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### Regulation of labour relations and the development of employment

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## CHAPTER 2

# REGULATION OF LABOUR RELATIONS AND THE DEVELOPMENT OF EMPLOYMENT

ROBERT KNEGT

The scope of the employment contract as a legal instrument is currently receiving a great deal of attention. In June 2003 a committee of the International Labour Organisation (ILO) gathered in Geneva to discuss the 'scope of the employment relationship'. This interest is due to efforts to redefine the limits of the employment contract. 'Working for wages' is increasingly being given a form other than that of the employment contract, which can have significant consequences for the workers involved.<sup>1</sup> Employers, and sometimes workers themselves, have found that choosing another legal form can often lead to such advantages that the parties involved make efforts to escape the regime of the employment contract in this manner.

In many countries the employment contract has been the most obvious model for more than a century for parties who want to give legal form to independently performed labour. In that case, the salaried employment relationship acquires the legal form of an employment contract between two parties: an employer and an employee. It is an *agreement*, which in the Western legal system is based on the primary assumption that the parties involved have reached consensus on that agreement and the mutual obligations they have undertaken. For more than a century we have known that this is not always the case for employment contracts, either *de jure* or *de facto*. In some cases at least one of the two parties does not even wish to enter into an employment contract, but the court nonetheless qualifies a relationship as such.<sup>2</sup>

Clearly the question of how a labour relationship is legally qualified has consequences for the parties' options regarding their actions. For example, a client can generally terminate the business relationship with the other party

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<sup>1</sup> This trend was noticed in ILO session reports; see International Labour Office, 1995; 1993a.

<sup>2</sup> See Chapter 3, section 3.9 in this regard.

more easily if the other party is 'self-employed' than if the other party is legally qualified as an 'employee'. In the latter case it appears that although the labour relationship is considered primarily a bilateral legal relationship, organised public interests are also 'on the table', as it were – invisible but perceptible when the employment contract is signed, palpable and explicit if the state collects taxes or social insurance contributions or if there is a conflict and one of the parties invokes a government power to administer or preserve justice.

This is why for some time regulation of the employment contract has been the battlefield for various parties that wish to enforce their often mutually contradictory interests. This has led to the further normative 'dressing up' of the employment contract, and regulation has grown from the famous, meagre three articles contained in the Dutch Civil Code of 1838 to a collection of many tens of thousands of provisions in the current Civil Code, in social legislation, in collective labour agreements, etc. An *employment contract regime* has arisen, which has become increasingly inclusive and has grown into a social arrangement that comprises relationships in various fields, in which context the employment contract is always the 'cornerstone'.<sup>3</sup> As a result, the 'employment contract' is now commonly seen as a limitation, even a splitting headache. Companies attempt to use alternative forms of labour relationships but find that these are often opposed by employee organisations, the government or the ILO. They argue that the use of other contractual forms, such as the commission agreement, often leads to less advantageous conditions for workers than they have under an employment contract and that this is threatening to undermine the system of collective agreements governing employment conditions. In the Netherlands, collective labour agreements have been entered into in various commercial sectors by employer and employee organisations that have been declared generally binding, usually with the government's aid. For trade unions, and sometimes also for the government and employers, it can be important to ensure that the consequences of those agreements cannot be evaded by giving the agreements a different contractual form. Moreover, the government is concerned that by using a different contractual form parties may be able to evade their duty to make social insurance contributions. This would lead to a possibility of 'opting out' that would affect the foundation underlying the social insurance system, which is largely based on obligatory solidarity.

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<sup>3</sup> Kahn-Freund, 1983.

It is not only the regulation of the employment contract itself which determines the position of the regime: it is rather the comprehensive character of the regulations that are linked to the existence of an employment contract. In Western countries, legislation has been enacted since the second half of the 19th century that is intended to protect workers against a number of social risks, including unsafe work situations, unhealthy work, loss of income due to industrial accidents, disability for work and unemployment. Such legislation often links the protection to the existence of an employment contract.<sup>4</sup> This complex structure of regulations and mutual agreements implies that when two economic actors choose the form of an employment contract, in addition to whatever agreements they wish to lay down they are also bound by a whole slew of obligations. Moreover, certain agreements cannot be made legally, and if the parties nonetheless make them the state will not make its sanctioning power available to maintain them.

Relationships that involve the performance of work are an integral part of the complex aggregate of relationships between people living in societies. Some relationships are covered by the regime of the employment contract, some aspects of relationships are regulated, and some agreements on those aspects are subject to government sanctions – but not all. As was noted in Chapter 1, the regime of the employment contract includes some relationships, aspects and agreements that are related to the performance of work and excludes others. In the past, the boundaries that determine what is included and what is excluded were often the subject of discussion, and they have become so again today. The boundaries set by the regime of the employment contract are also the main subject of this book.

In this introductory chapter, the genesis and nature of the employment contract as a manner of giving form to labour relationships will be discussed from the perspective of a historical sociology of law. From what has the regime of the employment contract developed, what has determined its boundaries, and what does it thus include and exclude? The analysis is based primarily on literature covering Western Europe, in particular Belgium, France, Germany, the Netherlands and the United Kingdom.

Nowadays, comparative analysis generally focuses on co-existing, contemporaneous systems (including legal systems). A temporal comparison nonetheless remains an important source of insight into current and possibly

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<sup>4</sup> In that context it is sometimes a condition that the employment contract must have existed for a certain minimum period of time.

future developments in the law. To gain insight into the current position and possible future of the regime of the employment contract it is important to determine the regime's place in the development of the standardisation of labour relationships. The mutual relationship between normative frameworks (and the development of those frameworks) and the socio-economic relationships in which they are deemed to have an influence (and the development of those relationships) is very important in this respect. In section 3 particular attention will be paid to the development of the form of labour relationships. The economic and political context will be discussed, out of necessity, only summarily.

First, a few notes that are necessary for the further analysis will be elaborated in section 2.1. Section 2.3 will discuss the relationship of the employment contract with inclusion and exclusion. Finally, in section 2.4 the position of the regime of the employment contract will be discussed in light of current socio-economic developments.

## 2.1. NORMATIVE STABILISATION OF LABOUR RELATIONS: CONCEPTS AND ISSUES

However self-evident it may appear to be, historically speaking the employment contract is a relatively recent legal invention. In the roughly 5,000 years about which we know something about the legal form given to employment relationships, the rise and growth of the employment contract comprises only the last four percent. In most of that history, the standardisation of employment relationships was based on legal notions other than that of the employment contract with which we are so familiar.

Nonetheless, the employment contract now appears to be considered a kind of 'end of history', a legal concept so abstract that it can be used for any indiscriminate content and can act as the 'atom' of the legal standardisation of employment relationships. The fact that the abstraction and the flexibility attained thereby are one of the most important legal achievements of the contract is undisputed.<sup>5</sup> Nonetheless, as we shall see the employment contract has a number of peculiarities that seriously affect that flexibility and detract from the certainty of it being the ultimate legal concept that will withstand the test of time.

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<sup>5</sup> Cf. Luhmann, 1995: 459.

### 2.1.1. DEFINITIONS

In order to determine the position of the employment contract in the developments on regulation of labour relationships, this section will offer a brief history of that regulation. In this context, 'labour relationship' is taken to mean any relationship in which at least one of the parties directs her work to instructions from or agreements with the other party based on a perception of being 'obliged' to do so. This implies a broader concept of 'labour' than the concept of work that is performed for the benefit of others in exchange for monetary remuneration.

Incidentally, this conceptualisation is in line with a historical development in which the scope and meaning of the notion of 'labour' has been subject to a significant forward development. Before the last quarter of the 18th century, 'labour' meant primarily physical work geared towards production, with a connotation of suffering 'by the sweat of one's brow' and penance for sins. Only after the Reformation did this perspective become more positive, and the up-and-coming bourgeois culture added an element of 'self-development': human beings may have to endure the performance of labour but they can be grateful for the virtuousness and health that it bestows. More recently, 'labour' seems even more closely linked to the development of personal identity.

Virtually all labour is partly based on the forms of orientation towards or collaboration with others, and thus implies the existence of labour relationships. Labour relationships are based on reciprocal behavioural expectations, hence require a form of temporal constancy as soon as they acquire a somewhat permanent character. The division of labour in society requires organisation, organisation means looking ahead, and looking ahead requires the normative stabilisation of social actions – the sociology of law theory may be paraphrased in this way.

This normative stabilisation often takes a legal form.<sup>6</sup> Norms or agreements with respect to the performance of work are deemed to have a *legal* character if they have four characteristics:

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<sup>6</sup> Luhmann (1972, 1995) views temporal stabilisation of behavioural expectations as an important function of the law that is realised not so much because the norm directs direct motives for action but because it protects the party that expects non-standard acts, thereby indirectly giving that party interactive advantages (1995: 195).

1. *making explicit/including*: norms or agreements define a relationship in terms of reciprocal rights and obligations with respect to the performance of work;
2. *exclusivity/exclusion*: claims of others ('third parties') are thereby excluded or subordinated for the duration of the relationship;
3. *temporal stabilisation*: the reciprocal rights and obligations are projected into the future, forming the basis for stable mutual behavioural expectations; and
4. *guarantee*: the norms or agreements ensure that the party whose behavioural expectations are not met by the other party can be sure that the infringement will lead to a sanctioning response towards the other party.<sup>7</sup>

This also gives a broader view of what 'labour law' can consist of, from an *external* standpoint rather than from an immanent standpoint. Several answers are possible to the question of when we can say 'labour law' originated. The first, most restrictive answer is: with the implementation of its systematic practice as a separate legal field. In that case it can be localised in Germany in the third quarter of the 19th century and in the Netherlands in the third decade of the 20th century.<sup>8</sup> Second, in historical considerations the dominant view is that labour law arose in the 19th century as a response to the socially undesirable consequences of a liberal economy that was supported by the state for a large part of that century. The criterion is thus: government regulation to protect workers, which is considered to have begun in the Netherlands – incorrectly, by the way – with the Child Labour Act of 1874 (*Kinderwet Van Houten*).<sup>9</sup> This presentation of matters is mystifying if it is simultaneously suggested that in the first half of the 19th century there was a kind of rule-free liberal market situation that led to excesses only under the influence of industrialisation, for which labour law would have constituted the adequate, compensating answer. It is likely that the regulation of the employment contract in the Dutch Civil Code initially had little practical

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<sup>7</sup> That response need not always be given in every case, but it is essential that the 'party' in question can expect it. Moreover, the response need not consist of physical force – not that physical force on the part of the government is a condition – it can also have a sacral character.

<sup>8</sup> Cf. Becker, 1995. In Germany Hugo Sinzheimer, in addition to Gierke and Lotmar, played a prominent role in establishing this field of law; in the Netherlands that can be attributed to P.A. Diepenhorst, W.H. Drucker, M.G. Levenbach and A.N. Molenaar, among others. See e.g. Levenbach, 1929.

<sup>9</sup> Act of 19 September 1874, Stb. 130. (N.T.: Stb. (*Staatsblad*): Bulletin of Acts, Orders and Decrees.) Incorrectly because French legislation for the protection of the safety of mine-workers had already been declared to apply in Dutch territory in 1816.

impact on the design of labour relationships; only once that regulation began to be taken seriously during the second half of the 19th century did the extent to which it failed to connect to the nature of the labour relationships become clear. However, this second view of 'labour law' has a tendency to identify the lack of statutory regulation with a lack of regulation of relationships in practice. In doing so it ignores the various forms of local regulation that, both in the form of municipal law and customary law, exerted their influence on labour relationships not only before but well into the 19th century.<sup>10</sup> It sometimes seems as though the historiography of labour law has not yet left behind the French Revolution, with its radical denial of prior legal relationships.

The third and most adequate view of labour law is that it comprises all the forms of legal regulation of labour relationships in the sense outlined above.<sup>11</sup> From an external point of view there are, by contrast, substantive reasons not to place a demarcation line at the revolutionary developments that took place around 1800 when the French *Code Civil* was enacted or when the Dutch Civil Code was enacted in 1838. Even more, these developments and their influence on labour relationships must be seen in a different light if in that sense we let go of the legacy of the French Revolution and the dominant liberalistic view of the rise of labour law.

At a first glance, the latter view seems to significantly expand the field of study; however, this expansion is restricted by the decreasing, limited availability of material as we look back further in time. For example, in patrimonial relationships, where command and jurisdiction are united in the person of the master, there may be unwritten rules to which a subject can appeal in the event of an infraction, but records of these practices are scarce. To a large degree, the same holds for jurisprudence as a source: until the 18th century there appeared to be little tendency to litigate in matters related to labour relations. In an urban environment conflicts did develop, but they could mostly be settled via the internal judicial function of the guilds, and that did not change until the 18th century, in any event in Belgium and France. Journeymen and masters from the guilds regularly called upon the urban courts to enforce compliance with the regulations of the guild.<sup>12</sup> This change is related to the larger distances that arose between masters and tradesmen in

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<sup>10</sup> Atiyah (1979) also assumes that the classic contractual model in the 19th Century still corresponded to actual practice. Cf. the criticism of that view put forward by Deakin (2001: 8).

<sup>11</sup> See e.g. Meyer-Maly, 1975.

<sup>12</sup> Cf. Sonenscher, 1987.

that century, which made calling upon an external agency possible for the first time.

### 2.1.2. THE GOVERNMENT AS 'THIRD PARTY'

The government has always – or in any event since the rise of urban crafts – been involved in labour relationships as a 'third party'. In the beginning of this chapter it was made clear that although in the law the labour relationship is primarily considered to be a bilateral legal relationship, organised public interests are also 'at the table' when an employment contract is entered into. The latter metaphor may not be adequate because it fails to do justice to the government's special position. It might be better to say that the government really only sits and listens in *under* the table: has it not, both previously and today, deliberately and explicitly authorised private parties to organise their relationship, so that it need only ensure that the related conditions are complied with? Or perhaps we should say that despite its physical absence at the negotiating table the government nonetheless fills the entire room; after all, is it not the government – particularly in recent history – which has laid down the concepts, rules and possibilities of enforcement in advance, so that the parties at the table are continuously adjusting to what the government has done? If for a moment we limit our discussion to recent history, we can conclude that it is the government which:

1. offers a closed system of conceptual frameworks that make it possible to give form to labour relationships, and in fact makes them also obligatory insofar as the parties wish to be able to invoke enforcement by the government;
2. formally regulates the conclusion and severance of labour relationships;
3. guarantees the enforcement of those formal rules and the mutual agreements made within employment relationships (if they are legitimate and adequately designed) through its judicial system;
4. sets certain boundaries on the content or scope of those agreements relating to labour relationships on the ground of collective interests (protection, compensating inequality), excluding certain options of private parties and imposing other, mandatory obligations; and
5. imposes obligations on parties in connection with collective schemes (*e.g.* making social insurance contributions).

Insofar as in many modern, Western legal systems protection, compensating inequality (4) and social insurance schemes (5) are closely linked to the existence of an 'employment contract', those who participate in economic life as 'self-employed' are to a large extent expected to fend for themselves in the market for goods and services and to be able to compensate for subsistence risks themselves if they so choose. Because various legal qualifications imply very different claims and obligations in this respect, for the government it is also very important to determine whether a relationship is qualified as an 'employment contract'. This applies particularly to the pursuit of well-balanced and stable relationships in the labour market (counterbalancing inequality, employee participation) and with regard to social insurance (see section 4 below).

### 2.1.3. REGULATION OF EMPLOYMENT RELATIONSHIPS AND SOCIO-ECONOMIC DEVELOPMENT

What is the correlation between the formal design of labour relationships and the development of the economy and production relationships? A brief answer should suffice here. It has been pointed out that labour relationships require a normative stabilisation that also tends to acquire a legal form. It would be incorrect to try to fit that relationship into a sequential model, in the sense that the nature of the production process would lead to certain labour relationships, which in turn would 'precipitate' a legal form. It is more likely that the standardisation of relationships is a permanent aspect of the relationship designs and an indirect part of the organisation of the production process. An example borrowed from the 17th- and 18th-century practice of the Amsterdam guilds can illustrate this:

Peat porters' guild<sup>13</sup>

(1) *Political economic conditions:*

Urban society generated a need for fuel. In Amsterdam in the 17th and 18th centuries this was furnished by the supply of peat, which was transported by ship via the Amstel River. The unloading of the peat at Oude Turfmarkt led to a somewhat fluctuating need for untrained labour, the provision of which needed a stable basis in view of its importance. The mutual relationship between the 'peat porters' was that they competed amongst themselves for the cargo to be unloaded.

(2) *Organisation of the production process:*

Peat porters were paid on the basis of the amount of cargo that they unloaded. After 1619, the Amsterdam peat porters' guild provided for a *numerus fixus* (in or around 1765 there were 366 peat porters) and a rotation system to distribute the work. Peat porters worked 'by the pin': the designated 'peat father' stuck a pin next to a name on a list of peat porters to indicate that it was a particular peat porter's turn. If a porter did not show up when it was his turn, he forfeited a penalty or was suspended. A replacement filled in for a porter who could not take his turn due to illness or old age, and paid part of his earnings to the disabled porter in exchange for his turn.

(3) *Legal form and regulation:*

The peat porters' guild was an association to which porters were admitted by the municipal authorities in connection with the *numerus fixus*. Together they had a monopoly, protected by municipal approval, to unload peat; they determined their working methods in consultation and submitted them to the municipal authorities to be ratified. Their solidarity consisted of arrangements for loss of income in the event of disability for work. They acknowledged the 'peat father' as the administrator of the distribution system of the guild and as the authorised adjudicator of disputes.

On the one hand, political and economic conditions contributed to the organisation of the business sector in the organisational and legal form of a guild; on the other, that form of association was a condition for the operation of the rotation system and the related social certainty, which in turn were the conditions for uninterrupted provision of peat to the city.

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<sup>13</sup> Source: Bos, 1998: 112-27.

#### 2.1.4. CONNECTION BETWEEN A HISTORICAL SOCIOLOGY OF LAW APPROACH AND OTHER APPROACHES

A historical sociology of law perspective views the regulation of labour relationships as part of institutional arrangements. This differs from the individualistic approach usually followed in jurisprudence and economics. Both legal and economic literature use the relationship of the principal/employer and performer/employee as the unit of analysis when attempting to determine the characteristics of the employment contract. Economists generally analyse the employment contract on the basis of the model of a repetitive commodity contract where transaction costs cause sustainable agreements on job demarcation, subordination and employee remuneration to offer efficiency gains.<sup>14</sup> Such deductive-nomological analyses can offer valuable insights into the practical rationality of the actors involved, into the consequences for the content of the contracts that they will sign under the existing economic conditions, and into the role that institutions can play in that respect. Although under certain conditions they can even be useable for the analysis of pre-capitalist economic relationships, their drawback is that the development itself of the social conditions falls outside their scope. They have a tendency to see the existence of markets and contracts as a 'natural' fact and not as a contingency: as something that is the result of a long period of social development that can operate only under certain social conditions. Hence they can inform us only to a limited extent about the genesis and future of labour relationships and the 'legal order of labour'. In the legal literature too, the relationship between two natural persons or legal entities in principle constitutes the point of engagement, although the collectivisation of labour relationships in labour law led to new legal forms at the supra-individual level (*e.g.* the collective labour agreement). The development of labour law is made thematic but then limited to that of positive law laid down by the state, starting when the national legislature became involved in the protection of labourers in the second half of the 19th century. Insofar as legal history addresses the preceding periods, its perspective is primarily that of the history of ideas, in any event in the Netherlands.

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<sup>14</sup> *Cf. e.g.* Coase, 1937; Simon, 1951; Williamson, 1975; Marsden, 1999.

#### 2.1.5. ASPECTS OF INSTITUTIONAL ARRANGEMENTS

If we now take as our point of departure the labour-related institutional arrangements that have developed in the course of time, we can mention a few aspects that form part of those arrangements in various combinations. In that context we can differentiate between the manner in which interrelated activities in the production process are *coordinated* and the *redistribution* of the proceeds and risks of those activities. Activities can be *coordinated* using three patterns, which are not necessarily exclusive:

(a) Vertical coordination (relationship of authority)

The mutual orientation of activities within the framework of medium-scale and large-scale production requires a certain degree of coordination, which can usually be most efficiently organised by means of a hierarchical model. Thus, as part of an institutional arrangement some workers may be expected to be implicitly or explicitly willing to follow and comply with instructions from others ('obedience' and 'subordination'). This model places a formal unilaterality on the labour relationship in terms of the organisation and performance of the work. In economics, based on an assumption of rational, calculated behaviour transaction cost theory reasons the conditions under which this method of coordination is more efficient than the types discussed below.

(b) Horizontal coordination (cooperation)

This aspect can be simply summarised by saying that when more than one person works on something there is always a greater or lesser degree of cooperation. Being physically present together in one place, for example in an industrial space, implies in and of itself behavioural norms that have a significant communal character and which are experienced as such. Important aspects include a certain degree of temporal permanency in the relationship ('loyalty') and a certain orientation towards communal goals ('solidarity'). Quite often, in the course of time relationships that are in principle vertically structured acquire a more horizontal character as the subordinate manages to acquire a more powerful position with respect to the superior. On the other side of the spectrum, market-based relationships (see pattern c) can also acquire such a lasting character that cooperation may be a more suitable description (for example in networks of self-employed persons).

(c) Coordination via market relationships (the market)

The mutual coordination is realised because participants are given a relatively independent responsibility for manufacturing and delivering part of a product, for which they are paid in money upon delivery. The form of this arrangement consists of a series of consecutive business transactions with a short temporal perspective.

Each arrangement also relates to material *redistribution* in the sense of the allocation of control over the resources and proceeds of the production, or of the allocation of risks. In the context of the relationship between parties, we find rules or agreements on the distribution (or redistribution) of proceeds and burdens, which take the form of:

- (a) allocation of resources and/or allocation of a share in the proceeds from the production, which must serve as a means of subsistence; and
- (b) allocation of the burdens that can result from the occurrence of risks that can affect the production itself and/or the social existence of the parties.

## 2.2. LEGAL FORMS OF INSTITUTIONAL ARRANGEMENTS

The legal forms in which relationships are categorised are more than merely form: they have their own influence on the development of institutional arrangements. Which forms are actually used in a given period depends partly on the forms that are available for that purpose. For example, it is known from legal history that in a period in which 'kinship' was the only model available for lasting, reciprocal obligations, newly-created relations were stabilised as 'quasi-kinship' relationships. For similar reasons, a transfer of powers always took the form of the physical transfer of a moveable piece of property.

Within the limited scope of this contribution four arrangements will be discussed, which extend over a period that exceeds a millennium. In that context we will see that in addition to all the variation a considerable degree of continuity in Western labour law can be discerned.

### 2.2.1. MANORIAL SYSTEM AND VASSALAGE

In the still primarily agrarian society of medieval Western Europe before the 12th century, production and consumption – and in connection with them administration and the law – had a predominantly local and, in that sense,

'fragmented' character. Trade and commerce were still marginal phenomena. In the feudal system, which in this context is primarily seen as a system of division of labour,<sup>15</sup> patriarchal and domanial relationships prevailed: in the manorial system the serf forms part of and knows his rights and duties as a member of the 'household' of a vassal; the vassal in turn is in a relationship of vassalage to a lord or liege.<sup>16</sup>

What is peculiar – and possibly unique to relationships in the West<sup>17</sup> – is the degree to which this hierarchal subordination simultaneously had a conditional character that was expressed in reciprocal rights and obligations.<sup>18</sup> The liege was obliged to protect his vassals and in return could rely on their loyal dedication, for example in defending the territory. The reciprocal character of the vassalage appears among other things from the fact that this dedication was limited to a maximum number of days; if that maximum was exceeded due to what was necessary for defence, the vassals could claim a daily allowance. This is also clear in cases where the vassalage was brought about at the initiative of the vassal by means of an owner's 'voluntary' transfer of land to the lord, who in turn grants the land to him as a fief and thus creates reciprocal obligations involving protection and service. The vassalage was often referred to by contemporaries as *servitium*, a Latin term that had by then already long lost its original association with slavery which developed through service in the household of a *dominus* into a model for every form of 'honourable dependence'.<sup>19</sup> For the formal design of labour relationships this means that in addition to household personnel, functionaries were 'appointed' in this manner. *Service* was also the model for young people who entered into

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<sup>15</sup> It is customary to consider it a political system; however, it is more correct to acknowledge that 'politics', 'legal system', 'economics' and 'labour' were as yet undifferentiated in that system.

<sup>16</sup> The public ritual (*homage*) conducted by the latter act is typical of the complexity of that relationship: the vassal kneels, bows his head and places his folded hands in those of his lord (as a sign of his submission and subordination in a hierarchal, mutual relationship) and kisses his lord on the mouth (as a sign of loyalty in a relationship of quality and solidarity), after which the lord transfers to him by means of a symbolic act (for example by giving him a lump of clay) possession of a fief (investiture in the means of sustenance). Cf. Bloch, 1961: 145 ff.

<sup>17</sup> According to Bloch, 1961, part II, final chapter. This had major consequences politically, in particular for the reciprocity of relationships of authority and the defensibility of 'disaffection'. I would mention as a well-known example the apologia in which Marnix van Sint-Aldegonde substantiated Willem van Oranje's *verlaetings* from the Spanish king in 1567.

<sup>18</sup> In some systems the vassal could unilaterally end the relationship; in other systems he could do so only in the event that the lord committed certain defined transgressions. Cf. Bloch, 1961: 158.

<sup>19</sup> *Ibid.*: 160.

an apprenticeship in the house of a lord. In exchange for the services rendered there was the promise of protection and support. Until a monetary economy arose, the lord had only two choices with respect to supporting 'his men': he could include them in the household or grant them a fief. Use of the latter option unavoidably led to greater actual independence of the vassal in relation to the lord, to a relationship of interdependence with a more horizontal character, and thereby strengthened the conditional character of the subordination.<sup>20</sup>

It was characteristic of the development phase of law and social relationships at the time that if there was no other suitable legal form, vassalage was sometimes used as a form to confirm agreements that we now would merge into the form of a contract under private law. Where an institutionalised and enforceable law of obligations had not yet been effected, the creation of a hierarchical relationship, through the ritual of honour and subordination, was used as a form to perpetuate relationships. This working method led to the element of 'subordination' gradually losing its content, so that it ultimately remained only in form.<sup>21</sup>

### 2.2.2. LAW, STATUS, LEGAL POSITION AND CONTRACT

The law that was predominant until the 18th century was an expression of an objective order in which reciprocal obligations were linked to status positions. Taking up a particular position thus entailed acquiring a fairly fixed aggregate of rights and obligations. The source of the rights and obligations could vary on the basis of the nature of the position: they could be based on customary law, they could be unilaterally granted by written proclamation, they could be imposed by an authority that was seen as legitimate or they could be mutually agreed upon in the context of a corporative relationship. Whatever the case may be, status implied the awareness that one formed part of and belonged to a social group – family, neighbourhood, guild, city – that held a fixed position in a hierarchically ordered social relation. From our position looking back we can say that the lack of the notion of freely entering into commitments further increased the legal importance of 'status'. Earlier forms of the creation of commitments were thus formally in line with the old form of 'status', the

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<sup>20</sup> Weber (1978, vol. 2: 1010) notes that 'such a relationship [...] always evolves the subjects' claim to reciprocity, and this claim "naturally" acquires social recognition as custom'.

<sup>21</sup> This process can also be illustrated on the basis of how assurances of esteem and loyalty are used in different languages when signing a formal letter.

very first forms consisting of symbolically creating an artificial consanguinity.<sup>22</sup>

Status was also predominant for a longer period of time for the normative framework of labour relationships. The relationship of the feudal lord to his vassal, the relationship of the guild master to his journeyman or apprentice, of the farmer to the farmhand, of the master of the house to the servants, implied a large degree of control which was limited to varying degrees by conventional or legal obligations. Sometimes the relationship took the initial form of ownership of persons; later it became possible to unilaterally terminate a relationship, which ultimately developed into the formal freedom to enter into labour relationships oneself. In that context it must be remembered that the differentiations with which we are now familiar had not yet come into play, and that the manner in which labour relationships were regulated was not primarily geared towards the labour itself but was practically and ideologically determined by legal fields such as family law (patrimony) or property law (land ownership). The current differentiation between 'labour' and other fields of life is an artefact that had not yet been created at that time. Unlike latter 'contractualism', a characteristic of the relationship in terms of 'status' was that it created reciprocal obligations whose nature can be indicated but whose exact content is necessarily undetermined and dependent on context and time. Although this characteristic generally comes under pressure as the relationships are interpreted more contractually, it has a tough constitution as a normative model – even today, relationships are actually or normatively defined in terms of 'patronage' or 'stewardship'.

'Status' was much more than an aggregate of rights and obligations related to labour, it was an entitlement to a public identity that was very closely related to collective feelings of honour. People presented themselves as such in the public arena, both externally (in the right clothing for their profession, under the banner of the guild, in the right position in the annual procession) and internally, within their own collective (in their participation in local (neighbourhood) or functional (guild) fraternisation rituals).

Entering into relationships that could also be qualified as labour relationships had already been 'contractual' for some time, in the sense that this happened on a formally voluntary basis. However, the *content* of the rights and

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<sup>22</sup> Weber, 1978, vol. 2: 672 ff. Status is still important now, despite the 'contractualisation' of society; for example, the status of 'parent' or 'public official' is linked to various rights and obligations that are the same for all those who hold that social position.

obligations attached to the relationship were not deemed to be available to the parties. This changed in the 18th century, when a view based on natural law attempted to link institutional frameworks with individual freedom. For example, in France the position was taken that as a citizen every member of a guild was entitled to his natural freedom, which he then contractually transferred to the sovereign's custody. In doing so he acknowledged his sovereign's authority, in exchange for which the sovereign granted the guild as a collective body an entitlement to manage its own affairs. The sovereign formally gave assent to this outcome and provided it with sanctions.

### 2.2.3. LEASE

With the rise of the monetary economy, the gradual trade growth and the increasing interwovenness between the growing cities and rural areas, an arrangement developed in agrarian relationships in Western Europe starting in the 11th century which gradually completed the transition to a contractually conceived relationship: the lease. Within the manorial structure, serfdom very gradually disappeared in favour of tenures, and the obligations related to the provision of services in kind (*corvée*) shifted towards the monetary lease. The payments by farmers gradually came to be seen as a fee for use of the land rather than as a sign of serfdom.<sup>23</sup>

This did not happen without a struggle: farmers' collective refusals to work were already known to occur in the middle of the 11th century, and proliferated in the 12th and 13th centuries. The growing cities attracted population from rural areas, while large reclamation projects were started, particularly in the 12th century. The horizontal mobility of the agrarian population that this generated strengthened the position of those who remained behind. This promoted the development of an arrangement in which the reciprocal rights and obligations of the lessee and the lessor were defined. Important matters in that respect included the amount of the payment to the lessor, obligations related to the maintenance of the land, the right to compensation for improvements made voluntarily by the lessee, and the inheritance or transfer of the leasehold to family members or others. Initially long-term tenancy was predominant, but beginning in the 13th century the urban middle classes, which started investing increasing amounts of capital in land, began using time-bound leases more often for better pieces of land. With these leases the land was usually leased for a multiple of three

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<sup>23</sup> Reinicke, 1989: 86.

years, and the lessee was obliged to apply more intensive methods of agriculture.

The development towards the lease bears witness to the change from a use of land based on the law of persons to a use of land based on property law. The Latin word *pactum*, closely related to the Dutch word *pacht* meaning 'lease', refers to both the rental and the entire legal relationship. In Latin documents the lease was often denoted with the word *conductio* or *locatio*.<sup>24</sup> Whether the reception of Roman law starting in the 12th century also played a constituent role in the rise of the lease as a legal form is unclear. It is also possible that it merely provided the terminology that legally trained clerks used when laying matters down in writing.

#### 2.2.4. GUILDS

In the developing cities, trade and crafts, which were concentrated there, led to other forms of organisation and regulation of labour relationships. Corporative organisations formed, first among merchants and subsequently among craftsmen for their trades: the urban guilds. Early forms of guilds built on older models, in particular those of religious fraternities. Thus, initially they were first and foremost fraternal, in the second place religious and only in the third place associations that internally organised the sector and represented external, common interests. The religious character gradually wore off, until the Alteration in the Netherlands ultimately put a definitive end to it.<sup>25</sup>

From a social perspective, the form of a voluntary association that organises and regulates its own activities was an important innovation. The mutual rights and obligations that the members assumed were legally based on the *coniuratio*: the oath taken by all members, the legal form that in many cases was also considered the basis for the legitimacy of the new Western city.<sup>26</sup>

Initially the guilds united both masters and journeymen in one organisation. In the course of the 18th century a process of social differentiation

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<sup>24</sup> *Ibid.*: 88.

<sup>25</sup> It is worth noting the secularisation that took place in Amsterdam on that occasion: the contributions that the guilds used to reserve for worship were thereafter deposited in the municipal fund for the poor.

<sup>26</sup> *Cf. e.g.* Althoff, 1990; Blickle, 1996; Dilcher, 1985; Oexle, 1996; Schwineköper; 1985.

commenced in which the social distance led to a separate organisation for journeymen, who in turn oriented themselves on the basis of models of religious fraternities and at the same time acted as an organised interest group. The *compagnonnages* in France, for example, were able to control employment policy to a significant degree, thereby forming a strong opposing force against the masters in some sectors.<sup>27</sup>

The guilds, which used to be associated primarily with the Middle Ages, still played a prominent role in the regulation of industry in the 17th century and the first half of the 18th century in Dutch and German cities, among others.<sup>28</sup> In Amsterdam more than 30% of the male working population was organised in guilds, and in other Dutch cities that percentage was as high as 80%.<sup>29</sup> The guilds' rules and regulations had the character of collective agreements that the municipal government declared generally binding; as a result they could be enforced vis-à-vis outsiders and foreigners. They contained provisions governing amount of wages, working hours, working conditions, product quality and employment policy. An important element was always the control of access to the local labour market; the journeymen attempted to force a 'closed shop' on the masters, and in exchange the masters demanded that their journeymen loyally perform their work.

Most guilds had *bussez*: funds that provided income support in the event of illness, old age and death. Those funds were built up by means of the premiums collected. Within the guilds, disputes between masters and journeymen or amongst themselves were resolved by the guild masters. Also in the guilds, the position that one assumed had a high 'status' quality: merely joining as an apprentice or journeyman meant being accepted in the guild, and as a result all the existing rules of action applied.

A relatively new element in this arrangement was the interweaving with public life in the city. The craftsmen presented themselves in the city's public arena. Problems related to the organisation's functioning quickly led to disruptions in the public order, which necessitated the municipal government's involvement. The municipal government generally ratified the guild's rules and regulations and made available its authority to impose

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<sup>27</sup> Truant, 1994.

<sup>28</sup> England seems to have been an exception; the influence of the guilds there was restrained relatively early.

<sup>29</sup> P. Lourens & J. Lucassen, 1998, *Ambachtsgilden binnen een handelskapitalistische stad: aanzetten voor een analyse van Amsterdam rond 1700*. 121-162, [http://www.neha.nl/publications/1998/1998\\_07lourens.pdf](http://www.neha.nl/publications/1998/1998_07lourens.pdf).

sanctions, but otherwise it had an interest in allowing the guilds to arrange most matters for themselves.<sup>30</sup> It actively intervened only when there was a threat of the public order being disrupted, for example when the cloth shearers in the textile industry caused a great deal of labour unrest.<sup>31</sup> Like the latter relationship between the government and the social partners, the interdependence between the government and the guilds was characteristic of the guild system. In exchange for the guild members' acknowledgement of the local government's monopoly on the use of force, the local government largely left regulating matters to the guild members themselves. Gradually, and increasingly in the 18th century, when the differences of opinion between masters and journeymen intensified, the government took on the position of arbitrator in which it initially generally sided with the journeymen, then supported the masters in the second half of the 18th century and finally abandoned them too in favour of the rising commercial capitalism.

For a long time, the guilds suffered from a bad reputation as a result of their being branded monopolistic clubs during the French Revolution. Only in recent decades has the relevant literature noted that in some cases the guilds were able to achieve well-developed regulation in the areas of working conditions, employment policy and social insurance.<sup>32</sup>

#### 2.2.5. WAGE WORK

In Germany and the Alpine region, the early involvement of the rising urban middle class in the mining industry led to labour relationships that at an early stage were very similar to those in the industrial age. The investments of aristocrats and rich burghers in the mining industry in those regions already started to increase at the end of the 12th century. The small businesses that, employing a few *Gesellen* and *Jungen*, were involved in the mining industry until that time were forced to make way for wage-earning workers for whom mining was the only or in any event the primary source of income. The combination of the relative proletarianisation of the miners and the risky nature of their work led to collective welfare benefits (medical services, benefits in the event of disability for work) at an early stage, which had already been laid down in an early form of collective arrangements (the

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<sup>30</sup> In some cities, more often in Flanders and Germany than in Holland, guild representatives held set, prominent positions in the municipal government.

<sup>31</sup> R. Dekker, cited by van Vree, 1994: 167-169.

<sup>32</sup> Cf. e.g. Bos, 1998; Lis & Soly, 1994.

*Bergordnung*) by around 1300. At the beginning of the 14th century the miners were already involved in the implementation of suitable arrangements and the application of those arrangements in the event of a conflict through the participation by older miners (*seniores*). In the 16th century, organisations of miners (the *Knappschaft*) participated in the management of the mine, and there were jointly financed funds for a number of social risks and institutionalised forms of resolution of labour disputes. Thus, there was industrialisation of wage work relationships in Europe at a much earlier stage than is generally assumed.<sup>33</sup> It even appears that relationships which are now referred to as falling under the 'polder' consensus model were already regulated in the *Bergrecht* of the 14th century.

The mining industry mobilised labourers from near and far from the Middle European population on a scale that was exceptional at that time. The only other labour organisations that existed at a comparable scale were armies (hierarchical relationship of command, military pay), the shipyards in Venice and Amsterdam, and a few large trading companies such as the United East-Indies Company (the VOC) and the East India Company (position differentiation under hierarchical supervision, allowance (*tractement* in Dutch) or salary).

In dependent labour, various forms of labour relationships were dominant. Domestic staff<sup>34</sup> and many farm workers<sup>35</sup> were employed for a term of usually one year, and sometimes six months, on the basis of a separate legal status (*Gesinde*, servant). In addition, wage work existed everywhere (day labourers in the agricultural sector or to build canals, dikes and fortifications), but on a relatively small scale. In rural areas it comprised no more than a small percentage of the working population, but a larger percentage in the cities.<sup>36</sup> In some large Dutch cities, workshops with larger groups of labourers could be found in the course of the 17th century (textile) and even more so in the 18th century (leather, confectionary products), where related industrial conflicts and, already in the 18th century, collective employment conditions could also be found.

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<sup>33</sup> Klatt, 1990: 47-52, 75-78. Tomlins, 1993.

<sup>34</sup> In the second half of the 17th century 10-20% of Dutch households employed at least one servant, usually a maid, who remain employed an average of two to three years (Haks, 1982). Many cities had servant regulations that governed matters including working conditions, protection against dismissal and procedures to resolve disputes (Bosch, 1931; 1932; Jongejaan, 1984).

<sup>35</sup> Klatt, 1990: 47-52, 75-78.

<sup>36</sup> Cf. Slicher van Bath (1960) on agrarian relationships, and van Zanden (1991) on the cities.

## 2.2.6. THE REVOLUTION AND THE LABOUR RELATIONSHIP: THE MODEL OF THE 'FREE LEASING OF LABOUR'

The second half of the 18th century brought a combination of changes, including technical and organisational (expansion of industrial workshops), philosophical (the Enlightenment) and political (in the United States in 1776 and in France in 1789: '*liberté du travail, du commerce et de l'industrie!*') transformations. During the French Revolution, the individualistic principle of contractual freedom became dominant in the thinking about labour relationships. Legal reform was a political project that reached the Netherlands through the French influence. An important characteristic was the radical political break with ties to status positions, also in labour relationships (the motto was 'absolutely no privileges for any group or any individual'). The abolishment of the guilds led to the formal elimination of (often subtle) rules for apprenticeship and employment policy measures, and to the disappearance of various social security arrangements.

In the new regime that sought dominance, working for others was classified under the model of the lease (*location conduction* under Roman law). Initially, the legal concept of leasing the working capacity was strongly based on the idea that the labourer (as *citoyen-propriétaire*) was the owner of his working capacity but transferred the disposal over that working capacity to another party for a certain (!) period of time or for a particular job in exchange for wages, in the same way that material goods can be leased to another party.<sup>37</sup> The ownership was seen as the basis of his independence and as the incentive for economically rational actions, the contractual freedom seen for the first time as a natural, *subjective* right. From a dominantly liberal perspective, any type of protection of the labourer against the patron's position of power was considered an unjustified limitation of the beneficial effects of the market mechanism.<sup>38</sup> The employment contract makes subordination the subject of an enforceable agreement between formally free and equal citizens, and to that degree can be deemed a significant social invention. As such it was also welcomed by natural law theorists. In the

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<sup>37</sup> Thomas Hobbes, 1965 (originally 1651): 'A man's labour is a commodity exchangeable for benefit as well as any other thing'.

<sup>38</sup> Cf. the 'employment at will' doctrine in the USA, which still applies, although it has been mitigated somewhat by case law.

course of the 19th century the employment contract acquired a pivotal position in the assignment and regulation of dependent labour.<sup>39</sup>

Also interesting is the development in England, which in the second half of the 20th century ended up at a place comparable to that of the Continental legal system, albeit by means of a very different route. That different development was caused by the absence of a civil revolution and the relative stability of the common law system, which in terms of labour relationships continued to build on the old concepts of master and servant, service and apprenticeship. Until well into the 20th century, contractual notions continued to be reserved for the higher occupations, whose character courts could not bring in line with service. Subsequently there was a concept of a 'contract of service', but it was not until the Beveridge reforms in 1946,<sup>40</sup> when social insurance legislation required that limits be set on the target group that was subject to mandatory insurance, that the necessity arose for an 'employment contract' that could clearly be differentiated from other forms, such as self-employment.<sup>41</sup> In England it was thus the link between social insurance and the need to demarcate employment which gave rise to the abstract notion of an 'employment contract'.

In the second half of the 19th century, vertical integration started to become a dominant form of economic organisation which partly replaced existing forms of subcontracting such as those used in the 'putting-out system'. On the one hand, this involved an increasing use of bureaucratic organisational forms and new legal forms for companies (building on mediaeval notions of limited liability in commercial transactions); on the other hand it involved the use of the employment contract as an institution that linked the labour supply to the organisation of production such that economic risks could be covered. In the context of factory production, the need for implementing more efficient production methods led to a process in which the distance to the individual contract was maximised and company regulations started regulating the work procedures. The combination of formal equality (of the contractual parties) and subordination (the labourer's transfer of the disposal over his working

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<sup>39</sup> In any event in the USA and Continental Western Europe, but not until the mid 20th century in England. What is not commonly known is that the last criminal sanction on the failure to perform work was not abolished in the Kingdom of the Netherlands until 1931! (Langeveld, 1975).

<sup>40</sup> Lord Beveridge is widely recognised as founder of the post-WW II welfare state in Great Britain, due to reports issued under his supervision in 1942 and 1944; his name has been attached to the reforms themselves.

<sup>41</sup> Cf. Deakin, 2001; Freedland, 2003: 15-18.

capacity to the industrialist) brought about by the employment contract, which natural law theorists welcomed as a fantastic achievement, can now clearly be seen as a paradox.

This generated a need to set boundaries on opportunistic behaviour on the part of industrialists while obtaining guarantees in order to protect against the social risks related to dependence on wages. Hence the employment contract came to perform a pivotal function in a trade-off between subordination (to the person of the patron and to the blind forces of the economic process) and social protection. The government increasingly came to play a role as a third party in this respect, which also strengthened its own position. National legislation governing industrial health and safety and social insurance can even be said to constitute an essential moment in the process of state formation starting in the last quarter of the 19th century. The arrangements that came into being in that respect do not detract from the fact that, ideologically speaking, contractual freedom remained central. However, in the field of labour relationships it was considered a revocable concession more than a natural right.<sup>42</sup> In the form that neo-corporatist arrangements took, the view was taken that everything arose from negotiated contracts.<sup>43</sup> The contract, now in the form of a collective labour agreement, simultaneously has the character of a non-statutory regulation that exceeds the normal law of obligations in its binding effect, thereby presenting problems for legal theorists.

Although the relationships have changed considerably, it appears that to date the employment contract has been able to adapt itself as the pivot of the relationship between the organisation of production and the labour supply. Perhaps this is due to the fact that its content does not oppose but rather generously allows for 'linking up' all kinds of policy measures. The transparent simplicity of the free contract,<sup>44</sup> with which the middle classes around 1800 believed they could free themselves of the corporatist connections they experienced as being so oppressive, was increasingly undone in the second half of the 19th century by the new forms of organisation, self-organisation and institutionalisation, which led to regulation of reciprocal rights and obligations. The employment contract managed to maintain its position as the

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<sup>42</sup> Simitis, 2000.

<sup>43</sup> Sinzheimer's concept of 'collective autonomy'. Cf. Sinzheimer, 1929.

<sup>44</sup> Supiot (2000a: 324) said it well when he spoke of the 'rustic anthropology' of contract law, in which humankind in all its simplicity knows what it wants and what is good for it – a model that fits in well with the perspective of the law and economics movement.

‘atom’ of labour law, but in the meantime older forms of law appear to have been revived, to such a point that Supiot has even spoken of a ‘re-feudalisation’ of the relationships.<sup>45</sup>

### 2.2.7. FROM STATUS, VIA CONTRACT, BACK TO STATUS?

In the relevant literature these developments are placed in the context of movements going back and forth between status and contract. Do these new forms of institutionalisation mean that we are moving from contract back in the direction of status? To what extent is this actually a development that is running counter to the development from status to contract observed by Henry Sumner Maine?<sup>46</sup> To answer that question it may be necessary to carefully differentiate between form and content.

With respect to the *form* it appears that the contract has acquired an unassailable position. In the natural law tradition of the 17th and 18th centuries based on the formal freedom and equality of citizens, an agreement voluntarily entered into was the only suitable legal form for any type of commitment. From a voluntary conception of society, in which the right was the source rather than a consequence of the relationships between members of society, working capacity was considered something that, like your freedom, was in your possession and that you could voluntarily dispose of. That view implies a commercialisation and an abstraction of ‘labour’, a notion that arose as such gradually in that period.

When the rise and growth of trade unions led to collective schemes for working conditions, those conditions were formally incorporated in the form of agreements, although they did not fundamentally differ from the guild rules and regulations of the 17th and 18th centuries – even more the case if they were declared generally binding. Finally, it is the relative enfeeblement of the position of power of national states in recent times that has led to a further ‘contractualisation’, even when the government is involved. As Supiot notes:

‘Any law which does not derive from a convention has become suspect and all efforts are devoted to founding every obligation on the mutual agreement of the parties subject to that obligation.’<sup>47</sup>

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<sup>45</sup> *Idem*, 2001.

<sup>46</sup> Maine, 1874.

<sup>47</sup> Supiot, 2000a: 329.

Everything that is imposed in a generic form from above (status), legally or otherwise, is engulfed by the stigma of heteronomy, while everything that takes on the form of a contract is experienced as a product of autonomy.

When it comes to the *content*, it is a very different story. The freedom of a guild master in the early 18th century to make working agreements with his journeyman within the scope of the applicable guild rules and regulations was undoubtedly greater than the freedom of a Dutch employer in 1970 who was bound by a collective labour agreement that had been declared generally binding. If the content of a contract means that the parties are autonomous in terms of the rights and obligations that apply between them, this applied hardly at all for the major part of the 20th century. The relevant case law also acknowledges that even if the parties voluntarily enter into a transaction, the resulting rights and obligations are determined on the basis of the law and not always on the basis of the parties' agreements.<sup>48</sup>

It thus appears that the regulation of labour relationships has shown a much greater degree of continuity than we are generally inclined to believe. In all of the arrangements discussed, the individual who 'enters into' a specific labour relationship assumes a position where the related rights and obligations are determined not by the parties' agreements but primarily heteronomously. In that heteronomy the tripartite relationship between 'employers', 'employees' and the government has played a dominant role since the late Middle Ages. The content of the rights and obligations as arranged for in collective labour agreements may differ in terms of scope and complexity, but not – or in any event to a much lesser extent – in terms of the subjects that were arranged for in many guild rules and regulations (wages, working hours, days off, training, etc.). As far as I am aware, little is known about 'customisation' of the agreements between master and journeyman in the 17th century, but there is no reason to assume that there was any need to do so – there were fewer possibilities of 'customising' such agreements than there were at the end of the 20th century.

The contractual freedom of the employment contract has had much more the character of a negative political project aimed at demolishing old structures than was ever an actual reality in a fictitious pre-regulative phase. It has contributed to the appearance of a regulatory intermezzo, in a sense to a demolition of the existing arrangements that comprised the second and third

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<sup>48</sup> Cf. Atiyah, 1979: 734 with respect to England.

quarters of the 19th century in the Netherlands. However much institutional arrangements have reclaimed their position, the abstraction of the employment contract as the ‘atom’ of labour law is an irreversible legal development – but, as we now know, even the atom can be split...

### 2.3. THE EMPLOYMENT CONTRACT AS A DEVICE FOR INCLUSION AND EXCLUSION

As noted above, when parties enter into a labour relationship they generally attempt to achieve a certain degree of temporal stability in that relationship, as well as stability in the form of an external guarantee that discourages opportunistic behaviour by the other party or that in any event ensures that such behaviour is subject to a counterbalancing sanction. In that respect, they generally must rely on the legal forms that are available under the applicable national law and which have been provided with effective sanctions (including those that rely on force) by the national state. Use of the legal form of the employment contract implies the use of a category that in various ways imposes boundaries and includes and excludes persons and relationships (including certain aspects of labour relationships), as was discussed in Chapter 1.

The legal construction of the ‘employment contract’ is constituent for the domain of labour relationships, for what is and isn’t included in the matters that the employer and the employee implicate in their mutual relationship and for the demarcation of, primarily, the ‘work sphere’ and the ‘private sphere’. Originally, the concept of the employment contract was fairly simple: the employee made his physical or mental work capacity and the control over it available to the employer in exchange for wages for a certain temporal term or on the basis of a product unit. The transfer of control was unqualified; anything exceeding its scope formed part of the private sphere and in principle was unrelated to the employment relationship. The employment contract was multiply indifferent, in terms not only of the private sphere but also of the employee’s entire working life.

On the one hand, those indifferences can be welcomed as important evolutionary acquisitions: the differentiation of various spheres enables a relatively independent development of those spheres, and the multiple indifference of the employment contract is a condition for the fantastic

economic development that has taken place in the West.<sup>49</sup> On the other hand, in prior arrangements the various aspects of life were much more in line with each other so that to a certain extent there were stable (but also fairly invariable) solutions for what today are considered problematic issues to combine, such as paid work, care, education and private life.

As a result of the arrangements that have been implemented since the end of the 19th century, the government is itself an interested party with respect to the various employee categories. Since different legal qualifications of labour relationships imply different agreements and obligations, it is also very important for the government to determine whether a particular relationship can be qualified as being subject to an 'employment contract'. This is particularly true for two forms of government activity.

First, socio-economic government policy has the goal of ensuring that there are balanced and stable relationships in the labour market. One way in which that goal has been given form is by means of labour law regulations intended to compensate the position of employees on a legal basis, which has traditionally been viewed as the 'weaker' socio-economic position. By making some employer obligations subject to mandatory provisions of law, by making certain actions legally ineffectual, by granting employees certain powers and means of enforcement, and by facilitating, prioritising or compulsorily imposing certain forms of collectivisation, including collective negotiations, the legislature has 'raised' the position that would result for employees due to the operation of market forces to a level that is deemed acceptable from the perspective of public order and social justice. As the parties come to view the consequences of such provisions as a heavier burden, they will be more inclined to attempt to escape from the mandatory nature of such counterbalancing provisions. The government will in turn see it as its duty to prevent that, in this case by making it more difficult to give labour relationships a form other than that of the 'employment contract'.

Second, the extensive arrangements in the field social security, which developed primarily in the 20th century, are linked mainly to the employment contract. Because of the burdens that this linking entails for the employer and/or the employee, there is a tendency to give relationships a form other than that of an employment contract. The need to clamp down on this becomes relatively more important as the financial base underlying those

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<sup>49</sup> Cf. Luhmann, 1972.

regulations is at issue. The more ‘good risks’ that have the opportunity to evade the collective arrangements, the smaller the base becomes in the event of virtually constant burdens.

In other words, the goals of socio-economic policy and of social security require an optimal correspondence between the characteristics of the employee categories that are intended to be covered by those protective measures and the criteria of the legal qualification that is being used to link them. Social principles of protection, counterbalancing inequality, and justice were worked out primarily in the course of the 20th century, although they played a more significant role in labour law doctrine than in legislative practice.<sup>50</sup> In working out such principles in practice, the status of ‘employee’ has been used as an ‘operationalisation’ of the criteria for the employee categories requiring legal protection on the basis of those principles. As such, this operationalisation can of course be challenged.<sup>51</sup> On the one hand there are also relationships that are qualified otherwise for legal purposes, in which an assessment of the actual balance of power on the basis of those principles could lead to the conclusion that legal protection is appropriate. On the other hand, the actual relationship or balance of power in which a person finds herself as an employee – despite her status as an employee – can be such that protection is superfluous.

With respect to a number of the above-mentioned indifferences, in the course of the 20th century dividing lines have been relocated or removed, and as a result there is much more interdependence between work and other spheres of socially relevant activity. There have been significant developments in terms of employer obligations in the event of an employee’s illness and with respect to mutual responsibilities for continued education and the ability to combine work with care duties; those issues will be discussed in more detail in Chapters 5 to 7 of this book.

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<sup>50</sup> Van der Heijden & Noordam, 2001.

<sup>51</sup> This is one of the reasons why there is not one but rather many legal variants of this status. *Cf.* Chapter 3 of this book.

## 2.4. THE INFLUENCE OF RECENT SOCIO-ECONOMIC DEVELOPMENTS ON THE ARRANGEMENT OF THE EMPLOYMENT CONTRACT

The employment contract as a legal institution has been an indispensable cornerstone in the development of a wage labour arrangement that acquired an unprecedented scope and intensity in the course of the 20th century. That scope is sufficiently indicated by the fact that in the Western world almost nine out of ten working persons has the legal status of employee or civil servant. The intensity is indicated by the diversity of the matters for which collective agreements are made or statutory regulations enacted, and by the far-reaching character of the obligations imposed on employers and employees by either the government or the social partners themselves. The term of the employment relationship can also be mentioned in this respect (although this observation applies more to earlier periods than to the present<sup>52</sup>): it is not uncommon for employees to spend one-quarter to one-half of their working life receiving salary from the same employer.

Recent socio-economic changes appear to be putting pressure on this arrangement but do not unequivocally work in a given way. On the one hand, the internationalisation of the economy – apart from the question whether it is actual or merely being politically mobilised as an argument – is leading to pressure for a downward adjustment of existing arrangements. There appears to be a tendency to replace arrangements with market forces and, for example, to leave the guarantee of social security more to the private sphere (including private insurance). On the other hand, training and the ability to combine work and care appear to be areas in which the need for arrangements has only increased.

I will refer to five of the various developments that could affect this system built around the pivot of the employment contract. First, the Tayloristic organisational method in industrial production has largely been replaced by other organisational principles that are more in line with the rising service economy. The vertical integration of production has lost much of its relevance and has been replaced mostly by network-like structures; as a result, the relevance of hierarchical management within the context of income-

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<sup>52</sup> A faster increase in labour mobility has often been presumed in discussions or put forward as a future scenario, but it cannot be supported by statistics. *Cf.* De Beer, 2004.

dependent work has also decreased in favour of relationships on a commission basis.

Second, there has been mention of a tendential decrease in the average term of employment relationships, although that certainly is not the case everywhere and can often be found in statistics only for certain sectors or age categories of employees. However, the expectation has often been expressed that labour relationships will be exchanged for others more often and at the same time will be based more on (temporary) confidence and loyalty. This implies a reversal of the policy at large companies based on industrial relationships, which is aimed at realising lifetime employment.

Third, there is the old division of work based on the breadwinner principle, which was implicitly one of the cornerstones of the government regulation of the employment contract, which has declined in favour of much more equal participation of men and women in the workforce. Fourth, at the same time the idea of progress, the experience that was dominant in the 20th century of an ascending line of progress, of permanent improvement of social position and prosperity, is also in decline. There is a tendency to replace it with a post-modern, short-term experience of episodes of work. The future has become less predictable, postponement of satisfaction has lost most of its potential for social ascent, and work is far less a physical sacrifice geared to provide for material benefits and has taken on a far more aesthetic meaning. And five, finally, it appears that the increasing internationalisation is undermining the autonomous-state character of the existing national employment systems. Capital in particular has become mobile, while wage labourers are still hardly mobile at all. This creates competitive relationships between states, which lead to employment protection and social security being seen internally as being primarily costly and obstructive while the level of employment participation becomes a primary national interest. In other words, the 'classic' social question of the redistribution of chances of survival *in retrospect* has given way to the question of the distribution of chances of survival *in advance*, for a policy aimed at optimal (maximal and equal) chances of entering the labour market. The extent to which protection and social security will be maintained in that respect will depend on both the international competitive position of a state and the national political relationships.

At the beginning of the 19th century the employment contract was a political project: it was introduced in order to do away with the old structures of feudalism and traditional corporatism, and could do so only by suppressing the social character of the work in its form. It thus helped enable industrialisation,

which then actualised the tension between the exercise of power and freedom of the market; this once again brought the social character to light. This led to the formation and growth of organisations that brought together interests and to an expansion of the activities of the nation-states that fortified themselves in that same process. Protection and social security, social policy in and of itself, are linked to the employment contract to a significant degree. In addition, there is the initially wide sector of the self-employed, which continuously decreased in the first half of the 20th century and now appears to be on the increase again.

The developments discussed above have a number of consequences within the framework of the 'legal system of labour', first of all for the position of the employment contract itself, as a legal arrangement between a business owner and worker. The character of a private, arm's length transaction between an 'employer' and an 'employee' has come under pressure. The social character of the relationship has been legally rediscovered, so to speak. In historical terms, this has revealed itself among other things in the development of protection against dismissal, and more recently also in case law and in the formulation of legal theories. Protection against dismissal in and of itself is an acknowledgement of the social character of the relationship; at the same time, the non-enforceability of maintaining an employment contract against the wishes of one of the parties is an acknowledgement of the extent to which its character is based on mutual trust. In case law there has been an acknowledgement of reciprocity, in part based on a vision of the company's workplace as a 'community', which implies diffuse mutual obligations that cannot be defined precisely in advance.<sup>53</sup>

Second, the above-mentioned developments have consequences for the various typical arrangements under social legislation that have been linked to the employment contract in the 20th century. As self-employment increases while at the same time the boundary between salaried employment and self-employment fades, the current link between dependence on a salary and protection and social security, as well as the sharp distinction that was always maintained between salaried employment and self-employment, will become problematic. Partly due to a higher level of education and professionalisation, the independence within salaried employment relationships is increasing, and the need for protection against risks may be decreasing. That protection is in any event under pressure because in political discourse it is generally

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<sup>53</sup> Cf. our comments above on the characteristics of regulation by means of 'status'.

considered incompatible with the alleged consequences of the internationalisation of the economy.

Finally, these developments have consequences for the possibilities of socio-economic policy to continue using the pivotal function of the employment contract in the future as its point of engagement. International competition and European employment politics relocate the centre of gravity of social law from the end to the beginning of employment participation. The link with salaried employment/the employment contract is less obvious in this respect. Self-employment is even being propagated as a means to increase participation. Social law of the future – if that is what it still is – may be confronted more often with the guarantee of actual and ‘equal’ access to various institutionalised participation options than with covering income risks.

The search for new legal forms that are in line with these developments has already commenced. For example, Supiot has argued for a new professional status (a *statut professionnel*) that would manage to incorporate individualisation and mobility. It would have to bring the need for flexibility in line with the need of every worker for an enduring participation in the labour market, a form of participation that actually enables him to develop individual initiative. According to Supiot, we can infer from what is happening in Europe that a new status is developing which is no longer linked to having a certain job but rather to ‘the continuity of labour force membership’.<sup>54</sup> What is original about this new status is the way in which it supplements the static organisation of the employer/employee relationship with the dynamic organisation of transitions between consecutive work situations.

The current concept of ‘employment’ excludes all non-marketable forms of work, even though those forms of work are essential for humanity and are distinguishable from self-employment. Supiot argues that this exclusion should be partially removed and that all forms of ‘work’ in the broadest sense – activities with an *obligatory* character, paid or unpaid – should be included in that *statut professionnel*.<sup>55</sup>

The new status must include a practical freedom to change the type of work one performs. In order to actually enable the exercise of certain rights that

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<sup>54</sup> Supiot, 2001: 28.

<sup>55</sup> *Ibid.*: 54.

have already long been acknowledged as such (care duties, training, union work, etc.), ‘social drawing rights’ should be introduced. The exercise of those rights would be linked for budgetary purposes to a reserve that had been acquired or accrued earlier, but it will be up to the individual’s free choice to exercise it. The drawing rights are social in terms of both the manner in which they are accrued and their goals.<sup>56</sup>

In such a model a number of differentiations, in terms of what the regime of the employment contract includes and excludes, would undergo an essential change. It is a model that partly harks back to lost elements of arrangements, such as the integration of continued education in the working career and the life-course perspective, that were available in the guilds, but now with a much more dynamic and flexible application. In that context, the concept of ‘drawing rights’ is an interesting attempt to give social content to the notion of ‘subjective law’.

Supiot’s proposal is only one of the results of the fact that the boundaries that are now determined by the regime of the employment contract – that what it now includes and excludes – are being affected by recent socio-economic changes. Subject-specific Chapters 4 to 7 of this book will investigate the changes in the regime of the employment contract to which this could lead, for a number of areas.

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<sup>56</sup> Supiot, 2000b: 14; 2001: 56.