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Remunerative Gifts, Societal Development and Legal Futures

1 Thinking about potlatch

As a law student, I came across a legal term, remunerative gift, which made an impression on me. What caught my interest was the hybrid character of the concept, the same kind of confusion as in the concept, self-employed, which I comment on below under. Remunerative gift is something midway between *obligatio* and *donatio*, between a binding contract and a free gift.¹ Over time it also has been treated in these different directions. Remunerative gift is defined as something given to remunerate past services.

There, for my part, the matter rested, until recently when I read a book written by Alf Rehn, titled *Electronic Potlatch* (KTH, Stockholm, 2001). In it, Rehn identifies similarities between new technologies and primitive economic behaviours in terms of a gift economy. He draws parallels between the gift economy among the native Americans of British Columbia and the inhabitants of the virtual land of Warezonía, which can only be reached through the screen of a computer. The Native Americans lived in a gift economy. One central element in realising the gift economy was to give a potlatch, a feast. It was a social gathering of great import. What is interesting is its economic importance, but it is also central to social structure, politics, religion, morality and law within the community. It has been used as an example of a “total social phenomenon”.² Potlatching was, thus, a reflection of the native society as a whole. From a legal point of view it is interesting to note that the economy was regulated by social norms. Describing the gift, Marcel Mauss sets out the origin of economy. The potlatch can be regarded as a game where individuals were given status and identity, within an activity having implicit economic functions.

Briefly, Warezonía, consists of groupings of people that compete in giving away commercial software and the people who participate in this as either intermediaries or “fans/consumers”. At the centre there is the hard core of the scene, consisting solely of those who give software to others, with the aim of being the most efficient and overall best provider of warez, i.e. programs, software. Any social structure has of necessity one implicit norm, the norm of continuing participation. In the social scene of Warezonía the rule regarding participation is stated by Rehn to be one of sharing and movement (pp. 139-140). To be a warez dude, you have to be a party to the circulation of programs/warez. The circulation of warez, in other words, is the social structure, and the actors merely assume various positions in this structure. The norm of sharing is perhaps the most telling. What is implied in membership in Warezonía is that you are part of the networked sharing on the whole. Not to do so is to disassociate yourself from the community. The other implicit norm, movement, refers to the continuous striving for total coverage, i.e. that all new releases are to be had at all relevant sites as quickly as possible.

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¹ See Reinhard Zimmerman, *The Law of Obligations. Roman Foundations of the Civilian Tradition*. Cape Town: Juta & Co. 1990

² Marcel Mauss, *The Gift: The Form and Reason for Exchange in Archaic Societies*. New York: W.W. Norton, 1924/1990.

Warezonian also has additional, explicit norms of what constitutes the good and the just. These norms are speed and functionality. Furthermore, we can speak of norms regarding primacy or origin. Following these norms, you are a successful participant in the community activities. Last but not least, we have the norm of giving. A warez release can only be given. The absence of money, or more precisely the absence of price, is a condition for Warezonian's gift economy. A release can have no price, although it can have a value. The work done within the circulation of warez is thus seen as a gift to the scene, as a contribution towards a greater good. To be good is, quite simply, to be a productive member of the community.

Alf Rehn claims in his book that the structure evident in the Potlatch is structurally synonymous to the structured interactions of competitive giving on the warez scene. The way in which the societies of the First Nations were structured wholly around the practice of the potlatch, with social life within the tribes being dependent on it, is mirrored on the warez scene. In both cases, Rehn points out, it is the process of giving and proving one's mettle that gives meaning to the social, and the material instances of exchange can be viewed as mere instruments for a "higher" purpose (p. 276). Based on observations regarding the way in which the rituals of the potlatch changed with the introduction of Western trading posts and similar instances of the market economy into the territories of British Columbia, Mauss has referred to it as "the monster child" of the market and the gift. Warezonian, says Rehn, could in this vein be called the return gift, the monstrous introduction of gift-exchange into capitalist hegemony (p. 294).

Several other authors have raised the same point as Rehn about the feature of a gift economy within the new economy.³ Raymond calls the development model belonging to the spirit of the new economy the Bazaar, as contrasted with the Cathedral, which characterises the commercial world of the old economy. Referring to Linus Thorvalds, the promoter of the open source based operative system, Linux OS, Raymond speaks of Linus' law: "With a sufficient number of eyes all bugs will be noticed." He regards egoboosting as the fundamental driving force behind an open source mentality, which gives it the features of a gift economy. The utility function hackers produce is not a question of classical economy, but is the intangible of their own ego satisfaction and reputation among other hackers. There are, according to Raymond, many voluntary cultures which operate in this way.

The young Finnish philosopher Pekka Himanen has described the same phenomenon in his book, *The Hacker Ethic and the Spirit of the Information Age* (London: Secker & Warburg, 2001), where he enumerates seven values of the hacker ethic that have had a significant role in the formation of the new society. A hacker who lives according to the hacker ethic gains the community's highest respect, he reaches the final level and gets the seventh and final value, which is creativity. This is in Himanen's description "the imaginative use of one's own abilities, the surprising continuous surpassing of oneself, and the giving to the world of a genuinely valuable new contribution" (p. 141). What characterises a hacker ethic is the co-operative structure of coders, where ideas and codes are shared, and work is done primarily out of enthusiasm and the joy of participating in a social sphere. But this is not a gift economy according to Alf Rehn of the same kind as in the Warezonian case, for two reasons: the problem of meaning and that of novelty.

Rehn claims that hackers, like the Protestant worker, find work in itself to be meaningful. They are climbing the ladder of accumulation. For the Warezonians, however, the scene makes sense in the same way as the Native Americans found meaning in the

³ See, for instance, Eric Raymond in his famous essay *The Cathedral and the Bazaar: Musings on Linux and Open Source By An Accidental Revolutionary*, London: O'Reilly, 2001. In his analysis of the open-source movement Raymond has made explicit the way in which the "hacker" culture behaves as a gift economy.

potlatch. The other point, on which Rehn criticises Himanen's book concerns novelty. Himanen, like many others addressing the network society, emphasises the paradigm shift that the new technology has created. It makes it seem that we, as humans, are entering something wholly new, Rehn describes it, and he continues: "This is the direct opposite of my contention. The technology might be new, but there is precious little that is new about society.... what is truly spectacular about the social world is not its newness but the way in which it has remained unchanged" (p. 303).

The interesting thing is that both Rehn and Himanen may be right. As so often, it is a question of how one specifies the underlying world view. Both Rehn and Himanen regard information technology as something new. They both also accept that this technology creates new things and material wealth. But while Himanen finds a new society representing a challenging alternative spirit of informationalism, Rehn is sceptical and looks at our daily lives, finding that not much has actually changed. We still have friends over for dinner, we still give alms, and we feel for those who have less than we do. Culture might bring radical variations and things can recur in numerous settings, but these alterations take place within the same theme of human behaviour, if I understand Rehn correctly.

The behaviour of the Warezonians shows remarkable similarities to that of the Native Americans. In both cases, the communities draw upon the surplus of the market economy in order to create economies that squander. In both cases, outsiders consider this criminal. Potlatching was terrifying enough for the Canadian legislature of the time for legislation to be passed against it. The same tendencies can be seen in relation to the practice of warez. The Native Americans adapted to the new economy at that time in a fashion that is hard for us to understand. They created a hybrid form, just as the Warezonians have created a marketplace for honour and gifts. The legal hybridity, remunerative gift, corresponds to the normative asymmetry in a society as a whole where the social structure belongs to one mind-set and the dominant economic rationality belongs to another. This was obviously the case for the Native Americans and what has probably characterised transitional periods from a gift economy to a market-based economy in other parts of the world, including our own. The question is what conclusions can be drawn from these experiences. Are we facing something new or not? The answer is both yes and no. Let me explain.

2 The long waves

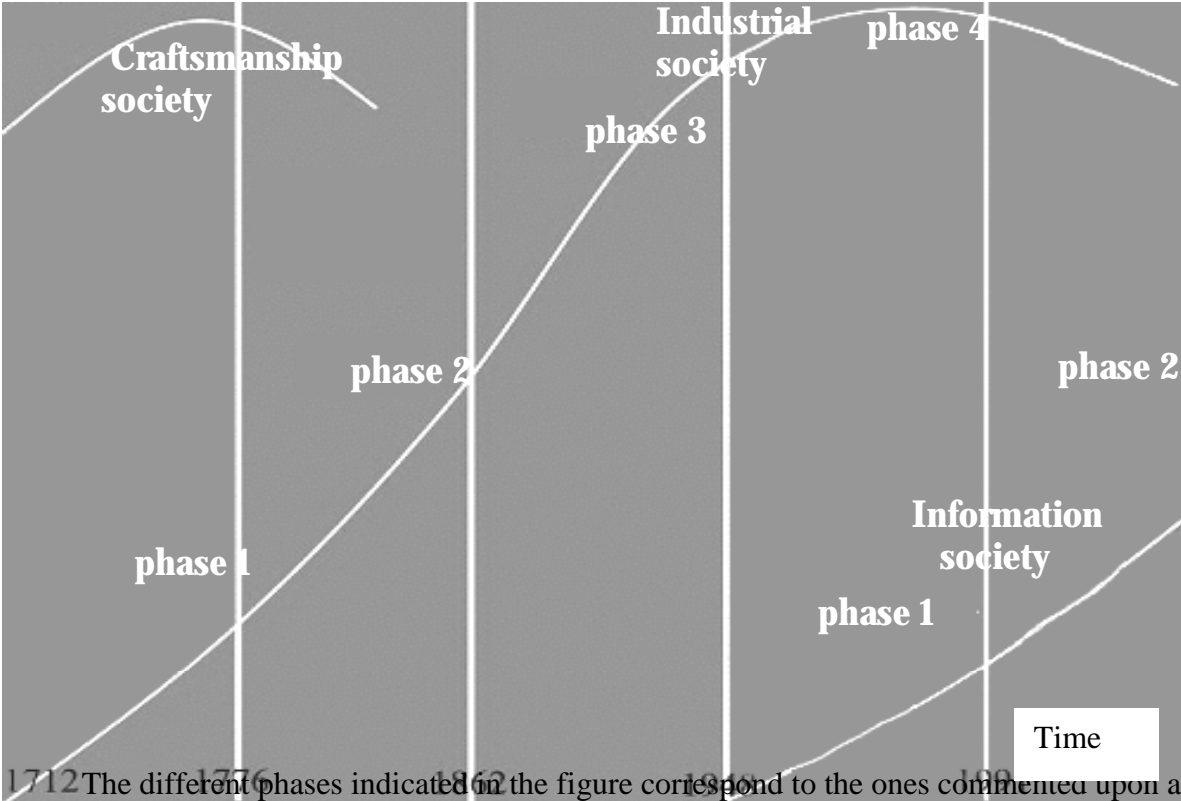
Information technology is a core technology, i.e. a technology, which needs itself to develop further and which is broad and deep enough to trigger the creativity and imagination of people for a sufficient length of time. Hand-tools were needed in order to make more and better tools. Precision mechanics helped to develop new precision mechanics, such as clocks. Steam engines were a prerequisite for the construction of more and more effective (steam) engines. Computers are used in order to create new generations of computers. This kind of technological development has, without a doubt, implications for society. Each of these technological periods marks a certain era in the development of an epoch. Thus the industrial society is the last era in the Market epoch, which can be traced approximately 1,000 years back.

The Market epoch was initiated by the businessman era in the beginning of the last millennium, followed by the era of the trading houses and the handicraft era. When mankind in the beginning for the first time learned how to produce and distribute artificial energy, starting with the steam-engine in the beginning of the 18th century, later complemented by electricity, a new core technology with societal implications was born, the industrial society. Many existing machines could then be used much more effectively, with much higher

productivity. An era goes through four phases of about 75 years, following a certain pattern. In a biological perspective one can speak of birth, adolescence, maturity and death. In a societal perspective, changes take place in a certain order following the phases that have now been mentioned. A new society is born with the new (core)technology which marks the first phase. The next step in the formation of a new society is the social phase as an expression for the need of social adjustments and alterations due to the implications of the new technology. When the core technology is established and developing and the society adapted to the new conditions, it is time for large-scale economic exploitation of the new technology. This is the heyday of the era, a time of linear development, when the mentality shifts from synthesising to specialisation and reductionism. For the industrial society we are talking about the time between the beginning of the 1860s and late 1940s. After a period of economic production of material wealth it is time for the political system to take the lead. At this time in history the accumulated surplus value calls for mechanisms for distribution. This becomes an important part of the political system in combination with corporate structures of different kinds. Later on the over-ripeness of the system necessitates political interventions in order to avoid crises of legitimacy.

In this way something new can be said to take place. Technological development creates new and technically more advanced possibilities of providing for human needs. But this is just one side of the coin. I return to the other side shortly. The best graphic illustration of the societal development is the horizontal S-curve or a wave. The S-curve is constituted by the combination of the law of increasing returns and the law of diminishing returns. Together they form the horizontal S, as in the following figure:

Benefit



The different phases indicated in the figure correspond to the ones commented upon above. The shift from one society to another is a question of developing a new core technology. It is noticeable that a new core technology starts as a reaction to the old one already before this one has reached its peak. Inventors, artists and other forerunners recognise the law of

diminishing returns long before the economy shows itself to be on the downgrade as a whole. This also means that the first phase in the growing society is parallel to the fourth phase in the old society. It is phase 4 which dominates the mental processes. The new technology is first applied in the old production structures and thereby speeds up the process of decay. Similarly, new social phenomena are interpreted and received within the mental structures of the old society. This tendency is explained by the prevailing institutions and the vested interests related to them.

The initial part of the process has a negative return, as indicated by the S. The economists call this phenomenon, the productivity paradox. In the mid 1980s, when everybody was talking about and started working with computers, this had no impact on the economic statistics. From a micro-economic perspective, the question that accompanies the paradoxical state of the initial phase when a new society is born, concerns incentives and motivation. What are the social-psychological driving forces among actors underlying an economy that is not remunerative for those involved?

As we can see from the discussion above, there are different, optional understandings. One is the mentality of a gift economy. In relation to the information society and the so-called new economy, Alf Rehn's story about the Warezonians is an illustration of that. The affluence following on the large-scale industrial economy has created a basis for a gift economy within a small but expanding sector of society. When the technical barriers to duplication are removed and when a program can be copied a thousand times at basically no cost, a particular form of abundance is at hand. The day someone succeeds in putting a price on the digital goods by being able to give them the right package, the gift economy will turn into an exchange economy. A second possible explanation is the hacker ethics connected to the open-source movement. For those coding enthusiasts, devoting time and competence to a development project is to a great extent accepted as a gift to the larger community, and prestige in this community is a direct effect of either egoism or altruism. This behaviour is also rational from a societal point of view. The ethos of being open has shown itself more dynamic than and implicitly superior to 'normal' program development, due very much to the social aspects of such an approach and the creativity which a freer system assumedly bestows upon a project. A third possible explanation of driving forces, explaining why the economic process is developed despite lack of economic remuneration for actors involved, is related to the dedication and devotion of those individuals to the joy of innovation and creativity. All three interpretations might be true at the same time, but for different actors and different parts of society.

3 A future for IT law?

Somewhere along the way the morality of the gift gets lost, but we can trace back barter and market exchange to their original forms, the total social phenomenon of the primitive gift. The legal construction of the remunerative gift marks the step from a gift economy to an exchange economy. In the transitional period, law has to be used to enforce and uphold the old structures while the new ones grow organically through a continuing social process, where certain patterns of behaviour become entrenched and turn into the "real" reasons for engaging in a particular activity. In this way gifts turn into exchange relations via the remunerative gift conception. This story has certain implications for an understanding of the role of law and legal development.

Law does not come into play until a societal phenomenon is threatened, i.e. cannot reproduce itself by itself. As long as something is growing spontaneously, it organises itself

according to principles of self-regulation. It is probably when the gift-economy is threatened and in dispersion that the gift becomes a remunerative gift and the law comes into play. Established segments of society are using law in order to uphold norms and institutions. Law is nothing but spontaneous norms that at a certain point in time have been given a special status and protection of the legal machinery.⁴ After the initial – gift-oriented, egoistic, altruistic, dedicated – phase of the new society based on the new core technology, the law of increasing returns predominates.

If we apply this reasoning to society as a whole and the role of law in relation to its development, the following conclusions become valid. As long as the law of increasing returns is operating, activities in society regulate themselves. We can hear talk of self-regulation. When the law of diminishing returns takes over, the role of law increases. The transformation from self-regulation into a fully-fledged legal system goes step by step. The first stage is that of rules of the game, where law only provides certain basic norms for the co-ordination of activities. The activity as such is then still unaffected. The legal system sets up limits for socially acceptable behaviour within penal law and provides instruments for co-operation in terms of law of contract and of property, etc within civil law. The next step corresponds to the initial part of the fourth phase in the figure above. When the political system comes into the arena, then law becomes a political instrument. This takes, firstly, the form of public law, primarily in order to entitle public authorities with competence to act on behalf of the politicians when providing the public services which are asked for at this time in history. Later on, in the dying phase of the old (industrial) society, the state has to intervene in order to hold society together. Law, then, changes character and becomes an intervening tool where public authorities are engaged in controlling more and more private activities. In this last phase the legal system tends to be overloaded and to have lost its soul manifested in what is called frame-laws.

Changing perspective from the upper curve of industrial society down to the lower curve of information society means, according to what has been said and what can be learned from similar transitional periods earlier in history, going from state regulation to self-regulation. This is due to certain common patterns of the transition.

These situations are characterised by a shift of focus from large scale to small scale. It is a question of looking for new ways of fulfilling old human needs using the new technology. Another transition is from planned to random processes in society. We are leaving a time of planned production and random consumption in favour of a time of random production and planned consumption.⁵ Wealth in future will depend on sufficient diversity of visions and strategies being mobilised, i.e. more risk-taking and trial-and-error operations. In this transition, society changes social and economic codes, norms and taboos are altered and some legal rules become obsolete. The formal structure of a code appears at the moment when production declines and/or the appearance of meaning fades. In the perspective of the industrial society, we are faced with a situation where corporate loyalty will probably cease to exist and the old (social) contract between company and employee will disappear. We will later on imagine a new social contract. These are examples of factors which contribute to the understanding of the normative changes in society of our time.

When it comes to law, these changes follow a certain pattern, going from pure self-regulation to self-regulation with legal support, to legal regulation and state intervention. The interesting thing, though, is that during its flow in time the legal system is confronted with the same kind of issues when entering the different societal eras. There is, in that sense, nothing

⁴ These aspects are elaborated in Håkan Hydén, *Normvetenskap* (Norm-science), Lund studies in Sociology of Law nr 11, 2002, chapter 4.

⁵ Anders Ewerman, *Marknaden 1000 år* (The Market 1,000 Years). Falun 1996.

new under the sun. The famous sociologist of law, later the early 20th century Austrian prime minister Karl Renner, has shown, in his book *Private property and its social functions*, that the concept of property has been the same over the last two thousand years, but the substratum has undergone radical changes. The legal content has been unchanged, despite the changing socio-economic implications. Thus, during the time of Roman slavery, private property meant a relation between a subject and a subject, while also accepting a relation between a subject and an object, which became the typical character of the concept. Later on, during the period of large-scale industrialism and the wage-earning system of capitalism, private property once again became a relation between a subject and another subject. Finally, in our time of state interventionism, private property was accepted as limited by state regulations of different kinds. These changes in practical implications were possible due mainly to the fact that the property concept over time has been connected to various other legal concepts, the law of contract, of security rights, public law, etc. in different combinations.

What are the consequences for the forecasting of law of the information age? I think there is reason to talk of a particular IT law. But following the reasoning above, one should not expect a lot of new legal constructions and concepts. Established legal principles will do, but they might be combined and put into new contexts, which will affect their socio-economic substratum. There will also be a renewal of old concepts that might have been obsolete. For example, there is reason to expect that the old regulation about the trustee (syssloman) will take on a new lease of life. Furthermore, legal regulations that have grown into special expert fields, like labour law, can be supposed to fade out and merge with the main regulatory categories within civil law, when going from the upper, industrial society, to the lower curve of the information society. Only a few new legal concepts, like self-employed, might be needed. Most of the institutionalisation of the new information society will initially take place outside the classical legal arenas and find its way via self-regulation. The most important part of this transitional period is related to the need for de-regulation in order to set the new normative structures free. This is shown by the fact that legal development follows the curves indicated in the figure above. The present situation, the relation between the industrial and the information society, is no exception.

Law in the digital world is confronted with the same kind of eternal questions as mankind has always had to find an answer to.⁶ This is the other side of the coin. While the tail is changing, the head faces the same kind of problems over time. The Swedish word for railway engine, *lokomotiv*, is a case in point. It comes from the Latin word *locus*, meaning place, and *motivus*, meaning movement. The word *lokomotiv*, then, contains both something static, a certain place, and something dynamic, movement. It is spatial and temporal at one and the same time. Since development in the world is found to be in different eras, a spatial move is also a temporal one. The same goes for the course of law, which is spatial and temporal simultaneously. It changes its content while moving from one societal phase to another. But it is the same legal principles that are being applied to new material conditions, in our time, to new virtual realities. In that sense we are from a legal point of view looking at something new but through old spectacles.

⁶ For more about these aspects, see Håkan Hydén, *Normvetenskap* (Norm-science), Lund studies in Sociology of Law nr 11, 2002, chapter 6.