Robert Knegt (ed.)

The Employment Contract as an Exclusionary Device

An Analysis on the Basis of 25 Years of Developments in The Netherlands

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An Analysis on the Basis of 25 Years of Developments in The Netherlands

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CHAPTER 3
THE EMPLOYMENT CONTRACT AS A SOURCE OF CONCERN

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3.1. THE EMPLOYMENT RELATIONSHIP AS A PATRIARCHAL RELATIONSHIP

The rules governing employment contracts contained in the Dutch Civil Code (*Burgerlijk Wetboek*) of 1838 were extremely meagre. In fact, at that time the Dutch Civil Code did not contain any such rules at all. Only three articles were dedicated to 'the hiring of servants and labourers'. That was considered adequate at the time the Dutch Civil Code was drafted. It should be borne in mind that, back then, the industrial revolution was all but unknown in the Netherlands. In the pre-industrial age there was no working class; the relationship between employer and employee (then the patron and the workman) was more akin to a patronage, in which context the patron felt responsible for his subordinates. This was 'a responsibility that extended beyond work into his workers' private lives'.[62] Of the 601 business owners subject to licence tax in Amsterdam in 1834, 584 lived adjacent to their factories and only 17 lived elsewhere.[63] Obviously such an employer could not easily ignore the needs of his employees, as he faced them on a daily basis.

This situation changed slowly in the early capitalist period, during which the relationship between employers and employees was still very similar to the 'patriarchal relationship between master and servant'.[64] During that period the employer was not generally considered to be a profiteer of his subordinates – he was more of a 'philanthropist who provided work'.[65] This was partly related to the large supply of labour that had little relative economic value. The deplorable conditions under which a large portion of the population lived

[62] Franssen, 1976: 169.
[63] Brugmans, 1971: 71.
[64] *Ibid.*: 82.
[65] Franssen, 1976: 170.

at that time were not considered to be the consequence of employers' actions so much as an effect of the economic condition of society as a whole.

The transition from an early to a pure capitalist economy, which started in the Netherlands at around 1870, changed this situation, albeit not to the same extent throughout the country. This transition was initially slow, but starting in 1895 there was a clear expansion. The growth of the capitalist economy is illustrated by the growth of the number of public limited liability companies (*naamloze vennootschappen*). In 1850 there were only 137 such registered companies; their numbers grew to 456 in 1870, 4,092 in 1902, and 8,722 in 1912.[66] The period of expansion is considered to have taken place around 1895. In 1859, 20% of the working population worked for medium-sized and large-scale enterprises in the industrial sector; in 1889 that percentage was 22.5%, and by 1909 it had increased to 45.5%[67] In the countries surrounding the Netherlands, the industrial revolution took place much earlier – for example, around 1850 in the United Kingdom.

It is likely that it was the transition to a pure capitalist economy which gave the first impetus for the development of legislation governing employment contracts. The duty of care that the employer felt, the paternalism of the employment relationship as it existed until about 1870, faded increasingly into the background. The employer was no longer a co-working foreman who toiled amongst the labourers on a daily basis, he was now an impersonal company that was far less interested in the ups and downs of employees' personal lives.

3.2. FROM A PATRIARCHAL TO A LEGAL RELATIONSHIP

Cornelissens has noted that the transition to a pure capitalist economy and the related technical expansion of small family businesses into modern large-scale enterprises led to the institutionalisation of labour law. As a result of this development, the employment contract acquired a more regulated, legal character.[68] The employer's responsibility was increasingly replaced by impersonal supervision, resulting in a more commercial focus on the manner in which the employee performed his work. Standing employment conditions,

[66] Verberne, 1950: 12-13.
[67] Franssen, 1976: 39. See also de Jonge, 1968: 226.
[68] Cornelissens, n.d.: 127.

often containing provisions that were extremely unfair to employees, replaced the employer's patriarchal authority.[69] This development is closely related to the increase in the size of the industrial organisation. Standing employment conditions could develop only at larger enterprises because they regulated the relationship of many employees with the employer. It is worth noting that the increase in the number of employees at each company also prepared the way for collectivisation of the labourers as the employer's negotiating partner.[70]

Prior to 1907, the statutory rules governing labour – engaging and hiring out servants and labourers – did not oppose this 'legalisation' of the employment relationship. On the contrary; under the statutory rules that governed labour prior to 1907 labour was deemed to be a tradable commodity that could be isolated from the employee, with respect to which the employee was free to negotiate with the employer. Slowly but surely it became clear that this concept, based on the French Revolution, was not in line with reality. The social position of the labourer was hardly enviable. Employees were so economically dependent on providing labour for others in an extremely wide labour market that it cannot be said that there was any real possibility to negotiate employment conditions with an employer.

The government was increasingly called upon to intervene by enacting legislation. The law was seen as responsible for regulating social relationships, even for influencing them. As Molengraaf stated, 'The law … is part of the knowledge of society. This is why people's actual daily lives must form the basis upon which lawyers base their learned, scholarly systems.'[71]

The decreasing involvement of employers in employees' social position and their decreasing responsibility towards it, which led to an increased use of standing employment conditions, also set off a change in mentality among employers and employees. This in turn led to the realisation that the employment relationship was a legal relationship that required legislated standardisation. Meijers expressed this when the Employment Contracts Act (*Wet op de arbeidsovereenkomst*) was enacted: 'The major change that the new law will effect in the relationship between patrons and workmen is that from now on that relationship is no longer one governed by the law only from the perspective of lawyers, but also for employers and workers. Before, the

[69] With respect to standing employment conditions, see Van Berensteijn, 1903.
[70] Although Molenaar (1953: IA, 160) notes that the first trade unions in the Netherlands arose among craftsmen and not among factory workers.
[71] Lokin & Jansen, 1995, quoting W.P.L.A. Molengraaf, 1885, *Het verkeersrecht in wetgeving en wetenschap*.

relationship between patron and worker was felt to be one of pure power or mutual benevolence; disputes to which the relationship gave rise were almost never brought before a court of law. The parties were more likely to go to a labour council. Such disputes were not considered legally valid.[72]

Still, it took legal scholars a long time to recognise the legality of labour law. Nolens, who was appointed extraordinary professor to the University of Amsterdam in 1909, was of the opinion that labour law constituted an exceptional phenomenon that had to be attributed to social politics.[73] In his 1926 public lecture entitled '*Arbeidsrecht als deel van het recht*' ('labour law as part of the law'), Levenbach strongly – and successfully – disputed that characterisation.[74] By then, labour law was considered to form part of the law. The legal protection of employees had been taking shape for half a century and was so comprehensive that there was no choice but to consider it as law.

3.3. THE SHAPING OF THE LEGAL PROTECTION OF EMPLOYEES

At the end of the 19th century, concerns about the position of subordinated workers increased. In that context, the fair regulation of labour was deemed to form part of the solution to the 'social question'. The Child Labour Act of 1874 (*Kinderwet 1874*)[75] introduced a prohibition against child labour for children under the age of 12. Fifteen years later that prohibition was included in the Factories Act of 1889 (*Arbeidswet 1889*), in addition to a maximum working day of 11 hours for youths under the age of 16 and women. That act also included a prohibition against working on Sundays. The Steam Act of 1896 (*Stoomwet 1896*) also contained a number of provisions that protected employees. Finally, the Compulsory Education Act of 1900 (*Leerplichtwet 1900*) is worth mentioning, as education was deemed to be an instrument to prevent child labour in addition to being a means of instructing the population.[76] A related question involved the sorry position of many older people at that time. Supporters of a (free) state pension noted that the only reason that labourers did not have a sufficient income at an advanced age was

[72] Levenbach, 1959: 6, citing E.M. Meijers, 'Bij het in werking treden der wet op de arbeidsovereenkomst', *Sociaal Weekblad* 30 January 1909.
[73] Nolens, 1909.
[74] Van der Ven, 1945.
[75] Molenaar, 1953: IA, 160.
[76] *Ibid.*: 310-311.

that they were not provided with the full proceeds of their labour during the period in which they worked.[77] The Lower House of the Dutch Parliament first discussed this subject in 1885, but it would be some time before it was laid down in the law, let alone sufficiently and to everyone's satisfaction. The Industrial Injuries Act of 1901 (*Ongevallenwet 1901*), modelled on the German *Unfallversicherungsgesetz* dating from 1884, is generally considered to be the first real Dutch social insurance scheme.[78] This act abstracts the occurrence of damage from guilt and provides for an entitlement to indemnification in the event of an industrial accident. The indemnification was paid by a national insurance bank, which was maintained by means of premiums paid by employers. The act did not permit any insurance excess. The first version of this law (dating from 1887) led to a storm of protest. Employers exerted pressure not to allow the 'unworkable and oppressive' legislative proposal to be enacted without first being amended. The law was passed by the Lower House of Parliament under the motto 'better a bad law than no law', but the Upper House refused to pass it, in particular due to its lack of practicability. The benefit of this political debacle was that all the points in dispute were discussed extensively, and all the parties involved agreed that a statutory obligation to insure was desirable. The rejection of the first legislative bill was thus determinant to the development of social insurance legislation in the Netherlands, 'even though on 1 June 1890 many thought that the clock had been set back for years'.[79] The liberals' most significant objection to the Industrial Injuries Act was that a subject of a private-law nature should not be handled with a purely public-law approach.[80] After that objection had been addressed in the second version of the law by adding the possibility of an opt-out for employers in the form of an insurance excess, it was passed by both Houses of Parliament. The opt-out was deleted 20 years later because it had not been applied in practice, but by then opposition to a duty to insure had more or less worn off.[81]

[77] Vliegen, 1899. The trade unions also took this position in the UK. In their view, labourers who worked hard their entire lives were entitled to a free state pension instead of benefits that they had to pay for from their own pockets. See Westerveld, 1994: 57.
[78] Noordam (2006: 40) notes that this is remarkable because already in the mid 19th century there were facilities for redundancy pay and pension schemes for civil servants, while the government's involvement with poor relief also dates from that time. See also Noordam, 2005.
[79] De Vries, 1970: 371.
[80] They certainly were not alone in this respect. Particularly in the UK until 1946, the matter of industrial accidents was regulated by the Workman's Compensation Act, which placed responsibility for industrial accidents with the employer as a mandatory rule of law without obliging him to take out insurance for this, let alone enact any form of public insurance to cover that risk, as had been done in Germany and is now also the case in the Netherlands.
[81] This is discussed extensively in Molenaar, 1953: 2B, 1530-1537.

The Employment Contracts Act was enacted a few years after the Industrial Injuries Act.[82] In addition to the employer's obligation to pay the employee's salary in a certain way and in a timely manner, this law referred to a limited duty to pay salary during a period in which the employee was unable to perform his work due to illness. Employees had that right 'for a relatively short period of time'. Of course, that stipulation did not provide employees who became ill or disabled for work with a real remedy, and the discussion about adequate coverage of those risks would continue for some time. The Invalidity Act (*Invaliditeitswet*), which was also based on a German law, was adopted in 1913 but did not enter into effect in its entirety until six years later; the Sickness Benefits Act (*Ziektewet*), also dating from 1913, did not enter into effect until 1930. The Invalidity Act was both an actual and fictitious form of invalidity insurance; it was simultaneously a form of insurance against premature disability for work and a provision for after the employee retired. An invalid was defined as a person whose capacity for work had decreased by at least 33% or a former employee who was 70 years of age or older. The latter was paid a free old-age pension. The Old Age Pensions Act (*Ouderdomswet*) entered into effect at the same time as the Invalidity Act, and offered self-employed persons between the ages of 16 and 35 who had a meagre income the possibility of taking out voluntary old-age pension insurance. There was never a great deal of interest in that voluntary insurance. Many self-employed persons reasoned that they would ultimately be entitled to take advantage of the free facility granted to older employees under the Invalidity Act.[83] History, and particularly the enactment of the Old Age Pensions (Emergency Provisions) Act of 1947 (*Noodwet Ouderdoms-voorziening*) and the General Old Age Pensions Act of 1957 (*Algemene Ouderdomswet*), shows that they were right.[84] The announcement of the Sickness Benefits Act followed in 1930. Under that law, an employee who became unable to perform his own work was entitled to benefits equal to 80% of his most recently earned salary for a maximum period of 26 weeks (since 1947 that has been a maximum of 52 weeks). The provision contained in the Employment Contracts Act pursuant to which an employee was entitled to continued payment of his salary for a relatively short period of time in the event of illness continued to apply after that much more generous facility had

[82] *Wet op de Arbeidsovereenkomst 1907*. This Act abolished the provisions contained in the Dutch Civil Code that governed 'the hiring of servants and labourers' and replaced them with five sections (in Book 4, Title 7A of the Dutch Civil Code) under the heading 'contracts for the performance of work'.

[83] Bossenbroek & van den Berg, 1952: 102.

[84] See Chapter 7.

been implemented. This element from labour law became the stepping stone for the extensive duty of employers to continue paying an employee's salary in the event of illness.[85]

3.4. A LEGAL PROBLEM?

When the Employment Contracts Act was implemented, the primary goal was to protect subordinated workers against their economically stronger employers.[86] There was an intention to physically protect employees and to improve their material, mental and moral standard of living.[87] In that context, the legislature was aware that employees were unable to properly assess their own interests,[88] let alone properly represent them. That is apparent from the further substantiation with which the legislative proposal was recommended to the Lower House of the Dutch Parliament:

> In terms of private law he is offered legal certainty and a guideline that emanates nurturing power. The fact that this can contribute to his social uplifting is an advantage that has far greater value than the few additional pennies or guilders in salary that he may earn.[89]

The significance of the Employment Contracts Act lies partly in its creation of legal certainty as a basis for the 'social uplifting' of the employee. What exactly is meant by this social uplifting of the employee was not explained; only vague ideas were given in that respect.[90] In the classical Catholic view, this comes down to the idea that a person who must perform labour should be able to develop herself physically, mentally and morally as a member of the state and other communal circles. As a religious creature he has duties to fulfil and rights to exercise.[91] In the realisation of labour law, the liberal vision

[85] See Chapter 4.

[86] Van den Heuvel, 1996: 35.

[87] Bles, 1907: I, 6.

[88] Heerma van Voss, 1996: 142.

[89] *Antwoord der Reegering n.a.v. het Voorlopig verslag der Eerste Kamer*, in Bles, 1907: I, 63.

[90] The government was of the opinion that the Employment Contracts Act would take a predominant place in the series of statutory measures relating to social justice. See Bles, 1907: I, 8. See also Van Esveld (1952), who speaks of material and psychological certainty: 'thus, laying down and ensuring a state in which the worker is protected against material and psychological deterioration'.

[91] Nolens, 1909.

placed the emphasis on ethical and moral necessity and community spirit.[92] In the socialist vision, the uplifting of the working class was of primary importance, by apportioning power, knowledge and means; this was to be accomplished through class struggle or, in a subsequent vision, trade unions.[93] We believe that this meant that the employee was to be uplifted above his poor economic and unassertive social position and develop into an articulate citizen.[94] Full participation in the democratic decision-making process, in society as a whole, was the 'higher' goal of the Employment Contracts Act, as well as much other 'social legislation'.

3.5. THE DEFINITION OF EMPLOYMENT CONTRACT: SUBORDINATION

When the Employment Contracts Act was being drafted there were no serious doubts about how employees should be provided with legal certainty. The definition under private law of an employment contract as a contract has always prevailed. Even a number of socialists in the Lower House of the Dutch Parliament who were known for being agitators did not dispute that basic assumption. At most, they pleaded for more extensive rules governing employment contracts in the Dutch Criminal Code (*Wetboek van Strafrecht*) in addition to the rules governing employment contracts as contracts under private law.[95]

There were arguments that the employee should be deemed as 'owner' of his work, and thus that the job within the company should be deemed to be the employee's property.[96] In particular, in the English literature on labour law it was argued that roots underlying the law on termination of employment could be found in the concept of 'job property'.[97] As a result, the employee could have acquired a position that, in terms of ownership, was certainly stronger

[92] See Molenaar, 1953: IA, 341 *ff.*
[93] See Mok, 1935: 5.
[94] See Van Esveld, 1946: 205: 'Labour law is intended to intervene when the social dependence of some groups in the population could lead to a danger of deterioration in the "energy of the people"'. See also the presentation of the view of Tak, a socialist, by Quack, 1915: 124.
[95] 'However, my objection is not that the rules governing the actual employment contract in a narrow sense ... have been included in the Dutch Civil Code; I object to the fact that too much has been included that relates to criminal law, in which context the court must protect the labourer ...'. Schaper, quoted in Bles, 1907: I, 117.
[96] See Molenaar (1953: IIA, 3-7), who discusses this thoroughly.
[97] See Anderman, 2004.

than in the past. But the personal element of the employment contract would have been lost completely. This leads inexorably to a comparison with the right of pledge.[98] That argument also received little support in the Netherlands. In the Explanatory Memorandum to the Employment Contracts Act it is simply stated that 'work can never be the object of a contract of sale.'[99]

The knowledge that the parties to an employment contract cannot be deemed to be equals – in fact the knowledge that the employee generally has no choice but to end the employment contract due to his 'economic weakness' – does not change the basic assumption that the employment contract is a way of arranging the employment relationship under private law. This 'economic weakness' was brought up for discussion when the Employment Contracts Act was being drafted. Many members of the Upper House of the Dutch Parliament considered it impractical to use a concept as vague as 'economic weakness' as the ground for mandatory provisions of law.[100] The government was not impressed with such arguments and responded that it had taken into consideration the experiences of other countries in drafting that statutory rule and had realised that such rules would be useless if they remained limited to supplementary law.

> ... that the employment contract is very different from other contracts in this respect, that almost without exception one of the parties, the labourer, is in such a state when concluding the contract – generally, although certainly not always, as a result of the necessity of acquiring the essentials of life from the salary to be earned, the 'economic weakness' – that he will be strongly inclined to accept conditions, to agree to stipulations that he cannot comply with without grave danger; that as a result the legislature ... cannot attribute legal consequences ... to deviations from all such prescriptions ...[101]

This shows the core of the social function of the employment contract as it was seen when the law was drafted in 1907: the goal was to protect the economically weak party in the employment contract.

[98] See Chapter 2, section 2.2.3.
[99] Bles 1907: I, 321.
[100] *Ibid:* 60.
[101] *Ibid.*: 67-68.

3.6. 'MURDEROUS UNIFORMITY'

The basic principle of protecting the 'economically weak' leads to a discussion of whether that principle justifies such a general rule of protecting workers, as in some cases the workers are not economically weak at all and the degree of weakness can vary considerably. The government anticipated this discussion in its Explanatory Memorandum, extensively arguing why only one definition of 'worker' was included in the act, with a general rule on the protection to which workers are entitled, and why it was decided not to differentiate between the various 'types' of employees and the degree of protection to which they are entitled. The government predicted that it would be difficult, if not impossible, to draw a line between the various types of employees:

> In daily life there are servants, farmhands, craftsmen, factory workers, foremen, office workers, clerks, bookkeepers, officials, artists, housekeepers, salesgirls, etc. It may be possible to make an academic differentiation between workers ... But it is something completely different, with a view to the difference in legal consequences, to define those categories and to draw the line between them so precisely that there is a safe guideline in practice and for the courts. If that is not possible it will lead to countless legal proceedings of the most thankless kind regarding the question of whether a particular employment relationship falls inside or outside the scope of the legal concept ... [102]

In order to avoid excessive discussions, and because in 1907 economic dependence almost always went hand in hand with working in a subordinated position, under the definition contained in the 1907 Act that subordination constitutes the core of the employment contract. The Employment Contracts Act protected labourers working in a subordinated position rather than those who were economically dependent on the work.[103] This was more or less the same in other countries. In Belgium, where both labourers and clerical workers were defined in the employment contract, an employment contract was deemed to be in effect only if the employee performed primarily manual or non-manual labour under the employer's supervision.[104] In Germany, employment contracts were also characterised as *im dienst des Arbeitgebers* (in the service of employers). In the United Kingdom a differentiation was

[102] *Ibid:* 136-137.

[103] See also Sinzheimer, 1927: 118; Annuss, 2004: 296.

[104] See articles 1 and 3 of the Belgian Act of 3 July 1978 governing employment contracts (*Wet van 3 juli 1978, betreffende de arbeidsovereenkomst*).

made between an 'employee' and a 'worker', in which context the former was entitled to greater protection under labour law than the latter. Although the definition was left to the courts, in the relevant case law various 'tests' were developed to aid the court – the degree to which the employer could or did exercise authority remaining a crucial aspect.[105] The performance of work in a subordinated position was continually related to, and clearly differentiated from, the economic dependence on the work. In the words of Goldin: 'Even though the true original rationale of labour legislation lies in the *economic hypo-sufficiency* ... the dominant type mentioned is better noticed in the personal subordination which derived almost invariably from such relationship'.[106]

3.7. PROTECTING THE ECONOMICALLY WEAKER PARTY AGAINST DISMISSAL

It should be remembered that the 1907 Employment Contracts Act was a meagre scheme by current standards. It contained primarily provisions on the obligation to pay the salary on time and in a particular manner. Most of the pages of the parliamentary history that addressed a particular article were filled with a discussion of the penalty provision and the obligation to continue paying an employee's salary for a short period of time during the employee's illness.[107] It is therefore not surprising that the discussions in the Dutch Parliament were more about the concept 'for a salary' when defining the employment contract than about the concept of 'being employed'.

Most of those provisions are still in effect, but they are hardly applied anymore. A good example is the provision pursuant to which the salary may be paid only in money or certain specific goods, which implied a prohibition against the 'truck system'. Hence the 1907 Employment Contracts Act did not arrange for much more than the manner in which the employer was obliged to comply with the obligations that he already had; the law added hardly any new obligations at all. The employer's right to terminate the employment contract was unaffected; the employer was obliged only to observe a notice

[105] Hepple & O'Higgins, 1981: 61-65.

[106] Goldin, 2006: 119.

[107] See Bles, 1907: I, 195-355, regarding the penalty provision contained in Articles 1637t and 1637u of the Dutch Civil Code; see Bles, 1907: II, 443-612, regarding the duty to continue paying an ill employee's salary under Article 1638c (partly in relation to Article 1638ij) of the Dutch Civil Code.

period when terminating an employment contract. In order to ensure that that obligation was not merely illusory, it was also provided that the probationary period could not exceed two months. The employer was also required to provide the employee with a letter of reference. The employer did not need to have or put forward any 'reasonable reason' to terminate the employment contract. Since the employer was at all times entitled to terminate an open-ended employment contract, most employees considered a fixed-term employment contract to be a better option, as such a contract could not be terminated prematurely unless the parties had agreed otherwise.

Employees' preference for a temporary employment contract did not change until the Labour Relations Decree (*Buitengewoon Besluit Arbeidsverhoudingen* or BBA) was enacted in 1945. The regulation was intended to fixate the labour market after the Second World War to what it was at the beginning of the war, and declared that any termination of an employment contract was null and void if it was implemented without the government's permission.[108] This rule, which was introduced as an emergency measure, is still in effect today, although it is now only the employer who is required to obtain permission to terminate an employment contract. Various attempts have been made to repeal the Labour Relations Decree, but they have been unsuccessful to date. In 1953 important additions were made to the protection against dismissal offered to employees under the Dutch Civil Code, partly with the idea that such additions would justify repealing the Labour Relations Decree.

Once of those additions is the rule on the 'manifest unreasonableness' of the termination of an employment contract, pursuant to which an employer that terminates an employment contract on the basis of a false or pretended reason or an employer that fails to sufficiently take the employee's interests into consideration when terminating an employment contract must pay compensation to the employee. In 1953 the first special prohibitions against termination were also introduced, *i.e.* the prohibition against terminating an employment contract during the employee's illness or military service. This set of instruments was supplemented in the 1970s and thereafter with a number of prohibitions against termination that were intended to fortify the position of women in the labour market, such as the prohibition against termination 'due to marriage' or during prenatal and postnatal maternity

[108] For an extensive discussion of the Labour Relations Decree, see Scholtens, 2005.

leave.[109] The Dutch Adjustment of Working Hours Act (*Wet Aanpassing Arbeidsduur*) of 2000, pursuant to which employees are entitled to request that their working hours be adjusted and employers may reject such a request only if they have urgent reasons for doing so, was also intended to improve the position of women in the labour market, as was the prohibition contained in that act against terminating an employment contract because the employee has made such a request. None of this has led to the BBA being abolished to date, so employers must still obtain permission from a government-designated organisation in order to terminate an employment contract. Termination by an employer counter to a prohibition against termination entitles the employee to have the termination declared void within six months by means of an extrajudicial declaration. The employee may also have such a termination declared void if the employer terminated the employment contract without obtaining the permission required on the ground of the Labour Relations Decree. If the employer does obtain permission to terminate the employment contract, the employee can argue that the termination was manifestly unreasonable and claim compensation. Such a claim has a chance of succeeding if the employer failed to sufficiently take the employee's interests into account with respect to the timing or manner of termination.

Many employers find that the procedure for obtaining permission to dismiss an employee pursuant to the BBA lacks transparency. The 1907 Act contained a provision pursuant to which the courts had the authority to dissolve an employment contract at the request of one of the parties. The legislature included that authority for exceptional cases, *i.e.* when a temporary employment contract that is not terminable should nonetheless be ended. Because such a dissolution must be effected quickly, the legislature provided for accelerated proceedings and excluded the possibility of bringing an ordinary appeal or an appeal in cassation. The legislature later added that the local judge that dissolves the employment contract may award one of the parties compensation, to be paid by the other party.

Starting around 1980, employers wishing to dismiss an employee have taken advantage of dissolution proceedings en masse. The proceedings are quick and lead to a definitive decision, which explains their popularity. The problem with the proceedings is that it is not completely clear in advance what compensation the employer will owe if the court grants the dissolution

[109] These rules were the result of the second Equal Treatment Directive 76/207/EEC of 9 February 1976, directing member states to implement the principle of equal opportunity in their own national legislation. RI 26/207/EEC, last amended by RI 02/73 EC of 23 September 2002.

petition. The various local judges render divergent decisions on the amount of compensation to be awarded to employees, and they substantiate these decisions differently. In order to put an end to that situation, in 1997 the judges themselves published a formula on the basis of which it is fairly easy to calculate a reasonable estimate of the amount of compensation to be awarded to an employee in the event that the employment contract is dissolved. In a nutshell, based on this 'local judge formula' an employee whose employment contract is dissolved and who cannot be blamed for its termination will receive a severance payment equal to one month's salary for each year of service. One-half of the approximately 150,000 yearly employment contract terminations which one of the parties (usually the employee) does not wish to accept are terminated by means of dissolution, the other half by giving notice of termination. Hence in the Netherlands there are two ways to terminate an employment contract, for which reason the system of rules governing termination is referred to as the 'dual termination system'.[110]

It can thus be concluded that the protection against dismissal has been expanded through the years and it now forms the basis of employees' negotiating position. In an increasing number of cases, an employee who wishes to compel his employer to take into consideration the rights to which he is entitled under the law (such as adjustment of working hours and equal pay) is specifically protected against dismissal by the employer. An open-ended employment contract provides considerable protection to employees, primarily thanks to this protection against dismissal. Compared to other European countries, the level of protection against dismissal in the Netherlands, particularly for temporary employees, is very high. An open-ended employment contract in the Netherlands too provides a high level of employment protection, equalled only in the Czech Republic, Slovakia and Portugal. The Netherlands is located in the middle of an OECD overview of protection against dismissal because of the relative ease with which collective dismissals can be implemented, and in particular due to the relatively low degree of protection against dismissal for temporary forms of employment.[111]

[110] For a further explanation of the complex rules governing dismissal in the Netherlands, see OECD, *Employment Outlook 2004*: 72 *ff.*, which can be found at: http://www.oecd.org/dataoecd/8/4/34846856.pdf.

[111] See note 49, Chart 2.1.

3.8. PROTECTION AGAINST DISMISSAL FOR EVERYONE?

The brief explanation of protection against dismissal presented above applies to employees who have open-ended employment contracts. Approximately 8% of Dutch employees work on the basis of a temporary employment contract or as temps. Approximately 14% of the working population does not have salaried employment but works on a contract basis, or combines the two. Many self-employed individuals hold two posts: they work part-time as salaried employees and part-time as freelancers.

Table 3.1 Position on the labour market of working population, aged 15-64

	Total number of employees	Employees with permanent jobs	Employees with flexible jobs	Self-employed persons
Period	*x 1000*			
1996	5456	4911	545	728
1997	5628	5055	573	755
1998	5850	5244	606	737
1999	6042	5464	578	726
2000	6116	5584	532	801
2001	6256	5753	503	765
2002	6256	5774	482	779
2003	6213	5754	459	788
2004	6116	5646	471	802
2005	6103	5590	513	816
2006	6195	5631	564	879

Source: Statistics Netherlands.[112]

Flexible employees who have a temporary employment contract generally cannot invoke protection against dismissal, but can invoke all the other provisions under labour law. Such temporary contracts end automatically, without a requirement of termination or dissolution. The courts may not assess how such contracts have been ended, unlike in the UK, where after a

[112] Centraal Bureau voor de Statistiek, Voorburg/Heerlen, 18-9-2007, http://statline.cbs.nl/StatWeb/.

year this ending can be legally assessed to determine whether 'unfair dismissal' was involved.

The Flexibility and Security Act (*Wet Flexibiliteit en Zekerheid*),[113] which led to an amendment of the labour-law provisions contained in the Dutch Civil Code, provides that a temporary employment contract that has been extended three times or that has been extended such that the total term of the contract exceeds three years will be deemed to have been entered into for an indefinite period of time, *i.e.* it will be deemed as an open-ended employment contract, after which the employee can invoke protection against dismissal in full. This law further arranges for temporary employment in the form of an employment contract that is entered into between the temporary employment agency and the temporary employee. A number of special rules govern such a temporary employment contract, pursuant to which the temporary employee accrues an increasing number of rights in the course of the employment relationship, and ultimately – after an average of three years – acquires an open-ended employment contract with the temporary employment agency. In practice this is more the exception than the rule though: the employment contract between the temporary employment agency and the temporary employee is generally terminated (*i.e.* not extended) before it turns into an open-ended employment contract. In the Netherlands, temporary employment contracts are used not only for flexible deployment of personnel but also to extend the regular probationary period, which may not exceed two months.

Employers may not differentiate between employees' terms of employment on the ground of the temporary or permanent character of their employment contracts.[114] Thus, a temporary employee has an employment contract pursuant to which he is entitled to an equal legal status, but not to protection against dismissal. This means that such employees have a weaker negotiating position than employees who have open-ended employment contracts, and it is more difficult for them to enforce their rights. For example, a temp will be less likely to submit a request to have his working hours adjusted, particularly if he knows that his employer would not favour such a change.

[113] This law entered into force in 1999; see section 3.13 for an extensive discussion on it.
[114] This rule ensues from Council Directive 1999/70/EC.

3.9. PROTECTION UNDER LABOUR LAW FOR EVERYONE?

More than 13% of the working population in the Netherlands is self-employed. It is estimated that approximately one-third of these self-employed individuals do not distinguish themselves from salaried employees in their social relationships or in relation to their clients. These freelancers, like employees, work for only one client, on whom they are dependent for work. Although there may be economic dependence, neither a position of subordination nor an employment contract should be assumed. Those self-employed persons who are dependent on only one client are therefore referred to as 'pseudo-self-employed'.

In a groundbreaking judgment, the Dutch Supreme Court held that in determining whether there is an employment contract one of the considerations must be 'the parties' intention when they entered into the contract'.[115] If both parties knowingly entered into a contract that was not intended to be an employment contract, a court will not be inclined to rule that an employment contract nonetheless applies. This would be different only if the details of the contract reflected all the characteristics of an employment contract from the start, in which case it will be assumed that the parties entered into an employment contract but gave that contract a different name.[116] Whether the parties had such an intention will depend on the assessment of all the circumstances of the case. In that context, the court will take into consideration circumstances such as the social position of the freelancer/employee and the question of whether the freelancer knowingly entered into a commission contract rather than an employment contract.[117] Through its ruling, the Supreme Court actually enabled the self-employed to exclude themselves from the rules of labour law. There is nonetheless a grey area that includes freelancers who are not eligible for protection under labour law but who nonetheless cannot be considered persons who are full negotiating partners of their clients and independent parties in the labour market.

[115] Dutch Supreme Court, 14 November 1997, *JAR* 1997/263 (Groen v. Schoevers); that determination subsequently became established case law.
[116] See *e.g.* Dutch Supreme Court, 10 December 2004, *JAR* 2005/15 (Groot v. Diosinth); Dutch Supreme Court, 10 October 2003, *JAR* 2003/263 (Van der Male v. Den Hoedt).
[117] Verhulp, 2005.

This lesser degree of protection makes finding a proper definition of the employment contract, and thus the proper allocation of rights to those who perform work pursuant to an employment contract or those who choose not to do so, one of the most significant challenges of labour law in the 21st century. The 'Green Paper', which discussed modernising labour law with a view to the challenges of the 21st century, also draws attention to this issue: 'The traditional model of the employment relationship can nonetheless turn out to be unsuitable for employees who have open-ended employment contracts, who must adapt to changes and who wish to profit from the changes that globalisation offers'. The '*Green Paper*' goes on to lump together various types of employment contracts and other contracts on the ground of which work can be performed: 'Permanent employment contracts, contracts for part-time work, contracts for stand-by workers, 'zero hours' contractual agreements, contracts for temps, freelance contracts, etc. are now established in the European labour markets. The number of employees who do not have a standard employment contract has increased from just over 36% of the working population in 2001 to almost 40% in 2005 in the EU-25'.[118]

The legislature has taken into consideration the lack of protection provided by some types of contracts and has attempted to intervene, but to date it has been unable to make an adequate distinction between the actual and the pseudo-self-employed. The scope of labour-law rules is sometimes expanded in order to offer the pseudo-self-employed some level of protection. A good example of this is the Labour Relations Decree, which also applies to self-employed persons who generally perform work personally for one or a few clients. This protects the pseudo-self-employed against too arbitrary a termination of the work relationship. Provisions governing protection against health risks related to work also apply to the self-employed.

[118] Green Paper, 2006: 4

3.10. WHAT CONSTITUTES PROTECTION UNDER LABOUR LAW? THE DUTY TO ACT AS A DILIGENT EMPLOYER

Defining the relationship between employer and employee as an employment contract is obviously not an objective in and of itself. The idea is to attach certain protection, rights and responsibilities to that contract in order to meet a social need. In 1907 that need was aimed primarily at the proper, timely payment of salaries, but in the last century is has shifted to more and different social needs, which can also require a different legal form. In that context, responsibilities are incorporated into the employment contract, which can also be deemed to be a public matter that should have been arranged for in a public manner. Those choices are sometimes debatable and are often related to a political compromise that was reached with some difficulty. The enactment of the Sickness Benefits Act and the Invalidity Act were discussed above, and they are clear examples of this. The employer's responsibilities in the event of an employee's illness and the modification of the employment contract on the basis of the employee's private life are particularly noteworthy, and are discussed in more detail in Chapters 4 and 5.

Some obligations are less explicitly regulated. Already when the Employment Contracts Act was enacted in 1907, a provision was included pursuant to which the employer was obliged to act as a 'diligent employer'. Although few consequences were attached to that provision in 1907, since that time an increasing number of responsibilities have come within its scope. The duty to act as a diligent employer can thus be considered a source of modernisation of labour law.[119] A wide variety of obligations imposed on employers are based on this provision, or in any event attempts are made to that end. For example, in the relevant case law a significant obligation for the employer has been developed to find an alternative, suitable position for an employee who has become disabled for work. This obligation has been developed on the basis of the duty to act as a diligent employer and was legislated in 2002 (see Chapter 4). More recently, the idea has arisen that employers are required to train their employees and ensure that they are able to perform suitable work (including different work if necessary). This comes down to an obligation to ensure that the employee remains 'employable'. Whether this is an actual obligation imposed on employers on the ground of diligent employment duty is a controversial issue. The 'flexicurity strategy' has been invoked to argue

[119] Good employership is also the title of the book by Heerma van Voss (1999).

that part of the protection against dismissal to which employees with permanent contracts are entitled should be decreased in exchange for the employer's 'employability efforts'.[120] Many employers are already responsible for their employees' training pursuant to the relevant collective labour agreements. The question arises of whether the employment contract can be used as a basis for a far-reaching obligation on the part of the employer to train his employees, or whether there are other, more appropriate bases for such an obligation (see Chapter 7). In general, employers are deemed to be responsible for their employees' pensions on the ground of diligent employment duty. In addition to the general old-age facilities under public law, in the Netherlands a system has been developed of collective pension benefits that are arranged for by the employer. Approximately 80% of all employees are entitled to these 'second pillar' benefits. It is sometimes argued that the employer's obligation to provide such benefits should be assumed.[121] The question is whether such an obligation can be based on the employment contract, if for no other reason because it provides for benefits after the term of the employment contract has lapsed. See Chapter 7 in this regard.

3.11. PRIVATISATION OF THE RESPONSIBILITIES: FROM WELFARE STATE TO 'INSURANCE STATE'

Sometimes the legislative choices on employers' responsibility for their employees' welfare appear to lack consistency. Although employers were deemed to be responsible for continuing to pay an ill employee's salary for a 'reasonably short period of time', the Sickness Benefits Act contained a provision pursuant to which the employee received benefits after being ill for two days. An employee's disability thereby became more of a collective problem than a problem of a specific employer and employee.[122] Collectivisation of the responsibilities started in the early 20th century and was related to the industrial age. Van der Veen noted that in industrial factories, industrial accidents are less and less often caused by individual errors, are increasingly difficult to trace back to individual responsibility of workers, and are more often caused by the manufacturing process itself. He notes that this observation has had consequences primarily for the

[120] See Baris & Verhulp, 2006: 46 *ff.*
[121] See de Lange, 2001: 71 *ff.* for an extensive discussion.
[122] Van der Heijden & Noordam, 2001: 133.

organisation of the social insurance system.[123] We would like to go further and propose that a comparable process can be found in modern society and the accidents that occur in it. This includes accidents in the literal sense – such as traffic accidents, which virtually entail risk liability for the motorist – as well as 'social accidents' such as structural unemployment and housing problems. The industrial age is now behind us, and modern society is currently characterised as being in a post-industrial phase that places an emphasis on the services sector. One of the most significant changes that this entails is the trend towards greater flexibility in employment relationships.[124] However, it is assumed that this has consequences for the employment contract: 'The open-ended employment contract, fixed working hours and an established relationship with the employer are becoming less significant'.[125]

The trend since the beginnings of the 'service society' appears to be contradictory: the employment contract seems to have lost permanency and has become more flexible, but the obligations or responsibilities that ensue from the contract seem to have increased. The question is thus whether Van der Meer was correct in arguing that the permanent employment contract and an established relationship with the employer have lost 'permanency'. This view of the modern employment relationship has been voiced more frequently, but generally speaking it is not correct. It is true that fixed working hours have become less important and there is more intermingling of working life and private life. In that sense the employment relationship has certainly become more flexible. Working in a service society also facilitates this increased flexibility better than industrial labour. But the contractual relationship between an employer and an employee is as strong as ever. Job-hopping, 'fluttering about in the labour market',[126] is an option only for employees who do not have a permanent employment contract but is generally not done by the average employee who has a permanent employment contract.

In this society, actors can exert an influence on the risks that are run: the actors have thus been made jointly responsible for those risks and the ways of dealing with them.[127] This could partially explain the trend towards 'privatisation of responsibilities'. One of the most noteworthy cases of 'privatisation' is that of the responsibility for an employee's disability. After

[123] Van der Veen, 2001: 73.
[124] Esping-Andersen, 1999.
[125] Van der Veen, 2001: 80.
[126] That expression was used by Pim Fortuyn (1997: 23).
[127] Also according to Van der Veen, 2001: 81.

the Sickness Benefits Act was abolished, the duty to continue paying an ill employee's salary – currently for a period of 104 weeks – was placed entirely on the employer. This casts doubt on the justification of such an allocation of responsibility. In their preliminary recommendation to the Dutch Union of Journalists (*Nederlandse Juristen Vereniging*) in 2001, Van der Heijden and Noordam wrote that 'the question can also be raised of whether a duty to continue paying an ill employee's salary for a period of 52 weeks is in line with (*i.e.* proportional to) the weight of the employer's responsibility'.[128] The answer to this (rhetorical) question is obvious, given the recent statutory amendment pursuant to which the continued duty to pay an ill employee's salary was increased to 104 weeks. In that context it must be borne in mind that this obligation also applies in the event that the employer could not have in any way prevented the employee's disability, as in the case of an employee who plays a dangerous sport. Hartlief is concerned about this development, which constitutes the crumbling of the social insurance system and the introduction into liability law of a form of liability without need of a breach and regardless of whether the injured party bears any blame: 'A great deal of emphasis has been placed on protecting the injured party, independently from the conduct of the party that caused the injury and regardless of whether the injured party bears any blame. Individual responsibility has been lost sight of completely.'[129] I consider this development more worrisome for liability law than it is with respect to the duty to continue paying an ill employee's salary – in that regard, although the employer has been given a responsibility, he has also been given a wide range of possibilities to give shape to that responsibility. The extension of the duty to continue paying an ill employee's salary also includes expanded options for the employer to redeploy the employee doing other suitable work. Nonetheless, it must be concluded that the employer has been burdened with a responsibility that generally arises outside its own 'guilt'.

3.12. PROTECTION OR INDIVIDUAL RESPONSIBILITY?

The idea behind expanding the responsibilities for private parties was at all times to protect the employee. In the words of Davies and Freedland, 'The main object of labour law has always been and we venture to say will always be a countervailing force to counteract the inequality of bargaining power

[128] Van der Heijden & Noordam, 2001: 149.
[129] Hartlief, 2004: 116.

which is inherent and must be inherent in the employment relationship'.[130] Protecting the employee thus leads to an expansion of the employer's obligations. When labour law was restructured in Eastern Europe in the early 1990s, new employment legislation principles were formulated. Protecting employees was also the underlying principle, but reticence prevailed when attaching a large number of legal standards to the employment contract because 'the democratic principle must be recognised ... that alongside the State, citizens too have the autonomous right to establish norms regulating at least some areas of there activities. Therefore, the State should establish only the minimum degree of legal control necessary for the common interest of its citizens, leaving them the freedom to supplement and develop this framework through norms created by themselves'.[131] In the Netherlands, reducing the number of employment regulations was considered because of the complexity of employment legislation,[132] and because of changing views about the division of responsibilities.

The mandatory protection offered to employees under labour law has also been an increasingly common topic of discussion in countries other than the Netherlands. This trend came into play in the UK when Blair introduced 'the Third Way' in 1998 under the motto 'no rights without responsibilities'. Fredman notes that, as a result, 'benefits can be withdrawn if people do not take up opportunities'.[133] This development applies particularly to social insurance law – also in the Netherlands – but has repercussions for labour law because an increasing part of what used to fall within the scope of social insurance law is now handled in the form of an obligation between the employer and the employee, in which context the employer is responsible for ensuring that the employee fulfils his responsibilities. In this respect, Van der Heijden aptly noted that there was a shift from the welfare state to an 'insurance state'.[134]

[130] Davies & Freedland, 1993: 18.
[131] Sewerynski, 1999: 39.
[132] See SER, *Advies Commissie Bruikbare rechtsorde*, 7 September 2005, http://www.ser.nl/publicaties/default.asp?desc=b24084.
[133] Fredman, 2004.
[134] Van der Heijden, 1997.

3.13. THE FULL-TIME, PERMANENT EMPLOYMENT CONTRACT UNCHECKED

For a long time, the separation of economic dependence and legal dependence was quite adequate in meeting the need to protect only those workers who needed to be protected. The case law referred to in section 3.9, pursuant to which workers were given an opportunity to shirk out of the rules of labour law, could be seen as a new trend in which employees are given the right – depending on their own needs and position – to decide whether they want to fall under such rules. Nonetheless, national and European legislators as well as the Court of Justice of the European Communities have expressed a preference for mandatory protection.

The Dutch Flexibility and Security Act of 1999 is generally considered a measure in the field of labour law that supports an easier transition to other work.[135] That law is basically intended to offer employees with a temporary employment contract more security and to make permanent employment contracts a bit more flexible. The law is in line with Directive 2002/73 on fixed-term employment contracts, and provides that if there are more than three consecutive employment contracts or if the terms of a series of temporary employment contracts jointly exceed three years, the employment contract will be deemed to have been entered into for an indefinite period of time (*i.e.* it would become a permanent employment contract). The law also provides that a contract with a temporary employment agency is an employment contract, but one that is governed by special provisions where further deviations from the legal protections may be arranged for in a collective labour agreement. The social partners in the temporary employment sector have taken ample advantage of that possibility, as a result of which the security afforded to temps has not appreciably increased. The Flexibility and Security Act also implemented two legal presumptions. On the basis of the first presumption, if a person performs work on a weekly basis for at least three months she will be deemed to have performed that work pursuant to an employment contract. On the basis of the second presumption, an employment contract will be deemed to comprise the number of hours that the employee has worked in the preceding three months. This is a presumption, hence the employer can submit evidence to the contrary, for example by showing that the contract is not an employment contract. This does not detract from the fact that it can be inferred from such legal

[135] Green Paper, 2006: 6.

provisions that the legislature considers a permanent employment contract to be the norm.

The same conclusion can be drawn from Directive 1999/70, whose preamble states that '[t]he parties to this agreement recognise that contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and workers'. In various judgments, the Court of Justice of the European Communities has ruled that the permanent employment contract is deemed to be the norm. For example, in its judgment of 22 November 2005,[136] the Court referred to the framework agreement[137] and held that enjoyment of a fixed employment relationship constitutes an essential part of the protection afforded employees. In its judgment of 4 July 2006,[138] the Court went even further and held that 'the framework agreement presumes that permanent employment contracts represent the customary employment relationship'. The Court ruled that the social partners' acknowledgement in the preamble and the general conditions of the framework agreement that fixed-term employment contracts are customary in certain sectors and occupations and for some activities,[139] and that under some circumstances a fixed-term employment contract may suit the needs of both employer and employee, does not detract from those basic assumptions.

Although social changes have damaged the permanent employment contract, for the time being it does not appear – particularly in an international context – that permanent employment contracts will come to play a less significant role in favour of commission contracts, despite all the burdens that a permanent contract implies.

3.14. CONSEQUENCES OF SOCIO-ECONOMIC DEVELOPMENTS: NEW ISSUES

The last paragraph of Chapter 2 refers to five socio-economic developments that could affect the system that is built up around the employment contract.

[136] *JAR* 2005/289 (Mangold), par. 64.

[137] Framework agreement dated 18 March 1999 regarding fixed-term employment contracts, enforced under Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, PB L 175: 43.

[138] *JAR* 2006/175 (Adeneler), par. 61.

[139] See the second paragraph of the preamble and paragraph 8 of the general considerations contained in the framework agreement.

Those developments have a number of consequences within the context of the 'rule of law governing labour', first and foremost for the position of the employment contract itself as a legal arrangement of the relationships between a business owner and a worker. Its intended character as a private, arm's-length transaction between an 'employer' and an 'employee' has come under pressure. The social character of the relationship between employer and employee has been legally rediscovered, as it were. This is reflected, among other things, in the development of the protection against dismissal, in the reciprocity of the reasonable attitude that the courts expect from the parties, and in the development of legal theories. The protection against dismissal is in and of itself an acknowledgement of the social nature of the relationship. At the same time, the ample possibilities to terminate an employment contract against the will of one of the parties is an acknowledgment of the nature of a relationship based on mutual trust. The relevant case law acknowledges the reciprocity, partly on the basis of a view of the company as a 'community' that entails various mutual obligations that cannot be precisely delimited in advance.[140]

This book has explored the developments of the employment contract as a legal instrument and as a social phenomenon in relation to four areas. Questions about developments in the social nature of the employment contract imply investigating the relationship underlying the employment contract, *i.e.* the relationship between employers and employees. In the Netherlands, the division of responsibility between those parties in the establishment and maintenance of the employment contract generally takes the form of a collective contract – a contract between the social partners that represent the individual parties to the employment contract. Chapters 4 to 7 discuss the developments in the division of responsibility between employers and employees.

Such developments have consequences for the various arrangements that are typical under social legislation, which were attributed to the employment contract in the 20th century. As independent work once again becomes more relevant and the line between salaried and freelance work becomes more blurred, the link between salaried employment on the one hand and protection and social insurance on the other will become more problematic. The same holds true with regard to the strict separation that has been maintained between salaried employment and freelance work. The level of

[140] *Cf.* the comments above regarding the characteristics of arrangements based on 'status'.

independence within salaried employment is increasing, partly due to better education and professionalisation, and it could be that the need for protection against risks is decreasing. That protection is in any event under pressure due to the internationalisation of the economy. Erosion or marginalisation of the employment contract raises the question of whether the nature of the employment contract is also changing.

These developments will be investigated in relation to four areas in the following four subject-specific chapters. Is the protection against risks actually decreasing, or is it actually increasing? At first glance, divergent trends can be ascertained on the various topics. For example, the developments in work and care could be considered a case of increased protection. It could be argued with respect to pensions that employers bear the risks more than they did in the past, so that there is continuing risk coverage for the same employee. The question regarding protection of those who are *included* – employees who fall under protective schemes on the ground of an employment contract – raises the question of who is being *excluded.* These four chapters are intended to show whether this always relates to the same group of workers/employees for the topics under discussion, or whether per topic exclusion or inclusion of different categories of workers is at issue.

Finally, one must ask whether any consequences must be attached to the developments that have been ascertained in socio-economic policy. Can the employment contract still function as the core of that policy, or should the scope of labour law be defined more broadly? International competition and European employment policy have shifted the focus of social and labour laws from the end to the beginning of employment participation. If the beginning of the employment relationship rather than the end becomes the central issue in terms of participation, the link to salaried employment and the employment contract will be less obvious. Independent work is even being propagated as a means to increase participation. In the future, social and labour laws – if they can still be referred to as such – may have to focus more on the guarantee of actual and 'equal' access to various formal participation options than on covering risks related to income. In other words, will the regime of the employment contract be affected due to the decrease in its scope and the changes in its function? Is the employment contract still the most adequate instrument to regulate employment relationships? The following chapters will address aspects of these key questions.