New forms of employment in the Netherlands

Barentsen, B.; Blanpain, R.; Hendrickx, F.; Waas, B.

New Forms of Employment in Europe

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Editor

The series started in 1970 under the dynamic editorship of Professor Roger Blanpain (Belgium), former President of the International Industrial Relations Association. Professor Blanpain, currently Professor Emeritus of Labour Law, Universities of Leuven and Tilburg, is also General Editor of the International Encyclopedia of Laws (with more than 1,600 collaborators worldwide) and President of the Association of Educative and Scientific Authors.

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Introduction

The Bulletins constitute a unique source of information and thought-provoking discussion, laying the groundwork for studies of employment relations in the 21st century, involving among much else the effects of globalization, new technologies, migration, and the greying of the population.

Contents/Subjects

Amongst other subjects the Bulletins frequently include the proceedings of international or regional conferences; reports from comparative projects devoted to salient issues in industrial relations, human resources management, and/or labour law; and specific issues underlying the multicultural aspects of our industrial societies.

Objective

The Bulletins offer a platform of expression and discussion on labour relations to scholars and practitioners worldwide, often featuring special guest editors.

The titles published in this series are listed at the end of this volume.

BULLETIN OF COMPARATIVE LABOUR RELATIONS – 94

New Forms of Employment in Europe

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Roger Blanpain

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Summary of Contents

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CHAPTER 24

New Forms of Employment in the Netherlands

Barend Barentsen[*]

§24.01 INTRODUCTION

Can the employment contract still be used in the twenty-first century, or has it outlived its usefulness? The concept of the master-servant relationship, which lies at the heart of this contract, has an outdated ring to it, to say the least.

It may have been suitable for a time in which the relationship at the work place was clear-cut. On the one hand, there were supervisors who gave instructions to subordinates. Those employees, due to a combination of lack of social security, lack of skills and education, were often highly – if not completely – dependent on their employer for their livelihood and that of their (large) family. Labour law developed as counterbalance to that socio-economic dependency. Employment contracts, therefore, are subject to imperative norms laid down in legislation and case law. Basically, even if both the employer and employee wish to make other arrangements, labour law prohibits this. In most European systems, health and safety rules, maximum working time and minimum wage are non-negotiable (at least as far as deviations to the detriment of the worker are concerned).

Needless to say, the average work place and working conditions, as well as the living standards and education of employees have changed significantly since the days labour laws were being developed. The question whether or not labour laws are overprotective as regards highly skilled, well-educated and professional workers is

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therefore legitimate.[1] The level of dependency may have decreased, which could imply a reduced need for protective measures.

Recent developments in the labour market have led to the rise of an academic discussion on the paradigms (and chances of survival) of labour law, at least labour law with the contract of employment at its core and as a cornerstone.[2] Changes are visible at an altogether different level as well. New forms of employment have developed to circumvent some of the constraints associated with the so-called standard employment contract, i.e., fixed working time (full-time) for an indefinite duration.[3]

Examples of these new forms of employment are evident across Europe. In some countries, crowd employment (virtual platforms matching buyers and sellers of services) is the 'buzz word', whereas casual work (employment relationships in which the worker is not entitled to the regular provision of work) is being used elsewhere. Other examples are portfolio work (self-employed work for a large number of clients and the provision of minor projects for each of them), labour pooling (an individual worker is jointly hired by a group of employers and works for the participating companies on a rotational basis), job sharing (a single employer hires a group of workers to jointly fill a specific job), interim management (situations in which a worker is hired for a temporary period by an employer, often to complete a specific project). Employee sharing (the secondment of workers, including (but not exclusively) the French *portage salarial* and similar schemes ('crisis pools') seem to have gained field and ICT-based mobile work (referring to employment terms determined by the worker, working from home, at the client's premises, on the road, etc.) are on the rise as well. Voucher systems (referring to employment situations based on vouchers or cheques the orderer of a service can acquire from a third party) and specific employment statutes (combining elements of traditional dependent employment and self-employment) have been introduced to create jobs at 'the bottom rungs' of the labour market ladder.

These developments have not left the Netherlands untouched, but a lot of the new forms of employment just mentioned have either not become 'fashionable' or do not raise legal(istic) problems, since these new forms can be incorporated into the traditional mould of the employment contract. A general observation is that most of the new forms of employment mentioned above do not exist in the Netherlands, or at least not on a significant scale. Virtually no special rules and provisions have been put in place to regulate new forms of employment. As a rule, different types of both work and of working are governed by the same provisions, namely those regulating the contract of employment. Those provisions leave room for all kinds of work and working

1. See Bellace, J.R., *Labour Law for the Post-Industrial Era*, International Journal of Comparative Labour Law and Industrial Relations, Vol. 12, Issue 3, pp. 189-194 (1996).
2. See Grandi, B., *Would Europe Benefit from the Adoption of a Comprehensive Definition of the Term 'Employee' Applicable in all Relevant Legislative Modes*, International Journal of Comparative Labour Law and Industrial Relations, Vol. 24, Issue 4, pp. 495-510 (2008).
3. See Hiessl, C., *Employer-Centered Benefits and the Atypical Workforce*, International Journal of Comparative Labour Law and Industrial Relations, Vol. 30, Issue 1, pp. 67-85 (2014); Davidov, G., *The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions*, International Journal of Comparative Labour Law and Industrial Relations, Vol. 26, Issue 1, pp. 61-81 (2010).

patterns. The main exception to the rule that all types of work – be it working from 9 to 5 for an indefinite duration or casual work – are covered by the same rules (employment contract), is that temporary agency work is covered by separate provisions.[4] It should be added, however, that such contracts are also considered to be employment contracts, hence, the separate provisions 'merely' contain additions to and exceptions to the general rules on employment contracts.[5]

Part-time work, on-call work and work on the basis of a temporary contract are all covered by general employment contract rules. The employment contract and its implementation can assume different forms and may entail flexible or new forms of arranging working time, place and content of work, and the organisation for which work is being performed.

It follows from this general observation that EU directives pertaining to labour law usually apply to new forms of employment as well, since they fall within the scope of employment contracts.

§24.02 EXCEPTION: SELF-EMPLOYMENT

The main exception to the rule that no 'new' form of employment is actually very new and even so could be qualified as normal employment contracts are contracts entered into by self-employed workers. As such, self-employment is not a new phenomenon. However, in recent years, the number of self-employed has been on the rise.[6] Self-employed workers are now being used in sectors and for positions traditionally held by employees.[7] The Dutch health care sector is an important example of this. Health care workers providing care and help in households are hired as self-employed workers. Notwithstanding the fact that they work full time for a health care provider, they can hardly, to all intents and purposes, be considered entrepreneurs who are running their own business.[8] Basically, they are completely dependent on the health care provider that sends them to their so-called clients. To circumvent tax and social security obligations and the applicability of (most) protective labour legislation, these employers assert that they merely manage the contracts entered into by the workers and the individuals in their care, and deal with formalities such as payment of fees by

4. See Netherlands Civil Code, Arts 7:690 et seq.
5. Zwemmer, J.P.H., *De uitzendkracht, de gedetacheerde en de payroll-werknemer*, in Houweling, A.R. & Voet, G.W. van der, *Bijzondere arbeidsverhoudingen* (Bakelsinstituut, 2012).
6. According to a census of CBS (Netherlands Statistical Agency), in 2002, 550,000 persons were self-employed, in 2012, it was 750,000; http://statline.cbs.nl/StatWeb/publication/?DM = SLNL &PA = 80150NED&D1 = 0-3,7&D2 = 1-2,26-27&D3 = 57-61&VW = T (accessed February 2015); www.cbsvooruwbedrijf.nl/index.aspx?FilterId = 2&ChapterId = 543&ContentId = 5875 en www.cbsvooruwbedrijf.nl/index.aspx?FilterId = 2&ChapterId = 543&ContentId = 5796 (accessed February 2015). If another, broader definition is used about 1.1 million workers are self-employed, see G.C.Boot, Arbeidsrechtelijke bescherming van de afhankelijke zzp'er' TRA 2012/84, par. 2.
7. Sociaal Economische Raad (SER), *Zzp'ers in beeld: Een integrale visie op zelfstandigen zonder personeel*, p. 16 (SER: Den Haag, 2010).
8. See *Gerechtshof Arnhem-Leeuwarden* (Court of Appeals Arnhem-Leeuwarden), 23 September 2014, ECLI:NL:GHARL:2014:7283ECLI:NL:GHARL:2014:7283 and 30 September 2014, ECLI:NL:GHARL:2014:7456ECLI:NL:GHARL:2014:7456, ruling on the status of care workers working via an agency.

those clients to their care provider. One could say that they are 'dating agencies', or put differently, that they act as brokers of service providers for those in need of those services.

An explanation for the increase in self-employment might be that there has been a legislative trend to strengthen the position of flexible workers, i.e., to bring them in line with workers who have concluded an employment contract for an indefinite duration. However, self-employment does not always mean that the rights and obligations of an employment contract can be circumvented. There is a respectable body of case law rejecting alleged self-employment. In those cases, the conclusion was drawn that an employment contract did in fact exist, despite the 'other' name and form the parties to the contract gave their contractual relationship.[9]

It must be noted, however, that work in some sectors traditionally performed by employees is being increasingly carried out by self-employed persons. Employees occasionally lose their employment contract only to be hired back as self-employed persons performing more or less the same work as they previously did as regular employees. Anecdotal evidence suggests this is the case in the construction sector (self-employed brick layers, carpenters).

It must be stressed that self-employment may be advantageous to the self-employed person as well, even if they are former employees. They may generate a higher net income by being self-employed due to tax advantages. Still, a considerable number of self-employed persons generate a very modest income and would prefer to be employed. It is estimated that up to 10% of self-employed persons cannot really be considered independent entrepreneurs, but are employees in disguise.

Among those who are bogusly self-employed are individuals who work for very few clients (sometimes their former employer) or those who perform services for a large number of clients, who in reality bear more similarity with clients of the organisation that is sending them to 'their' clients. In the home care sector, for instance, several agencies register both workers and clients and provide the clients with a care provider and the worker with a job.

The Netherlands has no specific employment statutes, in which elements of the traditional employment relationship and self-employment are combined. Having said that, a contract of employment may leave the worker a lot of freedom as far as the timing and organisation of work is concerned, and (partly) performance-determined pay. Therefore, the distinction between a worker under an employment contract and a self-employed worker is, in practice, gradual rather than very distinct.

An employee may enjoy a lot of freedom and responsibilities usually associated with independent contractors. Even though the contracts differ considerably, as far as the legal position of the worker is concerned, it is difficult to determine which is which on the basis of the way the work is organised.

9. See Boot, G.C., *Arbeidsrechtelijke bescherming* (diss. Leiden, Sdu uitgevers Den Haag, 2005) & van den Berg, L., *Tussen feit en fictie* (diss. Nijmegen, Boom Juridische uitgevers Den Haag, 2010).

§24.03 WHAT IS SO NEW ABOUT NEW FORMS OF EMPLOYMENT?

[A] Online Work

An employee who works online (at home) is a relatively new phenomenon. It is difficult to imagine a world without internet and email, but it is only around twenty years ago that working offline was the only option. However, workers who work at home instead of at the employer's premises are not such a new phenomenon. Under well-established case law, workers performing their duties without direct supervision because the employer is not able (travelling salesmen) or even allowed (working at home) to supervise and give instructions to the worker, can nonetheless be considered employees.[10]

The authority of the employer which is an element of an employment relationship may consist of instructions of a more 'organisational' nature, such as production standards, prescribing the volume of production (number of clients to be visited, number of items to be produced), regulating the ways and means of communication with the employer's establishment or rules relating to holidays or sick leave.[11] Whether or not a worker who works from home, be it online or not, can be considered an employee depends on the specific circumstances of the case. Being 'out of sight' does not preclude an employment contract/employer's authority. The more detailed and intense the instructions given by the employer to the worker are, the more likely it is that the contract will be qualified as one of employment.

The question whether or not the worker performs tasks that are similar to those performed by employees at the employer's premises is an important factor in qualifying the employment relationship. As a rule of thumb, if the work performed by the individual is the same as that performed by employees at the employer's premises, it is inferred that the contract is the same as well. The worker who works from home is thus in an employment relationship with the employer.

There is nothing new under the sun for workers who perform their work from home using modern ICT-facilities. Their absence from the employer's premises does not rule out that they are an integral part of the employer's organisation and are working under his authority.

[B] Casual Work

Casual work is not that new either.[12] Under well-established case law, two types of casual work can be distinguished, which fall within the remit of employment contracts.

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10. See *Hoge Raad der Nederlanden* (the Netherlands' Supreme Court), NJ 1979, 140 (IVA/Queijssen, 17 November 1978).
11. In *Hoge Raad der Nederlanden*, NJ 1994, 757 (Imam) the Supreme Court held that the right to give instructions on the organisational and administrative aspects of the work may fulfil the requirement of employer authority, even though the substance of the tasks and the way they are executed are determined by the employee (17 June 1994).
12. In *Hoge Raad der Nederlanden* (25 January 1980), NJ 1980, 264 (Possemis/Hoogenboom). See Knipschild, E., *De voordelen en risico's van een min-/maxcontract*, ArbeidsRecht, Issue 45 (2009).

The first type is the pre-employment contract and the second is the employment contract with 'delayed performance'. Under both types of contract the worker receives wages and has the right to work, if and when called upon by the employer. A so-called pre-employment contract contains the conditions under which the worker will work when called upon by the employer and the worker accepts an actual employment contract which is applicable for the duration of the call. Under an employment contract in which the duty to perform work (and the right to work) is delayed, the employee is not free to accept or reject a call by the employer to work, but his/her right to wages and to work depends on his/her being called upon. In reality, it is difficult to distinguish these two types of contract. An on-call worker might, formally or theoretically, be free to reject a call, but may be strongly compelled to agree to his employer's wishes with a view to continuation of the working relationship. Workers who have concluded a contract with delayed performance may on occasion be allowed to reject a call, if and when they have valid reasons to do so (domestic reasons, such as illness of children, previous engagements). Nevertheless, it is reasonable to assume that the pre-employment contracts are not widespread in practice, and that on-call work can be qualified as work under an employment contract, because the worker is usually under an obligation to work when called upon by his/her employer.

Casual workers also have an employment contract, albeit with limited rights when they are not actually working. Even so, employers are not allowed to stop calling on casual workers on discriminatory grounds or solely due to illness. Furthermore, if over the course of time a certain pattern and amount of calls become the norm, the employer and employee can be deemed to have agreed upon a minimum amount of work and wages per month. According to Article 7:610b of the Netherlands Civil Code, the parties are assumed to have concluded a contract for the average amount of hours per month performed over the last three previous months. The burden of proof to refute this assumption rests with the employer.[13]

As far as the right to work is concerned, case law of lower courts suggests that employers are obliged to offer casual workers work if and when it is available. Work may not be withheld for arbitrary reasons. The main difference between a 'regular' contract and a casual contract – apart from irregular working hours – is that the casual worker bears the economic risk of no work being available. In that case, the rule 'no work, no pay' applies. In principle, 'regular' employees remain entitled to wages if and when the employer cannot provide them with work due to organisational or economic problems.[14] The number of casual workers (on-call workers) has increased significantly over the last ten years.[15]

New legislation, which entered into force on 1 January 2015, limits the possibility to deviate from the rule that the non-performance of work due to organisational or economic problems continues to entitle the employee to receive wages. For the first six

13. Zwemmer, J.P.H., *Rechtsvermoeden omvang arbeidsduur, een updating*, ArbeidsRecht, Issue 60 (2005).
14. Article 7:628 of the Netherlands civil code.
15. Verbiest, S.E., Goudswaard, A. & van Wijk, E.B., *De toekomst van flex: een onderzoek van tno naar flexstrategieën van Nederlandse bedrijven*, TNO, 4-5 (2014).

months of an employment contract, this entitlement may be restricted by way of individual contractual or collective agreement. After six months, deviation is only possible for specific types of work mentioned in a collective agreement.[16] This is one of the measures that reflects the trend of strengthening the position of flexible workers as mentioned above.

[C] Interim Management

Interim management can be performed under different types of contracts. It is possible to conclude a contract of employment for a definite period for this type of work. An interim manager does not fundamentally differ from any other expert – say an accountant or in-house legal counsel – a temporary employment contract may perfectly meet the temporary need for certain expertise. Interim management and other specialised services and expertise can also be hired via temporary work agencies, i.e., the posting of experts to organisations with a temporary need for them.

Interim management can also be provided by so-called management BV's (management Ltd.). A management BV is a company/legal entity owned and run by a manager. Instead of hiring an interim manager directly, a company requiring interim management pays the management BV to provide interim management services. In this scheme, no contractual links exist between the interim manager and the managed company. However, this scheme is not always accepted by the tax authorities and courts. A management BV is occasionally merely a 'straw' man, and the interim manager and the managed company are the actual parties to the employment contract.[17]

§24.04 SHARING THE EMPLOYER[18]

[A] Single Employer Within a Group of Companies

The *Albron* case of the ECJ offers an example of a common practice within a group of companies.[19] In a significant number of groups of companies consisting of several legal entities and establishments, all employees are employed by one single company within the group, the so-called *personeels-BV* ('Staff Ltd.'). The payment of wages and taxes as well as any administrative processes are coordinated by the *personeels-BV*.

The staff employed by the *personeels-BV* do not actually work for it, but for one or more of the other subsidiaries of the group. Workers are permanently posted to the group. This might be the same company or different ones in the course of employment. The employer to some extent fulfils the role of an internal temporary work agency.

Having one central employer within the group is easier from a logistical point of view (central administration of taxes and wages, etc.). The transfer of an employee to

16. Article 7:628, subs 5 and 7 of the Netherlands' Civil Code.
17. *Hoge Raad der Nederlanden*, NJ 2007, 449 (13 July 2007).
18. See Zwemmer, J., *Pluraliteit van werkgeverschap* (diss. Amsterdam, Deventer, Kluwer, 2012).
19. Judgment of the ECJ of 21 October 2010 *Albron Catering*, Case C-242/09, ECLI:EU:C:2010:625.

another company within the group might be easier as well, since the new company does not need to enter into a new contract of employment, while the former company does not need to terminate the old one. Sometimes amendments to the existing contract are necessary because a change of company may lead to a fundamental change of responsibilities and another place of work.

Within groups of companies, employership is divided between several entities. The *personeels-BV* assumes the duty to pay wages, while another subsidiary of the group provides the work and instructs the employee on how to perform his/her tasks. The *personeels-BV* is considered the employer 'on paper' (formal employer) and the company for which the employee works as the actual employer (material employer). As a rule, the formal employer is considered the employer in terms of both tax and contract law. The material employer needs to meet obligations vis-à-vis the employee, e.g., health and safety requirements.

Case law has been hesitant about accepting dual employership, i.e., one employee being employed by two or more subsidiaries of a group at the same time.

[B] Payrolling

Payrolling is a relatively new phenomenon. It is similar to work via a temporary work agency in that a worker enters the service of an agency which posts the worker to its client. An important difference is that in the case of payrolling, the agency usually assumes a role after the worker has already been selected by the client. As a rule, payrolling work tends to be for a longer term than work through a temporary work agency. Payrolling is advertised by payrolling agencies as a means for employers to avoid the complications and obligations associated with being an employer. At present, the criteria for dismissal on economical and organisational grounds are less strict for payrolling agencies, as is the case for temporary work agencies, than for 'normal' employers. Hence, there are incentives for employers to hand over their employership to a payrolling agency.

The client is, for all intents and purposes, the employer of the worker, but the worker signs the employment contract with the payrolling agency. As its name suggests, it manages the payment of wages and taxes. On a day-to-day basis, the relationship between the client and worker is very similar to an employment relationship. On a case-by-case basis, case law distinguishes between bogus payrolling contracts (where the client and employee are party to an employment contract) from real ones. Payrolling tends to be viewed in both recent case law and academic literature as a bogus construction, with the sole purpose of avoiding employer's obligations. There are exceptions to the rule, but the tendency is to reject the payroll construction and assume the existence of an employment contract between the employee and client.

For a more extensive discussion of payrolling see Zwemmer in Chapter 9 of this book.

It should be noted that the term 'payrolling' is also used by agencies that deal with the formalities of wage payment to the employees of their clients without assuming the identity of employer.

§24.05 TRAINING AND REHABILITATION

Some outplacement agencies offer their clients (employers) to conclude outplacement contracts with their soon to be former employees. Sometimes an outplacement contract takes the guise of an employment contract: the employee receives wages and his/her work consists of receiving training and activities to find gainful employment. The contract might also entail elements of a temporary work agency contract, i.e., the employee may be posted to the agency's clients.

Such contracts cannot be qualified as contracts of employment if and when their main purpose is to rehabilitate the 'employee' and/or to improve his/her knowledge and skills. To qualify as an employment contract, the work performed should at least potentially be beneficial to the employer. If the primary goal is the enhancement of the worker's skills, an employment contract does not exist.[20]

It was therefore assumed that workers on disability insurance benefit from working under special conditions to gain work experience were not considered employees.[21] Then again, case law takes many different approaches and has many diverging answers to the question whether such work is primarily in the employer's interest or primarily aimed at enhancing the worker's skills.[22] As a rule of thumb, the more similarity the tasks performed by the worker bear with the work being performed by other employees and the more his/her position is similar to that of other employees and the longer the work is intended to last, the more likely the conclusion will be that an employment contract exists.

§24.06 NEW FORMS OF EMPLOYMENT (VIRTUALLY) UNKNOWN

In the introduction, some new forms of employment were mentioned that have become increasingly popular in other EU countries. A few of those forms are worth specifically mentioning, even though they are (virtually) unknown in the Netherlands.

Voucher systems are sometimes advocated as a means to reduce unemployment, but are unknown in the Netherlands at present. The same applies to employee sharing, especially as a counter crisis measure. It is advocated as an instrument to prevent unemployment. Trade unions have recently tried to convince government that pools should be established for workers in the home care sector. As a result of budget cuts and transfer of responsibilities of central government to local governments, unions fear mass redundancies and/or difficulties in securing decent work conditions for employees who must transfer to a new employer. In order to keep those workers employed – under the same conditions – a pool would have to be established from which the local authorities or their contractors could draw their workforce. This idea was not taken up

20. See *Hoge Raad der Nederlanden*, NJ 1983, 230 (29 October 1982).
21. See *Centrale Raad van Beroep* (CRvB), USZ 2014/268 (23 July 2014).
22. See *Hoge Raad der Nederlanden*, USZ 2013/183 (3 May 2013).

until recently. In 2015, a small-scale experiment was launched under the auspices of several home care institutions.[23]

There have been some local initiatives on a relatively small scale as far as employee sharing as a counter crisis measure is concerned. A recent example is a pool for highly skilled employees of technological companies in the Eindhoven region established after the Financial Crisis hit those employers in 2008. Another example is the pool of harbour workers in the harbours of Amsterdam and Rotterdam. Those pools went into receivership a few years ago and were replaced by temporary work agencies for harbour workers.

Some of the local initiatives are called 'labour pools' but amount to a more or less informal network of employers posting superfluous workers to colleagues. As such, the pool does not assume the position of employer, but is merely an intermediary for cooperating employers.

One sector which is familiar with employee sharing is primary and secondary education. Schools cooperate in/with 'pools' of teachers to be posted to them if and when they are in need of a temporary replacement due to sickness or pregnancy of a permanent member of their staff.

§24.07 SUMMARY

Quite a lot of the new forms of employment do not exist in the Netherlands, or, conversely, have been used for a long time. The latter (not so) new forms of employment and some new forms of employment usually fall within the scope of the contract of employment and the rules and regulations pertaining to it. Depending on the scope of the EU directive or regulation in question, this means that new forms of employment are covered by those EU rules as well.

A legislative tendency – and perhaps a judicial tendency – to limit the possibilities to deviate from the rights full-time workers under contracts of indefinite duration enjoy in the new forms of employment must be noted. This might offer an explanation for the steady rise of self-employment over the last ten to fifteen years.

23. Van den Elsen, W., *VWS zet licht op groen voor dienstencheque*, http://www.zorgvisie.nl/Personeel/Nieuws/2014/10/VWS-brengt-dienstencheque-in-stelling-1611091W/ (accessed February 2015).