Refutations and illegitimacy of the employment contract

Thomas Diefenbach PhD, MSc, BA

Independent scholar

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abstract: Modern economies are – almost – incomprehensible without employment contracts. Yet, only because something has been around for some centuries and is applied around the world doesn't make it right. This paper argues that the employment contract is fundamentally flawed and should be made *illegal* (like, for example, the slavery contract). The paper demonstrates that the employment contract pretends the impossible – the transfer of people's free will which actually is inalienable. But the main argument against the employment contract refers to its *substance*, that this contract has several flaws *in principle* in regard to meeting the universal principles and values of freedom, democracy, equality, and justice. It will be demonstrated that the employment contract takes away fundamental freedoms from one party, the employee (inalienable human, civil, and democratic rights), that it is deeply anti-democratic (with its hierarchical master and servant construct), contract-based exploitation (employees do not get the fruits of their labour, are not remunerated adequately), and unfair and unjust in principle (employees do not participate in the outcomes of their work proportionally). The paper argues that because of these fundamental flaws the employment contract should be rendered illegal and outlawed.

The more than questionable nature of the employment contract

Modern economies are – almost – incomprehensible without employment contracts. Yet, only because something has been around for some centuries and is applied around the world doesn't make it right. This paper argues that the employment contract *cannot* provide the contractual basis for the formalised and institutionalised continuous joint work of free people. It elaborates on the idea, and proves, that the employment contract is not only *invalid* for various reasons but should be rendered *illegal* because of several *fundamental* flaws:

- Already from a theoretical perspective, it can be shown that the employment contract claims the *impossible* – to transfer rights from one party (the employee) to another party (the employer) that are actually *inalienable* (such as one's free will, one's cognitive competencies, or the right to make decisions).
- In more practice-oriented terms, it will be discussed how many employment contracts can be invalid because of one or more variants of *coercion* (in particular duress and undue influence, inequality of bargaining power, or systemic conditions).
- But the main argument against the employment contract refers to its *substance*, that this contract has several flaws *in principle* in regard to meeting the universal principles and values of freedom, democracy, equality, and justice. In particular, the employment contract:
  - Turns people into masters and servants, giving the former (the owner/employer) all power and control 'rights' and taking away or restricting the employee's *fundamental freedoms* (e.g. personal freedoms such as freedom of thought, opinion, and expression and free development of personality), rights, and responsibilities *considerably and substantially*.

– Establishes hierarchical superior–subordinate relationships where power, resources, rights, and responsibilities are allocated *deliberately* unequally; where only a few people (owners and managers) are allowed to make decisions; and where the many (employees) are left with the prime duty to obey and to carry out orders. It creates a fundamentally autocratic and *anti-democratic* system.

– Constitutes *a highly unequal, asymmetrical relationship* between owners/employers and employees whereby the former takes advantage of the latter through an *exploitative exchange* and profits disproportionately via wrongfully appropriating *all* value added without legitimate reasons and at the expense of the employee. It is institutionalised, *contract-based exploitation*.

– Goes against the fundamental principles of *substantive justice* because some people (owners) wrongfully claim all profits whereas others (employees) are not rewarded for their contributions as they deserve. It privileges the former and discriminates against the latter unfairly and unjustly.

Because of these fundamental flaws, the employment contract should be rendered illegal. The following sections will discuss each of the employment contract's fundamental flaws in detail.

Inalienability of people's mind and free will

As early as the end of the 17th century, the great philosopher John Locke (1689/1998, p. 127) concluded: 'A man, as has been proved, cannot subject himself to the arbitrary power of another.' Locke's famous argument was based on 'natural rights', i.e. *universal* rights that individuals *always* have *independent* of (or even in contrast to) actual legal systems and laws.

The natural rights argument has been applied successfully in regard to the protection and preservation of individuals – their freedom, lives, property, dignity, and human rights – against (contractual forms of) slavery or oppressive state power. Nevertheless, the natural rights argument finds its limits when it comes to individuals *agreeing* to alienate and transfer some of their (natural) rights to someone else, for example to an institution (nation-state or organisation) or to an individual (a person in power, or the owner of property or an organisation). If it is individuals' natural right to have these rights in themselves – so the argument goes – then it should also be individuals' natural right to give away these rights (or sell them or rent them out) *if* they want to.

This claim regarding the voluntary transferability of natural rights arose in the 18th century and it limited the relevance and application of the natural rights argument considerably. From then onwards, all that could be argued was that only in cases with an absence of voluntariness and natural justice (e.g. coercion, unfairness, exploitation, injustice, or other moral issues) should such transfers be deemed illegitimate and rendered illegal. There are still many such cases. But right-libertarians could now argue that a transfer of natural rights 'voluntarily' and on the basis of consent was both possible and legitimate – as in the case of the employment contract.

It was the economist and social and legal philosopher David Ellerman who challenged this idea of the *possibility* of transferring natural rights most compellingly in fundamental terms. According to Ellerman (1992, p. 72): 'The issue was not coercion or contract. … The basic issue was and is the voluntary alienability versus the inalienability of the right to self-government and self-determination [and] … whether or not an individual may voluntarily alienate the natural right of self-determination as in a

voluntary self-enslavement contract. … The real issue is not consent, but whether or not consent can alienate and transfer the right of self-government to some sovereign person or body.'

Ellerman (1992, p. 84) also provided the answer to this fundamental question in a very well put argument: 'A right is *inalienable* (even with consent) if the contract to alienate the right is inherently invalid. The self-enslavement or self-sale contract is an old example of such a contract, while the self-rental or employment contract is a current example. … In general, any contract to take on the legal role of a thing or non-person is inherently invalid because a person cannot *in fact* voluntarily give up and alienate his or her factual status as a person.' He concluded (p. 112) that 'It is not a value judgment that labor is *de facto* inalienable and non-transferable; that is an empirical factual judgment. If true, then the legal contract to transfer that which is inherently non-transferable would be fraudulent.'

Individuals cannot transfer, or have transferred, their free will, reason, autonomy, responsibility, self-government, or self-determination via contractual agreements since these aspects only exist as *inseparable* parts or characteristics of a particular individual. These features constitute persons as individuals in an existential sense and, therefore, cannot be transferred; the moment these characteristic aspects of an individual were transferred, the individual would stop being an autonomous individual and would cease to exist as an individual. It therefore is not just morally wrong but formally, legally, and actually *impossible* for a contract to turn a person into a non-person, a thing (Ellerman 2005). The rights covered by one's self-ownership (i.e. one's personality, mind, individuality, mental competencies, and abilities) simply *cannot* be transferred (Phillips 1994, p. 234, Ellerman 2005, p. 463, Erdal 2011, p. 140). Any contract that pretends to transfer individuals' inalienable rights – such as the slavery or employment contract – to another person or legal entity is therefore invalid.

The inalienability of people's free will and the impossibility of the employment contract make it clear that no one should be made to work for someone else under the pretence of a contract that is actually invalid. Or, as Peirce (2001, p. 28) put it so poignantly: 'No one is anyone else's master, and no one is anyone's slave.' Any form of 'dependent employment' (i.e. employment based on an employment contract) is illegitimate and invalid.

However, although valid, the argument about the invalidity in principle of the employment contract is a rather formal or theoretical one – one day, hopefully it will become a socio-political and legal reality, will enter legislation and contract law, and will be applied in reality. For the time being, in the past, present, and foreseeable future, the employment contract has been, is, and will be used in order to constitute dependent employment (and to make and keep people dependent). Everywhere in the world people *do* enter into, and work under, the smokescreen of employment contracts on a daily basis. It should be clear that the argument here is not against work or contractual arrangements of work as such. There are many good reasons for entering into a standard employment contract (e.g. gaining and securing a job, a steady income, benefits, opportunities, and career development) – and there are many elements of the standard employment contract that are beneficial for the employee, such as defined and specified work, regular working hours, regular pay, social benefits, paid annual, sick and other leave, and equal treatment and opportunities (e.g. Turner 2013, pp. 82–83, NI Direct 2015). Such beneficial elements of the employment contract are *not* disputed but seen as *indispensable* aspects of *any* formalised and institutionalised regular joint work. But what *is* criticised – and needs to be changed – is the pretence (and the subsequent legal reality and actual work regimes) that the employment contract enables some people to buy or rent from other people their will and rights to themselves. This is fundamentally so flawed and

wrong in several respects that it should not only be rendered illegitimate and invalid but also outlawed straightforwardly. The various procedural and substantive weaknesses and serious faults of the standard employment contract will be discussed in the following sections.

Entering into the employment contract and coercion

In any social system that in some way is based on the notion of 'the individual', formal rule of law, and some form of freedom, there is freedom of contract. People are basically free to choose with whom to contract about what and on which terms. Freedom of contract concerning labour, i.e. the idea of people offering and selling their (will to provide their) labour to others, is one of the fundamental principles of political, legal, and economic theory and enshrined in constitutions and law (e.g. Henry 1999, pp. 153–158, Turner 2013, p. 17). Thus, in the context of negotiating and entering into the employment contract, the freedom and voluntary consent of the parties are crucial for its legitimacy and legality. An employment contract may be deemed invalid if the voluntary character of the parties' agreement or their individual consent are in doubt, or if individuals were *coerced* into the employment contract against their explicit or implicit will. The following sub-sections will look at some types of coercion that may render the employment contract invalid: duress and undue influence; inequality of bargaining power; and systemic conditions.

1) Duress, undue influence

In regard to agreeing contracts, coercion largely comes in the form of duress or undue influence. Whereas duress means more direct, intentional, actual, or threatened use of force, undue influence is more about indirectly persuading or affecting people against their own stated or assumed will. The law and courts rightly differentiate very clearly between these two cases. But here they can be treated together because the same argument will be put forward for each.

Both duress and undue influence mean that a person is not able to exercise their own free will when making a contract – even worse, that the person has to act *according to another person's will*. As the legal and political philosopher Joseph Raz (1986/2009, p. 154) put it: 'A person who forces another to act in a certain way, and therefore one who coerces another, makes him act against his will. He subjects the will of another to his own and thereby invades that person's autonomy.' The victim of coercion has no realistic alternative but to agree and submit to the inevitable (Poole 2012, pp. 551–552).

Duress – or any other form of illegitimate pressure – obviously goes against the very idea of freedom, and freedom of contract. In free and democratic societies, such coercion is deemed unlawful. Any contract that was established by at least one of the parties having been coerced into it would be deemed null and void. There certainly are employment contracts that are agreed solely or largely because of such illegitimate pressure. Nonetheless, (direct or indirect) coercion is only the case in particular, individual instances where people are forced into a contract – and *only* in such instances of (proven and evidenced) duress or undue influence is the employment contract invalid. In general and in principle, and in the absolute majority of all actual employment contracts, people are *not* exposed to coercion when they consider entering into and signing a specific contract but are able to follow their own will. Thus, the

employment contract cannot be refuted *as such* on the grounds of duress or undue influence, or the idea that one or more of the contracting parties may have been coerced into entering the contract.

2) Inequality of bargaining power

People can also be coerced into a particular contract if there is a marked *inequality of bargaining power* between the contracting parties (Peel 2011, p. 467). 'Inequality of bargaining power' means that there is a considerable difference between the negotiating parties in respect to their need to enter into a given contract (i.e. having meaningful alternatives) and their ability to negotiate the terms of the contract; the stronger party does not need to enter into the contract (i.e. they have other meaningful alternatives at hand) and can negotiate all terms of the contract, whereas the weaker party depends on getting the contract and is hardly in a position to negotiate, especially not regarding the key terms of the contract.

For example, in respect to (negotiating) an employment contract, the owners or representatives of an organisation ('employer') are in a relatively strong position simply because they define the terms of the contract of the particular job ('job description') and (usually) can decide among various candidates who will get the job. In contrast, most applicants are in a weaker position because they have to compete with other candidates, they (often) need the job, and they can only marginally negotiate the terms and conditions of the particular job (by and large, they have to accept it as it is offered). It is particularly the (prospective) employee who feels economically and practically pressured or even forced to accept the conditions of a particular employment contract (Hodgson 1984, p. 23, Peel 2011, pp. 441–444, Morgan 2012, p. 185, Van Waarden 2014, p. 357).[1] In this sense, there often is a marked and systemic inequality of bargaining power between job owner and job seeker, and between (potential) employer and employee.

Surely, inequality of bargaining power between contracting parties is, or can be, a serious problem and matter of great concern. Inequality of bargaining power advantages one party and disadvantages the other party, perhaps even to the extent that the power differential is seen not only as inefficient (producing sub-optimal allocation and outcomes) but also as unfair and unjust, even illegitimate. If the inequality of bargaining power is so severe that it renders impossible the process of bargaining (i.e. the weaker contracting party has no other choice but to enter into the contract and/or is not able to negotiate the key terms of the contract), then the employment contract will be deemed invalid. However, as long as the inequality of bargaining power does not seriously threaten the actual process of bargaining – or at least still leaves the theoretical possibility of bargaining – it does not render the employment contract invalid. *On the contrary*, in almost all cases proponents of the 'free market' and (unrestricted) 'freedom of contract' – and the courts – in particular do not see inequality of bargaining power as a serious problem. Why is this so?

[1] The argument needs to be more nuanced when it comes to the realities of the labour market. For instance, people with particular job characteristics (e.g. certain professions, skills, or qualifications), some professionals and other highly skilled employees, and blue-collar workers in industries where there is a shortage of skilled workers may receive offers from various (prospective) employers, and therefore they may be in the strong position of being able to choose the job they want and negotiate their contract. But here it is only the *general* argument of inequality of bargaining power that is under discussion; usually, it is the employer who is in a strong position and the employee who is in a weak position when it comes to negotiating an employment contract.

The main reason is that inequality of bargaining power actually *reflects* – and corresponds with – the very nature of the employment contract. The employment contract is meant to establish a superior–subordinate relationship where all (ownership, property, management, and control) rights are allocated to one party – the owner and their representatives (such as line manager or supervisor) – and where the other party's (the employee) main rights and responsibilities are to obey, to follow, and to execute orders.[2] It is the fundamental idea of the employment contract to have a 'strong' party and a 'weak' party entering into the contract. In its substance, the employment contract constitutes a perfect *inequality of power*. It therefore is not only logical but also rather helpful to have an *inequality of bargaining power* inherent in the negotiation of the employment contract because it establishes this superior–subordinate relationship *before* the actual contract begins and, in so doing, prepares the ground for the smooth establishment and functioning of this unequal relationship from the moment the contract is signed. In this sense, inequality of bargaining power is not an evil, or at least a necessary evil, but a (very) fitting external element of the employment contract.

That inequality of bargaining power is actually *welcomed* by the proponents of unregulated – and, hence, unlimited – 'freedom of contract' (and markets) is evidenced by various facts:

- Inequality of bargaining power can be found in regard to various contractual relationships that are quite common, for example principal and agent, landlord and tenant, franchisor and franchisee, company and customer, and employer and employee. But this inequality of bargaining power does not make agency contracts, tenancy agreements, franchise contracts, purchase agreements, or employment contracts invalid – on the contrary, it helps them come into place.
- Inequality of bargaining power is particularly the case in capitalist (neo-classical or neo-liberal) market economies and markets, i.e. in relatively un- or under-regulated markets and industries that largely function on the basis of, and cater to, the 'free play of forces' and unrestricted competition among market participants. It is a *cornerstone and constituting element* of these markets and industries (e.g. markets for rental properties, extensions of business activities via a franchise, or labour markets).
- That inequality of bargaining power is so widespread and common (in certain markets or industries) actually indicates that it is a *systemic feature* of (neo-liberal) market models where particular market players are systematically advantaged (e.g. the principal, landlord, franchisor, company, or employer) and have a privileged and more powerful position not only *during* but also *before* and *after* contractual arrangements. It is *planned* and *intended* inequality.
- Although the proponents of such market models officially call for no or little regulation under the battle cry of 'freedom of contract' and the 'free play of market forces', they actually make sure that the law, the courts, and business associations (as well as politicians and the media) are on the side of the stronger parties. Almost everywhere in the world, landlords, franchisors, corporations, and employers are in a very strong position, and tenants, franchisees, consumers, workers, and

[2] See the sections 'The Employment Contract vs. Fundamental Freedoms' (in particular the sub-section 'Master and Servant: Employer's Control Rights and Employee's Duty to Obey'), 'The Anti-democratic Nature of the Employment Contract', and 'The Employment Contract, (In)equality, and Exploitation' (in particular the sub-section 'Constellation: Asymmetrical Relationship') further down.

employees are in a much, much weaker position not only for economic reasons (having or not having property) but also because of regulatory, legal, and contractual frameworks.

For these reasons, inequality of bargaining power is not sufficient to refute the employment contract in general – not because it is not a serious enough problem (*it is!*) but because it perfectly complements the employment contract in establishing a highly unequal social relationship on a legal basis.

3) Systemic conditions

Finally, there can be *systemic* coercion that may render the employment contract invalid. Systemic coercion means that people are *not* forced to do (or not to do) *x* because of someone specifically influencing them illegitimately or illegally directly (i.e. duress or undue influence) or indirectly (inequality of bargaining power), but because of the general conditions or circumstances people find themselves in. For instance, the general state of the economy or society, people's specific living conditions, as well as political, social, cultural, and educational value systems and institutions, structures, processes can put pressure on people to willingly accept (or even actively seek) certain contractual arrangements – such as the traditional employment contract. Although all of these conditions are specific and different, and worth being looked at individually, for the purposes of the argument put forward here they will be collectively termed 'systemic conditions'.

In theory people may have the choice to enter into any contract as they wish – but in practice they may be either unwilling or unable to make use of that choice because the systemic conditions allow only for certain options – or no options. For instance, Hodgson (1984, p. 27) argued that 'It is not satisfactory to regard mere consent as the *sine qua non* of freedom: there are other factors to be taken into consideration. The value of the consent has to be assessed in terms of the pressures and other circumstances acting upon the person. To return to our example of the employment contract, freedom is not marked simply by the consent to work for an employer. Although that consent is meaningful and real, it has to be considered alongside the economic and social pressures which are pushing that person into work.' Or, as Hahnel (2005, p. 81, italics in original) stated: '*When initial conditions are unequal*, voluntary, informed, and mutually beneficial exchanges will still be coercive and lead to inequitable outcomes, even if exchanges take place under competitive conditions.'

In this sense, it could be argued that although people are entirely free to negotiate and enter into specific (employment) contracts, (some or certain) people are left with no choice but to accept the work options that are available to them and the employment contract they are offered, due to their very status and situation within the systemic conditions that restrain them (Hodgson 1984, p. 26).

History, and even the current status quo in many countries, is full of countless examples of systemic conditions so appalling that people are forced into work and into accepting *any* employment and contract (Hodgson 1984, p. 27). At first, one may think of the poor and the vulnerable, the unskilled and the poorly skilled, and migrants and seasonal workers, who may be forced into (disadvantageous or illegitimate) employment contracts, exploited, and treated unfairly and inhumanely. And it is perhaps certain types of economic activity or industry where this is more likely to be the case (e.g. agriculture, construction and the built environment, domestic work, and other unregulated or poorly regulated service industries). Each and every one of these exploitative forms of employment is a far cry from the standard employment contract (with comprehensive employee rights) and should be deemed illegal.

But it is not only 'Manchester Capitalism-like' modern slavery or servant-like employment that are of great concern. Even 'attractive' work and jobs can be turned into nightmarish arrangements because of their contractual design – for example, via zero-hour contracts (no minimum working hours and, hence, no minimum wage for employees); via the 'gig economy' (where people work like employees but legally are independent contractors or freelancers, i.e. they bear all the economic risk and do not get the benefits relating to regular full-time jobs); via 'McJobs' (low-paid jobs with few, if any, career prospects); or via people working three or more part-time jobs to make ends meet. These are only the latest examples of systemic conditions forcing people into jobs and employment they – *if* they had a choice – would *not* choose (as permanent and/or fulfilling employment).

As devastating and appalling as these conditions are for millions and millions of people, and as much as we need to change systemic conditions that force people into any kind of oppressive or exploitative relationship, the question (in the context here) is whether referring to 'systemic conditions' is a sufficient argument to render the employment contract invalid per se (Morgan 2012, pp. 186–187).

For systemic conditions to be relevant, they must not only 'force' people into a particular type of work or job according to the *common* understanding of the term but also in a *legal* sense, i.e. they must be *coerced* into a particular contractual arrangement. For a situation to be accepted as a reasonable and sufficient case of *coercion*, (1) there must be a *specific* pressure or threat, (2) the pressure or threat must be *illegitimate*, and (3) the pressure or threat must constitute a *significant cause* inducing one party to contract (Morgan 2012, p. 187, Poole 2012, pp. 552–555). There may be individual or even historical situations when this has been the case in regard to systemic conditions. However, although many systemic conditions are 'bad' and morally questionable, they do not represent illegitimate pressure in a legal sense, or the pressure may not amount to a 'significant cause' of the decision to enter into a *particular* contract. The economic realities of market economies, the threat of unemployment, social expectations, and social exclusion may put severe pressure on individuals to seek employment opportunities, perhaps even *any* job, and accept existing employment contracts that are available to them. But in any given case it may be rather difficult to argue (and to prove) that systemic conditions directly impacted on the negotiation and forced the person to enter into a particular employment contract. Even if it is possible to legitimately argue that workers are pushed into dependent employment, all the aforementioned types of systemic pressure nonetheless do not count as coercion in a legal sense and, thus, cannot render the contract null and void. Systemic conditions – as appalling, unequal, unfair, and unjust as they may be – are *not* an argument against the standard employment contract per se.

All in all, it can be concluded that coercion *can* invalidate employment contracts in *particular* cases. Any contract where at least one of the parties was directly or indirectly forced into it against their will in a legal sense (*duress* or *undue influence*) would be deemed null and void. This would also be the case if the *inequality of bargaining power* were so severe that one of the contracting parties had no choice but to enter into the contract without being able to negotiate the terms of the contract or if *systemic conditions* put such a specific and illegitimate pressure on the person that they were forced to contract because of that very pressure. Thus, there *can* be instances when coercion – whether in form of duress or undue influence, inequality of bargaining power, or systemic conditions – during the negotiation and at the point of entrance into the employment contract renders the contract invalid. Nevertheless, at least in free and fully fledged democratic societies with relatively developed and comprehensively and sufficiently regulated market economies, people usually are *not* coerced, but free to enter or not to enter into

contracts, including employment contracts. In this sense, the standard employment contract cannot be refuted or invalidated *in principle* on the grounds of coercion (or any of its forms).

The substance of the employment contract

But there is another way that the standard employment contract can, or even should, be refuted or invalidated *as such* – the nature or substance of it. This will be interrogated in the following sections comprehensively and in detail in respect to key principles and features that constitute and guarantee the legitimacy of any social system and arrangement – *freedom*, *democracy*, *equality*, and *justice*. In order to give a first idea of how challenging it is for the standard employment contract to meet those four fundamental criteria, I represent here a long quote from the aforementioned political philosopher and economist David Ellerman (1992, p. 69) because it summarises the main concerns quite succinctly:

> The capitalism/socialism debate has not only diverted attention away from the renting of human beings, it has allowed capitalism to be positively identified with democracy, equality, justice in property, and treating people as persons rather than things. Yet the employment relation inherently denies all these ideals in the workplace.
>
> Slavery has been abolished both as an involuntary or as a voluntary relationship. But instead of creating a form of enterprise where people are treated as persons rather than things, we only have a system where workers are rented rather than owned. The transition from workers being an owned input to their being a hired input was certainly a moral improvement. But the capitalism/socialism debate has paid little attention to the alternative form of work where the human element is not 'employed' at all by public or private employers where people rent only things rather than the owners of things renting people.
>
> Consider equality. There is a basic equality of rights in the political sphere. But prior to the democratic revolutions, there was a fundamental political inequality between ruler and the ruled where the ruler governed in his own name and was not selected by and did not represent the ruled. Today in the economic sphere, that same type of authority relationship exists between the master and servant where the employer governs in his own name, and is not selected by and does not represent the employees.
>
> Or consider democracy. The capitalist democracies stands for democracy, but not in the workplace (viz. Dahl 1985). … The nondemocratic tradition of liberal thought … founded autocracy on a voluntary contract, the *pactum subjectionis*. With the triumph of the democratic revolutions inspired by the natural rights philosophy of the Enlightenment, that non-democratic liberalism retreated to the capitalist workplace where it has flourished ever since as part of capitalist ideology. The employment contract is the *pactum subjectionis* of the employment firm.
>
> Or consider justice in the private property system. Under capitalism, doesn't everyone get what they produce, the fruits of their labor? [It is] quite the opposite, …

> when labor is hired, the fruits of labor go elsewhere. Labor is the natural basis for the appropriation of newly produced property; the natural 'wages' of labor are the fruits. Instead of somehow being the economic system realizing justice in private property, capitalism systematically violates the basic labor principle of private property appropriation. It is again the employment relation which sets up the mis-appropriation of private property.
>
> In each case, we trace the root cause of the problem to be the renting of human beings, the employer-employee relationship. The alternative to the employment relation … is having everyone working for themselves (individually or jointly). This means restructuring companies so the membership rights are personal rights attached to the functional role of working in the firm. Then there is no human 'employment' since working in the firm makes one a member so people are always jointly working for themselves.

The rest of this chapter discusses in more detail how the standard employment contract relates to *freedom* ('The Employment Contract vs. Fundamental Freedoms'), *democracy* ('The Anti-democratic Nature of the Employment Contract'), *equality* ('The Employment Contract, (In)equality and Exploitation'), and *justice* ('The Employment Contract, Justice, and Just Remuneration').

The employment contract vs. fundamental freedoms

Master and servant: Employer's control rights and employee's duties to obey

The main idea of the employment contract is not only to establish the rights and responsibilities (or duties) of the two contracting parties – employer and employee – but also to put the two contracting parties into a particular legal, formal, organisational, and social relationship. It defines and establishes the relationship between employer and employee as a superior–subordinate or master–servant relationship (Bird 2005, pp. 160–161, Diefenbach 2013, Turner 2013, p. 84). In his famous article 'The Nature of the Firm', the economist Ronald Coase described the rights and responsibilities of master and servant and their relationship very clearly (1937, pp. 403–404):

> We can best approach the question of what constitutes a firm in practice by considering the legal relationship normally called that of 'master and servant' or 'employer and employee.' The essentials of this relationship have been given as follows:
>
> (1) the servant must be under the duty of rendering personal services to the master or to others on behalf of the master, otherwise the contract is a contract for sale of goods or the like.
>
> (2) The master must have the right to control the servant's work, either personally or by another servant or agent. It is this right of control or interference, of being entitled to tell the servant when to work (within the hours of service) and when not to work, and what work to do and how to do it (within the terms of such service) which is the dominant characteristic in this relation and marks off the servant from an independent contractor, or from one employed merely to give to his employer the fruits of his labour. …

> We thus see that it is the fact of direction which is the essence of the legal concept of 'employer and employee.'

If 'master and servant' sound too old fashioned as a way to describe employers' and employees' relationship and main duties, the *standard test of employment status* (Weir 2003, pp. 450–451, Turner 2013, pp. 83–95, NI Direct 2015) provides a very good idea of the nature and object of the employment contract, the contracting parties' relationship, and the main responsibilities in contemporary wording:

- *Control test*: A person is subject to detailed control by the person for whom they work and can be told what they must do and directed in what manner the work must be done.
- *Integration or organisation test*: A person's work is fully integrated into the business, not an accessory.
- *Economic reality or multiple test*: The person provides skill or work in return for a wage from the person for whom they work, the person expressly or impliedly accepts that their work will be subject to the control of the person for whom they work, and there is nothing inconsistent with there being a contract of employment (e.g. method of payment, tax and national insurance contributions, ownership, self-description, or job description).
- *Mutuality of obligations test*: One party is bound to provide work whereas the other party is bound to do the work.

These are *the* key features of any master–servant or employment contract; all *control rights* and *de facto control* must rest with the employer, owner, and/or their representatives (managers or supervisors with line authority).[3] These control rights comprise the rights of the employer or its representatives to make decisions, give orders, manage, control, and sanction in regard to the organisation as a whole, how the organisation is run, and its conduct of business as well as in relation to individuals and their work, behaviour, and performance. Control rights also comprise the corresponding *duties*, even the willingness, of the employee to behave, reason, act, work, and execute orders as they are told (by their employer, the owner of the organisation, and/or their representatives) and according to expectations and performance standards and measures. Or, as Wright (2010, p. 51) put it quite bluntly but correctly: 'An essential part of the employment contract is the agreement of employees to do what they are told.'

The master–servant relationship established and institutionalised by the employment contract restricts not only employees' rights and responsibilities but also their freedom *considerably and substantially* (Erdal 2011, p. 140). It actually restricts employees' *fundamental* freedom*s*: freedom of thought, opinion, and expression; free development of personality; the right to information, consultation, and participation; and the right and freedom to decide what one deems is best or most appropriate for oneself and for the whole (i.e. the organisation). When a nation-state or any other political or social system restricts any of people's fundamental human and civil rights and freedoms so comprehensively and with as broad

[3] Employer, owner, and manager can be the same person (e.g. in a family business) but they can also be different persons (e.g. when the organisation is a legal entity and has absent owners such as shareholders and employed managers). The latter case complicates the legal, administrative, and managerial aspects between those parties (e.g. principal–agent problems) as well as between the parties and employees, and would require additional investigation and analysis. Nonetheless, for the sake of the argument here (the legitimacy or illegitimacy of the employment contract and the employer–employee relationship), it is assumed that all three are the same (legal or administrative) person.

a scope as the employment contract does employees' rights and freedoms, we call it a (non-violent) totalitarian and oppressive regime.

Justifications of employers' rights - and why employees give up their freedoms

The strange inconsistency – if not to say hypocrisy – of withdrawing fundamental freedoms from one of the contracting parties (i.e. the employee) and granting them solely to the other contracting party (i.e. the employer) is also reflected in how the presence or absence of these fundamental freedoms is explained and justified.

Employers' 'rights' are allegedly deduced from their property rights. For example, Wright (2010, p. 51) argued that 'institution of private property is the power of owners to decide how their property is to be used. In the context of capitalist firms this is the basis for conferring authority on owners to direct the actions of their employees.' But to say so is either a confusion or a malicious misdirection.

Property rights entail rights *only* in regard to *things*. The closest they come to people is when they are about 'the right to manage, that is, the right to decide who shall use the thing owned and for what purpose(s) it shall be used' (Arnold 1994, p. 44, Christman 1994, p. 227, Ingram 1994, p. 30, Fried 2004, p. 72, Learmount & Roberts 2006 – all referring to A. M. Honoré's original definition of property rights in 1961). But these property rights are just rights to grant or refuse access to property and to define how it should be used – *not* to instruct people *directly* what to do with that property (why, when, and how) or how to conduct their work and themselves (Ellerman 1992, pp. 10–11, Mayer 2001, p. 231).[4] Property rights (i.e. rights stemming from property) do *not* provide or entail *any* right to order, manage, or control *people* (employees). These 'rights' are *not*, and *cannot*, be deduced from property rights. As a consequence, the employer's 'rights' to manage and to control people are just *declared* and implemented via the standard employment contract but not deduced from a legitimate source (like property rights). They are without a valid foundation or valid justification. Malleson (2014, p. 45) therefore argued that 'the idea that legitimate decision-making power over other people can stem from property ownership is a feudal anachronism that we need to outgrow'.

It is self-evident that owners (as employers and masters) explicitly, implicitly, and happily accept their 'rights' to manage and to control people – why should they refuse such power? But it definitely is *not* clear or self-evident why employees accept their corresponding duties explicitly, implicitly, and happily. Thus, in order to give the master–servant relationship some form of legitimacy, its proponents are keen, *very* keen, to explain and to justify why and how employees give up some of their fundamental freedoms and explicitly accept their duty to obey and follow orders.

The proponents' short answer is that people give up their fundamental freedoms and subject themselves to autocratic or oligarchic power voluntarily simply by joining a hierarchical or authoritarian organisation. Mayer (2001, p. 237) put forward this argument as follows: 'They [employees or members of an association or club] have an option to be a member or not, to join if the association will have them, and this means that the rules of the association do not bind in the same way where the option is lacking.

[4] Ellerman (1992, p. 10) differentiated between *negative* and *positive control rights*. He showed that an owner or employer only has the right to exclude others from their property (negative control right) and not the right to tell others what to do with their property (positive control right).

Associations that recognize a subjection option on the part of prospective members do not conscript subjects but recruit volunteers. They make an offer, one element of which might be voicelessness in the governance of the association, but the voicelessness is not imposed without the option to refuse subjection. The terms of subjection are negotiated, and while the resulting distribution of voice may be unequal, that distribution does not violate the principle of justice upon which Dahl's proof is premised.' And he added (2001, p. 233): 'If I could go elsewhere but decide to stay, then my subjection to authoritarian power in an association is voluntary. Hence I am not entitled to political equality in it since I voluntarily submit to powerlessness.'

Unless there is or has been any kind of illegitimate or even illegal coercion, employees join organisations (i.e. enter into an employment contract) voluntarily and are free to leave at any time (assuming that the hierarchical organisation is not *so* authoritarian that it holds its members captive physically, psychologically, or emotionally). In this sense, the argument of the voluntariness of entry into or exit from contracts or organisations as such – provided that there are alternative options and there is no coercion – is not problematic.

But what *is* problematic is to claim that people are capable (in whatever way) of giving up their fundamental rights or freedoms. As argued in Chapter 2 concerning the constitutional foundations of the democratic organisation and in the section earlier in this chapter titled 'Inalienability of People's Minds and Free Will', people's fundamental freedoms and rights – many of which are considered to be human rights or civil rights – are *inalienable* from a logical as well as practical point of view; they can be transferred neither explicitly via a contract nor implicitly by joining an authoritarian organisation.

And, of course, there have been attempts to clarify that these fundamental rights are formally and legally inalienable. For instance, the Universal Declaration of Human Rights (United Nations 1948) in various of its articles makes explicitly clear that people's fundamental rights and freedoms are *non-negotiable*. It particularly states that 'all human beings are born free and equal in dignity and rights' (Article 1), 'Everyone has the right to freedom of thought' (Article 18), 'Everyone has the right to freedom of opinion and expression' (Article 19), and 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized' (Article 28).

Of course, the Declaration is not automatically adopted into international or national law, nor does it automatically become labour or contract law; instead, it requires ratification by national governments and, even more crucially, implementation and application. But many countries *do* uphold and protect people's fundamental freedoms in words and deeds. For example, the 1949 German Constitution (the 'Basic Law for the Federal Republic of Germany') *explicitly* refers to human dignity, human rights, and the *legally binding force* of human rights as *basic*, i.e. *immutable*, rights of every person. In its very first article, the German Basic Law states that 'the German people therefore acknowledge inviolable and inalienable human rights as the basis of every community' (Deutscher Bundestag 2018, Article 1(2)). It explicitly refers to personal freedoms and stresses that 'every person shall have the right to free development of his personality' (Article 2(1)) and that the 'freedom of the person shall be inviolable' (Article 2 (2)). In addition, Article 5(1) specifies that one of those personal freedoms is freedom of expression: 'every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures' (Deutscher Bundestag 2018).

Many countries have similar constitutions or basic laws. Especially free and fully fledged democracies do not just pay lip service to people's fundamental civil and human rights; they have come a long way to uphold, protect, and implement these rights in all areas of society. In that sense, it is time for contracts to be deemed illegal and invalid on moral and legal grounds where a person gives up their fundamental human and civil rights and freedoms, or where a person 'sells themselves' or parts of themselves actually or metaphorically (i.e. physically, cognitively, emotionally, or morally) to another person. In such cases legal paternalism is justified in protecting people from the harmful consequences of 'giving themselves away' to another person or private institution via a contractual agreement – even if it is their wish to do so (Feinberg 1980, p. 129). If a nation-state's labour and contract laws are to be consistent with universal human and civil rights (and in many cases, such as Germany, with their own constitutions) then contracts like the standard employment contract *must* be declared illegal.

The anti-democratic nature of the employment contract

The employment contract establishes, structures, and maintains the relationship between employer and employee as a *hierarchical* social relationship (Diefenbach 2009, pp. 222–223, Diefenbach 2013, pp. 37–38). It is a relationship where power, resources, rights, and responsibilities are allocated *deliberately* unequally; superiority and inferiority, and dominance and obedience are specifically ascribed to and define the roles of employer and employee as *superior* and *subordinate*. In such a hierarchical relationship the superior has all the rights and power whereas the subordinate has none. Clearly, there is no – and *cannot* be – democracy between superior and subordinate in the sense of equal rights and power to govern, separation of powers and 'checks and balances', or democratic decision-making, participation, deliberation, transparency, or accountability. On the contrary, the employment contract establishes the employer–employee relationship as an *autocratic* regime (or as an oligarchic regime, if there is an established and institutionalised power elite within the hierarchical organisation, such as managers).

Malleson (2014, p. 27) provides a vivid description of how this hierarchical social relationship works in the organisational reality of hierarchical organisations where superior–subordinate relationships are based on and shaped by the standard employment contract: 'Many workplaces in our society [Canada], particularly for working-class jobs, are organized so hierarchically that they are deeply unpleasant if not outright oppressive. Almost everyone has experienced at some time or another the degradations of workplace hierarchy – yelling bosses, managers who act like petty tyrants, supervisors who stonewall and stifle feedback, arbitrariness and inequality, favouritism and snobbery, privilege and superiority. In such ways hierarchical work can underline the freedom of large numbers of working people to adequately control their own lives.'

Because of the autocratic employment contract and the design and workings of hierarchical organisations, employees have hardly any of those civil or democratic rights people take for granted in free and fully fledged democratic societies: there is no free speech, freedom of assembly and association, right to participate in decision-making, free and fair elections of representatives, autonomy, self-governance, democratic governance, self-management, participative or representative management, or democratic control and accountability (Carnoy & Shearer 1980, p. 246, Miller 1990, p. 7, Fournier 2002, p. 204, Courpasson & Clegg 2006, p. 329, Wright 2010, p. 50, Doran 2013, p. 85). None of this is explicitly, or at least implicitly, incorporated in the standard employment contract or the blueprint of the hierarchical

organisation. These essential and basic features of democracy are alien to the employment contract and hierarchical organisation. Schweickart (2011, p. 48), therefore, states that 'contemporary capitalism celebrates democracy, yet denies us our democratic rights at precisely the point where they might be utilized most immediately and concretely'. Similarly, Sauser (2009, p. 157) concludes that 'hierarchical structure is a major obstacle to democracy and self-governance as it is the embodiment of autocratic control'.

The old adage 'democracy stops at the factory gate' brings home this point. But the reality is even worse: organisations based on the standard employment contract are not just *non*-democratic but *anti*-democratic. The social philosopher and socialist André Gorz described it as follows (quoted in Blumberg 1968, p. 6): 'On the margin of civil society, with its formal liberties, there … persists behind the gates of factories, a despotic, authoritarian society with a military discipline and hierarchy which demands of the workers both unconditional obedience and active participation in their own oppression.'

Hierarchical organisations based on a differentiation between superiors and subordinates as outlined by the standard employment contract are flatly un- or even anti-democratic, despotic, oppressive, and exploitative both *de jure* and *de facto* and alien to the idea of a liberal, democratic, fair, and just social system or society (Dahl 1985, p. 55, Ellerman 1992, p. 11, Dahl 1998, p. 182, Rothschild & Ollilainen 1999, Diefenbach 2009, pp. 222, Malleson 2014, p. 27). Hierarchy is a fundamentally anti-democratic and oppressive social order. It is not compatible with democracy – even worse, it *negates* democracy (Miller 1990, p. 7, Schweickart 2011, p. 152). And the employment contract lays the (legal) foundations for this anti-democratic system. The employment contract *is* anti-democratic. There cannot be much legitimacy of, or justification for, any hierarchical social system or contract that helps to establish such a system – at least not in societies that claim to be free and democratic.

The employment contract, (in)equality and exploitation

Equal exchange or exploitation?

The standard employment contract establishes a highly unequal relationship between an employer as the stronger party (i.e. superior) and an employee as the weaker party (i.e. subordinate) where power, resources, rights, and responsibilities are allocated *deliberately* unequally. The employment contract privileges the owner/employer at the expense of the employee by giving the former (all) power and control over the latter as well as the sole right to govern and manage; make decisions, supervise, control, and punish; and accrue all gains generated collaboratively and collectively, especially profit. Moreover, the standard employment contract establishes and specifies an exchange of labour and money between the employer and employee as the two contracting parties. Its proponents, especially conservative, neoclassical, and neo-liberal politicians, economists, and businesspeople, claim that the exchange of labour and money via dependent employment (i.e. regular work for an agreed salary) represents and constitutes an *equal exchange*; the contracting parties exchange goods, services, labour, and/or money in mutually

beneficial ways without one party taking advantage of the other (e.g. Carson 2008, p. 385, Narveson 2010, p. 111).[5]

In contrast, in the tradition of classical and Marxist schools of economic thought, I will argue here that work for a salary (i.e. the standard employment contract as we know it) represents and constitutes a rather *un*-equal exchange, even *exploitation*. Generally speaking, exploitation means that *in an asymmetrical relationship one party takes advantage of another party's weaker position against the weaker party's genuine will and interests and wrongfully appropriates all, or a disproportional large part, of outcomes that stem from the parties' relationship, actions and interactions*.[6] According to this definition, it is possible to identify three main characteristic elements that together constitute exploitation:

1. *Constellation*: In a (social or economic) relationship or exchange, one party is (considerably) stronger, i.e. more capable of pursuing its interests than the other party (*asymmetrical relationship*).
2. *Process*: The stronger party takes advantage of the weaker party during and/or on the basis of this *asymmetrical* relationship against the latter's genuine will and interests (*exploitative exchange*).
3. *Outcome*: The stronger party's disproportional profiting from that exploitative exchange is without legitimate basis (*wrongful appropriation*).[7]

The following sections discuss whether the common standard employment contract (working for a salary) entails all three components, i.e. an asymmetrical relationship, exploitative exchange, and wrongful appropriation. *Only* if it meets all three criteria we can call the standard employment contract exploitative and deem it illegitimate, even illegal.

Constellation: Asymmetrical relationship

When all parties in a social or economic relationship or exchange have equal power, i.e. when they are equally able and willing to pursue their interests, exploitation *cannot*, and *will not*, happen. Strong people, whether individually or collectively strong, cannot be exploited. Exploitation can only take place in *asymmetrical* relationships, i.e. in social relationships of unequal power where there is a 'stronger' and a 'weaker' party or parties (Birks 2005, p. 106). It can be almost anything that makes actors or parties 'strong' or 'weak' in a social, economic, or contractual context: money, tangible assets (property or things), intangible assets (owing a company, positions, symbolic resources, power, connections, or influence), and socio-psychological traits, attitudes, or behaviour.

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[5] From a sociological perspective, Gouldner (1960, p. 170) called such patterns of mutually gratifying exchange 'reciprocity'. He even argued that there is a 'generalized moral norm of reciprocity which defines certain actions and *obligations* as repayments for benefits received'.

[6] This definition is based on definitions from Gouldner (1960, p. 165), Ellerman (1992, pp. 62–63), Archer (1995, pp. 42–43), Van Parijs (1995, pp. 145–146), Carson (2008, p. 396), and Wertheimer (1999, pp. 10–12), the last of whom presented definitions of exploitation from 16 different authors.

[7] 'Constellation', 'process', and 'outcome' represent not only a logical but also a chronological order in the sense of stages that happen 'before', 'during', and 'after' the exploitation happens (each stage has an impact as soon as it has emerged and then continues to exist and exert an influence).

It is not necessary for the weaker party to be forced into this unequal (contractual) constellation or relationship – on the contrary, very often, the weaker party joins 'freely' and gives their consent to the unequal relationship (and to the exploitative behaviour and outcomes that are highly likely to result from it). In other words, most people are *not* coerced into an asymmetrical relationship but enter it voluntarily. Most asymmetrical relationships are voluntary. They are established and maintained with the explicit or implicit consent of all parties involved, even of those who are *not* privileged in this asymmetrical relationship.

What *is* required is that the weaker party somehow *needs* the resource the stronger party is offering – or is at least of the opinion that it needs that resource. Very often, this resource is exactly what differentiates the two parties, and the possession or lack of possession make them either the stronger or the weaker party. Moreover, the weaker party must be of the belief that the stronger party can provide this resource. In other words, there must be one or more 'good' reasons for the weaker party to voluntarily enter into an asymmetrical relationship that actually goes against their genuine will and interests. In the case of the standard employment contract, the 'good' reasons for the employee may be 'the job' (i.e. to have *a* job or *any* job), the specific work, the salary, the career prospects, the social image that will come with the job, or any other reason to join an organisation as an employee.

One can also assume good reasons on the side of the employer. The need to fill a vacancy is only the most obvious reason. But the real reason, and most relevant, for an employer to enter into a formal relationship with an employee based on an employment contract is that it enables the employer to have full control over the resources the employee will use to carry out their job as well as full control over the employee. This control is exercised at the employer's discretion due to the asymmetrical relationship, and the employer gains all the benefits stemming from that asymmetrical relationship. This is the second of the main principles and driving forces of capitalism (the first is productive private property, i.e. the desire to start and own a business): to invest in, organise, and run an operation with others working for oneself and under one's control *so that one's income (profit) is amplified through others' work, efforts, and performance, i.e. value-adding activities*.

Accordingly, a highly unequal, if not to say dichotomal, allocation of rights and duties (in which *all control rights*, in particular the right to give orders, are granted to the employer and its representatives, whereas *all work duties*, especially the duty to obey and follow orders, are given to the employee) is the main characteristic, the core and nature, of the standard employment contract. This is one of the reasons why the employment contract is so dubious and suspicious. Through the allocation of all control rights and power to the employer and all duties to obey and follow the employer's orders to the employee, a highly unequal superior–subordinate or master–servant relationship is established formally, legally, organisationally, and practically. The master–servant relationship constituted by the employment contract is one of the most unequal constellations one can imagine. The standard employment contract is not a contract between equals but constitutes a completely *vertical* (i.e. hierarchical) relationship. If it were a society it would have a Gini coefficient of 1, i.e. the maximum grade of inequality in regard to the allocation of rights and duties and the jointly generated outcome. In this sense, the standard employment contract definitely meets the first criterion, i.e. it establishes a highly asymmetrical relationship.

Process: Exploitative exchange

The asymmetrical relationship lays the groundwork for a potentially exploitative exchange: according to Gouldner (1960, p. 164), 'if B is considerably more powerful than A, B may force A to benefit it with little or no reciprocity'. Such a relationship with a lack of reciprocity is one sided, or exploitative. In an exploitative relationship, or *exploitative exchange*, one party takes unfair advantage of another party, such that the former party uses the other party (its skills, competencies, or capacities) mainly as a means or tool for its own advantage. It does so even with the weaker party's explicit or implicit consent – which is usually the case – and against the weaker party's genuine will and interests. The question is whether the standard employment contract constitutes an equal or exploitative exchange.

The core object of the standard employment contract is regular work for a regular salary. In that respect it is important to note that the employee is *not* only paid for the time they make themselves available for the organisation, i.e. hours of work against an hourly rate of pay. The work the employee has to provide, which is specified in the employment contract or job description and then remunerated accordingly, takes into account the agreed number of hours of work but also includes the specific tasks the employee has to conduct, certain responsibilities, and the (expected) outcomes. This is what the employee gets paid for, i.e. the remuneration in the form of a salary reflects this whole bundle of deliverables (the employee's individual experience, skills, qualifications, outcomes, and performance) as well as their job grade and all relevant labour laws, industry standards, and regulations that define and protect employees' and workers' rights and benefits.[8]

Such a (contractually agreed) exchange of specified work for a specified salary seems to be a fair and equal arrangement. However, the problem with the standard employment contract is not what *is* included but what is *not* included. It is an *incompletely specified* contract, an *incomplete* contract.

The employee's work and performance (as specified by the employment contract and paid for via a regular salary) is input into the organisation's transformation processes (the 'production' of goods or services, even if the employee works on back-office activities). During the transformation process, the employee *adds value* to things – to material and immaterial assets, products, services, structures, and processes – via their work and activities. This value-added contributes to the generation of the organisation's overall outcomes and revenues, and finally profit.

Although it is the employee's work and activities that generate this value-added (and part of their individual performance), the value-added is *not* linked (back) to the individual. The employee's contributions to the organisation's performance, the value-added they generated, are not itemised – and *not* included in the employee's remuneration.[9] The result is that, even with the best standard employment

[8] Obviously, this is as good as it can get (for the employee) in the real world of (dependent) work. This means that for the purposes of the discussion here of possible exploitation I assume the best possible and most legitimate form of standard employment (and contract). Many employments arrangements and contracts (in certain industries and in developing countries but also in developed countries) are much less 'generous', 'fair', and legitimate – by far – if not to say straightforwardly exploitative in the very common meaning of the word.

[9] Some employment contracts have a 'performance-related' wage or salary component, bonuses, or even some form of profit-sharing scheme. Such elements do recognise, and thus compensate for, *some* of the value-added the employee generates. Nevertheless, such agreements are voluntarily, i.e. are solely based on the employers' 'goodwill', and usually such policies are limited in their design, are relatively marginal compared to the overall profit

contract available, employees are only remunerated for their *contractually agreed* work and performance (input), but not for (all of) their *actual* work and performance, i.e. all the specified work *plus* the value-added they create (output).[10]

This difference between *contractually agreed* (and remunerated) performance as input and *factually produced* (and partly *not* remunerated) performance as output lies at the core of the employment contract and the capitalist system (and it is one of the employer's reasons, if not *the* reason, to employ people in the first place). It means that employees are neither remunerated nor compensated *fully* for their *actual* performance and value-added activities by their employer, or the owner(s) of the organisation they work for.

But is this an *exploitative exchange*? If one understands the process of owners' and employees' joint activities and collaboration to (respectively) create value-added and provide compensation as an exchange, then it becomes clear that it is *not* an *equal* exchange. In an *equal* exchange, *all* benefits or gains that stem from the joint endeavour of the contracting parties are allocated to the parties according to their contributions (see the section 'The Employment Contract, Justice, and Just Remuneration' later in this chapter, which covers the principles of justice, especially distributive justice). In contrast, the results of, or gains from, an *exploitative* exchange go entirely or largely to one party, usually the stronger party, taking advantage of the weaker party. They benefit the stronger party *beyond* its contributions and at the weaker party's expense.

In the case of the standard employment contract, *both* contract parties, i.e. employer (owner) *and* employee, contribute to the generation of value-added, but they participate disproportionately in the remuneration of the value-added and the distribution of profit. Only *one* party is compensated (by receiving its *and* the other party's share of the value-added activities); all results of the value-added activities go *entirely and exclusively* to the owner(s) (in the form of profit). In contrast, employees *usually* and *in principle* do not receive any profit due to contractual arrangements. The standard employment contract does not provide for compensating employees adequately for their (value-added) activities and contributions and does not allow them to participate in all gains (in particular profit) stemming from their joint work and cooperation (e.g. Miller 1990, p. 175, Van Parijs 1995, p. 147, Carson 2008, p. 381). As a result, employees are insufficiently remunerated and compensated for their work, performance, value-added activities, and contributions to the generation of profit. In this respect they are treated unequally, unfairly, and unjustly. This means that with regard to employees' performance and value added, there is no (full) reciprocity provided by the standard employment contract. In this sense, the owner/employer utilising the employee as the weaker party on the basis of their asymmetrical relationship to generate value-added and profit, and then take all profit as the stronger party at the expense of the employee as

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and distribution of profit, are more the exception than the rule, and do not represent or constitute employees' fundamental and principle-based right to their fair share of value-added or profit.

[10] The argument, obviously, is similar to Marx's *theory of surplus value* (*Mehrwerttheorie*) – but there are differences. The value-added theory or surplus value theory followed here is *not* based on, or linked to, the (falsified) *labour theory of value*, the employee's salary is not seen as a meagre 'subsistence wage', and productivity or generation of value-added or surplus is not seen as a mere function of hours worked. Hence, exploitative exchange and exploitation are explained here rather differently from how they are explained in Marx's theory (though I share wholeheartedly both his observations of and his opinion about the capitalist production process as well as his indignation about the capitalist system and regimes of employment).

the weaker party, constitutes and represents an *exploitative exchange*. The standard employment contract – together with other regulations such as property rights and corporate laws – establishes the employer–employee relationship and collaboration as an exploitative exchange.

Outcome: Wrongful appropriation

As explained in the previous sub-section, in organisations that are based on private ownership and that have their members legally, formally, and organisationally differentiated into owners and employees, the owners get *all* the value-added or profit whereas the employees do not get *any* – the *classical distribution of profit*. But it is anything but evident why this *is* so – or *should* be so. Therefore, the question is whether and how it can be justified that owners (should) get all profit and employees (should get) none, i.e. on what grounds this specific profit distribution is – or is not – justified, justifiable, and hence legitimate.[11] The following three sub-sections discuss this topic with a focus on three areas:

- Legal and contractual regulations;
- Capital and property, and property rights;
- Labour.

Legal and contractual regulations

A first point of reference in any attempt to find possible justifications for owners to receive all profit and employees none is law and regulations. However, (country-specific) corporate laws, and accounting and tax rules and regulations provide only guidance on how (distributable) profit must be calculated and distributed in a technical sense among owners or shareholders. They either explicitly specify how (distributable) profit must be distributed (e.g. as dividends or in proportion to the capital investors have made available to the organisation) or leave it to the founders/owners of an organisation to specify in the organisation's formal constituting documents (such as a constitution, articles of organisation, articles of incorporation, partnership agreement, or corporate or company charter) how profit will be distributed.

But these laws and regulations take for granted that 'the owners' are the (only) ones who are responsible for distributing the profits (among themselves) without providing any explanation or justification as to why this is, or should be, the case; they do not provide an answer to the fundamental question of what grounds should be used to decide whether a party should *legitimately* receive a certain amount or share of the profit. They do not provide a definite answer to how profit distribution, in particular the classical distribution of profit, is justified.

This vagueness is even greater when it comes to the most relevant agreement and legal document between owner/employer and employee, the employment contract. Usually, contracting parties make sure that all important points are explicitly addressed and clarified in their contractual agreement. In that

[11] Usually it is assumed that profit is *positive* and that profit distribution or profit-sharing means distributing or sharing a win. Of course, there can also be *negative* profit, i.e. losses. However, the main argument made here about employers'/owners' and employees' contributions to the generation of profit and the justification of a particular distribution or sharing of profit among them does not change in principle whether the profit is positive or negative.

sense, one would expect to see something about the (generation and) distribution of profit in the employment contract. But the standard employment contract does not say anything *explicit* about profit or profit distribution – which is rather strange, as in contrast all of the most fundamental 'rights' of the employer and all of the most fundamental 'duties' of the employee are meticulously listed in the contract. That the employment contract actually could, or even should, address the distribution of profit is evidenced by the fact that some employment contracts detail performance-related bonuses or participation in profit-sharing schemes for (certain groups of) employees (or the employment contract refers to enterprise or company agreements where such arrangements are agreed between the employer and the employees' representatives). Thus, *if* the employer and the employee wanted, they actually *could* insert clauses about profit distribution into the employment contract.

What the employment contract *does* do is to specify that the employee gets a salary – and that this salary is the whole of the remuneration that the employee will receive for their work. This is, the standard employment contract indirectly clarifies that profit and the distribution of profit are anathema since it is 'clear' that (all) profit belongs to the owners and is irrelevant to deciding an employee's remuneration.

Altogether, it can be said that corporate, accounting, and taxation laws and regulations *do not provide any justification* for the idea that (only the) owners (should) receive all profit (they only assume or declare it to be the case). Moreover, owners/employers *do not have a contractually agreed right to profit*, let alone *all* profit (equally, however, the standard employment contract does not stipulate any right of the employee to profit).

Capital and property, and property rights

Actors may be entitled to (all) profit because of what they own and have made available to the organisation as factors of production. This especially refers to capital, land, property, and technology, i.e. all 'non-human' factors of production. It is usually the owners of the organisation who own these factors of production and make them available during the transformation process – and, as it is argued by the proponents of the classical distribution of profit, it is therefore they who ought to get all the profit.[12]

The justification for this claim can be found in *property rights*. Property rights specify private ownership of things – a whole range of rights related to, or stemming from, owning property, in particular 'the right to the income from the thing' (Honoré 1961, pp. 112–128). Although income is still not profit, at least it could be argued that the property rights of the owner/employer justify their claim to the profit – and, since owners usually own *all* property and assets (or at least have all property rights over all assets) of an organisation, it could be concluded that they thus also should get *all* profit. Correspondingly, since employees do *not* provide any capital or property to the organisation they work for, property rights do not apply to them. Unlike employers, employees therefore cannot make *any* claim to profit based on property rights. Owners own the (non-human) factors of production and are therefore entitled to all the profit; employees just work for them and are therefore entitled (only) to a salary – that's it. This property-

[12] For the sake of simplicity, this argument sets aside the question of external investors who may provide an organisation with these factors of production because their remuneration – whether in form of interests, fees, or a share of the profits – is more of a technical nature and not relevant to the question interrogated here.

rights-based argument is 'the' standard argument and justification for the classical distribution of profit – but it is flawed.

Things *as such* (here, all non-human factors of production) do *not* generate *any* value-added or profit. Granted, the value of things (such as capital, property, assets, products, and services) may increase or decrease over time – but this is because of their appreciation or depreciation or because of external factors ('the markets' or 'the economy'), i.e. their *book* value or *market* value may change. But capital, property, and other things as such do *not* add value to something – only their *use*, *lease*, or *sale* does so. It is value-added *activities* – and not *things* – that create value. It is not the *possession* but the *use* and *application* of capital and property that add value to things and generate profits. And it is *humans* who add value to things during transformation processes via their activities (i.e. their work) by using capital or property.

Evidently, the provision of capital or property by the owner provides crucial factors of production – but it is *only* their *use* by the employer *and* employees in the transformation process that contribute to the generation of value-added and profit. Hence, there are good reasons for remunerating the provision of capital and property with interests (at or even beyond market rates) – just as there are good reasons to remunerate those *people* who *use* the capital or property to generate value-added and profit with a proportional share of the profit. And since employees, especially, use capital or property in organisational transformation processes in order to produce things and to add value to things (which is why they are hired in the first place), it would only be logical that they *in principle* also participate in the profit according to their contributions (see the next sub-section).

It therefore can be concluded that a narrow interpretation of property rights ('the possession of property entitles one to the income from the thing') is wrong. Property *as such* cannot lay claim to profit, and the mere possession of property does not justify claims to (all) profit. Instead, a broad and more comprehensive interpretation of property rights ('the use of property in and for value-added activities in transformation processes entitles one to the income from the thing') is much more appropriate and better reflects the economic reality of production. With regard to property, it is a shift from the mere possession of property to the activities of people using property that explains value-added and, hence, can justify any claim to profit.

Labour

As became obvious in the previous sub-section, the *human* factors of production are decisive when it comes to transformation processes, value-added, and the generation of profit. For example, the owner (assuming they are an owner-*manager* who works for or actively contributes to the business regularly and is not an absent owner, like a shareholders) provides entrepreneurial and managerial capacity that definitely adds value. Since, according to the standard employment contract, employees do not have any managerial or control rights (they only execute the employer's orders), they do not provide any entrepreneurial or managerial capacity. However, even if someone only executes another person's orders, they still need to provide their agreement, motivation, commitment, reasoning, creativity, decision-making, knowledge, skills, competences, and expertise – all of which can be subsumed under 'human capacities'. And it is those human capacities and activities during the transformation process that then add

value to the things. This is how value is added and profits are generated – by *human* activities and enterprise.

It is owners *and* employees that provide human capacity. Besides or on top of remuneration for hours worked (in the form of managers' or employees' salaries), the provision of human capacity (entrepreneurship, creativity, decision-making, performance, and so on) deserves and justifies a share in profit in proportion to the value-added. And since *both*, i.e. owner *and* employees, provide such capacity, no individual party can legitimately claim (a right to) *all* profit, only to a proportional share. Just as the employer can make a legitimate claim to a share of profit because of the provision of their entrepreneurial and managerial capacities, so can employees make a legitimate claim to a share of profit because of the provision of their human capacities.

Overall, despite not having a contractually agreed right to profit, owners' activities – such as their provision and use of capital and property for the enterprise, their immaterial contributions (mainly in the form of entrepreneurial and managerial capacity), and their risk-taking – provide some justification for their claim to profit. There are definitely good reasons that owners/employers should get *a share* of the profit in proportion to their material and immaterial value-adding contributions and activities. But, as important as these factors are, they are only *some* of the factors contributing to the generation of value-added and profit. Even combined, these factors do not provide an explanation or justification for the owners of an enterprise to get *all* the profit. This is further evidenced by the fact that *employees* can invoke (almost) all of these good reasons that support owners' claims in a similar way. Employees, too, provide human capacity and conduct activities that create value-added. If one acknowledges that these are good reasons for owners then they are also good reasons for employees to get a proportional share of the profit. On the basis of the 'blank check' of 'all profit to the owner', which is based on a conservative and narrow interpretation of property rights, owners profit *beyond* their actual contributions. *If* owners get *all* profit then they are disproportionately (and unjustly; see the section 'The Employment Contract, Justice, and Just Remuneration' below) remunerated without a legitimate basis or sound justification. Their claim to all profit is *wrongful appropriation*.[13]

The standard employment contract as contract-based exploitation

Overall, concerning the standard employment contract's relevance to equality, establishing an equal social relationship, and equal exchange between parties, it can be concluded that:

- The employment contract constitutes an *asymmetrical relationship* between the employer as the stronger party and the employee as the weaker party.

[13] This is nothing new. Adam Smith saw this kind of wrongful appropriation happening between landlord and peasant, i.e. even before the emergence of capitalism. He criticised (quoted in Fine 1997, p. 17) how 'the poor provide both for themselves and for the enormous luxury of their superiors. The rent which goes to support the vanity of the slothful landlord, is all earned by the industry of the peasant. … The labourer who bears, as it were, upon his shoulders the whole fabric of human society, seems himself to be pressed down below ground by the weight. … Those who labour most get least.' And John Francis Bray (1839/2013, p. 50), another great economist and social philosopher, called the transaction between capitalist and worker (i.e. employer and employee) a 'barefaced though legalised robbery'.

- The employer takes advantage of the employee during and on the basis of this *asymmetrical* relationship via an *exploitative exchange*.
- Since the employer profits disproportionately from that exploitative exchange via appropriating *all* value-added ('profit') *without legitimate reasons* (and the employee is systematically and in principle excluded from a proportional and appropriate share of the value-added and profit), this distribution of profit constitutes *wrongful appropriation*.

The standard employment contract between employer and employee privileges the former at the expense of the latter by giving the former power and control over the latter and the sole right to all collaboratively and collectively generated gains, especially profit. In this sense, the standard employment contract is neither a contract between equals nor a contract about equal exchange. It constitutes and represents a highly *unequal* and rather *exploitative* social relationship and exchange. It is exploitation institutionalised and legitimised by a contractual agreement. It is *contract-based exploitation*. Therefore, from an equality perspective, there is reason to declare the employment contract illegitimate.

The employment contract, justice, and just remuneration

Procedural and substantive justice, and the principles of distributive justice

The standard employment contract principally increases the freedom, power, and status of *one* party (the employer and/or owner) while at the same time comprehensively reduces the freedom, power, and status of *another* party (the employee). That the standard employment contract is *fundamentally* anti-liberal, anti-democratic, and anti-egalitarian indicates that it is also highly likely to be *unjust*.[14] Nevertheless, 'justice' – or 'injustice' – is quite an ambiguous term and concept. Hence, it is first necessary to clarify what kind of justice is meant in order to establish in what way(s) and how exactly the employment contract is – or could be seen as – 'unjust'.

Usually, justice is differentiated into *procedural* and *substantive* justice, i.e. it is either concerned with procedures or with outcomes (e.g. Lucas 1980, p. 6). This sub-section and the next discuss, in regard to each of these types, whether the classical employer–employee relationship (based on and shaped by the standard employment contract) is just or unjust.

Procedural justice basically means impartial application of legitimate formal rules to issues and people so that they are (therefore) treated equally and fairly according to the rules and without bias (e.g. Nielsen 1985/1997, p. 208, Bell 1992, p. 127). Such a procedural understanding of justice as rule-based, equal, and unbiased treatment of humans and human conduct can be applied to the process of entering into, as well as the execution of, the employment contract.

As argued earlier in this chapter, in most cases people are equally free to enter into the standard employment contract and to negotiate, or at least to accept or not to accept, the specific terms and conditions of

[14] For example, Malleson (2014, p. 45) stated that 'it is fundamentally unfair for some to have substantial decision-making power over others simply on the basis of their wealth'.

the contract. Under normal circumstances,[15] people are not exposed to specific duress, and inequality of bargaining power and systemic conditions are not so severe, specific, and significant that they would threaten the formal process of bargaining or directly force one party into the contract. Formal rules, regulations, and procedures are followed and applied as laid out explicitly in contract law. In this sense one might say that usually there is procedural justice in regard to the process of contracting and entering into the employment contract.

The same is true regarding the *actual* exchange, i.e. *during* the employment contract. Usually, employer and employee perform and function according to what the employment contract stipulates: the former gives orders whereas the latter executes orders; the former controls and sanctions the latter whereas the latter obeys. Their behaviour and social exchange correspond in a formal or procedural sense with the employment contract, conservative labour laws, and relevant employment rules and regulations. As long as neither employer nor employee deviates from their prescribed roles, there is procedural justice during the execution of the employment contract.

However, the relationship and exchange between employer and employee, as designed and shaped by the standard employment contract, appear more problematic when one looks at them from a *substantive* justice perspective. *Substantive justice* essentially means that people are not only treated equally according to the rules and regulations (procedural justice) but also *actually* receive for their actions or inactions what is deemed fair (substantive justice). In the context of the employer–employee relationship considered primarily as a productive joint cooperation, the focus is on fair allocation and distribution of the commonly produced output. How (fairly) a common good is allocated to specific actors and distributed among the actors is the realm of *distributive justice*; 'Who gets what and why?' – and 'Who *should* get what and why?' – is *the* fundamental problem of distributive justice (e.g. Arts & van der Veen 1992, p. 145).

Distributive justice is a *relational* or *proportional* concept; what is allocated or distributed is seen in relation to a particular point of reference (the source where it comes from or the claim or reason put forward to justify the distribution). Referring to the Greek philosopher Aristotle (1997, p. 20), one could say that only distribution proportional to the point of reference is just distribution. Only proportional distribution is equal, fair, or just distribution (Vlastos 1962/1997, p. 121).

The question is what is, or should be, the point of reference or justification – and what should be proportional to it and in what way. In other words, according to what principle(s) should profits be distributed in order for the process to be just? For example, would it be just if everyone got the same? Or should distribution be done according to each person's needs, worth, or social status? Or according to *individual* abilities, effort, work/performance, merits/achievements, or desert (e.g. Lucas 1980, pp. 164–165, footnote 6)? Table 1 shows that there are various concepts and principles of substantive justice, and each provides a different answer.

[15] This is in free and fully fledged democratic societies where the rule of law prevails, people live under secure conditions, and people find themselves in situations where their basic human and civil rights are guaranteed and met.

Concept	Justice mainly in regard to	Principle
Egalitarian distribution	Allocation of wealth (especially property) and distribution of income (especially profits and remuneration)	'To each the same'; the distribution of tangible or intangible resources is just when everyone gets exactly the same.
Needs	People's basic needs	The distribution of resources is just when everyone gets what they need.
Utilitarianism	Utility; 'happiness'	Weak version: an action is just when it either increases pleasure or reduces pain more than another measure. Strong version: an action is just when it maximises the happiness (i.e. increased pleasure and reduced pain) of everyone.
Pareto efficiency	Allocation of resources	The current allocation of resources should be altered if, and only if, at least one individual can be made better off without making anyone worse off.
Reciprocity	Response to (good or bad) direct actions by others	Actions by others should be returned in qualitative and quantitative terms in kind (or even (slightly) exceed the original action).
Social minimum	Provision of economic and social goods	A minimum of economic and social goods ('primary goods') should be provided to each person.
Social justice	Availability of the institutions and functions a society provides for the well-being and development of its citizens	All people should be provided with the best possible conditions for their own development and should not be treated differently because they inherit different social positions or belong to different social categories (such as race, gender, age, or class) unless it is justified either on objective grounds or by higher ethical principles.
Desert	Individual and collective actors' actions (effort, work, performance, merits, and achievements) and related consequences (sanctions, rewards, and punishment)	*X* deserves *y* in virtue of *z*, where *x* is an individual or collective actor; *y* is any kind of positive or negative appropriate consequence of *z*; *z* is any kind of conscious, deliberate, free, and voluntary activity that shows effort, work, performance, or achievement; and *x* is responsible for *z*.
Capabilities	Capabilities of people	The distribution of resources is just when it equalises the basic capabilities of each person (to function).

Table 1: Concepts and principles of substantive justice.

Obviously, there is not a single, but many, and competing, principles of (distributive) justice (e.g. Austin 1979, pp. 127–128, Walzer 1983/1997, p. 301). Justice is a pluralistic concept. It would be neither possible nor recommended to apodictically decide that a single principle of justice is *the* universal principle of justice (Lucas 1980, p. 184). Instead, justice needs to be understood as a *context-dependent* and *issue-specific* phenomenon; which principle of justice is appropriate and should be applied depends on the particular situation, issue, and case in question (Lucas 1980, p. 13, Deutsch 1985, p. 35, Cullen 1992, p. 39, Konow 2003, p. 1231).

This leaves – or creates – the question of which principle of justice should be selected and applied,[16] in this case when it is about the employment contract and its subject, the special relationship and social exchange it creates and shapes between the employer and employee. This is discussed in the next sub-section, where the focus is on the problems that employer and employee may experience as a result of the collaboration, in particular whether and how the value-added or profit should be distributed and shared between the two.

The principle of desert, the fruits of one's labour, and proportional profit-sharing

The employment contract is about people's *work*. Human work, *any* type of physical or cognitive work, is a conscious, wilful, deliberate, planned, and organised activity that links actions and outcomes (or, in more economic terms, input, a transformation process, and output). Thus, when it comes to evaluating, appreciating, and remunerating people's work, a principle of justice should be chosen and applied that links people's actions to the results and consequences of their actions because people are responsible for both. The principle of *desert* does exactly that; it states that *people should get what they deserve and deserve what they get* (e.g. Miller 1976, pp. 83–121, Nielsen 1985, pp. 104).

In its general form, the principle of desert can be formulated as '*X* deserves *y* in virtue of *z*', where *x* is an individual or collective actor; *y* is any kind of positive or negative appropriate consequence of *z*; *z* is any kind of conscious, deliberate, free, and voluntary activity that shows effort, performance, and achievement; and *x* is responsible for *z*.[17] To put it slightly differently and more specifically: when people conduct an activity for which they are responsible (i.e. wilful, conscious, deliberate, free, and voluntary behaviour or actions), they should also experience and receive the related consequences (e.g. outcomes, reactions, or sanctions, such as rewards or punishments).

In an economic context the principle of desert translates into *the right to own one's labour and the fruits of one's labour*. Locke provided the most fundamental formulation of this economic right (Locke 1689/1998, p. 123): 'Every man has a property in his own person. This nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other men. For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.'

Generation after generation of moral philosophers and economic scholars adopted this economic version of the principle of desert when analysing the righteousness of economic activities and systems. For example, the famous Scottish moral philosopher and economist Adam Smith (1723–1790) argued

[16] For some comprehensive and detailed meta-concepts regarding how to apply principles of (distributive) justice, see Deutsch (1985, pp. 2–4) or Törnblom (1992, pp. 203–219).

[17] This principle can be traced back to Aristotle's *Nicomachean Ethics* and reads in its original version: 'S deserves X in virtue of F, where S is a person, X some mode of treatment, and F some fact about S' (e.g. quoted in Brandis 1985, p. 873; see also Christman 1988, Lamont 1994).

(1776/1999, p. 167) that: 'The produce of labour constitutes the natural recompense or wages of labour. In that original state of things, which precedes both the appropriation of land and the accumulation of stock, the whole produce of labour belongs to the labourer. He has neither landlord nor master to share with him.'[18]

Furthermore, the American socialist economist John Francis Bray (1809–1897) declared (1839/2013, p. 33): 'Every man has undoubted right to all that his honest labour can procure him. When he thus appropriates the *fruits* of his labour, he commits no injustice upon any other human being; for he interferes with no other man's right of doing the same with the produce of *his* labour.'

That *everyone* deserves the fruits of their labour is not only a fundamental and universal principle of desert but also a fundamental *right* – or at least it should be (Ellerman 1992, p. 301, Medearis 2005, p. 142).

Clearly, such a principle is highly relevant for any economic or organisational context when various people work together. Such a desert-based view of justice provides the foundation for putting people's input, their (contribution to the) output, and the distribution of the output among people into a (just) relation to each other. If one agrees with the use of a desert-based principle to link people's actions and consequences, the question is how exactly desert can be specified or operationalised, i.e. what, and how much, do people deserve for their work and for their contribution to the overall outcome? In the case of institutionalised collaboration, i.e. people working together to produce a collective output, the fundamental problem of distributive justice is who should get which share of the overall outcome of the joint enterprise in respect to their contributions so that the distribution is just.

In the context of joint organised work (i.e. an organisation), desert-based justice means that *all* people should get appropriate rewards for their performance, productivity, and contribution to an overall outcome (e.g. Deutsch 1985, p. 38, Nielsen 1985, pp. 106–107, Arts & van der Veen 1992, p. 156, Cullen 1992, p. 40, Sugden 2004, p. 216, Olsaretti 2008, pp. 436–438).[19] Obviously, outcomes, and people's contributions and rewards, can come in various dimensions. But if one focuses on one very common and important type of outcome of joint work – *profit* – as the main result of people's collective and cooperative work in a socio-economic context (i.e. people working for private organisations in a market economy), the question to ask to determine a just distribution then is: *Who contributes what to the joint generation of value-added and should, therefore, get a proportional share of the overall profit?*

The answer to this question – and just solution – is a contribution-oriented model of internal *proportional profit-sharing* or *proportional distribution of profit*. In the context of productive social relationships and social exchange, proportional distributive justice means *proportionality* between input/contributions and output/rewards (Homans 1961, p. 244). Contributions and remuneration should be related and equivalent or proportional to each other, i.e. the factors of production should be remunerated

[18] However, Smith was also well aware that this original (right and just) state was already very different from the economic system and society in which he lived. As he observed (1776/1999, p. 168): 'But this original state of things, in which the labourer enjoyed the whole produce of his own labour, could not last beyond the first introduction of the appropriation of land and the accumulation of stock. As soon as land becomes private property, the landlord demands a share of almost all the produce which the labourer can either raise, or collect from it.' What was the landlord became the capitalist or owner-manager.

[19] Where these aspects can be measured (or assessed or judged) in *quantitative* and/or *qualitative* terms.

according to their contributions to the value-added. After deduction of all costs, the value-added (measured in the monetary dimension) equals profit. The factors of production are non-human (capital, land, property, or technology) or human (people). In this sense, a *desert-based proportional remuneration of the factors of production and distribution of profit within organisations* means:

- Capital, land, property, and/or technology provided by people (usually the owners of the organisation or external investors) are remunerated with interest at market rates whereby the interest paid is treated entirely as costs that reduce profit.
- People's (i.e. all members of the organisation) work is remunerated twice: the hours they work via salaries at market rates (with salaries treated entirely as costs) *plus* additional remuneration based on their contribution to the generation of value-added and profit (e.g. owners' or employees' human capacities, reasoning, creativity, knowledge, skills, competencies, decision-making, , or personal aspects and performance) via a share of the profit in proportion to their value-added activities.[20]

It is clear that the desert-based principle of distributive justice provides a basis for everyone who is involved in and contributes to joint, value-adding work to be remunerated in a just way. It suggests that *everyone*, i.e. owners *and* employees alike, should get *their fair share* of the profit *in proportion* to their material and immaterial value-adding contributions. A desert-based remuneration of the factors of production and distribution of profits is just in two ways. The first is that people are not only remunerated for the work they do in the form of a salary at the market rate but also that they are remunerated for their value-added activities and contributions in the form of a proportional share of the profit. Second, the remuneration of all factors of production and the distribution of profits to them is just because all factors of production are remunerated and receive a share of the profit according to the same principle, i.e. in proportion to their real costs and value-adding contributions.

And it is also very obvious that the standard employment contract, in tandem with a conservative and narrow interpretation of property rights, is *inconsistent* with the principle of desert (or with any legitimate principle of justice); by allocating all profit to a minority of absent owners (shareholders) or owner-managers, and by not granting any profit to employees (or only offering a tokenistic employee share scheme), it privileges the former and discriminates against the latter unfairly and unjustly. Worse, it enables owners, managers, and employers to enrich themselves *at the expense of others* (workers and employees). The employment contract, therefore, is *fundamentally* and *in principle* unjust, unjustified, and unjustifiable. It should be declared invalid and outlawed.

[20] There will be, of course, differences in the reasons and extent to which (certain groups of) people are remunerated for their value-added activities and contributions to the generation of profit. For example, in their roles as entrepreneurs or investors, owners take above-average risks (e.g. by providing their capital or property to the enterprise as factors of production or security, by taking out credit, and also by risking their reputation or even the foundations of their private lives). Such risk-taking in the form of venturous investments or personal aspects deserves, even necessitates, some compensation or incentives. In contrast, employees do not take risks in the form of venturous investments or personal aspects like employers and owners do. In that sense, it would be difficult to see how employees could argue for a risk premium, to be compensated by some share of the profit based on their risk-taking.

Fundamental flaws of the employment contract - make it illegal

Perhaps with the exception of a few anarchists or right-wing libertarians who interpret 'freedom of contract' literally as boundless, the common opinion is that this freedom has, and *must* have, its limitations for good reasons (Phillips 1994, p. 235). Not every contract that *is* possible *should* be possible. The question is what *are* good reasons, i.e. why should some types of contract be invalidated and made illegal – in this case the employment contract? The critical investigation and discussion of the employment contract in this chapter revealed that the contract has various fundamental flaws. The standard employment contract:

1. Claims the impossible because it pretends to transfer fundamental rights from the employee to the employer or their representatives (rights of self-ownership, free will, reasoning, decision-making, autonomy, and responsibility) that actually are *inalienable* rights and impossible to transfer because they constitute the individual in an existential sense.

2. Substantially withdraws or restricts *fundamental* freedoms, self-ownership, and basic human rights of employees (e.g. freedom of thought, freedom of opinion and expression, autonomy and the right to make decisions, and free development of one's personality) by granting *all* power and rights (in particular the rights to govern, manage, make decisions, give orders, control, and sanction) to the employer or their representatives (managers or supervisors with line authority), and all duties (especially the duty to obey and follow orders) to the employee.

3. Establishes, structures, and maintains the relationship between employer and employee as a superior–subordinate or master–servant relationship that withholds fundamental civil and democratic rights from the employee, such as free speech, freedom of assembly and association, the right to participate in decision-making, free and fair elections of representatives, self-governance, democratic governance, self-management, participative or representative management, democratic control, and accountability. There is no – and *cannot* be – democracy between superior and subordinate in the sense of equal rights and power to govern. The employer–employee relationship represents an *anti*-democratic, *autocratic*, or *oligarchic* regime.

4. Formally, legally, organisationally, and practically establishes a highly unequal and *asymmetrical* relationship between the employer and the employee in which the former takes advantage of the latter during an *exploitative exchange* and profits disproportionately via appropriating *all* value-added and profit at the expense of the employee, who gets nothing. That all value-added or profit goes entirely to the owner(s) constitutes *wrongful appropriation* because they profit disproportionately without a legitimate basis. At the same time, employees are *not* compensated for their value-added activities and their contributions to the generation of profit and do not receive a share of the profit proportional to their contributions. In this sense, the employment contract institutionalises and legitimises exploitation – it is *contract-based exploitation*.

5. Is *inconsistent* with the principle of desert (and with any other legitimate principle of distributive justice) because the distribution of profit is highly unequal and disproportional in regard to the parties' contributions to the value-added and profit; owners/employers get too much ('all profit') relative to their material and immaterial value-added contributions, whereas employees get too little ('no profit') compared to their immaterial value-added contributions. By allocating *all* profit to the owner(s) and not granting any to the employees, it privileges the former and discriminates against

the latter unfairly and unjustly. The employment contract, therefore, is *fundamentally* and *in principle* unjust, unjustified, and unjustifiable.

Assuming that the employment contract meets all general legal requirements, it can be deemed illegal with regard to its substance if (Buchanan & Tullock 1962/1999, pp. 268–269, Feinberg 1980, p. 121, Peel 2011, pp. 470, 474–477, 485, 501, Poole 2012, pp. 581, 585–590):

- Its object is a deliberate commission of a legal wrong (crime or civil wrong);
- Its harmful tendency (in regard to one or all of the contract parties or the public) is clear;
- It severely restricts the fundamental freedom(s) of an individual.

The question is whether the *standard* employment contract can be criticised and declared invalid or even illegal on these grounds, i.e. whether its object is a legal wrong, because of its harmful tendencies, or because it severely restricts the fundamental freedom(s) of individuals.

That the object of the employment contract is a *deliberate commission of a legal wrong* could be the case if, for example, someone is formally employed to commit a crime or tort – but this is not what the standard employment contract usually or in principle is about. And withholding fundamental freedoms and the right of and to self-ownership from individuals (in non-violent ways); establishing a (non-radical and non-criminal) anti-democratic, autocratic, or oligarchic regime; putting people into highly unequal, *asymmetrical*, and hierarchical relationships; and institutionalising contract-based exploitation are *not* in countries' criminal codes – not yet. Hence, under current (criminal, contract, labour, or employment) law the substance or objects of the standard employment contract do not constitute a legal wrong.

The case is different in respect to the potential *harmful tendencies* of the standard employment contract's objects or substance. Usually, this criterion is applied in a more 'technical' sense to occupational health and safety issues at work, such as healthy work environments, exposure to poor working conditions and hazards, unsafe work and activities, location of work, arrangement of tasks and working hours, injury-related risks and accidents, rates and severity of accidents, mental health and harassment risks, psychosocial working conditions, and psychological and physical well-being.

But the criterion of 'harmful tendencies' could, and should, also be understood and applied in a much more fundamental and general sense when it comes to (possible) harmful tendencies, especially for the weaker contracting party, i.e. the individual employee. In *that* respect the standard employment contract is extremely bad and does considerable harm. Withholding the fundamental freedoms and democratic rights of people to self-ownership, self-governance, and self-management as well as participation in collective decision-making; and treating people as subordinates and putting them into highly unequal, *asymmetrical*, hierarchical, and authoritarian social relationships where all they can (and have to) do is to function subserviently, behave, obey, and follow their employers' or superiors' orders while at the same time being controlled, oppressed, belittled, infantilised, and exploited – all of these definitely generate a whole range of rather worrying harmful tendencies for each and every individual who is put into such a position. The employee (potentially) is seriously harmed in their:

- Sense of personal competence (self-efficacy), level of personal control and control of their environment (locus of control), and psychological empowerment;
- (Intrinsic) motivation, commitment, engagement, identification with the organisation, and sense of belonging;

- Satisfaction, sense of achievement, and sense of goal attainment;
- Personal integrity, dignity, sense of personal worth, and self-respect;
- Personal growth, self-realisation, and self-actualisation;
- (Psychological) health and well-being.

The standard employment contract not only turns people into dependent and rather limited subordinates but also encourages them to develop severely conditioned, deficient, and obedient personalities lacking most of the essential characteristics of the free and autonomous individual. These harmful tendencies are a *fundamental and inherent* part of standard employment and the standard employment contract, i.e. they cannot be avoided or tackled via modifications or 'repair work'. In order to avoid these harmful tendencies, the standard employment contract as a whole must be outlawed.

In addition to having harmful tendencies, the standard employment contract severely withdraws or restricts the fundamental freedom(s) and basic human and civil rights of individuals, in particular employees. It forces the weaker party (the employee) to surrender some of their most fundamental rights or freedoms to the stronger party (the employer), in particular (see especially points (3) and (4) made above in respect to the fundamental flaws of the employment contract):

- Inalienable rights of self-ownership, i.e. individuals' inalienable rights to themselves, their personality and individuality as well as the mental (cognitive, psychological, emotional, and intellectual) competencies and ability to feel, think, make decisions, behave, act purposely, and bear responsibility for their actions or inactions;
- Free will, freedom of thought, freedom of opinion and expression, autonomy, free development of one's personality, and ability to develop as a person;
- Civil and democratic rights, such as free speech, freedom of assembly and association, participation in decision-making, free and fair elections of representatives, self-governance, democratic governance, self-management, participative or representative management, and democratic control and accountability.

By granting *all* of these powers, rights, and freedoms solely to the owner or employer, and withholding *all* of these powers, rights, and freedoms from the employee, the employment contract is not only inconsistent but illegitimate in principle. To *systematically* withdraw basic human, civil, and democratic rights and freedoms from people as soon, and as long, as they are employees clearly severely restricts their fundamental freedom(s) as individuals. For this reason, the employment contract should be rendered invalid and unlawful.

Clearly, these issues are not just 'technical' but *fundamental* problems of and with the employment contract; the standard employment contract is anti-liberal, anti-democratic, oppressive, coercive, exploitative, unfair, and unjust *in principle*. It goes against the fundamental rights and freedoms of the individual and against the fundamental principles of freedom, democracy, equality, and justice that constitute free and democratic societies.

On the basis of the grounds mentioned throughout the last section of this chapter, it should not only be regarded as a *moral* wrong but also established as a *legal* wrong. There is a very strong and compelling case for rendering the standard employment contract illegal because of the *harmful tendencies* its objects

and substance impose on individuals and because it *severely restricts the fundamental freedom(s)* of individuals, especially employees. If we are serious about individuals' rights and the principles of freedom, democracy, equality, and justice, then the standard employment contract not only *could* or *should* but *must* be deemed illegitimate and rendered illegal.

Of course, whether or not contracts or contractual arrangements are seen and treated as illegitimate or illegal by law, the courts, public policy, and the public depend on the prevailing political, legal, sociocultural, and religious norms and values of a particular society and epoch (Peel 2011, Poole 2012). Currently, the standard employment contract is rarely contested on fundamental grounds or in principle-based ways. But people's (and lawmakers') positions and perceptions evolve and change over time. It is entirely possible to imagine that one day it will be perceived as morally (and then also legally) unacceptable for people to work *for others*, for them to have to follow orders and obey, and for them to have to conduct tasks and behave in ways others deem right and appropriate for them – and for them then to be exploited by those others. *People deserve better!* Additionally, at work, when working as an employee, people deserve to be free; to enjoy *all* their human, civil, and democratic rights; to be treated decently, equally, and fairly; and to be remunerated justly, i.e. in proportion to their value-adding activities and contributions. It is high time that we prepared the ground for this.

References

Archer, R. (1995). *Economic democracy: The politics of feasible socialism*. Oxford: Clarendon Press.

Aristotle. (1997). Justice as equality. In L. P. Pojman & R. Westmoreland (Eds.), *Equality: Selected readings*. Oxford: Oxford University Press, 17–26.

Arnold, N. S. (1994). *The philosophy and economics of market socialism: A critical study*. Oxford: Oxford University Press.

Arts, W., & van der Veen, R. (1992). Sociological approaches to distributive and procedural justice. In K. R. Scherer (Ed.), *Justice: Interdisciplinary perspectives*. Cambridge: Cambridge University Press, 143–176.

Austin, W. G. (1979). Justice, freedom, and self-interest in intergroup conflict. In W. G. Austin & S. Worchel (Eds.), *The social psychology of intergroup relations*. Monterey: Brooks/Cole, 121–143.

Bell, J. (1992). Justice and the law. In K. R. Scherer (Ed.), *Justice: Interdisciplinary perspectives*. Cambridge: Cambridge University Press, 114–142.

Bird, R. C. (2005). Employment as a relational contract. *University of Pennsylvania Journal of Labor and Employment Law*, *8*(1), 149–217.

Birks, P. (2005). *Unjust enrichment* (2nd ed.). Oxford: Oxford University Press.

Brandis, R. (1985). Distribution theory: Scientific analysis or moral philosophy. *Journal of Economic Issues*, *19*(4), 867–878.

Bray, J. F. (1839/2013). *Labour's wrongs and labour's remedy*. New Delhi: Isha Books.

Buchanan, J. M., & Tullock, G. (1962/1999). *The calculus of consent: Logical foundations of constitutional democracy – The collected works of James M. Buchanan* (Vol. 3). Indianapolis: Liberty Fund.

Carnoy, M., & Shearer, D. (1980). *Economic democracy: The challenge of the 1980s*. Armonk: M. E. Sharpe.

Carson, K. A. (2008). *Organization theory: A libertarian perspective*. Charleston: BookSurge.

Christman, J. (1988). Entrepreneurs, profits, and deserving market shares. *Social Philosophy and Policy*, *6*(1), 1–16.

Christman, J. (1994). *The myth of property: Towards an egalitarian theory of ownership*. Oxford: Oxford University Press.

Coase, R. H. (1937). The nature of the firm. *Economica*, *4*(16), 386–405.

Courpasson, D., & Clegg, S. R. (2006). Dissolving the iron cages? Tocqueville, Michels, bureaucracy and the perpetuation of elite power. *Organization*, *13*(3), 319–343.

Cullen, B. (1992). Philosophical theories of justice. In K. R. Scherer (Ed.), *Justice: Interdisciplinary perspectives*. Cambridge: Cambridge University Press, 15–64.

Dahl, R. A. (1985). *A preface to economic democracy*. Berkeley: University of California Press.

Dahl, R. A. (1998). *On democracy*. New Haven: Yale University Press.

Deutsch, M. (1985). *Distributive justice*. New Haven: Yale University Press.

Deutscher Bundestag. (2018). *Basic Law for the Federal Republic of Germany, 23 May 1949, last amended on 13 July 2017*. Berlin: German Bundestag Public Relations Division.

Diefenbach, T. (2009). *Management and the dominance of managers*. London: Routledge.

Diefenbach, T. (2013). *Hierarchy and organisation: Toward a general theory of hierarchical social systems*. London: Routledge.

Doran, J. (2013). Working towards economic democracy. In R. Harrison (Ed.), *People over capital: The co-operative alternative to capitalism*. Oxford: New Internationalist Publications, 85–102.

Ellerman, D. (1992). *Property and contract in economics: The case for economic democracy*. Cambridge, MA: Basil Blackwell.

Ellerman, D. (2005). Translatio versus concessio: Retrieving the debate about contracts of alienation with an application to today's employment contract. *Politics & Society*, *33*(3), 449–480.

Erdal, D. (2011). *Beyond the corporation: Humanity working*. London: Bodley Head.

Feinberg (1980). *Rights, justice, and the bounds of liberty: Essays in social philosophy*. Princeton: Princeton University Press.

Fine, R. (1997). Civil society theory, enlightenment and critique. *Democratization*, *4*(1), 7–28.

Fournier, V. (2002). Utopianism and the cultivation of possibilities: Grassroots movements of hope. In M. Parker (Ed.), *Utopia and organization*. Oxford: Blackwell, 189–216.

Fried, B. (2004). Left-libertarianism: A review essay. *Philosophy and Public Affairs*, *32*(1), 66–92.

Gouldner, A. W. (1960). The norm of reciprocity: A preliminary statement. *American Sociological Review*, *25*(2), 161–178.

Hahnel, R. (2005). *Economic justice and democracy*. New York: Routledge.

Henry, J. F. (1999). Property rights, markets and economic theory: Keynes vs. Neoclassicism – again. *Review of Political Economy*, *11*(2), 151–170.

Hodgson, G. (1984). *The democratic economy*. Harmondsworth: Penguin Books.

Homans, G. C. (1961). *Social behavior: Its elementary forms*. New York: Harcourt, Brace & World.

Honoré, A. M. (1961). Ownership. In A. G. Guest (Ed.), *Oxford essays in jurisprudence*. Oxford: Oxford University Press, 107–147.

Ingram, A. (1994). *A political theory of rights*. Oxford: Clarendon Press.

Konow, J. (2003). Which is the fairest one of all? A positive analysis of justice theories. *Journal of Economic Literature*, *41*(4), 1188–1239.

Lamont, J. (1994). The concept of desert in distributive justice. *Philosophical Quarterly*, *44*(174), 45–64.

Learmount, S., & Roberts, J. (2006). Meanings of ownership of the firm. *Journal of Interdisciplinary Economics*, *17*(1/2), 139–162.

Locke, J. (1689/1998). Of property and government (from *Second treatise of government,* included in *Two treatises of government*). In D. Boaz (Ed.), *The libertarian reader* (1st paperback ed). New York: Free Press, 123.

Lucas, J. R. (1980). *On justice*. Oxford: Clarendon Press.

Malleson, T. (2014). *After occupy: Economic democracy for the 21st century*. New York: Oxford University Press.

Mayer, R. (2001). Robert Dahl and the right to workplace democracy. *Review of Politics*, *63*(2), 221–247.

Medearis, J. (2005). Labor, democracy, utility, and Mill's critique of private property. *American Journal of Political Science*, *49*(1), 135–149.

Miller, D. (1976). *Social justice*. Oxford: Clarendon Press.

Miller, D. (1990). *Market, state and community: Theoretical foundations of market socialism*. Oxford: Clarendon Press.

Morgan, J. (2012). *Great debates in contract law*. New York: Palgrave Macmillan.

Narveson, J. (2010). Property and rights. In E. F. Paul, F. D. Miller Jr., & J. Paul (Eds.), *Ownership and justice*. Cambridge: Cambridge University Press, 101–134.

NI Direct. (2015). Employment status. Retrieved 25 May 2015 from http://www.nidirect.gov.uk/index/information-and-services/employment/understanding-your-work-status/employment-status.htm

Nielsen, K. (1985). *Equality and liberty: A defense of radical egalitarianism*. Totowa: Rowman and Allanheld.

Nielsen, K. (1985/1997). Radical welfare egalitarianism. In L. P. Pojman & R. Westmoreland (Eds.), *Equality: Selected readings*. Oxford: Oxford University Press, 204–217.

Olsaretti, S. (2008). Justice, luck, and desert. In J. S. Dryzek, B. Honig, & A. Phililips (Eds), *The Oxford handbook of political theory*. Oxford: Oxford University Press, 436–449.

Peel, E. (2011). *The law of contract* (13th revised ed.). London: Sweet & Maxwell.

Peirce, M. (2001). Why libertarians should reject full private property rights. *Philosophical Forum*, *32*(1), 25–52.

Phillips, M. J. (1994). Should we let employees contract away their rights against arbitrary discharge? *Journal of Business Ethics*, *13*(4), 233–242.

Poole, J. (2012). *Textbook on contract law* (11th ed.). Oxford: Oxford University Press.

Raz, J. (1986/2009). *The morality of freedom*. Oxford: Clarendon Press.

Rothschild, J., & Ollilainen, M. (1999). Obscuring but not reducing managerial control: Does TQM measure up to democracy standards? *Economic and Industrial Democracy*, *20*, 583–623.

Sauser, W. I. (2009). Sustaining employee-owned companies: Seven recommendations. *Journal of Business Ethics*, *84*, 151–164.

Schweickart, D. (2011). *After capitalism* (2nd ed.). Lanham: Rowman & Littlefield.

Smith, A. (1776/1999). *The wealth of nations*. New York: Penguin Books.

Sugden, R. (2004). Living with unfairness: The limits of equal opportunity in a market economy. *Social Choice and Welfare*, *22*(1), 211–236.

Törnblom, K. (1992). The social psychology of distributive justice. In K. R. Scherer (Ed.), *Justice: interdisciplinary perspectives*. Cambridge: Cambridge University Press, 177–236.

Turner, C. (2013). *Unlocking employment law*. Abingdon: Routledge.

United Nations. (1948). Universal Declaration of Human Rights. Retrieved 4 April 2019 from https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf

Van Parijs, P. (1995). *Real freedom for all: What (if anything) can justify capitalism?* Oxford: Oxford University Press.

Van Waarden, F. (2014). The governance of markets: On generating trust in transactions. In D. Levi-Faur (Ed.), *The Oxford handbook of governance*. Oxford: Oxford University Press, 355–371.

Vlastos, G. (1962/1997). Justice and equality. In L.P. Pojman & R. Westmoreland (Eds.), *Equality: Selected readings*. Oxford: Oxford University Press, 120–133.

Walzer, M. (1983/1997). Complex equality. In L.P. Pojman & R. Westmoreland (Eds.), *Equality: Selected readings*. Oxford: Oxford University Press, 299–311.

Weir, G. (2003). Self-employment in the UK labour market. *Labour Market Trends*, September, 441–451.

Wertheimer, A. (1999). *Exploitation*. Princeton: Princeton University Press.

Wright, E. O. (2010). *Envisioning real utopias*. London: Verso.