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Framing labor contracts: Contract versus network theories

Robert Knegt

1 Introduction

One of the crucial insights that sociology has brought us is that, in order to understand social life, it is necessary to transcend the perspective that is so familiar to us in our everyday practices: that of ourselves and others as individual, willful actors. Founding fathers like Georg Simmel and Emile Durkheim developed this insight, theorists like Norbert Elias and Pierre Bourdieu, each in their own way, built upon it, but nowadays dominant streams of sociology have come to value the ready-to-hand methodological orthodoxy of individualism rather than the substantial results that the typically sociological perspective has generated. To be fair, within sociology there are some outstanding exceptions (for instance, Randall Collins and Niklas Luhmann) but, curiously enough, individual-transcending approaches are now mainly kept alive by theorists who position themselves *outside* of sociology proper, like Bruno Latour (actor-network theory) and those building upon the work of Michel Foucault.[1] Their insights can be made fruitful for theories about law and for thinking about the history and future of legal practices.

A dominant legal conception of contract these days grounds it upon a *consensus*, a meeting of the minds of legal subjects. And we are supposed to believe that this has basically always, at least since the times of Roman law, been an element of contract. However, when Roman lawyers wrote about *consensus*, they in all probability were merely referring to the presence of conformity as to the delineation of the *object* of the transaction, and did not have in mind some correspondence of inner frames of mind. It was only much later "consensus" was deemed to refer to this.[2] The model of contract has been based on the *transfer of property*, and this analogy of physical transfer was adopted, in the 18th century, in theories of the labor contract as the temporary transfer of one's "labor power" as a part of one's property, into the hands of a patron or master, in exchange for remuneration. This quite new way of legal conceptualization then became part of the political program of Enlightenment and of the French Revolution, and has had a substantial impact on labor relations from 19th century onwards.

In this paper, I investigate the nexus between this conceptualization of the labor contract and practices of labor relations by way of confronting two strands of theory that try to deal with these relations in different ways. On the one hand, this involves theories based on the *contractual model* that depart from a will or preferences of individual actors and are based on regularities in the

[1] Collins (2004, p. 4): "My analytical strategy is to start with the dynamics of situations; from this we can derive almost everything that we want to know about individuals, as a moving precipitate across situations." Cf. on Latour: Latour (2013), Kyle McGee (2014); on Foucault: Rossi (2006).
[2] Austen-Baker 2002, p. 1.

relations between them that can be derived from that point of departure. On the other hand, it involves theories inspired by *network-like interdependencies* between acting entities, theories that tend to regard contract rather as a technical device that enters into, and then plays a part in relations of interdependency, and treat the will rather as one of its consequences. Both of these theoretical strands have been developed from concepts that had at first a relatively narrow field of application (transfer of property and the practice of scientific research) but then turned out to lend themselves to a much broader use in other fields of theoretical study. A crucial difference between these strands is the way they conceptualize the human subject: as a kind of atom and point of departure for the explanation of all social relations, or as an element of, and itself produced by, interdependencies between entities.

Contract should, in the latter perspective, not just be seen as a kind of formal, normatively biased and defective representation of relations out there – as one side of the gap so often taken for granted in socio-legal research. It should rather be seen as a *device* that *performs* itself in social relationships, in labor relationships in particular for our purposes here. Interestingly, such a view implies that law is much more important than even lawyers tend to believe – be it largely in other ways than they expect it to be.

Contract theory is the subject of the second section. I briefly trace the concept's development and wider application, and then consider the presuppositions of contract theory. The third section deals with network theories. In the fourth, I go more particularly into the subjectivity concept, and in the final section I set out some of the consequences of these considerations for the legal practice of labor relations regulation.

2 *Contract theories*

2.1 Development of contract as a commitment device

From what is commonly called an external perspective on its current use, we may consider *contract* as a *commitment device*. Generally, the argument is that in social life some formalization of relations is functionally required, in particular in view of the social time dimension:[3] formalization is a way of trying to stabilize a present, or presently projected set of relations against (if possible) all contingencies that might detract from it in the future. If concluded with respect to current commitments of parties, contract could thus also be characterized as a sustainability of commitment device. During the last centuries, the device has gradually become dominant, in line with an increase of the number and importance of relations between parties not familiar with each other (the company of strangers[4]). Contract appears on the scene as a late successor to several other kinds of commitment devices.

Historically, before contract was raised to the central position it now has in the law of obligations, the *oath* had for a considerable time been in use as a way of fixing commitments in the dimension of time. Adopted from the ecclesiastical world, the oath was mobilized, from about the 9th century onwards, as a formally one-sided, mainly socio-political commitment device. Its force rested to a large extent upon its *sacramental* status: breaching one's oath was considered to be a deadly sin and

[3] Luhmann 1995, p. 141: legal norms as a "collision of legal bonding and sociality" "*Kollision von Zeitbindung und Sozialität.*"
[4] Seabright 2004.

expected to be heavily sanctioned in the hereafter. The oath as a commitment device had its heydays in the newly developing cities of 12th to 15th century Europe, where citizens and guild members were required to commit themselves by oath to the city's or guild's common rules, the content of which had already been fixed in communal decision-making. The oath was conceived as the performance of a conditional self-conviction: besides being a sin, breaching it would also mean to call down upon oneself sanctions that had been included in the rules of the community to which one committed oneself. Taking the oath was an *oral* procedure, only the fact of its having been performed used to be recorded in writing.[5] This was the way the technique of writing had for a long time been used, to reconstruct the past. But from the 11th century onwards it started, in the form of contracts, also to be used in a *prospective* way to "construct the future." The spread of the technique of writing has thus had a huge impact on the ways of formalizing social relations and prepared the ground for the rise of contract.[6] A first element of the pre-modern contract is that the sacral character of the promise, sealed by an oath, has been important to the development of contract as well. It allowed canonical law to abstract the contract from the bonds to formal and ritual acts it had in Roman law. Even as late as the 18th century, English traders contemplating breach of contract were more afraid of divine sanctions than of the opinions or actions of their counterparts.[7] This may remind us that we ought to be careful not to project our current notions of contract onto earlier periods.

Secondly, the practice and theory of contract has persistently been based on the model of the transfer of property, in which formal, relatively public acts, rather than the supposed wills of parties, have been decisive, and for ages they have come in pairs, in the interlinked but clearly separate legal acts of offer and acceptance. In the 17th century, Grotius still closely followed the analogy with transfer of property: "entering an obligation is the transfer of a particle of freedom[8] from the debtor to the creditor." The idea of consensus, of a meeting of minds has been a relatively late, early-18th-century development. Thirdly, the written contents of contract did not constitute an absolute truth between parties. In England until far into the 19th century courts could revise an agreed price if they deemed it to be unfair. It was only in around 1860 that contract law developed into a separate field of law in England.

Meanwhile, the notion of contract had been transferred and adopted into political theory, as a way to detach sovereignty from its metaphysical foundations and to suggest the primacy of a private sphere from where contractual transfer could found the reciprocity between ruler and ruled. As such contract was embraced by Enlightenment thinkers and made its way into the ideology of the French Revolution. An increasing awareness of man as biologically determined by his finitude and natural insufficiency is theoretically compensated by the claim of a transcendental sphere of freedom and of rights of individuals.[9] The way to construct relations between ruled and rulers would then be on the basis of voluntary contracts. In the field of labor relations, contract was mobilized to counter *Ancien Régime* corporatist structures, using the property transfer metaphor to construct labor power as a kind of property that every individual citizen has a right to freely alienate to another. Labor relations were thereby taken away from a semi-public sphere and relegated to a private sphere, reducing the

[5] Prodi 1997; Oexle 1996 p. 88-90.
[6] Kosto 2001p. 218.
[7] Biernacki 2014, on the basis of study of 18th-century diaries.
[8] "*alienatio particulae cujusdem nostrae libertatis*" Nanz 1985 p. 141.
[9] Rossi 2016 p. 111.

role of government to that of providing for the enforcement of private contracts. One advantage of conceiving a labor contract as the mere transfer of labor power against wages was that any mention of subordination of the worker could be avoided. This element was reinserted only later, thereby developing it further into the employment contract that became the basis of regulating relations in the 20th century.

2.2 Contract in theory

The Enlightenment concept of the human subject was thus constructed in terms of individual property and of natural rights apt to be mobilized against *Ancien Régime* collectivism. In the field of labor relations, contract was adopted in legal doctrine and provisionally incorporated in early-19th-century legislation mainly driven by the negative motive of countering former corporatist structures. From a positive perspective, its advantages parallel those mentioned above. The notion of a contract between formally equal parties brackets material conditions and relegates these to a legally irrelevant sphere. In this sense, the contract functions as an exclusionary device.[10] It attributes full individual responsibility to each of the parties for both entering into the contract and performing its contents. To the parties, the contents of the contract have the force of law (*Code civil*: "*tiennent lieu de loi à ceux qui les ont faites*") and, unlike before, the public authorities refrain from judging their fairness, holding the principle of *volenti non fit inuria* ("to a willing person, injury is not done"). By imposing clear demarcations of duties and thus increasing calculability, this way of formalizing relations has facilitated the development of larger, industrial companies, and the institutionalization of what we now treat as labor markets. The consequences of these demarcations have incited labor movements from the mid-19th century onwards to challenge the formal character of the contract. The political answer to this challenge has been the development of the in part compensating regulation that we now know as labor law.

Apart from in legal theory, the Enlightenment concept of the human subject as an individual, autonomous, goal-oriented, self-realizing actor has been adopted in several other strands of theory: in liberal philosophy, in mainstream economic theory and in variants of rational choice theory. If one would include theoretical variations that allow for different kinds of relativism as to the autonomy of subjects, but nevertheless take it as its point of departure (for instance, psychology, bounded rationality etc.), the range of influence of the concept could be stretched even wider.

The presuppositions of contract theories can be set out as follows. First, the human being is considered as a separate entity, enclosed by his skin,as an individual atom of society. Secondly, a human entity is an active being, an *agent*, and as such different from non-human entities. Thirdly, it is also a goal-oriented agent, it is supposed to have its innate drives or pre-established *preferences* – theories typically do not deal with them, but accept them as given. Fourthly, as a human agent it has a certain *autonomy* in the way it acts to realize its goals. Fifthly, its way of acting develops in a kind of strategic *exchange* with the individual's environment, and that environment is, finally, treated as something *instrumental* to the realization of its goals.

Note that there is, up to now, nothing social in the subject of this *Robinsonade*. How is this human being to be turned into a social one? From a contract perspective, the answer is: only by its being dependent upon others in its strive to realize its goals. It needs these others, but they have their

[10] Knegt 2008.

own goals and are therefore potentially unwilling to do what would best suit the subject's goal attainment. Therefore, it is dependent upon the possibility of contracting with them.

Criticism of the contract approach has a long history. In 1893, for instance, Emile Durkheim argued that contracts were only possible on the – often at least partly unnoticed – social basis of common rules, and that the figure of the human/legal subject of these contractual relations was itself a product of social relations.[11] That contract theory has nevertheless had an enduring appeal that could be ascribed to at least three main advantages of such an approach. First, taking the individual human actor as a point of departure fits in with practical presuppositions of our own way of living in society. It short circuits moral with epistemological principles, and makes it relatively easy to project theoretical concepts onto our experiences. Secondly, rather than deny the social conditions of the type Durkheim pointed to, it instead brackets them and relegates them to a context held constant, so that it becomes possible to focus more narrowly on what *does* change. Finally, the presupposition of goal attainment and of a certain amount of rationality allows for more formal ways of modeling relations that at present have a relatively high scientific legitimacy. The *homo oeconomicus* of economic theory and its counterpart in sociological rational choice theory are (extensively criticized) epitomes of this.[12]

In social-psychological theories of employment relations, a curious application of the contract model is the concept of the so-called psychological contract. This rather misleading term has been introduced to indicate the informal mutual expectations that employee and employer tend to have about their mutual duties of effort. Apart from the fact that there is nothing 'contractual' in the true sense of the term in these expectations, there is also hardly anything 'psychological' about them, since they obviously refer to conventional norms in a social, workplace setting.

The adoption in sociological theory of a contract perspective, that starts from individual actors, has a somewhat paradoxical character. Sociology developed as a science of the social sphere that, although at first deliberately neglected by liberalism, gradually became problematized during the 19th century. Sociology constituted itself by taking its distance from individual actors, and developed based on the insight of the need to analytically transcend individual action. Nevertheless, in several currents of self-proclaimed social theory, nowadays *en vogue,* methodological individualism has banned this insight out from theory.[13] In these currents of theory, ultimately based on the model of contracting individuals, the innovative contribution of sociology seems to be lost. In other strains of theory, however, to which I will now turn, it is still alive, albeit in different forms.

3 *Network theories*

Confronting these contract theories are a number of approaches that I here subsume under network theories, admittedly through a lack of a more adequate common measure. What they have in common is that they do *not* treat the subject as an atom but as itself the product of relations. The most radical proponent of such an approach is Bruno Latour who goes as far as to propose to replace the modern constitution of the subject/object divide with a multiplicity of ontologies.[14] Originally building on research into scientific research practices in laboratories, his theoretical work has

[11] Durkheim 1997 [1893] p. 159-63.
[12] See, for instance, Douglas & Ney 1998 and Heath 2008, Ch. 2.
[13] For instance, in what is now being called "formal sociology."
[14] Latour 2013.

inspired legal[15] and economic thinkers.[16] For instance, building upon Latour's work, Michel Callon argues for the performativity of economics, a perspective that invites a reassessment of part of the relations between law and human practices. Finally, in view of his theoretical work on power and the human subject, I will also refer to theories inspired by the work of Michel Foucault.[17]

3.1 *Latour on [LAW]*

Following A.N. Whitehead, Latour criticizes what he calls the modern constitution of an opposition between a transcendental, in its cognition purifying subject and an objective, not thoroughly penetrable world in itself. According to Latour, the world instead consists of elementary practices in which human and non-human entities coproduce networks in which humans do not take a superior position in advance, reducing all other entities to objects of instrumentality. By way of example: even in our computers the central processing unit (CPU) is not 'central' in the sense that the keyboard and hard disk would be related to it as instruments; what counts is the current flowing through the whole of it, producing, by a series of transformations, something that did not exist before, for instance, human beings as Word processors. The same goes for our smartphones: we may consider them as instruments, but their touchscreens subject human beings to the swipes that they require and, as recently discovered, change the physiology of our brains within a few weeks of our using them.[18] In other words: devices tend to create new positions for human entities to take, thereby changing who we are. In this respect, human subjects are as much the result of the networks in which they are entangled as the non-human entities involved.

This approach implies a critique of the way we usually treat technologies, that is as neutral intermediaries between human actors, as instruments that tend to contribute to changing the world in which we live, but not ourselves as subjects. A more adequate way of treating them would be as *mediators*, as technologies that change our practices, that may create options for our actions (empower us) but at the same time tend to exclude others. Technologies prefigure their users, create virtual positions that users otherwise would not be able to take, "They enroll their users in programs of action they would not otherwise follow, creating positions that users can occupy along paths that the technologies, not the users, have established." By determining our options, they have what Latour calls a *moral* impact, and in this way also change their human users, "the moral law (…) is also in our apparatuses." The will to use them is only a supposition, a "purified and distilled outcome" of the entanglement of humans and technologies.[19]

Although it is more easily imaginable that technologies like smartphones have this effect upon us, it applies no less to social technologies. Looking from his point of view at a scattered world of different levels of enunciations, Latour claims that the mediation of law is essential to doing the connective work of linking these levels. Without law we would never be able to impute or attribute a statement or action to any actor,[20] "Law brings off the miracle of proceeding as though, by particular linkages, *we were held to what we say and what we do*. (…) By being attached to the forms of law, [humans] become capable of continuity in time and space – they become *assured*, attributable selves

[15] McGee 2014.
[16] Callon 1998; MacKenzie et al. 2007.
[17] Miller & Rose 2008; Rossi 2016.
[18] Gindrat et al. 2015 in *Current Biology*, 25, 1 p. 109–116.
[19] McGee 2014 p. 42; Latour 2010.
[20] McGee 2014 p. 213-4.

responsible for their acts."[21] By providing for these forms, law thus implies a specific offer of subjectivity alongside others like the political offer of citizenship. Only by accepting this specific offer, by filling up these virtual positions, humanoids turn into legal subjects.

Latour considers contract as a hybrid of law and organization (the mode of being that provides for scripts). Contract is both a script and a certain type of attachment between those who establish the contract and the stated terms that bind them in the legal sense, regardless of how the script unfolds. The majority of scripts, however, do not *reveal* these legal attachments, particularly when we are dealing with habitual courses of action. The mode of "[LAW]" is a specific way of assembling the world, it provides for a type of attachment only and has no content of itself, it has content through its attachment to scripts.

Law acts as a technology of responsibilization and, thereby, of subjectification. The availability of commitment devices like oath or contract have thus created virtual positions for human action that, when taken, turn us into legal subjects of a certain kind. Contract should not be treated as a neutral technique of writing down, and thereby relatively fixing agreements, but as a *mediator*: to a large extent it *creates* and *performs* what it purports to *document*. Rather than as representing, it should be regarded as constituting action positions.

3.2 *Callon on markets: framing and performation*

The perspective outlined above turns out to be insightful if we use it to approach markets, including modern labor markets. In working out Latour's approach for economics, Michel Callon comparatively stresses its *exclusionary* aspects, bracketing and disentangling, rather than sharing Latours attention to the mediating and connecting of levels. Callon's answer to the Durkheimian question: under what social conditions can a labor market function that is made up of contractual relations?, would then be: if the institutionalized *framing* of transactions is sufficiently provided for. The framing of transactions is effected by way of technologies that *bracket* a whole range of social and cultural involvements that human beings are entangled in, produce these beings in their stripped figures of relatively autonomous buyers and sellers, and produce the object of the transaction as a definable, relatively stable, measureable 'thing-like' entity, in a word: as a commodity.[22] Not only are they "rules of property and contract (…) are among the distinctive technologies of power and obligation in market societies, generating a variety of micro sovereignties, disciplinary regimes, and coercive forces,"[23] they are also accompanied by diverse kinds of technical devices. In the medieval market place, for instance, the importance of the production of commodities is marked by the prominent position of the weigh house that, apart from the scales and standard weights, housed market inspectors charged with surveillance and enforcement of market rules.

Let me illustrate how this framing works out. If you buy a shirt at the clothes shop, you may expect it to have a certain composition and quality (as you know its production is controlled by a legal regime) and you may expect it to be delivered to you irrespective of your religious, political or other affiliation or of the clothier disliking your son. Furthermore, if this shirt had been produced in Bangladesh under inhuman labor conditions, the sales contract, by its legal construction, frees you

[21] Latour 2013 p. 370, 372 emphasis in the original; "assured" here refers to the guarantee that law offers regarding the connection of actions that would otherwise fall apart by "shifting out."
[22] Holm 2007 p. 234.
[23] Mitchell 2007 p. 245.

from any legal responsibility for damages done to the workers. The device of the sales contract thus provides for a framing that disentangles transactions from social and cultural textures, and for a calculability and predictability of the outcomes of choices to be made.[24] Buyer and seller are strangers in the sense that *in the exchange itself* they reproduce only these roles.

In this perspective, the abandoning of the modern constitution, as advocated by Latour, implies another relation between discourse and the reality it purports to describe, integrating discourse into it and making room for an active contribution of discourse to its construction. Michel Callon has introduced the notion of *performativity* into the debate on the relation between economic knowledge and practices. Austin, who introduced the notion in the philosophy of language, initially thought of performative utterances as a specific category (classic example: "I now declare you man and wife"), but later stepped back from his categorization and argued that there are no utterances that do not also create their context. On the one hand, statements are not outside the world to which they refer; on the other hand, this world is senseless without the statements that make it move. Systematic knowledge is thus involved in a process in which it creates the conditions of its realization. Donald MacKenzie has shown this for the Black and Scholes formula, developed in the theory of economics as a model to calculate prices of options, having become real through its implementation in software used at the stock exchange. Callon refers to these findings as he radically takes distance from the modern constitution (Latour):

> "We could say that the formula has become true, but it is preferable to say that the world it supposes has become actual. (…) The formula that is born performative, and remains so, seems to be constative when the world (finally) acts according to it. (…) Statements and their worlds are caught in a process of coevolution."[25]

Now, what about law? The descriptive pretensions of economics might suggest that such an analysis could not easily be transposed to a normative type of systematic knowledge such as law, but such a suggestion would be misleading. Both are essentially *modeling* enterprises and both have normative implications. Where economics constructs relations on the basis of presuppositions of rational choice, legal doctrine constructs the assignment of powers and responsibilities to legal subjects and defines legitimate ways of committing oneself to make changes to them in relations with other subjects. Law, as systematically developed in legal doctrine, defines subjects' options to act and defines the legal consequences of choosing each of them. These assignations and definitions together constitute a model that, if institutionalized and enforced, facilitates interactions between market participants. As they use these options to act and actualize their responsibilities, the legal order is being realized. Both in economics and in legal doctrine, a body of knowledge regarding the interrelations between actions of human beings, albeit it of a different type, performs its own conditions of realization to a certain extent.

What does it mean to say that "a body of knowledge performs its own conditions of realization"? First, that in a defined setting, like for instance a town market, participants are involved with devices (standard measures, money, an order of stalls, market bells, etc.) that constitute a framework within which they develop a practical knowledge, not only of their own options to act but also of what may

[24] Callon 1998.
[25] Donald Mackenzie 2007, "Is Economics Performative? Option Theory and the Construction of Derivatives Markets", in MacKenzie et al. 2007 p. 54-86; Callon 2007 p. 320-1.

be expected from others. If participants can fruitfully mobilize parts of this market knowledge to realize their practical goals, then these parts of knowledge tend to be incorporated in the discourse that goes with the new practices they develop. In this process, it is thus not only the discourse that changes, but also the practices and the actors themselves. As much as human actors (*agents*), knowledge and devices are parts of the texture of elements "that have been carefully adjusted to one another"[26] and that constitute markets. In this way they are now regarded as *assemblages* of agents, knowledge and devices, as *socio-technical arrangements* or, as Callon calls them, *agencements*.[27]

The degree to which a model is successfully actualized in the world, is called its *felicity*, with reference to the *felicity conditions* that Austin (1962) formulated as to the success of performative utterances.[28] This is what constitutes 'performativity' or 'performation', but it is not the same as what we know as a 'self-fulfilling prophecy'. Even discourse may have effects that strike back, that put an end to a certain process of co-evolution of a particular assemblage of discourse and practices, and that may instigate the development of a new assemblage. It must be admitted that the term "felicity conditions" refers to a complicated process, explicitly making room for discourse to help create its own reality, rather than bringing the kind of causal clarity that one would hope to find, but that, as we have to recognize, could only be approximated in careful studies of practices.[29]

While the ethos of contract theories can be regarded as being oriented to moments of relative *stability*, to the beneficial and reassuring fixing of relations between otherwise centrifugally inclined individuals, the ethos of network theories is rather to be found in a ceaseless *dynamics* and permanent circulation of knowledge, technological devices and practices. *Performation* is then dynamically defined as "the process whereby sociotechnical arrangements are enacted, to constitute so many ecological niches within and between which statements and models circulate and are true or at least enjoy a high degree of verisimilitude. This constantly renewed process of performation encompasses expression, self-fulfilling prophecies, prescription, and performance."[30]

4 *Framing the (legal) subject*

In contrast to the stable position that subjects have as the atoms of contract theory, they are in network theories variably produced by the arrangements of which they are part. Actors themselves are as much part of Callon's *agencements* as knowledge and devices are. Neoliberalism, he specifies, comprises an "anthropological program" that cognitively configures "a passible version of *homo oeconomicus.*" Neoliberal economists "tend to localize agencies in (individual) human corporeal envelopes and to equip them with tools, instruments, prostheses (…), and rights, enabling them to construct something like individual interests (…), and granting them the resources to calculate

[26] Callon 2007 p. 319.
[27] Callon 2007 p. 330. For the cognate concept of property, we might say that, if entities like fences, locks and the paper of title deeds do stabilize and work together, they are *performing* "property." "Property is not property unless it is actualized in particular relational arrangements." For instance, bookkeeping in Blomley 2013. MacKenzie et al. 2007 refers to a number of instances. On double-entry bookkeeping, see Poovey 1998.
[28] Blomley, *CJLJ* p. 28.
[29] Like the study of fish quota by Peter Holm 2007.
[30] M. Callon 2007 p. 330, here approvingly referring to work by A. Mol.

them."[31] What economists tend to treat as naturalized presuppositions of their knowledge models is in fact *performed* as part of a socio-technical arrangement.

Callon ascribes the anthropological program of neoliberalism to economics. He thereby undervalues the extent to which economic transactions tacitly rest upon an implicit legal structure and upon the (sub)consciousness of agents of their legally defined positions. Market relations build upon a preliminary individualization of market actors as legal subjects, performed by an institutional attribution of powers and responsibility that we use to characterize as law.

This idea that the subject is a construction generated by social processes stands in a long tradition of sociological theory, even though it has now to some extent been relegated to its bad books. As early as 1890, Georg Simmel criticized the misleading individualistic conception of the subject and pointed to its religious roots.[32] Later, the ways that it distorts our view of social relations has been a persistent theme in the figurational sociology of Norbert Elias as well as in the structuralist legal theory of Jan M. Broekman.[33] Michel Foucault has analyzed subjectivity in terms of power-knowledge, and Bruno Latour – to end this all too short synopsis – has defined the legal subject in terms of "LAW" as an original form of networking of people, acts and texts.[34]

What these approaches have in common is that the subject is neither an entity that can be held constant nor is it only "the transhistorical object of techniques for being human." The subject is rather an element of, and in the view of some produced by different practices.[35] How technology shapes (legal) subjectivity can be illustrated by referring to techniques that are now completely internalised, like writing down and calculating performance, techniques that are "an incitement to individuals to construe their lives according to such norms."[36] Mary Poovey has nicely shown how the technical device of double-entry bookkeeping, introduced primarily to legitimize gainful trade, performed itself by changing those involved in its practice: "the personal-moral metaphors of accounting tended to realize what they purported to describe – by encouraging the company's agents to act as responsibly as the books represented them as being."[37]
In Foucault's analysis, subjectivities are connected to governmentalities characterized by different politics of truth. Medieval and 16th and 17th-century markets were, as much as courts, *places of jurisdiction*, where in the exchange and in the price something like justice was deemed to come to light.[38] Markets too are places of both jurisdiction and truth telling (*véridiction*) where rules are formed that constitute forms of subjectivity and types of knowledge.[39] Since the mid-18th-century, the counterfactually stabilized (Luhmann) expectation that prices were reflecting a just balance has been gradually giving way to a learning attitude towards prices as the revelation of the true result of a natural play of supply and demand. The legal subject is then, on the one hand, being adjusted to the rules of political economy, on the other hand, those parts of the individual that are *not*

[31] Callon 2007 p. 344-7, partly referring to MacKenzie & Millo 2003 p. 141.
[32] Georg Simmel in *Über socialen Differenzierung* 1890, cf. Helle 1988 p. 122-3.
[33] Elias 1969 p. il; Broekman 1978 p. ch. 8.
[34] Rossi 2016; Latour 2009 p. 260.
[35] Miller & Rose 2008 p. 7.
[36] Miller & Rose 2008 p. 67.
[37] Poovey 1998 p. 58.
[38] Foucault 1994 p. 540. In § 2.1 has been referred to English court practices of revising agreed-upon prices deemed to be unfair. And in law nowadays there is still "unjust enrichment" as a corrective to formality.
[39] Foucault, *idem*.

amenable to governmentality are negatively ascribed to nature. Foucault therefore characterizes the new type of governmentality of which this subjectivity is part, as "rather a naturalism than a liberalism."[40]

According to Miller & Rose, who build upon Foucault's analysis in terms of power, practices are presently converging into the neoliberal regime of governmentality that links a seductive ethics of the self to a design for the radical transformation of contemporary social arrangements.[41] They point out that the knowledge on which policies claim to be founded is predominantly a practicable discourse that *re*presents reality in a form that makes it amenable to political deliberation and interventions. To make a domain, like transactions in goods and services for instance, amenable to management, processes and relations first have to be conceptualized as a market and the knowledge of its functioning as economy. "Theories here do not merely legitimate existing power relations but actually constitute new sectors of reality and make new fields of existence practicable."[42] In the neoliberal state law has been rediscovered as an instrument of political economy. Where the liberal state formerly withdraw from the private field of markets, the neoliberal state now lets economics invade into politics and accepts economics as the expertise knowledge that guides its interventions.[43]

In the course of these developments, subjects are considered to change with the arrangements of which they are part. There is no natural base to define an individual and to ascribe to it all kinds of motives or powers like "rational, self-interested behavior" or "formation of a will," as contract theories presuppose. The (legal) subject itself is to be considered as a shifting element in, or even as a product of the arrangements that it is linked to.

5 *Labor Contracts and Network Theories*

As set out in Section 2.1, a contractual theory has been the basis of a new regime of regulation of labor relations that has been proclaimed during and in the aftermath of the French Revolution, and that has been incorporated in new legislation of civil codes, in France as well as in other continental states. The network theories, discussed above, allow us to regard this contractual conception as a kind of legal model that would not represent changing labor relations in a better way, but as partaking of a new regime of governmentality, of a new *agencement* of human, material, technical, and discursive elements, to a certain extent gradually creating their own felicity conditions. I will argue that such a perspective can also be fruitful in an evaluation of historical as well as current developments in the regulation of labor relations.

5.1 *Five normative regimes of labor relations*

In light of this perspective, different regimes of labor relations can be identified. If we look at the way that labor relations have been normatively structured, we find that, before the end of the 18th century, labor relations are hardly covered by public law. In medieval towns as well as in the countryside, relations are structured by conventional rules, only the relatively *public* acts of the entry into, or the termination of a labor relation are subjects of public rulings. In the *corporatist*

[40] Frerichs 2010 p. 245-6. This is a theme that has been further developed by Giorgio Agamben in *Homo sacer*.
[41] Rose 1998 p. 30-33, 153.
[42] Miller & Rose 2008 p. 31.
[43] Frerichs 2010 p. 241.

regime in the town, traders, workers, apprentices, etc. are to some extent enacting the relatively fixed scripts that are part of their status positions. Their subjectivity is primarily defined by the membership of a group constituted in terms of brotherhood, defined both by the *independent* craftsmanship of the master – a notion that is shared by his journeyman being on their way to masterhood – and his taking part in the honor of the collective of the craft. The collective honor of the brotherhood is of utmost importance in defining and keeping a position in the complex social composition of these cities. Externally, membership brings collective rights, among others towards city authorities and towards foreign competitors, and, internally, rights and duties towards the brotherhood and its other members, for instance an individual right to financial support in case of disability and a collective duty of assistance at funerals of members. The town is regarded as a *place of distributive justice*, and it is therefore, for instance, legitimate to put restrictions on the number of workers a guild master may employ. The market is regarded as a *place of jurisdiction*; prices reveal a fair balance in economic exchanges, not (as they were to be theorized later) because of some kind of natural mechanism behind them, but as artificial representations of the instituted order of the town and its markets. This *assemblage* may, for our purposes, be identified as a first type of *corporatist* governmentality of labor relations. Subject positions are constituted in a dual way. Within the framing of town markets, an economic subject arises out of the institutional transfiguration by which "natural desires enter and adjust themselves to the artifice of communal life."[44] Within the conception of the guild as a brotherhood, the oath acts, in combination with written rules defining the self-executing sanctions on infractions, as a mediating legal technique (based on the medieval *coniuratio*)[45] creating the virtual brotherhood positions for the craftsmen to take. Within towns, the individualization of the craftsmen as legal subjects is framed in the artificial orders both of communities (guild, city) and of markets as places of distributive justice.

In the cities of the second half of the eighteenth century, as manufactures start to develop without the guild structure, and to grow larger, a second regime of labor relations arises that takes its inspirational model from the ecclesiastical world and may be qualified as patriarchal. The patron manufacturer considers himself to be charged with a duty of fatherly care, while the workers owe him obedience and respect. To be sure, this type of relation had also been an aspect of corporatist relations, but only as regards the relation between a master artisan and the apprentices or journeyman that live in his household. In a sense, it is the household model that is being inflated to encompass a hierarchized productive community of much larger dimensions. As a model of primarily morally defined positions, as a status-bound relation of protection governed not by legal but by conventional norms, it is now being extended to upcoming new types of quasi-industrial companies.[46] In a German romantic tradition of thought and partly in reaction to the upcoming third model (below), this type of moral regime is being hailed as a basis of a genuine Germanic law conception of labor relations, based on an old notion of retinue (*Gefolgschaft*). It conceives of workers being embedded in the community of the enterprise.[47] In the context of the empowerment of the nation state, this type of moral regime also tends to be translated into state law. In Germany the lawyer Joseph von Buß pleaded, as early as April 1837 in the Baden parliament, for a broad program of legal protection of workers, including prohibition of the truck system, a three-months

[44] Rossi 2016 p. 73.
[45] Within an extensive literature on *coniurationes*, cf. Althoff 1990.
[46] Cf. for Germany Becker 1995 p. 6.
[47] Gierke 1887.

term of notice, prohibition of child labor and of detrimental work in general, a maximum of fourteen working hours a day, and relief funds for disabled workers. In the 1860s, German legislation incorporated the obligation of employers to take measures to protect the life and health of workers, albeit only formulated in general terms.[48]

The regime of this new configuration of power relations generates subject positions in which workers are primarily subjects of a patron-manufacturer, this position being constituted by a hierarchical relation in which what one may expect from the other is *morally* defined, and in which this moral control compensates for the formal and material inequality of positions. There is a fundamental tension between this patriarchal regime and the juridification that results from the liberal-contractual regime, as can be seen, at the end of the 19th century, both in the reluctance of workers to address their patrons in terms of their rights and in the aggrieved reactions of patrons when they start to do so.

The third, liberal regime, had been initiated by Enlightenment philosophers adopting concepts of legal doctrine, in particular contract, and is then further developed by legal theorists as well as political philosophers. The contract model was mobilized in the struggle of the bourgeoisie rising against the *Ancient Régime* powers, including corporatist and city-level organizations. However, although formally incorporated in the civil code, the new concept of a labor contract at first hardly has any practical impact. Labor law theorists who berate the "meager three articles" that, for instance, the Dutch Civil Code (1838) devotes to labor, oversee that their insertion in the Code was rather prompted by systematic considerations than that the Code played any role whatsoever in actual labor relations – and was thus, in fact, quite adequate. During the 19th century, there was a permanent struggle for power between different regimes, and contract only started to play a role in the game later on. In the first half of the century it is, to a large extent, independent workers trying to defend their honor (first regime) against trends of subordination in larger companies (second regime).[49] As soon as workers finally start to mobilize the notion of the labor contract (third regime) during the last quarter of the 19th century, the issue of the implied equality of contract becomes controversial. Workers strive for an extension of equality from a merely formal to a substantial one; employers react with a plea for legal recognition of their inevitable position of authority in the factory. These endeavors are not replicating but rather echoing the ethos of the first (for an honorable treatment and fair distribution), and the second regime (for legal recognition of the patron's patriarchal position) respectively. The national state gets seriously involved as a third party in the struggle. Gradually, the liberal regime's narrow framing of the contract is being contested, primarily in terms of the health of workers and of their rights as citizens.

The subjectivity of workers shifts from partaking both in the community and honor of the trade and in the legal order of the town market (first regime), or from being constituted as a moral subject, appealing to a duty of care of the patron (second regime), to that of a legal subject being bound by, as well as claiming, rights in the framework of a contractual conception of the labor relation. In the liberal regime, the contract acts as a mediator by framing work as the delivery of individual labor power as a commodity, and the labor relation as a purely private one dealing only with the worker's

[48] In the regional *Gewerbe Ordnungen*, for instance of Sachsen 15-10-1861 and of the *Norddeutsche Bund* 21-06-1869, § 107 the latter being extended to the entire *Reich* in 1871. Cf. Becker 1995 p. 49.
[49] For lively accounts of this struggle, see Brand 2002.

delivery of that. The legal position of the worker is that of an individual lessor of his property, all references to collective or material aspects of his existence are suppressed, exteriorized and, at first, declared to be legally irrelevant. Through the exclusionary character of the labor contract, this regime thus creates an extremely individualized subject position for the workers to take. This individualization constitutes the basis of the kind of mobility of workers that, in the course of the 19th century, is going to be called a "labor market."

After the turn to the twentieth century, both endeavors (for equal and fair treatment of workers, and for recognition of the employer's command) are gradually reconciled through the legal notion of the employment contract that institutes a trade-off between workers' recognition of subordination in the production process, and employers' guarantees for working conditions and a system of collective agreements on wages, partly backed up by social security arrangements instituted by the state. What economists call the incompleteness of contract, this lack of specification of what is going to be delivered is compensated by assigning the employer a right of direction that is, however, not easily reconcilable with the formal equality of contractual parties.[50] Workers, in turn, are compensated by offering them protection against risks that are considered to flow from the labor they perform in a subordinated position. The realization of this fourth welfarism regime[51] is strongly furthered by the peculiar political situation during, and by the political consequences of, the two world wars that urge states to intervene in labor relations as well as in other matters. On the one side, recognition of subordination implies a more intensive control of the workplace (Taylorism) as well as, after WW I, a broader interest in personal circumstances, from an understanding that "it would be possible to conceive of administering the working environment to ensure simultaneously the contentment and health of the worker and the profitability and efficiency of the enterprise. (…) Human requirements were to be internalized within a technical reconfiguration of the work process itself."[52] The other side, that of guarantees, constitutes the citizen, in particular in the three decades after WW II, as a social being whose powers and obligations are articulated in the language of social needs and responsibilities and of collective solidarities.[53]

Due to the role that nation states take in instituting programs of social insurance, insurance transforms the way citizens are integrated into the social order. The state interferes in the contract of employment and "articulates this relation within a different but complementary contract between the insured individual and society, introducing a relation of mutual obligation in which both parties have their rights and duties."[54] To a certain extent, insurance provides subjects with a "peace of mind of the welfare state."[55] Social needs are met by programs of intensified surveillance and assistance.

The subject of the worker under the welfarist regime is defined by extensively legalized duties and rights flowing from the trade-off between recognition of outside control and guarantees against social risks. Recognition of the importance that the social relations, both at the workplace and outside of it, may have for the worker's productivity lead to a less exclusionary concept of what may

[50] Hugo Sinzheimer (1927) has developed this point, building on the writings of Otto von Gierke.
[51] The term is derived from Miller & Rose 2008 p. 72.
[52] Miller & Rose 2008 p. 45, 186.
[53] Miller & Rose 2008 p. 48.
[54] Miller & Rose 2008 p. 77.
[55] Van Stolk & Wouters 1982.

be legally relevant in the framework of the employment contract. The collective character of the position of workers is recognized (again). From half way through the century onwards, dismissal law increasingly protects their position introducing long-term commitments into employment relations.

Finally, as of the 1980s, a *neoliberal* or "advanced liberal"[56] regime introduces a new discourse, seeking to realize its felicity conditions: a seductive language of freedom, autonomy and choice, of enterprise, concomitant to a political rationality that at the same time ties these individual choices and the productivity of workers much more strongly to the economic welfare of nations that are themselves involved in strong geopolitical competition. Installing technologies of calculation, responsibilization and accountability "enjoins those within the locales to work out 'where they are,' calibrate themselves in relation to 'where they should be,' and devise ways of getting from one state to the other."[57] The legal subject of the neoliberal regime is constructed "as *autonomous activity* geared at the actualization of his productive and vital necessities"[58], is conceived as a calculative citizen and as an individual, conscious market actor, as an entrepreneur, individually responsible for his or her being of value at the market, and also increasingly individually responsible for covering the risks of his or her working existence. Although the state is still increasingly interested in the economic performance of its citizens, its role is now less in guaranteeing the compromise of employment. In particular economic theory, based on the contractual idea of rational contracting, provides states with a discourse of far-going individualization as a, in light of fiscal problems, sustainable way of realizing its perceived goals.

6 *Conclusion*

From the second half of the 18th century onwards, contract theories have gradually become dominant in conceptualizing the normative aspects of labor relations. The individual contracting of its labor power as its property has been the model upon which shifting regimes of labor relations have been founded. For the legal practice of regulating labor relations, network theories are important in that they point out the extent to which the legal subject in these relations, usually treated as a constant, is itself a shifting product of regimes of governmentality. The subject is nowadays held constant, not only because it is treated as a rational actor, but also because research treats it as a "human envelope" constituted by natural drifts and propensities.

Developments in normative regimes of labor relations have been shown to imply different conceptions of subjectivity that are relevant for the different ways labor relations have been and are being normatively regulated. The seductive force of individualization is not to be underestimated and the performative success of neoliberal governmentality may be said to be great. But we can learn from history that, when new technical devices come forward, opportunities for new legal conceptualizations of labor relations may arise. For research into the regulation of labor relations, and of their possible developments in the future, their analyses in terms of a network of entangled human beings, technologies and discourses is of utmost importance.

[56] Miller & Rose 2008 p. 18.
[57] Miller & Rose 2008 p. 67.
[58] Rossi 2016 p. 161.

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