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Self-employed – The Problem of Societal Development and Adequate Legal Concepts

1 Self or employed?

Within the IT Law Observatory, several hearings have taken place over the years discussing the phenomenon of self-employed. The main focus of these hearings has been the question of whether a separate legal institution is needed for this category of workers. From a practical point of view there are two different kinds of self-employed: those who are self-employed of their own volition and those who have self-employment more or less forced upon them. The first group consists of the strategic persons that companies want to hire. These people can choose their own jobs. The work of the other group is less central jobs that companies try to get rid of by placing a contract for them, so-called outsourcing. Most of the discussions have been about self-employed in this second case. The focus is on the need for protection of this more or less vulnerable group. An aspect which has not been discussed all that much is the relation between self-employed and the new information society. Is there a need for a legal institution covering the self-employed for the sake of stimulating the new economic structures?

We are said to be moving from a hierarchically organised society to a horizontal network-society.[1] The majority of the labour force in the advanced economies is under salaried conditions. But the diversity of the levels, the unevenness of the process, and the reversal of the trend in some cases call for a differential view of the patterns of evolution of the occupational structure. When networking and flexibility become characteristic of the new economic organisation, and as new technologies make it possible for small business to find market niches, we witness a resurgence of self-employment. The occupational profile of the information society will be far more diverse compared to the industrial society. The data show a growing proportion of the labour force tending to leave salaried status in most countries between 1983 and 1993. Different data sources seem to indicate an accentuation of this trend in the late 1990s.[2] The trend was particularly intense in Italy, with approximately 30 % of the labour force, and in the UK. It appears that economies in various countries try different forms of flexibility in working arrangements, depending on their labour legislation, social security, and tax systems.

The new system is people working for themselves. In the USA 33 million people make their living as free agents today.[3] Thus, one American worker in four is already a free agent. There are different work values behind this development, such as having freedom, being authentic, i.e. doing your own job, putting yourself on the line and defining your own success. Instead of up-and-down loyalty, free agents practise a new side-to-side loyalty. Seen from an

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1 Manuel Castells, *The Rise of the Network Society,* Malden: Blackwell Publishers Ltd. 1996/2000.

2 Martin Carnoy, *Sustaining Flexibility: work, family, and society in the information Age*, Cambridge, MA: Harvard University Press 2000.

3 Daniel H. Pink, *Free Agent Nation. How America's New Independent Workers Are Transforming the Way of Life*, New York: Warner Business Books 2001.

economic point of view, free agency is, in effect, a form of just-in-time staffing, where companies are hiring the exact number of people they need for a project or job. In this way the risk of ups and downs has shifted from the company to the free agent's shoulders. Balancing between the corporate need of flexibility and the workers' need of employment security will in this situation be subordinated to the joint efforts for both to gain by the construction. In this situation there is a need for legal changes and innovations. The background is the following.

2 From natural law to legal positivism

2.1 The example of juridical persons

When the industrial society in the 19th century entered a phase of large-scale production, the legal system faced a number of challenges. The need for accumulation of private capital for the growth of large companies called for an introduction in the legal system of a new kind of person. There was an interest of limited liability among the owners in order to stimulate the industrial growth. This created in the mid-19th century a tension within the legal doctrine surrounding company law.
Until that time some companies could be granted limited liability as a privilege given by the state. This system can be traced back to the East-Indian Companies in the beginning of the 17th century. Limited liability was at that time related to public law and not company law within the civil law system. The associations that existed until the mid-19th century were treated in the perspective of the legal doctrine about persons as societas, using the Roman law term. Societas expressed a relation of law of contracts among the participants. The company relation, however, constituted a community based on the law of property (communio). This transition took a long time to complete.[4] The natural law theory had to be substituted by legal positivism.

As long as persons were observed through the scheme of societas, supra-individual persons could not find their place within the legal system. The first step in the transition was to think about a company in terms of a person with its own legal capacity built on the parallel to natural persons, individuals. Companies could be seen as juridical persons. This fiction started with an acceptance of juridical persons not being a person according to the commonly known criteria of persons but still useful in order to place the phenomenon within the legal system. The process of change in legal systematising was initiated by making analogies between natural and juridical persons. But there are differences. Juridical persons cannot feel and act as such. They do not exist in the natural world. In other words, they are fictitious.

In this situation there was a need for legal constructions. Parallels with natural persons were no longer enough. The juridical person had to have its own existence within the legal system. This called for an expansion of the cognitive scope of legal perceptions. The law had to change its relation to its environment. Legal concepts had to be based on legal positivism instead of natural law. The difference is that of going from linear explanations of legal concepts to recursive arguments. The definition of law became circular as a consequence of legal positivism. Law is created out of law. There is for legal positivism no such thing as natural rights or natural persons. The cognitive effect of the circular model of explanation instead of the linear is the increased variation and flexibility.

Legal positivism, by breaking with natural law thinking, opened up for legal constructions. It was only by making a distinction between natural and juridical persons that

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[4] Jan Torpman, *Rättssystemets lärande*. (The Learning Capacity of the Legal System) Diss., Stockholm: Stockholm Business School 2002 (in press).

the *fiction* of supra-individual persons could become redundant. Society is regarded as separated from nature and law regulated society. Law had become the positive law, which responded to and actually changed with societal development. The discovery in the legal system of its own sovereignty made the legal fiction possible as an arbitrary legal construction so long as it provided functional solutions in society. This acceptance of the fiction opened the way to new ways of projecting social systems in legal terms. The topology of legal theory was changed in an almost paradigmatic manner. The construction of the juridical person represents the association of co-operating individuals and thereby substituting what was earlier understood in terms of relations among the same individuals.

Thus, the concept of juridical person was not created by the state and the political system, but by the legal system. Also the state is a legal category and constructed by the law. By the innovation of the juridical person, the legal system has been able to bring forth a theory of persons that has had revolutionary implications in society. Within the legal system, as a consequence, an almost exponential growth of norms has taken place. The legal system has through many cognitive innovations and a capacity for learning expanded its ability to observe its environment and thereby successively provided more effective structures as the need arose. The creation of the innovation is in most cases, as in this one, a question of a long process with many influences. With the concept of juridical person, the legal system both expanded its capacity to observe changes and developments in society and was able to retain and develop existing (Roman law) legal doctrines. The concept of juridical person made the expansion of large-scale industrial society possible. Companies got an identity of their own and as legal constructions became power centres with a rationality which goes beyond the interaction of the co-operating individuals. These social and legal changes could take place without alterations in legal reasoning.

2.2 The example of collective agreement

A similar problem in relation to the growth of the large-scale industrial society was the need for a collective agreement in order to create self-regulative mechanisms on the labour market. The problem was if the collective agreement could be legally accepted. Even if the perception of contract was decisive when the collective regulation of working conditions via trade unions emerged, it was not given that the legal system could accept collective agreement as a contract in a private law sense. Could rules of contract and claims be applied to collective agreements? The nearest analogy was to treat collective agreements as reciprocal binding contracts, but the law of contract and torts, based on Roman law, was too individualistic to fit the purpose of labour market regulations. The main problem was that contracts only had legal consequences for the parties directly involved. The personal will was conclusive; personal contracts could break through collective agreements. Another important aspect was about the binding force of the collective agreement. To be effective it had to be binding not only on the contracting parties, the organisations, the employers and the employees, but on the members in the trade unions as well.

At the time of the growth of collective agreements in practice, in the late 19th and early 20th century, legal positivism, as we have seen, already had been established in legal thinking, and the lawyers gradually came to accept collective agreements as a legally binding contract with adequate legal consequences. By use of legal constructivism, collective agreements were given a special status with priority over individual contracts and they also became exceptional in having binding force even for those not being directly parties to the contract.

3 From legal positivism back to natural law design. The example of self-employed

When someone buys job performance, they use a labour contract. This can in its turn within the Swedish legal tradition be subdivided into two forms of contracts, contract of employment and contract of commission. Collective agreements complement the contract of employment in determining the working conditions, while in the contract of commission the parties to the contract have to decide on what has to be done and under what conditions in terms of payment, etc. The question is if work by a self-employed should be regulated by a contract of employment or of commission. In the present situation the answer is that if you perform the work in terms of an individual, natural, person, the work relation is regarded as employment, and if you do it as a juridical person and/or private firm it is regarded as contract of commission. In the first place you are regarded as an employee and in the second as a business firm. In the latter case you have to bear the burden of payroll tax and social security charges as if you are an employer. Being self-employed, you are from a legal point of view either an employer or an employee; actually, you are something in between.

The legal system does not accept a natural person performing a job without being employed. If you would like to be self-employed, you have to be employed within your own firm. The structures supported by legal positivism have in our time created a mentality and a legal superstructure that create new paradoxes. What from a natural law perspective appears as the most natural thing, namely for an individual to conclude an agreement about work without being regarded as a juridical person or a firm, is in the positivistic era of law not possible. The legal constructions void it and force the work into the black market. In order to bring the phenomenon back into the acceptance of the legal system, a deregulation has to take place within company law and tax law.

The contract of commission is an existing and a relevant legal institution for regulating the work of self-employed. There is, though, a need within tax law for getting rid of the fiction of the self-employed being a firm and thereby the fiction of the self-employed being an employer, a specific fiscal subject. The self-employed could fairly well pay tax on the income he gets for his work but, since he is organising his own work, be free from overhead costs. In order to match the practical needs of the information society, the mental structures of legal positivism first have to be replaced by the natural law construct of self-employed. A person is a person who is capable of concluding a contract of commission on his own.