerging trade unions, but also the American trusts and French efforts to place religious communities under state control. Dicey puts the question: "[h]ow can the right of combined action be curtailed without depriving individual liberty of half its value; how can it be left unrestricted without destroying either the liberty of individual citizens, or the power of the Government."[426] Dicey points out that what is involved is 'the nature of things' a question of bringing into harmony two essentially conflicting rights, namely the right to individual freedom and the right of association and to arrive at a rough compromise between them.[427]

In Dicey's comparison of the legal regulation of workers right, or rather lack of right, to combine, in England and France, striking similarities are reviled, but also differences. The setting in which the British Combination Act of 1800 was passed, has by Dicey been described as "a mixture of Blackstonian content with everything English, and Eldonian dread of any change which panic-stricken prejudice could term foreign or Jacobinical, that coloured the whole public opinion of 1800, and determined the course of legislation during the first twenty-five or thirty years of the nineteenth century."[428] In France, again, the governments after the French revolution did in the same way as the monarchs of the *ancien régime* see association and work stoppages as a threat to law and order. Thus trade combinations, whether occasional or permanent were unlawful. A strike was a crime, a trade union an unlawful association, according to the Loi Chapelier of 1791. The Penal Code (arts 291, 292) prohibited all societies of more than 20 persons not authorised by the government. Severe penalties were imposed on the combination of masters or workmen, the penalties being higher for workmen than for masters. In 1864 strikes were made lawful, but trade unions were still prohibited. A new crime was introduced in the case of combination to interfere

[426] Dicey, A V, Law and Public Opinion in England, (1919), p. 468.
[427] Dicey, (1919), p. 468.
[428] Dicey, (1919), p. 468 and pp. 83, 84.

with the free exercise of a man's business. Thus, Dicey notes, although strikes were made lawful, it was hardly possible to make use of any of the means which render a strike effective without breaking the law, that is, without committing a crime.[429] In 1884 trade unions were legalised with the legalisation on professional associations (*syndicats professionels*) for the promotion or the protection of the interests of any profession or trade. Interference with a man's right to carry out his business was, however, still a criminal act.[430]

While the organisation of workers was illegal in France after the revolution, in England it was at best a non-lawful action. In the ambience pictured by Dicey, prevailing during the 19th century, The Combination Act of 1800 was an expression of the reactionary sentiments of the time. This act must be read in conjunction with the law of conspiracy, which aimed at suppressing all combinations of workmen for the purpose of promoting wages or terms of employment. It was an offence to assist in maintaining men on strike, which rendered strikes difficult in practice. The courts had given the law of conspiracy a very wide interpretation, so when read in conjunction with the Combination Act the relevance of collective action to the following provisions, as accounted by Dicey, is obvious: "A conspiracy, it is submitted [by the courts] included in 1800 a combination for any of the following purposes: that is to say:-

(1) For the purpose of committing a crime.

(2) For the purpose of violating a private right in which the public has a sufficient interest, or, in other words, for the purpose of committing any tort or breach of contract which materially affects the interest of the public.

(3) For any purpose clearly opposed to received morality or to public policy."

The effect of these provisions is, as Dicey notes, that "[s]ince a combination to commit a crime is 'ipso facto' a conspiracy, it follows that a combination for any purpose made or declared criminal by the Combination Act, 1800, e.g. a combination to collect money for the support of men on strike, was in 1800 an undoubted conspiracy." The extensive interpretation that the courts had given the notion of conspiracy would make it hard for any trade union to escape the provisions of this act.[431]

It was Bentham and his utilitarian school that were to released England from the trauma caused by the French revolution, which had had the effect of practically preventing reform.[432] A reform of the Combination Act was introduced in 1824 and 1825 under direct influence of the Benthamite school, aimed at extending contractual freedom, in accordance with the principles of individualism. Both acts reversed the policy of 1800, with the intention of establishing free trade in labour, allowing discussions between workers and masters, and picturing the purchase and sale of labour like that of any commodity. Both acts imposed severe penalties on the use of

[429] Dicey, (1919), pp. 469-470.
[430] Dicey, (1919), pp. 471-72.
[431] Dicey, (1919), pp. 97-99.
[432] See Dicey, (1919), pp, 123-125.

violence, threats, or intimidation whereby the contractual freedom of an individual worker or master would be curtailed. The 1824 Act had separated combination from the law of conspiracy, but this was reintroduced in 1825. Accordingly, any trade combination was a conspiracy unless it fell within the limited right of combination confirmed by the act.[433]

7 The effects of general franchise

In view of the features pictured above it is appropriate to direct attention to the implications of general franchise for labour law and industrial relations, as the right to vote meant that the working population gained access to political decision-making. Did this extended participation in political decision-making imply an empowerment in other aspects of life, such as working life? Hepple has assessed the effects of general franchise in England, Germany and France. He notes that in England political and legislative efforts of the new-found political power had to be concentrated on removing obstacles facing the trade unions. These were, first, the penal sanctions for breach of contract, second, efforts had to be put into securing the freedom of association (1871) and the freedom to strike (1875 and 1906) against renewed judicial attack. Further, efforts had to be directed towards preventing 'sweating', in certain trades, where this threatened to undermine the collective bargaining system. Substantive gains, such as minimum standards had to be secured through collective action because the British movements for factory legislation had been too weak politically, to secure general legislation applying to all workers in the early 19th century.[434]

Workers in continental countries were to a larger extent able to use their votes to secure the amelioration of their conditions through legislation. In Germany Bismarck counteracted socialism by his successful welfare legislation (1883-89). With some modifications, his model was followed by the liberal government in Britain (1906-11), and provided also a model for other countries. The situation in France was different. Both the pace of industrialisation and of population growth, were relatively slow. Further there was a relatively large number of '*petits patrons'*, some self-employed and some owning small workshops, which meant that there was no homogeneous proletariat, and the ruling-class parties were fragmented, as well. This delayed any major response to the social question.[435] In France the bureaucracy was more effective than the legislator in ameliorating the conditions of workers.[436]

Here we thus see the particular setting in those countries, which were forerunners in the field of labour law. As the above account should have revealed, it is not enough to study legislation in order to understand the social phenomena involved. In Hepple's words "[i]t is in the power relationships, which are rooted in social

[433] Dicey, (1919), pp. 193-195.
[434] See Hepple, (1986), p. 20.
[435] Hepple, (1986), pp. 20-21.
[436] Hepple, (1986), p. 21.

structures, that we may find a key to understanding both the common tendencies and the divergences in the labour laws of societies which have shared the experience of capitalist industrialisation."[437]

With general franchise, collective action both through the political channel and through the labour movement made it possible for the working population to put pressure on the state, and bargain with it, in order to further their interests. In the 'private' sphere this entailed modifying the classical liberal ideas of the 'free' market. In the 'public' sphere it meant labour legislation to tolerate and actively to promote collective bargaining. The state itself came, in the 20th century, to integrate the collective groups of employers and workers into its own activities, consulting with them on economic and social policies, and bringing them into the organs of government.[438]

Despite the participation of labour or socialist parties in government in many European countries, no major changes were made concerning the theoretical status of workers. This was primarily due to the fact that no major changes were made in the basic economic and social structure of capitalism, which, despite the economic crisis after world war I proved to be resilient and was revitalised by public investment and rearmament in the 1930s. Another major problem was unemployment. Large-scale unemployment made labour law a law for an elite of workers who were lucky to have work. "The separation of labour law from economic policy left the reformist socialist governments in the position of having to implement cuts in living standards dictated by the great depression. Another determinant factor was that the socialists had a reform programme for capitalism and a revolution programme for socialists, but that there was no adequate bridge between the two", Hepple concludes.[439]

8 Finland an illustration

In chapter VI today’s challenges for the legal regulation of working life and social security will be looked at with specific illustrations from Finland. In anticipation of this, a brief account will here be made of factors that influenced the development of labour law and industrial relations in this country.

The continental legal tradition, and particularly German legal doctrines have exercised a strong influence on the Finnish legal culture. Another particular feature is a strong legalistic and formalistic tradition. Finland thereby portrays the way mainly a continental legal tradition is at play in Finnish working life, whilst this country at the same time has been strongly influenced by other Nordic countries, particularly Sweden, in regard to institutional arrangements.

On the face of it, Finland follows the same tradition of industrial relations as the one for which a foundation was laid in Denmark and Sweden around the turn of

[437] Hepple, (1986), p. 5.
[438] Hepple, (1986), pp. 21-22.
[439] Hepple, (1986), p 24.

the 19th and 20th centuries. The socio-economic conditions in Finland were, however, different. Industrialisation developed later than in Denmark and Sweden. In addition, civil war, political divisions and other external factors conditioned the pace at which a tradition of collective bargaining developed.[440]

A look beyond the surface will therefore reveal quite a different legal rationale in Finland than that in the neighbouring countries. In Denmark and Sweden the industrial relations system grew in a social process of reluctant give and take between workers and employers. As everywhere else, the formative phase was a period of great uncertainty, with revolutionary forces in sway. Employers put up hard resistance against the demands of the unions, insisting on their employer prerogatives. So the Swedish December compromise 1906 that laid the foundation for the industrial relations system, confirmed the employers' right to direct and distribute work and to employ and dismiss workers. These rights were confirmed in exchange for the right for workers to organise and bargain collectively.[441]

In Denmark and Sweden there was little or no room for legislative intervention in the regulation of working life and industrial relations. In Finland the power constellation between the labour partners was so asymmetrical that legislative intervention was needed. Where we have legislation, we have a theoretical framework, which both steers the perception of different social phenomena and influences the drafting of laws, and their subsequent administration. The issue that I want to put into the spotlight here, is how well suited the legal mechanisms were for their purpose of protecting the worker as the weaker party, and in due course the handling of collective agreements.

8.1 Legislation preceded factual practices

In Finland a legislative framework was thus introduced before a practice of collective bargaining had crystallised, with the effect that industrial relations came to receive a pronounced legalistic character. This was the case, notwithstanding the fact that the system was modelled upon one which had emerged as a reluctant mutual understanding between the labour partners in Denmark and Sweden. In Finland the employers put up fierce resistance against strikes. These were drawn out actions with a flavour of wearing out the unions. The employers' organisations held a negative attitude towards collective agreements all through the 1920s, although particularly smaller employers concluded collective agreements in different trades. It is in this context that the legislator stepped in. After an aborted attempt to pass legislation in 1908, an act on collective agreements was passed in 1924 and one on mediation in labour conflicts in 1925. For some time, these acts did not have any major impact on the practices on the labour market.[442] It was not until the two wars Finland fought in 1939-1944 that the labour partners reached an agreement concerning collective

[440] Bruun, Kollektivavtal och rättsideologi (1979), p. 8.
[441] See Adlercreutz, Axel, Kollektivavtalet, p. 346.
[442] See Bruun, (1979), pp. 9-13.

bargaining. They came together in a 'preliminary' agreement during the winter war in 1940, the 'January engagement', which was followed up by an agreement in 1944, initiating thereby a new era in industrial relations in Finland.[443] When thus collective bargaining, in the 1940s, became a practice rather than an expectation, the legal rationale had placed its mark on the administration of labour relations. An effect of this development is that a strong emphasis came to be placed on the individual employment relationship, which had been regulated through a contract of employment act in 1922. In Denmark and Sweden the employment contract was not regulated through legislation, but through collective agreements, which constitute the cornerstone of labour regulation in these countries.

Niklas **Bruun** has studied the process of adapting the collective agreement to the Finnish legal system. His point of departure was to study the value premises on which different actors based their views and actions in the formative phase. The employers held an individualistic view of the employment relationship, a view also held by the political right. The employer ideology was characterised by a patriarchal conservatism, which highly influenced the relationship on the labour market. These views prevailed until the 1940s when the labour partners finally settled their internal dealings through a basic agreement. Since 1944 labour market practices have undergone a considerable change. There was a break-through for the collective agreement as an institution for regulating the relationship between the labour partners. The social ideology of the employers had changed; they had given up their patriarchal and individualistic attitudes and adopted a parity approach. This came to signify a consensus throughout society as to ideology in labour relations, although this consensus did not extend itself to individual issues.[444]

Bruun notes that the ideological premises steering the integration process were dictated by specific legal paradigms rather than a legal ideology about the collective agreement.[445] The collective agreement has, in legal dogmatics, been incorporated in the legal system with the use of traditional concepts and methods of systematisation, reflecting the individualistic legal order.[446] One effect of this is that there is an implicit presumption of equality between the labour partners, which often is at variance with factual circumstances, and equally with the conditions in the model-countries, Sweden and Denmark, where the industrial relations systems reflected a more factual balance of power. Notwithstanding this, in both legal theory and legislative policy, such a balance of power was presumed as an unarticulated premise. Bruun notes that what is involved is 'the ideals of equality, liberty etc' rather than factual states of affairs. A practical effect of this is that the presumed equality becomes coupled with the presumption that the state should remain neutral in regard to the industrial partners.[447]

[443] See Bruun, (1979), pp. 9- 13.
[444] Bruun, (1979), p. 157. Only the Marxists represented a view which was incompatible with the parity ideology.
[445] Bruun, (1979), p. 174.
[446] Bruun, (1979), p. 173.
[447] See Bruun, (1979), pp. 135-137.

8.2 Contractual theories at play in working life - the collective agreement

Despite changing attitudes towards collective bargaining, from its early days, corresponding adaptations have not been made to the conceptual schemes, neither have these changes been reflected in the praxis of the Labour court. This state of affairs is revealed in the way the peace obligation associated with a collective agreement is conceived in a wild strike. During the duration of a collective agreement, the parties have a peace obligation, that is, not to resort to strike or lockout directed against the agreement.[448]

In order to perceive the implications of the conceptual schemes for practical life, it is in place to here recall the *raison d'être* of collective action, that is, to put pressure to bear on an employer or employers' association with the purpose of improving the conditions of work. A decisive problem here is how the legacy of Locke is at play. Because property rights are incorporated in the employer prerogative, this gives the employer a room of manoeuvre that cannot properly be counterbalanced by the means at the disposal of a trade union. This imbalance is further reinforced by the peace obligation. So despite the recognition of trade union rights and many a practical or legal arrangement aimed at correcting the imbalance between the labour partners, much residual power is nevertheless vested in the employer.

An industrial action is, as a rule, an indication of some conceived injustices, which prompt workers or a union to take action against an employer. If such an event occurs during the duration of a collective agreement this case can be brought before the Labour court. The court again, will to a degree bordering on certainty, consider the action as a breach of the peace obligation. In practice, this means that a local trade union will be fined for negligence to respect the peace obligation and often also the national union for neglecting its surveillance obligation. Thus, a situation that has been perceived as unfair, to which a union would react in accordance with its mandate towards its members, will almost automatically be considered as unlawful, because of the dual and opposing obligations facing a trade union or a shop steward due to the peace obligation.

Olavi **Sulkunen** has looked into cases involving shop stewards as guardians of the peace obligation.[449] Among some 2 600 cases brought before the Labour court during the period 1977-94, 1092 cases concerned industrial action. Out of these cases 948 of them involved the peace obligation. In an overwhelming number of cases the peace obligation would thus have been an issue. Sulkunen notes that in the interpretation of collective agreements, there is a strong presumption that an agreement cannot be breached without sanctions.[450] This is a position that the Labour court took in the 1950s, and has since then adhered to. Subsequent changes in civil law, allowing an adjustment of unreasonable provisions, has not entered the filed of

[448] See Suviranta, Antti, Labour Law in Finland, (2000), pp. 184-187.
[449] Sulkunen, Olavi, Luottamusmiesaseman tulkinnassa (1997), p. 163, in Työtuomioistuin 50 vuotta (The Labour Court 50 years).
[450] Sulkunen, (1997), p. 176.

interpretation of the Labour court.[451] Neither does the practical experience that the composition of the Labour court is aimed at securing, appear to have much practical impact when it comes to judging questions of fairness. The tripartite composition of the court (employers' organisations, trade unions and independent legal expertise) is aimed at securing both legal expertise and practical experience and equally to enhance the legitimation of the court. However, Sulkunen points to the manner in which a teleological way of argumentation is in operation in the work of the Labour court. The court applies formal criteria that disguise the finalistic aims and value premises of its decisions.[452]

Sulkunen notes that in the act on collective agreements the definition of the peace obligation is open.[453] However, in the early 1950s, the Labour court took a first decision on the status of the shop steward and the obligation of the local union to respect the peace obligation, the interpretation being that local unions are responsible for the acts and omissions of their elected shop stewards and other representatives. Since then this interpretation has been adhered to.[454] This position by the Labour court leads to the strange situation that the shop steward, whose function it is to safeguard the interests of the workers at the work place, at the same time will be a guardian of the peace obligation.[455] There is, thus, a constant tension between the rights intended by labour legislation and the effects of the theoretical prerequisites applied.

9 A balance sheet for labour law

The picture of the new labour legislation that emerged in the new context brought about by industrialisation, confirms Raiskio's point that although we use new terminology, we are in fact dealing with the same old phenomena. This is an aspect we need to be aware of when approaching changes that have occurred in working life during the last few decades. Although working life never has been as standardised as is presumed by labour legislation, it is even less so now. The diversification of working life brought about by new technology, and an increasing use of so called atypical work formats requires a new departure in theory as well as in law.

We see this same pattern repeated with the presumed novelties when the social welfare state emerged. In essence, we are in the social field dealing with the same basic constellation of subduing persons in a vulnerably position, rather than empowering them, as will be elaborated in chapter VI. Next, we will, at a general level, look at the theoretical landscape that steered the formation of labour law and industrial relations.

[451] See Sulkunen, (1997), p. 177 see also Bruun, Niklas, Työehtosopimuksen ehdon kohtuullistamisesta, LM 1983, pp. 888-896.
[452] Sulkunen, (1997), p. 178.
[453] Sulkunen, (1997),p. 171, Act on Collective Agreements, Article 8.
[454] See Sulkunen, (1997), p. 178.
[455] See Sulkunen, (1997), p. 179.

10 Utility and positivism legitimating the new order

The overall theoretical context into which a new kind of working population emerged was in broad strokes the following. Bentham was the man who spelled out what our aims are, and what we need to do in order to achieve them. This is utility, and this principle of utility "approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question". Bentham emphasised that this applies to all actions, not only those of private individuals, but also to every measure of government.[456] From the way working life became legally regulated, it should be obvious that, at a practical level, working men and women, were not always included in the calculation for the greatest happiness of the greatest number. The either or construction in respect of community or individual is an important aspect of Bentham's theory. The interest of the community is in his construction the sum of the interests of the several members who compose it.[457] As this construction has been put to work in practice, it has the consequence that if a number of persons will be worse off by an act by the government, this will be legitimised if it has the tendency to augment the overall happiness of the community.[458] This is today a current feature, where many working men and women have seen their happiness foregone for the happiness of a boosted economy. This illustrates the feature that what in Bentham's time was a largely felt need to break with traditions that no longer corresponded to social reality, has today become counterproductive of its initial aspirations.

Dicey, who lived in the midst of the transition 'from status to contract' in 19th century Britain, undertook the task of picturing how the major transformations of the 19th century were reflected in public opinion and revealed in legislation. He identifies three different orientations that he summarises as Blackstonian toryism, which was the historical reminiscence of paternal government, Benthamism as a doctrine of law reform, and collectivism as a hope of social regeneration.[459]

The era of paternalism, which prevailed up till 1830 was one of old toryism. This period was characterised by legislative stagnation. Originally it was due to a general satisfaction with things as they were, as they had been inherited from a previous generation. Major threats to this order were seen as coming from Jacobinism and revolution. The reactionary character of this period increased rather than diminished as the century advanced. Laws passed during this period assumed a deliberately reactionary form, aimed at the suppression of sedition, of Jacobinism, of agitation, or of reform.[460] An interesting illustration of this atmosphere is the way the emerging trade unions were legally perceived and regulated, as accounted above (IV.5.1).

---

[456] Bentham, Principles of Morals and Legislation, (1907), chap I, II.
[457] Bentham, (1907), chap I, III.
[458] Bentham, (1907), chap I.VII.
[459] Dicey, A,V (1835-1922), Lectures on the Relation between Law and Public opinion in England, (1919), p. 69.
[460] Dicey (1919), pp. 62-63.

Dicey notes that at a theoretical level, this orientation was not supported by any theory of legislation. It was a sentiment of conservatism which, whether due to conservatism or hatred of revolution opposed innovation in every province of national life.[461]

Reactions of a similar kind were to be found on the European continent. When **Hegel's** followers on the left directed their criticism against legal, political and economic institutions, they were eliminated from the academic world during the 1840s and were, after 1848, forced to emigrate or just get along as best they could.[462] Sweden produced a philosophical school of its own, the school of thought of **Boström**, which had effects similar to both the British and continental traditions, of halting or preventing revolutionary movements from emerging.[463] It was not until the 1890s that Boström's ideas started loosening their grip on Swedish society. Sven-Erik **Liedman** attributes Boström the 'merit' of having created a mistrust among radicals against anything that flavours philosophy, and he notes that the a-historical approach of Boström's school of thought had became a living cultural heritage of the Swedes.[464]

Common to the orientations of the early part of the 19th century were attempts by the 'establishment' to retain the *status quo*. Bentham was the one to break this stalemate in England, precipitating thereby the second orientation identified by Dicey, the period of Benthamism or individualism. This was the era of utilitarian reform. Bentham was the personification of a new trend reflecting public opinion that influenced legislative reform, affecting every part of the law of England in different ways. "It has stimulated the constant activity of Parliament, it has swept away restraints on individual energy, and has exhibited a deliberate hostility to every historical anomaly or survival, which appeared to involve practical inconvenience, or in any way to place a check on individual freedom."[465] As opposed to the previous conservative period, Dicey notes about the era of Benthamism that it was a definite body of doctrine directly applied to the reform of law. "It was a legal creed created by a legal philosopher."[466] The one who was to put just as overwhelming a mark on the third phase, collectivism, was a man who, because of his ideas had been forced into exile in 1840. This was Karl Marx. When Dicey wrote, in the early part of the 20th century, this new trend of collectivism was something new, which he defines as follows: "By collectivism is here meant the school of opinion often termed (and generally by more or less hostile critics) socialism". As Dicey saw this new trend it was not, in England at any rate, connected with the name of any one man, or even

[461] Dicey (1919), p. 66. Dicey refers, however, to the cautious efforts of Lord **Eldon**, to elaborate the doctrines of equity, while obstructing every other change or improvement in law.
[462] Vår tids filosofi, Filosoferna, de filosofiska strömningarna, p 18.
[463] See Liedman, Sven-Eric, Boströmianerna, pp. 253-266, in 17 uppsatser i svensk idé- och lärdomshistoria (1980) . Boström's orientation left no room for Hegel, in the world of ideas in Sweden, neither did his philosophy leave room for any dialogue. Boström's philosophy became a powerful factor in Swedish intellectual life. His philosophy stood in opposition to all contemporary streams of thought. Liedman (1980), p. 255.
[464] Liedman (1980), pp. 256-257, 262.
[465] Dicey, (1919), pp. 63-64.
[466] Dicey, (1919), pp. 66-67.

with the name of any one definite school. He sees collectivism, as this had appeared during the 19th century, rather as a sentiment than a doctrine. To the extent that it might be identified with socialism, it was an economical and a social rather than a legal creed. Comparing Benthamism and collectivism, Dicey notes of the latter that it is a term which hardly admits of precise definition, and "in so far as it may be considered a doctrine has never, in England at least, been formulated by any thinker endowed with anything like the commanding ability or authority of Bentham."[467] Marx, on his part, saw the implications of Bentham's as such genuine democratic aspirations towards liberty, equality and property, as the legitimation of egoistic self-interests.[468] Marx was the first one to relate capitalism to human considerations. He saw how a growing number of people, a continually enlarging class of men and women, were living wholly from wages, related to their employers only by a cash-nexus. The employment relationship became stripped of human significance and moral obligations. The relationship turned into one of power. This Marx saw as the potentially most revolutionary fact in modern history.[469]

10.1 Legal positivism

The reform movement which Bentham and his disciples were able to promote gave law a new dimension as a means of social engineering. John **Austin** was the one to give this trend its theoretical legitimation. Bentham had emphasised the role of law as a means of introducing reform, whereby utility was the standard against which the validity of any state of affairs was to be judged, and law, thus, the means through which changes were to be introduced. The theoretical environment in which this reform movement emerges is one of philosophical positivism characterised by logical atomism, nominalism, methodological individualism, and science freed of values.[470] On to this philosophical basis reality was assessed through the calculus of utility, and what utility dictates was to be confirmed through law. This was thus the conceptual landscape in which Austin developed his theories about law, which, combined with the utilitarian calculus, was to influence the way in which reality was conceived. In the same vein, the legal order was to be determined by the way a legal norm was conceived.[471]

The basic trust behind legal positivism is to mark a demarcation to natural law, as a law created by man that relates to a specific historical context. Positive law thus stands in opposition to natural law as an expression of eternal principles and norms, which are not of human making.[472]

Bentham refuted natural law. What counts for Bentham is act and aspect,

[467] Dicey, (1919), pp. 64-66.
[468] Cited in Bruun, (1979), p. 54.
[469] Sabine, George H, Thorson, Thomas L, A History of Political Theory (1981), p. 682.
[470] see Tolonen, H, Normista ja oikeusnormista erityisesti John Austinin mukaan, p. 24.
[471] see Tolonen, H, Normista, p. 23.
[472] Tolonen, H, Normista, p. 25.

which to him constitutes the essential ingredients in the idea of a law. Bentham's ideas were by Austin taken as a departure when he developed his theory of positive law. A central aspect of Bentham's thinking, on which Austin was to develop, was the notion of sovereignty. Bentham had added the following characteristics to this notion: that sovereignty is neither derived from nor explained by reference to morality or moral principles, but that it is based exclusively on the social fact of the habit of obedience; and that the concepts of a habit and of personal obedience, that is, obedience to a specific person or group of persons, become the key concepts in the analysis of sovereignty.[473] In the theories of the enlightenment, sovereignty had been a central problem. With legal positivism, the basis for sovereignty was not questioned but taken as a matter of fact.[474] To Austin law is a general command of a sovereign to his subjects. In contrast to Bentham, Austin thinks that only general commands, that is, those obliging 'to acts or forbearance of a class' are laws.[475] To Austin commands are laws 'simply and properly so-called' when they prescribe courses of conduct and not specific acts. He makes a distinction between law and morality that he considered were blurred in natural law doctrines. Austin defined law as a species of command that expressed a desire that another shall do or forebear from some act, accompanied by a threat of punishment (sanction). In this way Austin distinguished 'positive law' from fundamental principles of morality and from positive morality, that is, man-made rules of conduct such as conventional morality that does not emanate from a sovereign.[476]

Austin was subsequently to receive followers developing their variations of legal positivism in the persons of H L A **Hart**, Hans **Kelsen** and members of the Uppsala school of thought. These orientations have both meeting points and diverging ones, albeit their implications are fairly similar. Of interest here is how the positivist orientations have narrowed the field of theoretical reflection about law.

Hart identifies the following elements in legal positivism: 1. the notion that law is the product of a human command; 2. the notion that there does not necessarily exist a relationship between law and morals, nor between law as it is and law as it ought to be; 3. the notion that the analysis of legal concepts (inquiry into meaning) is meaningful and is to be clearly distinguished from matters relating to the historical background of a law, sociological research concerned with the relationship between law and social phenomena, and criticism mounted against a law as to its moral or sociological aims; 4. the notion that the legal system is a 'closed system' within which legal decisions can be derived through logical means from existing norms, without a need to rely upon standards relating to social aims, politics or morals; 5. the notion

[473] Tolonen, H, Normista, p. 7.
[474] Tolonen, H, Normista, p. 29.
[475] Raz, Joseph, The Concept of a Legal System, An Introduction to the Theory of Legal System, (1980), p. 11.
[476] During his lifetime Austin exercised little influence outside the utilitarian circle with Bentham himself and James and John Stuart Mill. Encyclopaedia Britannica (H.L.A.H), Austin, John.

that moral judgments cannot be made or defended as facts by means of rational argument.[477]

Kelsen defines a legal system as the use of socially organised power (coercion). This same criteria of coercion is to be found in every legal norm (Wenn A ist, soll B sein).[478] To Kelsen the basic idea inherent in legal positivism is the autonomy of legal science. Legal science should be able to identify a method and an approach, through which the legal scientist can approach the object of research in a pure legal way. The approach of the legal scientist should be clearly distinguished from political sciences, which apply a casuistic descriptive method, as is the case in sociology, and from value oriented sciences such as politics and morals. Kelsen does accord morals and religion a normative nature as well, but normative within the social order alongside the normativity of law. In the last resort, what distinguishes the normative character of law from that of morals or religion is the nature of its sanctions. In this respect law enjoys autonomy because the sanctions, which it applies are organised by society.[479]

The Uppsala school or the school of Scandinavian realism offers one further variation of legal positivism. This orientation does not attempt a strict separation between legal norms and other social norms. The focus of this orientation lies on an analysis of imperative sentences or orders, which are seen to illustrate also the nature of legal norms in a central way. The analysis is basically a linguistic one (**Hägerström, Olivercrona**). Axel Hägerström maintains that imperatives cannot be explained on the basis of the state of affairs to which they relate, because they do not relate to a state of affairs. As to the practical implications of an order he makes a detailed psychological analysis of the social implications and effects of an order. Norms are means for practical suggestions, to which a particular linguistic expression is attached, an imperative, and these cannot be reduced to the content of the will of the norm authority.[480]

11 Ideology and ideal-type implicit in the positivist orientations

What legal dogmatics (jurisprudence) provides us, Eriksson pictures as follows: Legal dogmatics produces a *Vorverständnis*, out of which the legal dogmatist and the law implementer act. This *Vorverständnis* often remains implicit and unarticulated.[481] This unarticulated premise reflects the prevailing legal ideology, the modes of argumentation and interpretation. Eriksson notes that the predominate tradition of argumentation and interpretation in any society, is always historically and politically determined.[482]

---

[477] Tolonen, H, Normista, pp. 25-26.
[478] Tolonen, H, Normista, pp. 29-31.
[479] See Tolonen, H, Normista, pp. 29-30.
[480] Tolonen, H, Normista, pp. 34-35.
[481] Eriksson, Lars D, Marxistisk teori och rättsvetenskap, (1980) p. 106.
[482] Eriksson, (1980), p. 107.

What is then the *Vorverständnis* of the theoretical landscape that evolved during modernity influencing our perception? This can, in Leo **Huberman's** words be illustrated as follows: "He was eager for profits. Along came the classical economists who said that was exactly what he should be interested in". A great blend between theory and praxis! And the situation is even improved when he, how is eager for profit, is told that "every minute of the time that he was looking toward his own profit he was helping the state as well". In these two sentences Huberman has encircled the theoretical heritage that influences our V*orverständnis*.[483] There would not even be a dissenting voice from Hobbes, because wealth and riches of all the particular members are the strength of his commonwealth, Leviathan. Here we have the blend between commerce, industry and state power of the night watch state of the 19th century that has continued to operate as an undercurrent in law, despite the introduction of economic, social and cultural rights. With the current neo-liberal trend, this trend has again been reinforced.

Competition was, and continues to be, the mechanism through which profit is sought. And competition finds its legal form in freedom of contract and trade, in private property and the instruments of production.[484] In this scheme the state was to stand aloof of the natural course of economic processes.[485] This was the scenario of the 19th century, which also saw law reform on a grand scale, aimed at deregulating the old order. And here decisive paradigmatic changes were made in law, corresponding to these economic perceptions. H*omo economicus* had entered the scene, he became the ideal-type.

Franz **Neumann** discusses ideal-types, basing himself on Max **Weber**, who pictured the ideal- type as a mental design "which is not itself a reality, but with which reality is measured and with which it is compared."[486] Neumann puts a question that will assist in pinpointing problems relating to the theoretical foundation of law reform in the 19th and 20th centuries. He notes that by eliminating certain individual features, while emphasising others, which appear essential for the construction of the ideal-type, the ideal-type is attained. And Neumann asks: Why may we neglect certain historical phenomena, and consider others as essential? Does this not make the very notion of the ideal-type a purely arbitrary one? Are there any standard of measurement indicating which individual historical features are necessary for the construction of the ideal-type, and which are only incidental?[487]

When looking at law in operation in the early third millennium, we need to keep in mind those features, which in the 19th century were seen as central for the ideal-type. It was the economy and trade, which had to be freed from different kinds of restraints. The focus on economic processes made contract the central legal notion

[483] Huberman, Leo, Man's Worldly Goods, (1968) p. 205.
[484] The classical economists did, however, not include the labour market into the conception of competition, only commodities. Neumann, Franz, The Rule of Law, Political Theory and the Legal system in Modern Society, (1986) p. 192.
[485] Neumann, (1986), p. 192.
[486] Neumann, (1986), p. 87.
[487] Neumann, (1986), pp. 187-188.

in the restructuring of law. Here Neumann's questions are pertinent. How did the ideal-type, on which new legal regulation came to be based, relate to different social settings and human relations? What kind of problems can be traced back to aspects, which were omitted from the ideal-type, and what kind of legal problems result from the way the ideal-type influenced legal regulation in different fields? The preceding account of the emergence of labour law is an illustration of these questions (IV.1).

These questions can also be illustrated by looking at the *Vorferständnis* residing behind different perceptions of the contract. This will reveal what implications the *Vorverständnis* has for the way the employment contract and collective agreements are perceived, and what effects these have for the parties involved. Juha **Pöyhönen** has identified the following prerequisites that steer the perception of a contract in the western theoretical tradition: freedom/compulsion, free will /determinism, freedom / necessity, freedom /equity, individual/community, the interests of exchange/ compensation for the weaker party. These basic dimensions steer the explanation of the validity of a contract. When changes occur, alternations are made within these parameters.[488] Pöyhönen depicts these contract models as based either on will, trust or social practice. Central elements of these different models are the 'deep justification' of the model and the criteria that are relevant for determining obligations and responsibility. From these different models a guiding principle is extracted, which is given a *prima facie* bearing, providing thereby the deep justification of that contract model.[489] The way the peace obligation operates in collective agreements, accounted above, is one such illustration (IV.2.2).

When freedom of trade was introduced, the 'will' model had established itself. It represented a model of formal legal rationality embodying freedom as a basic value. Its main prerequisites were, at its deep layer, the free will through which contractual obligations were determined. This was thus a *prima facie* principle governing a contract, for which Friedrich Carl **von Savigny** had developed a theoretical scheme in the former part of the 19th century. Although the free will was the determining aspect, elements reflecting the interests of exchange were also discernable. Savigny did, however, qualify the freedom of contract with a requirement that this freedom should be factual.[490] This aspect of factual freedom was largely ignored in the perception and administration of labour contracts, as revealed above.

By the time freedom of trade had been introduced and the nature of the employment relationship had changed from status to contract, there was a change in focus in the perception of a contract. The free will was maintained, but now complemented by the interest of exchange. In this process trust became an independent criterion for determining matters of responsibility.[491] It was in this order of values that the emerging labour contracts are to be perceived. The effects of this we still see at work in regard to the peace obligation attached to a collective agreement. This *prima facie* principle, the notion of trust, associated with the peace obligation,

[488] Pöyhönen, Juha, Sopimusoikeuden järjestelmä ja sopimusten sovittelu, (1988), p. 116.
[489] Pöyhönen, (1988), p. 118.
[490] See Pöyhönen, (1988), pp. 121, 124.
[491] See Pöyhönen, (1988), p. 139.

has persisted notwithstanding later developments in contract law, towards a focus on equity and social justice.

In the critical research orientations in civil law, researchers have argued that a change of emphasis is needed between freedom of contract and equity. Equity aspects should replace freedom of contract as the major determining factor. The freedom of contract should be accorded the status of exception, whereas equity should be the determining factor. According to Pöyhönen, equity should assume the function of a *prima facie* position, where fair social practices would be decisive in determining legal obligations.[492] The lack of such a perspective has more often than not left the working population at a disadvantage where contractual relationships are involved.

Because of the way the utilitarian tradition has been implemented at a practical level and the way legal positivism has divorced legislation from its social reality, there is often a considerable discrepancy between law in the books and law in action.

Looking back at his legal studies in the period when a Kelsenian tradition was at its pinnacle Eriksson recalls: During my studies in the late 1950s and early 1960s, Finnish legal dogmatics was largely a technical field of knowledge. One was supposed to know the systematisation of the legal order and the rules and methods of interpretation. Much more than that was not required. Different methods of interpretation that in principle could have made law become alive, where not discussed or questioned. The methods were considered as given and there were no problems associated with them. And Eriksson notes that for a young soul with a genuine interest in philosophy and politics, the whole situation appeared rather hopeless. "I did not intend to get a training as an engineer."[493]

Accounting his attempts at broadening the scope of legal investigation, Eriksson notes that he in the 1970s had become increasingly convinced that in order for us to comprehend the legal system in its entirety, is has to be studied in conjunction with associated systems, above all the political and the economic systems.[494] He also considers that we need a method rather than a theory.[495] Eriksson was not alone with these concerns. Since the 1960s, a central research agenda in law as well as in philosophy has been to widen the scope of theoretical consideration. To this we will now turn.

[492] See Pöyhönen, (1988), p. 178.
[493] Eriksson, Lars D, Mina metoder, p. 57, (1997) in Häyhä, J, Ed. Minun metodini.
[494] Eriksson, (1997), p. 59.
[495] Eriksson, (1997), p. 5.

Chapter V

recaptures lost clusters

Where to start

To start from an initial and fundamental error makes it impossible not to run into disaster at the end, Aristotle notes. "Therefore we must make use both of numerical equality and of equality of value."[496] Aristotle's thinking offers a contrast and a corrective to the tradition of modernity, because his thinking comprises the human being both as a moral agent and as a social and human being, prerequisites that gradually were lost in modernity because of the narrow focus of the positivist traditions. There were good reasons for the turn thinking took during modernity. Old ways of thinking had to bee revised in order to catch up with social change. But, as frequently appears to be the case, thinking then establishes its own course, with the effect that account is not taken of subsequent change. This is where we had arrived by the 1960s, and it is but natural that there would be a revived interest in Aristotle's thinking.

There are striking similarities between the problems, which concern politics and society today, and those of the ancient Athenian polis. Today we could take any western country as an illustration of problems that occupied the minds of the Greek philosophers. In the time of **Plato** and Aristotle, concerns about justice and ethics were central. This reflects the problematic moral character of Greek life at that time, which in Alasdair **MacIntyre's** words "arises from and partially consists in the fact that moral usage had ceased to be clear and consistent."[497]

A central concern today, is to recapture clusters in theoretical thinking that were lost because of the dominating positivist trends in philosophy, with their spill-off effects in other disciplines. In both philosophy and law, it is a question of differentiating the theoretical landscape, in order to make sense of the human condition in the changed context of the early third millennium, dominated by information technology and a global economy. Contemporary societies share the same features of uncertainty concerning moral usage, direction and conduct, as the Athenian polis. The way the philosophers studied in chapter III have been relied upon has left us with a poor theoretical equipment for considering contemporary human and social problems. We therefore need to make a transition from a view of the human being

[496] Aristotle, Politics, (1987), V.i, 1302a2, 298-299.

[497] MacIntyre, A Short History of Ethics, (1984), pp. 24-25. These concerns were addressed in different ways; Plato and Aristotle relate moral concepts to a certain sort of social order, whereas the Stoics, Cynics and Cyrenaics sought to provide a moral code independent of society, tied only to the individual's choice and decisions, and attempting to make the individual moral life self-sufficient.

merely as a *homo economicus* or reduced to his mechanical movements and physical processes. Friedrich W **Taylor's** model of man at the assembly line illustrates this point, where people's movements were studied in order to extract a maximal economic output from the labour force. In contrast to this, we need to see the kind of activities people are engaged in. Art and culture are examples of activities that are not easily apprehended in economic terms, for which reason such activities and their human significance have largely been ignored.

1 Movement on a broad front

The stream of dissenting voices that have been heard since the 1960s and -70s, is a clear indication of a problem inherent in mainstream theoretical traditions that rely on models borrowed from natural sciences, as a means of investigating human and social affairs. In the worldview dominated by natural sciences, human aspirations are regarded as given by nature, allowing thereby an objective study, or they are conceived of as chosen in an autonomous way. Utilitarianism is a product of this modern understanding, which emphasises instrumental thinking, calculation and a naturalistically determined aim, happiness, or a neutral description of the individual's choices, in terms of preferences, free of interpretation. As Charles Taylor rightly points out, this emphasis on freedom has its origin in the rejection of paternalism.[498] So here we have an illustration of a general tendency to rely on previous thinkers for other aims than they intended. Because the aspirations of thinkers since the 17th century have been taken on board as unarticulated premises, we are at odds in attaining the complex field where human meanings should be investigated and interpreted at different levels, covering the whole array from questions concerning democracy to a person's project of life.

On this point there is an interesting contrast between the thinking of Greek philosophers, and that of the philosophers of modernity, looked at above. The modern thinkers headed forwards, their thinking envisaged new openings, aimed at freeing the energies held back by old structures. In Greek democracy, this stage was reached, for those who were 'free an equal', and focus was placed on the disposition of men. This made ethics and justice central concerns. Here we have a parallel to present day concerns. Thinkers like Locke, Bentham and Mill pawed the way for democracy. We have the form, and now it is a question of giving substance to the formal notion of democracy, which would reflect social change during the 20th century.

In the Athenian polis the decline of democracy after the Peloponnesian war and after, and the disintegration of Athenian society and the values for which Athenian democracy stood, inspired the thinking about justice and the relation between justice and positive law.[499] Many problems we face today are, likewise, associated with social change, making habitual ways of handling social matters and human relations

[498] Taylor, (1995), p. 158.
[499] Friedman, (1967), p. 7.

problematic. In today's global economy we are in a situation fairly similar to that of the Athenians, who saw their polis superseded by the vast empire of Alexander the Great. Such a radical change in the social context cannot but affect the way in which we perceive social reality. And of course, today's globalized economy did not come about overnight, as the economic scenario (Chapter II) has illustrated. This change has occurred in an intimate interaction between a new economic culture, new technologies and new attitudes among people, to name the most outstanding features of the past decades. The purpose of the preceding scrutiny of philosophical thinking was to display the theoretical heritage, and how we make use of it in present day circumstances, as reflected in legal regulation and administration. By laying bare these features, and the way they differ from classical perceptions, might make it easier to tackle problems we face today.

There is, however, one thinker in modernity, who in an interesting way combines thinking in antiquity and modernity, Jean-Jaques **Rousseau**. Rousseau states in the introduction to his 'Social Contract' that he is investigating whether there can, in a civil order, exist some legitimate and sure principles of government, which allow for people as they are, and for laws as they might be. In this effort he states that his method of investigation is always to combine, what law permits and what interest prescribes, *in order that justice and utility are in no way divided* (emphasis added).[500] Rousseau's requirement that we need to combine justice and utility fits admirably well problems that have occurred because of an one-sided emphasis on Bentham's utility formula. This is because of the emphasis on utility as maximization in economic terms, often at the cost of considerations about justice. It is not surprising, therefore, that theories of justice are responses to contemporary problems. Such endeavours will be looked at shortly, but first some glimpses of Rousseau's thinking, as a bridge between utilitarianism and perceptions of justice in contemporary thinking.

To Rousseau all human beings are born free and equal, and they surrender their freedom only when they see an advantage in doing so.[501] This is an important qualification to, above all, the way Bentham's utility formula has been applied in practice. A just state of affairs in Rousseau's scheme implies that your freedom can be conceded only for your own utility. It is in relation to the 'general will' ('*volonté générale*') that your freedom is at stake, and it is in the process of arriving at the general will that you compromise between freedom and utility. The general will is the only one to direct the forces of the state, in accordance with the end for which the state has been established, to attain the common good (*bien commun*): "[F]or if conflict between private interests has made the setting up of civil societies necessary, harmony between those same interests has made it possible. It is what is common to those different interests, which yields the social bond; if there were no point on which separate interests coincide, the society could not conceivably exist...And it is precisely on the basis of this common interest that society must be governed."[502]

Rousseau states that the personal engagement vis-à-vis the social body can

[500] Rousseau, Jean Jaques, Du contrat social, (1966), p. 39.
[501] Rousseau, (1966), p 42.
[502] Rousseau, (1966), p. 63.

pose obligations only to the extent that they are mutual. The nature of these obligations must be such that in fulfilling them one cannot work for others without also working for oneself. So Rousseau puts the question: why is the general will always rightful, and why do all always wish the happiness of each, if it is not because nobody would work for the disadvantage of himself in voting for the best of the whole? The conclusion Rousseau draws from this is that equality of right and the notion of justice which is thereby produced is derived from everybody's preference, and hence from human nature as such. "It also proves that the general will, to be truly what it is, must be general in its purpose as well as in its nature; that it should spring from all and apply to all; and that it loses its natural rectitude when it is directed towards any particular and circumscribed object - *for in judging what is foreign to us, we have no sound principle of equality to guide us*" (emphasis added).[503] This statement by Rousseau is of interest in view of how the *Rechtstaat* model, in the 19th century, created a view of formal equality without means of assessing whether individuals are equal also from a substantive point of view. In my view, Rousseau's construction of the general will and the means of arriving at it shares its basic construction with Aristotle's deliberations about justice. Rousseau's main target is the thinking of Hobbes and Grotius, and his model is an alternative to the authoritarian elements in Hobbes' and Grotius' views on sovereignty. Where Rousseau talks about the social contract, Aristotle talks about the constitution, which makes the citizen-body in a state into an association of free men. "[T]hose constitutions which aim at the common good are right, as being in accord with absolute justice; while those which aim only at the good of the rulers are wrong."[504] The good aimed at in a state is justice, and that means what is for the benefit of the whole community.[505] In the Nicomachean Ethics, Book V, Aristotle considers political justice: "Political justice obtains between those who share a life for the satisfaction of their needs as persons free and equal, either arithmetically or proportionately. Hence in associations where these conditions are not present there is no political justice between the members, but only a sort of approximation to justice."[506]

The way Aristotle sees the common good materialise is through the nature of action and disposition of man: "The courage of a state, or its sense of justice, or its practical wisdom, or its restraint have exactly the same effect and are manifested in the same form as the qualities which the individual has to share in if he is to be called courageous, just, wise, or restrained."[507] The common good thus boils down to virtue, virtuous disposition and action. Because of the narrow focus of the positivist orientations there was not much room for considerations about virtuous disposition and action.

[503] Rousseau, (1966), pp. 68-69.
[504] Aristotle, Politics, (1987), Book III.vi, 1279a16, p. 189.
[505] Aristotle, (1987), Book III,xii, 1282b14, pp. 207.
[506] Aristotle, (1987), V.vi, 1134a23-b8, p. 188.
[507] Aristotle, (1987), VII.i, 1323b21, p. 393.

2 A narrow world-view

Charles Taylor is one of many who, since the 1960s and 1970s, has put effort into enlarging the theoretical focus. He illustrates how we, by the questions we put, can open up new venues for investigation. An alternative agenda, therefore, has been to provide options to the atomistic worldview that, in part, resulted from the way the enlightenment scheme was formulated, and in part, from the way this tradition has been drawn upon, reducing human beings to 'social atoms'. A result of this is the *prima facie* influence individual rights have gained, Taylor notes.[508] This has led to a change of focus from a preponderance of ethics to one of rights. Taylor points to how weird the rights tradition is to other civilisations, where arguments about rights are seen both as eccentric and preposterous.[509] Taylor attributes the western individualist orientation to social contract theories, but observes that all enlightenment thinkers who advocated social contract, equally emphasised the advantage people have of entering into such a contract.[510] He asserts that the free individual of the western world is what he or she is precisely because of the total societal context and the civilisations that brought this about. This, he argues, creates an important obligation of belonging, for all those who affirm the value of this freedom. It includes all those, who want to emphasise the right to this freedom.[511] Is it not rather so, Taylor asks, that the free individual asserting oneself already has an obligation to bring to fruition, to maintain and support a society that caters for this identity.[512]

Taylor suggests that some fundamental questions need to be put, such as, what do we mean when we talk about individuals, and how does this differ from talking about persons? Taylor illustrates this by transforming an individual into a respondent. He puts two questions: What does it mean to talk about a respondent, and what is specific to agents that we call persons?[513] These two questions trigger two different modes of explanation, a scientific one, - how to explain human behaviour - and a moral-practical one -what is a good / decent /acceptable form of life, which places emphasis on the nature of human action.[514]

In his endeavours to provide an alternative to the instrumental view, Taylor also adds the notion of meaning. By paying attention to meaning, also human emotions are revealed. Among the different illustrations of meaning that Taylor advances, I will here single out one that is central to this work, dignity as an expression of meaning. Taylor notes that in this field, where there is no more than the meaning given by human beings, the research process differs from the instrumental one. It involves a searching approach. So, Taylor remarks that the one who hungers for certainty will only find it in the first perspective, which departs from a view that

[508] Taylor, Charles, Identitet, frihet och gemenskap, (1995), p. 163.
[509] Taylor, (1995), p. 163.
[510] Taylor, (1995), p. 165.
[511] Taylor, (1995), p. 185.
[512] Taylor, (1995), p. 189.
[513] Taylor, (1995), p. 137.
[514] See Taylor, (1995), pp. 138-139.

human aims can be captured through natural sciences. These two ways of looking at the human being are present in the modern western culture, and most people refer to both these models, in a contradictory way, perhaps, Taylor notes. But at a theoretical level these models can be separated and they constitute alternatives that exclude one another. This does not mean that they lose their significance. Theoretical models with an inner coherence exercise a strong influence on our thinking even when - or perhaps particularly - when they are not quite conscious or explicit. Taylor notes that these rivalling orientations are an expression of the conflict between a moral and an intellectual view. To recognise this, is a first step towards resolving the conflict these rivalling orientations cause.[515]

2.1 Broadening the conceptual scope

Much effort has been put into offering an alternative view of persons than the instrumental, utilitarian one. This involves the whole spectrum, from reassessing political institutions and democracy to theories of social justice and ethics. All these orientations contribute by adding elements that make it possible to make the transition from an atomist view of an individual to a view that takes on board human beings as moral agents, situated in an identifiable social context. The global and digital world in which we live and the new conditions it has brought along requires fresh approaches to capture human and social relations as they are displayed today. Castells points to how production, experience and power constitute forceful elements that condition societal structures. He places these phenomena into theoretical perspective, postulating that society is organised around human processes that are structured by historically determined relations to production, experience and power. Production is mankind's means of acquisition for the purpose of making products, for consumption and for accumulating surpluses, in accordance with certain socially determined goals. Experience is a product of the interaction between a biological and cultural identity. This is built on the human being's constant search for the satisfaction of human needs and aspirations. Power, again, is the relation between human subjects that, based on production and experience, impose on certain subjects the will of others through potential or factual use of physical or symbolic repressive force.[516] It is in this blend of production, experience and power that we need to discern the place of the human being, in the new context of the IT society. What is required from legislation in this new social setting? In order to perceive this, we again need to pay attention to the role law was assigned through law reform during the 19th and 20th centuries.

What primarily 19th century thinkers aspired to was a sphere of autonomy for the pursuit of commerce, manufacturing and industrial production. These aspirations were influential in the shaping of the '*Rechtstaat*' idea on the continent and the idea of the 'rule of law' in the common law tradition. Although different in outlook, both the rule of law and the *Rechtstaat* ideas laid emphasis on law, not on individuals. Both

[515] Taylor, (1995), p. 159.
[516] Castells, (1999), p. 28.

were constructed in such a way that the process of reconciling competing interests, which is the guiding idea in the thinking of Aristotle and Rousseau, were not carried all the way through, but stopped with the law-making process.

Like Rousseau, Locke had developed his ideas in opposition to absolute rule, with the aim of liberating the individual from the trusteeship of the state. Locke's ideas differed in a crucial way from those of Rousseau, and it was the ideas of Locke, which were to win the day. Both Locke and Rousseau saw law as central, but their emphasis differed. To Rousseau the way the general will should be extracted was a guarantee that the laws would be just because "we can no longer ask *who* is to make laws, because laws are acts of the general will;... no longer ask if the law can be unjust, because no one is unjust to himself, and no longer ask how we can be both free and subject to the laws, for the laws are but registers of what we ourselves desire."[517] This Rousseau sees as a process of accommodating competing interests between the particular and the collectivity.[518]

It is thus towards negotiation and a process of reconciliation we need to direct attention in order to exit the utilitarian maximisation trap and the dichotomy legal - illegal. This is the basic constellation for example in John **Rawls** theory of justice, to which we will shortly turn. But first some more mapping of the contrast between different traditions and today's challenges.

The notion and role of the rule of law has in a fundamental way modified the ideas inherent in Aristotle's and Rousseau's views on how to arrive at a just state of affairs, or the general will. Their ideas follow us to the point at which a law is passed, but thereafter the business is handed over to the sovereign authority, public administration. As Wolgast has pointed out, the legacy of Hobbes is here central. His legacy is alive in present day organisation, public as well as private, raising ethical concerns because of representation by an agent rather than a personal commitment.[519] A challenge we face today, albeit belatedly, is to tune our perception in line with social justice, as it has been formulated in public policy and human rights standards during the 20th century. We need an alternative to the view of human beings as omnipotent individuals, the 'architectures of fortune' to borrow Bacon's characterisation. This picture fails to represent the factual situation of an increasing number of people. We therefore need to take a more global perspective on man and society. A first step in this direction is to revise our concepts and theoretical tools.

As the scenarios, which set the scene for this work should have indicated, a solution to the problems, with which people are faced, whose life prospects are affected by social change, should be sought at different levels. We need to dig deeper than government policies and legislation. The conditions of democracy must be addressed if the value of general franchise is to be rescued. What is needed is therefore to bring forth substantive aspects of social cooperation.

[517] Rousseau, (1966), p. 76.
[518] Rousseau, (1966), p. 76.
[519] Wolgast, (1992), pp. 1, 2.

2.2 Democracy - practices and expectations

Democracy was the means, which should remedy all those wrongs that appeared in the wake of industrialisation in the 19th century. Parallel with democracy we have basic rights, particularly economic, social and cultural rights, which aim at securing a good aspired through democratic processes. A democratic form of government provided the means, through which people could partake in arranging the joint social enterprise. Through economic, social and cultural rights, again, guarantees were intended to secure a substantive aspect to remedy the shortcomings of classical rights and liberties. One could say that the never ending need there appears to be to establish different categories of human rights is a diagnosis that the instrumental aspects of a democratic form of government has not been a sufficient means of regulating the social enterprise in a way to secure the expectations placed on it. And basic rights do not fare much better. Wolgast notes that, although rights is both a powerful and useful tool, the schema is sometimes unfit for the uses we make of it. "It can bind us to a senseless stance, stereotype our reasoning, and lead to remedies that are grotesque. Our commitment to this language is deep, however; even in the face of bizarre consequences we hold it fast and view the consequent problems as demands for further rights. Thus our reasoning often goes on in an enclosed framework of rights, a framework from which counter examples are excluded a priori."[520]

The by now constant calls for a value discussion indicates that although living in the 'best form of government' we appear to find ourselves in a situation where we are at a loss as to standards, external to the system, against which to measures politics, and to ideals through which to assess and modify policies.[521] This discrepancy between the legitimate expectations people place both in a democratic form of government and human rights, and their practical outlook has already for some time caused a critical assessment of democracy. Benjamin **Barber** has rightly pointed out that there is nothing simple about (liberal) democracy. "It is an exotic, complex, and frequently paradoxical form of politics". He distinguishes at least three dominant *dispositions* entailing a quite distinctive set of attitudes, inclinations and political values.[522] Taking The US as an illustration, he pictures the following three dispositions, which with some change of emphasis could be applied to most western democracies. These are *anarchist, realist* and *minimalist.* Barber characterises them as follows: "Americans, we might say, are anarchists in their values (privacy, liberty, individualism, property, and rights); realists in their means (power, law, coercive mediation, and sovereign adjudication); and minimalists in their political temper (tolerance, wariness of government, pluralism, and such institutionalization of caution as the separation of powers and judicial review)".[523] These dispositions, Barber notes, can all be regarded as political responses to conflict, which is the fundamental condition of all liberal democratic politics. These conflicts he pictures in the following

[520] Wolgast, The Grammar of Justice, (1987), p. 28.
[521] see Barber, (1984), p. 3.
[522] Barber, (1984), p. 5.
[523] Barber, (1984), p. 5.

way: "[A]narchism is *conflict-denying*, realism is *conflict-repressing*, and minimalism is *conflict-tolerating*. The first approach tries to wish conflict away, the second to extirpate it, and the third to live with it."[524] The American form of liberal democracy he characterises as conflict-denying in its free-market assumptions about the private sector and its supposed elasticity and egalitarianism. In adjudicating the struggle of individuals and groups, it is conflict-repressing and also conflict-adjusting, in its prudential use of political power. And it is conflict-tolerating in its characteristic liberal-sceptical temper. These are contradictory impulses acting within a single political tradition, rather than independent philosophies belonging to distinct political systems, Barber notes.[525]

The picture of the human being that Barber sees emerging from this is the following: Inherent in these portraits of human nature there is a belief in the fundamental inability of the human beast to live at close quarters with members of its own species. These views of the human being seek to structure human relations in a way to keep them apart rather than bring them together. It is the mutual incompatibility of these views that turns men into reluctant citizens, and their aggressive solitude makes them into wary neighbours.[526] "Like some sovereign founder of a universal protection racket, the liberal state manipulates men by first implanting terror in them and then, in return for their socially acceptable behavior and their prudential fealty, protecting them from it."[527] The protective function is in tune with what Aldous **Huxley** has named 'preventive ethics', practiced in the field of economics and politics. The aim of preventive ethics is to create such social conditions that people are not given a chance to act in an undesirable way. This, Huxley notes, is a very 'dependent' way. It is thought that improvements can be achieved through reforms of social structures, whereas no attention is paid to a change in peoples' dispositions.[528]

From this logic embedded in legislation, there results a schizophrenic picture of the human being. Barber notes that the defence of 'thin democracy' as he calls it, is negative rather than affirmative and can conceive of no form of citizenship other than the self-interested bargain. Every prudential argument for democracy is an argument for its thinness; "every defence of democracy *in lieu* of something better invites one to search for the missing "something better"; every attempt to cut man down to fit the demands of hedonism and economics makes him too small for civic affiliation and too mean spirited for communal participation."[529]

[524] Barber, (1984), p. 6.
[525] Barber, (1984), p. 6.
[526] Barber, (1984), p. 21.
[527] Barber, (1984) p. 23.
[528] Huxley, Aldous, Mål och Medel, (1938), p. 19.
[529] Barber, (1984), p. 24.

3 Where the problem lies

Why is then democracy so problematic? As I conceive of it, our theoretical inability to perceive factual states of affairs is one major reason. This, again, is to a large extent dependent on the way we have taken on trust the thinking of foregone centuries inspired by different social settings and different forms of government. We thus operate with fragments of former schemes, and with this equipment we try to come to grips with problems that to a great extent are derived from these very schemes. What we have lost in the process is a view of people as human beings and how they relate to each other; that they are not social atoms, but that there are dependencies among people, which work in varied and complex ways.

Another major problem is the still current belief that something relevant can be said about human affairs through a method borrowed from natural sciences and its truth propositions. I join in Graham **Greene's** view that "Truth... has never been of any real value to any human being - it is a symbol for mathematicians and philosophers to pursue". This is an old 'truth' for which already Aristotle was a spokesman. Bringing this notion to theoretical reflection today, I join in Barber's view that democratic and politics are forms of human relations that do not answer to the requirements of truth.[530] "Danger lurks in democracy, but danger also lurk in a tradition of philosophizing that has devoted itself to condemning the rabble publics who, one might say, have been waiting for eons to be enlightened by those who have in fact only denigrated and betrayed them. This danger, indigenous to philosophy, should be kept constantly in mind as we examine the liberal critique of democracy."[531]

While our theoretical and legal traditions conceal from view human interdependencies, it also capacitates egoism, and almost pushes people into the social atomism of the theoretical premises. Barber has caught this in a nutshell. He notes that democracy, despite its successes, has also contributed to the moulding of mass men: individuals are defined by their property but "unable to determine who they are, emancipated by rights and freedoms but unable to act as morally autonomous agents, driven by ambition and lust yet distanced from their happiness by the very powers that were supposed to facilitate its achievement". Secure in his rights and governed by impartial law and accountable representatives, this man is obviously not mass man, let alone totalistic man, Barber notes, pointing out how these, as ideal types, are completely opposite, one to the other. Liberal democratic man is burdened with a psychology that disposes him toward the very pathologies he most fears. Barber concludes that "[a]s a philosophical abstraction he is perfectly safe; as a figure encumbered with a real history, however, he walks a tightrope, forever in danger precisely because of the abstractness of his safety net.... The model is perfect, but perfection can be a defect in the real world of history."[532] The real history can only be discerned if we, as Wolgast proposes, take a broader view of human life needs, one

[530] Barber, Preface, (1984), p. xii.
[531] Barber, (1984), p. 96.
[532] Barber, (1984), pp. 97-98.

that allows a firmer juncture between the moral and political realms, 'between the grammar of good and the grammar of justice'. She proposes that this might amount to the same thing as a need to loosen the hold that the atomistic picture has on our thinking, and to recognise the importance that theory has on our judgments and our moral condition.[533]

4 First task: 'To rearrange the places and give them all another name'

In order to escape the impasse described above, other distinctions have to be made than those of the *Rechtstaat* idea of justice. The 19th century theoretical tradition squeezed social reality and human relations into an ideal formula (contract) reflecting human beings as social atoms. Because of the inadequate expression of human relations and interdependencies, as contractual ones, constant exceptions and modifications have to be made for situations that are at variance with the ideal picture of the omnipotent individual who goes about his or her life project in an autonomous manner. Basic rights, from freedom of association, through the he second generation of human rights, economic, social and cultural rights, to the third generation of rights, and the discussion whether animals should have rights, are all expressions of a need to remedy an inadequate premise in order to provide some protection and predictability. In my view we will never hit the true nature of the problem from the present premises, and a first matter to remedy, is therefore to propose an alternative point of departure to the contractual construction in the *Rechtstaat* model. This does not imply a negation of the role of contract, but rather that we need a greater differentiation of the status of different parties, as the preceding account of labour law revealed. This differentiation is therefore of particular importance in fields such as working life and social security.

First a few words about the construction itself. Douglas R **Hofstadter** has in his book 'Metamagical Themas' offered an illuminating illustration of our thought structures, and their implications. Using the Greek notion nómos (law), he has developed a game he calls Nomic, which, based on the idea of government, provides a set of rules, which will allow players to change the rules of the game as they play. He has constructed a departure, which he deliberately has made as simple as possible, and the reason for making it simple in the start is that it is easier to add tiers to it than to subtract them from a complex one.[534] Although there will now be a confusion of language, I here see an interesting contrast to the construction of the *Rechtstaat* idea, which will help to illustrate what I wish to place in stead. The basic premise of the *Rechtstaat* model, that human relations are pictured through contracts is an over-generalisation that allows nothing to be added in a natural way, only exceptions can be made. The contract construction is incapable of having something added to it, which does not constitute an exception to the basic idea, instead of it being a qualification or derivation of the basic idea. Hofstadter boils his proposition down to the following:

[533] Wolgast, (1987), p. 27.
[534] Hofstadter, Douglas R, Metamagical Themas: Questing for the Essence of Mind and Pattern, Nomic: A Self-Modifying Game Based on Reflexitivity in Law, (1987), pp. 74-75.

"To get *flexible cognition*, concentrate on *reflexitivity* and *recognition*."[535] Thus, what is needed of an alternative departure to the contractual one is a scheme, which takes account of factual states of affairs and allows them to be reflected in a dynamic manner.

The contractual scheme, on the contrary, reflects the human tendency to simplify complex situations. Our intellect, Huxley notes, desires explanations that seek to reduce complexity into identity. We feel great satisfaction from any doctrine that reduces irrational complexity into a comprehensive and rational entity. This is the very basis for science, philosophy and theology, he notes. Nevertheless, Huxley warns that this search for identity can be pushed too far particularly so when it comes to a field that does not represent well-ordered natural sciences. The human being has a capacity to look at things in different ways. She can state that chalk and cheese are composed of electrons, and this can satisfy our quest for explanations. This reductionist knowledge has its place in a library, but in the dining room there is not much use for it. And in practical life, we seldom make such mistakes. However, Huxley warns, there are other categories of phenomena where we can simplify with less visible consequences. In many instances we do not even notice the errors and they are not immediately visible. This is the case in human affairs. We will never come to grips with human problems before we learn from the natural sciences to suppress our quest for rational explanations, and instead accept a certain degree of irrationality, multiplicity and specificity. We have to realise that there are a multiplicity of factors, which stand in an intricate relationship to one another with reduplicated effects and reactions.[536]

This is something that also Taylor draws attention to. He points to an interesting paradox of modernity, inherent in the individualistic orientation. The individualistic approach allows a distance from a down-to-earth reality. It expresses a longing for spiritual freedom that is a fundamental part of human life that cannot be denied. This desire is expressed in different ways - even in instances where it is vital that it should not be applied.[537] What is needed, therefore, is a scheme that will allow a consideration of substantive aspect of the conditions of human beings. For this I will here develop, and later on apply the notion of personal autonomy, as a means of exiting the impasse in which the legal tradition now largely is.

[535] Hofstadter, (1987), p 86. His article was inspired by Peter **Suber's** thinking on the reflexitivity of the law. In an ensuing correspondence concerning his article he arrives at his proposition about reflexivity.
[536] Huxley, (1938), pp. 16-17.
[537] Taylor, (1995), pp. 157-158.

4.1 A conceptual tool instead of a theory

The notion of *personal autonomy* will serve as a theoretical tool. In the following I will gradually assemble those prerequisites that I consider central to this notion. In the context of ethics and social justice, the notion of autonomy may have a dubious ring. This is because autonomy is so closely associated with social atomism and classical rights and liberties. This is reflected in the legal tradition, as it now operates, by upholding the autonomy of some at the cost of others, as can be seen in the economic and social scenarios, with which this work started. This constantly leads to social marginalization, of which there are increasing signs today. My reason for choosing autonomy as a conceptual tool is that it will more easily display what is required of the system if we insist that policies and actions may not infringe on those people's autonomy, who today are marginalized or stand the risk of being so.

A major problem associated with economic, social and cultural rights, as they have been legally formulated and administered, is that they have not granted autonomy for persons 'dependent' on these rights. Instead particularly economic and social rights, which largely have constituted correctives to classical rights and liberties, have been constructed in a way that make them appendices to classical rights and liberties, rather than rights in their own right. This leaves persons relying on provisions aimed at securing economic and social rights, such as social security, in a dependent position. In addition, it may be extremely difficult to defend one's rights from such a dependent position.

We can see that autonomy is no self-evident matter for, say, those who have been made redundant because of the employer's aspirations to improve his productivity when he rationalises his activities to this end. The autonomy in this case is the autonomy of the employer to go about his business of making and improving his profit. This has been done at the cost of the autonomy a person has enjoyed through salaried employment. Autonomy here is autonomy for one at the cost of others. This may stand as a first illustration of autonomy, which later on will be illustrated in different ways.

In order to differentiate the notion of autonomy, I will be concerned with *personal* autonomy. The qualifying notion of 'personal' requires a contextual consideration. This focus will display whether Rousseau's requirement that justice and utility should combine, has a backing in practice. The autonomy test is a means of assessing what a certain state of affairs, a specific action or government policy implies for the persons affected by such an action or policy. The qualifying notion that autonomy be personal makes it contextual, substantive and relational. The relational aspect also brings action into consideration, allowing us thereby to bridge the gap between the static picture of law and the dynamic field of ethics.

In order to prepare the ground for an application of the idea of personal autonomy, some basic differentiations have to be made. The rule of law or the *Rechtstaat* is a construction that presumes that justice can be secured through general laws, which are administered in a neutral manner, making thereby everybody equal

before the law. The scenarios with which this work started strongly suggest that this idea has not materialised in the way it was intended. An explanation to this is that the theoretical tradition on which the *Rechtstaat* idea is based is so permeated by an economic rationale that it cannot properly cope with other aspects of life than economic activity. The *Rechtstaat* model was designed to meet the needs of the economy and its place is among businessmen, which, as a restricted group among peers are involved in 'balancing' transactions. When relationships are extended to people as employees, consumers or tenants, this balance is no longer at hand. Corrective measures are needed, and modifications have to be made to the general idea of contract proper. In order to avoid a theoretical construction that to a great extent is comprised of exceptions to the general rule, we thus need a different departure.

An alternative approach to that on which legal institutions are based, is to take our departure from human beings in their social context. Theories of social justice do this, to some extent, and I will in the following rely on them. They represent ideas of justice that differ from the rule of law or *Rechtstaat* idea. The latter represent law as a formal means of guaranteeing justice. As this construction has not proved able to live up to the expectations put on it, substantive aspects need to be considered. This requires considerations to be contextual, which is an antidote to the generality required in the *Rechtstaat* model. It implies substituting for a departure from a general idea of social atoms, a departure from physical human beings, who are situated in a particular context that conditions their actions and choices. This is a much more complex departure than that of the *Rechtstaat*, because the unifying notion is justice as it is expressed in context, where focus is placed on the factual situation of human beings. Generality in a formal sense, which has been seen as a measure of justice, is in this approach replaced by a contextual assessment where fairness is the unifying notion.

5 Theories of justice, a conceptual groundwork

During the last three decades or so different attempts have been made to construct theories about social justice. They provide an alternative to a longstanding and well-established tradition of utilitarian thinking and legal positivism. These new theories provide a paradigmatic shift. The theories I will here rely upon are John Rawls, 'A Theory of Justice', David **Miller**, 'Social Justice' and Wojciech **Sadurski**, 'Giving desert its due - Social Justice and Legal Theory', which all illustrate some points or open some venues for the ensuing analysis.

A brief account will here be given of these theories of justice, for the purpose of preparing the groundwork for the subsequent analysis of present day challenges (Chapters VI and VII).

5.1 The fairness of institutions

Theories of (social) justice address questions of justice as fairness in social cooperation. A major incentive for those who have elaborated different theories of (social) justice has been to advance viable alternatives to utilitarianism in its various outfits. The moral implications of utilitarianism have here been a motivating force.

John Rawls was the first one to propose an overall theory viable of questioning different orientations of utilitarianism. He notes that utilitarianism has been espoused by a long line of brilliant writers, who have build up a body of thought, truly impressive in its scope and refinement. He points out that the great utilitarians, David Hume and Adam Smith, Jeremy Bentham and John Stuart Mill, were social theorists and economists of first rank. The moral doctrine they worked out was framed to meet the needs of their wider interests to fit into a comprehensive scheme. Those who today question the utilitarian tradition because of the moral implications of that theory have, in the absence of an alternative theory, been faced with the choice between utilitarianism and intuitionism.[538]

It is perhaps an illustration of the difficulty there is in breaking with one's own theoretical tradition, that Rawls' theory, notwithstanding its aim, is very close to utilitarianism, and is, above all, atomistic in character. That Rawls theory filled a vacuum is, however, quite obvious from the reception it received. Also those, who would not share his views recognise the vigour of his theory. Thus, Robert **Nozick**, who can be said to be one of the chief adversaries to a theory of justice has noted that "political philosophers ... must either work within Rawls' theory or explain why not."[539]

The theories of Rawls, Miller and Sadurski, represent different approaches and methods, but the basis of their theories is the same, a search for a viable means of assessing the fairness of social institutions and social arrangements. All of them aim at providing an alternative to utilitarianism. Rawls focuses on the basic structure of society as the primary subject of justice. "Justice", he notes "is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust... Being first virtues of human activities, truth and justice are uncompromising."[540] Rawls advances principles of social justice as the set of principles through which rights and duties in the basic institutions of society should be assigned, and the benefits and burdens of social cooperation distributed.[541]

For his theory, Rawls draws inspiration from the social contract theories of Locke, Rousseau and Kant, among others, carrying them to a higher level of abstraction The principles with which Rawls is concerned are principles which free

[538] Rawls, (1978), pp. vii-viii.
[539] Cited in Sadurski, Wojciech, Giving Desert its Due, Social Justice and Legal Theory, (1985), p. 4.
[540] Rawls, (1972), pp. 3-4.
[541] Rawls, (1972), p. 4.

and rational persons, concerned to further their own interests would accept in an initial position of equality, in order to define the fundamental terms of their association.[542] The device Rawls uses to extract these basic principles of justice is a hypothetical original position, in which persons are placed under a veil of ignorance. No one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like. This original position means that all are similarly situated and no one is able to design principles to favour his particular conditions. Through this construction the principles of justice are the result of a fair agreement or bargain. The symmetry of everyone's relations to each other, in the original position, is fair between individuals as moral persons, that is, as rational beings with their own ends and, as Rawls assumes, capable of a sense of justice.[543]

In Rawls' scheme justice as fairness thus begins with one of the most general of all choices that persons might make together. This is a choice of the first principles of a conception of justice, which is to regulate all subsequent criticism and reform of institutions. What ensues from this is that a society satisfying the principles of justice as fairness, comes as close as a society can to being a voluntary scheme, as it meets the principles that free and equal persons would assent to under circumstances that are fair. In this sense its members are autonomous and the obligations they recognise are self-imposed.[544] From the original position Rawls derives that persons in the initial situation would choose two rather different principles: the first requires equality in the assignment of basic rights and duties, whereas the second principle holds that social and economic inequalities are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society. These principles, he notes, rules out justifying institutions on the grounds that the hardships of some are offset by a greater good in the aggregate, which is the utilitarian postulate. It may be expedient but it is not just that some should have less in order that other may prosper. Rawls suggests that the principle of utility is incompatible with the conception of social cooperation among equals for mutual advantage, and that it appears to be inconsistent with the idea of reciprocity, which is implicit in the notion of a well-ordered society.[545]

5.2 A just state of affairs

Miller, in his theory of social justice, places his considerations at a more tangible level than Rawls. Miller proposes the notion of a just state of affairs as a point of departure for considering the question of justice. We describe actions as just, he notes, either when we believe that they were undertaken in a serious attempt to bring about a just sate of affairs, or when we find that they actually have this desirable result. It is,

[542] Rawls, (1972), p. 11.
[543] Rawls, (1972), p. 12.
[544] Rawls, (1972), p. 13.
[545] Rawls, (1972), pp. 14-15.

therefore, impossible to assess the justice of actions without a prior identification of just states of affairs.[546] Miller notes that in order to make judgments of justice it is necessary to examine the relation in which people stand to one another, such as the transactions in which they have engaged, or by comparing the amount of some attribute which each possesses. As a first step towards an analysis he proposes that the subject matter of justice is the manner in which benefits and burdens are distributed among persons whose qualities and relationships can be investigated.[547]

Miller also points out that the principle of utility cannot accommodate the distributive principles of social justice. The principle of utility is concerned with the overall amount of happiness enjoyed by the members of a society, which in many circumstances is an important or even overriding political consideration. Theories of social justice, again, are concerned with dealing justly with each member taken separately, sometimes even at the cost of a net loss in total happiness. Miller analyses three basic criteria of justice that are aimed at considering the distinctiveness of persons and a concern for the individual; the principle of rights by guaranteeing security of expectation and freedom of choice; the principle of desert by recognising the distinctive value of each person's actions and qualities and the principle of need by providing the prerequisites for individual plans of life. Miller points out that these principles are likely to conflict with one another, but over and above this, they stand in common opposition to the demands of social utility.[548] The principles of rights, desert and needs, Miller notes, are by no means unproblematic as theoretical notions. Of the three, the principle of rights is the most unproblematic.[549]

5.3 Perceived just practices

Sadurski takes the principle of desert as the principal measure of justice. This principle he arrives at through a 'reflective equilibrium': a principle is deduced from a particular practice perceived as just, and then generalised and applied to other spheres of social justice. Sadurski views desert as the principal measure of justice. Its paramount role, among the principles of justice, lies in the fact that it makes a person's share in the social distribution solely dependent upon circumstances and features which are under this person's control. He views factors that are totally beyond a person's control (such as natural endowments or the social position into which a person is born) as irrelevant to desert. Their influence upon a person's share in a social distribution should therefore be minimised. The principle of balancing benefits and burdens, which is used to analyse the concept of desert, also demands the satisfaction of basic human needs because certain needs, when unmet, constitute such a powerful

[546] Miller, (1979), pp. 17-18.
[547] Miller, (1979), p. 19.
[548] Miller, (1979), pp. 151-152.
[549] For a discussion on the three principles, see Miller (1979), chapters II, III and IV.

burden in a person's life that the overall equilibrium of benefits and burdens in a society is upset.[550]

Sadurski emphasises that desert is just one of several grounds for just distribution. The reason why he singles out desert as an important criterion of justice, is that "[i]t is the only basis of just distribution which is necessarily and inherently connected with, and justified by, moral praise for the action of a particular individual". If there is a relation between a person and the nature of action in other justice-related perspectives, it is an accidental rather than a necessary one.[551]

The principle of equilibrium Sadurski pictures as follows: Whenever an ideal, hypothetical balance of social benefits and burdens is upset, social justice calls for restoring it.[552] His premise consists of a hypothetical balance of benefits and burdens, which he suggests, can be "described in terms of situations which intuitively strike us as requiring just solutions; that is, situations in which we feel that a distribution of benefits and burdens should be based on moral grounds". By describing a hypothetical equilibrium in terms of justice-relevant situations, it will be much easier to make a transition from the general principle to particular judgements.[553]

Sadurski assigns the hypothetical equilibrium three characteristics. First, the abstention from harm, equalling a mutual respect for liberties. This Sadurski sees as an equilibrium in the sense that if there is full respect for each person’s sphere of autonomy, then everybody will share the same benefits of autonomy and the burden of self-restraint. This again, requires a set of general rules by which it will be possible to determine if an act undertaken by somebody will result in harm to somebody else. Sadurski notes that through such general rules, it will be possible to guarantee autonomy to everyone, in their sphere of action, which is non-harmful to others. To Sadurski this autonomy is an uncontroversial pillar of the conception of justice that he presents. It is not absolute, but is determined by changing social and cultural values.[554]

The second characteristic that Sadurski attributes to equilibrium, is that every person should have equal satisfaction of basic material conditions for a meaningful life. Nobody should suffer burdens that make his subsistence or participation in community life impossible. Nobody should be deprived of the elementary conditions for self-realisation.[555]

The third aspect of social equilibrium means that everyone’s work, effort, action and sacrifice yield a benefit equivalent to the contribution. Sadurski notes that in a complex society one can hardly talk about 'equality' of input and outcomes, because they are usually incommensurate. "Equilibrium is achieved when the overall

[550] Sadurski, (1985), p. 3.
[551] Sadurski, (1985), p. 156.
[552] Sadurski, (1985), p. 101.
[553] Sadurski, (1985), p. 103.
[554] Sadurski, (1985), pp. 104-105.
[555] Sadurski, (1985), p. 105.

level is equal for all people, that is, when the ratio of one person's outcomes to inputs is equal to other persons' outcome/input ratio."[556]

The emphasis in Sadurski's view of social justice is to reward desert. This implies equalising benefits with efforts; "someone who had done for others more than he has actually received from them, may legitimately expect to be rewarded for this difference."[557] What justice-as-desert ultimately is about, Sadurski notes, is "an attempt to make a person's situation dependent upon his own free choices, and to liberate, to the largest possible extent, people from the operation of uncontrollable forces in social distribution. It is a protest against the reduction of social life to a game or to a lottery, and it is a defence of the relevance of morality to social allocation of desired goods."[558]

5.4 The distributive principle

The question of distribution is a dominant element in these theories of justice. I will here rely upon Miller's considerations of the distributive principle. Social justice concerns the distribution of benefits and burdens throughout a society, as it results form the major social institutions - the protection of a person's rights through the legal system, such as property, the regulation of wages, and profits, the allocation of housing, medicine, welfare, and so on. A genuine distributive principle must either simply recommend a division of goods, or indicate some property of the individual that will determine what his or her share shall be. To this end Miller proposes 'to each his due' as the most valuable general definition of justice, one which most plainly brings out its distribute nature.[559]

The formula 'to each one's due' is non-substantive in character, but helps to bring out the distributive character of justice. On the substantive side of the question what someone is due, different and conflicting means are available to answer this question, Miller notes. He points to three conflicting interpretations of justice, which may be summarised in the three principles: to each according to his rights; to each according to his deserts; to each according to his needs. Miller observes that the conflict between these principles is not symmetrical. 'Rights' and 'deserts', and 'rights' and 'needs' are contingently in conflict, since we may strive for a social order in which each man has a right to that (and only that) which he deserves, or to that (and only that) what he needs. If perfectly just societies could be created, Miller notes, the contrast between conservative and ideal justice would vanish, since the actual distribution of rights would correspond to the ideal distribution. On the other hand, 'deserts' and 'needs' are necessarily in conflict since (accidents apart) no society can distribute its goods both according to desert and according to need. In reality it can, however, distribute part of its good according to desert and part according to need, but

[556] Sadurski, (1985), p. 105-106.
[557] Sadurski, (1985), p. 106.
[558] Sadurski, (1985), p. 157.
[559] Miller, (1979), p. 20.

the different specification of ideal justice appears to be in ineradicable conflict with one another.[560] Miller treats the notions of rights, deserts and needs as follows:

5.4.1 Rights

Rights and social justice stand in a close relationship to one another. An important part of social justice consists in respecting the positive rights which people have. The most powerful instrument for achieving this end is of course the law. Any socially just society must include a public mechanism for specifying and protecting people's rights, though it will be a matter of argument how far the existing legal system, in protecting the rights that it protects, realises justice. Miller points to the need to strike a balance between 'conservative' and 'prosthetic' justice - between the justice which preserves established rights and the justice which modifies these rights in terms of an ideal standard (a principle of desert or need). The connection between the concepts of rights and justice is repeated, in slightly weaker form, between the concepts of rights and social justice. There are some personal rights, which do not really fall within the sphere of social justice, but many other rights must be taken into account when assessing the justice or injustice of social policy.[561]

5.4.2 Deserts

The concept of desert has a tendency to expand in the same way as the concept of right, with similar results, Miller notes. In its widest, loosest sense, 'A deserves X', means 'It is fitting for A to have X' or 'X is due to A'. Miller notes that if we consider the abstract definition of justice as *suum cuique* 'to each his due', we can see how, in the widest sense, desert encompasses the whole of justice. Taking 'desert' in its widest sense, we can find cases in which claims of rights and needs are expressed, perfectly naturally in the language of desert.[562] Desert is a matter of fitting forms of treatment to the specific qualities and actions of individuals.[563]

Miller points out that, if we compare the notion of rights, we shall see that utilitarians make no reference to the particular qualities of the individuals concerned.[564] How do things stand when we consider social justice? In speaking of social justice we have in mind the distribution of goods such as wealth, housing, and education among the people who make up a society. One of the criteria we use in assessing the justice of such a distribution is that it should correspond to desert. But what kind of desert? This will clearly vary from one good to the next. Just as an

[560] Miller, (1979), pp. 27-28.
[561] Miller, (1979), p. 77.
[562] Miller, (1979), pp 83-84.
[563]Miller, (1979), p. 85.
[564] Miller, (1979), p. 85.

individual wishes to repay his benefactor in proportion to the benefits he has received, so he will wish society as a collective body to reward its members to the extent to which it benefits from their activities. If this analogy can be sustained, Miller notes, it provides the most defensible interpretation of economic desert. The basis of desert will be the value that each individual has contributed to the common stock of society, or more strictly, that proportion of the value, which is due to his own efforts, skills, and abilities. We therefore return to the principle of contribution, but now justified rather differently, as a reward conferred by society on its individual members, understood by analogy to private rewards.[565]

5.4.3 Needs

An influential minority view in political philosophy holds that needs, conceptually speaking, have nothing to do with the concept of justice. To use needs as a basis for just distribution is not so much morally reprehensible as conceptually confused. A strategy adopted in two versions of the minority view is to argue that when referring to needs, people are really appealing to one of the other criteria of justice, although the concept of need is used. Miller sets out to show that the attempted assimilation fails to capture the sense of the original needs claims.[566] Since not all morally relevant cases of need are cases of which the individual has some prior expectation that his need will be satisfied, under what general principle do these cases fall, if not the principle of justice, he asks. He refers to J. R. **Lucas**, who appears to imply that the satisfaction of needs is a matter of humanity, or generosity, or benevolence – virtues, which are quite distinct from justice. But although considerations of need are certainly relevant to the practice of these virtues, there is also a distributive principle of need, which forms part of social justice.[567]

What Miller sees as the safest conclusion to draw is that the 'needs' conception of justice and the principle of equality stand in a peculiarly intimate relationship to one another but still less than an identity. The intimacy consists, first, in the fact that the equal satisfaction of needs is the most important element in bringing about equality, and second, in the fact that the premise underlying distribution according to need, also underlies equality in the broader sense. Miller suggests that the principle of need represents the most urgent part of the principle of equality.[568]

This urgency finds its expression in our undoubted willingness to regard the satisfaction of needs as a matter of justice, compared with our uncertainty about the satisfaction of other wants. It is certainly true, Miller holds, that to satisfy everyone's needs it is necessary to mete out different physical resources to different people. This

[565] Miller, (1979), pp. 118-119. For the difficulty involved in this conclusion, see pp. 119-121.
[566] Miller, (1979), p. 122.
[567] Miller's reply to Lucas is twofold: a. one cannot plausibly maintain that all need claims which are popularly held to be matters of justice are disguised right claims; b. one cannot assimilate distributive need claims to principles such as humanity or benevolence. Miller, (1979), p. 124.
[568] Miller, (1979), p. 149.

is not inegalitarian, because the principle of equality does not demand that each person should receive the same physical treatment, but rather that each person should be treated in such a way that he achieves the same level of well-being as everyone. Because people have varied needs and wants, physical resources such as food, medicine, and education should not be assigned in equal quantities to each man, but in different proportions to different people, according the their specific characteristics.[569]

We have here seen the contours of three different theories of justice sketched. They each treat different aspects of justice, moving at different levels, but all with the purpose of overcoming the shortcomings of utilitarism. These theories also provide a tool for penetrating the shield of legal positivism, because they provide external standards against which legislation and institutional arrangements can be assessed.

6 Assembling the conceptual tool

The above accounted theories of justice assist in bringing the analysis of personal autonomy forward. Some additional aspects further need to be considered, in order to pinpoint problems associated with (legal) positivism, from which an exit is sought in this work.

6.1 Values and action

A first step is to consider *values*, as a contrast to the requirement of value neutrality in the positivist tradition. Competing values must be brought to the fore, and if possible accommodated. Miller made a pertinently point in noting that attention has to be paid to what values are appealed to when rights claims are made.[570] He noted that a balance has to be struck between 'conservative' justice, which aims at preserving established rights, and 'prosthetic' justice, which modifies these rights in terms of an ideal standard.[571] We need to bring forth and contrast competing values in order to see what is involved when considering a person’s autonomy. If we ignore the value elements and the discordant interests associated with them, different theoretical orientations cannot be contrasted. When this incompatibility is not brought to the fore, arguments will continue to bypass each other without ever hitting the core of a dispute, because the concepts we use are incommensurable. This problem is particularly visible in industrial relations that constitute a meeting point between economic concerns and concerns about social justice. This problem can most easily be seen in working life. In each negotiation round, the same arguments will be advanced; arguments about a need to promote competitiveness and to keep inflation down, will

[569] Miller, (1979), p. 149.
[570] Miller, (1979), p. 83.
[571] Miller, (1979), p. 77.

be met by demands for a level of pay that would reflect economic growth and/or demands for social justice.

MacIntyre has dealt with this incommensurability of rivalling arguments. He notes that each of such arguments is logically valid, or can be expanded in order to become logically valid, in the sense that the conclusions follow from the premises. The problem is that the rival premises are such that we have no rational way of weighing the claims of one as against the other, because each premise employs a different normative or evaluative concept from the others. The claims which are advanced, are consequently of different kinds.[572]

This problem is not solely confined to competing premises; it is inherent in the quality criteria associated with a theory as well. Because such quality criteria require that a theory be coherent, without internal contradictions, the effort of constructing a theory will command a reconciliation of a number of conflicting elements in this process, leading to an oversimplification of reality, as Huxley already noted. The danger inherent in this is that when we apply a theory we are no longer confronted with those competing or contradictory elements, which have been reconciled in the process of constructing the theory. Rights and freedoms are illustrations *par excellence*. A case in point is how the liberal notion of freedom has been appealed to. Although it was designed to answer a set of philosophical questions, it has in practice been put to work as a starting point for solving practical political questions. What was a useful fiction in formal argument has become a dangerous illusion in a real world where the rule of formal arguments is beside the point, as Barber pointed out above. "Freedom is a social construct based on a rare and fragile form of human mutualism that grants space to individuals who otherwise would have none at all", Barber notes, observing further that the will unimpeded by external obstacles is not in itself free in any recognisable human sense. It is not until the human will is informed by purpose, meaning, context, and history that we can talk about freedom.[573] Wolgast, again, gives a series of striking illustrations of how the notion of rights, when inappropriately applied, drive us to caricature the matter at hand, and forces our considerations into a grid that has room only for individuals who are autonomous, have property, make contracts, and are void of basic human sentiments.[574] She observes that our habit of emphasising individual rights obscures the focus of moral objection, rather than giving the objection a firm foundation.[575]

The next step in clearing the ground for an alternative theoretical framework is to bring *action* into the picture. Through theories of social justice we gain a differentiated view of rights, desert and need, but how do different situations come about, which make us refer to either rights, desert or needs? They are often, in one way or the other, associated with human action and human relations, which bring about or contribute to generating certain states of affairs. Take speculation in real estate, which in a drastic way can alter the conditions for the satisfaction of the basic

[572] MacIntyre, After Virtue - a study in moral theory, (1982), p. 8.
[573] Barber, (1984), p. 100.
[574] Barber, (1984), see chapter 2, Wrong Rights, pp. 28-49.
[575] Wolgast, (1987), p. 47.

need of housing for a great number of people. By introducing action, the consideration is brought into the field of ethics. But here again, the ground has to be cleared by recapturing clusters that have been lost particularly because of the narrow focus of different positivist orientations.

6.2 Dynamics back to ethics

The ancient Greek and Chinese philosophers, and, although in a different sense, the scholastics, offered comprehensive ethical schemes, which during modernity have been scattered, bit by bit. In an article 'How to rejuvenate ethics', Kirill Ole Thompson offers an instructive account of problems associated with current orientations in ethics. He points to the clusters that have been lost from earlier comprehensive moral schemes.[576] As a reflection of the philosophical tradition of the 20th century, ethics became considered at a meta-level, as 'meta-ethics'. Reactions against this orientation arouse in the late 1960s and 70s, when philosophical considerations became seen as a 'voyage to Laputa'. Theoretical reflection became a self-absorbed project, tragically out of touch, Thompson notes. Received ethical theory could not provide expected moral perspective and counsel. Instead these meta-considerations of ethics lost considerable lustre for their aloofness, and Thompson notes that many disappointed students turned away from philosophy "which proudly proclaimed its aloofness from the moral issues tearing at the seams of the social fabric."[577]

In the analytical traditions considerations about ethics have been brought to a meta-level, at which philosophers have been concerned with an analysis of basic terms such as 'good' and 'right', or the use of ethical terms, expressions, and judgments, and also investigations of the evidential grounds offered by competing theories of ethics.[578] Stephen D **Hudson** associates problems we encounter in our understanding of ethics with the emergence and acceptance of the tradition of the rule of law and the sort of liberalism that underlies both the social contract tradition and utilitarianism. A major problem here is the ideals of theoretical unity and completeness, of moral perfection and the power of reason, which underpins these orientations.[579]

In regard to action, Hudson notes "one cannot simply go *forthwith* to the principles of conduct that sort acts (or types of acts) into classifications (such as 'morally acceptable' and 'morally unacceptable'). This avenue is not actually accessible. Instead, the moral theorist must pursue a somewhat circuitous path to arrive at such principles; he must first engage in a somewhat detailed examination of the nature of *moral agency*.[580] Agent and action are *interdependent*, "[t]he traffic on

[576] Thompson takes his departure in Chu Hsi, and gives a succinct account of the western ethical tradition in his article 'How to rejuvenate ethics: suggestions from Chu Hsi', (1991).
[577] Thompson, (1991) p. 493 including footnote 2.
[578] Thompson, (1991), p. 494.
[579] Hudson, Stephen D, Human Character and Morality, Reflections from the History of Ideas, (1986), p. 4.
[580] Hudson, (1986), p. 5.

the road of virtue from acts to agents flows in both directions, from no particular starting point, with no set terminus."[581] Hudson notes that people rarely praise or blame an action *per se*. Instead people ordinarily assess an action in light of what they know of the person, his personality, his purpose, his pursuits. An action is deemed praiseworthy insofar as the agent is deemed praiseworthy, for it is most typically viewed in the light of what is known of the person's character.[582]

In Aristotle's scheme action and disposition combine. MacIntyre notes that in the teleological scheme of Aristotle's Nicomachean Ethics, there is a fundamental contrast between man-as-he-happens-to-be and man-as-he-could-be-if-he-realised-his-essential nature. Ethics is the science concerned with the question how to enable men to understand how they make the transition from the former state to the latter. Ethics therefore presupposes some account of potentiality and act, some account of the essence of man as a rational animal, and above all, some account of the human *telos*. Ethics is concerned with the question of how to move from potentiality to act, how to reach our true end. The desires and emotions that we possess are to be put in order and educated by the use of precepts and by the cultivation of those habits of action, which the study of ethics prescribes. Reason instructs us both what our true end is and how to reach it.[583]

Here, MacIntyre notes, we have a threefold scheme in which human-nature-as-it-happens-to-be (human nature in its untortured state) is initially discrepant and discordant with the precepts of ethics and needs thereby to be transformed by the instruction of practical reason and experience into human-nature-as-it-could-be-if-it-realised-its-*telos*. Each of these three elements of the scheme - the conception of untortured human nature, the conception of the precepts of rational ethics and the conception of human-nature-as-it-could-be-if-it-realised-its-*telos* - requires reference to the other two if its status and functions are to be intelligible.[584]

This scheme of realising one’s *telos* has largely disappeared when self-interest became a motivating force during modernity. Hudson points out that our choices of criteria or standards themselves, are not products of pure, disinterested rational consideration, as is demanded by theory. On the contrary, they are very much products of our traditions and social experience. Built into the very patterns of our thought, there are our indices of value, and evaluation exists and changes with our cultural learning and interpersonal identification. It is this process of identification that gives us a clear sense of what constitutes 'rational human behaviour'.[585]

[581] Hudson, (1986), p. 6.
[582] Thompson, (1991), p. 497.
[583] MacIntyre, (1982), p. 50.
[584] MacIntyre, (1982), pp. 50-51.
[585] See Thompson, (1991), p. 497.

6.3 How to identify a just state of affairs?

With Miller's theory of justice, we have a conceptual groundwork, which assists in differentiating various states of affairs and their perceived character. As noted above, Miller suggests that we take a just state of affairs as a point of departure for our considerations. This requires a consideration of how people relate to each other, such as what transactions they are engaged in, or by comparing the amount of some attribute which each possesses.[586] After having placed consideration in a specific context, next comes the decisive question, how we are to determine what is a just state of affairs.

Miller noted that we describe actions as just either when we believe that they are truly aimed at a just state of affairs, or when they actually have this result. This appears as such encompassing, but for the sake of clarity this notion should perhaps be spelled out. When we move into the field of legal rights, different sets of rights often compete and the legal rationale will make one right the winner over the other. If we aim at just state of affairs, this would often require an accommodation between the competing rights in question.[587] In many spheres of life legal rights will be associated with a contract, although the detailed regulation of the relationship often makes one contractual partner subordinated to the other (such as the employment contract) or we have a blatantly unequal contractual relationship of which the standard instance is the consumer faced with business institutions. How are we to perceive what is a just state of affairs in such situations? Another set of instances are those where there is no fictional notion of equality but an explicit subordination, such as when a person turns to the service of the social security administration.

It is at this point that the most decisive paradigmatic shift has to be made. We have to make the person, whose position is threatened the arbiter of what is a just state of affairs. This may sound individualistic and a return to the enlightenment project, but it is not. The person who is made arbiter of what is a just state of affairs is a particular person placed in a particular context, related to other persons, whose personal autonomy is as much in focus as his or her own. In this scheme, autonomy is not a point of departure, as it is in the enlightenment scheme, but the object of consideration at the very point where it is threatened. Contrary to the *Rechtstaat* view, in which obligations can become a heavy burden on a 'subdued' contractual partner, whose factual position is disguised behind the notion of formal equality, the nature of the obligations of both parties will become visible through an autonomy test. One can then see how the autonomy of one contracting party can be encroached upon, by upholding the autonomy of the other party.

[586] Miller, (1979), p. 19.
[587] This is a central concern in Storlund, Trade union rights - what are they? (1992).

6.4 Autonomy equals self-sufficiency

The notion of personal autonomy, that I have tried to sketch here, had all the necessary qualifications to it in Aristotle's thinking, and therefore the task of giving substance to the notion of personal autonomy is best achieved by reference to his thinking. Here we have to keep in mind that Aristotle saw society and individuals in a relational way, in contrast to the atomistic tradition of modernity. Personal autonomy, as reflected in his thinking (although he did not use this term), is therefore one, which is associated with government. The role of the state is to secure the good life. "...the aim and the end is perfection; and self-sufficiency is both end and perfection."[588] The good life, which Aristotle has designated as the ultimate purpose of government, requires a certain minimum supply of necessities. Property is one such necessary prerequisite for satisfying basic needs.[589] Property is thus a means for the end of satisfying basic needs, and thereby there is also a natural limit to the acquisition of property.[590]

These distinctions, made by Aristotle, should help in perceiving features of our time, which have caused a need for considerations of social justice. As the western social welfare state developed, it has not been able to enhance the autonomy of vulnerable persons or groups. Social security has to varying degrees provided for the necessities of life for those who are rejected from an economic activity, the aim of which is the 'accumulation of property' to speak in Aristotle's terms.[591] Social security schemes have not in practice come to aim at a good life and a personal autonomy for those dependent of the safety net. One reason for this is that we, at a theoretical level, lack a proper notion of a reserved sphere on which the logic of the capitalist economy should not infringe, with the effects that people's autonomy are constantly in jeopardy. Locke operated with a notion of a limit to appropriation, but this was to give way to a utilitarian maximisation, which, because of the marginalizing effect it can have on people, is at the root of much ethical concern today.

Aristotle's thinking thus offers advice because he perceives ethics and justice in a relational manner. In this way the somewhat individualistic tone of ethics for the rational man becomes qualified because acts and dispositions are measured in context. It is in the same way that the notion of personal autonomy should be perceived. In contrast to the *Rechtstaat* model which only can be modified by introducing exceptions to the basic idea, the notion of personal autonomy will allow a contextual assessment of different states of affairs, whether they are fair or not, and a consideration of the nature of action, which influences people's conditions of life. This is an open-ended theoretical device, aimed at assessing different situations throughout the human and social enterprise.

---

[588] Aristotle, Politics, I,.ii, p. 59.
[589] Aristotle, Politics, I, iv, p. 64-65.
[590] Aristotle, Politics, I.ix, p 81.
[591] This also applies to those who lose the competition in economic life, because of the zero-sum game it represents.

Carol C. **Gould**, in her book 'Rethinking democracy', also argues for an open-ended conception of human nature and human capacities in which these are themselves seen as the results of human choices and actions.[592] Gould observes that the concept of freedom has to be understood more broadly than it is in traditional theories of democracy. Whereas freedom is often understood as the absence of external constraint or as free choice, she argues that it should be interpreted as the activity of self-development, requiring not only the absence of external constraint but also the availability of social and material conditions necessary for the achievement of purposes and plans. The concept of equality needs, likewise, to be extended beyond the way it is perceived in liberal democratic theory, as encompassing, in addition to political and legal equality, equality in social and economic life as well.[593]

6.5 Normative structures

A crucial aspect of the notion of personal autonomy is to be aware of how people relate to each other. In order to perceive this we need to direct attention to the normative structures, which are at play in human and social relations. These will tell us how people relate to each other and what expectations people place on each other's conduct.

Christensen has offered a perceptive illustration of the normative structures at play in society, representing either conflict or harmony.[594] The conflict-prone relationship is associated with contract, and social practices associated with contractual relationships. The relationship, which reflects harmony represent groups of people, who assemble around a 'joint venture', where the normative relationships are determined by the aim of this venture. In this setting individual interests are subordinate to joint aims. Historically, Christensen notes, the contractual relationship emerged as a normative relationship between strangers, even enemies, between different families or competing groups.[595]

Within a group again, the joint endeavour determines the normative relationships between its individual members. The outlook or composition of these constellations varies with time, reflecting its social environment. So Christensen, who uses working life as an illustration, points to how in the patriarchal system, the notion of a joint venture was dominating, whereas rights played no essential part. From a present day perspective, the subordination of the worker in a patriarchal system was balanced with care functions. In their time, old mill societies were in their kind rather phenomenal social welfare societies with housing, health care at work, midwives and own schools, Christensen remarks.[596] This aspect has often been lost because we have tended to see subordination without considering what went with it. With

[592] Gould, Carol C, Rethinking democracy (1988), p. 19.
[593] Gould, (1988), p. 32.
[594] Christensen, Anna, Konflikt eller harmoni, Två normativa strukturer, (1988).
[595] Christensen, (1988), p. 39.
[596] Christensen, (1988), pp. 40-41.

industrialisation, capitalism and trade unions, the patriarchal system was torn apart. Thereby, the potential there was for harmony in the status relationship, was replaced by conflict in a contractual relationship.[597] Now, my right as against others became the predominant focus. Another decisive shift was the singular focus placed on *freedom of contract*, whereby no attention was paid to whether there was any substance to this freedom or not. In the world of work trade unions became the joint venture, through which some substance could be given the notion of freedom for individual workers.

This may serve as illustrations for how I conceive the notion of personal autonomy. In the status relationship the worker enjoyed some personal autonomy in the knowledge that the employer, if he lived up to his responsibilities, provided for the necessities of life during employment. When this relationship was transformed into a contract between 'formally equal partners', this autonomy was lost, as obligations weigh heavy on a contractual partner in a subdued position, and in a relationship, which easily is interpreted from a perspective of mistrust. The combination of workers into trade unions came to provide a remedy for this position of factual inequality, and now the trust was located in the collective body of workers. The defence and promotion of workers' interests now came to offer some autonomy for a worker, which had been lost when the care function of the employer was removed. But, as seen above (Chapter IV), this collective body of workers was at odds with the atomistic worldview, which contract represented.

Here we see the two distinct 'worlds' that Tönnies has characterised as *Gemeinschaft* and *Gesellschaft*. *Gemeinschaft* is a natural and unplanned social entity of an organic character. *Gesellschaft*, again, is something designed, of a mechanic character. This difference is fundamental and makes almost everything look different in these two forms of social life. It can also lead to a situation where some features of *Gesellschaft* do not exist or are not comprehended in *Gemeinschaft*. To be a human being or to act in a specific way is one thing in *Gemeinschaft* and quite another in *Gesellschaft*.[598] One interesting point, which Tönnies makes, is that even language is different in these two spheres. In *Gemeinschaft* language is constitutive of the part people take in each other's lives, and their thorough knowledge of each other. Language is both to its form and content living human understanding. In contrast, the language of *Gesellschaft* is instrumental. Here language is used as a detached tool, which we use for certain specific purposes. But, Tönnies notes, human understanding cannot be construed or promoted through agreements and conventions. The language of *Gesellschaft* is the language of businessmen, an expression of the rational will, in contrast to the natural will of *Gemeinschaft*. Tönnies remarks that if true words do not lead to desired results in *Gesellschaft*, it is close at hand to rely on lies. True, lies are not officially allowed, Tönnies notes, but the calculative and instrumental words of businessmen are even more than lies, because they have lost their original qualities and have been reduced to quantitative utility. Thereby, lies become in a general sense characteristic of *Gesellschaft*.

In a wider sense, this discrepancy between the two kinds of language caters for

[597] Christensen, (1988), p. 41.
[598] Asplund, Johan, Essä om *Gemeinschaft* och *Gesellschaft*, (1991), p. 67.

a difficulty in perception, when bringing forth a human perspective, which must constitute a point of departure for a consideration of personal autonomy. This is particularly so, when attention is directed toward artistic work.

7 Artistic work as a project of life

Above, prerequisites have been gathered, that I find necessary in order to bring forth a human perspective on social arrangements. In the following, these prerequisites will be tried out. I will start by attempting, at a conceptual level, to make sense of artistic work as an activity in its own right. Equipped with this test of the theoretical scheme, attention will in the next chapter be directed towards working life and social security from a social justice perspective.

During the year 2000 when Helsinki was a cultural capital, the city practically speaking exploded with art and cultural activities. This involved perhaps some thousand artists, who shared their work with an unlimited number of people. What categories do we have in our legal and theoretical schemes to capture and give recognition to artistic activities? What legal means do we have to remedy problems that an artist may encounter in her or his artistic activity, if an artist is, say, confronted with the social security system? The problem here is that artistic work in its own right is invisible, non-existent in our legal categories. Professional activity is either seen as entrepreneurship, salaried employment - typical or atypical - or a person is considered as unemployed, independently of the factual (artistic) activities a person is engaged in. This leaves a considerable amount of activities outside the recognised categories of economic activity or salaried employment, with repercussions for artists' access to social security. This state of affairs should a long time ago have triggered the question how economic, social and cultural rights apply to artists. This is evidently a question that concerns everybody, but from a perceptional point of view the question becomes particularly challenging in the case of artists.

As matters now stand, there is no link between the role accorded art and culture through different cultural policies and cultural institutions, and the conditions of many artists. There are different support structures, yes, but they are in many respects problematic, seen from an artist’s perspective. Such support structures, like grants, are punctual and remedial in nature. The availability of such structures does not remove the fundamental problem of a lack of recognition of artistic work in its own right. Support structures will be looked at below. At this stage our concern is perception.

7.1 Artistic work - a legitimate demand?

Is it a legitimate demand that artists should have a right to pursue their artistic activity, considering that such a venue is not catered for in our legal or theoretical schemes?[599] What would we base our views on, if we consider that artists should have a right to pursue artistic activity?

The approach I have suggested in this work is one that departs from human beings. From this perspective I propose that a person's project of life should be a starting point. John Stuart Mill has, in my view, captured the 'space of tolerance' we need when we approach this question: "If a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode."[600] Personal autonomy, as I envisage it in this work represents just this; respect for the personal choices and preferences of an individual because they are his or her own, as long as this does not interfere with other people's possibility to pursue their projects of life.

Mill's principles and maxims were directed against laws, institutions and practices that impeded trade. Today one could say that we have moved full circle since then. A major challenge today, is to find means of correcting the imbalance caused by the preponderance of economic concerns and the effects of a global economy and a profoundly altered working life. Likewise, the economy generated around art and entertainment needs to be considered.

7.2 The context one of released energies

The industrialised world, if not the whole globe, has experienced a creative chaos during the past decades. We therefore need to stand back and see what patterns emerge from the individual activities that have lead to new kinds of activities and new ways of doing things. We need to pay attention to and assess how sensitive different institutional structures are to these factual changes. An enormous amount of human energies, earlier tied to assembly lines, to put it metaphorically, has now been released for people to pursue deeper human aspirations - a project of life - rather than merely a project of gaining one's material subsistence. What we term 'unemployment', holds the potential of personal fulfilment, if we are ready to see things as they are, and are ready to remove institutional obstacles that might prevent a person from pursuing an artistic project of life, or any other deliberately chosen direction in life.

An interesting illustration of the changes societies have gone through, is how artistic activity has moved into old factories, where the Kaapelitehdas, Nokia's old factory, may stand as a symbolic illustration. There is more or less a direct link

[599] From a 'rights perspective' artistic activity can be considered as freedom of expression. Freedom does, however, not qualify as an answer from the social justice perspective chosen here.
[600] Mill, On Liberty, pp. 162-163.

between the introduction of new technology, which has reduced the need for human labour, and the growing volume of artistic work and its enjoyment through festivals, concerts, theatre and other happenings. We need to take account of the propelling force art and culture exercises in our lives. Here some random observations. In medicine, the therapeutic role of art is well recognised. Does not art have this same function for most of us? Why should we not use the power of art to improve the quality of life in society at large? This was an aspiration of the German artist Josef **Beuys**, a tradition that many artists continue to pursue today. One of them is the Slovenian concert violinist Miha **Pogacnik**. Through his institute, The Institute for the Development of Intercultural Relations through the Arts, he wants to bring the healing power of art out in society. Among many projects, through which he pursues this aim, he also directs attention to the business world, with the aim of using art as a means of developing business leaders' emotional intelligence.

We all experience the power of art when we participate in artistic or cultural activities. We therefore need to be aware of the significance of art for a wider public, for all of us as 'consumers' of art. Yet another expression of the significance of art; what would our knowledge of past times be if we did not have pieces of art that convey a picture of human life throughout the ages? Why then, do we have such difficulties in giving recognition to artistic activity in its own right? In my view, the problem, again, boils down to *perception*.

7.3 Victims of our thought structures

As Christensen has noted, wage labour has conditioned social organisation more than democracy, the market economy or the family. And what is worse, it has conditioned our perception in a way that has made it difficult to perceive and give value to much work that is done outside the wage labour structure. The work of artists is a striking example of this, in addition other 'invisible' work done both in households and in the third sector.

Hans-Georg **Gadamer** has depicted the rationale of the industrialised wage labour society, as something that separates and divides us. He points to how we are still divided as individuals in our day-to-day endeavours, notwithstanding all the cooperation necessitated by joint enterprise and the division of labour in our productive activity.[601] Gadamer makes this observation in a context where he considers festivals as a form of art. He points to the contrast between productive activity and festive celebrations. In festive celebrations we are not primarily separated but rather gathered together. It is true, he notes, that we now find it hard to realise this unique dimension of festive celebration. But, it is an art, and it is one in which earlier and more primitive cultures were far more superior to us.[602] We have difficulties in

[601] Gadamer, Hans-Georg, The Relevance of the Beautiful and other essays, (1995), p. 40.
[602] Gadamer advances these thoughts in the article The relevance of the beautiful Art as play, symbol, and festival, p. 40.

perceiving festivities and cultic ceremony as a kind of creation. One explanation for this is the stronghold theories and methods borrowed from the natural sciences have had on our perception. So yet again, a great part of human experience is left outside our filed of theoretical perception. We therefore also need to direct attention to the spiritual dimension in people's lives.

Gadamer notes that there is a widespread tendency among the general public to look at the essence of cultic ceremonies as magical practices. This, he maintains, is fundamentally mistaken. The problem lies in our modern civilisation, 'the deliberate and calculating pursuit of power and material advances, the tendency toward acquiring and manipulating things to which we owe the principal achievements of our modern civilisation. *It is our account that fails to perceive that the original and still vital essence of festive celebration is creation and elevation into a transformed state of being'* (emphasis added).[603]

We thus need to change our focus from a view of the human being as merely his or her physical dimension, endowed with only material aspirations, also to include spiritual and creative dimensions. These latter dimensions have gained momentum in IT society. As Castells observes, it is the first time in history that different forms of human communication combine in a comprehensive system, the written, the oral and the audiovisual. This implies a new kind of interaction between the two brain halves, the rational and the creative and emotional. Castells emphasises that this is something that hardly can be overestimated.[604] He sees this as a development of the same magnitude as when the Greeks introduced the alphabet, 2 700 years ago. [605]

Castells observes that culture is transmitted through communication. In the new setting bought about by new technology, our cultures are now in a process of transformation. Castells notes that at the time he is writing these observations, this new system is not yet totally in place. This is a unique situation that should induce us to reflect on what potentials there are in this new situation, what it will look like, and what the effects of this change will be.[606] Castells argues that the strong influence of the new communications systems will lead to a new culture that will be intermitted by social interests, governmental policies and business strategies.[607]

We are thus all partakers in a process in which a new culture is being formed. This offers a historical chance to make up for much of human and social aspects that have been lost in mainstream research, with repercussions for the way human beings and social arrangements have been perceived. The way we perceive the legal system is central, reflected in the drafting of laws and their administration. Our challenge, therefore, is to seize the opportunity of trying to make sense of the new social reality by which we are surrounded, and make use of the potentials it offers. At a practical level this means adapting social structures so that they become more receptive to today's reality, to the factual space there is for people to pursue a project of life. In

[603] Gadamer, (1995), p. 59.
[604] Castells, (1999), p. 334.
[605] Castells, (1999), p. 333.
[606] Castells, (1999), p. 334.
[607] Castells, (1999), p. 335.

this context the human need for artistic creation and the need for sharing such activities are central.

8 Artistic work - work of a different kind

When we are concerned with artists, we are concerned with persons for whom self-realisation is a primordial aim. Artistic work is often an inner necessity, and artistic work is therefore not tradable in the sense a bread-winning job is. For this reason we cannot apply the same criteria to artistic work as to traditional economic activity, such as entrepreneurship or employment. The position of artists has not received much attention in legal research. In order to advance in a search for an understanding of the issues we are faced with, and be able to formulate the problem, we need to accord artistic activity other values than merely economic ones. A starting point here is the lack of a positive recognition of artistic work as a value in itself. This should be contrasted to the role accorded art in society. As matters now stand, artistic activity is more or less taken for granted, without an accompanying recognition of the work that goes into it. There is thus a gap to be filled.

8.1 Integrity and recognition - missing dimensions

Integrity for an artist means recognition of artistic work and a respect for an artist's need to pursue this work. Taylor points to this when deliberating on what he calls 'Good things', to which he accords a strong value. Our emotions enable us to have a sentiment of what the good life is. This, in turn, implies that we are able to make a qualitative difference between our desires and goals in such a way that we give some desires and some goals a higher priority than others. Some are truly important, others more trivial.[608] We are here dealing with person-related sentiments. Strong values involve subject-related meanings, implying that we make distinctions between purposes that are more elevated or inferior, between motives that to their nature are either good or bad. One can say, Taylor notes, that these sentiments are reflexive of the nature of the subject.[609] This means that we relate distinct purposes to each person when we draw up our moral map.

By drawing a moral map we can try to give shape to our life experience.[610] Strong values refer to our lives as a subject. If such a status is not allowed, if some people are denied the respect and possibility to choose, this implies a lack of respect for these persons.[611] The scenario that is unveiled, when we look at artistic work as a person's project of life, testifies of the inability of legal systems to comprehend other

[608] Taylor, (1995), p. 123-124.
[609] Taylor, (1995), p. 125.
[610] Taylor, (1995), p. 125.
[611] Taylor, (1995), p. 145.

features than those pertaining to the ideal types underpinning the legal system, the business man and the male factory worker. This implies, speaking in Taylor's terms, that economic activity has been accorded a strong value, full stop. This illustrates how the legal traditions and associated theoretical schemes fail to recognize activities that by their nature cannot be measured in economic terms, in case this activity is not 'sanctioned' by an institution. Here an 'on-off' mechanism is at play for the same activity depending on whether this activity results in a sold product, or if it is supported by a grant or otherwise recognised or carried out within some institution. The effects of this, for persons pursuing artistic activity, can bluntly be summed up as follows: In order to be able to pursue artistic activity, one needs to be wealthy in order to afford it. Or, one needs enough physical strength to do artistic work it in addition to a bread-winning job, provided jobs are available. If neither of these preconditions apply, and an artist has to rely on social security, this person will by the employment authorities be first considered *unemployed*, before some form of subsistence allowance will be granted, if it is. To be labelled unemployed is a blatant disregard and negation of the work an artist is doing. In addition, we here have an illustration of how a rule of a technical character in the unemployment benefit system overrules human rights standards, such as economic, social and cultural rights.

9 A broadened perspective

It is only by broadening our perspective on societal arrangements and by incorporating a human perspective that we can make headway. We need to take a look at the human being, her project of life, as an issue in its own right, in addition to people as mere factors in or outside economic production and working life. Only by recognising the human condition, will we be able to make sense of, and seize the opportunities today's world offers. The human being is not simply the omnipotent man that walked into the theoretical landscape through Bacon's pages. We are not social atoms, persons who go about our projects of life, controlling it and making the most profit out of it, as the utilitarian worldview has it. It should be obvious that this is not a true description of the human condition, for which artists offer a fairly obvious contrast.

Gadamer also points out how extremely one-sided modern man's concept of action is.[612] He proposes that Greek epic and drama remain real for us because we too live with great uncertainty. We can be alarmed by sudden transformations. At a stroke, everything can have changed. "Wee are too familiar with darkness, perplexity, madness, catastrophe, sickness and death, love and hate, jubilation, arrogance and ambition, the whole vast range of human sufferings and passion that the Greeks experienced as the real presence of their gods. Greek myth speaks about this fundamental experience which we all have of the way in which such things befall us". That is why it always speaks to us.[613] As a contrast to a material viewpoint, art represents the spiritual dimension in people's lives. If we turn attention toward arts,

[612] Gadamer, (1995), p. 77.
[613] Gadamer, (1995), p. 77.

we are thus offered an alternative and more truthful picture of the human being and her condition, than the one permeating much of our thought structures. Gadamer again: "We know and yet do not know ourselves in the struggle between nature and spirit, animality and divinity, a discussion that is yet inseparably united in human life. In a mysterious way, this struggle pervades all our most particular personal, psychological, and spiritual activities and combines the unconscious life of natural being with our conscious and freely chosen existence to produce a unit that is consonant and dissonant at one and the same time."[614] As this is how we are, Gadamer says, it allows Greek religion as we encounter it in epic-poetry and drama to speak to us anew. It is thus a question of fathoming the complexity of life itself, for which law should be sensitive. To put it in Hofstadter's words, we should allow for reflexivity. And as Gadamer notes, Greek drama represents a first attempt to resolve the enigma of our existence. However remote they appear to be, Greek epic and drama are still present to us, and they still tell us something about ourselves in proclaiming the deeds of the gods and heros who represent us all.[615] This also goes for mythology. Serracino-Inglott has in an analysis of western films and other entertainment pointed to the mythical elements they contain. They are often stories that explain the happenings and conditions of the actual world. Mythical thought is based on a fundamental belief in some transcendent power that is the root-reason for the existence and structure of the world and its happenings.[616]

9.1 Art - a key to a changed perception

In contrast to industrially produced objects, the work of art provides a perfect example of the universal characteristic of human existence - the never-ending process of building a world. In the midst of a world in which everything familiar is dissolving, the work of art stands as a pledge of order. Gadamer notes that "[p]erhaps our capacity to preserve and maintain, the capacity that supports human culture, rests in turn upon the fact that we must *always order anew what threatens to dissolve before use* (emphasis added). This is what the productive activity of the artist and our own experience of art reveals in an exemplary fashion."[617]

There is an interesting intermix between what we see and what we think. Fredrik **Lång** has lucidly illuminated this in his book 'Image and Thought, On the genesis of categorical perception'.[618] This book illustrates the basic idea of this research; how different theoretical traditions either restrain or liberate thought.

Lång's book starts with an aphorism 'On the despair of comprehension'. "Many years ago I wrote an aphorism that went like this. On the despair of comprehension. During the twentieth century artists, in despair, destroyed their ideal of beauty. Nowadays the

[614] Gadamer, (1995), p. 76.
[615] Gadamer, (1995), p. 76.
[616] Serracino-Inglott, Beginning Philosophy, (1987),p. 164.
[617] Gadamer, (1995), p. 103, 104.
[618] Lång, Fredrik, Bild och tanke, Om det kategoriala seendets genesis, (1999).

idyllic can only be seen as naivety. I do understand, but what am I to do with my despair? What induced me to these thoughts was puzzlement rather than despair", Lång notes. "I was puzzled by the question: Where was the ideal of beauty lost, inherent in visual art from **Leonardo** to **Cezanne**, after Cezanne? Or the other way around: Why did it become a necessity to do as **Duchamp** did, to smash these ideals?"[619]

As Lång illustrates in his book, there is an intimate relationship between a certain historical phase and the worldview generated through our thought structures. Perhaps is it not surprising that Duchamp did what he did, smashed the ideals of beauty, as anything metaphysical was banned from the theoretical landscape, leaving people in 'puzzlement and despair'. Perhaps are we therefore now at a threshold similar to that of **Petrarch**, that Lång pictures in his book. Lång notes that **St. Augustine** and Petrarch stand at the outer posts of one thousand years of obliteration and silence. With St. Augustine the quest for knowledge and curiosity was cut off. But Petrarch lived at a time when nature had captured the imagination of people, directing interest and curiosity in other directions than the divine order. St. Augustine and Petrarch reflect on the same questions. They try to find the place of worldly and divine love in life, the role of truth and man's assignment. Whereas the response to divine love finally excludes all other considerations in St. Augustine's case, it is the worldly love that wins the battle over Petrarch's soul. Petrarch finds himself in a very delicate position: In his thoughts he accepts the Augustinian virtues, but in practice he breaks with all of them.[620]

During Petrarch's time people's attitudes towards nature had changed to such a degree that nothing could stop curiosity about the secrets of nature. Lång observes about Petrarch that, fitting, as it is, for a person standing on the threshold to a new epoch, endowed with a sensibility great enough to differentiate contradictory impulses, Petrarch *wants* to live up to the requirements of the old truth, but he cannot resist the new ones. Notwithstanding the *revealed* Augustinian truth, he constantly sees the *evident*, empirical or sensual truth, one that gives pleasure to the eye, delight to the senses and pride to the heart, which he can no longer resist. Baffled he notes, citing **Ovidius**: "I agree that this would be better, but I do what is worse."[621]

We are today at a similar threshold to that of Petrarch in the 14th century. He took a decisive step in the transformation from scholasticism to the renaissance. By reviving the tradition of antiquity, he sought a union of elegance and power with virtue. "One who studied language and rhetoric in the tradition of the great orators of antiquity did so for a moral purpose to persuade men and women to the good life". Petrarch says in a dictum that could stand as the slogan of renaissance humanism, "it is better to will the good than to know the truth."[622] And as Gadamer notes, art begins precisely where we can do otherwise.[623]

---

[619] Lång, (1999), p. 7.
[620] Lång, (1999), p. 132.
[621] Lång, (1999), p. 133.
[622] Encyclopaedia Britannica (1997).
[623] Gadamer, (1995), p 125.

10 The tension between production, salaried employment and wealth generated by art

In view of what has preceded, we have reason also within the legal traditions to critically assess the premises on which legal regulation is based. We need to expand the perspective from industrial artefacts as the major feature around which society revolves. It is a challenging task, because we need different kinds of measurement than a price given an artefact, the production of which can be measured in time, costs and profit. Art does create wealth, spiritual as well as pecuniary, only it does not do so on a straight axis, like an industrial product. This is a conviction that Josef Beuys strongly advocated, as do those who follow in his tradition. In an Adam Smith lecture (1995), Richard **Demarco** talked on Beuy's theme *'Kunst = Kapital'*, Art = Wealth. Demarco refers to the way Beuys perceived of money. Beuys emphasised the circularity of money, which he compared to the circulation of blood in the human blood stream. Demarco also refers to the Irish painter Robert **McDowell**, who turned into a banker. In a Keynesian tradition McDowell points to our need to take a three-dimensional view of money flows. In doing so we can see how very real and productive financial resources can be created through investments in areas such as arts or health.[624] Until the 1980s, governments had a more three- dimensional view of money. What goes around, comes around, which means that the tax income generated by public expenditure is also taken into account. After the 1980s this view has changed, making all public spending appear as a cost to the taxpayers.[625]

Through the Demarco European Art Foundation, Demarco is an active agent in the Fringe Festival accompanying the Edinburgh International Festival. Based on extensive experience of these activities he offers the following insight: "The impression I have gained, however, from artists dealing with the subject of money is that they, and no doubt economists as well, really want to be valued not only for having new and insightful means of engaging us about life's fundamentals, they also want to be recognised as making a real economic contribution."[626] And they do. Demarco presents the following estimate of temporary jobs generated by the Edinburgh festival. There are some 12 000 jobs generated in relation to the festival, whereas another 10 000 temporary jobs are created in shops, restaurants, hotels etcetera. The festival attracts at least 70 million pounds in additional spending in Edinburgh.[627] Why should artists not stand to gain from this as well? Demarco notes about artists, actors and also art impresarios that somehow they find ways to survive against the odds. "Artists may have a reputation for stargazing, but believe me most time is spent searching for solutions to short term financial problems, which I venture are, in the arts, more unremittingly elusive than in other fields of human endeavours".

[624] Demarco, Richard, Fife College of Further and Higher Education, Kunst = Kapital, Art = Wealth, (1995), p 19.
[625] Demarco, (1995), p. 22.
[626] Demarco, (1995), p. 19.
[627] Demarco, (1995), p. 24.

And Demarco concludes: "Economists and politicians talk about unemployment and job insecurity! They should talk to artists. In this field they are the experts."[628].

This tension between salaried employment and the work of an artist displays something vital about our through structures. In mainstream theoretical reflection, which exhibits the mass-producing industrial and technological culture, there is no room for truly human elements. This is carried over to law, to the way our societies are legally regulated and administered. In the rationale of industrial society there is not much room for a *refinement of mind, morals, or taste,* one of the characterisations the Webster's Comprehensive Dictionary attributes to art. This is one explanation why we have difficulties in seeing also the economic wealth that art generates. The history of the Edinburgh International Festival itself is an illustration of the wider social significance of art. This festival was launched after world war II, as a way of 'revitalizing' a Europe thorn by the war. This has put its stamp on the town in a wider sense than merely for the time of the festival. This is how Encyclopaedia Britannica portrays post-war Edinburgh. "The cultural life of the city has expanded, and although it found major expression in the Edinburgh International Festival, initiated in 1947, firm roots also have been put down in more local enterprises such as the Traverse Theatre; the Demarco art gallery; …" and the list goes on.[629] Those who follow in the footsteps of Josef Beuys, have this broader view of art and see its wider social implications. This is a perspective that should be extended to different practical and theoretical fields, law included.

11 An artist's rights

In extending our perspective, we also need to take account of the work of an artist. Besides artists meriting this attention, there is a more general advantage in this. Because of the nature of artistic creation, artists reflect and articulate a spiritual dimension that is as central an aspect of a human being, as the rational one. The question now is, how are we to incorporate this spiritual dimension in our theoretical tools, in order to make them as relevant as the rational dimension, by which the legal tradition is permeated. We need a new theoretical departure as indicated here, if we want to make sense of a person's project of life and allow for this.

As a first step, rights will be considered, as they are the most comprehensible element of theories of justice in the legal culture. We need to start by considering what a right implies. I will rely on Carl **Wellman's** elaboration of Wesley **Hohfeld's** distinctions of a right.[630] Wellman introduces the notion of a core of a right, which stands at its centre. This core defines the essential content of that right. Legal rights,

[628] Demarco, (1995), p. 20.
[629] Encyclopaedia Britannica, (1997), Edinburgh the modern city.
[630] Wellman, Carl, Legal Rights, (1978), pp. 218-219. The elements Hohfeld distinguishes in the notion of a right are, in a simplified version a 'claim-right' versus a 'duty' a 'liberty' versus 'lack of duty to refrain'; a 'power' versus 'legal ability to change people's claim-rights and duties in certain respects'; 'immunity' versus 'lack of legal power'.

he notes, are not "monolithic creations of the law that spring into existence in complete and final form to persist unchanged until they disappear from the legal system in toto". Instead they grow, diminish, and change with changes in legislation or adjudication. As long as the core persists, the right is essentially left unchanged. The core determines the modality of a right as a whole, and around this core a set of associated legal claims, liberties, powers, immunities and duties revolve.[631]

Wellman further draws attention to how a right is associated with freedom and control. One cannot be really free if one is under the control of others, and one is fully free only if one has control over those who would interfere with one's action.[632] From this follows that one has control over some thing or in some area of action only if one is free to act in relation to that thing or in that area. "Perhaps the best word to capture this two-sided freedom-control is "autonomy", in the sense of self-government, for whether the possessor of a right exercises or enjoys his right is governed primarily by his own will rather than that of any alien will." By this notion of autonomy Wellman considers that a functional unity is achieved between the different elements that make up a legal right.[633]

The autonomy provided through this combination of legal liberties, claims, powers and immunities make up the complexity of rights. Taken collectively, the legal rights recognised in a given legal system determine the distribution of freedom and control to the several parties subject to that legal system. This autonomy becomes legally relevant when rights come into conflict with one another.[634] But it is equally relevant for perceiving rights-that-should-be, but are ignored because of the prevailing perception and its reflection in legal regulation. By looking at economic, social and cultural rights as an expression of autonomy, it will be easier to catch sight of societal features. Wellman noted that rights are not something static, but that they grow, diminish, and change with changes in legislation or adjudication. Such changes are today due, in regard to economic, social and cultural rights, and constitutional provisions seconding them. Economic, social and cultural rights require a change in the distribution of freedom and control among different agents. As the subsequent scrutiny of working life and social security will reveal, there has not been a change in legislation that would reflect a redistribution of freedom and control, corresponding to constitutional guarantees or economic, social and cultural rights.

[631] Wellman, (1978), pp. 218-219.
[632] Wellman, (1978), p 219.
[633] Wellman, (1978), p. 219.
[634] Wellman, (1978), pp. 219-221.

12 Where to direct attention

The rights of artists to pursue artistic work is perhaps the most extreme conceptual contrast to the wage labour society, a logic according to which present societal structures are largely designed. Artists thus assist in placing in relief both existing structures, which will be analysed shortly, but they also assist in seeing the potentials of our time. We thus have two poles here, one from which present structures take their departure, that were created to meet the needs of industrialisation, and the factual changes surrounding us, that are the product of a high tech society. Castells noted that it is the first time in human history that the human being is using all her senses in productive work, on a fairly large scale at least.

If we want to make use of the potentials offered today, both artistic work and people's projects of life more generally, should be taken seriously. This would require that rules and practices that directly hamper artistic activity should be removed. The same goes for perception, such as is the case when an artist is labelled as unemployed, when not engaged in salaried employment. To remove obstacles is one reforming phases. Another would be to create structures that facilitate artistic work. In the next chapter a cursory look will be taken at working life and social security provisions in a social justice perspective. The purpose is to take an overall view, with the aim of pinpointing where we need to change our habitual ways of thinking, and in which direction to go. In this endeavour, what has preceded will guide the analysis with attention paid to rights as autonomy, and the criteria of social justice elaborated above.

Chapter VI

looks at working life and social security
in a social justice perspective

Back to front

How can people's access to justice be enhanced, as embodied in economic, social and cultural rights? What does this require from social arrangements, legal regulation and human conduct? Working life is an appropriate field through which to illustrate these questions, as work, at least traditionally, has been the principal source of a person's material subsistence. Work is the primary basis that allows a person to make plans and go about one's project of life. I will here look at working life from the point of view of those groups that are most vulnerable, atypical workers, artists and unemployed persons. What are their prospects of gaining a decent living through their labour, and are they able to rely on the safety net of social security? When relying on social security, are they able to make plans for their future? Looking at law in operation through these questions, will reveal how law, as matters now stand, often subdue rather than empower people in a vulnerable position. Law thus often provides a fairly ineffective tool for defending a human point of view because an economic perspective reigns supreme, leaving in its wake a growing number of atypical workers and unemployed persons.

If we apply criteria provided by theories of social justice, we can see current trends in working life in a new light. We can then see how ineffective it is to use old theoretical concepts when approaching working life and social security provisions in the changed setting that a global economy and information technology have brought about.

A fair distribution of benefits and burdens in society is one of the cornerstones of theories of social justice. This balance between benefits and burdens has been upset with the trends that have occurred in working life during the past decades. Distribution has thereby become a central issue in working life and social security. As Raiskio notes, there has always been a need for a distribution of the fruit of labour in any society. He takes a long-term perspective on this question, and points to how this very natural thing has became obscured in the western wage-labour society. Throughout human history, only a part of the adult population has directly participated in productive work.[635] It has therefore been both a practical necessity and a natural thing

[635] Raiskio, (2001), p. 69.

to distribute the fruit of the active member's labour to children and the elderly. "There is a need both for direct productive work, as well as the distribution of its fruit, and a need for social care-functions, education and training, that in the long run brings a return, that secures the continuity of culture and life itself."[636]

As we do not easily see the natural links there are between different functions in society, distribution as a natural thing is substituted by distribution as something to be earned or qualified for through a certain way of behaviour or attitude. Raiskio points out how those, who live at the borderline of work, have had to pay the price for the new neo-liberal ideology. Despite this, the unemployed as well as other marginalized people freed from work, are supposed to feel anguish about their situation.[637]

Here we are victims of the prevailing through structures. This is because it is not human beings and their needs, which are the point of departure, but rather economic interests to which human beings should be succumbed. The criteria advanced by theories of social justice have the merit of turning perception around, making our pages inhabited by human beings endowed with more dimensions than that of the ideal-type underpinning the theoretical tradition, in other words, the *homo economicus*. We need to be aware that it was in a theoretical landscape where the *homo economicus* reigned supreme that labour law and social security systems saw the light.[638] This is one of the many legacies that have blurred our view of distribution in society as both a natural and an indispensable thing.

1 'To each one's due'

Miller proposes 'to each one's due' as a criterion for capturing the notion of distribution. Distribution is concerned with how benefits and burdens are shared throughout a society, such as the protection of a person's rights through the legal system, in the form of the protection of property and profit, and also through the regulation of wages and social welfare provisions. A genuine distributive principle must specify some property of the individual that will determine what one's share will be. Miller points to how to each one's due can lead to three conflicting interpretations; to each according to one's rights, to each according to one's desert and to each according to one's needs. All these aspects are involved in working life and in social security. These conflicts will, in my view, dissolve if we apply the notion of personal autonomy, as this will allow a blend of rights, deserts and needs according to the specific characteristics and conditions of a particular context.

A major problem in the design of the rights' tradition is that one has to defend one's rights. This can be an insurmountable burden for people in a weak position, faced with an employer or an excessive bureaucracy through which to fight one's way

[636] Raiskio, (2001), p. 69.
[637] Raiskio, (2001), p. 107.
[638] See above, IV.1.

in order to hopefully access the good intended by a piece of legislation. If we start, as we should in a justice perspective, from those persons who are placed in the most vulnerable position, we can see that a balance needs to be procured, that is now lacking, because of the predominance of the rights' perspective. The firmly rooted position of property inherent in the rights tradition caters for a fundamental distortion in legislation governing working life and social security.

2 The deregulating trend

In order to perceive the challenges facing us, we need again, to take a look at how the world of work has been transformed, as a result of a new deregulated economic culture, and the structural changes that have set in as a consequence of the introduction of information technology. The International Labour Organisation is the appropriate body through which to take stock of the changes that have occurred in working life, as social justice is an express aim of the activities of this organisation. Labour standards will thus guide us through a scrutiny of changes that have occurred throughout the industrialised world, whereas Finland in this chapter will provide specific illustrations of current general trends.

3 Social challenges

To fight unemployment is a topical concern worldwide. Unemployment is a road to marginalization and poverty. Much effort is today placed in alleviating unemployment, and voices are increasingly raised for greater solidarity in society. One illustration of this is a Finnish 'Hunger group', which presented its report in December 1998. The members of this group covered exceptionally large sections of society, political parties, employers' and labour organisations, the church and civic organisations. Bishop Eero **Huovinen**, who chaired the group, points to this extensive coverage and notes that all agencies who would have the potentials to counteract poverty were present. In presenting the report to political decision-makers, he urged them not to let society escape its responsibility for marginalized people.[639] "Look at the members of the group", Stig **Kankkonen** notes when commenting on the report in the daily newspaper Hufvudstadsbladet: "These persons are almost always involved when decisions are taken on big societal issues."[640]

It is hardly through any grand design or coup that the present situation of poverty and exclusion has come about. It is through piecemeal actions and outdated and irksome legislation that a growing number of persons are being marginalized on the labour market or in the social welfare system.

[639] Hufvudstadsbladet, 3.12.98, p. 3, 'Vi måste få regeringsprogram mot fattigdom'.
[640] Kankkonen, Stig Den mätta hungergruppen, Hufvudstadsbladet, 4.12.98, leading article p. 4 .

Structural changes in the economy, with accompanying adjustments in working life have been major reasons for increasing unemployment and social marginalization. A first step in counteracting poverty and marginalization is therefore to direct attention to working life, and to focus on how people's position may be secured through their own work. An income from one's own work is the most meaningful way of securing a person's autonomy; and by enhancing people's ability to gain their own living, less pressure is put on the social security systems, which today face increasing problems. There can thus only be positive effects from counteracting problems at their root, in working life, rather than handing problems over to the social security systems. This requires, however, a fresh approach to the regulation of working life.

I will use atypical workers, particularly freelance workers and cultural workers as professional groups, through which to illustrate problems in the regulation of working life, social security and other relevant fields of law. The merit of scrutinising these groups is that they place in relief the logic underlying regulation in different fields of law, and the discrepancies that have occurred between the presumptions underlying legal regulation and factual circumstances. I will use the term atypical, although I join in Reinhold **Fahlbeck's** view that this term is, by now, an anachronism.[641]

In order to gain an overview, I will first rely on work being done by the International Labour Organisation, as matters pertaining to working life, is the very mandate of that organisation. Eddy **Lee** may set the scene: "People are confused. Are uncontrolled global forces determining their incomes and their chances for decent employment?" Is this anxiety justified?, he asks. Lee concludes an article 'Globalization and employment' by noting that in spite of increasing globalisation, national policies are still paramount in determining levels of employment and labour standards.[642] He offers the advice that more cost-effective and incentive-compatible means should be sought in order to achieve social objectives. Schemes for unemployment benefit, is one such example. These schemes should be designed in a way to minimise disincentives to work and instead be geared at creating employment. Excessively distortionary labour market regulations should be avoided, and active labour market programmes should be made more cost-effective. "If this could be done then it would have the double benefit of making redistributive programmes more feasible in fiscal terms as well as more politically acceptable."[643]

[641] Fahlbeck, Reinhold, Ett revolutionerat arbetsliv? Informationssamhället och arbetslivets omvandling, (1997-98) p. 1024.
[642] Lee, Eddy, Globalization and employment: Is anxiety justified? (1996), p. 495.
[643] Lee, (1996), p. 496.

4 Standards relating to the conditions of work

Some international labour standards may here provide direction for the ensuing scrutiny. I will not engage in a discussion about particular rules or the effectiveness of different sets of standards, but rather highlight them and use them as yardsticks for assessing national legislation and practices, with focus on Finnish conditions.[644]

In a number of conventions, ILO has established standards for the conditions of work in regard to wages, general conditions of employment, occupational safety and health and social welfare. In 1928 the ILO adopted convention no. 26 concerning the Creation of Minimum Wage-Fixing Machinery. This convention (Article 1) places an obligation on member states to create or maintain a machinery whereby minimum rates of wages can be fixed for workers employed in certain trades, particularly in home working trades, where no arrangements exist for the effective regulation of wages by collective agreement or otherwise and wages are exceptionally low.

In 1996 a convention was adopted to regulate homework, Convention No. 177 concerning Home Work. At the time the minimum wage convention was adopted, in 1928, industrial production was consolidating itself in the industrialised world, with home work as one remnant of old work formats, thus an atypical work. Today we are there again, with the disintegration of the factory model of work, and a movement back home. In the preamble of the 1996 convention on homework it is recalled that many international labour conventions and recommendations lay down standards of general application concerning working conditions, which are thus also applicable to homeworkers. The new convention aims at reinforcing these general standards also for homeworkers. The same applies to a convention on part-time work, No. 175 with the accompanying Recommendation 182, adopted in 1994.

Here we are in the filed of atypical work, which has gained momentum since the late 1970s. We have a trend whereby atypical work has became so general that it is legitimate to question whether we can call it atypical any more. But this also tells the story of what has happened in working life during the past decades. It is a trend through which the economic position of working people is gradually weakened. The preamble of the ILO convention concerning part-time work highlights the history of labour standards in a nutshell, where the relevance of the following ILO standards is emphasised for part-time workers: Equal Remuneration Convention, 1951, Discrimination (Employment and Occupation) Convention, 1958, Workers with Family Responsibilities Convention and Recommendation, 1981, Employment Promotion and Protection against Unemployment Convention, 1988, and Employment Policy (Supplementary Provisions) Recommendation, 1984.

Furthermore, the preamble of the convention on part-time work emphasises the importance of productive and freely chosen employment for all workers, the economic

[644] For a penetrating analysis of ILO standards, see Sulkunen, Olavi, Kansainväliset ammmattiyhdistysoikeudet,
(2000).

importance of part-time work, the need for employment policies to take into account the role of part-time work in facilitating additional employment opportunities, and the need to ensure protection for part-time workers in the areas of access to employment, working conditions and social security.

5 To come to grips

To come to grips which these phenomena on the labour market is no easy matter. One illustration of this is that it took almost 20 years for the European Union to arrive at a major regulation of atypical work. Since 1982, nine drafts had been put forward by the European Commission, before a directive was adopted in 1991,[645] extending existing health and safety regulations to temporary workers. Not until 1997 was there a first major break through in the form of a directive concerning the regulation of part-time work.[646] It remains to be seen, Mark **Jeffrey** notes in 1998, whether this directive will prove to be the culmination of all the efforts made to address the issue of atypical work, or if it is the first step towards a larger body of European legislation in this area. Whatever the case, it must be a cause for serious concern, Jeffery notes.[647]

What makes atypical work atypical? Rather than reflecting on definitions concerning atypical work, it is worthwhile to follow Jeffrey's path. He hits the core when noting that the problems associated with atypical work do not relate directly to the form of work itself. The issue tends to be the degree to which labour law, collective agreements and social security law apply to particular forms of work. The discussion of atypical work is thus a discussion of forms of work with less coverage of legislative and collective regulations than would be the case if other forms were used.[648] Jeffery notes that deregulation or flexibility, which ordinarily are the road to atypical work, provides a means of bypassing legislative and collective regulations. Employers seize this opportunity to avoid costs associated with the application of labour law, collective bargaining and social security law.[649]

Jeffery points out that the rationale behind these policies seems to be the idea that by reducing or avoiding legislative and collective regulations, enterprises will be more successful, the economy will be more healthy and more jobs will be created. Certainly, the encouragement of atypical work does seem to have been successful in promoting an increase in the use of these forms of work Jeffery notes, but whether this implies the creation of any new jobs, or merely a move from 'typical' work to 'atypical' is quite another question.[650]

---

[645] Directive 91/383/EEC, OJ L 206/19 (29 July 1991).
[646] Directive 97/81/EC OJ L 14/9 (20 January 1988). See Jeffery, Mark, Part-Time Work, 'Atypical Work' and attempts to Regulate it, (1998), pp. 193- 194.
[647] Jeffery, (1998), p. 194.
[648] Jeffery, (1998), p. 205.
[649] Jeffrey, (1998), p. 210.
[650] Jeffery, (1998), p. 211.

6 Interests involved

6.1 Home work

To be clear about what features we are dealing with, it is instructive to assess the trend toward atypical work from the point of view of the different parties concerned. This is done in the ILO Report on 'Home Work', where advantages and disadvantages are assessed from the point of view of the employer, worker and the national economy.[651] Much of what is brought forth can be generalised to other forms of atypical work.

The main advantage of home work for employers is flexibility, with a direct impact on costs and profits of the enterprise.[652] This economic advantage can be associated with most atypical work. For the case of home work, the report adds the following features: firstly, it gives the employer greater freedom to vary the volume of work distributed among homeworkers, secondly, it offers the possibility to respond to irregular and seasonal changes in the market; and thirdly in offers greater opportunity to vary the nature of the work.[653]

Through the use of homeworkers the employer is able to reduce costs. Homeworkers are normally paid on a piece-rate basis and it is generally recognised that wages are lower, in most cases significantly lower than wages paid to 'in-workers' for comparable work in terms of quantity and quality. Another advantage for the employer is that home work gives improved productivity. This is partly explained by a higher degree of motivation, but another explanation is unpaid or only partly paid overtime.[654] This is also called sweating.

While it is clear that employers stand to gain economically from the use of homeworkers, the position of homeworkers themselves is more complex. The positive aspects brought forth in the ILO report on home work are the following: an opportunity to contribute to family income; to work at home while attending to young children or working on other projects; to work at one's own pace; and the possibility, in some cases, of earning more than full-time workers, because homeworkers may work for more than one employer.[655] The possibility of gaining a higher income surely is not a general feature of home work. So, among the problems associated with home work, the most crucial one is that the large majority of homeworkers receive very low levels of remuneration, work excessively long hours and have very low, if any, social protection.[656] Although there are, without doubt, advantages with working at home, as matters now stand this solution is often one dictated by necessity rather than a deliberate choice.

How does home work relate to the overall context of national economies? It is

[651] Home work, ILO (1995), Report V (1).
[652] Home work, ILO (1995), p. 15.
[653] Home work, ILO (1995), p. 15.
[654] Home work, ILO (1995), p. 16.
[655] Home work, ILO (1995), p. 17.
[656] Home work, ILO (1995), p. 19.

noted in the report that the income generated through home work is important, not only for the survival of poor families, but for national economies as well. It is one way of combating unemployment, and this form of work can make a significant contribution to GNP and export earnings of the country.[657] Another advantage of home work is that it can be used to revive the economy in remote areas as a complement to rural work. This reduces the need to travel long distances or to move in order to find employment. Thus, it is noted that home work makes a significant contribution to regional and national policies and generates income in very poor households, where there are few, if any, alternative forms of economic activity available.[658]

This scrutiny of the effects of home work for different agents involved is illustrative of present trends in working life. Economic gains are meted out from persons, who often already are in a vulnerable position. In regard to the gains accrued for the national economy it would be worthwhile to investigate whether the gains reported might not be coupled with increasing expenditure for social security, where such exist, because wages are held at such a low level, that it might have to be complemented by social security.

The ILO report also points to problems associated with the very low levels of remuneration received by the vast majority of homeworkers. This is the most crucial issue, which coexists with or lead to other problems.[659] A significant aspect of the status of home workers is their extremely weak bargaining position, which allow unscrupulous employers or contractors to abuse homeworkers.[660]

As the above will have testified, there is an inherent inequality in the 'contractual constellation' of home workers and other atypical workers. For homeworkers, as for other atypical workers, the situation if further aggravated because they might find that they do not have access to social security provisions associated with work. Although there are, in many European countries, compulsory social security schemes, homeworkers may in practice experience difficulties in profiting from these.[661] Health and safety provisions, is another set of problems encountering homeworkers, as is child-labour.[662]

Rights in jeopardy are security of employment and the right to annual leave and social security, because such rights are employment related, and this very connection is problematic in the case of home work.[663] The opening remarks of the ILO report on homeworkers may sum up the situation. "Homeworkers constitute a particularly vulnerable category of workers due to their inadequate legal protection, their isolation and their weak bargaining position."[664]

---

[657] Home work, ILO (1995), p. 18.
[658] Home work, ILO (1995), p. 19.
[659] Home work, ILO (1995), p. 19.
[660] See Home work, ILO (1995), pp. 19-23.
[661] See Home work, ILO (1995), p. 23.
[662] See Home work, ILO (1995), pp. 24-25.
[663] See Home work, ILO, (1995), pp. 38-43.
[664] Home work, ILO (1995), p. 1.

6.2 Part-time work

In addition to homeworkers, part-time workers constitute another particularly vulnerable group on the labour market. Part-time work has perhaps been the major route towards atypical work formats. This is testified in the ILO Report on 'Part-time work', of 1993: "Until a few decades ago, it used to be assumed that the vast majority, if not all workers, would automatically conform to the standard full-time working pattern, particularly in terms of the hours worked."[665] An increasing use of part-time work has revealed structural problems in legal regulation and institutional arrangements. In the preparatory work for the 1994 convention on part-time work, the status of part-time workers on a restructured labour market is scrutinised. The problems identified are of a general applicability to different kinds of atypical workers, as these relate to the rights, protection and terms and conditions of employment. The yardstick generally used is that of comparable full-time workers. So the question is raised, whether part-time workers are discriminated against because of their shorter hours of work. "Such discrimination may come about in several ways. In the first place, part-time workers may be excluded from coverage by certain regulations or provisions of collective agreements. This usually happens on the basis of thresholds, that is, minimum levels of hours of work or earnings required to qualify for the protection or benefit concerned. A second form of discrimination relates to less-than-proportional treatment, for example the payment of lower wage rates for the same work or work of equal value. Thirdly, there are a number of ways in which benefit or protection may have been designed in a way that does not take into account the specific situation of part-time workers... In addition there may be de facto discrimination as regards practical matters such as work schedules, training arrangements or career prospects."[666]

In some countries there are statutory provisions, which determine equal or proportional treatment to part-time workers.[667] This is the case in Portugal, Spain and Sweden, where virtually no legal distinctions are made between full-time and part-time workers in regard to protection against dismissal or maternity protection.[668] In many countries the status of part-time workers is affected by the number of hours they work. Falling under a certain threshold will mean exclusion from a varying number of protective measures.

These same problems were already indicated for homeworkers, who often receive less than the minimum wage, work very long hours, have no security of employment and are unable to ensure that contractual obligations are observed.[669] The challenge facing policy makers, the report on home work notes, is to devise means of improving the effective protection of homeworkers and prevent abuse, while at the

[665] Part-time work, ILO (1993), p. 1.
[666] Part-time work, ILO (1993), p. 31.
[667] Part-time work, ILO (1993), p. 31.
[668] Part-time work, ILO (1993), p. 31.
[669] Home work, ILO (1995) Report V (1), p. 1.

same time safeguarding the economic advantages for those who rely on home work for their livelihood.[670]

6.3 Legal issues involved

The nature of the relationship between the employer and the homeworker is "surrounded by a vagueness in practice and a vacuum in law such as are quite unknown in the realm of civil contracts."[671] This is how the legal position of homeworkers is characterised in a Council of Europe document dealing with the need to protect persons working at home. And as noted, problems facing both homeworkers and part-time workers are common to most persons holding an atypical position on the labour market.

It is by approaching the legal regulation of the labour market from outside, from the realm of civil contract, that this vagueness in practice and vacuum in law is revealed. We therefore need to go beyond the premises of labour law, that is, full-time employment, in order to perceive the problems involved. By so doing, the stronghold and the steering effect that the ideal type underpinning labour and social security legislation has on our perception, is exposed. It also reveals how the premises easily prevents us from perceiving the factual nature of a phenomenon, when we try to come to grips with the problems which have emerged with present-day trends. There have always been professional groups, whose conditions of work have not been protected by the rules governing 'standard employment', which constitutes the basis for labour legislation. Freelancers are such a group with longstanding experience of irksome rules and a risk of forfeiting rights associated with working life and social security, not to mention persons pursuing artistic work.[672]

The aims and standards adopted by the ILO are clear; that everybody on the labour market should enjoy protection against abuse by their employer, and likewise, everybody should have access to social security. By taking this approach unnecessary energy is wasted in contemplating definitions and testing thresholds. Instead a comprehensive approach should be taken both to atypical work and social security provisions. Such a holistic approach is one alternative to present practices of a piecemeal approach to atypical work, which Jeffery pictures as "plugging only some of the holes in a sinking boat."[673]

[670] Home work, ILO (1995), p. 1.
[671] Home work, ILO (1995), p. 30, reference to Council of Europe document 'The protection of persons working at home', p. 53.
[672] The ILO is at present taking stock of the economic and social status of freelancers.
[673] Jeffery, (1998), p. 212.

7 We talk about considerable numbers

In many industrialised countries more than one-third of the total employment is atypical (intermittent, seasonal, causal, temporary, part-time, homework),[674] and it is fairly generally recognised that there is no return to the situation where full-time employment for a major part of the professionally active population will be the rule. On the contrary, Germany, which can bee seen as a trendsetter in Europe offers the following scenario concerning atypical work. In the 1960s 10 per cent of the German working population was engaged in atypical work, performing bouts of work and part-time work. In the 1970s the percentage had increased to 25 and in the 1990s to 30 per cent. Experts predict that within a decade only half of the German working population will be engaged in full-time permanent employment. The other half will either be engaged in atypical work or unemployed.[675]

This trend means that those who are most vulnerable on the labour market bear the brunt of the present economic development. What this implies, is that the employer transfers the cost of uncertainty in demand from the enterprise to the individual worker.[676] "The need is greater than ever to help disadvantaged workers retain and become reintegrated into the labour market and to alleviate poverty. There is also a greater need for specific labour regulations to protect vulnerable groups in the labour market. All these are important for maintaining social cohesion and staving off the political discontent that could thwart the process of globalization", Lee notes.[677]

This is one, and a very important side of the coin. But there is also another one. Changes that have occurred in economic and working life also offer new possibilities. This development could allow space for people's own preferences and priorities, which also would require flexibility to meet such needs. The problem today is the one-sided focus on employers' flexibility,

"Does flexibility necessarily connote to unilateral control of one party?", Fahlbeck asks. "Does, in the labour context, flexibility mean unilateral employer freedom to arrange matters as it sees fit? Or is the notion of 'flexibility' neutral in this respect, lending itself not only to unilateral but also to multilateral avenues to flexibility?" Fahlbeck notes that there is probably no common agreement in this respect, partly because this question has hardly been discussed.[678]

The factual changes that have occurred require flexibility, both for employers and particularly for persons working in atypical work. It is not flexibility as such that is the problem. The problem resides in the material implications of this form of work, the rights and responsibilities associated with this form of professional activity. In

[674] Part-time work, ILO (1992), p. 7.
[675] Heikka, Mikko, Jäähyväiset täystyöllisyydelle, Suomen kuvalehti 37/2000, p. 87.
[676] Jeffery, (1998), p. 210.
[677] Lee, (1996), p. 496.
[678] Fahlbeck, Reinhold, Flexibility - Potentials and Pitfalls for Labour Law (1998), p 12. The book is a General Report presented at the International Academy of Comparative Law, in Bristol, England July 26- August 1, 1998

addition to the changing nature of economic and working life in information society, there are also an increasing number of persons who whish to work according to different formats than the ordinary eight to five. And there are professional groups for whom, because of the nature of their activities, a free form of work is better suited than the 'factory model'. The challenge is to make this a viable alternative. This again requires employers' to assume their responsibilities, which Fahlbeck has summed up as follows: (a) social responsibility of employers, (b) objectivity of treatment of workers, including equal opportunity and non-discrimination, (c) transparency in matters regarding manpower and manpower handling, (d) proportionality, (e) predictability (or legal certainty) and (e) legal protection of employees, particularly employment security. "This is a rather formidable gamut of interests", Fahlbeck notes. "All are part of today's legal debate, all are considered of vital interest and all, consequently, are promoted by various actors at national level. Strong international trends at the supra-level also promote these interests."[679]

How to go about these challenges? Changes require a new kind of regulation, which would take into account the different interests involved and allow for an optimal weighing between the interests of workers, employer and the state (economy). In addition to requiring new thinking about the organisation of working life, it also requires an appreciation of how different elements of the regulatory framework operate in a dynamic relationship to each other.[680]

[679] Fahlbeck, (1998), p. 15.
[680] Fahlbeck, (1998), p. 13

Finnish working life and social security - an illustration

In her new year speech 2001, the Finnish President Tarja **Halonen** makes a plea that people's basic rights should be better respected. She refers to the new Finnish Constitution that took effect on 1 March 2000, containing an expressed aim at promoting democracy, equality and justice. In her speech opening the parliamentary session for the year 2001, the President points to how laws often are drafted in such a complicated way that many people may forfeit their rights because of this.[681] Also the Parliamentary Ombudsman Lauri **Lehtimaja** has repeatedly pointed to the complicated nature of legislation. Many complaints addressed to the Ombudsman reveal that the person presenting a complaint has not understood the meaning of the provisions of an act, to which the complaint refers. Perhaps does not even a public official understand the provisions, or he or she might not have the energy to explain it, the Ombudsman is reported as saying. Lehtimaja notes that many complaints to the Parliamentary Ombudsman could be avoided if only laws were easier to comprehend. Such problems mainly occur in the fields of social security and tax legislation, but also in legislation regulating supported employment and safety at work.[682]

The institution of the Parliamentary Ombudsman was founded to safeguard the legality of the activities of public authorities. Today it is often the laws themselves, rather than malicious behaviour by public officials that constitute the problem. These problems often derive from the premises, on which legislation is based that do not correspond to the changing nature of working life and people's existence at the borderline of work today. In the following, I will pinpoint problems in working life and social security, with reference to Finnish constitutional provisions. At this instance, it is important to keep in mind the global picture that I have tried to sketch in this work. Perception, once again, is the key issue. What does the prevailing paradigm allow us to see and remedy? To what extent do the premises, on which labour and social security law are based, relate to different spheres of life, to economic and social conditions and to people's projects of life? The key question here is how predominant theoretical schemes influence how we go about societal and human issues. This illustrates Raiskio's point that the problems we deal with are largely the same over time, although we use different terminology.[683] The central concern here is to point to our failure to make a required paradigmatic shift that would allow us to take stock of, and adapt to changing circumstances in a way that would make sense of economic, social and cultural rights.

[681] Hufvudstadsbladet, New years speech 2.1.2001, report on the opening of the parliamentary session, 3.2.2001.
[682] Linked to the journal's report about the President's speech, reference is made to the Parliamentary Ombudsman Lauri Lehtimaja's views on the nature of legal regulation. JO: Svårtydda lagar ger fler kagomål, p. 6.
[683] See Raiskio, (2001), p. 68.

8 The research agenda reiterated

The task I set before myself in this work, was to scrutinise how the prevailing theoretical tradition conditions our ways of apprehending economic, social and cultural rights; why they have been such easy targets in the transformation western societies have gone through since the 1970s. The purpose has been to lay bare, firstly, the deadweight we carry in our theoretical baggage, by applying, often in a distorted way, the thinking of previous centuries. The philosophers looked at above developed their thinking in order to meet other needs and interests than those we are faced with today. Secondly, my aim has been to introduce an evaluative element in the theoretical tools lawyers use. To properly operationalise this tool is a vast and laborious task in itself, for which this work has aimed at preparing the ground. In the following I will therefore only in a cursory manner point to the way in which to go, by looking at how economic, social and cultural rights should be approached, if we take them seriously.

To pull this last part together has not been easy, for several reasons. One of them is a lack of research that would assist in substantiating the points I raise. The research I have come across, that comes closest to the paradigm I suggest, is an interdisciplinary research project 'New work'. It is significant that this research project concerns activities in the third sector. It is in the third sector that the human being is the central agent, displaying thereby the human being in one's social context. I will therefore rely on the findings of this research project in the summary indications that will be presented, as to the direction in which we need to go.

At the same time, I will indicate the last position on my own research map. After having researched the major theoretical orientations raised here (chapters III-V), I have been working as a freelance journalist. Journalism has served the research process in important ways. Through journalistic work, I have been able to relate to people's social reality, which, it may be recalled, was the point of departure for my research altogether. The starting point of my research was the effects that the oil crises of the 1970s and the ensuing neo-liberal trend, has had on working life and industrial relations. Assessing the effects these changes have had on working life, I concluded in 1992, that the structural changes in a decisive way have altered the preconditions for an optimal weighing between economic and human interests in working life. This has to do with the degree of interdependence that prevails between the labour partners. When this interdependence is weakened, special attention must be paid to the position of individual workers, and to a contextual assessment of atypical work.[684]

[684] Storlund, (1992). See VII. Conclusions, pp. 208-227.
In my journalistic work I have been able to direct attention both to the life situation and projects of life of individual persons, and equally to transcend disciplinary boundaries. Further, I had the doubtful pleasure of living my own research agenda, as an atypical worker.

9 A first step - to remedy the premises

In order to exit the impasse in which labour and social security legislation is today, the first thing to remedy is the theoretical premises on which labour and social security legislation resides. It is thus at a conceptual level that we need to start. Here we need the conceptual tools elaborated above, as a means of perceiving how a person's position has been jeopardised, either by different practices or because of discrimination enabled through labour and social security legislation itself. It is to a large extent such discrimination that has caused the poverty that has followed in the wake of a transformed working life, for which remedies are continuously sought, often in the wrong direction. We therefore need to change focus from contract as the legal device and the employment relationship, to persons and the relations in which they stand, and pinpoint where and how rights and obligations are unevenly distributed. This boils down to Hofstadter's proposition that we should seek flexible cognition, by concentrating on reflexivity and recognition.[685]

We need firstly, to take account of working life as it operates and see where protective provisions are needed. Secondly, we need to assess existing legislation with the view of identifying instances where laws legitimise discrimination that leads to inequality.

The analytical tool I have devised in this work, *personal autonomy,* is aimed at assessing factual states of affairs. The purpose of this tool is to allow departure to be taken in both factual and legal practices, revealing thereby to what extent legislation and different practices subdue rather than empower a person, in one's a work or other activities aimed at securing one's material existence, or in pursuing an important project of life, such as artistic activity. The aim here is to bring forth substantive aspects, as opposed to an instrumental approach, that largely is a characteristic of legal positivism.

9.1 Differentiation on a novel axis

The degree of autonomy a person enjoys requires a contextual assessment that takes on diverse aspects depending on a particular situation or setting. Theories of social justice assist in differentiating the nature of various settings in a justice perspective. I will therefore briefly recall the major prerequisites that have been elaborated on above, that assist in indicating substantive aspects of what personal autonomy is about.

Autonomy as freedom: Rawls moves at the most general level. He singles out autonomy as freedom, in its most general notion. Rawls observes that a society satisfying the principles of justice as fairness comes as close as a society can to being a *voluntary* scheme (emphasis added). This implies that people are free and equal, and

[685] Hofstadter, (1987), pp. 74, 75, see above V.4.

ready to assent to arrangements that they perceive of as fair. In such a scheme people are autonomous and the obligations they recognise are self-imposed.[686]

Autonomy as 'to each one's due': Miller advances 'to each one's due' as the criterion that best brings out the distributive principle. The distributive principle is concerned with how benefits and burdens should be shared throughout a society. This notion brings forth the distinctiveness of persons and a concern for the individual. At the same time it brings forth the central prerequisites of justice, that is, rights, deserts and needs. The principle of rights guarantees security of expectation and freedom of choice; the principle of deserts recognises the distinctive value of each person's actions and qualities and the principle of needs provides the prerequisites for individual plans of life.

Autonomy as desert: Sadurski notes that, what justice-as-desert ultimately is about, is an attempt to make a person's situation dependent on one's own free choices. This focus is aimed at liberating people from the operation of uncontrollable forces in social distribution. "It is a protest against the reduction of social life to a game or to a lottery, and it is a defence of the relevance of morality to social allocation of desired goods."[687]

These approaches to social justice boil down to an empowerment of persons who find themselves in a vulnerable position because of social arrangements, practices or the lottery of life. Applying these criteria to present conditions requires attention to be directed towards dimensions that are hidden from view in a legal positivist perspective. A contextual assessment requires a study of how different practices and laws affect a person, and whether these practices are in line with basic human rights and constitutional provisions, that represent the legal expression of human worth.

9.2 Starting in working life

Raiskio points to how increasing pressure on a strained labour market and the uncertainty about the future, that present changes have caused, have also distorted a sound approach to work "Work addicts entered the scene, and in a tragicomical way there was even admiration when talking about byte-widows and orphans". It was not only those who became marginalized in this transformation process that were affected. "The social problems accompanying unemployment were a cause for poverty, but this was a marginal part of the total anguish felt in society."[688] This, Raiskio notes, pictures an increasing appreciation for work and an increasingly divided society, where part of the population works at the brink of burnout. "It was perhaps forgotten, in the midst of all this, that an exhausting work could be a central cause for problems in a person's life."[689]

[686] Rawls, (1978), p. 13.
[687] Sadurski, (1986), p. 157.
[688] Raiskio (2001), p. 104.
[689] Raiskio, (2001), p. 101.

The picture Raiskio sketches is a well-established pattern. With the slimmed organisations that are part of the transformations in working life, we have the irrational picture that many unemployed persons want to work, whilst simultaneously, those who have a job live at the brink of burnout. Let us therefore take burnout and the right to health as a first demonstration of challenges facing working life. At the same time, it will illustrate our difficulties in making sense of economic, social and cultural rights, and corresponding rights in the new Finnish Constitution.

9.2.1 The right to health

The Finnish Constitution places an obligation on public authorities to promote the health of the population (Article 19). How are we, in view of this provision, to approach the central problem of burnout in working life? Eriksson has addressed the question of the constitutional right to health in an article 'The right to health - more than a right'.[690] His analysis is to the point, when he points to the difficulty we face in administering the right to health, equipped with the legal tools we now have at our disposal. One reason why the right to health has not been properly enhanced is that courts are simply unable to tackle this kind of question. This is partly due to the fact that, when a court addresses a question relating to health, the matter becomes individualised. This being the case, external factors such as social and economic ones and other factors that trigger ill-health are excluded from consideration. This is the most serious aspect, Eriksson notes.[691] His diagnosis of this problem is that economic, social and cultural rights have been subordinated to a legal rhetoric, for which they are not suited.[692] This makes provisions pertaining to economic, social and cultural rights difficult to operationalise. But Eriksson is optimistic. By formulating new questions and by being ready to make use of other strategies than merely and purely legal ones, we can give the provision of the right to health a new content.[693]

As opposed to the narrow approach a court takes to a question such as the right to health, Eriksson thus suggests a wide perspective, one that he calls a policy perspective. In this perspective it is not ill-health that is in focus, but health instead.[694]

Burnout and the right to health place us at the centre of today's problems. In a human perspective, we can see how economic concerns override human ones, a problem that can be seen in almost any walk of life. This confrontation between economic and human concerns comes to its head in working life. I have elsewhere illustrated this in the case of job security and collective dismissal.[695] In order to come to grips with a whole array of problems we face, we need a balance to be stricken

[690] Eriksson, Lars D. Rätten till hälsa - mera än en rättighet, (1998), pp. 3-9.
[691] Eriksson, (1998), pp. 6-7.
[692] Eriksson, (1998), p. 3.
[693] Eriksson, (1998), p. 7.
[694] Eriksson, (1998), p. 7.
[695] See Storlund, Reflexive Potentials in Industrial Relations and the Law, Collective Dismissals in Sweden, (1994), pp 281-299.

between economic and human considerations. A precondition for justice at this general level is, that people are autonomous and the obligations they assume are self-imposed.[696]

As things now stand, the individual is put in the back seat for the benefit of larger economic interests. The economic rationale underpinning the legal tradition has always catered for this, but the problem has become accentuated with the neo-liberal trend. This premise equally tends to make us look for solutions in the wrong direction, such as the way in which we look for remedies for burnout. Early rehabilitation is here seen as the solution, aimed at handling both mental and physical problems in a preventive and swift manner,[697] whereas a sound remedy to this problem would be a more even distribution of work.

So, the right to health is much more than a right to health. It has to do with how we organise society, where the aim should be that people's health is not jeopardised in the way now is the case, by allowing an economic rational to override human considerations. When focus is placed on curative action rather than on remedying the roots of the problem, we look for solutions in the wrong direction. Rehabilitation is of course required, but if we see this as the only remedy, it will in no way decreases the anguished rush that has become the hallmark of our time.

If we take rights seriously, implying personal freedom, personal autonomy, we need to direct attention to the basic distributive structures in society. In doing so, we need to critically scrutinise questions of responsibility. We need a new kind of distribution of responsibility in working life that takes account of the factual changes that have taken place. The position of so called atypical workers amply illustrates this.

10 A *tour d'horison* of Finnish working life and social security

When applying theories of social justice, we need to be aware both of the wider perspective of social arrangements as Rawls suggests, and of a person in one's specific context, as Miller and Sadurski suggest. We therefore have to link the wider context with a specific situation or constellation, and be attentive to how they interact. This will be attempted in the following *tour d'horison* of working life and social security. The purpose here is to pinpoint the nature of the problems we face, and to advance cursory indications of problems to attend to in future research.

It is appropriate to here recall Castells' analysis of the transformation towards the network society and the social divisions that have followed in its wake. Castells notes that we are again back to a divided working life, as it has been during most part of human history, a division between winners and losers in an endless process of individual negotiations between unequal partners. But there is a new element in the present trend. Never before has the work of an individual been more central in the

[696] Rawls, p. 13.
[697] See Raiskio (2001), p. 101.

value creating process. But at the same time, and independently of one's qualifications, the worker is, as never before, submitted to the mercy of the organisation as it now operates, with 'slimmed' individuals, hired out in flexible networks.[698]

What expressions this new culture takes in Finnish working life, has been scrutinised by Raiskio in his article, 'Oppressive evaluation at the borderline of work in post-war Finland'. This he has done by analysing the way social security has been approached in Finland, as revealed in some central journals covering the field of social security.[699] His analysis sets a historical frame for the combined employment and research project New work, allowing thereby points of comparison to empiric research carried out in this project. This research project approaches and assesses institutions in the field of labour and social security legislation, from the point of view of identifiable persons.

10.1 Locating problems

Many problems encountered in working life and social security, are associated with the premises. In a nutshell, the problems pertaining to the premises are the following: the basic pillar in labour legislation, aimed at securing certain rights in working life, the employment act, departs from full-time employment of an unspecified duration. The basic protection for people who are rejected from working life, unemployment compensation, basically departs from full-time employment as a precondition for touching income-related unemployment benefit. In order to touch such benefits, an unemployed person is further required to be available for full-time employment. Where exceptions are allowed from these basic premises, they are often accompanied with different thresholds. Legal administration in regard to the protection sought by a person will consequently be dependent on how this person's life situation *happens to conform* to the requirement of full-time employment. A vital issue here is that full-time employment has became an increasingly scarce commodity, making thereby an increasing number of persons so called atypical. A vital aspect here is that persons who work in atypical work formats, or are dependent of social security will not, as a rule, have been able to influence their situation in a way to make their position a voluntary scheme.

An illustration of the kind of thresholds a person has to reach up to, in order to access the protection and the benefits provided by labour and social security legislation, is given by Koskinen, in his scrutiny of labour legislation from the point of view of employment by third sector organisations. Simplicity and lucidity are hardly attributes that one would give the following rules: According to the employment act, an employee is entitled to a salary during sick-leave if the employment relationship

[698] Castells, (1999), p. 286.
[699] Raiskio, (2001), pp. 68-115, Huoltaja/Sosiaaliturva-lehti (Guardian/Social security), Sosiaalivakuutuslehti (Social insurance).

has continued for at least one month. If the employment relationship has continued for less than one month, the employee is entitled to 50 per cent of his or her salary during sick-leave. To be entitled to study-leave, a person must in general, have been full-time employed for a period of one year, whether in one go, or in fixed-term employment periods. An employee is entitled to a maximum of five days of study-leave if full-time employment has continued for at least three months in one go, or in several periods. In order to be entitled to partial child-care leave, the employment relationship of the employee should, during the past two years, amount to 12 months of employment, unbroken or split up in different periods. An employee qualifies for an alternation-leave, if his or her working time amounts to 75 per cent of full-time employment, and the employment relationship has continued for at least one year. If a person works for less than 14 working days, or less than 35 working hours a month, vacation entitlement will not accrue in the form of vacation, although a vacation compensation will be paid for all work of a duration of at least six working hours. If the daily hours worked exceed six hours, an employee is, according to legislation that regulates working hours, entitled to a rest period of at least one hour.[700]

This sweep of Finnish legislation actualises at least three major issues. First, the complex nature of legislation, to which the Finnish President and Parliamentary Ombudsman pointed. With all the thresholds contained in legislation, a person is easily at a loss as to what one is entitled to. Second, a person who falls below the stipulated thresholds hardly has any influence on the conditions of work that will determine, whether required thresholds are reached or not. On the contrary, as the ILO reports revealed, it is through this kind of flexible use of human labour, that employers can maximise their input-output, whilst atypical workers at the same time are deprived of protection and entitlements that are attached to an employment relationship. A third major issue is that as legislation now stands, increasing uncertainty and marginalization lies ahead, considering the continued diversification of working life.

The problem, thus, is that the protection aimed at by labour and social security law is undermined for those who are in the greatest need of this protection, because departure is taken in full-time employment, ignoring thereby the diversification of working life. Koskinen points to this when assessing labour legislation in a third sector perspective. He notes that people are becoming increasingly mobile. Working life is individualised; the amount of temporary and part-time work is speedily increasing. The labour force has become divided into a core labour force in enterprises, complemented by a mobile auxiliary labour force. The division increases between those who have a secured job, and those who reside at the borderline of work. Koskinen points out that, at the same time, new possibilities are emerging for continuous employment. However, such employment does not mean permanent jobs, as formerly was the case, except for persons in key positions. This trend generates a general need to improve social security provisions associated with work.[701]

[700] Koskinen (2001), p. 285-286.
[701] Koskinen, (2001), p. 262.

11 Atypical in a Finnish labour law context

Finnish labour legislation has traditionally been based on the understanding of an unequal contractual relationship between employer and employee. To rectify this imbalance a guiding principle - both in legislation and legal administration - has been to protect the weaker party, the employee. A major manifestation of this principle is a provision concerning the general responsibilities of the employer, article 17 in the contract of employment act. According to this provision the employer has, as a minimum standard, to apply provisions contained in relevant collective agreements. The employment act also provides protection against discrimination on grounds of sex, birth, religion, age, political or trade union activities or other comparable factors.

The employment act has been revised in 2000.[702] Here the law-drafters have missed a historical opportunity to draw conclusions from the factual changes and new practices that have occurred in working life, and to remedy the legal problems and uncertainties associated with these new practices. Instead, the bill has only to a minimal degree taken account of the needs triggered by the increasing use of atypical work. Full-time employment of an unspecified duration continues to be the standard. It is only within this context that slight adaptations have been made to cater for the increased use of atypical work. This is done by introducing more specific rules concerning the employer's obligations.

The employer's general obligations, provisions of non-discrimination and a requirement of equal treatment, have become central in determining good practices at the work place. This is a reflection of the needs generated by an increasing use of atypical work, amplifying the need to assess whether the employer treats his or her employees in a non-discriminatory fashion. "The requirement of equal treatment is a complicated obligation, as it involves assessment of day-to-day work in a comprehensive way", Koskinen notes.[703] The basic problem here is that no improvements were introduced for those who fall outside an employment relationship.

11.1 Discrimination - the difference between being inside or outside an employment relationship

As pointed out by the ILO report on part-time work, discrimination occurs in different ways. A part-time worker may be excluded from the coverage of collective agreements or provisions in labour law, because the hours worked do not reach up to thresholds provided by legislation or collective agreements. Another form of discrimination relates to less-than-proportional treatment, because part-time workers often receive a lower wage for the same work or work of equal value. There are further a number of ways in which benefits or protection may have been designed in a

[702] The Governmental bill, HE 157/2000 was submitted to the parliament in early October 2000.
[703] Koskinen, (2001), p. 281.

way that does not take into account the specific position of part-time workers. In addition, there may be de facto discrimination as regards practical matters such as work schedules, training arrangements or career prospects.[704]

Prohibition against discrimination in working life is a well established principle, confirmed through the ILO Convention no 111 concerning Discrimination in Respect of Employment and Occupation of 1958. Notwithstanding this, there is factual discrimination, not only in regard to part-time workers, but also so in regard to homeworkers, freelancers and artists. In short, all those who perform work outside a full-time employment relationship are potential targets of discrimination. The basic problem here is that work performed outside an ordinary employment relationship is not recognised in its own right, but is considered as a deviation from the standard premises of full-time employment. A consequence of this is that there are great deficiencies in the protection attached to those who fall outside the standard. Because full-time employment is the premise, conditioning thereby access to certain rights and protection, we are if fact faced with a legislation that legitimises discrimination, that is dissonant both with ILO standards and with the constitutional provisions aimed at an equal treatment of citizens.

In the section dealing with fundamental rights the Finnish Constitution stipulates, in Article 6:

"All persons shall be equal before the law.

No one shall, without acceptable grounds, be afforded a different status on account of sex, age, origin, language, religion, conviction, opinion, state of health, disability or any other reason related to the person…."

How will, say, a person of mature age residing at the borderline of work effectively defend oneself against what this person sees as discrimination because of age?[705]

Article 7 stipulates: "Everyone shall have the right to life and personal liberty, physical integrity and security of person". This provision primarily relates to criminal law. But if we take personal liberty as implying mental integrity as well, such a provision would be particularly relevant for persons depending on social security.

12 The autonomy test - *a tabula rasa*

It is vital, in the present scrutiny of rules in operation, not to be conditioned by current and competing methods and argumentation models. We need a fresh start that will allow us to attain factual conditions and practices, enabling an assessment of the justice quality of these arrangements. The purpose of the autonomy test is to provide

[704] Part-time work, ILO, (1992), p. 31.

[705] When it comes to working life proper, it is the equality of sexes that is in focus, aimed at deterring discrimination. "Equality of sexes shall be promoted in social activities and other terms of service, in a manner more precisely specified by Act of Parliament".

such a fresh start, a detached assessment of whether the standards and values that are intended by legislation materialise in practice. The autonomy test could be characterised as a 'lie detector', that reveals whether we mean what we say, when we talk about social justice and economic, social and cultural rights. The criteria that come out most strongly in theories of social justice, is a requirement that people be autonomous, and that the arrangements they engage in are freely chosen. This equals personal autonomy. In an assessment of rules in operation, a decisive aspect is therefore to what extent persons would be ready to freely choose or conform to the arrangements by which they are affected. The implications of the different criteria, with which theories of social justice operate, will be considered in the concluding part of this work. At this stage, focus will be placed on how a person is affected and how this person's autonomy is encroached upon by different rules and practices.

13 Outside an employment relationship - the architect of one's fortune

Parallel with an increasing segregation on the labour market, there has been an almost unlimited belief in the possibilities for new work opportunities. Raiskio pictures this neo-liberal creed as it has been voiced in the pages of journals in the field of social security. "There is work and know-how. Those who venture into entrepreneurship only need the key... when the most important instrument, one's own personality is ok, one can start collecting the first million". The control of one's life, special knowledge and the right networks, were like new magic words, that were expected to trigger a good job and entrepreneurship, Raiskio notes.[706]

Occasional success stories apart, the new ventures that were tried out, after the economic depression had lead to mass unemployment and a disintegration of working life, did not always correspond to the ideal picture. Instead, a person can be very much on one's own without support structures. Or when such structures are found, they can be accompanied by great legal uncertainty. One aspect of these changes is that people have become very mobile, which in turn has accentuated many problems. This is particularly the case in the new economy that has emerged based on networks.[707]

Assessing the future, the Ministry of Labour has, for example, emphasised the importance of the network economy that links communities and individuals. This is in line with the general philosophy of the day, where emphasis is placed on an active society whereby citizens and their organisations assume an increasingly important role as producers of services, and as players that in a flexible manner complement the official system.[708] Against these aspirations that take account of social reality as it now stands, thresholds contained in both labour and social security legislation, such as those mentioned above, should be critically assessed. General policy aspirations are easily undermined, because of the way labour legislation denies certain guarantees to

[706] Raiskio, (2001), p. 101.
[707] Koskinen, (2001). p. 256. The focus of his analysis is on the position of organisations when they act as employers for unemployed persons.
[708] See Koskinen (2001), p. 256.

those who fall below the thresholds. At the same time these thresholds make those who would be in the greatest need for support all the more vulnerable, in risk of marginalization.

13.1 Discrepancy between policy and legal regulation

The neo-liberal view relies on self-help, entrepreneurship and a privatisation of tasks, where a person creates one's own job. Freelancers are one professional group that has a long-standing experience of the factual conditions in which this is done. Freelancers and artists are professional groups that never fitted the wage labour model, as it is expressed in labour legislation. Notwithstanding this, persons working as freelancers or artists are in as great a need of the protective provisions labour law offers, as any other profession. Like other atypical latecomers on the labour market, freelancers offer a cheap solution to employers' need for products and services. As legislation now stands, the effect is often that freelancers are deprived of the benefits and security aimed at through both labour law and social security. I will therefore illustrate problems of a general applicability through examples of freelance work in which also artists are frequently engaged.

13.1.1 Discrimination in regard to pay

A basic equality aspect in working life is the principle of equal pay for work of equal value. This is a principle that is largely ignored in regard to freelancers and also other atypical workers. A person performing work for 'an employer', without an employment relationship, such as home workers, will be at odds in defending oneself against discrimination in regard to pay. As the ILO study of home work revealed, home workers often work for lower rates than those who have a regular employment. For freelancers this is also a frequent occurrence. I will illustrate this through a calculation, based on current rates received for articles published by papers in the Swedish-speaking minority group in Finland. There are roughly speaking three sets of rates currently paid, ranging from EUR 50, 45 - 84, (FIM 300-500), to EUR 504,50 (FIM 3000). This is a spread of 900 per cent. A middle rate lays at roughly EUR 168 (FIM 1000).

Say, that an article concerns a doctoral thesis. The journalist needs to acquaint oneself with the findings of the research, and will perhaps also attend the disputation. Even if the journalist does not read the whole theses, time will be spent on familiarising oneself with the content of the research and digest it. An interview with the author is most probably part of producing the article. Then comes the writing process. Now, with the rate paid for the article, EUR 168, this freelance journalist would need to write more than 12 articles a month, in order to reach a salary level of an employed journalist, whose minimum salary level, according to journalists'

collective agreement is approximately EUR 2018 (FIM 12 000). With this rate, the freelancer would be left with just above one and a half day for writing one article, in order not to be subject of discrimination in regard to pay. We are here not talking about a working day of nine to five, but around the clock. If established working hours were considered, the journalist would need to write just less than two articles a day (1,75) in order to reach up to the standard of an employed journalist.

Book reviews may offer a second example. As to its subject matter, a book review is a fitting task for an author. For book reviews a current rate paid by newspapers is EUR 50,45 - 84 (FIM 300-500). From a book review it is certainly required that the reviewer reads the whole book. This takes the time it takes. Writing requires its own time. In order to reach the level of an employed journalist, the book reviewer would need to write about two and a half book reviews a day at a rate of EUR 50,45. And this, of course, in addition to writing one's own books.

A working group of the Confederation of Unions for Academic Professionals in Finland, AKAVA, has looked into the status of freelance journalists. In its report it is noted that when comparing the fees paid a freelancer to those holding an employment, attention should also be paid to the additional costs that a freelancer has to pay. If the commissioned work would later be seen as having been performed in an employment relationship, the employer would be in neglect of taxation and pension payments.[709]

Another illustration of problems associated with a formalistic approach, is that it has been seen as a violation of free competition that freelance journalists have negotiated tariffs or even tariff recommendations. The AKAVA report on freelancers notes that this banning of negotiated tariffs is groundless in the case of freelancers that only sell their own work, and do not act as entrepreneurs.[710] A basic problem in the case of freelancers is the fiction that freelancers bargain their fees with the 'employer' commissioning the work. The factual possibility of one single freelance journalist to effectively negotiate is minimal.

The problems brought forth by the AKAVA freelance-working group is seconded by investigations done by the International Federation of Journalists (IFJ). In a 'World Survey: Social and Economic Status of Freelance Journalists', the following picture is conveyed:

With the transformation that the media world is undergoing, much new journalistic work is performed in more flexible ways. For freelancers this implies more vulnerable and difficult terms of employment. Among the answers retrieved from a questionnaire, on which the IFJ study is based, it is estimated that some 23 per cent of journalists in the 29 European countries work on a freelance basis.[711] It is thus not a question of any marginal phenomenon.

---

[709] AKAVA, Freelance-työryhmä, Raportti 25.5.2000, p. 6.
http://www.akava.fi/html/edunvalvonta/free.html.
[710] Akava, (2000), p. 7.
[711] International Federation of Journalists, World Survey: Economic Status of Freelance Journalists (IFJ), Final Report, Submission to the International Labour Organisation, (1999), p 3.

The pattern is the same concerning the role of labour law and fiscal regulations that weigh heavily on some freelancers. Taxation arrangements are difficult and social benefits are not available to freelance journalists. Further the report notes that there can also be very uneven standards within a country, because of a lack of nationally agreed standards for freelance journalists. Reference is here also made to how competition laws may be an obstacle for negotiated and unified standards.[712]

The practice of seeing free competition as an obstacle for negotiated tariffs is one good illustration of how economic concerns supersede human ones. If justice aspects were considered, there should be a weighing between economic and human concerns. In addition, we have the equality aspect within the journalist profession. The AKAVA freelance- working group draws attention to the need to remedy the inequalities associated with freelance work, from the point of view of an equal treatment of citizens.[713]

13.1.2 Conditions of work

An implication of the discriminating rates paid many freelancers is that much time is required for accruing a living wage. This should be seen in conjunction to the lack of support structures that further burden the conditions of work of freelancers.

Freelancers, and artists as well, work without the institutional frame a workplace provides. At a workplace there is a division of tasks and different support functions. One important support function is training required to perform work in times when technical devices constitute a central prerequisite at work. Freelancers thus have to invest in technical devices, learn to use them and service them. The IFJ World Survey points to the fact that freelancers are among the most technically equipped of journalists, and that the changing nature of information technology makes training an urgent priority.[714]

In addition to this, there is a need for different kinds of supports that are an integral part of ordinary activities at a work place. Training in the subject area is another aspect that a freelancer would need, perhaps even more than a person surrounded by colleagues.

Further there is a constant need to keep up with legislation, such as finding out, what social security accrues from the work performed. It can turn out that the answer is 'nothing'. This means that a person has to take care of one’s own social security, while already working for lower rates than one’s colleagues in an employment relationship.

[712] IFJ, (1999), pp. 3- 4.
[713] Akava, (2000), p. 7.
[714] IFJ, (1999), p. 3.

For a freelancer there is never a certainty that a product will be sold, although a considerable amount of time and costs may be involved. In this respect there is also a lack of predictability that further burdens the conditions of work of freelancers.

13.1.3 Projects an opportunity and a curse

One central ingredient in the transformation of working life is an increased use of projects as a means of carrying out old functions in new ways, or devising new activities altogether. But here an indiscriminate use of projects can create as many problems as it solves. In the research done in the New work project, Koskinen points to the increasing insecurity that goes along with projects, because of their fixed duration. As central is a constant uncertainty about external funding, by which project workers are directly affected. Looking at this from a labour law perspective, Koskinen notes that as both entrepreneurship and organisational work involves risks it is not acceptable that this risk in its entirety should be transferred to the employee.[715] The above view about the negative side of projects is seconded by Börje **Mattsson**, who for over a decade has been working with projects aimed at activating unemployed persons and immigrants, mostly refugees. Mattsson emphasises the advantage that projects offer as an alternative to public structures. The problem is their limited duration. There is the risk that the day a project ends, the participants will again walk around with empty hands. Mattsson insists that the substance matter of a project needs to be a process that does not come to an end.[716] This view is well substantiated in the New work project. Mari **Kivistö** researched the well-being of long-term unemployed persons who had been employed in the project. Those employed testified the importance this project-employment had had on their well-being. Among the persons Kivistö interviewed,[717] as many as 64 per cent considered that this supported work had had a positive effect on them. Their relations with people around them had improved. The work itself had activated them socially, both in their own surrounding and through the new contacts in the working community. Many of them considered that their social life had improved during the employment period. "I was somewhat more alert and not so depressed as when I was unemployed. I'm a sociable and extrovert person. It was very inspiring to have colleagues. I felt worthwhile."[718]

Mattsson emphasises that we need new structures. He points to how projects reveal the amount of ideas that people have, and are eager to act upon. Also, the great number of projects there are, reveals all the ideas and energies that have been hidden under the surface, because there has not been any structures to channel them. For this

[715] See Koskinen, (2001), p. 306.
[716] Framgångsrika exempel i det nordiska integrationsarbetet, Nordiska ministerrådet, Nord 1999:28 Finnish report, p. 95.
[717] Kivistö, Mari, The well-being of persons employed through the combined subsidy, (2001), see pp. 116-117. A questionnaire was addressed to all persons employed by third sector organisations in the Oulu region in Northern Finland.
[718] Kivistö, (2001), p. 132.

reason, there should not be deadlines, Mattsson suggests, because this is a new way of killing people's creativity and activities. In this way no synergy effects are created, only parallel structures that all require resources and time.[719]

Mattsson locates the problems in public structures and legislation. He notes that a number of problems they have encountered in their projects, derive from the structure of the Nordic welfare systems. These systems are not designed for the time in which we live. They are based on a view of passive citizens that should be helped, and not on active ones. He also points to the lack of recognition there is for work carried out in the third sector, how invisible the third sector is in legislation. There is no support for the activities that are carried out in the third sector. Looking at the systems in operation from a third sector project perspective, Mattsson's conclusion is that both social welfare legislation and labour legislation require a total revision. Legislation conveys a black and white picture that does not reflect people's reality. One effect of this is that if a person is unemployed, one is expected to be unemployed. If one is stupid enough to earn some income, one is penalised. "How are we to activate people" Mattsson asks, "when there is no support for this in the legislation, only obstacles."[720]

14 The theoretical problem

The problem we face at a theoretical level is that the dimensions of working life brought forth here, are invisible in a legal positivist approach, because of the oversimplified perception of work and economic activity. In legislation, there is an oversimplified division between working life and entrepreneurship, and no supportive provisions exist for the great variety of activities that factually take place, now located in a grey zone, largely void of supportive regulation.

In addition to freelancers, an increasing number of persons and professions have thus entered this grey zone between entrepreneurship and working life. As legislation has not adapted to these changes, new phenomena have to be squeezed into old formats, for which they are not suited. As we have seen above, many atypical workers pay with their income and benefits, for the economic advantages an employer gains from resorting to atypical work formats. If we approach this situation from the point of view of economic, social and cultural rights, a fundamental question is whether atypical workers have effective means of defending their interests. It should be obvious that we are here dealing with a grave structural imbalance between atypical workers' position and that of employers', who profit from this work format. To defend one's rights in an 'atypical' position is not a realistic option. In addition, to resort to a court to defend one's rights has the effect that Eriksson pointed to in the case of the right to health. As a court case, the issue is individualised, and will hardly allow for overall aspects of justice to be considered.

[719] Nord, (1999), p. 95.
[720] Nord, (1999), pp. 94, 95.

A major challenge is therefore to find a new balance between human and economic interests in economic life and working life. This requires new perceptions and new concepts, through which to address these problems.

14.1 A question of desert

The basic trait in the conditions in which so called atypical persons are working - which are more typical than atypical today - is that such persons work under conditions that constitute a discrimination, when compared to persons holding full-time employment. Discrimination implies that a person is not accorded what one is due, which to Miller is a precondition for a just distribution of benefits and burdens. This constellation also involves desert, which to Sadurski is a question of allowing for an autonomous status that would deliberate a person from the operation of uncontrollable forces in social distribution.[721]

In order to remedy the discrimination and inequality that 'atypical' workers are faced with, their factual conditions should be recognised and guarantees introduced to counteract such discrimination. Autonomy as desert, as Sadurski develops on it, is ultimately a matter of devising such conditions that a person is able to depend on one's own free choices. Now, those working in atypical work formats have seldom had the freedom to choose their work format. Instead, it is often a question of getting along as best one can in a situation that is not of one's own choice.

It is a futile path to proceed along if we try, as we now do, to squeeze new work formats into old labour standards. What is required is to recognise the factual work that is performed in the intersection between entrepreneurship and an employment relationship. What we term atypical, should be recognised as a category of its own, to which standards should be attached that reflect the principle governing labour law; that there is an unequal relationship between employer and employee, and that certain supportive provisions are therefore required. By devising a 'status' for those working in a variety of so called atypical work formats, this work could be made a viable alternative that a person would make a deliberate choice about. This would cater for a different distribution of benefits and burdens than now is the case.

Another way to remedy the present imbalance is to remove the thresholds inherent in labour legislation. This would mean doing away with cases of discrimination that law at present legitimises. Why should an employer not pay for the flexibility he or she gains by making use of flexible work formats? Would this not reflect a sound principle in 'economic transactions'? If a person were duly compensated for an inconvenience, this could lead to a different kind of circulation in working life, reflecting the flexibility that is indeed often required. This would have the advantage of making decisions about flexibility an option for a worker as well, and not solely a possibility for the employer.

[721] Sadurski, (1985), p. 157.

If an independent status for atypical workers would be devised, this would become a viable alternative that could have widespread effects on the labour market. It would introduce a freedom of choice for those who value freedom and flexibility, whereas those who cherish 'ordinary' work would have easier access to such vacancies. There are potentials for this, if only viable solutions were devised. Aaro **Harju** notes in the New work project that the mental climate in Finland has not been conducive to movements on the labour market; to switching over from one professional career to another, or to leaving the fast track altogether. Most people cannot afford such choices, and so there are many who hang on to their job, however much they might dislike it. Thus, stability and endurance have been appreciated, Harju notes and points to how things nevertheless are changing. As of late, there are examples of people changing their life in a radical way. With great probability, this is a phenomenon that will increase. General prosperity, less social control, and appreciation of the individual, encourage people to make their own choices. Personal aspirations and commitments will increasingly be the basis for building a work career, instead of succumbing to the wishes of others or to ideas that have governed the work-oriented attitudes of the Finns during many decades, Harju notes.[722]

15 A revolutionised working life

If we recognise the changes that have occurred, and introduce support for them, rather than further burdening those who have become the victims of the process, we could make use of the potentials that IT society offers, in ways from which the whole society would stand to gain.

In an article, 'A Revolutionised Working Life', Fahlbeck has formulated some fundamental questions that are central for the agenda pursued here. He presents thoughts about the design of working life, "if we were faced with the option of "starting from zero"."[723] Fahlbeck's aim is to discuss the organisation of working life free from links to the present system, which, as he notes, is evidently no easy task. His attempt is to present a perspective that is as unbiased as possible.[724] What Fahlbeck does, is to free himself from the prevailing premises, that is the employment contract. Instead he takes departure in human beings as "buyers of labour" and "sellers of labour". Fahlbeck notes about this departure that "[i]n so doing the article is completely value neutral and the terms are used in a strictly technical way, with no hidden meaning."[725] The merit of Fahlbeck's approach is that he frees himself from the standard departure in an employer - employee relationship. He notes that this dichotomy is not suitable for the simple reason that his scrutiny is not confined to

[722] Harju, (2001), p. 52.
[723] Fahlbeck, Reinhold, Towards a Revolutionised Working Life, (2000), p. 327. The article has also been published in Swedish, Ett revolutionerat arbetsliv? Informationssamhället och arbetslivets omvandling, (1997-98).
[724] Fahlbeck, (2000), p. 327.
[725] Fahlbeck, (2000), p.328.

employment relationships, but encompasses categories such as independent contractors, contract work, subcontracting or hiring out of manpower. Fahlbeck notes that "value provider - value receiver", would be more appropriate terms. Those who work provide / create / give / sell new and additional values, whereas their opposite party receives /buys / takes these newly created values."[726] Comparing IT society to its predecessors, the agrarian and industrialised society, Fahlbeck points to the specific attributes of IT society. In IT society, it is knowledge that is primarily held by the many, and knowledge is never completely standardised. So even independently of personal preferences and choices, the structure of the IT society in itself represents decentralisation and flexibilisation.[727]

A central question in the scenario Fahlbeck sketches is the role of capital versus work. To this old question, the information society brings a new angle, Fahlbeck notes, and puts the question where priority is to be placed, on capital or work? The answer is quite simple, Fahlbeck notes, even a truism, perhaps. "Only work can create new values. Capital, regardless of shape - be it land, buildings, equipment or money - does not *per se* increase in value. Only when human work is added will an increase in value result. "Capital" is created by humans and ruled by human labour."[728] Fahlbeck points to how capital always tends to take precedence over work. But here we need to be aware of factual social change, which he illustrates as an evolution from "muscle power" (agrarian society), via "machine operation power" (industrial society) towards "brain power" in information society. Fahlbeck notes that whenever the "capital" of sellers of labour is easily substituted, buyers of labour enjoy a considerable advantage. But information society changes this all. As the relevant "capital" is increasingly personal, representing individual knowledge and creativity, people are far less substitutable. In this setting it will be easier to understand and recognise the precedence of work over capital, Fahlbeck notes.[729]

Fahlbeck further points to an illusory dualism between capital and work, that he sees as predicated on a chain of basic misunderstandings, i.e. "(1) that capital is given precedence over work, that (2) work is considered from an economic angle only and that (3) work is looked upon as a means of production, a commodity."[730] Here, the legacy of Locke is very much alive. Because of the need in his time, to consolidate property rights, these rights have assumed such precedence over Locke's other observation that the *"Labour* of his body, and the *Work* of his Hands, we may say, are properly his."[731] Fahlbeck's analysis of the relation between capital and work in information society will facilitate a perception of the work of artists. But before opening this issue, a look will be taken at social security in operation. This will illustrate Fahlbeck's point about the way capital and an economic rationale still condition our perception, in a way that disempowers people.

[726] Fahlbeck, (2000), p. 328.
[727] Fahlbeck, (2000), pp. 333-34.
[728] Fahlbeck, (2000), p. 334.
[729] Fahlbeck, (2000), p. 335.
[730] Fahlbeck, (2000), p. 335.
[731] Locke, (1965), p. 329.

Social security - support or guillotine

We are using Stradivariuses to fuel steam engines, the sociologist Friethjof **Bergman** has noted, observing how human potentials are wasted today. Bergman's vision is a redistribution of work so that people could share their time between salaried work, time for themselves and time for creative work, politics, art or culture.[732] An important field to remedy in order to make this happen is the legal design of social security .

In Finnish social security, associated with working life, a major problem is the way the notion of an employment relationship, as a foundation for working life, is carried over to social security legislation. In order to touch unemployment benefits, a person is required to be at the disposal of working life for full-time employment. At a conceptual level, this implies that unemployment compensation is not primarily considered as something deserved, something that a person, who has lost a job, can rely upon in an autonomous manner. Instead, this compensation is associated with an obligation of availability that at a practical level can severely hamper a person's possibilities to make a new start. As Mattsson pointed out, if a person strives to ameliorate one's situation, there is a risk that one is penalised for this. What we need therefore is a new departure for social policy and its legal regulation, by providing a structure that will allow people to control their life and their particular situation.[733]

It should be obvious that when full-time employment of an unspecified duration today is an exception rather than a rule, a requirement of availability for such work can severely hamper a person's efforts to find a new material basis for one's life. In addition, this requirement is tragically out of tune with the conditions on a diversified labour market and the general aspiration that one should be ready to accept changes in one's life, to restructure one's existence and adapt to new values. We here have a blatant discrepancy between the philosophy steering unemployment regulation and the neo-liberal view that breathes an almost unrestricted belief in a person's mental resources as well as economic ones.[734]

A further problem pertaining to the conceptual level is the black and white picture of being employed or unemployed. This notion, as it is now associated with an employment relationship, acts as an opaque on-off shield that hides from view the factual activities that people are engaged in. This is particularly problematic in case of activities that are dependent on external funding. Take a researcher working on a doctoral thesis. Funding runs out, which is a not too infrequent phenomenon. In order to continue one's research, the researcher, besides applying for further funding, will in the meantime turn towards the employment fund or office in order to acquire unemployment compensation. At this instance a person becomes under the obligation to be at the disposal of working life. With this follows a number of provisions, aimed at supporting and improving the position of unemployed jobseekers. The problem here

[732] Heikka,(2000), p. 87.
[733] Eriksson, Socialrätten - I kris eller utveckling? (1992), p. 263.
[734] See Raiskio, (2001), p. 101.

is that such provisions tend to be applied in an indiscriminate way, without regard for the position of a particular person. In one case where a researcher ignored such guiding activities, he was considered to be in breach of the rules, with the effect that he had to repay the unemployment compensation he had received.

It should be obvious that a researcher has a clear view of professional orientation. This is one illustration of how the best of intentions pertaining to employment policies, rules and practices can become counter-productive of their aims, because of the indiscriminate way in which rules are applied. This is certainly fuelling steam engines with Stradivariuses, a state of affairs that should assist in displaying the problem inherent in the employed - unemployed dichotomy. If we take departure in human beings and their projects of life, we can see that the problem is not that a person is unemployed, but that this person lacks funding for an activity that he or she considers important to pursue.

16 Personal autonomy in social security legislation

To be dependent on unemployment compensation can in practice imply a severe infringement on a person's autonomy. Rules that restrict a person's choice of action are in violation of economic, social and cultural rights, and the spirit of constitutional provisions, if not their letter. Instead of focusing on the existence or not of an employment relationship, we need to bring to the fore the factual activities that a person is engaged in. The example of the researcher is here a case in point. If we look at the activities a person is engaged in we get sight of purpose. There is a generally recognised value in research. Now, because funding for this activity is lacking, the logic of social security, that is remedial in nature, supersedes the public good of research and usurps its meaning. If we take our departure in a person's project of life, we will be able to differentiate situations were the well-intended policies of employment authorities are in place, and where they are superfluous or hamper meaningful activity.

Basically, we are here caught in the all too human tendency of categorising people. We here have distant echoes of the past, in the attitudes towards the poor since the 16th century. Behind the poor laws that were enacted in the 16th century, there was an aspiration to consolidate royal power, with an ambition of total control, of exploiting the citizens to the full.[735] In this context the repressive apparatus of the modern state emerged, likewise the idea that people should 'be made happy', even against their own wishes, with force, if so required.[736] This is a legacy that we still live with today. A Norwegian assessment may here illustrate the generality of this phenomenon. Tove **Stang Dahl**[737] notes about the logic governing unemployment benefits in Norway, that although this compensation is aimed at sustaining the living

[735] Englund, (1991), p. 169.
[736] Englund, (1991), p. 169.
[737] Stang Dahl, Tove, Dagpengar under arbeidslöshet: rettighet eller redskap, accounted in Eriksson, Lars D, (1992).

of unemployed persons, it is at the same time a tool for a public steering of the labour market. The right to unemployment compensation is thereby directly related to the needs of the labour market. Stang Dahl points to the consequence of this. Small farmers have been forced to change their lifestyle altogether, to leave their farms. Families have had to accept a reduction in their standard of living, by being forced to split up into two households. In all this, it is the authorities that choose what kind of 'assistance' a jobseeker is in need of.[738]

16.1 Legal certainty wanting

Present practices illustrate the fact that the welfare state of the 20th century was no more than a cosmetic retouch of the poor laws, a change at the level of terminology, rather than implying a personal autonomy for persons relying on social security associated with working life. In addition to the deadweight carried over from past centuries, we are also faced with the problems involved in present day frame legislation. Looking into this problem, Eriksson notes that we today face critical choices regarding social policy. Within the frame of social policy a heavy and labyrinthine institutional and bureaucratic system has evolved. On the one hand, these structures undermine existing social structures, and on the other, they more or less effectively 'normalise' people by force. So Eriksson asks whether traditional social policy any longer is suited, as cultural and structural changes occur with an increasing speed, resulting in new distinctions between individuals and groups, creating in its wake new forms of inequality.[739]

One reason for increasing inequality is the fact that social provisions are related to income. In addition to, or perhaps rather as a consequence of this, thresholds are increasingly introduced in legislation, conditioning thereby whether a person will get access to income-related social benefits or not. Eriksson points to the need to critically scrutinize the validity of the premises on which social policy is based, in the present changed environment.[740]

At a conceptual level, the biggest challenge in the field of social security is to loosen up the tendency of categorising people and as a consequence, evaluating them. Here we have a long-standing tradition to make up with, as illustrated by Englund's observation about the poor laws. The forms this has taken in Finnish society is amply illustrated by Raiskio in his analysis of social security in post-war Finland.[741] Raiskio points to how evaluation goes along with development, triggering a need to evaluate people. And there is no end to the evaluation that goes along with the great number of thresholds involved in labour and social security legislation.

Again, an exit from the evaluation-trap is facilitated if we take a person’s

[738] Eriksson, (1992), pp. 254-255.
[739] Eriksson, (1992), p. 238.
[740] Eriksson, (1992), p. 241.
[741] See, Oppressive evaluation at the borderline of work in post-war Finland. Raiskio (2001).

project of life as a point of departure, such as the case of the researcher. With or without research funding, a researcher pursues an activity that is important to him or her, besides being considered valuable for society.

We can also get a fresh perspective on problems relating to social security by looking at the origin of public funding, from a distributive point of view. Be it the salary of a professor, a researcher, an artist or a person, who for reasons outside his or her control is unemployed, the source of funding is the same. It is all taxpayers' money. Funding is, in all these instances, intended for the good of society and human beings. So a question to ask is, why should those who can be seen as victims of circumstance be penalised for this, rather than being assisted in going about their lives. We are here dealing with the question of a fair distribution of benefits and burdens in society.

An additional aspect that should be brought to the fore is resource management, that is, how constructively the resources are used for the purpose, for which they are intended. In this perspective, a central question concerning social welfare is the extensive bureaucracy that is needed in order to administer the good social security is aimed at, precisely because of the evaluation that is generated by the thresholds contained in legislation.

One case brought before the Parliamentary Ombudsman may illustrate the position of a person trying to secure one's subsistence, and the way one may be caught up and conditioned by the logic of social security legislation. Here it is worth recalling that the Finnish Constitution secures (Article 19) everybody a basic subsistence. "Everyone who is unable to procure the security required for a dignified life shall have the right to necessary subsistence and care". In calculating a living allowance for a family, a social worker had included unemployment compensation for the complainant that he in fact had not received. The reason why the complainant had not received unemployment compensation was because he had, during this period, received a home care allowance, which meant that he was then not entitled to unemployment compensation. The reason why the social worker had included unemployment compensation in the calculations was because according to her, the complainant would have had the opportunity to register as a jobseeker, being thereby entitled to unemployment compensation. The complainant was therefore advised to apply for unemployment compensation, as this would amount to a bigger sum than the home care allowance. This in turn would have decreased the need for a living allowance.[742]

In this example, we have a person caught between different public systems, that caters for all too frequent bureaucratic excursions, primarily among the state employment office, the municipal social security office, and the office of the Social Insurance Institution, Kela. In his report the Parliamentary Ombudsman notes concerning this case that a client for a living allowance cannot be expected to apply for social security with the view of minimising the need for a living allowance.[743]

[742] Eduskunnan oikeusasiamiehen kertomus toiminnastaan vuonna 1999, p. 223.
[743] Eduskunnan oikeusasiamiehen kertomus (1999), p. 223.

Seen from the perspective of the client, getting on with one's life is the primary motive. At a more general level, attention should also be paid to the cost-effectiveness of this multitude of legislation and the bureaucracy associated with it. The question should be asked whether this a proper use of taxpayers' money, aimed at social security.

Here we can see how the division of tasks and responsibilities between municipalities and the state social sector, a complicated setting of its own, interferes with people's struggle simply to go on with their lives. The above accounted case raises several issues concerning the regulation of social security. Eriksson has pointed to this problem, as it pertains to frame legislation. When such legislation is implemented, instructions and directives are issued by different authorities, involving a complicated system of delegation. This form of regulation jeopardises traditional *Rechtstaat* or rule of law principles, while it at the same time has the effect of boosting the bureaucracy.[744]

Among the many problems Eriksson identifies with this type of legal regulation, he points to how it endangers traditional principles of legal certainty. Legal certainty presupposes that citizens should be able to foresee the decisions with which they will be confronted. Furthermore, it implies that public authorities should be submitted to an effective control. Eriksson notes that, in the present setting, the individual is about to disappear as a legal subject.[745] He questions whether the principles governing a legal system can be used in the fields covered by frame legislation. It would appear, Eriksson notes, that we need altogether new legal principles for areas of law, such as social security. This is one of the most urgent tasks that Eriksson assigns public law today.[746]

16.2 Income-related security triggers inequality

One central reason for the need to device a new departure is the linkage of social security to salaried employment and the level of income. Eriksson notes that this linkage to income, which still constitutes the basis for both social policy and social law, has cased to function as a reasonable basis in present day society. He therefore advocates a new basis for social policy that would be founded on citizenship, not on salaried employment.[747] Through such a focus on citizenship we get sight of human beings. By further using autonomy as a qualitative yardstick we are able to device criteria that would constitute alternatives to the foregone notions of legal security. This question will be elaborated upon in the ensuing conclusions. Before that, we still need to make some excursions in how the systems work today. As a point of repair for what we are to encounter, I wish to join in Eriksson's proposal about a citizens' insurance system instead of the present income-related one.

[744] Eriksson, (1992), pp. 243-244.
[745] Eriksson, (1992), p. 248.
[746] Eriksson, (1992), p. 246.
[747] Eriksson, (1992), p. 259.

Eriksson notes that all citizens should be guaranteed a minimum income that is not subject to means-testing. The advantages Eriksson sees with such a system, is that an insurance system based on citizenship would accord citizens tangible rights, and in addition an enlarged room of manoeuvre that would have the effect of offering a certain degree of security[748] that today is lacking for many persons living at the borderline of work. In this way a basic income would bring about a certain degree of personal autonomy. Likewise, it would reduce the power and size of the authorities in charge of social security. This is thus an alternative to the present system that I wish to propose as a point of repair in the continued *tour d'horison* of the social security scene and the conditions of artists.

17 Social security as a fair distribution

If we consider a fair distribution from the point of view of a person's project of life, we will be able to differentiate rights, deserts and needs. These are person-related notions against which the nature of social security legislation and the thresholds it comprises should be critically assessed. As noted above, the purpose of this part of the work is to indicate problem areas and ways to go about them in future research, rather than researching the problems here. Because, as noted, they constitute big and complex research areas, that can only be pointed to here. At this stage, I will indicate how the distributive principle as expressed through rights, deserts and needs could be made use of in assessing the nature of social security legislation.

Thresholds for accessing social security provisions actualise serious questions of rights. For an income deriving from work, a person pays taxes. Taxpayers' money, as we know, is what basically keeps the joint social enterprise going. If we take part-time workers, home workers or freelancers that work under comparable conditions, a vital question is whether the work performed will reach up to different thresholds that will give access to allowances foreseen by legislation. If a person does not reach up to these thresholds, this means that despite the fact that one has paid taxes, one might not be able to profit from the security provisions associated with the work, from which an income derives. This means that any social security provision a person might be in need of, will not be something 'deserved'. Instead this person will have to rely on the ultimate resource of a basic living allowance. This can mean less compensation, but there is also an important psychological aspect involved. Because no perceptional changes were made at a theoretical level, when social security was introduced, support provisions did not became perceived as person-related, but subordinated to business activity. We here have the phenomenon that Raiskio points to, that we often operate with new terminology only,[749] whereas attitudes and rules have not undergone any corresponding transformation. To be unemployed is perceived as shameful enough, as Raiskio amply illustrates. But not to be able to 'earn' one's social security reinforces a sentiment of shame.

[748] Eriksson, (1992), p. 262.
[749] Raiskio, (2001), p. 68.

If we take the case of home workers and part-time workers, as the ILO studies revealed, employers and society at large stand to gain from these forms of work. The only losers are those who more often than not have become victims of circumstance rather than having made a deliberate choice of an atypical work format. Instead of being compensated for this disadvantage, such persons are now penalised in many respects. Because their services are relied upon according to the employer's needs rather than their own they often see their own rights and interests forfeited. If we were to take a fair distribution seriously, those who have become victims, should be compensated for this. This compensation should be regarded as something deserved that in line with Sadurski's thinking would give a person concerned an autonomous position.

17.1 Transformations in working life and their effects on social security

The economic crises that followed on the speculation wave of the late 1980s resulted in extremely high unemployment rates in Finland, close of 20 per cent in the early part of the 1990s. This is also the period, when employers started to engage persons in atypical work formats. Unemployment and receded earnings, which have been the general result of atypical work, have placed people under hard economic strain. While employers have stood to gain economically from this, the costs associated with reduced earnings have been transferred to the public sphere, to the field of social security. This, again, has placed public funding of social security under a hard strain. While attempting to meet new needs that occurred with increasing unemployment and atypical work, it would appear that the system at the same time entered on a defensive trait, where financial aspects increasingly appeared to take precedence over human needs. New provisions were introduced to respond to new needs, but always accompanied by a number of qualifying provisions, which in practice simply add up to increasing bureaucratic procedures, while at the same time jeopardising a client's access to provisions sought. This cannot be cost-effective. In view of future research, this way of using public resources should merit an analysis of cost-effectiveness. In such an analysis, attention should also be paid to the fact that when expenditure is reduced in one field, such as income-related unemployment compensation, expenditure is instead increased for the living allowance. At the same time, it implies a humiliating excursion from one office to another for people affected by this.

17.2 Practical illustrations

Unemployment was at its peak in Finland in 1995, with 494 247 unemployed persons, amounting to almost 20 per cent of the labour force. Among them, 133 561 persons had been without a job for more than one year. After this, unemployment gradually decreased due to a rapid growth in the economy. Notwithstanding this, the improvement of the unemployment situation was unexpectedly slow.[750]

In 1997 amendments were made to the act on unemployment compensation, aimed at activating unemployed persons by inducing them also to accept temporary work. But at the same time, the period of work required to qualify for income-related unemployment compensation was prolonged. This prolongation, it is noted in a brochure issued by the employment administration, confirms the insurance principle, according to which there is a link between work done and the benefits deriving from this.[751] The qualifying period for touching unemployment compensation was prolonged from six months to 10 months. So at the same time as people are encouraged to accept temporary work and part time work, their qualification for income-related employment compensation was made more severe.

Statistics tells its story about the restructuring of working life. The number of unemployed is still inconceivably high, considering that there had been several years of steady economic growth. This has shown that economic growth no longer means a job for all, a matter that by now is a fairly well recognised fact.

The risk of becoming unemployed has not decreased since the years of depression, on the contrary. In 1993 there were 813 000 instances of people getting unemployed, whereas by 1999 the number had increased to 910 000. This is a reflection of an increasing use of fixed-term employment, resulting in an increasing number of spells of unemployment. Another explanation to this is the short duration of labour policy measures, which thereby contributes to the increase in intervals of unemployment. At each such instance, an unemployed person and an official of an employment office have to consider or calculate, whether these fixed-term employment periods will add up to the required thresholds, when a person again is faced with unemployment. This means nine-hundred-and-ten-thousand instances. If a person is working part-time or on a freelance basis both the official of the employment office and the client will easily get lost in the calculus, whether a person is entitled to income-related unemployment compensation or not. In contrast to the years of depression, those that now become unemployed are relatively soon employed again. An illustration of this is that among 910 000 persons registered as unemployed in 1999, 66 per cent of them were employed again in less than three months. Within three to six months, 16 per cent had found a job. A further 10 per cent received employment after 6 -12 months. For 6 per cent of the jobseekers, the duration of unemployment was longer than one year. 8 per cent remained unemployed for more than two years. According to an estimate made by the Ministry of Labour, 8 per cent

[750] Harju, (2001), p. 19.
[751] Työttömyysturva on uudistunut, Työministeriö. TM 4.002, 1/1997

of those who now become unemployed will remain long-term unemployed. The major part of those who are today long-term unemployed are persons who lost their job during the years of depression.[752] And with each extended spell of unemployment, the possibility of getting access to income-related unemployment compensation will be reduced.

Up to the mid 1980s, long-term unemployment was a rare feature in Finland. Since then it has become a difficult human and social problem. In the New work project, employment was targeted towards persons who had been unemployed for more than two years. Employment by non-governmental organisations, NGOs, was enabled through a subsidy, the combined labour market subsidy, implying ordinary work in organisations. Here we can see thresholds at play. The employment enabled through the combined subsidy was a maximum of 12 months, but social security accrued only for one third of the factual period worked. Now, those unemployed persons who qualified for work based on the combined labour market subsidy had exhausted their right to income-related unemployment compensation. In order to regain access to this, an unemployed person needs to be employed for at least 10 months within a period of two years. As only one third of the duration of such an employment is accounted as qualifying for income-related unemployment compensation, this person will need to find a job for another half year in order to become entitled again to income-related unemployment compensation.[753] Considering that these persons had been unemployed for more than two years, the prospects of finding a new job is fairly small. It is thus a harsh requirement that they should find employment for another half year. This, yet again, is an illustration of how rules are devised in such a way that they create unreasonable obstacles for persons already in a disadvantaged position. They will then be entitled to a flat rate only, which is so small that a person hardly can sustain one's living on it. Recourse has then to be made to the living allowance - yet another bureaucratic excursion.

In the case of the combined labour market subsidy, all parties involved saw the fact that a person employed through this subsidy could not accrue social security like in regular empolyment, as a very negative thing. Liisa **Hokkanen** reports from her research on opinions about the combined labour market subsidy, that this was clearly condemned both in earlier research[754] as well as in the inquiry she carried out in the project. Among the respondents, 90 per cent considered that the best solution would be to make all this time qualify for unemployment compensation. Above all, those persons employed through the combined subsidy clearly condemned this shortcoming. Although they in other respects mostly considered the employment as a positive experience, the weakening of their social security is something that was regarded with contempt. Situations continuously occurred whereby both the employed and the

[752] Harju, (2001), p. 20.
[753] Hokkanen, Liisa, Kinnunen, Petri, Introduction, pp. 12-13, in Harju, Backberg-Edvards, Eds, (2001).
[754] Hokkanen, Opinions about the combined labour market subsidy, p. 219, where reference is made to earlier research. In Harju, Backberg-Edvards, eds. (2001a)

employer were unaware of the weakening effect that this subsidised work had on an employed person's social security.[755]

The above case is yet another illustration of the complicated nature of social security legislation, as the Parliamentary Ombudsman has pointed to. It equally illustrates the lack of predictability and legal certainty endemic to the field of social security. It is an illustration of how the rules are designed in such a way that a person is deprived of something that one should be entitled to, like others are. Hokkanen's observation about this is that "[i]n such situations, the confidence that the employed and the employer feel for the institutions is weakened, and thus the institution is here redefined. The generally recognised way by which unemployment compensation is accrued, is all of a sudden invalid, and this undermines the confidence in the institutions."[756] Not only were those employed through the combined subsidy denied 2/3 of the social security that would accrue in an ordinary employment relationship, although their work was work just like any other, there were many other problems associated with their situation.

18 Misconceived equality

The subsidy that formed the basis for employment in the New work project, the combined labour market subsidy, had largely been tailored to allow third sector organisations to employ long-term unemployed persons. It is evidently justified to concentrate effort and resources to generate employment opportunities for long-term unemployed people. But here again, we have one illustration of how the best of intentions can become counter-productive, in a requirement of an uninterrupted unemployment period of 500 days before a person would be eligible for employment by NGOs. In the reform proposals ensuing from the project it was, among others, suggested that the qualifying period for eligibility for employment through this form of subsidy be shortened. Harju points to the overall gains of employing jobseekers sooner rather than later, and equally for a longer duration. When one enters into an employment relationship, this strengthens one's personality, self-esteem, and social appreciation in the wage labour society. Employment brings about social relationships and improves, in general, the standard of living. Employment is thereby the most efficient means of counteracting marginalization, as it improves the position of a marginalized person. At the same token, hang-ups, like illnesses and different social problems that unemployment causes to people and their immediate relations, can be reduced.[757] These positive effects of employment were substantiated in the research carried out in the project, where the persons employed were consulted concerning their experiences.[758]

[755] Hokkanen, (2001a), p. 219-220.
[756] Hokkanen, (2001a) p 220.
[757] Harju, (2001), p. 59.
[758] See Kivistö, The well-being of persons employed through the combined subsidy, pp. 115-146, in Harju, Backberg-Edvards, eds., 2001.

18.1 Compensation and compulsion

The way the 'system' reacted to the new challenges faced by mass unemployment and a diversified working life was to introduce compensation and compulsion, both with regards to work, rehabilitation and training. Rehabilitation, support and activating measures are a plausible solution for many persons at the borderline of work, to sustain social and mental cohesion, Raiskio observes, but he notes that "through compulsion there is the general tendency to blame, to exercise social control and to transfer society's exhausted anguish to the borderline of work". Raiskio points to the effects of the view of the individual that permeates the neo-liberal order of values. This almost infinite belief in the omnipotent individual makes it easy to continue to label people at the borderline of work as "lazy slackers, that do not use their potentials in line with the ideal of the time, for infinite mental and material growth."[759]

The long out-drawn mass unemployment with its multiplying effects, has in practice led to a situation, where one part of the population lives on what could be termed as a meagre 'civic salary', made up of basic security and different supports linked to it. Many persons at the borderline of work fare quite well, Raiskio notes, and they would like to live a balanced and decent life, for example in retirement, looking for a job or attempting to pursue studies. But here we have the requirement for compulsion and obligations that secures a continuous feeling of anguish, only to be increased, Raiskio notes. In addition, thresholds cater for continuous categorising assessment in regard to the income-related unemployment allowance that induces a feeling of guilt for the station in life of those who live on a living allowance.[760] And here we have the paradox that if a person attempts to go about ones life, in line with general policy aspirations, it can turn out to be a risky exercise, because the well-intended activating policies in practice has become a disciplining element, a feature that again would require careful scrutiny from a constitutional rights' perspective. One illustration of evaluation and disciplining is waiting periods that a person might face when taking matters in one's own hands or otherwise acting in a way that does not conform with the authorities' view of a person's motivation for job-application. Hokkanen has researched this by looking at recommendations concerning waiting periods that long-term unemployed jobseekers had received.

18.1.1 Waiting periods - a means of disciplining

Among the changes that have been made in regard to unemployment compensation, one is an extension of the time before income-related unemployment compensation can be received, a so called waiting period. There are two kinds of waiting periods, one so called quitting waiting period and one called a refusal waiting period. The quitting waiting period is often associated with a person quitting a job 'without valid

[759] Raiskio, (2001), p.105.
[760] Raiskio, (2001), p. 105.

reason', whereas the refusal waiting period is a sanction if a person fails to adhere to active labour market measures, such as when a jobseeker is assigned to work and training, in order to review this person's motivation for job-application. Hokkanen made a study of such waiting periods. This revealed that waiting periods caused by persons quitting a job, made up approximately 60 per cent, while waiting periods caused by a refusal to adhere to proposed measures was approximately 40 per cent. It was mainly young people and young adults (25 to 44 years of age), who were affected by these waiting periods. Hokkanen's study further revealed that among those who were subjected to a waiting period, a greater number than the average is given to jobseekers with a low level of education, people who live in an area with a good employment situation, and people who rely on the living allowance. Some 40 000 jobseekers have, during the past years, been apportioned a waiting period, which is approximately 6 per cent of all jobseekers.[761]

Hokkanen also made a separate statistical run for those who were unemployed for 500 days, and for persons who were employed through the combined labour market subsidy. This scrutiny revealed that 13 per cent of persons who had been unemployed for 500 days had, in their recent history, been given a statement recommending a waiting period. They had thus experienced that their own decisions or actions had been in violation of the labour administration's norms. An effect of this was that these persons were excluded from social security for a certain period of time. Hokkanen points out that in the group of persons who had been unemployed for 500 days, half of them were older than 55 years. This is a group for which there is not necessarily many measures taken, in other words, persons who are not likely to get a job.[762]

This encroachment on a person's own decisions about one's life, is also something Stang Dahl pointed to in the case of Norway. In cases where a person is seen as being responsible for one's unemployment, family reasons have not been considered as a legitimate reason for not working or seeking a job. Marriage and the aim of being together with one's children have been considered as a private business that does not entitle a person to social security. The same goes for caring for sick parents or family members. Such grounds have not been seen as valid reasons that would prevent the mobility of a jobseeker.[763] Quitting for 'personal reasons' has also received topicality in view of increasing burnout in working life, if options such as a sick leave or pension are not accorded. Furthermore, the logic of many social security schemes almost forces a person to act in a strategic manner in his or her attempt to make the best out of a problematic situation. Long-term unemployed persons in the age group of 55 to 59 years illustrate this phenomenon. Persons aged 55 to 59 can get an unemployment pension if their unemployment remains uninterrupted. These unemployed persons have economic reasons to avoid possible short-term work or training, in order not to relinquish their possibilities for unemployment pension. In an

[761] Hokkanen, Liisa, Local use of the combined labour market subsidy - a statistical study, p. 200, in Harju, Backberg-Edvards, eds., 2001b.
[762] Hokkanen, (2001b), p. 200.
[763] See Eriksson, (1992), p. 256.

inquiry concerning long-term unemployed persons, functionaries of the employment offices estimated that an obstacle for employing one out of two persons over 55 years of age was their aspiration towards a pension. The use of the pension career is a product of the depression, a silently accepted means of reducing the work force by turning unemployed people into situations that qualify them for unemployment pension. "Unemployment at the end of a working career does not reduce the pension income, and can thwart a feeling of injustice linked to marginalization on the labour market", Hokkanen notes.[764]

Among those employed through the combined labour market subsidy, an average of one fourth had, in their recent past, experience of sanctions relating to unemployment compensation, meaning an interruption in income for the unemployed. The research showed that among the persons faced with a waiting period, more than half of them had to rely on a living allowance. The waiting period not only interrupts payment for the duration of that period, for after that, delays in the payment of unemployment compensation are to be expected, as well as problems concerning the living allowance.[765] This is illustrated by one of the persons Kivistö interviewed. "I had a waiting period after the job had ended and my living allowance was cut … the first two months were almost a total catastrophe. When I got unemployed at the beginning of the month I went to the employment office to register as unemployed. They said that after three weeks there should be money from the Social Insurance Institution... when the month was drawing to an end and I put in my papers at the social welfare office, for a living allowance, the answer was that I don't qualify for this... and then at Kela (the Social Insurance Institution) a surprised secretary looks at a big heap of papers and says that she has not had time to look through them. First she was sick for two weeks and then she was on vacation... So it was not until the end of the following month before I had money from Kela. This is how it is, when the job is terminated. You should in principle be able to sustain yourself for three months, and that's something. That came as a big surprise for me". (Pertti) [766]

Pertti's experience above is one example of how the institutions work, and how people experience their situation. In the New work project, Kivistö looked at how the persons, who had been employed in the project had experienced their employment, and how they perceived their situation after the work period expired. Kivistö looked at well-being through life's various lenses, as perceived by the persons concerned.[767] This is the kind of research perspective that is needed in order to assess the fairness of institutions, and catch sight of people's projects of life. As the above glimpses of the research findings of the New work project reveal, a formal neutrality in the application of rules and regulations can have very improper effects that are revealed when viewed from a justice perspective and a person's project of life.

The picture conveyed above of what we call the social welfare state reflects some kind of implicit fear that people would not like to work. This is an attitude that

[764] Selvitys yli viisi vuotta... 1998, cited in Hokkanen, (2001a), pp. 194-195.
[765] Hokkanen, (2001b), p. 201.
[766] Kivistö, Mari, (2001), p. 138.
[767] Kivistö, (2001), p. 116.

has little coverage in reality, as was repeatedly confirmed in the research carried out in the New work project. Another aspect that is strongly conveyed is the picture of the human being. There is not much sign of the ideal-type (*homo economicus*) underpinning legislation in other spheres of life, when a person is confronted with what should be social *security*. On the contrary, if a person resides at the borderline of work, society places obligations, compulsion, sanctions and orders. In his article portraying the oppressive evaluation at the borderline of work, Raiskio points to how the terminology used at the borderline of work is 'labelling'. This mirrors the perception of human beings at any period in time, and the values governing that society. "This is a theme that concerns both subsistence, work, and the distribution of its return. It tells about marginalization, poverty, unemployment, the emergence of class differences, but also about survival and possibilities."[768]

19 Deserving a better treatment

From a justice perspective, people would deserve a better treatment. Miller notes that when approaching 'desert' in its widest sense, we can find cases in which claims of rights and needs are expressed, perfectly naturally in the language of desert.[769] Desert is a matter of fitting forms of treatment to the specific qualities and actions of individuals. It is a matter of fitting desired forms of treatment to qualities and actions, which are generally held in high regard.[770] Here we need a decisive change of perception, to show respect for those who have became victims of social change. Raiskio puts this in a nutshell when picturing the change of values that have occurred. "It is somewhat ironic that wealth accrued through speculation can create admiration, while simultaneously, attempts are made to make social security subject to compensation."[771] We have to make up with the legacy of the Lutheran work morals that is so profoundly imprinted upon us, and allow for the space there factually is for personal integrity at the borderline of work. This is equally relevant for those who are engaged in artistic creation.

20 An artist's project of life

The changing nature of working life in information society is one incentive for focusing on the status of artists and persons engaged in different forms of creative work. These groups offer us a genuine theoretical challenge that also serves a wider aim of capturing the changed makeup of society and mentality. Above, (chapter V.7), the role of art for the wider society and the problematic status of artists was

[768] Raiskio, (2001), p. 68.
[769] Miller, (1979), pp. 83-84.
[770] Miller, (1979), p. 85.
[771] Raiskio, (2001), p. 102.

scrutinised at a perceptional level. Next, attention will be directed towards the conditions of artists in Finland, with the aim of pinpointing conceptual improprieties in the way artistic work is perceived. Here the most decisive rearrangements must be made, that will serve also other parts of the atypical labour market. The question is, what are artists due?

20.1 To make sense of art

As the legal tradition stands artists constitute perhaps the most problematic professional group. The nature of their work is of a different kind than salaried employment or entrepreneurship. We therefore need to approach the status of artistic work in a way that is detached from these models. As a thought experiment, a civic salary would offer leeway for artistic work, because classification and evaluation would be disposed of, and an artist, as also any other person, could pursue one's own project of life. Whatever solution might be chosen at a political level, at a perceptional level we must start by freeing artistic work from the categories of salaried employment, unemployment or entrepreneurship. Due to the nature of artistic activity, there is often no 'profit- making relationship' between the time and material costs put into a work of art, and the income generated from it. Artistic work is therefore a kind of activity to which ordinary business standards cannot be applied. As this is not recognised in legislation, many artists are left in a position that stands in blatant contrast to the bearing of art in society.

A basic problem here is that the ideal type permeating legislation does not recognise the values inherent in artistic activity. One illustration: Matti **Klinge**[772] makes a comparison between two ways of looking at what surrounds us. He refers to a location, Punkaharju, that has received profound nationalistic connotations. For some Punkaharju represents the morally elevated beauty, the patrimony, whilst others look at the forests covering this location from an economic perspective, assessing how much money could be retrieved from the trees. This latter way of looking at the world is endemic to our time, something that also Gadamer has directed attention to. Gadamer points to how we have became victims of a deliberate and calculating pursuit of power and material advances. Because of this, we have difficulties in perceiving the vital essence of artistic creation.[773] Yet precisely because of the material advances, there is now ample space for artistic activity. What we need is a mental space of tolerance, in order to facilitate artistic activity.

[772] Naturen, column in Hufvudstadsbladet 7.3.2000.
[773] Gadamer, (1995), p. 59.

20.2 Art - an activity in its own right

I will here in a cursory way illustrate the kind of problems that artists encounter (taken to cover artistic and creative work of different kinds.) The unifying notion here is that the activity in itself has a value as a means of self-realisation, as opposed to it being geared towards economic profit reflecting self-interest. As economic activity is the dominating feature of what we term work or entrepreneurship, artistic work is visible only when it produces economic results. An effect of this is that artists often find themselves in very peculiar and economically untenable positions, for example by being characterised as entrepreneurs or unemployed. To be characterised as unemployed is an implicit denial of the nature and value of artistic work, as not having a worth in itself, independently of whether this will produce an income or not. Certainly most artists would prefer to live on the income of their artistic work, but this is not an economic activity in the first place, and should therefore be recognised for what it is. This is a first step.

If we continue looking for solutions along old tracks, ahead are only problems. If we look at the potentials inherent in freed human energies, because so many people are not needed for 'productive work', many possibilities open up. A considerable part of the vision Bergman expressed above, about a new distribution between paid work, creativity and leisure, could be realised within existing economic frames, if only we are willing to look at social reality in a new perspective. If we want to make sense of a person's project of life, we need to allow for the symbolic value in Punkaharju, as an expression of people's spiritual dimensions and needs, in addition to a view of how much money can be retrieved from the trees at Punkaharju. This means perceiving a person as a spiritual person on equal terms with the implicit view of a person as a *homo economicus.* John Stuart Mill's characterisation of a person's project of life is here a fitting point from which to start. To Mill, what counts is that a person with a reasonable degree of common sense and experience, should be entitled to lay out his or her existence as this person sees fit. This is the best for the very reason that this is the mode of one's own choice. To this principle Mill added two maxims. "[F]or such actions as are prejudicial to the interests of others, the individual is accountable and may be subjected either to social or to legal punishment if society is of opinion that the one or the other is requisite for its protection."[774] What Mill here does, is to make a person's project of life relational to the surrounding society, an aspect that is central for the notion of personal autonomy. The autonomy a person enjoys is interrelated to its surrounding, requiring thereby mutual respect for other persons' autonomy, which again amounts to a requirement that each person should have as much control of one's life as is possible in any particular situation. This maxim also brings into focus a consideration of the nature of an activity, an occasion for contemplating the wider role of art, as extending beyond the activities of an individual artist.

Mill's second maxim runs as follows: "[T]he individual is not accountable to society for his actions in so far as these concern the interest of no person but

[774] Mill, On Liberty, (1984), p. 163.

himself."[775] This maxim is central in view of the way social security entitlements are regulated, raising serious issues about personal integrity. As will be shown below, this can lead to grotesque situations for artists. Artists should of course be entitled to the same constitutional guarantees for their material subsistence as any other person or profession. A first thing to remedy is therefore not to apply the wage labour or business logic to artists.

21 The status of artists investigated

In Finland, the conditions for employment through artistic activity and artists' social security, have been investigated by the Ministry of Education and the Arts Council of Finland, sorting under that ministry.[776] The point of departure for this investigation has been that artists should be treated on equal terms with other citizens on the labour market. As also the committee, the Taisto II expected, this investigation revealed a host of problems.[777] The major problem facing artists is that Finnish legislation only knows two forms in which work is carried out, either as an entrepreneur or as a salaried employee. Artistic work is ordinarily something between these two categories, it is noted.[778] A consequence of this is that the particular features of artistic work may lead to an unfair treatment of artists when they are confronted with public authorities. Professions singled out as particularly problematic are painters and authors, when they act as free artists.[779]

21.1 Obstacles identified

The Taisto II committee looked at what categories authorities apply when dealing with artists. This account revealed that the labour and social administrations are poorest in recognizing the particular nature of artistic work. The only categories, with which they operate, are entrepreneurs and salaried employees. The administration of art and artists has the most diversified categorisation, identifying an artist as performing one's work either as an entrepreneur, a free artist, a freelancer, who either has commissioned work, or is employed for a limited duration, or that the artist has a regular employment. Between these administrations, taxation authorities operate with four different categories.[780] Constant clashes occur for artists because of the different

[775] The maxim continues as follows: "Advice, instruction, persuasion, and avoidance by other people, if thought necessary by them for their own good, are the only measures by which society can justifiably express its dislike or disapprobation of his conduct." On Liberty, (1974), p 163.
[776] Committee on the employment and social security of Finnish artists, Taiteilijoiden työllistämisedellytyksiä ja sosiaaliturvaa selvittävän toimikunnan (Taisto II) mietintö, 22:2000.
[777] Taisto II, (2000), p. 1.
[778] Taisto II, (2000), p. 3.
[779] Taisto II, (2000), p.1.
[780] Taisto II, 2000, p. 22.

categories the various administrations apply. In this respect the administration of social security is the most problematic. One such illustration is that if an artist does not have salaried employment, he or she can be considered an entrepreneur, independently of whether this artist's work generates an income or not. For artists, as for freelancers, problems occur when work performed deviates from the standard format of full-time employment of an unspecified duration. The investigation thus revealed that the problems artists face, are associated with short-term or causal employment, a varying level of income, 'spare-time' occupation and overlapping employment. Another problem area is associated with grants. In all these settings problems mostly actualise in regard to social security. It is pointed out in the report that problems occur because enough consideration is not paid to so called atypical work, although this is becoming increasingly common, also in other sectors of the labour market. So the committee expresses the hope that the problems identified in the report and the solutions they suggest would be of use for the labour market at large, as these also concern other atypical work formats and professions.[781]

The committee considered solutions that would improve the position of artists, mainly in the form of changed practices in the application of rules and instructions. It is noted that if the proposals the committee presents will be implemented, certain problems can be remedied. However, the fundamental problem cannot be remedied merely through changed practises or even through legislative change. The fundamental problem is that many artists have a very low income. The committee notes that it has not been able to solve this fundamental problem.[782] A pertinent question formulated in the report, is whether entrepreneurship is a solution for generating employment and income for artists. If an artist cannot employ oneself in one's work, it cannot automatically be expected that this artist will find a market by starting an own business. Supportive measures for such activities can however facilitate entrepreneurship on a small scale. Nevertheless, market mechanisms alone are not able to cater for the needs for an income and work for artists.[783]

These observations testify of the need Eriksson pointed to, for a new theoretical basis for social law. Through a new departure account can be taken of the variety of work that is performed, recognising its specific character and value, detached from market mechanisms.

22 Cooperation required among different administrations

The goal the Taisto II committee had set before itself was to bring about a closer juncture between different administrative sectors. This is particularly important because many problems facing artists are not derived from cultural policies, but from policies pertaining to social, labour and taxation issues. Public authorities need to be

[781] Taisto II (2000), p.1.
[782] Taisto II, (2000), p. 2.
[783] Taisto II, (2000), p. 2.

aware of the complex juncture there is between art and entrepreneurship.[784] The general picture conveyed by the Taisto II investigation into employment prospects and social security of artists, is that in case an artist does not pursue this artistic activity in addition of a breadwinning job, their conditions are in most respects inferior to that of other working citizens. The basic problem here is the incompatibility between the wage labour society and artistic work. Some examples of problems painters encounter when dealing with the social security administration, will illustrate this point in a caricatured way.

A number of social security entitlements are income-related. As painters often have a low income, this has repercussions for their access to social security. Painters may therefore have great difficulties in getting access to unemployment compensation. There are instances were a painter, in order to get access to such compensation, has to show that he or she has given up artistic work, for example by giving up one's studio. This stance illustrates the ambiguity in administrative practices concerning a demarcation between being unemployed and being an entrepreneur. The many uncertainties artists face are further underscored by incoherent and unpredictable practices among different authorities.

If an artist is considered as an entrepreneur, she or he will be excluded from social security associated with work. We here have the weird situation that a person who cannot count on one's activity generating an income, has to pay for one's own social security in the way entrepreneurs do. Also in regard to pension schemes, the position of free artists is highly problematic.[785] Another problem area is associated with grants. Grants that are aimed at facilitating artistic work may turn out to be a problem when considered by the administration of social security. Here the logic of the social security administration supersedes the rationale of a grant. Thus, as one example, when income-related social benefits are calculated, such as sickness benefits, a grant is not taken into account as an income.[786]

23 Funding through grants - another meeting of conflicting rationalities

There are, of course, different support structures for artists, such as grants. But here again, the general failure to recognise the particular nature and conditions of artistic work can make grants a risk as the Taisto II investigation revealed. Seen from the point of view of the conditions of work of artists, another problem is a constant need to apply for funding in order to pursue one's work. This means that artists largely lack predictability, which is one basic prerequisite of a legal order. In regard to funding, artists have one further disadvantage, when compared to salaried employees. The time required for planning projects and applying for funding, is off the time one should spend on one's work and on accruing an income. Such time is therefore very

[784] Taisto II, (2000), p. 2.
[785] Taisto II, (2000), p. 9.
[786] Taisto II, (2000), p. 9.

expensive time for free artists, when compared to persons who have a monthly salary running.

In the application for grants, artists meet with a logic that is not far from the one displayed by public authorities in the field of social security. This is because the artistic process is such that it does note easily lend itself to 'rational organisational models'. Artistic work is not something that can easily be anticipated, calculated and measured. Neither are there 'objective' criteria according to which to assess a piece of art or artistic creation of some other kind. A valuable documentation of the hardships encountered by artists is offered in a report from an umbrella project, Rötter, Röster, Rum, (RRR) carried out during the year 2000 when Helsinki was one of the European cultural capitals. This report is valuable in that it describes the process involved in carrying out some 150 projects under the RRR umbrella. A major concern in making the RRR project happen was to obtain funding. The problems associated with funding, are voiced by many persons involved in the project. The opinions expressed in the report put words to problems that artists constantly face, articulating thereby wider concerns than those of the project itself. Some opinions will therefore be transmitted because of the wider interest they reflect.[787]

As to the conditions for obtaining funding, Stan **Saanila** notes that one never knows how the financing of a project will be solved. In the last resort it rests with the hazardous condition that eight people will be of the view that your project is a good idea. But not only that, even if one gets some money, there is never a certainty about the sum one will be granted; will it be one tenth, half or the whole sum applied for. For this reason, one cannot start planning a project from the knowledge that we have what we need. It is always the other way around. Saanila points to the absurd situation that one cannot properly start to plan a project before financing is sorted out, whilst at the same time, it is required that one can account in detail for every penny, when applying for funding. One should be aware that a plan, an application is nothing more than an idea, Saanila notes.[788]

The funding problem was a central concern among the persons involved in the RRR project. Pilippa **Forsman** saw the whole situation as ridiculous, and notes that "it is only because I was so inexperienced in this field that I accepted to work on these terms. Never again would I work under such conditions". This she notes, having worked full-time for a part-time compensation. She refers to a question often discussed in cultural circles: should one work for the love of art or should one work for money? I see this activity as work for which I want to be compensated, is Forsman’s view on the question.[789]

The RRR project also revealed another problem which artists frequently face, and are often ill placed to remedy, to market their products. Nina **Gran**, the chief

[787] Gran, Nina, Londen, Magnus, Rötter, Röster, Rum - en rapport om ett kulturstadsprojekt, 2001.
[788] Gran, Londen, (2001), p. 7.
[789] Gran, Londen, (2001), p. 8.

coordinator of the RRR umbrella project, attests to the difficulty in getting some funding agencies to realise the need for marketing and that this costs money.[790]

The RRR project also revived the old question: what is a reasonable compensation for cultural work? Those who decide about funding easily perceive of this question as being calculable and controllable. Thus Pär **Stenbäck,** heading one of the major cultural foundations, is reported saying that people do not seem to have got accustomed to cutting their coats according to an unaccustomed cloth. It is not the task of the foundation to be enthusiastic we should be to the point and objective. The view of Lasse **Koivu**, heading another major funding agent, was more attuned to the reality of the conditions in which artists work. Koivu was of the view that the whole Finnish-Swedish cultural sector should become more vigilant when it comes to compensation. One cannot expect that people work on a voluntary basis. Proper funding also implies that one can carry out qualitatively more demanding projects.[791] Yet another problem encountered in the RRR project was to define the concept of the project. This was seen as a problem in conveying information to mass media and to the funding agents likewise. Here we are again faced with a confrontation between two different rationalities. Art is a creative process that hardly can be defined ahead of the factual process. This is particularly the case when new forms of work are tried out. The producer of a project 'Women in ecstasy' (Kvinnor i extas), Heidi **Backman**, notes that "we need courage, risk-taking and trust in order to get good results, otherwise nothing will come out of a project like Women in ecstasy."[792] This leeway required for the creative process is part of the space of tolerance that is needed in order to be able to remedy present shortcomings in the status of artists.

24 The challenge

The challenge when addressing the question of the status of artists is to be aware of the role art plays in our lives as human beings and in society at large. This should be reflected in the status of artists, so that they are accorded a legal standing that corresponds to their contribution to society. Once this is done, the legal and administrative categories with which different administrations operate should be harmonised so that artists are being treated on equal terms by different public bodies, and on equal terms with other citizens. A major challenge is to provide structures that enhance the predictability and legal certainty for artists.

[790] Gran, Londen, (2001), 15.
[791] Gran, Londen, (2001), p. 14 - 15.
[792] Gran, Londen, (2001), p. 14.

Chapter VII

concludes by indicating in what direction to go

The justice quality of legal regulation

This work started with André Tunc's observation that in a perfect society the citizen would enjoy the benefit of law (assuming there is still a law...) without recourse to the courts.[793] Law is here understood in its widest sense as the justice quality of the regulation of relations and transaction in which people are engaged.[794] The goal of this research has been to identify the reasons why we lack this justice quality, and point out the effects of this as they are revealed in working life and social security. At an overall societal level the lacking justice quality is revealed in increasing social marginalization. One explanation for this state of affairs is shortcomings in the way economic, social and cultural rights are perceived and implemented.

The justice quality of legal arrangements can only be properly revealed if we pay attention to human beings in their real life context and in the relationships in which people stand to one another. This relational aspect is central to theories of social justice. Concepts devised by such theories can therefore assist in remedying shortcomings in the way societal matters are today legally perceived and regulated. A decisive aspect here is to make the human being a starting point, instead of laws and regulations that constitute the starting point in a legal positivist paradigm.

Through the approach proposed in this work, the ambiguities surrounding legal personhood are revealed. The question of personhood is central, as it signals social values and aspirations, communicating thereby who counts for legal purposes and in what way. This approach also allows us to distinguish what Bacon has termed three fountains of injustice: mere force, a malicious ensnarement under the colour of law and harshness of the law itself.

1 A person in one's own right

"If a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode."[795] This often cited statement by Mill implies that every person should enjoy a sphere of personal autonomy. This statement has acted as a

[793] Tunc, (1981), p. 316.
[794] Galanter, Marc, Justice in many rooms, p. 161., in Cappelletti, (ed.) Access to justice and the welfare state (1981).
[795] Mill, On Liberty, (1974), p 163.

guidepost in the present endeavour to try to perceive and indicate what is required if we take a person's autonomy seriously. By turning the notion of personal autonomy into a recognition of a person's project of life, it is possible to open up a number of perspectives that are hidden from view in a legal positivist approach. Mill's statement is thus an indication of what it implies when we talk about autonomous persons. This should be a point of departure when we consider whether economic, social and cultural rights materialise or not. This so called second generation of human rights cannot be handled in the same way as classical rights and liberties, that is, approached from an abstract and general level. On the contrary, it is precisely because of the abstract and general approach to rights' questions that problems arise, for which we continuously seek remedies in different categories of human rights. The classical rights tradition, such as property rights, often legitimises courses of action, in working life, for example, that encroaches on the rights of workers. Where social security subsequently should remedy a harm encountered, such as unemployment, the way this safeguard is legally regulated, it often has the effect of reducing a person's autonomy rather than enhancing it.

The constant need there is to remedy problems by devising new categories of rights, and an increasing host of legislation to back this up, is one indication that there is a fault in the design of the legal construction. These problems originate in perception, and are carried over to different spheres and levels of activity, among which the drafting of laws and their administration are central for this work.

I have in this work formulated the conceptual tool, personal autonomy, through which to bring forth a human and social context. Hereby I rely on a central notion in philosophical thinking of modernity, for which the passage by Mill may stand as an illustration. The purpose of this work has been to lay bare the reasons why this autonomy depicted by Mill and several other thinkers of modernity, in many instances has been frustrated. It is when people are deprived of their autonomy that we seek remedies in human rights, ethics and theories of social justice.

2 The purpose of law - to enhance everybody's freedom

When we, at a practical level, seek remedies for social injustices, we need to be aware that part of our problems resides in the theoretical tools we use. This has in part to do with the way thinkers of modernity have been relied upon in legal thinking, in a way that has distorted the intention of these thinkers. A decisive aspect is that what was aspired by these thinker has been taken as an unquestioned premise in legislation. Because of the deductive nature of the positivist paradigm, problems relating to the premises cannot be attained. Thereby important aspects of what the thinkers we rely on did said, will go unconsidered, as I have tried to illustrate in chapter III. I will here pinpoint some aspects of what Locke and Kant said, as these two philosophers have exercised a major influence on the legal tradition, Locke by laying the foundation for rights, among which property rights are primordial, and Kant by explaining autonomy but also separating law and morals.

Locke emphasises that the end of law is not to abolish or restrain, but to preserve and enlarge freedom.[796] The right to order one's possessions and property within the confines of the laws is here central, but he also notes that a person should not be submitted to the arbitrary will of somebody else, but freely follow one's own.[797] The autonomy that Locke here implies, was also central to Kant, who considered that every person is to be regarded as an end in oneself, and that "there can be nothing more dreadful than that the actions of a man should be subject to the will of another."[798]

What the citations of Mill, Lock and Kant clearly convey is a requirement that the autonomy of a person should be respected as far as this is practicable. The power vested in government was the target of their thinking, aimed at freeing the barred energies in the ascendant middle class. Today this same agenda applies to persons at the borderline of work, involving both government and other agents in society. As is revealed in the passages in this work, where law in operation in working life is accounted, the autonomy of employers have, more often than not, been upheld at the cost of this autonomy for those persons that rely on an employer for their material subsistence (Chapters I, IV and VI). It is in relation to those, who have had to pay with their autonomy that economic social and cultural rights, and theories of social justice actualise. This is an indication that the autonomy aspired, has not materialised because of the way in which law tends to uphold the autonomy of some at the cost of others. This displays that whilst drawing on Locke in regard to property rights we have not succeeded in living up to his intentions, when he notes that "[l]aw, in its true Notion, is not so much the Limitation as the direction of a free and intelligent Agent to his proper Interest, and prescribes not farther than is for the general good of those under that Law."[799]

The legacy of Kant is also very much at play here, likewise in a distorted way. In the trend of social marginalization we witness today, there is not much sign of Kant's view that a person should never be used as a mean. Autonomy is also what Kant aspires in his definition of law: "Law is the aggregate of the conditions under which the arbitrary will of one individual may be combined with that of another under a general inclusive law of freedom."[800]

Another reason why it is difficult to come to grips with problems originating in the legal positivist tradition is the requirement of objectivity and value neutrality. In practice, the requirement of objectivity and value neutrality means an affirmation of *status quo*, because emphasis is thereby placed on formal aspects rather than on substantive ones. As Aristotle notes, justice is equality when we deal with people who are equal. "We make bad mistakes if we neglect this 'for whom' when we are deciding what is just."[801]

---

[796] Locke, (1965), pp. 347-48.
[797] Locke, (1965), p 348.
[798] Russell, (1982), p 678.
[799] Locke, (1965), 347-348.
[800] Friedman, (1967), p. 159.
[801] Aristotle, Politics (1987), p. 195.

The efforts to exit the positivist orientations that have been made on a large scale since the 1960s clearly indicate that we need to remedy shortcomings in the positivist traditions, at a philosophical as well as a legal level. This applies to considerations about rights as well as ethics. I will therefore gather together elements from the orientations presented above (Chapter V) that seek alternatives to the positivist and utilitarian traditions, which, one could say, are tailored for the present neo-liberal trend.

3 A new departure

What we need, is to do as Bacon did, rearrange and reassess the elements that we operate with, in order to make present conditions intelligible, as Bacon did, in order to adapt to changes in his time. In the present endeavour, the notion of personal autonomy will be used, through which to assemble different elements that have been raised in this work. The role of ethics is perhaps the most intricate problem in the filed of law. I will therefore start by relying on some perceptive observations Eriksson has made about the relation between law and ethics, its place in both a human and a legal context. This will illustrate how ethics enters the autonomy test, modifying thereby the nature of legal rights. Likewise, an autonomy test will reveal how the prerequisites of social justice theories, rights, deserts and needs, can be perceived as complementary rather than conflicting.

Eriksson differentiates three distinct aspects of ethics, in an article where he considers the relation between law and ethics. The first aspect relates ethics to each person's individual life. The second aspect concerns ethics as the device that gives direction for our individual actions. The third aspect is ethics as it is reflected in factual practises, values and perception.[802]

4 Ethics and a person's project of life

The first aspect Eriksson assigns ethics relates to a person's project of life. This has to do with the goals we put before ourselves. If we are morally conscious persons, we reflect on what we want to do with our life, how we want to cultivate our personality. We strive to articulate a purpose for our life. We strive towards the good life. We search for the *telos* in our life. Concerning this aspect of ethics, an Aristotelian one, Eriksson notes that it is fairly obvious that in this respect there is no direct link between law and ethics. Ultimately, we can say that it is the task of the lawgiver to establish the boundaries of law that will allow individual self-fulfilment.[803]

This perspective on ethics goes to the heart of this work, it being an assessment

[802] Eriksson, Lars D, Rätten och moralen, (1990), pp. 4-5.
[803] Eriksson, (1990), p. 4.

of how and where legal traditions have gone wrong in securing an autonomous sphere of life for every person. As illustrated in the previous chapter, legislation in the fields of working life and social security is often drafted in such a way that it reduces rather than enhances the autonomy of persons in a vulnerable position. We here have the paradoxical situation that although the main purpose of legislation in these fields is to secure the position of people in working life and those dependent on social security, nevertheless, laws in these fields are often drafted in such a way that they subdue rather than empower people. In order to overcome this problem, regulation that infringes on a person's autonomy should be identified and removed. In this field there are great shortcomings, as illustrated by research carried out by the Finnish National Research Institute of Legal Policy, revealing that in 85 per cent of the draft laws the researchers had studied, the law drafters had not assessed the possible effects of the draft legislation for individual households. When we talk about households, we talk about people's possibilities to go about their projects of life.

By taking a person's life context as a point of departure, the effects of a specific piece of legislation becomes the starting point of an assessment of the space of manoeuvre the lawgiver warrants. This illustrates the shift in focus of 180 degrees, made in this work, making the question how laws are drafted a primary test, instead of taking a law as a point, a departure. At the same time, this change of focus assists in explaining the difficulty law drafters today have in perceiving the effects of a draft bill. The effects are largely out of reach in a legal positivist paradigm. In contrast to this, considerations about the effects, that is, the fairness and predictability a person can count on, becomes related to the nature of legal regulation, in the perspective chosen in this work. This first aspect of ethics makes the lawgiver the addressee.

5 Ethics as a guide to human action

The second aspect of ethics that Eriksson distinguishes is ethics as a guide for human action. Ethics provides us with maxims for our action in specific instances, guiding us when we are faced with choices among several more or less just or unjust courses of action.[804] Eriksson notes that on this point, one could presume that law and ethics would combine, but he observes that if we follow Kant, this is not the case. Eriksson points to the process involved in Kant's categorical imperative and compares this to a democratic deliberation. Kant's premise is problematic, because hypothetical as it is, it *presupposes* freedom and equality. The moral discourse in which Kant's virtuous person is engaged, is a *monologue* that a person conducts with oneself, in contrast to the *dialogue* involved in a democratic process, where everybody concerned should be guaranteed factual freedom and equality in decision making.[805]

If we approach ethics from the point of view of personal autonomy, as an autonomy test, a linkage can be made between individual courses of action and the

[804] Eriksson, (1990), p. 4.
[805] Eriksson, (1990), p. 5.

wider human and social context. The person deliberating about alternative causes of action and the degree of fairness or injustices it involves, has to consider the consequences of this action for people, who will be affected by this. Kant's monologue is through an autonomy test transformed into a contextual and relational assessment. There is nothing hypothetical left, when it can be shown that such and such an action will encroach on the autonomy of a number of persons, such as when an employer makes use of atypical work formats. Or, that a rule that introduces thresholds for accessing a good, such as social security, leads to factual discrimination. In the perspective chosen here, the decisive aspect of the fairness or unfairness of an action is how this affects the autonomy of those who will be affected by it. The same goes for the legislative process. An autonomy test will reveal if a person's autonomy is enhanced or impeded by a piece of legislation or a chosen course of action. The latter aspect is continuously at play in economic and working life, where utility is frequently seen in economic terms. This aspect of ethics makes all of us addresses, government as well.

5.1 Ethics sets a limit for utility

We recall that some contemporary theories of (social) justice were responses to the way Behtham's utility formula has been put to work in practice. As utility is conceived at a practical level, it is acceptable that some people suffer if a greater good is achieved in the aggregate, a standard scenario in economic and working life. Rousseau offers in this respect a more varied view of justice and utility. In Rousseau's scheme there is no opposition between social justice and utility, because his method involves searching for solutions that combine, what law permits and what interest prescribes, in order that justice and utility are in no way divided.[806] For Rousseau a person's freedom can be conceded only for one's own utility. It is in relation to the 'general will' ('*volonté générale*') that a person's freedom is at stake, and it is in the process of arriving at the general will that a compromise is made between freedom and utility.[807] Rousseau states that the personal engagement vis-à-vis the social body can pose obligations only to the extent that they are mutual. The nature of these obligations must be such that in fulfilling them one cannot work for others without also working for oneself. To Rousseau the equality of right and the notion of justice, which is thereby produced, are derived from everybody's preference. Rousseau notes that "in judging what is foreign to us, we have no sound principle of equality to guide us".[808] Therefore it must be up to an individual person and not an external agent to determine what is best for that person.

The challenge today is the same as in Rousseau's and Bentham's time, to strike a balance between 'conservative' and 'prosthetic' justice - between justice that preserves established rights and justice that modifies these rights in terms of an ideal

[806] Rousseau, (1966), p. 39.
[807] Rousseau, (1966), p. 63.
[808] Rousseau, (1966), pp. 686-9.

standard. In Bentham's time utility was the ideal standard, today it is social justice, precisely because of the effects of the way utility has been perceived.[809] It is because of the preponderance of economic utility that theories of social justice have been devised, as a corrective to the utility formula, because it has became counter-productive of its aim.

At this stage, we need to do, as Hofstadter suggests, get flexible cognition by concentrating on reflexitivity and recognition.[810] In operationalising the criteria provided by theories of justice, we need, in an autonomy perspective, to be aware of how people's lives are affected by the application of the utility formula. That some people have to pay with their autonomy for the sake of economic profit implies that harm is done to the persons affected. It is a question of circumstances that they have not been able to influence, an indication that they are victims rather than persons acting in an autonomous manner, able to influence their conditions of life. Miller characterises harm as whatever interferes directly or indirectly with the activities essential to a person's plan of life.[811]

5.1.1 Harm a starting point instead of utility

Let us take changes towards atypical work on the labour market. The use of atypical work formats has often been legitimised through the property rights embedded in the employer prerogative. This has caused harm to those who have became so called atypical workers, because they have forfeited a number of rights that labour law is aimed at securing, such a right to equal pay for equal work and different social security entitlements. In practice we see that economic, social and cultural rights weigh light when confronted with property rights. If we approach the reliance on atypical work from an autonomy perspective, we are freed from the bias in favour of property rights that is an implicit premise in labour law. In an autonomy perspective, we are instead able to see and assess the extent to which an employer causes harm to employees, by hiring them as atypical workers, in order to avoid employer obligations in relation to them. The effects of the way legislation is drafted are that many persons do not reach up to the thresholds embodied both in labour and social security legislation. Consequently this means that people are bit by bit stripped of a number of entitlements provided by legislation. A harm is thereby caused that should be remedied at different levels.

[809] See Miller, (1979), p. 77.
[810] Hofstadter, (1987), p. 86.
[811] Miller, (1979), p. 134.

5.1.2 Avoiding that harm eventuates in need

When employers avoid their responsibilities towards employees, as this is intended by labour legislation, this results in a need to remedy the harm done. This causes a chain of bureaucratic processes, particularly where thresholds in legislation actualise an assessment of access to social security. When such thresholds are not passed, a 'bottom' is reached that lead us to talk about needs that require remedies. If we approach this situation from an autonomy perspective we can see that a harm is being remedied at the wrong end. Miller pointed to the ambiguities associated with the notion of need (Chapter V.5.). Also Barber has pointed to this, noting that to identify man as governed by needs is to portray him as small, static, inflexible, and above all prosaic.[812] To take departure in need, easily brings along projection that Raiskio has amply illustrated, when picturing how people in an oppressive way are evaluated at the borderline of work.[813]

If the criteria of personal autonomy were considered at each instance, where it is infringed upon, a different logic ensues. Sadurski notes that if there is full respect for each person's sphere of autonomy, then everybody will share the same benefits of autonomy and the same burden of self-restraint. This again, requires a set of general rules by which it will be possible to determine if an act undertaken by somebody will result in harm to somebody else. Through such general rules, it will be possible to guarantee autonomy to everyone, in their sphere of action, which is non-harmful to others. This autonomy is not absolute, but is determined by changing social and cultural values, Sadurski notes.[814]

If we take a harm done as a point of departure, needs as well as rights and deserts will stand out in a different light. If we apply an autonomy test at each stage in a chain of events that causes harm, the negative connotation associated with need is avoided, and the order in which rights, deserts and needs are considered, is reversed. When an employer resorts to atypical work and a harm is thereby done to the persons affected, they should be compensated for this harm on pair with the advantage that an employer extracts by being freed from certain employer's responsibilities. The employer should, in other words, pay for the flexibility that he or she aspires through the use of atypical work. This would leave atypical workers with an optimal degree of autonomy in the situation in which they have been placed. At a conceptual level, such a procedure actualises the notion of desert; a person deserves to be compensated for a harm done. Through compensation a person's autonomy, when infringed upon, is rectified in a manner that is conceived of as fair. Here we can see how the classical rights embedded in the employer prerogative, has to be accommodated with an employee's right to a compensation for a harm done, something this person deserves, because of the inconvenience encountered. In this constellation the conflict between

[812] Barber, (1984), p. 24.
[813] Raiskio, (2001), pp. 67-108.
[814] Sadurski, (1985), pp. 104-105.

'conservative' and 'prosthetic' justice is resolved, that is, one that conserves rights and one that modifies rights in terms of an ideal standard.[815]

In this perspective also needs assume different connotations than the ones alluded to above. To put it in Miller's words, "[h]arm, for any given individual, is whatever interferes directly or indirectly with the activities essential to his plan of life; and correspondingly, his needs must be understood to comprise whatever is necessary to allow these activities to be carried out."[816] What needs are about, Miller notes, is part of an end itself, as opposed to the view that needs only are means towards certain ends.[817]

5.2 A differentiated context

By applying the autonomy test, we are able to discern and deal justly with each member taken separately, which is Miller's approach to social justice.[818] This approach will also allow a differentiation of the nature of different activities and contexts, as opposed to the present day simplistic perception of economic activity, salaried employment (typical or atypical) or unemployment. In a differentiated context, it will be easier to perceive the nature of different activities, such as artistic activity and activities carried out in the third sector, that largely go unnoticed because of the prevailing premises. If we take departure in factual activities, Miller's notion of needs becomes central, in this setting perceived of as an end in itself. Artistic activity may illustrate this. Artistic creation derives from an inner need that stands apart from economic and breadwinning activities. If we respect an artist's project of life, the need is here of a different kind than in other activities, requiring thereby a different approach to rights, deserts and needs. Miller notes that the equal satisfaction of needs is the most important element in bringing about equality, and that the premise underlying distribution according to need, also underlies equality in the broader sense. Miller considers that the principle of need represents the most urgent part of the principle of equality.[819] Thus, for the work of artists to be recognised, questions of equality actualises, rather than rights or deserts that mainly underpin wage-labour society.'

[815] Miller, (1979), p. 77.
[816] Miller, (1979), p. 134.
[817] Miller, (1979), p. 128.
[818] Miller, (1979), pp. 151.
[819] Miller, (1979) p. 149.

5.3 Equality requires recognition

Equality requires equal recognition. The problem in regard to artistic work and many other activities is that this is not recognised in its own right in legislation. The structures that have been created to remedy this shortcoming, mainly in the form of grants, imply a constant process of application and assessment, that makes the recognition of the work of an artist 'a zero-sum game'. In practical terms it means that the work of an artist is recognised if the work is funded through a grant, otherwise this work remains invisible and a person who does not receive an income can be considered as unemployed, independently of the factual work this person is doing.

When we talk about a person's needs we are talking about the consequences for the person of *not* having what is needed. This entails that a person suffers harm by not being given what we say he or she needs.[820] Here desert can be introduced. If we respect a person's project of life, if we consider the official recognition of art and culture in society, we can say that also artists deserve this recognition. This fits Millers characterisation that desert is a matter of fitting forms of treatment to the specific qualities and actions of individuals, and in particular that good desert (i.e. deserving benefit) is a matter of fitting desired forms of treatment to qualities and actions, which are generally held in high regard.[821] Having linked harm to desert, Miller gives desert the following characterisation: The basis of desert will be the value, which each individual has contributed to the common stock of society, or more strictly, that proportion of the value which is due to his own efforts, skills, and abilities. This involves the principle of contribution, justified as a reward conferred by society on its individual members, understood by analogy to private rewards, Miller notes.[822] The notion of desert can thereby be applied both to those who have forfeited a right (atypical workers) and those whose contribution is now neglected in legal terms, such as artist's work. If we look at the criteria rights, deserts and needs from an autonomy perspective, in the way done above, what may have appeared as contradictory elements tend to resolve into complementary rather than conflicting aspects of one and the same situation.

6 Ethics as factual practices

The third ethical dimension Eriksson distinguishes, is ethics as it is expressed in factual practices, values and perception embraced by different social groups, as to a proper conduct among people. This can be called a sociological or an empirical perception of ethics. Eriksson observes that it is this aspect of ethics we most commonly refer to in everyday discourse.[823] Many lawyers hold the view that this

[820] See Miller, (1979), p. 134.
[821] Miller, (1979), p. 85.
[822] Miller, (1979), pp. 118-119.
[823] Eriksson, (1990), p. 5.

ethical dimension should be recognised in legal administration. Likewise, law should as far as possible reflect this ethical expression. Eriksson considers this ethical dimension ill suited for direct application within the legal order. This also goes for Kant's universalising ethics.[824] What makes such a link problematic, is the limitations of the legal positivist tradition, Eriksson notes. The view that legal application can be legitimised solely by applying a law, has become increasingly problematic. Today we know that the activity of interpretation does not solely consists in a deduction of purely legal conclusions. In actual fact, legal interpretation involves a great variety of argumentation models and arguments that are weighed one against another. The relationship is not as clear-cut and unambiguous as it was traditionally thought to be in the legal positivist orientations. To its nature, legal application/ argumentation /administration is such that it allows the use of both ethical and social policy arguments, Eriksson notes.[825]

I fully endorse Eriksson's reservation about taking prevailing practices and values as an ethical standard. This is precisely what this work is about, to show the effects of such a departure for the materialisation of economic, social and cultural rights. The aim in this work has been to spell out the multitude of factors that reside behind the alleged value neutrality that is presumed by the legal positivist traditions. This I have done by contrasting different philosophical and legal orientations to historical and contemporary accounts of how the systems work in practice. By focussing on our mental landscapes, I have wanted to pinpoint how perception conditions the way we approach different phenomena, explaining thereby features in our time, such as the trend of increasing social marginalization. I have attempted to show that despite many good intentions, articulated at a political level, law has not kept up with factual changes that would allow such intentions to materialise. This failure to keep abreast with social change can largely be attributed to the technical construction of legal positivism. By relying on factual practices and values, as a legal standard, we operate with both hidden paradigms and hidden agendas that I have attempted to spell out here. In short, we operate with an instrumental and atomised view of a human being, the consequences of which have been spelled out in chapter VI. In order to remedy these problems, we need to be aware of human nature, recognising that we are not always disinterested agents. We are very much the product of a cultural upbringing, something that the scrutiny of the history of ideas aimed at exposing (Chapter III).

The following observation made by Hudson may summarise the views expressed in chapter V. Our choices of criteria or standards themselves, are not products of pure, disinterested rational consideration, as is demanded by theory. On the contrary, they are very much products of our traditions and social experience. Built into the very patterns of our thought, there are our indices of value. Evaluation

[824] Eriksson, (1990), p. 5.

[825] Eriksson notes that modern theories of argumentation have not succeeded in, or perhaps not even dared to present clear-cut criteria about how law-external arguments should be eliminated from legal argumentation. His concern in the article is that if law and ethics are blended this would deprive citizens of their ultimate means of criticizing legislation, which Eriksson illustrates with the case of civil disobedience. pp. 7, 13.

exists and changes with our cultural learning and interpersonal identification. It is this process of identification that gives us a clear sense of what constitutes 'rational human behaviour', Hudson notes.[826] Considerations about ethics as factual practices thereby make the academic community a principal addressee.

7 A new direction

Rationality is thus a key notion, when we approach the question of prevailing practices and values as an ethical standard for legislation. This rationality, as it is reflected in legislation and the administration of law, will condition interpretation and can in practice lead to a delimitation of what is possible, the anatomy of which Lars **Hertzberg** describes as follows: "Some aspects of the legal order seems to be designated primarily to *uphold* certain prevalent practices or generally accepted norms of conduct. They do so by clearly delimiting the forms of conduct required, and by enforcing those requirements ... the concerns expressed in the law will be held to determine, roughly, what may or may not count as a just application of the law in question; what sorts of considerations are to be held relevant in applying it; etc. In this way, those concerns can be said to delimit the autonomy of legal reasoning."[827]

Because of this delimitation of forms of practices we easily fail to see new phenomena that surrounds us, such as the changes that have been brought about by a globalized economy and information society. This being the case, we easily fail to seize new opportunities that present themselves. In order to come to grips with this discrepancy between the theoretical perception and factual circumstances, we need to contrast our theoretical legacies with present day circumstances. On this point, the following observation made by Hertzberg is helpful: "Judicial decisions, just like the judgments of lawyers, are based on reasons, and the reasons that both have been taught to consider relevant are of the same kind."[828]

When the reason that steers law becomes too much at variance with a general sentiment of fairness and the normative structures at play in society, the question of the relevance of the reason, on which law is based, has to be reconsidered. Marc **Galanter's** observation about access to justice may illuminate this point. "Ultimately, access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged."[829] In order to do this, we need to pay attention to how laws are drafted, what the implementation of a law looks like, and what its effects are.

[826] See Thompson, (1991), p. 497.
[827] Hertzberg, Lars, The nature of legal expertise, (1981), 102-103, further elaborated upon in Storlund, Law, ethics and the economy, (1995), p. 143.
[828] Hertzberg (1981), p 101.
[829] Galanter, (1981), p. 161.

Bibliography

Adlercreutz, Axel, Kollektivavtalet, Studier över dess tillkomsthistoria, GWK, Gleerup, Lund 1954

Albert, Ethel M, Denise, Theodore C, Peterfreud, Sheldon P, Great traditions in Ethics, Wadsworth Inc. Belmont, California 1988

Ariès, Philippe, Duby, Georges, (eds.), A History of Private Life, II Revelations of the Medieval World, Harvard University Press, 1988

Aristotle,
- Nicomachean Ethics, Penguin Classics, Harmondsworth, (1955), 1986
- The Politics, Penguin Classics, Harmondsworht, (1981), 1987

Asplund, Johan, Essä om Gemeinschaft och Gesellschaft, Bokförlaget Korpen, Göteborg, 1991

Bacon, Francis, De Augmentis Scientiarum, The Works of Francis Bacon, (eds.) Spedding, James, Ellis, Robert Leslie, Heath Douglas Denon, 1858

Barber, Benjamin, Strong democracy, Participatory Politics for a New Age, University of California Press, Berkeley, Los Angeles, 1984

Barnes, Jonathan, Aristotle, Past Masters, Oxford University Press, (1982), 1985

Bentham, Jeremy
- An Introduction to the Principles of Morals and Legislation, Clarendon Press, Oxford, 1907
- A Fragment on Government, Oxford University Press, London (1891), 1931
- Selected Writings on Utilitarism, Wordsworth Classics of World Litterature, Hertfordshire, 2000

Berman, Harold J, Law and Revolution, the Formation of the Western Legal Tradition, Harvard University Press, Massachusetts, 1983

Blanpain, Roger,
- Recent trends in collective bargaining in Belgium, International Labour Review, vol. 123, no. 3/1984

Brand, Hanno, Urban policy or personal government: the involvement of the urban élite in the economy of Leiden at the end of the Middle Ages, in Diederiks, Herman et al. (eds.) Economic Policy in Europe since the Late Middle Ages, The Visible Hand and the Fortune of Cities, Leicester University Press, Leicester, London and New York, 1992

Bruun, Niklas
- Kollektivavtal och rättsideologi, En rättsvetenskaplig studie av de rättsideologiska premisserna för inlemmandet av kollektivavtal och kollektiva kampåtgärder i finsk rättsordning efter 1924, Juridica, Vammala, 1979
- Työehtosopimuksen ehdon kohtuullistamisesta, Lakimies 1983

Cappelletti, Mauro (ed.) Access to justice and the welfare state, Sijthoff, Alphen aan den Rijn, Bruylant, Bruxelles, Klett-Cotta, Stuttgart and Le Monnier, Firenze, 1981

Castells, Manuel, Nätverkssamhällets framväxt, Informationsåldern, Ekonomi, samhälle och kultur, Band 1, Daidalos, Uddevalla 1999

Cerny, Philip G, The dynamics of financial globalization: Technology, market structure, and policy response, in Policy Sciences, vol 27, 1994

Chandler, Alfred D, Daems, Herman, Managerial Hierarchies, Comparative Perspectives on the Rise of the Modern Industrial Enterprise, Harvard University Press, Cambridge Massachusetts, 1980

Charles, Susan, Webb, Adrian, The Economic Approach to Social Policy, Wheatsheaf Books, Great Britain, 1986

Christensen, Anna
- Konflikt och harmoni, in Politisk filosofi - Rättigheter, Symposium Bokförlag, Stehag 1988
- Wage Labour as Social Order and Ideology, in Shifts in Values within Swedish Society, The Secretariat for Futures Studies, Sweden, 1984

Dabscheck, Niland, Recent trends in collective bargaining in Australia, International Labour Review, vol 123, no 5/1984

Demarco, Richard, Kunst = Kapital, Art = Wealth, Adam Smith Lecture 1995, Fife College of Further and Higher Education, 1995

de Vries, Boudien, The city council and the economic élite: Haarlem 1890-1920, p 151, in Diederiks et al., (eds.) Economic Policy in Europe since the Late Middle Ages, 1992

Dicey, A V, Lectures on the Relation Between Law and Public Opinion in England During The Nineteenth Century, Macmillan and Co., Limited, London 1919

Duby, Georges, Preface, in Ari s, Philippe, Duby, Georges, A History of Private Life, II, Revelations of the Medieval World, Harvard University Press, Cambridge, Massachusetts, 1988

Däubler, Wolfgang, New technologies, employment and the legal regulation of working hours, in Bruun, ed. New Technology - a new labour law? SAK, Helsinki 1985

Ehrenkrona, Olof, Nicolin, En svensk historia, Timbro, Göteborg, 1991

Englund, Peter, Förflutenhetens landskap, Historiska essäer, Atlantis, Stockholm 1991

Eriksson, Lars D
-Marxistisk teori och rättsvetenskap, Juridica, Helsingfors 1980, Juridiska föreningens i Finland publikationsserie, Nr 48
- Rätten och moralen, Retfaerd, Nordisk juridisk tidskrift, 1990, nr 1.
- Mina metoder, in Häyhä, J, ed., Minun metodini, (1997)
- Rätten till hälsa - mera än en rättighet, in Länsineva, Pekka and Viljanen, Veli-Pekka (eds.) Perusoikeuspuheenvuoroja, Turun yliopisto, Turku, 1998
- Socialrätten - I kris eller utveckling?, in Kritik, moral och rätt, Helsinki, 1992

Eriksson, Ralf, Jäntti, Marcus (eds.) Economic Value and Ways of Life, Avebury 1993

Ervasti, Kaijus, Tala, Jyrki, Castrén, Elina, Lainvalmistelun laatu ja eduskunnan valiokuntatyö (summary The Quality of Law Drafting from the Viewpoint of Parliament Committee Work), Oikeuspoliittisen tutkimuslaitoksen julkaisuja 172, Helsinki, 2000

Ervasti, Kaijus, Empirisk forskning, Rättsvetenskap och Rättens dynamiska element, Tidskrift, utgiven av Juridiska Föreningen i Finland, 2000

Europa World Year Book, The, Europa Publications Ltd, London, 1980, 1994

Fahlbeck, Reinhold
- Flexibility - Potentials and Pitfalls for Labour Law, Juristförlaget I Lund, 1998 (General Report presented at the International Academy of Comparative Law, in Bristol, England July 26- August 1, 1998)
- Ett revolutionerat arbetsliv? Informationssamhället och arbetslivets omvandling, Juridisk Tidskrift, 1997-98, Nr 4
- Towards a Revolutionised Working Life, in Liber Amicorum, Tatashi Hanami, Japan 2000

Ford, Henry, Mitt liv och mitt arbete, Söderström & Co, Helsingfors, Stockholm 1922

Fox Alan
- Beyond Contract, Work, Power and Trust Relations, Faber & Faber Ltd, London 1974
- History and Heritage, The Social Origins of the British Industrial Relations system, Allen & Unwin, London 1985

Friedmann, Wolfgang, Legal theory, Stevens & Sons, fifth edition, London, 1967

Fürstenberg, Friedrich, Recent trends in collective bargaining in the Federal Republic of Germany, International Labour Review, vol 123, No 5/1984

Gadamer, Hans-Georg, The Relevance of the Beautiful and other essays, (ed.) Robert Bernasconi, Cambridge University Press, USA (1986) 1995

Galanter, Marc, Justice in many rooms, in Cappelletti, (ed.) Access to justice and the welfare state, 1981

Galbraith, John Kenneth
- The Age of Uncertainty, A history of economic ideas and their consequences, Houghton Mifflin Company, Boston, 1977
- A Short History of Financial Euphoria, Penguin Books, Whittle Books, New York, 1993

Giugni, Gino, Recent trends in collective bargaining in Italy, International Labour Review, vol. 123, No 5/1984

Gould, Carol C, Rethinking democracy, Cambridge University Press, Cambridge, 1988

Gran, Nina, Londen, Magnus, Rötter, Röster, Rum - en rapport om ett kulturstadsprojekt, Yliopistopaino, Helsinki, 2001

Hale, Robert L, Freedom through Law, Public Control of Private Governing, Fower, New York, 1952

Hampson, Norman, The Enlightenment, An evaluation of its assumptions, attitudes and values, Penguin Books, London, (1968), 1990

Harju, Aaro, New Work project - Enhancing employment. A research and development project, in Harju, Aaro, Backberg-Edvards, Kristiina, (eds.), Towards new work, Helsinki 2001

Hayek, F A, Studies in Philosophy, Politics and Economics, The university of Chicago Press, Chicago, 1967

Helleiner, Eric, Editorial: The world of money: The political economy of international capital mobility, Policy Sciences, vol 27, Nr 4/1994

Hepple, Bob, ed. The Making of Labour Law in Europe, A Comparative Study of Nine Countries up to 1945, Mansell Publishing Ltd, London 1986

Heikka, Mikko, Jäähyväiset täystyöllisyydelle, Suomen kuvalehti 37/2000

Hertzberg, Lars, The Nature of Legal Expertise, in A. Aarnio, I. Niiniluoto and J. Uusitalo (eds) Methodologie under Erkenntnistheorie der juristischen Argumentation, no 2 in Rechtstheorie, Beiheft, Duncker & Humbolt, Berlin,

Hobbes, Leviathan, or The Matter, Forme, & Power of a Common-wealth, Ecclesiasticall and Civill (1651), Penguin Classics, Harmondsworth, 1986

Hobsbawm, E.J.
- The Age of Revolution 1789-1848, Cardinal, London, (1962), 1988(a)
- The Age of Capital 1848-1875, Cardinal, London (1975), 1988
- The Age of Empire 1878-1914, Cardinal, London (1987), 1989

Hofstadter, Douglas R, Metamagical Themas: Questing for the Essence of Mind and Pattern, (Nomic: A Self-Modifying Game Based on Reflexitivity in Law), Penguin Books, London, (1985), 1987

Hokkanen, Liisa,
- Opinions about the combined labour market subsidy, in Harju, Backberg-Edvards, (eds.) 2001a
- Local use of the combined labour market subsidy - a statistical study, in Harju,Backberg-Edvards, (eds), 2001b.

Hokkanen, Liisa, Kinnunen, Petri, Introduction, in Harju, Backberg-Edvards, (eds.), 2001

Huberman, Leo, Man's Worldly Goods, The Story of the Wealth of Nations, Monthly Reveiw Press, New York and London, (1936), 1968

Hudson, Stepen D, Human Character and Morality, Reflections from the History of Ideas, Routledge & Kegan Paul, Boston 1986

Hume, David, An Enquiry concerning the Principles of Morals, Open Court Classics, La Salle Illinois, (1966), 1988

Huxley, Aldous, Mål och Medel, En undersökning av idealens natur och metoderna för deras förverkligande, (Ends and means), Whalström & Widstrand, Helsingfors, 1938

Häyhä, Juha, Minun metodini, Werner Söderström, lakitieto, Porvoo 1997

Jaspers, A.Ph. Betekenis en funktie van de arbeidsovereenkomst in haar maatschappelijke context, Sociaal Maandblad Arbeid, 1982, nr 7/8

Jeffery, Mark, Part-Time Work, 'Atypical Work' and attempts to Regulate it, Industrial Law Journal, Vol. 27. No. 3, September 1998

Kairinen, Martti, Oikeusjärjestelmä ja työoikeus, Työoikeudellisen yhdistyksen vuosikirja, In memorian Kaarlo Sarkko, 1984

Kinnunen, Petri, Employment in the third sector - the research agenda, in Harju, Backberg-Edvards, (eds.), Towards new work, Helsinki 2001

Kivistö, Mari, The well-being of persons employed through the combined subsidy, in Harju, Backberg-Edvards (eds.) Towards new work, 2001

Kooij, Pim, Fingerprints of an urban élite: the case of a Dutch city in the nineteenth century, in Dideriks et al., (eds.) Economic Policy in Europe since the Late Middle Ages, 1992

Koskinen, Seppo, The third sector and labour law, in Harju, Backberg-Edvards, (eds.), Towards new work, Helsinki 2001

Lee, Eddy, Globalization and employment: Is anxiety justified?, International Labour Review, vol 135, No. 5, 1996

Lieberman, David, The province of legislation determined, Legal theory in eighteenth-century Britain, Cambridge University Press, Cambridge 1989

Liedman, Sven Eric, Boströmianerna, 17 uppsatser i svensk idé- och lärdomshistoria, Stockholm, Carmina 1980

Lijphart, Arend, The Politics of Accommodation: Pluralism and Democracy in the Netherlands, Berkeley 1968

Lis, C. & Soly, H. Poverty and Capitalism in Pre-Industrial Europe, Foreword, Humanities Press, USA, New Yersey, 1979

Locke, John, Two Treatises of government, (1698) Mentor, New American Library, New York, 1965

Lord, Rodney, Privatisation - the boom goes on, The Economist Intelligence Unit, Multinational Business, Autumn 1991

Lång, Fredrik, Bild och tanke, Om det kategoriala seendets genesis, Förlaget Draken, Esbo, 1999

MacIntyre, Alasdair,
- A short history of Ethics, A history of moral philosophy from the Homeric age to the twentieth century, Routledge & Kegan Paul, London reprint 1984
- After virtue - a study in moral theory, Duckworth, London, 2nd impression, 1982

Mikkola, Matti, Law - Social Welfare - Social Development, Proceedings of the 24th International conference on Social Welfare (ICSW), Berlin (West), 31.7-5.8.1988.

Mill, John Stuart, Utilitarianism, On Liberty and Considerations of Representative Government, (ed.) Acton, H.B., Everyman's Library, London 1984,

Miller, David, Social Justice, Claredon Press, Oxford, 1979

Neumann, Franz, The Rule of Law, Political Theory and the Legal system in Modern Society, Berg Publishers Ltd, Warwickshire, 1986

Nousiainen, Metodini? Esitys? Minun metodini, in Häyhä, (ed.) Minun metodini, 1997

Pauly, Louis W., National financial structures, capital mobility and international economic rules: The normative consequences of East Asian, European, and American distinctiveness, in Policy Sciences 27/1994

Pöyhönen, Juha, Sopimusoikeuden järjestelmä ja sopimusten sovittelu. Suomalaisenlakimiesyhdityksen julkaisusarja A- n:o 179, 1988

Raiskio, Teuvo, Oppressive evaluation at the borderline of work in post-war Finland, in Harju, Backberg-Edvards, (eds.) Towards new work, Helsinki 2001

Rawls, John, A Theory of Justice, Oxford University Press, Oxford, (1972), 1978

Raz, Joseph, The Concept of a Legal System, An Introduction to the Theory of Legal System, Clarendon Press, 2nd ed, 1980

Rousseau, Jean Jaques, Du contrat social, Garnier- Flammarion, Paris 1966

Russell, Bertrand, History of Western Philosophy, Unwin Paperbacks, London (1946), 1982

Sabine, George H, Thorson, Thomas L, A History of Political Theory, Dreyden Press, 4th ed, Tokyo 1981

Sadurski, Wojciech, Giving Desert Its Due, Social Justice and Legal Theory, D Reidel Publishing Co, Dordrech, 1985

Schama, Simon, the Embarrassment of Riches, An Interpretation of Dutch Culture in the Golden Age, Alfred A Knopf, New York 1987

Serracino Inglott, Peter, Beginning Philosophy, Media Centre, Malta 1987

Sinclair, Timothy J, Between state and market: Hegemony and institutions of collective action under conditions of international capital mobility, in Policy Sciences, vol. 27, Nr 4/1994

Storlund, Vivan
- Trade union rights - what are they?, Åbo universitet, Juridiska fakulteten,1992
- Reflexive Potentials in Industrial Relations and the Law, Collective Dismissals in Sweden, in Rogowski, Ralf, Wilthagen, Ton, (eds.) Reflexive Labour Law, Kluwer, Deventer, 1994.
- Law, ethics and the economy, in Eriksson, Jäntti, (eds.) Economic Value and ways of life, 1995

Sulkunen, Olavi, Luottamusmiesaseman tulkinnassa, in Työtuomioistuin 50 vuotta (TheLabour Court 50 years), Lakimiesliiton kustannus, Helsinki 1997
- Kansainväliset ammmattiyhdistysoikeudet, Helsinki, 2000

Suviranta, Antti, Labour Law in Finland, third revised edition, Kluwer Law International & Kauppakaari Oyj, 2000

Süssmuth, Rita, Law - Social Welfare - Social Development, Proceedings of the 24th International conference on Social Welfare (ICSW), Berlin (West), 31.7-5.8.1988.

Tala, Jyrki, Lakien vaikutukset, Lakiuudistusten tavoitteet and niiden toteuttaminen lainsäädäntöteoreettisessa tarkastelussa. Oikeuspoliittinen tutkimuslaitos, no 177, Helsinki 2001

Taylor, Charles,
-Overcoming Epistemology, in Baynes, Kenneth, Bohman, James, McCarthy, Thomas, After Philosophy, End or Transformation?, MIT Press, Cambridge, Mass. 1987
-Identitet, frihet och gemenskap, Politisk-filosofiska texter i urval av Harald Grimen, Daidalos, Göteborg 1995

Tesar, Linda, L, Savings, investment and international capital flows, Journal of International Economics, no 31, 1991

Thompson, Kirill Ole, Philosophy East & West, vol 41, Number 4, October 1991, University of Hawaii Press

Thompson & Ponak, Industrial relations in Canadian public enterprises, International Labour Review, vol. 123, No 5/1984

Tolonen, Hannu, Normista ja oikeusnormista erityisesti John Austinin mukaan, Turun yliopisto, (unpublished)

Tolonen, Juha, Stat och rätt, En studie över lagbegreppet, Meddelanden från Stiftelsen för Åbo Akademi Forskningsinstitut, no 111, Åbo, 1986

Tunc, André, The Quest for Justice, in Cappelletti, Mauro (ed.) Access to justice and the welfare state, 1981

Veneziani, Bruno, The Evolution of the Employment Contract, in Hepple, (ed.) The making of Labour Law in Europe, 1986

Vlekke, Bernard H. M. Evolution of the Dutch Nation, Roy Publishers, A.N., New York 1945, reprint in the Netherlands 1963

Wagenaar, Michael, From hidden hand to public intervention: land use and zoning strategies in the liberal and post-liberal city (1875-1914), in Diederiks & al., 1992

van Houtte, J.A.,An Economic History of the Low Countries 800-1800, Weidenfeld and Nicholson, London, 1977

Webb, Michael, C, Capital mobility and the possibilities for international policy coordination, in Policy Sciences, vol. 27, Nr 4/1994

Wellman, Carl, Legal Rights, in Uppsala skolan och efter, Filosofiskt symposium, Uppsala 1978

Werin, Lars, Det finansiella systemet i omvandling, in Werin, ed, Från räntereglering till inflationsnorm. Det finansiella systemet och Riksbankens politik 1945-1990. SNS Förlag, Stockholm, 1993

Whilborg, Clas, Valutapolitiken, in Från räntereglering till inflationsnorm, Det finansiella systemet och riksbankens politik 1945-1990, in Werin ed., 1993

White, Howard, Peace among the Willows, The Political Philosophy of Francis Bacon, Martinus Nijhoff, the Hague, 1968

Wilhelmsson, Thomas, Sosiaalisen siiviilioikeunde metodiset lähtökohdat, 1997, in Häyhä (ed.) Minun metodini

Williamsson, John, The Open Economy and the World Economy, Harper International Edition, USA, 1983

Wolgast, Elizabeth H
- The Grammar of Justice, Cornell University Press, Ithaca, 1987
- The Ethics of an Artificial Person: Lost Responsibility in Professions and Organisations, Stanford University Press, Stanford 1992

Ylikangas, Heikki, Varför förändras rätten - lag och rätt som en del av den historiska utvecklingen, WSOY, Juva 1983

Åberg, Alf, Vår svenska historia, Natur och kultur, Stockholm, 1989

Documents and reports

AKAVA, Freelance-työryhmä, Raportti 5.5.2000,http://www.akava.fi/html/edunvalvonta/free.html

Eduskunnan oikeusasiamiehen kertomus toiminnastaan vuonna 1999

Harvard Law Review, Notes: What We Talk About When We Talk About Persons: The Language of Legal Fiction, Volume 114, Number 6, April 2001

ILO,
- Studies and Reports, Industrial Relations, Series A, no 34/1933
- Part-time work, Report V(1), International Labour Conference 80th Session, 1993
- Homework, Report V (1), International Labour Conference, 82nd Session, 1995
- Collective bargaining: A response to the recession in industrialised market economy countries, Geneva, 1984

International Encyclopedia of Labour Law and Industiral Relations

International Federation of Journalists, World Survey: Economic Status of Freelance Journalists, Final Report, Submission to the International Labour Organisation. Brussels, Belgium, December 1999

Framgångsrika exempel i det nordiska integrationsarbetet, Nordiska ministerrådet, Nord 1999:28

Law - Social Welfare - Social Development, Proceedings of the 24th International conference on Social Welfare (ICSW), Berlin (West), 31.7-5.8.1988. Report Deutscher Verrein für öffentliche und private Fürsorge, 1989

Rättvisa i vågskålen, Om 1980-talets välfärdsutveckling och 1990-talets möjligheter, LO, Stockholm, 1991

Taiteilijoiden työllistämisedellytyksiä ja sosiaaliturvaa selvittävän toimikunnan (Taisto II) mietintö, 22:2000, Helsinki, Finland

Työttömyystruva on uudistunut, Työministeriö. TM 4.002, 1/1997

WRR, V 7/1978, Internationale macht en interne autonomie, Een verkenning van de Nederlandse situatie, Voorstudies en achtergronden

WWR, V 60/1987 H.G. Eijgenhuijsen, J. Koelewijn, H. Visser: Investeringen en de financiele infrastructuur

WWR 16/1977 Over social ongelijkheid, Een beledisgreichte probleemverkenning, Rapporten aan de Regering, Wetenshappelijke Raad voor het Regeringsbeleid, Staatsutgeverij, 's-Gravenhage 1977

Journals

Dagens Nyheter, Sweden
Hufvudstadsbladet, Finland
Suomen kuvalehti, Finland

Index