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### The employment contract as an exclusionary device

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# CHAPTER 1

## THE EMPLOYMENT CONTRACT AS AN EXCLUSIONARY DEVICE

ROBERT KNEGT

*‘Omnis determinatio est negatio’*  
Spinoza (1674)<sup>1</sup>

The employment contract, as a legal form, performs a pivotal function in labour law. In many labour relationships it formalises the parties’ mutual rights and obligations. In the last century it has become the dominant model used to give shape to employment relationships, not only in Western countries but virtually all over the world. The circle of relationships to which it is applied has increased enormously, as has its scope, *i.e.* the aspects and subject about which it lays down rights and obligations. The difference between the employment contract and other models that are used, such as independent work, has thereby increased in the course of time.

Every form, every model, is selective: it includes and it excludes. The employment contract also sets boundaries in various ways. It regulates certain relationships and only certain aspects of those relationships, hence including certain relationships and, implicitly or explicitly, excluding others. In the form that it originally took in the 19th century as a formalisation of a market transaction, the employment contract excluded many things and declared many aspects of labour relationships that had previously been part of labour regulation to be henceforth irrelevant. The borders that it sets are not invariable, they shift in the course of time. The development in the last century can be roughly typified as one of inclusion: under the influence of various developments the employment contract has gradually had to re-include what it initially excluded. It has gradually been ‘garnished’ with regulations that partially cancelled out or compensated for those exclusions.

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<sup>1</sup> ‘Each determination implies a negation’. In Spinoza, 1925, vol. 4: 248, Epistola 59.

When thinking about the changes that have occurred in relation to employment contracts it is easy and tempting to take the current, individualised relationship between one employer and one employee as the starting point. If we want to understand those changes we will have to avoid giving in to that temptation though. We must keep in mind that the existence of that individualised relationship is not a natural fact; it is possible only as the final product of a long period of social development. If we are to understand the changes with respect to the inclusion and exclusion we are interested in here, it would be better to start at the other end –with the complex aggregate of social relationships that make social production and reproduction possible.

An increasing interdependence, from both a geopolitical and a social perspective, makes it tempting to revert to time-honoured, functionalistic formulations in order to explain those social relationships. If we give in to that temptation for a moment we can take as a starting point the assumption that society as such requires the production of goods and services; that the manner of production is tailored to the capabilities of the workers; that the population has adequate housing and is reproducing; that children are being born, raised and schooled; that the old and the sick are being taken care of, etc. The relationships that are connected with what we now consider paid work form only part of that whole. They have become relatively independent, but at the same time – and possibly now even more than in the past – they are closely interrelated with other relationships, *i.e.* those related to unpaid work, education, training, livelihood, health, the living and working environment, water management, transportation, etc. The differentiation in which paid work has developed into a relatively independent area that is ultimately organised on the basis of the market model is the product of a gradual historical process. Work is ultimately released from the connections with other terrains and is given legal form as a market transaction.

Nowadays if we ask ourselves how work can be reconciled with training and care, it is necessary to first face the opposite question: how did these areas actually become relatively independent, and how was their exclusion from the area of work brought about socially? In other words, under what conditions was work organised so that upbringing, housekeeping, care for others, social relationships at and outside the workplace, training and citizenship could be deemed external in relation to the employment relationship? It is clear that the construction that is the employment contract as a form of market transaction has played a significant role in that respect.

The employment contract was constructed as an agreement through which an 'employee' hires out his working capacity to an 'employer' for a certain period of time, during which the 'employer' acquires control over how that working capacity will be used, in exchange for the payment of a salary.<sup>2</sup> By giving it the form of a kind of lease, to a significant extent the working capacity is handled for legal purposes as though it were something material, somewhat comparable with the way in which electricity is for all practical purposes equated with material objects in case law. But it was never possible to make that the *only* perspective, and it cannot be otherwise even if we limit ourselves to the relationships that are linked to work: that working capacity is almost always 'supplied' within the scope of a relationship that *also* occupies a place within an industrial organisation, and that 'supply' of working capacity is also an element of a relationship between individuals based on reciprocity and the related behavioural standards between the parties.

The use of the employment contract during the emergence and growth of industrialisation was primarily transaction-oriented. At that time, the number of issues excluded was the largest, compared with both prior and subsequent regulations relating to work. A strict separation was made between the regime of factory work and everything else – a separation in space, time and behavioural rules. That separation was symbolised by the factory gates and whistle, which clearly demarcated the beginning and the end of shifts. The gates and the whistle have all but disappeared since then, and to a certain extent the outside world has won back its place within the work sphere.

This does not mean that the relationships from before the industrial revolution have been restored, but rather that new regulations have been enacted pursuant to which what was initially excluded has been reintegrated. The development of labour law (in the sense of the specialised legal field that is generally understood as such) was an important moment in that respect. Below we will continually differentiate between the core of the employment contract as the legal form of a market transaction and all legal and other regulations that have been linked to the employment contract since that time and that are the legal result of those new regulations.

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<sup>2</sup> Quotations have been used to underscore the fact that concepts are themselves the result of the use of legal forms. Thus, the concepts 'employee' and 'employer' were created by the new legal form of the 'employment contract' itself.

## 1.1. INCLUSION AND EXCLUSION

What do the inclusion and exclusion to which we are referring consist of, and what characteristics of the employment contract are responsible for them? This book will focus on three characteristics that relate to the form, content and relevant employee category. First, the employment contract is an *agreement*, which in its pure form directly regulates only a temporally limited transaction between one employer and one employee, to the exclusion of all other relationships in which the employee participates within the scope of his work. Second, it is an agreement with respect to *work* – specifically paid work – to the exclusion of a series of aspects of social life that are related to that work. Third, there are *other* legal frameworks in addition to the employment contract in which socially useful activities are conducted, and there are persons who in a different framework are excluded from many of the rights enjoyed by employees. We will discuss all three characteristics below.

### 1.1.1. THE LEGAL FORM: AN AGREEMENT

The legal form of an employment contract is drawing lines of demarcation in social space and time. A first demarcation line regards the parties to the agreement. Within the aggregate of relationships between people that are relevant within the framework of the productive work process, the employment contract focuses on one relationship: that between an employee and the party that bears legal responsibility in the company, *i.e.* the employer. Other relationships are excluded and kept at a distance. Employment relationships are embedded in an aggregate of relationships that involve various individuals and agencies: customers, colleagues, supervisors, suppliers and, more peripherally, investors, occupational physicians, course instructors, labour inspectors, benefits agencies, etc. Nonetheless, the mutual rights and obligations that are related to all these relationships are determined *indirectly* rather than directly through the relationship between an employee on the one hand and a business owner or company (as a legal entity) on the other. Hence the relationship that an employee has with colleagues or the company's customers is set as a norm only indirectly, as a derivative of the employment contract that is brought about between the employee and the employer.

This construction relates to the hybrid character of the employment contract: although it is constructed on the basis of an analogy with leasing material objects, what is temporarily transferred in this case is control over people

rather than control over things. The company thus consists of a hierarchical organisation of individualised commitments based on market transactions, in each case between one worker (the 'employee') and the top of the hierarchy (the 'employer'). The hierarchical organisation implies a division of responsibilities whose core is at the top of the organisation. The indifference of the agreement between the company and the employee compared with other relationships thus leads to a clear hierarchical line.

A second demarcation line is the temporal limit of the agreement. Like every other type of agreement, an employment contract relates to a transaction that is temporally and spatially definable. It relates to the transfer of control over working capacity during a certain period of time, to the exclusion of what precedes and what follows that period. The employee receives payment in the form of a salary in exchange for the period of time during which working capacity is supplied. In principle, the temporal limits of the rights and obligations do not exceed the period in which the working capacity is supplied. Thus, in addition to the socio-spatial boundary a clear demarcation line is essentially being drawn in the temporal dimension between what is included in the employment contract and what is excluded.

#### 1.1.2. THE CONTENT: WORK

An employment contract is an agreement governing the supply of work capacity in exchange for wages – and in principle nothing else. It thus draws a line between work and other aspects of life that are more or less related to work, and excludes the latter, in some cases because they form part of what is referred to as the 'private sphere'. Aspects that are directly necessary to perform the agreed work (and for the continued performance of that work) – such as education, preparing and consuming food, and physical and psychological recovery from the work performed – are also normatively excluded. The fact that this is done this way is closely related to the construction of the employment contract as a transaction in the market. In the market it is customary for the conditions for the creation of a product to be excluded from the framework of the 'transfer transaction' as such; the parties settle their accounts only by means of a financial transaction.<sup>3</sup>

Particularly with respect to the content of the employment contract, the regulations that later arose constitute corrections to its character of

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<sup>3</sup> Cf. Callon, 1998.

formalisation of a market transaction. The statutory limitation of the duration of the working day, provision of income in the event of illness and protection against dismissal are a few of the regulations that have played a role in that respect, sometimes during an early phase of the developments. For employers this means that if they use an employment contract they automatically bind themselves through the applicability of those regulations to a variety of obligations that transcend the agreement's character as a market transaction. Each correction can also be seen as a rearrangement of responsibilities within the employment relationship.

### 1.1.3. EMPLOYEE CATEGORIES

The employment contract is one of various legal forms of employment relationships. In the Netherlands there are no employment contracts for some flexiworkers or for any freelancers who work for example on a commission basis. A dichotomy arises on the basis of the criteria for the existence of an employment contract (employed, for wages) between persons who work in salaried employment and other working and non-working individuals. This dichotomy has become increasingly significant as more legislation and regulations have been linked to the existence of an employment contract.

In terms of inclusion and exclusion, persons who do not have an employment contract often end up being excluded from a variety of regulations and facilities enjoyed by employees. The government thus determines that some citizens are entitled to protection, compensation for inequality or the extensive guarantees under social insurance schemes, while others are not. If an independent photographer no longer receives any work from his clients, that is his tough luck and he will have to find new clients; if he is employed and his employer wants to terminate his employment contract, in the Netherlands the reasonableness of that intention will be assessed by an independent third party and it is possible that the employment relationship will remain intact against the employer's wishes.<sup>4</sup> In the first case the operation of the services market prevails, with the related assumption that the market operates efficiently; in the second case the government protects the employee against possible opportunism or capriciousness on the part of the employer.

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<sup>4</sup> For more information about protection against dismissal in the Netherlands, see Chapter 3, section 3.7.

This differentiation in any event gives rise to two questions. First, to what extent is that exclusion justified in view of the actual position of those other categories? If we take into consideration the principles that justify the existence of those regulations and facilities, for example the inequality of the parties' respective power, we are left to wonder to what extent the exclusion of *e.g.* independent workers – referred to in the Netherlands as 'self-employed with no staff' (*zelfstandigen zonder personeel*) – from those regulations is legitimate. The same holds true of jobseekers who are attempting to find salaried positions but have not yet managed to.

The second question relates to the consequences for the degree to which various legal forms are used to formalise employment relationships. Will the use of the employment contract decrease as the employment relationship becomes subject to more rules intended to compensate for market effects, and will more relationships acquire the form of commissions given to the self-employed and the pseudo-self-employed?

## 1.2. DEVELOPMENTS ON INCLUSION AND EXCLUSION THROUGH THE EMPLOYMENT CONTRACT

In the preceding three subsections the radical form of the employment contract as a formalisation of a market transaction constituted the basis for an elaboration of three characteristics of the employment contract in terms of inclusion and exclusion. We can now easily determine how much has changed in just over a century with respect to content of the employment contract and employee categories, and possibly to a certain extent the form of the employment contract. In this book we generally will not look back that far (with the exception of Chapters 2 and 3), and will use the changes in the last 25 years as the basis for our investigation. Within that scope we will examine what changes have been made to regulations on four related but initially excluded topics, what those changes mean for the three types of inclusion and exclusion we differentiated, and to what extent the employment contract can still be considered an adequate instrument to regulate employment relationships in light of those developments.

The four areas with respect to which the changes in those regulations will be investigated relate to status of workers where they fall outside the scope of an employment contract in the aforementioned sense of a market transaction. All

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these regulations relate to situations in which there is no exchange – or not yet or no longer an exchange – of work for wages, either because the worker has temporarily or permanently left the work process or because socially useful activities are conducted which fall outside the scope of an employment contract. In all these cases, arrangements have come about that compensate for the income-related consequences of non-participation in paid work and, where possible, are directed towards reintegration into the work process.

This book will focus on regulations for the following four situations:

1. the inability to work due to illness or disability for work;
2. performing care duties;
3. receiving training; and
4. retirement.

The central questions raised in this book will be discussed below.

### 1.3. QUESTIONS RELATED TO INCLUSION AND EXCLUSION THROUGH THE EMPLOYMENT CONTRACT

We will ask several questions on the developments in regulations for the four areas referred to above. Those questions will be answered partially for each area and partially in the last chapter, which synthesises the book. The questions are contained in the following box:

- 1 a What developments in the socio-legal regulation of this terrain have occurred in the last 25 years in the Netherlands, and in a European, ILO or other international context and elsewhere in Europe (only insofar as they can be usefully compared with the developments in the Netherlands)?
  - b To what social developments are these mentioned developments related ('context')?
- 2 a Has there been a shift in the terrain with respect to:
  - the division of responsibilities between employers, employees and the government; and
  - the limits of inclusion and exclusion in terms of the employment contract's form and content?

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|-----|---|
| b   | What consequences do the developments for inclusion and exclusion have for the employee categories ( <i>i.e.</i> the relationship between insiders and outsiders)?  |
| 3 a | What arguments have been put forward for the distribution of responsibilities (and the changes in it) and/or the limits of inclusion and exclusion?   |
| b   | How can those arguments be evaluated?   |
| 4   | To what extent does that lead to a change in the character of 'the employment contract' (as a legal procedure/complex of regulations)?  |
| 5   | In light of these developments and their consequences, to what extent can the employment contract still be considered an adequate instrument to regulate employment and employment-related relationships? |

The questions relate first and foremost to the context of the developments in the following area: what are the developments in regulations and how do they relate to broader social developments? In that context we will look at regulation at the national level and at the European and international (ILO) levels. The focus will lie primarily on developments in the Netherlands, but where appropriate they will be compared with developments elsewhere in Europe (of course we have absolutely no pretensions of being able to describe the developments fully).

Another question (2) relates to the shifts that those developments entail for the limits of inclusion and exclusion and for the allocation of responsibilities between employers, employees and the government. This is about the first two of the three types of inclusion and exclusion distinguished (on the basis of form and content). In that context we will also address the arguments that have been put forward in favour of the distribution of responsibilities (and the changes in it). A separate question relates to the consequences of these developments for inclusion and inclusion of the third type, with respect to worker categories. Here too the arguments (3) that have been put forward for and against regulations for worker categories can be relevant.

The final, most difficult question (4) relates to the consequences for the 'character' of the employment contract itself. Does the character of the employment contract change as a result of the regulations that have been imposed on it? If we answer that question in the affirmative, we could mean three different things. First, that the character of the legal procedure known as the 'employment contract' itself has changed in its constitutive characteristics.

That would be a weighty statement.<sup>5</sup> Second, we can take the legal institution and all the regulations attached to it by the government and/or the social partners as a whole, and argue that that whole has a different character in terms of the division of responsibilities and inclusion and exclusion than it did previously. Third, we can go further than the normative regulations and take into consideration their practical application at the workplace, determining on that basis whether there has been a change of character. The last option lies outside the scope of this book; we will focus on the second change of character, and in the final chapter we will come back to the question of the extent to which it might be possible to argue that the first change of character might also be involved.

Finally, we will discuss the ‘tenability’ of the employment contract as a prominent legal instrument to regulate employment and employment-related relationships (5). Is the employment contract still an adequate device to regulate those relationships? In order to answer that question we must first specify what we mean by ‘adequate’. The conditions that the employment contract must meet if it is to be deemed adequate can be formulated as follows in the form of questions, which allow us to differentiate between four categories of conditions:

1. Are the limits set by the employment contract sharp and clear (*formal conditions*)?
2. Is it possible for parties to reliably predict the consequences of their use of the employment contract as a device (*formal-functional conditions*)?
3. Are the substantive limits set by the employment contract and the division of responsibilities that it creates between the parties sufficiently in line with the parties’ requirements in that respect (*material-functional conditions*)?
4. Does the employment contract contribute sufficiently to public order, economic productivity and the realisation of socio-economic policy objectives (*public conditions*)?

The formal conditions relate to whether it is clear who the parties are to the contract (*i.e.* the employer and the employee, to the exclusion of all other parties), what their mutual powers and claims are, what the temporal scope of the contract is (in principle during the period in which working capacity is

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<sup>5</sup> For example, in the Netherlands that conclusion could be linked to a judgment of the Dutch Supreme Court (*Taxi Hoffman*): under certain conditions the work to be performed on the basis of the contract can be a different type of work than the work that was agreed to by the parties and laid down in the wording of the contract.

exchanged for a salary), and what the contract pertains to (work) or doesn't (*e.g.* the private sphere). We noted above that parties other than the employer and the employee are exerting an increasing influence on the employment relationship, but this does not mean that they are formally being admitted as parties to the employment contract.

The question regarding the adequacy of the employment contract is implicitly also a question about its future. If we take into consideration all the regulations that have been and will be attached to the employment contract, might we require a new concept that is less unilaterally dependent on the model of a market transaction (form)? Or is the current form flexible enough to absorb even more content?

The foregoing questions will be answered for each topic in Chapters 4 to 7. First, Chapter 2 will investigate what forms of regulation for employment relationships preceded the employment contract, what the situation was with respect to inclusion and exclusion in those forms, and what the long-term role of the employment contract is in those developments. Chapter 3 will discuss the regulation of the employment contract as it has developed since the mid 19th century, with an emphasis on the developments in the last 25 years. After subject-specific Chapters 4 to 7, the questions will be answered for the entire area in Chapter 8 and we will take stock of the situation as a whole.