



## UvA-DARE (Digital Academic Repository)

### Symphonic metamorphoses

*Variations on vulnerability: orchestral musicians' employment in times of crisis*

Kurzbauer, H.R.

#### Publication date

2022

[Link to publication](#)

#### Citation for published version (APA):

Kurzbauer, H. R. (2022). *Symphonic metamorphoses: Variations on vulnerability: orchestral musicians' employment in times of crisis*. [Thesis, fully internal, Universiteit van Amsterdam].

#### General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

#### Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

## 20. Countervailing reactions to vulnerability

*“Organizing freelancers is like organizing cats, or maybe, more like giving a cat a bath.”*<sup>2285</sup>

The quote above with its reference to real cats as opposed to gigging musician cats (see reference at the beginning of the *Back in the USA movement*) bears further investigation. As several *movements* have highlighted, employers, judges, legislators, and politicians in jurisdictions far and wide have applied their expertise to the ins and outs of categories of workers, the problems inherent to misclassification, and the differences between false self-employed and their entrepreneurial self-employed colleagues. As noted in *En Route to the FNV KIEM case*, the ECJ’s judicial ruling in *FNV KIEM* established a ‘pattern of understanding and acceptance’ of the concept of the false self-employed status of orchestral freelance musicians. Yet, quo vadis? Union organizers have attempted valiantly to pave the way to collective bargaining for cultural workers regardless of classification, and leading academics ponder ways to transmute hybrid ‘employee-worker’ categories into positive legislation. In the Netherlands, the boots on the musical ground are increasingly concerned by continuing austerity in terms of cultural financing and new vulnerabilities in the wake of fair practice legislation. In the U.S., even employed musicians are plagued by increased financial precarity as the COVID-19 crisis continues.

### 20.1 Countervailing or controversial? The Fair Practice Code

In 2017, a joint report published by the Dutch Social and Economic Council (SER) and the Council for Culture (RvC) on the consequences in the arts sector of the economic crisis of 2007-2008 and the government cutbacks that followed presented disturbing conclusions.<sup>2286</sup> According to their analysis, the culture cuts impacted the sector to the tune of a loss of 20,000 jobs, five times higher than the national average.<sup>2287</sup> Hard figures led to a soft solution: a ‘Labour Market Agenda’ was drawn up with as its centerpiece a Fair Practice Code (Code), launched in October 2017. The Dutch Minister of Education, Culture and Science, Ingrid van Engelshoven mandated that as of 2021 cultural organizations could not receive government subsidies if they did not comply

<sup>2285</sup> Speech given by Thérèse Boutin, former CEO Orchestre Symphonique du Québec, FIM International Conference, Montreal, Canada, May 2017.

<sup>2286</sup> See, in Dutch, Advies 17/07 *Passie gewaardeerd Versterking van de arbeidsmarkt in de culturele en creatieve sector*. April 2017. Available at: <https://www.ser.nl/-/media/ser/downloads/adviezen/2017/passie-gewaardeerd.pdf>

<sup>2287</sup> Ibid.,

---

with the code. Freelance and parttime staff members were included in the Code's ambitious objectives. Hopes ran high that cultural institutions would raise employee remuneration, equalize the pay scales for freelance and part-time staff, and of special significance within the orchestral sector, pay for structural overtime not previously compensated. Criticism of the Code underscores three main issues: the astronomical costs of implementation, its limited scope, and the lack of an enforcement mechanism to guarantee that employers are adhering to fair pay under fair play principles.<sup>2288</sup> Minister van Engelshoven opted for soft but firm encouragement by stating that "institutions must provide insight into how the core values underlying the Fair Practice Code in the period 2021-2024 are translated into concrete policy."<sup>2289</sup> Musicians beg to differ: the government, as the commissioning authority, should take responsibility for Fair Practice implementation and enforcement. In these early stages, the Code needs concretization through guidelines, enforcement mechanisms, and significantly, musician input at every step of the way as the example that follows illustrates.

An additional vexed question for vulnerable orchestral musicians with regard to the effects of the Fair Practice Code and rate increases for Dutch-based freelancers-substitute players under the WAADI<sup>2290</sup> discussed in *Symphonic Variations: A long and winding road* is: can fair pay initiatives actually accelerate a decrease in employment for freelancers? A case in point: orchestral employers in the Netherlands are linking a freelance substitute player's number of years of professional experience to pay scales in a system similar to the pay scale determinations for the regularly employed. What could be seen as a resounding success for fair pay has created a great deal of concern among older players concerning employability. The PvFM website resounds with questions such as, 'should I tell the employer the truth with regard to my years of experience or lower the magic number so as to make myself more competitive in terms of remuneration?' with the implicit fear that older players will be less desirable as hires simply because they are more 'expensive' than younger freelance colleagues. Issues brought forward in *Greener Pastures* resound here in a somber timbre.

As *Requiem for an orchestra* illustrated, more often than not, policy makers turned a

---

<sup>2288</sup> Additional personnel costs will amount to an estimated €20.1 per annum. Regarding scope: the Fair Practice Code stipulation applies only to institutions and festivals that receive multi-year government subsidies. See, in Dutch, Kamerbrief Fair Practice Code, 19 februari 2020. Available at: [https://www.kunsten92.nl/wp-content/uploads/2020/02/Kamerbrief-Fair-Practice-Code.pdf?utm\\_source=MailingLijst&utm\\_medium=email&utm\\_campaign=19-02-2020](https://www.kunsten92.nl/wp-content/uploads/2020/02/Kamerbrief-Fair-Practice-Code.pdf?utm_source=MailingLijst&utm_medium=email&utm_campaign=19-02-2020)

<sup>2289</sup> Ibid., in the original Dutch: "Instellingen moeten inzichtelijk maken hoe de kernwaarden die ten grondslag liggen aan de Fair Practice Code in de periode 2021-2024 (stapsgewijs) vertaald worden in concreet beleid."

<sup>2290</sup> Consult the discussion of the WAADI above.

deaf ear to the arguments brought forward by musicians and others who are far from the hallowed halls of economic or political decision-making. To illustrate with a recent example: a story released on the Dutch news outlet [nu.nl](https://www.nu.nl) in November 2020 provoked angered responses on the part of musicians, unions, and the PvFM. The headline *Van Engelshoven cannot assess the impact of corona-related support for freelancers as of yet*<sup>2291</sup> revealed that the Minister could not discern the extent of the negative impact of the COVID-19 crisis on the performing arts sector, despite reports that confirmed these adverse effects.<sup>2292</sup> A close reading of *Follow the money* correlated with information detailed in *Requiem for an orchestra* shows that political will is of paramount importance in order to win the cultural subsidy sweepstakes. The sheer volume of responses from orchestral musicians who had lost their means of support because of concert hall closures during the pandemic, substantiated by information collected by the Dutch Association for Performance Arts (Nederlandse Associatie voor Podium Kunsten-NAPK), musician unions, and the PvFM did not satisfy the Minister's call for 'scientifically proven facts.' The voices of those who perform, the voices of the most vulnerable, do not reverberate in the halls of policy making. They do, however, thanks to recent lawsuits in the Netherlands, resound at the courts.

## 20.2 The sweet sounds of success: employment *pur sang*

The sweet sounds of success in recent cases in which freelance-substitute players<sup>2293</sup> brought suit against Het Ballet Orkest (HBO) has given a renewed sense of empowerment to musicians whose false self-employment has taken on its true color: employment with no 'falsification' attached. The PvFM's co-founder Dorine Schoon worked regularly as a substitute oboist in the HBO until the summer of 2020. Following years of regular work, she was informed that her services were no longer necessary in the orchestra she had considered her 'home' base. Speculation ran high: her vociferous actions on the part of the PvFM made her a target for the employer. "After all, who wants to hire someone who will stand up for the rights of others especially if those others are vulnerable?"<sup>2294</sup> Supported by Kunstenbond union representation, Ms.

<sup>2291</sup> In the original Dutch, "Van Engelshoven kan effect coronasteun aan zz'pers nog niet beoordelen." The article is available at <https://www.nu.nl/cultuur-overig/6089463/van-engelshoven-kan-effect-coronasteun-aan-zzpers-nog-niet-beoordelen.html> 11 november 2020.

<sup>2292</sup> Parliamentarians Lodewijk Asscher (PvdA, Labor Party), Niels van den Berge (GroenLinks, the Green Party) and Peter Kwint (SP, Socialist Party) submitted requests for additional cultural support in September 2020. Further, the NAPK's research that pointed to adequate support in October was outdated due to increasingly stringent COVID-19 regulations imposed in early November 2020.

<sup>2293</sup> See, reference to Ms. Marinkovic, *supra* at fn. 2281.

<sup>2294</sup> Helmke Janssen's comments at a PvFM meeting.

---

Schoon decided to mount a test case. Could it be possible that her years of freelance work with one employer would have the character of a real employment contract? Unlike Tiziana Pintus, Ms. Schoon did not seek permanent employment at HBO, but rather, amends for the sudden loss of work.

On February 10, 2021, the Amsterdam Subdistrict Court confirmed that regardless of the terms used in a contract ('gastspeler' - guest player was the HBO's term of art) substitute musicians were employees under Dutch law: the oboist performed her duties over a specified time period, her remuneration was contractually specified, and there was clear evidence of authority in almost all aspects of the work performed, including scheduling and dress codes. According to the court, the intention of the parties is with regard to the contract was not the overriding factor: an employment relationship arises when the manner in which the work is performed meets the criteria of an employment contract under the law. Ms. Schoon was therefore entitled to recompence for lost work. "Of course, I am very happy with the judge's ruling, but what I hope most of all is that it will inspire a dialogue between orchestras and freelance substitute players. It should no longer be possible for substitutes to be treated differently simply on the basis of the type of contract they signed. On to a sustainable and fair orchestra sector, there is so much room for improvement!"<sup>2295</sup>

### **20.3 Back to the USA: sober news and solidarity for MET musicians**

This is a study that appraises vulnerabilities linked to orchestral employment. One of the conundrums implicit to an orchestral musician's experience is that the joy of music-making can transcend vulnerabilities, at least up to a certain breaking point.

In 2020, the Metropolitan Opera (the MET) along with thousands of musical institutions worldwide remained shuttered as the COVID-19 pandemic raged. The situation in which the MET musicians and thousands of other opera house employees and associates found themselves was particularly egregious. Breaking any conventional rules of engagement between management and musicians, the MET's management furloughed its musicians and hired foreign orchestras and non-MET players to mount

---

<sup>2295</sup> Dorine Schoon, Facebook post on the PvFM closed site, 16 February 2021 in the original Dutch: 'O! dat was me wat. Ik ben natuurlijk heel blij met de uitspraak van de rechter, maar wat ik vooral hoop is dat de dialoog tussen orkest en remplaçant op gang komt. Het verschil in behandeling alleen maar op basis van je contract zou niet meer moeten kunnen in deze tijd. Op naar een duurzame en eerlijke orkestsector, er valt nog zoveel te verbeteren!'

its Met Stars series. Instead of working as a collaborative team by bringing board members, and community members, and its vast online audience to find solutions to an untenable situation, the MET management hid behind a mantra of ‘labor costs are crippling, we cannot pay when the musicians are unable to play.’<sup>2296</sup> Public outrage and, according to many insiders, great disappointment from major donors did not deter management from attempting to cut corners and ‘cut its way to success.’<sup>2297</sup>



In a public post on Facebook, one of the MET concertmasters shared his bittersweet views on his forced departure from the famed orchestra and its storied venue. His plea for tuned-in leadership ‘artistic and economical’ gets to the heart of the matter: if the MET musicians can suffer such loss, where does the spiral of vulnerability leave freelance substitute players not to speak of the multitude of professional orchestral musicians who could have only dreamt of a career at the MET?

*“I emptied my Met locker the other day. If that wasn’t difficult enough, I then walked outside with my suitcase and saw this “Met Stars” poster at Lincoln Center, featuring 100% NON-Met musicians. Struck me as quite insensitive and insulting. It was a*

<sup>2296</sup> The Metropolitan Opera Orchestra Committee, see, [metorchestramusicians.org](http://metorchestramusicians.org)

<sup>2297</sup> Ibid., adapted from the website quote: “great artistic institutions cannot cut their way to success.”

---

*profoundly emotional moment for me. I'm one of the lucky ones. Very recently, I was offered a contract to lead a fine German orchestra for several months. After 8 months of borrowing and draining my savings accounts, I will finally be able to start to rebuilding. The cost: I leave my family tomorrow, for an unknown period of time. I'm elated and devastated at the same time.*

*In a country that doesn't support the arts very well, it is imperative that management values what it is "selling", and that we seek empathetic leadership with sincere vision – both artistic and economical. Our lives – Met lives – are being majorly impacted by this, every day. A third of our orchestra has already had to leave the NYC area — and that's not to speak of myriad other challenges we are all facing every day, with no end in sight. I hope that this world-class orchestra returns to work one day with a respectable contract and a dignified outlook. The Met musicians certainly deserve this, and the international community too. Sadly, healthcare plus \$0 isn't enough to retain much talent these days. We need advocacy on all levels, urgently. The future of our culture depends on it."<sup>2298</sup>*

Social media campaigns (#WewillMeetAgain) and a concert series in which world-renowned singers collaborated with orchestral musicians in online concerts (Spotlight series <https://spotlight.metorchestramusicians.org/#/home> ) illustrated the MET musicians' attempts to maintain their high-performance standards. Collegial solidarity on the part of U.S. orchestras who have negotiated COVID-19 and incumbent financial complications more successfully led to invitations for unemployed MET musicians to perform with orchestral colleagues cross country.<sup>2299</sup> Yet for all the information shared in the pages above, for orchestral musicians from the illustrious MET stars to the Dutch-based freelance substitute players who have taken action to reclaim deserved employment contracts, the tensions, and vulnerabilities in the sector persist.

*'When we play music, magic happens. The magic is in the air, even though we can't see it or hold it in our hands. It happens in time and is gone as soon as it stops. Yet it touches our souls, and its effects linger in our memories long after it has ended. It pulls up memories and feelings from the past and takes us places we have never been before. It enlivens our imaginations, soothes our souls, and sparks creativity in other directions and in intangible ways. Each person's listening experience is unique. It is their own personal musical journey, influenced by their present circumstances, their mood, and the atmosphere at the moment."<sup>2300</sup>*

Early on in the 21<sup>st</sup> century, Martha Nussbaum, the grand dame in the field of legal philosophy explained the study of law to those starting out on their educational

---

<sup>2298</sup> Benjamin Bowman, co-concertmaster The Metropolitan Opera Orchestra (commenting on Facebook) November 14, 2020. Available at: <https://www.facebook.com/METOrchestra>

<sup>2299</sup> The Dallas Symphony Orchestra welcomed 50 players from the MET to perform side-by-side in May 2021. Testimony and photos posted on Facebook: "I have spent the most beautiful last few days with the incredible musicians of the Dallas Symphony Orchestra playing side by side with members of the Met Orchestra Musicians. Their warmth, humanity and musicianship have made memories for me for a lifetime." Posted by Sylvia Danburg Volpe, associate principal second violin, The Metropolitan Opera Orchestra.

<sup>2300</sup> <https://nyphil.org/whats-new/2020/august/farewell-and-thanks-ahlen-fast>



paths: “Law is [to be] understood as not simply a set of technical maneuvers, but as a way of being active and influential in public life that has a definite normative ethical dimension.”<sup>2301</sup> Recasting her words into the orchestral sphere uncovers the true reason for spending years treading along a research path that has led to more and more questions, less answers.<sup>2302</sup> The ‘technical maneuvers’ found in analyses of jurisprudence and legislation recount but a small part of orchestral musicians’ employment sagas. By describing, evaluating, and reconsidering the internal and external factors that influence orchestral musicians’ vulnerability, it is possible to re-connect to the underlying value within an inherent musician’s predisposition: the love of music for music’s sake, the push to communicate, and to make music against all odds, to some noteworthy degree a musical ‘ethical dimension. Perhaps a symphonic metamorphosis is an apotheosis, a chimera of harmonic resolution in a dissonant epoch, or just maybe, as countless examples cited in these pages suggest, metamorphosis lies within reach.

The prescient message of a conductor who described the orchestra as “an “organism” that “kind of grows” underlines the necessity for cultural survival in times of pandemic anxiety. “There’s a certain moment when you go offline and someone curates a space, with a piece (of music), and the power of the ritual. It happens in real time, but it will never happen again, and you were there. You can let yourself go. And I think that’s actually a real liberation. We are going to need that more than ever before.”<sup>2303</sup>

---

2301 Martha C. Nussbaum. “Cultivating Humanity in Legal Education” 2003 p. 271.

2302 Irresistible not to share this reference to Charles Ives’ extraordinary *The Unanswered Question*, composed in 1908, revised in 1930-35.

2303 Anthony Tommasini. “Esa-Pekka Salonen Goes Off ‘the Grid.” *New York Times* March 10, 2019.