

RECOGNISING ARTISTS' RIGHTS: A NEW CHALLENGE TO THE HUMAN RIGHTS PARADIGM

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Artistic work is a strange bird in our legal culture, particularly so in labour law that is permeated by the logic of industrial production. We therefore have difficulties in envisaging the kind of protection that labour law should accord artists as well as other persons, whose work differs from the standard on which labour law is based. This problem has gained increasing topicality with the diversification of working life that has followed in the wake of the information society. Artists can therefore be seen as precursors for work in IT society. To recognise artistic and cultural work and to introduce appropriate provisions for such work is a compelling need in order to catch up with social change. This requires a new conceptual framework that is considered in this article. The point of departure is the existing set of economic, social and cultural rights that are primarily approached through concepts devised by theories of social justice.

1. A person in one's own right

Artists and prostitutes are the most ancient professions of humankind, it is said. This sounds plausible. But notwithstanding a long history, and notwithstanding the human rights standards introduced during the past century, particularly economic, social and cultural rights, many artists and prostitutes may ponder what their rights are. Surely they are as worthy of human rights as any other person. How come then so many artists and prostitutes live a life of hardship at the borderline of work? I will argue that we need a change of perception in order to properly address the problems facing artists and prostitutes – as well as many others. We equally need to devise new structures and to revise old ones, in order to accord people the legal protection that economic, social and cultural rights are aimed at securing.

I will here be concerned with the rights of artists – or rather

shortcomings in this regard – but I will start by juxtaposing artists and prostitutes in order to illustrate the implications of two notions on which I will base these considerations; the notions ‘to each one’s due’ and ‘personal autonomy’. This will primarily be done relying on concepts provided by theories of social justice.

The reason why I wish to juxtapose artists and prostitutes is that, speaking in general terms, their situation may be characterised by needs of some kind that helps to differentiate the notion of needs. For a prostitute it is fairly safe to say that this activity has been a last resort for many a person in a vulnerable position – a means of material survival. For a person with a strong urge for artistic creation again, the need is of a different kind. It is a question of an inner necessity that often goes along with a struggle for material survival. For prostitutes the gist of the problem is that society does not provide the kind of protection for persons in a vulnerable position that would give them a free choice as to how to gain their living. Here it is a question of inadequate economic and social rights that raises the issue of a fair distribution of benefits and burdens in society. In regard to artists, again, the question of cultural rights is brought to the fore, involving primarily the question that the value of artistic work should be recognised and that appropriate structures should be devised that would allow artists to carry out their work under decent conditions.

2. The human in a theoretical context

I will start by relying on David Miller’s considerations of needs, as elaborated in his book ‘Social Justice’. Miller notes that the satisfaction of needs can be regarded either as a matter of justice or as a matter of humanity. There is no strict inconsistency between them, but they depart from different premises. If we approach the question of needs as one of humanity, the underlying premise is that human suffering should be avoided. But if the satisfaction of needs is seen as a matter of justice, a different underlying premise is required. Miller considers the premise difficult to state with any clarity, but he suggests that it may be expressed by saying that every person is as worthy of respect as every other. Although men differ in moral virtue, in merit, in personal success, in usefulness to society, there is an underlying equality, which consists in the fact that each man is a unique individual with his own aims, ideals

and outlook on the world and that consequently he must be treated as such. Further, this premise is required to show why each man has an equal claim to carry out his plan of life, and hence to have satisfied the needs which are related to that plan of life. Unless the premise is granted, we cannot show why it is *unjust* (and not merely inhumane) to satisfy one man's needs and not the needs of another, Miller notes.¹

Alasdair MacIntyre can assist in throwing some light on the difficulties in finding a proper premise that would have justice as a starting point. In his book 'After Virtue', he points out how the paradigmatic shift that occurred with Enlightenment thinkers, has had the effect that 'man' ceases to be a 'functional concept' (except within theology). This is because the Aristotelian understanding of nature and action were repudiated in the 17th and 18th centuries and substituted by theoretical efforts to lay bare the physiological and physical mechanisms underlying human action.² A unifying notion of a person was thereby lost. Hence we are no longer simultaneously concerned both with questions of how human action is to be explained and understood and with questions of what kind of actions are to be performed, as this is expressed in Aristotle's *Ethics and Politics*.³

In law this problem is reflected in the ambiguities surrounding legal personhood, to which attention has been drawn in Notes in the Harvard Law Review (HLR). Legal personhood is there pictured as a 'grossly under-theorized' field' under the heading 'What we talk about when we talk about persons: The language of a legal fiction'.⁴ The metaphor of a legal person reflects and 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.⁵ What is at stake is the social

¹ Miller, David, *Social Justice*, (1979), pp. 146,147.

² MacIntyre, Alasdair, *After Virtue, a study in moral theory*, (1981), pp. 54-55.

³ MacIntyre, (1981), pp. 78-79.

⁴ Harvard Law Review, volume 114, April 2001, number 6, pp. 1745-1768.

⁵ HLR, Notes, (2001), pp .1746-1747.

meaning of law; revealing that law does more than regulate behaviour, it also signals social values and aspirations.⁶

“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.”⁷

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 we use.

“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.”⁸

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, it is noted in the HLR Notes.⁹

3. To be a moral agent

To remedy the uncertainty concerning the premise that Miller refers to and the ambiguities concerning legal personhood, I propose that we need to restore an Aristotelian paradigm, whereby a view of a person as a moral agent is revealed. This implies taking humans as a point of departure, rather than laws and institutions, which is the premise of a legal positivist paradigm. In order to capture Miller’s point that every man is as worthy of respect as

⁶ HLR, Notes, (2001), p. 1760.

⁷ HLR, Notes, (2001), p. 1766.

⁸ HLR, Notes, (2001), p. 1767.

⁹ HLR, Notes, (2001), p. 1768.

every other, I propose the notion 'personal autonomy' as a means of assessing what is required in a particular situation to allow a person to act according to his own aims, ideals and outlook on the world. I would reduce this to a person's possibility to act as a morally responsible person. Such an assessment I consider to be prior to, and to assist in differentiating situations in a social justice perspective. By addressing the notion of personal autonomy, we are able to catch sight of persons in their life context, such as a person having to resort to prostitution when no other means appear to be available, or an artists who often has to forsake material well-being because of a compelling need to create.

If our aim is social justice, policies and actions may not further burden persons who are marginalized or stand the risk of being so, but should on the contrary correct such injustices. It is in order to capture this that I propose 'personal autonomy' as a conceptual tool, as it will be easier to reveal unjust situations and see what is required of institutional arrangements to remedy such injustices. It also helps to bring out problems associated with the way economic, social and cultural rights are legally formulated and administered. The way many social security schemes associated with working life work are designed, they have not granted autonomy for persons 'dependent' on these rights. Although economic and social rights are largely correctives to classical rights and liberties, they have often been constructed in such a way that they become appendices to classical rights and liberties, rather than providing benefits over which a person would have control. This leaves persons relying on provisions aimed at securing economic and social rights, such as social security, in a dependent position. In such a position it may be extremely difficult to defend one's rights.

We can see that autonomy is no self-evident matter for, say, those who have been made redundant or hired as so called atypical workers because of employers' aspirations to improve their productivity, when they rationalise their 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, at the cost of the autonomy a person has enjoyed through full-time salaried employment. Autonomy here is autonomy for one at the cost of others.

If focus is placed on the degree of autonomy a person enjoys at each instance, where it is infringed upon, a different logic ensues.

Wojciech Sadurski points out 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.¹⁰ I propose that if we focus on how a person's autonomy is negatively affected by different states of affairs, and what this person would be due in order to have her or his autonomy restored, this would to a large extent meet the requirement of the general set of rules that Sadurski is in search of.

4. Criteria of social justice

Miller proposes 'to each his due' as the most valuable general definition of justice.¹¹ The notion to each one's due has the advantage that it is non-substantive in character. Thereby it is easier to perceive the specific setting and conditions of any particular case. By investigating what it is that infringes on or undermines a person's autonomy, one can also see at what level remedies need to be introduced and in what form. Furthermore, the individualistic ring that is associated with the notion of autonomy is totally transformed when qualified as requiring a personal sphere of autonomy. This implies that both substantive and relational aspects are considered, in addition to bringing forth a particular institutional setting. The relational aspect also brings action into consideration, allowing us to assess human behaviour, bridging thereby the gap between the static picture of law, as revealed in a legal positivist paradigm, and the dynamic field of ethics. This focus allows us to consider the nature of the actions of different parties involved, bringing forth how different parties are

¹⁰ Sadurski, Wojciech, *Giving Desert Its Due* (1985), pp. 104-105.

¹¹ Miller, (1979), p. 20.

affected, as was illustrated in the case of employers rationalising their activities in order to improve their profit.¹²

The 'autonomy test', as I call it, is purely instrumental and can, depending on the context, be translated into different notions according to that particular context. It may place the considerations in the field of rights by assessing whether a piece of legislation, by securing the rights it does, guarantees control to a person in a vulnerable position. This raises the question whether deficiencies should be remedied through legal reform and/or changed practices in legal administration. The autonomy test may also be translated into an assessment whether there is 'respect' for a person's plan of life, or whether a person enjoys such integrity that it allows this person to act as a morally responsible agent, placing considerations in the field of ethics. Or we might focus on inter-dependencies that may place considerations into the field of political philosophy or sociology.¹³

This differentiation of diverse situations and constellations is an important first step when addressing the substantive question, what someone is due. In theories of social justice different and conflicting means are available to answer the question what somebody is due, that Miller summarises in the three principles: to each according

¹² These considerations are based on Storlund, Vivan, *To each one's due at the borderline of work – Toward a theoretical framework for economic, social and cultural rights*, (2002). The notion personal autonomy I derive from Carl Wellman's analysis of rights, see further pp. 160,161. Wellman 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. "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. Wellman, Carl, *Legal Rights*, (1978), p. 219.

¹³ For the notions 'ethical integrity' and 'inter-dependency' see Mason, Mark, *Ethics and Values in an Open Society: Fostering a Culture of Peace*, pp. 43-44, and Agyman, Kwasi, *The Causal and Purposeful Angles of Peace*, p. 6. Abstracts of presentations at Joint UNESCO seminar 'Ways of Promoting a Culture of Peace', organised by Johanna Lasonen, UNESCO chair at the University of Jyväskylä, Finland 13-14 June 2003 in Espoo.

to his rights; to each according to his deserts; to each according to his needs.¹⁴

I will continue to focus on needs. Miller observes 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 needs, also underlies equality in the broader sense. Miller suggests that the principle of need represents the most urgent part of the principle of equality.¹⁵ This urgency, he notes, can be seen 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, because people have varied needs and wants, as the case of artists and prostitutes is intended to illuminate.¹⁶

5. A real life context

The way many artists have to struggle for their material survival displays a flagrant paradox. Culture is valued in society, and it is something that no society could either be or do without. Why then are the producers of art and culture not recognised as professional categories with a status that would reflect the particular characteristics of artistic and cultural work? Anna Christensen can throw light on this. She observes that wage labour has conditioned social organisation more than democracy, the market economy or the family.¹⁷ And what is worse, it has conditioned our thought structures

¹⁴ 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.. See Miller (1979), pp. 27-28, Storlund (2002), pp. 140-141.

¹⁵ Miller, (1979), p. 149.

¹⁶ Miller, (1979), p.149.

¹⁷ Christensen, Anna, *Wage Labour as Social Order and Ideology*, (1984), pp. 7- 8.

in a way that has made it hard to perceive and give recognition for much work that is done outside the wage labour structure. The work of artists is a striking example of this. This is a problem we have faced throughout the industrial era, the effects of which have been felt in many sectors of working life, such as public services, education, research and other activities, where it is difficult to measure the relation between economic input and outcome. These misleading premises have, however, gained increasing topicality with the changes societies have undergone during the past decades transforming many societies from industrial ones to information societies, with far-reaching effects on working life.

There is, therefore, an urgent need to reconsider the notion of work to see also other values than the economic values associated with industrial production and business. Likewise, it must be recognised that economic gains are not merely accrued on a straight axis, as is the case in industrial production and business activity, but that there is circularity that becomes visible if we approach this issue in a Keynesian tradition. The artist Josef Beuys has drawn attention to this, a topic that has been followed up by art promoters such as Richard Demarco and Robert McDowell.¹⁸ But in addition, we also need to see and give credit to other values than purely economic ones, to the cultural and social values involved.

Over the past 20 years or so, there has been an exceptional growth in the cultural labour market, for which the following figures speak clearly. (The term cultural worker is here used to cover different professional categories in the fields of art, culture and media.) During the period 1981-1997 the number of cultural workers in Spain increased by 3.2 million persons. In Sweden there was an increase of 60 per cent in the number of cultural workers in the period 1970-1990. In Finland, again, there has during the past 25 years been an increase of 127 per cent in the number of cultural workers, which should be contrasted to a decreased by 9 per cent of the total labour force.¹⁹ An indication that we have not,

¹⁸ See Storlund (2002), p. 159, 160, Demarco, Richard, *Kund = Kapital, Art = Wealth*, (1995), p. 19.

¹⁹ See *Pyramid or Pillars*, (Eds.) Cliché, Danielle, Mitchell, Ritva, Wiesand, Andreas Joh., (2000), p. 12.

at a perceptual level, caught up with this change is that, within the 127 per cent, there is an increase by 349 per cent in the category 'other art and entertainment occupations', meaning other than the established professional art categories.²⁰ This is something that Manuel Castells also has drawn attention to at a general level of the economy and the labour market, in his analysis of the changes that information technology has brought about.²¹

6. The human as an organising factor

The growth in the cultural sector, and the changing work formats that information technology has brought about, have in a decisive way changed the nature of work in an individualising direction. However, this increased emphasis on identity is not yet sufficiently recognised, and consequently neither is it properly reflected in legislation and 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 Castells clearly brings out in his comprehensive analyses of the changes that have led to the rise of the Network Society.²² Identity is for Castells the process through which a social player primarily perceives oneself and how meaning is formed out of given cultural attributes.²³ Calderon & Lasegna have in a nutshell formulated the challenges it poses. They put the question how we, in a world simultaneously characterised by globalisation and fragmentation should relate new technology and collective memory, universal knowledge and a culture of community, passion and reason.²⁴ These are central ingredients in our responses to structural change, in our way of seeking new venues for our lives

²⁰ See Karhunen, Paula, Statistics on the number of Finnish Artists, Facts and Figures 1/2002.

²¹ See Aoyama, Yuko and Castells, Manuel, An empirical assessment of the informational society: Employment and occupational structures of G-7 countries, 1920-2000, in *International Labour review* 2002.

²² Castells, Manuel, Nätverkssamhällets framväxt, *Informationsåldern, Ekonomi, samhälle och kultur*, Band 1 (1999), p. 35.

²³ Castells, (1999), p. 35.

²⁴ Castells, (1999), p. 35.

that differ from a society dominated by large-scale industrial production. This change requires recognition of the human as a spiritual person as well as the material aspect of people's lives. At a legal level these questions primarily relate to economic, social and cultural rights that should be properly recognised in labour and social security legislation.

7. Artists as precursors for work in IT society

To recognise artistic and cultural work and to introduce appropriate provisions for such work is a compelling need in order to catch up with social change. This is all the more pressing because of the expansion of the art, culture and media sectors. As a general trend the cultural labour market has in recent years been expanding at a rate near to or beyond the overall growth of some national or regional economies, extending also beyond national economies to global markets. This sector, covering such diverse fields as the visual or performing arts, broadcasting or multimedia production,

“has been heralded as one which can secure sustainable employment, reinforce endogenous regional potentials and shape the future through high levels of creativity and innovation in a market in which the majority of goods and services are non-sustainable”.

So it is noted in a project report 'Pyramid or Pillars – Unveiling the Status of Women in Arts and Media Professions in Europe'.²⁵

Considering the narrow theoretical perspective on the human and society that ensued from the paradigmatic shift introduced by Enlightenment thinkers, we are greatly served by art and culture, because through them, it is possible to attain dimensions that are hidden from view in our theoretical schemes. Or, as Ferenc Molnár has formulated it in an article about the arts and the state:

²⁵ Pyramid or Pillars, (2000), p. 10. The authors refer on this point to the declaration of the Conference “Cultural Industries in Europe”, held under the German Presidency of the EU in Essen, May 1999 (www.ericarts.org)

“After all, the social function of art, in the strict sense of the term, perhaps oversimplifying the issue, is no more than the description of those processes which cannot be covered by other, objective means of social research (statistics, sociology, history, etc.). In other words, it is the development of the human soul, the slow transformation of consciousness which art – beyond and besides what is specifically aesthetic – can offer to society or to the leadership of the state.”²⁶

But also in the aesthetic field, we face problems that might not be without consequence for how we perceive things and consequently go about them.

Commenting on classical texts on aesthetics, David Cooper remarks on the effects of the paradigmatic change since the Enlightenment:

“1,500 years divide Plotinus’ chapter on beauty from Hume’s essay on taste (1757), but it might as well be 15,000, so different are the contexts assumed and the problems addressed.”²⁷

Whereas thinkers before the Enlightenment had focused on the value of art and beauty as contributing to human life, by the 18th century focus became placed on the status of judgements of aesthetic values, such as ‘This design is beautiful’. As a consequence of this approach, influenced by Galileo and Descartes, moral and aesthetic aspects were banished from the objective reality, Cooper notes.²⁸

The theoretical tradition and a wage labour rationale combine to create obstacles for perceiving the human values inherent in art and culture that would allow us to give artists a status accordingly. Hans-Georg Gadamer has lucidly depicted the rationale of the industrialised wage labour society, as something that separates and divides us.

²⁶ Molnár, Ferenc, *The Arts and the State*, in *The New Hungarian Quarterly*, (1979), p. 55.

²⁷ Cooper, David E. *Aesthetics*, *The Classic Readings* (2000), p. 76.

²⁸ Cooper, (2000), p. 76.

“For all the cooperation necessitated by joint enterprise and the division of labour in our productive activity, we are still divided as individuals as far as our day-to-day purposes are concerned.”²⁹

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, in which earlier and more primitive cultures were far more superior to ours.³⁰

Gadamer notes that the general public tends to look at cultic ceremonies as magical practices. This he considers to be 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 civilization. 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”.³¹

Miha Pogacnik has also drawn attention to the processes involved in artistic creation, where music is a central focus of interest for him. He points out how in the musical process, consciousness is lifted, moving us beyond a dialectical discourse of right or wrong, black or white and so on.³²

We are separated both by our social structures and by our thought structures. Another legacy originating in the Enlightenment

²⁹ Gadamer, Hans-Georg, *The Relevance of the Beautiful and other essays*, (1995), p. 40.

³⁰ Gadamer advances these thoughts in the article *The relevance of the beautiful Art as play, symbol, and festival*, (1995), p. 40.

³¹ Gadamer, (1995), p. 59.

³² Interview with Miha Pogacnik in Storlund, Vivan, *Konsten har mycket att ge näringslivet*, (2000), p. 19.

is the view of humans as social atoms, of individuals who go about their plan of life, controlling it as profit making social atoms. Yes, we also act as a *homo economicus*, but neither always nor entirely. It should be obvious that this is not a comprehensive description of human nature, for which artists offer a fairly obvious illustration. Gadamer also points to how extremely one-sided modern man's concept of action is.³³ He suggests that Greek epic and drama remain real for us

*“because we too can still be dismayed by a sudden transformation in the appearance of things – one event can change everything at a stroke. We 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.”*³⁴

If we turn our attention toward art, we are offered an alternative and more truthful picture of the human and her condition that differentiates the view of individuals as social atoms. Gadamer notes:

*“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.”*³⁵

³³ Gadamer, (1995) p. 77.

³⁴ Gadamer, (1995), p.77.

³⁵ Gadamer, (1995), p. 76.

8. Implications of a human rights culture

By restoring an Aristotelian paradigm, we are better suited to differentiate the varied constellations pictured above. One thinker of modernity can serve us in this exercise, John Stuart Mill. He says:

*"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"*³⁶.

Mill's statement indicates 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 new human rights culture has far-reaching implications that Salvo Andò has analysed in an illuminating and comprehensive way in an article 'The welfare state as a legal obligation'.³⁷ He notes that the state must first of all

*"satisfy the needs of a pluralistic society; one which is founded on an organised system of autonomous social groups."*³⁸

Andò illustrate this, among others, with the Italian constitution that establishes a duty for the Republic to promote the right conditions so that freedom and equality of the individual and of the groups in which one's personality finds fulfilment, become real and effective.³⁹

³⁶ Mill, John Stuart, *Utilitarianism, On Liberty and Considerations of Representative Government* (1974), p. 163.

³⁷ Andò, Salvo, *The welfare state as a legal obligation*, in *Mediterranean Journal of Human Rights*, 1999.

³⁸ Andò, Salvo, (1999), p. 85.

³⁹ Andò, (1999), p. 88, where he refers to articles 2 and 3 in the Italian constitution.

How are we to make this relevant for artists? Three different stages need to be considered. A first decisive step is to recognise the worth of every person. Second, we need to go beyond the wage labour rationale and give credit to people's efforts to enhance both their own life situation and that of others, be it through artistic work or through a variety of activities in the third sector. It is my impression that many social security schemes provide rescue for a person's material subsistence when no other means are available, but that they fail to support different efforts, such as artistic work, when this does not fit the wage labour structure.⁴⁰ The perception of work needs therefore, as a third step, to be differentiated, accompanied with different kinds of supportive measures also for those who do not have full-time employment. It must be recognised that the collective level of industrial relations, at which labour standards mostly are determined, does not properly cover the great variety of work patterns today, such as artistic work, project work and work in the so called social economy. This being the case, the state has, in line with what Andò noted above, an obligation to remedy the injustices that follow from inefficient protection in labour and social security legislation.

Lucy A. Williams also draws attention to the need to establish a closer juncture between work and social welfare law. She points to how the perspective of welfare law remains limited to wage labour, privileging thereby collective bargaining, as the primary site of progressive initiatives for economic and social redistributions.⁴¹ This illustrates the problems associated with personhood referred to above; that laws signal social values by including or excluding certain categories of persons.⁴² The gist of this problem is that as long as cultural workers are treated according to the same rules as persons holding an employment, this will ordinarily lead to exclusion from the benefits and safeguards embodied in collective

⁴⁰ I have dealt extensively on this issue in Storlund (2002), chapters V and VI with practical illustrations from Finland.

⁴¹ Williams, Lucy A., *Beyond Labour Law's Parochialism: A Re-envisioning of the Discourse of Redistribution*, in *Labour Law in an Era of Globalisation*, (eds) Conaghan, Joanne, Fischl, Richard Michael, Klare, Karl (2002), (2002), p. 93.

⁴² HLR, Notes, (2001), pp. 1746-1747.

agreements as well as labour and social security legislation. We are advised by Aristotle on this score. He observes that 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”.*⁴³

Attention therefore needs to be directed to the forms artistic and cultural work takes.

What today is called atypical work can be seen as a typical format for work in the cultural sector. The work is highly mobile and flexible, often of a trans-national nature. Actors, for example, may work for a theatre, television, performing alone, or play a role in a multimedia installation. A composer may be engaged to create a film soundtrack and, if lucky, the next day have a contract to compose for a publicly funded symphony orchestra, in addition to making own compositions, as well as performing herself. This varied picture of cultural work and the high degree of mobility between different kinds of activities both within and often also outside the cultural sector has implications in many respects.⁴⁴ Also because of downsizing of public cultural institutions, there has been an increasing proportion of small business, of outsourcing, of self-employment, short-term contracts, freelance or part-time work.⁴⁵ In this setting there is not much left of labour law's premises: a clearly defined employer – employee constellation, full-time employment as well as defined working hours and working conditions.

Equally, the cultural labour market cannot be considered as a homogeneous one in other respects than that it presents a rationale that differs from the wage labour rationale, and must be treated accordingly. In the project *Pyramids or Pillars*, Austrian contributors have made a differentiation of artistic work that helps to grasp the cultural sector. In reporting on artistic work the authors were, not surprisingly, faced with:

⁴³ Aristotle, *Politics* (1987), p. 195.

⁴⁴ See *Pyramid or Pillars*, (2002), p. 10.

⁴⁵ *Pyramid or Pillars*, (2000), p. 10.

“[m]ethodological difficulties inherent when defining artistic and media professions according to “traditional” boundaries between the individual professions.”⁴⁶

Faced with this dilemma the authors opted for the following distinctions:

- (1) High culture, “artistic culture”: traditional, representative art with *symbolic profitability*.
- (2) Social culture: the so-called third sector in culture, which consists of process and communication oriented initiatives with *social profitability*.
- (3) Mass culture: culture and leisure industries with *economic profitability*.⁴⁷

This distinction among three different kinds of artistic work can be generalised to work at large as it differentiates the varied nature of work in a way that is as valid for the old ‘industrial era’, as it is for today’s context, only the proportions differ. A new phenomenon today is that the share of industrial work as the sector generating economic growth has diminished, whereas art and culture are among the fastest growing sectors of the economy.

9. A just treatment of artists

Because the focus has almost exclusively been placed on wage labour, and because the role of government in social welfare has been seen as one concerned with transfers and redistribution, attention has not been directed to the state’s role in constructing labour markets, Williams remarks.⁴⁸ She points out that established definitions

“reinforce the socially constructed identities upon which mainstream discourse and political rhetoric are founded. By pursuing a traditional social welfare agenda primarily

⁴⁶ Pyramid or Pillars, (2002), p. 43.

⁴⁷ Harauer, Robert, Mayerhofer, Elisabeth, Mokre, Monika ,Thanks for Playing Anyway, in Pyramid or Pillars, p. 43.

⁴⁸ Williams, (2002), p. 93.

*connected to an anachronistic image of the waged worker, and by distancing other members of society as 'non-productive', labour contributes to the stigmatisation of millions of low-waged and non-waged workers, including welfare recipients and immigrants."*⁴⁹

A basic question for legislative policy is therefore

*"what legal instruments and institutions should determine who receives the protection of labour law – how courts and other arbitral forums interpret legal definitions of who should be covered by labour law."*⁵⁰

Should not everybody? If we aim at justice the answer must be that everybody should enjoy the protection of law on equal terms. This requires new approaches and structures. One illustration of such a new approach is a scheme for artists introduced in the Netherlands in 1999.

The Dutch scheme for artists, '*De Wet inkomensvoorziening Kunstenaars*', WIK, departs from the recognition that artistic work does not fit the standard picture of work and that many artists are therefore unable to gain a living from their own artistic work. Thus a basic support system is provided.⁵¹ This system has many merits and could act as a model for a variety of activities outside the wage-labour structure.

A major merit of the WIK system is that it is flexible. The support provided by the scheme covers four years, but can be drawn upon over a period of 10 years. Thus an artist who gets a commission or a grant can temporarily exit the scheme and return once an income or external financing is no longer available. Through this formula the testing of thresholds is avoided, that in existing social welfare schemes often exclude those who are in the greatest need of economic support.

⁴⁹ Williams, (2002), pp. 94-95.

⁵⁰ Benjamin, Who Needs Labour Law? Defining the Scope of Labour Protection, in *Labour Law in an Era of Globalisation*, (eds) Conaghan, Joanne, Fischl, Richard Michael, Klare, Karl (2002), p. 76.

⁵¹ See Wik informatie, p. 18, *Kunstenaarswijzer* nr 29, herfst 2000.

10. Economic, symbolic and social values

To differentiate activities according to the values they represent in social cooperation, is one way of considering to each according to one's right, to each according to one's deserts and to each according to one's needs.

If we look at what a person is due in the artistic field, the activities representing a symbolic value appears to be most clear-cut as they represent activities that by the polity have been designated a societal function and worth. These are institutions such as museums, theatre, opera that can be placed on a par with education and research. These activities are the least problematic. Because of their institutional standing, their activities are regulated by laws and collective agreements. This does not mean that they would be unproblematic, but in their legal and institutional structures they conform to the legal regulation of working life.

In the entertainment and cultural industry the setting is more obscure because of the variety of ways in which economic profit is accrued, triggering questions such as who stands to gain from such products. Instead of an employer and employee-constellation we are here concerned with commissioners, producers and the doers. How is economic gain distributed among the different players involved? This is a highly versatile area of growing economic significance that would require another point of legal departure than the one represented by existing labour law. The same goes for activities generating social value. This sector is even more challenging than the one represented by the entertainment and cultural industries. This is because the value of such work cannot be measured in conventional economic terms, at least not in a neo-liberal sense. With a Keynesian approach to economics, it is easier to make sense of the value created in activities generating social value.

If we address these questions through the notions of rights, deserts and needs, a tentative picture emerges on the following lines: Where the nature of work conforms to conventional labour standards, such as is the case for those who perform artistic or cultural work within an employment relationship, they can assert their rights in regard to their employer, a municipal orchestra, theatre, museum, etc. Here the whole array of labour standards is available, such as compensation according to established standards

(collective agreements), social security provisions and different entitlements such as in-service training and so on. When artists are hired as so-called atypical workers, such as through fixed-term contracts or on a freelance basis, the testing of thresholds starts. There may still be some protection to be gained from labour legislation, when an employment relationship can be identified, but here uncertainty set in.

In much entertainment as well as artistic and cultural activities, work is done on a freelance basis. To a considerable degree such work is done outside an employment relationship and the protective provisions of labour legislation are lost. Here social security associated with employment is out of reach. The same goes for artistic and cultural work that is not primarily aimed at economic profit but done for artistic or communitarian purposes. These activities cannot be approached from the same perspective as work done in an employment relationship.

11. A new re-distributive agenda

A new re-distributive agenda is required that takes account of the variety of values created at the borderline of work. Symbolic, social and economic values are complementary and they are all an inherent, even a necessary part of any social setting. These different values also represent different modes of operation that have not been sufficiently brought to the fore. To look at the nature of 'profitability' as symbolic, social or economic also allows a fresh perspective on the distinction between public and private. The public – private distinction easily conceals from view the varied nature of activities carried out in the respective sectors, involving economic as well as social and symbolic values. This needs to be recognised and here we can be assisted by art because, as Gadamer notes "*Art begins precisely there, where we are able to do otherwise*", and we need to do otherwise today.

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