Recht en humanisering van de arbeid

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Summary
Law and Humanization of Labour

This is a book about humanization of labour and the law. More specifically the book will deal with the (legal) position of the employee. Although humanization of labour has for a long time been seen as a purpose of labour law, new interest for this concept was established by the approval, in 1980, of the 'Arbeidsomstandighedenwet' (Labour Circumstances Act, to be compared with the Health and Safety at Work Act), hereafter referred to as Arbo-Act. It is in this Act that humanization of labour is explicitly put forward as a purpose to be achieved through the Act. This purpose, however, should be realized within a certain context, namely that of the company, of dissimilar interests and of traditional power relationships. This means, for instance, that employees under the Arbo-Act are no longer seen as objects of care, but as independent subjects of rights and duties. But this also implies that this independence is only a relative one; not only because the employer still has a primary position in the developing of a policy on labour circumstances, but also because many of the rights and powers created on behalf of the employees have been granted to collectives representing the employees. Therefore these rights and powers will have to be exercised and maintained through the existing collective structure of consultation and decision-making within the company. Essential in this respect is the role of the 'ondernemingsraad' (works council). It can be argued that dealing with problems collectively has great advantages for the employees, for instance with respect to the pursuit of power and influence. But doesn’t this also imply that for the individual employee a new dependence has been created, namely the dependence upon the collective which represents him or her. The foregoing presents a source of tension, within which the problem which is central to this thesis is stated; partly this will be done in the form of a hypothesis. Central to this thesis is a research into the legal developments with respect to humanization of labour of the employee, as well as into the legal and practical meaning which these developments have for the employee. The relevant law in this respect cannot only be found in the Arbo-Act, but will also have to be derived from other important sources of law. To ask what the meaning of this field of law is, is to ask to what extent it does justice to the values — stated as its intrinsic and social-ethical purpose — which form the substance of the humanization of labour on behalf of the employees. Follow-
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ing this line of thought it is important not only to put forward claims, but also, and more particularly, to establish an effective implementation of legal provisions which neutralize the factors which constitute an impediment to the achievement of the purpose mentioned above.

Furthermore in Chapter I a definition will be given of some notions which frequently recur in this book, followed by a description of the structure of the book.

In Chapter II a description will be given of the historical developments of the law of labour circumstances from the nineteenth century onwards, and more particularly of the effects of industrialization and economic growth in this respect. The passive role of the government, urged by the appalling circumstances in which many employees lived and worked, and by the activities of various pressure groups and individuals pursuing various goals, changed into an active one; active in the sense that the government started interfering with the relationship between employer and employee, a relationship which until then had been unregulated.

The year of the approval of the Labour Act (1919), which has been valid until today, in more than one way represents the end of an era: principal issues have been settled, such as the need for legislative intervention by the government, and the acknowledgement of the need for control of the application of the law.

Public law guarantees for employees are no longer restricted to women and children. The framework for a new era is outlined. The period between 1919 and about 1975 is characterized by a gradual extension of legislation on the protection of labour; great changes in the general policy on the subject do, however, not take place in this period. Changes in policy do, however, occur from 1975 onwards. This process will be illustrated and analysed by reference to the Explanatory Papers to the Budgetary Laws of Ministry of Social Affairs and Employment for the years 1973 to 1983. In the first half of the seventies the need for a greater participation and development of employees is emphasized. This results in some important legislation: the 'Wet op de ondernemingsraden 1979' (the Works Council Act, hereafter referred to as OR-Act) and the Arbo-Act 1980. From now on most emphasis is laid upon the need for a more restrained position of the government. The pretence of an active, caring government, is beached upon the reality of the eighties, during which humanization is no longer seen as a purpose in itself, but more and more as an instrument to achieve other, mainly economic, goals. This tendency is heavily supported by the employers. The deliberate minimization of rulemaking and the stepwise implementation of the Arbo-Act represent some good examples of this changing attitude.

To give a good picture of the position of the employee with regard to the humanization of labour, Chapter III describes the field of countervailing legal forces in which this position is settled. This is done by a description of the role which other important actors play in this field. Attention will be given to the role of the employer, the works council and the specialists in the company. Furthermore the role of the unions of employers and of employees and the
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Labour Inspection, which operate outside the company, will be discussed. From the Arbo-Act it appears that the employer mainly has general or more specific duties, but that his most important right, the power to make internal regulations, is self-evident. It is the encroachments upon this power which have to be formulated explicitly.

Then the role of the employer in the OR-Act is examined. The legal obligation to establish a works council and to consult with it about labour circumstances is discussed. In spite of the considerable differences between companies, it appears from various studies that the contacts between the employer and the works council about labour circumstances are not only to be described as negative.

The position of the employer is also regulated in private law. The most important statutory provision in this respect is article 1638x of the Civil Code, which obliges the employer to provide good labour conditions. If he refrains from doing so and if this causes the employee to have an accident, then, in principle, the employer will be liable for damages. Considerable attention is given to the legal questions and answers which are connected with this article. Some remarks about the application of article 1638x in the present time and about expectations for the future in this respect conclude this paragraph. Research shows that more and more employees appeal to article 1638x; over the last ten years the number of employees who apply for legal aid has doubled. However, this has not lead to an increase of the number of 1638x-cases before the ‘kantonrechter’ (to be compared with the county court judge). It is to be expected, however, that in the future more employees will appeal to the judge. Relevant in this respect are both the growing assertiveness of employees and recent caselaw advantageous to employees, which last can be explained by the incorporation of the public law rule of the Arbo-Act (rules with an administrative law character) in civil procedure, and by new legislation, in particular article 7.10.4.2 of the New Civil Code. The role of the works council, on the basis of powers and institutions granted in the OR-Act and the Arbo-Act, is discussed. In connection with this the unintended coincidence of some provisions of these Acts is discussed, as well as the most desirable legal solution to this problem. A separate paragraph is devoted to the legal and practical meaning of labour consultation as regulated — in terms which are too discretionary — in the OR-Act as well as in the Arbo-Act. Finally from various studies the conclusion is drawn that the works council makes (too) little use of the Arbo-Act. The main legal result to which the interest in the Arbo-Act has lead seems to have been an increase in the use of the institutions of the OR-Act. The position of the specialists in the company is illustrated, mainly by discussing the company health service and the position of the company physician. The conclusion is drawn that the company physician has acquired a firmly established independent position, but also that he is still too occupied with individual contacts — whilst he doesn’t always enjoy the trust of the employee in these contacts — instead of with his general preventative task. Furthermore, attention will be given in this paragraph to the Safety Service, the Specialists on Safety, the
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Arbo-service and the Arbo-institute.
The Labour Inspection Service is concerned with the enforcement of legislation on labour conditions. Its tasks, powers, policy and ways of working are discussed extensively, followed by discussion of the criticism which it has attracted, particularly from the unions. Furthermore, attention is given to the way in which the Labour Inspection Service has reacted to this criticism. Although it seems that criticism is now abating, research shows that, in spite of the obligations which arise from the Arbo-Act in this respect, the majority of companies appear to have noticed little change in the ways of proceeding of the service.

In various ways, unions of employers and employees are involved in the humanization of labour. At a national level they participate in advisory bodies—particularly in the Arbo Council—and in the concluding of collective agreements. A separate role within the company is attributed to the employees’ union which, in the absence of the works council, can replace the latter in the exercise of a number of powers.

A discussion about the results of research into the quantity and quality of collective agreement provisions concerning labour circumstances conclude this paragraph. The conclusion is drawn that in the past ten years there has been an increase of such provisions, probably under the influence of the Arbo-Act. The two main substantive differences between the new provisions and their predecessor are: the greater attention which is given to questions of welfare in labour, and the increase in the number of provisions concerned with consultation and information. It should be noted, however, that these new provisions have mainly been derived from the Arbo-Act; new substantial changes are scarce.

Chapter IV deals entirely with the employee. His or her legal position is researched according to the possibilities for the employee to realize the humanization of his or her labour in the way that this has been expressed by the numerous regulations, i.e. the rights, powers and possibilities for legal actions in the field. The conclusion is drawn that the Arbo-Act contains hardly any provisions exercisable by the individual employee. Insofar as he or she has any rights, these rights nearly always have to be derived from the obligations of others, in particular the obligations of the employer. The most distinct right of the employee is the right to interrupt work under specific conditions. Ample attention is given to the legal implications of this right. In spite of the criticism that can be expressed against this provision, it is argued that the provision represents a genuine means of protest and that as a logical conclusion of the Arbo-Act it deserves appreciation.

In the paragraph concerned with the position of the individual employee under the Arbo-Act, attention is given to: the right to information and education; the right to complain to the Labour Inspection Service; the possibilities to influence the employers’ policy about labour circumstances; and the relationship with the specialists in the company. In respect of all the provisions of the Arbo-Act which are discussed, it is concluded that the provisions are written on
behalf of the employee, but that it is equally true that the employee can hardly claim any directly enforceable rights. This is followed by a discussion of the position of (the majority of) interested employees. According to the Arbo-Act, the interested employees have specific powers of there is no works council or Arbo-committee, which is comparable with the works council. It is considered important that, in the absence of institutionalized forms of participation, (a majority of) interested employees have specific powers. Another conclusion which is drawn in this respect, however, is that, in a number of ways, their position is inferior to that or the Arbo-committee.

The paragraph dealing with the position of the employee under the Arbo-Act ends with a discussion of the employee’s obligations. The present Arbo-Act imposes more obligations upon the employee than did its predecessor. It is debated whether this increase is justified, considering the dependence of the employee upon the activities, particularly, of the employer.

The position of the employee is also regulated by the rights and obligations which flow from the contract of employment. This contract, however, is governed by the Civil Code and by the relevant collective labour agreement provisions. With respect to the regulations in the Civil Code ample attention is given to article 1638z, the ‘good-employer-article’. It is argued that this article is particularly suitable to improve the position of the employee in the field of conditions of employment. This is because the employee can take direct legal action if article 1638z is violated; in such cases the Arbo-Act could be applied as ‘lex specialis’. There are some indications in case law in this direction. Apart from the Civil Code the collective agreement is, in many cases, decisive for the contents of the employment contract. The earlier mentioned study into the quantity and quality of collective agreement provisions shows that such rights and duties of the employee which are concrete and which can apply to him as an individual, are, generally spoken, self-evident and hardly spectacular.

To complete the picture, the position of the employee, as it appears in the OR-Act, is studied. The conclusion is drawn that, when it comes to the legal enforcement of participation in establishment of the policy on labour circumstances by the works council, individual employees are almost powerless. The same is true for the legally enforceable control of the policy of the works council. But, in respect of the structure and the purpose of the OR-Act, this is understandable.

The end of Chapter IV is about the employee’s right of complaint within the company. It is argued that a statutory right of complaint is an important factor in the endeavour to improve the position of the employee with respect to the humanization of labour. The advice of the ‘Sociaal Economische Raad’ (Social Economic Council) on this point is extensively discussed and found to be insufficient. The striking inertia of consecutive governments in the drafting of legislation on this subject glaringly contrasts with its importance.

Some concluding considerations form the substance of Chapter V. First, the development in policy and legislation and the role of the persons involved in the humanization of labour are described. Then attention is focussed upon the
position of the employee. The importance of the actual power-relationships in
the company are indicated, as well as the dependent position of the employee
within the company. It remains difficult to provide legal compensation for this
factual inequality. Two external institutions could play an important role in
this respect: the Labour Inspection Service and the courts. It appears that the
Labour Inspection Service is not an ally that can be taken for granted. This is
due to the existing law as well as to the way it is actually applied by the Service.
The courts present a better opportunity. In the end the conclusion is drawn
that the great importance of the Arbo-Act for the employee is that the courts
could — and already appear to be doing so — apply provisions from this Act in
order to grant a claim for humane labour circumstances; the same humane
circumstances as the Arbo-Act purports to grant to the employee without,
however, supplying the legal means to bring this claim individually and inde-
dependently.
The chapter explains the factual backgrounds, legal implications and legal pro-
cedings of a recent case which illustrates the relatively powerless position
of the employee who strives for improvement of his conditions of employment.
Humanization and the law is the subject of the paragraph mainly concerned
with the effectivity of the Arbo-Act. Criteria derived from a number of theo-
ries of sociology and the law are used to assess this effectivity. These criteria
are: the contents and structure of the Act; the relationship between substan-
tive and procedural rules; the provisions for implementation and maintenance
of the Act; the economic and socio-cultural climate; and the attitude of the
employee in pursuing legal actions.
The conclusion is drawn that the question whether an improvement of the
employee’s position with regard to the humanization of labour can be accom-
plished through the Arbo-Act, has, in principle, to be answered affirmatively.
At the same time, however, it should be noted that this Act is more suitable for
the fixing of minimum demands in the field of health and safety and for the
establishment of organizational conditions — such as collective consultation —
than for the giving of guarantees for individual claims to humane labour cir-
cumstances. This is emphasized by socio-economic developments: generally
speaking few opportunities remain for the employee to be actively engaged in
a true realization of the right to humanization of labour. This is another reason
why the legal position of the employee with respect to labour circumstances
must not only be judged in the light of legislation on labour circumstances of a
public law character, and the Arbo-Act in particular; mistakenly the applica-
tion of private law is largely ignored in this field. Most of all, it is the courts
which are capable of creating and developing new principles of law. The legis-
lator does not necessarily have to be excluded; the rules laid down in the Arbo-
Act could be an important guideline for the courts. From this point of view the
function of the Arbo-Act is not limited to its guarantees for a minimum of
health and safety; it performs another function which perhaps can be charac-
terized as symbolic: it incorporates certain important social views about the
meaning of labour and labour circumstances into the existing law. Due to the

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fact that these social views have acquired legal status the courts are more likely to use them as a basis for their judgements. This function is too important to be taken over by the collective agreement. Consensus between employer and employee about the fact that employment should not present a threat to the health and safety of the employee is to be expected. But the way in which this consensus will be reached and the extent to which it will be reached — whereby the level of consensus will always be temporary — is dependent upon the power-relationships within the companies, and the state of the economy. It is for this reason that legislation remains an irreplaceable ally for the more marginal groups in society and, particularly, the employees in the companies.