

# **THE COMPARATIVE EVOLUTION OF THE EMPLOYMENT RELATIONSHIP**

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**Abstract**

It is widely believed that the legal institution of the contract of employment is currently undergoing a conceptual crisis as a result of changes in labour markets, the organisation of production, and the form of the enterprise. A historical and comparative perspective, however, indicates that conceptual crises of this kind are nothing new, and have occurred periodically in the systems of western Europe since the industrial revolution. The employment form serves important functions in a market economy even in an era of deregulation and liberalization, and is unlikely to be replaced by a radically new model in the near future.

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## 1. Introduction

It is widely believed that labour law is currently undergoing a ‘crisis’ of core concepts.<sup>1</sup> This is exemplified, above all, by the growing number of labour relationships which fall outside the scope of protection provided by the concept of the contract of employment or employment relationship. This paper aims to contribute to the debate over the present and future scope of labour law by examining the evolution of the contract of employment from an historical and comparative perspective. A principal reason for doing so is that the conditions under which the contract of employment began to take shape as a core institution of labour law, around the turn of the twentieth century, were in certain significant respects similar to those of today.<sup>2</sup> Then, as now, there was widespread concern in many countries about the negative implications for the social fabric of a system of industrial enterprise which appeared to be entrenching inequality.<sup>3</sup> The persistence of poverty meant that the supposed benefits of the market economy could not, as its proponents had claimed, be made universally available.<sup>4</sup> At the same time, the few, fragile social compromises which had been established through early forms of collective bargaining and labour legislation were being undermined by technological innovation and changes in the structure of the firm.<sup>5</sup> The internationalization of trade and the interlinking of economies – then called ‘imperialism’ – undermined appeals for social protection in much the same way as ‘globalisation’ does now.<sup>6</sup> The intellectual orthodoxy of the day was provided by ‘iron laws’ of economics, which proclaimed, just as they do again, the futility of regulation in the face of market forces.<sup>7</sup>

The emergence of the modern ‘welfare’ or ‘social’ state from these highly unpromising circumstances was, of course, not simply or even principally the consequence of an intellectual revolution.<sup>8</sup> The beliefs which projected the free market credo of the nineteenth century well into the twentieth became impossible to maintain as a result of the unprecedented global crisis of the 1920s and 1930s.<sup>9</sup> It would, however, be wrong to assume that a cataclysm on that scale is needed if new ideas and solutions are now to come forward. Whether a crisis of some kind is unavoidable, given the protean nature of modern capitalism, remains to be seen, and perhaps this broader question should be seen as outwith the present debate within labour law. Rather, the task – which is no doubt difficult enough – is to challenge neoliberal and neoconservative dogmas which might otherwise become so deeply entrenched that only another upheaval of catastrophic dimensions could shift them.

Part of that task is an engagement with historical evidence.<sup>10</sup> Reform does not start with a blank slate – for better or worse, we have to deal with the conceptual legacy of twentieth century labour law, to reshape it where necessary, but also to appreciate its malleability, and its capacity for adaptation. We can understand better the limitations of existing models if we improve our knowledge of the conditions under which they emerged and then developed. The study of their origins will help to reveal whether their weaknesses are structural and deep-rooted, or merely contingent and temporary.

The analysis must also be comparative. The current fashion is for ‘end of history’ type analyses which predict the convergence of systems around a supposedly functional core of rules and precepts which support economic growth.<sup>11</sup> Labour law is, in principle, no more immune from this all-embracing neo-functionalism than those areas, such as company and commercial law, to which it has already been extensively applied.<sup>12</sup> Under these circumstances it is essential to see comparative law as the study of systemic diversity,<sup>13</sup> and to revisit the lessons of an earlier generation of scholars which identified the risks associated with the transplantation of legal rules and techniques across systems.<sup>14</sup> The task is to understand the variety of solutions and the specificity of the local and national conditions which gave rise to them, rather than trying at every point to fit divergent experiences into a single, universal model.

The centrepiece of this project is an analysis of the contract of employment as a juridical concept, which explores its complex links to the wider economic and social environment of industrial capitalism. Disentangling the multiple strands of meaning in the legal concept of the contract of employment (and its civil law equivalents) is part of this process, but wider questions must also be addressed. What was the relationship between the emergence of the employment model and phases in the evolution of capitalist labour relations? How far was the employment model a by-product of the welfare state? In what ways did the different national trajectories of economic growth under capitalism influence the evolution of the rules and principles of labour law, and what, in turn, was the influence of that body of law upon economic growth?

Some answers to these questions have already been suggested for the British case.<sup>15</sup> The experience of Britain is significant because it was the first nation to industrialise, but, precisely for that reason, it may be difficult to draw generalisations from that case. A comparative perspective is required, but the potential scale of the project is vast. This paper is a first attempt to map out some of the issues and suggest solutions.<sup>16</sup> Section 2 summarises the argument recently presented the work just referred to in relation to the evolution of the

contract of employment in British labour law. Section 3 draws on comparative material on the experience of continental European systems in order to put the British case in context. Section 4 offers some first conclusions on the significance of the analysis for the contemporary debate over the scope of labour law and the future of the contract of employment.

## **2. The evolution of the contract of employment in Britain: an overview**

However British ‘industrialisation’ is defined – as the rise of the factory, the shift from a rural to an industrial and urban economy, the transition from agricultural subsistence to dependence on wage labour, or, more abstractly, as the movement from status to contract – it is apparent that, by comparison with the experience of most other countries, it was a lengthy process, lasting several centuries. The institutional roots of a market economy can be found in the later middle ages and in the early modern period; the stimulus provided to innovations in governance by such events as the Black Death and the dissolution of the monasteries have been extensively documented.<sup>17</sup> England already had a mature *national* legal system at this stage, the significance of which for its economic development is only now beginning to be understood. The first labour statutes, passed by way of response to the labour shortage which followed the Black Death of 1346, indicate the growing importance of legislation as a mechanism of state control of the economy, and are testimony to the existence at that point of an early system of contracting over the performance of work, already displacing compulsory labour in the form of villeinage or serfdom.<sup>18</sup> The Statute of Labourers of 1351 did not just formalize the system of wage regulation; it also helped to seed legal innovations which led to the promissory action of *assumpsit*, the forerunner of modern contract law.<sup>19</sup> The sixteenth century saw, alongside the diminution in the role of the Church as an institution of social protection, the extension of state control over labour, through the passage of numerous poor law statutes and of the pivotal Statute of Artificers of 1562, which was to provide the legislative foundation for wage setting, service in agriculture and the activities of the urban guilds up to the early nineteenth century.<sup>20</sup>

Formally, labour was not yet completely ‘free’: under the Statute of Artificers, service in agriculture was compulsory for those without property or other independent means of subsistence. Within the guilds, relations between masters, journeymen and apprentices were more akin to those of producers who were equally subject to the rules of the trade, than to those between capitalists and subordinate workers. Putting-out systems resembled extended networks of independent contractors linked by merchant capitalists, rather than integrated

industrial enterprises. Thus it is not possible to point to the existence of wage labour in the modern sense of that term. For this reason, the terms used by the Statute of Artificers and the poor law legislation of this period, including 'servant' and 'labourer', have to be treated with care; it would be a mistake to see them as simply the functional equivalents of the much later concept of the contract of employment.<sup>21</sup>

At the same time, the corporative system of the seventeenth and eighteenth centuries can be understood as responding in a number of ways to the growing dependence on wages of the large part of the English population. The poor law provides the clearest indication of this. A sophisticated framework of taxation and mutual insurance was put in place, based on the concept of the poor law 'settlement', through which annual service provided an entitlement to cash doles in the event of a loss of income through sickness or old age. The system was administered locally, at parish level, but it was national legislation which required each of the fifteen thousand parish units to raise local taxes for the purpose of supporting poor relief, and to suppress indiscriminate charitable giving. Anticipating the modern welfare state, the English poor relief system was both publicly instituted and legally mandated.<sup>22</sup>

The 'old' or pre-1834 poor law undoubtedly had disciplinary objectives. One of these was the control of labour mobility. Migrants were characterised as the 'vagrant' or 'wandering' poor; 'masterless men' who refused to work at customary wage levels or absconded from service were liable to severe punishments including branding and imprisonment.<sup>23</sup> Poor law officers enforced the 'removal' of paupers to their parishes of settlement. At best, the old poor law constituted a paternalist code, in which cash doles were combined with payments in kind and what remained of access to common land to ensure little more than the bare minimum of subsistence. But the confinement of the recipients of relief in workhouses, a regular feature of the system after 1834, was rare at this stage. The reality of economic insecurity was not lost on some of those who administered the system: according to a mid-eighteenth century edition of a leading treatise for justices of the peace, the 'poor' were 'here to be understood not vagabond beggars and rogues, but those who labour to live, and such as are old and decrepit, unable to work, poor widows, and fatherless children, and tenants driven to poverty; not by riot, expense and carelessness, but by mischance'.<sup>24</sup>

The poor law also provided the occasion for the first significant attempt to systematize the law governing the service relationship.<sup>25</sup> Disputes between parishes over the allocation of responsibility for poor relief led to an enormous

body of litigation for that time. From the mid-seventeenth century the Court of King's Bench used the recently developed prerogative writs to impose a degree of administrative uniformity on settlement practice. Hundreds of settlement cases were reported, specialised law reports on the subject were compiled, and textbooks were written to guide justices of the peace and poor law officers. In the process, the juridical concept of service began to take shape as a reciprocal relationship, founded on contract while also incorporating status-based obligations on both sides, including the servant's open-ended duty to obey orders and the master's obligation, as Blackstone put it, to maintain the servant 'throughout the revolution of the respective seasons, as well when there is work to be done as when there is not'.<sup>26</sup> It is also possible to see, in the eighteenth century case law, numerous decisions on what would now be called task contracts and casual labour relationships, as well as attempts by masters to avoid the application of the settlement laws by dismissing servants just before they completed a year's service. There is some evidence to suggest that the attitude of the courts to the definition of annual service shifted over the economic cycle, with the concept becoming more rigid and narrow at times of hardship when claims increased and parishes sought to restrict payments of relief.<sup>27</sup> It would seem that difficulties in the application of abstract juridical concepts to the 'reality' of labour relationships are nothing new.

The century after 1750 which is conventionally associated with the period of the 'industrial revolution' in Britain was, in addition to being a time of rapid technological and social change, also a period of legal innovation; hence Arnold Toynbee's suggestion, made in the 1870s, that the essence of the industrial revolution was not to be found in the adoption of steam power or the advent of factory labour, but in 'the substitution of competition for the medieval regulations which had previously controlled the production and distribution of wealth'.<sup>28</sup> Unmediated competition in the labour market was promoted through the repeal of the wage-fixing laws and apprenticeship regulations which had formed the main body of the Statute of Artificers (in 1813 and 1814 respectively). It is not clear how far the 1562 Statute had ceased to be enforced by this point, but it does not seem that it was a complete dead letter. The removal of legal support for apprenticeship controls was resisted by a series of strikes in the 1810s, and there was considerable litigation around the same time, in the course of which the courts watered down the Statute's restrictions on entry into the regulated trades.<sup>29</sup> Where a seventeenth century court had concluded that 'he who cannot use a mystery himself, is prohibited to employ any other men in that trade; for if this should be allowed, then the care which has been taken to keep up mysteries, by erecting guilds or fraternities would signify little',<sup>30</sup> by 1811 Lord Ellenborough CJ could refuse to convict an

unqualified mill owner of a breach of the Statute, on the grounds that ‘persons of the first families of this kingdom’ could not be expected ‘to serve regular apprentices as millers’.<sup>31</sup> In this way a potential legal constraint on the form of the capitalist enterprise, which would in future be based on the clear separation of labour from ownership of the means of production, was removed.

A parallel change which occurred in the sphere of the poor law was the dismantling of the institution of annual service upon which access to poor relief as of right (or, at least, on the basis of a customary expectation) had depended. The courts were the first to restrict the notion, by introducing the concept of the ‘exceptive’ hiring to explain why industrial workers, who did not live in the household of the master and so were deemed not to be continuously under his authority, could not acquire a settlement.<sup>32</sup> In 1834 Parliament abolished the category of settlement by hiring altogether. This was part of the wider reform, embodied in the Poor Law Amendment Act of that year, which saw the legal instantiation of the principle of ‘less eligibility’. This was a reaction to what had been seen as the excesses of the old poor law, and in particular the variant of the Speenhamland system, which from the late eighteenth century had encouraged the payment of poor relief to subsidise low wages. The problem with the old poor law, and in particular with Speenhamland, according to the political economists of the time, was that it distorted the working of the market. As Bentham put it, ‘if the conditions of individuals, maintained without property of their own, by the labour of others, were rendered more eligible than that of persons maintained by their own labour, then, in proportion as this state of things were ascertained, individuals destitute of property would be continually withdrawing themselves from the class of persons maintained by their own labour, to the class of persons maintained by the labour of others’. This would have the all too troubling consequence, if it continued, that ‘at last there would be nobody left to labour at all, for anybody’.<sup>33</sup> The solution, adopted in the Act of 1834, was known as the principle of less eligibility: no pauper should be better off than the least well-off ‘independent’ workers and their families. This meant confinement in the workhouse for the able-bodied poor. But because even this might give rise, on occasion, an improvement in the condition of the pauper, since ‘humanity demands that all the bodily wants of the inmates of a public establishment should be provided for’, a level of subsistence which the market itself was not able to guarantee, it was essential ‘to submit the pauper inmate of a public establishment to such a system of labour discipline and restraint as shall be sufficient to outweigh, in his estimation, the advantages which he derives from the bodily comforts which he enjoys’.<sup>34</sup>



In these ways, what were seen as ‘distortions’ or ‘interferences’ with the working of the market for labour were removed. It might be thought that this would have led to the contractualisation of labour relations and hence to the recognition in the courts of the concept of the contract of employment as the paradigm legal form of the work relationship. However, this is not what happened. For some occupational groups, a type of employment contract did indeed emerge, to which the courts attached status obligations in the form of implied contractual terms. The common law action for wages due as earned under the contract, and the action for damages for wrongful dismissal, can be identified in cases from the early decades of the nineteenth century.<sup>35</sup> However, these decisions were almost without exception based on the employment of managerial, clerical or professional workers. Manual workers fell under the distinctive legal regime of the Master and Servant Acts, under which breach of the service contract was a criminal offence, for which thousands of workers were fined or imprisoned each year up to the 1870s.<sup>36</sup>

The master-servant model was not a hold-over from the corporative regime of the Statute of Artificers and old poor law. On the contrary, most of the disciplinary powers used by employers and courts were additions from the mid eighteenth century and early nineteenth century, the result of parliamentary action to bolster the prerogatives of the new employer class. The nature of the paradigm legal form of the labour relationship under early industrial capitalism in England was statutory and hierarchical, rather than common law and contractual. The legal influence of the master-servant regime was just as far reaching as its considerable social and economic impact. The model of a command relation, with an open-ended duty of obedience imposed on the worker, and reserving far-reaching disciplinary powers to the employer, spilled over into the common law, so that long after the repeal of the last of the Master and Servant Acts in 1875, not just the terminology of master and servant but also many of the old assumptions of unmediated control were still being applied by the courts as they developed the common law of employment.<sup>37</sup>

It took the advent of the welfare state and the extension of collective bargaining, with state encouragement, to achieve a more complete ‘contractualisation’ of employment relations.<sup>38</sup> The persistence of the master-servant model in employment law, and the enduring influence of the principle of less eligibility in the long transition from the poor law to social security, which was completed only in the 1940s, delayed the advent of the contract of employment. If the contract of employment is identified, above all, with a classification of labour relations which incorporates the ‘binary divide’ between employees and the self-employed, we have to look to the middle of the twentieth century to find it in British labour law.

The first statutes to adopt the binary divide in a clear form were concerned with income taxation and social insurance. Even then, it cannot be found in the first income tax and national insurance measures of the 1910s, which adopted slightly different classification schemes from those used later, retaining distinction between manual and non-manual workers. The National Insurance Act 1946, which incorporated Beveridge's plan for social security, marked the turning point; its clear division between those employed under a 'contract of service', a term which gradually became interchangeable with the term 'contract of employment', and those who were 'self-employed' or independent contractors, was then carried over into early employment protection statutes in the 1960s. The term 'employee' is truly a very recent innovation in British labour law.

### **3. The origins of the employment relationship in the civil law systems of continental Europe**

There is also evidence from the civil law systems to support the claim that the modern contract of employment is an invention of the late nineteenth and early twentieth centuries, associated with the rise of the integrated enterprise and the beginnings of the welfare or social state. However, it is also clear that the experience of the civil law systems was far from uniform. Distinct conceptions of the employment relationship took shape in different systems, reflecting variations in economic conditions and in legal cultures, and further reinforcing divergence through their influence on the development of labour law.

The starting point for the analysis the process by which the emerging forms of wage labour were grafted on to the traditional Roman law concept of the *locatio conductio* in the post-revolutionary codes. In relying on the model of the *locatio*, the drafters of the codes were grouping labour relationships with other types of contracts, the effect being to stress that, in common with them, they were based on exchange. Thus labour, or in some versions labour power – as, for example, in the German term *Arbeitskraft* – thereby became a commodity which was linked to price (not necessarily the 'wage'), through the contract. The further consequence was to align the labour relationship with the law of things rather than the law of persons: the notion of the personal 'subordination' of the worker was absent from the formulae used by the codes.<sup>39</sup> The reality was rather different, since more or less all systems acknowledged the power of the employer to give orders, to issue rules which had binding force (in the form, for example, of the French *livret* or work book), and to retain the worker in employment, without a testimonial, until they considered the work to be complete. However, this body of legislation and practice was formally separated from the general private law of the codes, and

administered by police authorities and specialized labour tribunals; as a result, it remained under-developed from a conceptual point of view.

Two versions of the *locatio conductio* were contained in the French *Code civil* of 1804: one, the *louage d'ouvrage*, was loosely based on the Roman law idea of the *locatio conductio operarum*, or hire of work (in the sense of a piece of work or completed task); the other, the *louage de services*, had some affinity to the *locatio conductio operis*, or hire of services. In each case, the link to Roman law concepts was more tenuous than it might seem at first sight. The concepts used in the *Code civil* were adaptations – they were ‘the same as the old *locatio conductio* in name only’.<sup>40</sup> This was because they aimed to replace the Roman law notion of the *locatio conductio* as a form involving the subjection of the individual worker, with the liberal idea of formal equality between contracting parties. Even in the case of the *louage de services*, the form which most closely resembled an agreement to serve, the *Code civil* insisted (in Art 1780) that services could only be provided for a certain purpose or limited period of time. A commitment to lifelong service, for example, would be void.

It is possible to see, in the distinction between the *louage d'ouvrage* and the *louage de services*, the essence of the division between independent contractors and servants in English law, and perhaps, the origins of the binary divide itself. However, to take this view would be to run the risk of viewing what was in practice a highly complex and differentiated set of categories through the lenses of alternative systems of classification. Under the system of the *Code civil*, those falling under the concept of the *louage de services* were domestic servants (*domestiques*) and day labourers (*journaliers*), leaving the *louage d'ouvrage* to cover all others. Although the *Code civil* placed the risks of non-completion of the task on the worker in the case of the *louage d'ouvrage*, upon completion the property in the relevant goods, and any surplus, vested immediately in the employer (Art 1790). Under the *louage de services*, the employer was to be the sole judge of whether the work had been completed (Art 1781), so in practice the allocation of risks differed little between the two forms. Neither relation could give rise to an indeterminate or open-ended contract. Cutting across the classifications contained in the *Code civil*, the regulatory jurisdiction associated with the *livret* or workbook was strengthened by legislation just before the *Code* was adopted (law of 12 germinal An 11, or 12 April 1803). It is arguable that both of the categories set out in the *Code* were, in practice, closer to wage labour than to relations between commercial parties.<sup>41</sup>

Nor should it be assumed that there is a direct line of descent between the *louage de services* and the notion of the contract of employment or *contrat de travail*.

Although the existence of such a link was posited at the end of the nineteenth century by a number of labour law jurists, this was, it has been more recently claimed, a ‘mystification’ of the process involved: ‘republican writers on labour law pretended to themselves and persuaded others that “service hiring” was a category of the Civil Code that had applied to the employment of workers from the outset’.<sup>42</sup> This was done to lend the appearance of continuity to the law at a time when the concept of the *contrat de travail* was still relatively new. The term itself appears not to have been in use before the mid-1880s.<sup>43</sup> The main impetus for its adoption was an argument by employers in larger enterprises that the general duty of obedience should be read into all industrial hirings. However, once the term became established, it was used in turn of the century legislation on industrial accidents,<sup>44</sup> and its adoption was promoted and systematized by commissions of jurists charged with developing a conceptual framework for collective bargaining and worker protection.<sup>45</sup> At the core of the concept was a notion of ‘subordination’ in which the open-ended duty of obedience was traded off in return for the acceptance and absorption by the enterprise of a range of social risks.

The terminology used in the German Civil Code, the *BGB*, adopted in 1896, is superficially similar to that used in the French *Code civil* at the beginning of the nineteenth century, with the *Dienstvertrag*, literally the ‘contract for service’, distinguished from the *Werkvertrag*, the contract for work or sub-contract. The *BGB* nevertheless marked a significant break with the Romanist model of the *locatio*. This was not just because the two categories were placed in separate volumes of the code, signifying the fragmentation of the *locatio* concept; more substantively, the *Dienstvertrag* came to embody the idea of the employer’s duty of care (*Fürsorgepflicht*), the counterpoint to the duty of loyalty (*Treuepflicht*) owed by the worker. This reflected the influence of Gierke who argued for the integration into the Code of the principles of social solidarity which, he argued, were to be found in the historical antecedents of the *Dienstvertrag*. In this way, the emerging employment law was realigned with the law of persons and with the notion of the enterprise as an employing community.<sup>46</sup> At the same time, there is no clear reference in the *BGB* to the binary divide between employees and the self-employed: ‘at the time the *BGB* was drafted... the distinction between employment and services had not been established, so the term *Dienstvertrag*... covered both types of agreement. This means that in the context of Art. 611 [*BGB*], *Dienstvertrag* refers both to the contract for service... and the contract of employment’.<sup>47</sup> The modern notion of the employment relationship or *Arbeitsverhältnis* came later, as in France, with the adoption of protective legislation and the legal accommodation of collective bargaining.

Both France and Germany saw the late development of the contract of employment. What emerged, however, were forms which reflected the distinctive legal cultures of the two systems.<sup>48</sup> In the French-origin systems, the power of the state to regulate conditions of work was instantiated within the legal system through the concept of *ordre public social*, that is, a set of minimum, binding conditions which applied as a matter of general law to the employment relationship. The implicit logic of this idea was that in recognizing the formal contractual equality of the parties to the employment relationship, the state also assumed, by way of symmetry, a responsibility for establishing a form of protection for the individual worker who was thereby placed in a position of 'juridical subordination'. In German-influenced systems, by contrast, a 'communitarian' conception of the enterprise qualified the role of the individual contract. This approach was summed up at the end of the nineteenth century by Gierke's argument that the supposedly 'eternal juridical truths' of the modernised Romanist tradition simply served to conceal 'formulas expressing individualistic and capitalistic assumptions'.<sup>49</sup> Under Gierke's influence, the employment relationship was orientated away from the law of obligations and towards the law of persons; thus in contrast to the French approach, German law came to recognize the 'personal subordination' of the worker in the form of 'factual adhesion to the enterprise' or *Tatbestand*, a process which conferred 'a status equivalent to membership of a community'.<sup>50</sup>

Alain Supiot has suggested that 'there is no European country in which the conception of the employment relationship has not been influenced to some degree by each of these two legal cultures, the Romanist and the Germanic'.<sup>51</sup> The influence of communitarian thinking was particularly strong in all continental systems, French-origin included, in the first part of the twentieth century, when it overlapped to some degree with fascist ideologies. At the same time, it would be excessively reductive to identify this line of thought with fascist notions of the corporative state. The idea of the 'interests of the enterprise' as a reference point for the mutual obligations of employer and employee has had a wider resonance, since it predated the rise of authoritarian regimes and retained an influence after their fall. It owed much to the concentration of industry and the emergence of vertically integrated and bureaucratically-organised enterprises during the same period, a process which, as we have noted, began earlier and was more complete on the continent than in Britain. The result was a 'synthesis' of contractual and communitarian elements that has been ever since a source of 'structural ambivalence',<sup>52</sup> in the conceptual framework of European labour law.

#### **4. Initial reflections on the significance of comparative and historical analysis**

What is the significance of the analysis set out above for our understanding of the contemporary debate over the scope of labour law and in particular over the future of the contract of employment? The following conclusions may, tentatively, be advanced.

*1. The concept of the contract of employment or employment relationship has roots in the process of industrialization but it owes its full development to the further intervention of the welfare state.*

Were it not for the social legislation of the welfare or social state, and for the related development of collective bargaining, there would not be a 'contract of employment' or 'employment relationship' as we have come to understand it. The earliest antecedent for the modern employment contract in Britain is the eighteenth century institution of annual service, which emerged from what was essentially a prototype of the welfare state, the poor law system of settlement by hiring. In all systems, it was twentieth century social insurance and employment protection legislation which stabilized the employment relationship and, together with the macroeconomic policy of that period, actively sought, for a period, to suppress casualisation. In Britain, collective bargaining assisted the process further as unions encouraged employers to replace the internal contracting system with direct employment relations.

On the continent, there is evidence of a longer continuous tradition of an 'integrative' conception of the enterprise. As industrialisation occurred later, vertical integration of the enterprise occurred more quickly. There is also evidence that labour shortages in regions of France and Germany where workers retained a tie to the land for longer than was the case in Britain, providing them with an alternative to wage labour, made employers more ready to assume responsibility for social risks arising from employment, as the quid pro quo for the acceptance by workers of managerial direction and control.<sup>53</sup>

However, in all systems it is arguable that without certain institutional interventions, the employment model would be confined again to certain occupational groups, in particular professional and managerial workers occupying a relatively secure and protected market segment. That is essentially what is happening now thanks to the diminishing influence of collective bargaining, the encouragement by government policy of outsourcing, and attempts by employers to exploit possibilities for the fragmentation of the legal form of the enterprise.

This is a process which, rather than being the inevitable consequence of technological shifts or structural changes in the economy, has in many cases has been set in motion by legislative changes and by reversals of policy, particularly in macroeconomic policy.<sup>54</sup>

*2. There is nothing new about the claim that the contract of employment is an 'artificial' model imposed on a more complex 'reality' of labour relations.*

The debate about 'scope' is essentially an argument about how to apply protective labour statutes. Work relations which fall on the 'margins' of the employment category, because they involve casual or part-time work, or work at a distance from the workplace, have always posed a problem of classification. As we saw above, this was the case as early as the poor law legislation of the eighteenth century. Again, in the early twentieth century, arguments about the meaning of the terms 'servant' and 'workman' were concerned with the same issues of workplace fragmentation and the disintegration of the employing enterprise that today are regarded as imposing new constraints on the ability of labour law to protect workers. To point to the recurring nature of the problem is in no way to underestimate the problems involved in solving it today, since the techniques of avoidance used now inevitably differ from those of a century or more ago. However, it may serve as a reminder that what appears to be the consequence of technology or ineluctable economic changes, is instead often the result of political decisions (such as the decision in the 1980s to reverse the trend in macroeconomic policy towards the stabilization of the employment relationship) and managerial strategies (such as the current vogue for outsourcing) which history shows are by no means irreversible.

*3. The concept of the contract of employment serves important functions in a market-based economy even in an era of deregulation and liberalization, and is unlikely to be replaced by a radically new model in the near future, even if there is some 'rebranding' of concepts.*

The trajectory of the contract of employment suggests that as a legal concept it embodies at least two significant functions: one is to assist in the managerial task of the coordination of work within the enterprise, a task signified by the 'control' and 'integration' tests of employee status; the other is to serve as a device for shifting and controlling for the social risks of a loss of income through sickness, unemployment and old age which are inevitable and unavoidable in an economy in which the vast majority of the population is dependent, directly or indirectly, on wages for subsistence, a function signified by the 'economic reality' test. The risk-shifting function, and hence some form of social security for at least some

workers, is just as much an integral feature of a market system as the capitalist enterprise is. This is not to say that the emergence of a mature welfare state is inevitable in a given system, any more than one can say that we inevitably and always find democracy and human rights in capitalist economies. It is simply to say that the presence of an advanced social security and employment protection system is by no means incompatible with a market economy, or necessarily hostile to it. It is possible that an advanced social model of this kind is best represented in the western Europe experience; however, to argue, on 'cultural' grounds, that it can *only* flourish there, or possibly in parts of north America, is to make very strong and arguably untenable assumptions about the evolutionary path which capitalism is taking, or may take, in other systems.

The enduring presence of the contract of employment in most developed economies, even in those which have undergone considerable liberalization and deregulation over the past two decades, is striking. Thus in Britain, notwithstanding some decline in job tenure rates for male workers and some growth in flexible forms of work, the vast majority of workers have employment status. This figure reaches 90% if self-employed 'workers' are included;<sup>55</sup> and the 'worker' concept is arguably nothing more than a rebranding exercise, designed to overcome the difficulties created by the highly artificial 'mutuality of obligation' test. Self-employment has not grown much if at all over the past decade, suggesting that its incidence is cyclical (in the sense of being associated with falls in overall employment) rather than structural. The same pattern is broadly observable in other EU member states.

*4. However, the contract of employment is the product of those historically contingent features which accompanied its mature development in the mid-twentieth century; as those particular features of the economy and social policy fade away, there are growing problems in using the existing form of the contract of employment as a device of classification.*

The employment model is useful, even indispensable, to labour lawyers, but it bears the marks of its origin. It reflects, in particular, the context in which the mid-twentieth century compromise between labour and capital was struck. It assumes not simply that the employing entity is a large, vertically integrated enterprise, characterised by unified management and by an internal labour market based on bureaucratic control, for which the regulation of workplace relations through collective bargaining is well suited; it also makes assumptions about the household division of labour. In Britain, the instantiation of the male breadwinner model in the legislation of the welfare state was a reaction to the extreme forms of competition between men and women which the nineteenth century poor law



embodied.<sup>56</sup> The poor law was more gender neutral than might be supposed;<sup>57</sup> but this was a world in which the workhouse was used to break up family relations as a warning to the improvident, and where the male and female able-bodied were equally subject to the harsh impositions of the duty to work. In the twentieth century, in sharp contrast, the preservation of the male breadwinner wage became the goal of collective bargaining, and the social insurance rights of married women were almost entirely derivative of those of their male partners. Restricting the scale of female employment and confining it to the margins of the economy was to some degree the goal, and in any case certainly the effect, of Beveridge's supply side reforms and macroeconomic policy.<sup>58</sup>

The erosion of the male breadwinner model has accelerated rapidly since the 1970s.<sup>59</sup> This has been the result of changes in the economy, associated with growing female participation in paid employment, rising divorce rates, the fragmentation of family structures. At the same time, male breadwinner model has ceased to serve as a normative point of reference, as it has been judged to be incompatible with the principle of equal treatment between men and women in both employment law and social security law.<sup>60</sup> However, as of yet, no clear alternative to that model has emerged. Full-time employment for men is no longer guaranteed, and since, for women, it never was, some kind of parity has been restored; but one effect is growing poverty and social exclusion in 'workless households' where neither partner is in employment.<sup>61</sup> No matter how imperfectly, the male breadwinner model protected individuals and households from the effects of unmediated competition in the labour market. Its eclipse has led to new forms of insecurity and social exclusion.<sup>62</sup>

*5. The timing of industrialization and the form taken by the welfare state shape the evolution of labour law in a given system and influence the form taken by its core concepts including the contract of employment.*

The most distinctive feature of the British case is *early industrialization*, that is to say, industrialization which occurred *before* the putting in place of many of the social and legal institutions which support and sustain a market economy. This had profound implications for the nature of industrial enterprise in Britain and for the form of the welfare state, which are reflected in labour law. Thus the development of legal forms which could support the vertically integrated enterprise and unified management had to wait until the mid to late nineteenth century. Industrial enterprise developed before there was limited liability and a straightforward incorporation process; thus to a greater extent than in continental Europe, British firms in the formative early phases of industrialization were small scale, relied heavily on internal contracting in lieu of unified management, and

made little use of the capital market. This explains, in part, the predominant role of master-servant legislation in the British experience: this offered a form of legal support for managerial prerogative at a time when the typical enterprise lacked managerial capacity of its own.

This might just be of antiquarian interest, were it not for the path-dependent nature of legal change. The master-servant model long outlived its usefulness to employers in early industrial England, and, thanks to the global influence of the English common law, was exported worldwide, with far-reaching and arguably negative results in terms of the entrenchment of an adversarial conception of the employment relationship.<sup>63</sup> That conception arguably still influences British labour law, and the labour law of many other systems, today. The principal tests used to classify labour relationships – control, integration, economic reality and mutuality of obligation – all too clearly bear their origins as responses to particular phases in the evolution of the employing enterprise and the growth of the welfare state, a legacy which causes confusion in the application of labour law. But path dependence can have much more negative effects than even that. The peculiar mix of Speenhamland-type wage subsidization and Benthamite less eligibility which characterizes the social security policy of today's New Labour government suggests that history can cast a very long shadow indeed.

This is not just to argue that 'history matters' to our understanding of contemporary labour law. From a wider perspective, the most important question is the following: which features of the British case offer insights into the general, structural features of the relationship between labour law and industrialisation, and which are unique to the British experience? If the concept of the contract of employment was a relatively late arrival in Britain, what was the experience elsewhere? In this regard, Mark Freedland<sup>64</sup> has posed the critical question of whether the distinction between employees and the self-employed, rather than being 'contingent and circumstantial... a product of a particular set of social policies, imposed by legislation upon a specific labour market in a certain jurisdiction at a given moment of time', could instead very well be regarded as 'a much more universal and deeply embedded one which permeates the jurisprudence, as well as the legislation, of many legal systems over very long historical periods of time'.

While a certain amount of progress in understanding the nature of the employment model can arguably be made on the basis of a single-country study or a two- or three-country comparison,<sup>65</sup> resolution of the wider question posed by Freedland can only be achieved through a broader comparative analysis. This

paper has made an attempt to point the way to some of the answers. The evidence reviewed here supports the view that the contract of employment or employment relationship, understood as a juridical concept, has a highly complex lineage. It has roots in the adaptation of Roman law concepts to liberal economic philosophies in the post-revolutionary period, and in the commingling of contractual ideas with legislative regulation of the service relationship. However, just as in the British case, the conceptual classifications used in the nineteenth century codes do not map precisely on to the binary divide between employees and the self-employed which is at the core of modern labour law. What emerges again is the importance of specific national and local conditions in shaping the development of employment model, and the role, above all, of a particular historical conjunction, associated with the coevolution, at the end of the nineteenth century, of the welfare state and the modern industrial enterprise. The next step in this research is to fill in the gaps in our knowledge, in particular concerning the relationship between the evolution of the law and wider changes in the economy during and after the industrial revolution.

## Notes

<sup>1</sup> This has been a consistent theme of labour law writings since the early 1980s. See Clark and Wedderburn, 1983, in particular at p. 153. More recently a key point of reference is Supiot (ed), 1999.

<sup>2</sup> A number of historical studies have explored the conditions which accompanied the emergence of the modern employment relationship and the core institutions of the welfare state, including collective bargaining and social insurance, at the turn of the twentieth century. For the US, see Jacoby, 2004, in particular ch. 1; for the UK, Deakin and Wilkinson, 2005; for France, Castel, 1995, Mansfield, Salais and Whiteside (eds.), 1994, and Didry, 2002; on Germany (with a comparison to the British case), Biernacki, 1995; and on general European developments in this and earlier periods, Hepple (ed.), 1986.

<sup>3</sup> For the UK, this is most clearly evident in the Minority Report of the Poor Law Commission of 1909: Webb and Webb, 1909, and in the contemporaneous study of Beveridge, 1909.

<sup>4</sup> On the evolution of concepts of ‘poverty’ in this period in Britain, assessing the work of Charles Booth and of Seebohm Rowntree, see Williams, 1981.

<sup>5</sup> On the significance of the comparison, in this regard, between today’s trend towards vertical disintegration and the experience of the early twentieth century, see Cappelli, 2000.

<sup>6</sup> There is a growing literature considering the parallels between the ‘first’ globalisation of the late nineteenth century, and more recent developments. See, in particular, Berger, 2003.

<sup>7</sup> See Deakin and Wilkinson, *op. cit.*, at pp. 24-3.

<sup>8</sup> On the respective roles of social forces and intellectual movements in the development of modern labour law, see Supiot, ‘Introduction’, in Supiot (ed.), 1999.

<sup>9</sup> See Polanyi, 1957. Polanyi wrote: ‘the origins of the cataclysm’ – referring here to the crisis of the 1930s – ‘lay in the utopian endeavour of economic liberalism to set up a self-regulating market system’ (at p. 29).

<sup>10</sup> For defences of this methodology, see Berger, 2003, and Castel, 1985.

<sup>11</sup> Hansmann and Kraakman, 2001.

<sup>12</sup> Kraakman, Davies, Hansmann, Hertig, Kanda, Hopt and Rock (eds.). 2004.

<sup>13</sup> Aherling and Deakin, CBR Working Paper No. 312, 2005.

<sup>14</sup> Most importantly, the work of Otto Kahn-Freund, 1974.

<sup>15</sup> See generally Deakin and Wilkinson, 2005.

<sup>16</sup> Because of shortage of space, an analysis of the US case is beyond the scope of the present paper. The reasons for the appearance of a distinctive US version of ‘employment at will’ in the late nineteenth and early twentieth century, the point at which American and English law diverged, are discussed by Deakin and Wilkinson, *op. cit.*, at pp. 82-86.

<sup>17</sup> See, respectively, Palmer (1993), and Woodward, 1980.

<sup>18</sup> ‘As villeinage ceases, the poor law begins’ was Tawney’s assessment (Tawney, 1967), at p. 47, and the point can be extended to wage regulation more generally.

<sup>19</sup> See Palmer, 1993, for details of this process.

<sup>20</sup> See Deakin and Wilkinson, *op. cit.*, at pp. 44-51.

<sup>21</sup> For a more complete account of the points made in this paragraph, see Deakin and Wilkinson, *ibid.*, ch. 2.

<sup>22</sup> See generally Slack, 1990.

<sup>23</sup> Beier, 1985.

<sup>24</sup> Dalton, 1746, at p. 164.

<sup>25</sup> See generally Snell, 1985.

<sup>26</sup> Blackstone, 1779, at p. 413.

<sup>27</sup> The case law is discussed by Deakin and Wilkinson, *op. cit.*, at pp. 118-124.

<sup>28</sup> Toynebee, 1969, at p. 92.

<sup>29</sup> Prothero, 1979.

<sup>30</sup> *Hobbs v. Young* (1689) 1 Show KB 267.

<sup>31</sup> *Kent v. Dormay* (1811), Kingston Assizes, August 14 reported in Chitty, 1812, at p. 122.

<sup>32</sup> Deakin and Wilkinson, *op. cit.*, at p. 122.

<sup>33</sup> Bentham, 2001, at p. 39.

<sup>34</sup> *Report on the Continuance of the Poor Law Commission* (1839), reproduced in H.R. Jenner-Fust, 1907, at p. 4.

<sup>35</sup> A watershed decision, synthesising these developments, was *Emmens v. Elderton* (1853) 13 CB 495.

<sup>36</sup> See generally Deakin and Wilkinson, *op. cit.*, pp. 61-74.

<sup>37</sup> *Ibid.*; see also the comprehensive survey of master-servant laws in the British Empire, Hay and Craven (eds.), 2004.

<sup>38</sup> See Deakin and Wilkinson, *op. cit.*, at pp. 86-100, for a fuller account of the development described in this paragraph.

- <sup>39</sup> See Simitis, 2000.
- <sup>40</sup> Veneziani, 1986, at p. 32.
- <sup>41</sup> Petit and Sauze, 2003, p. 10; Cottereau, 2002. ; Cottereau, 'Droit et bon droit. Un droit des ouvriers instauré, puis évincé par le droit du travail (France XIX<sup>e</sup> siècle)' *Annales HSS*, novembre-décembre no. 6: 1521-1557 (2002).
- <sup>42</sup> Cottereau, 2000.
- <sup>43</sup> Ibid.
- <sup>44</sup> Veneziani, 1986., at p. 64.
- <sup>45</sup> Ibid., at p. 68.
- <sup>46</sup> Ibid., at p. 59; Sims, 2002, at pp. 85-86.
- <sup>47</sup> Ibid., at p. 83.
- <sup>48</sup> Mückenberger, and Supiot, 2000.
- <sup>49</sup> von Gierke, 1895, at p. 32.
- <sup>50</sup> Supiot, 1994, at p. 18.
- <sup>51</sup> Ibid., at p. 19.
- <sup>52</sup> Ibid.
- <sup>53</sup> O'Brien, 1996.
- <sup>54</sup> Deakin and Wilkinson, *op. cit.*, ch. 4.
- <sup>55</sup> Burchell, Deakin, and Honey, 1999.
- <sup>56</sup> Deakin and Wilkinson, *op. cit.*, ch. 3. It does not of course follow that the employment contract is *inevitably* tied to the male breadwinner model; indeed, it is arguable that the model of the employment contract can be renewed or modified in the context of a less gendered division of labour. See Browne, Deakin and Wilkinson, 2004.
- <sup>57</sup> See Clark, 2000; Levine-Clark, 2000.
- <sup>58</sup> See Deakin and Wilkinson, *op. cit.*, at pp. 171-175.
- <sup>59</sup> Ibid, at pp. 319-326.
- <sup>60</sup> This is particularly clear in the case law on Article 141 (ex Article 119) of the EC Treaty, which has had major implications for pay systems and for systems of social security in Member States of the EU. Thus just as difference in pay between men and women for work of equal value cannot be justified by the supposed need to pay a male breadwinner wage (Case 170/84 *Bilka-Kaufhaus GmbH v. Weber von Hartz* [1986] IRLR 317), so the principle of equal treatment has led to an equalisation of pensionable ages in occupational social security (Case C-262/88 *Barber v. Guardian Royal Exchange Assurance*

*Group* [1990] IRLR 240) which can imply a ‘levelling down’ of provision (Case C-408/92 *Smith v. Avdel Systems Ltd.* [1994] IRLR 602).

<sup>61</sup> Deakin and Wilkinson, *op. cit.*, at pp. 171-175.

<sup>62</sup> Creighton, 1999.

<sup>63</sup> See generally Hay and Craven, *op. cit.*

<sup>64</sup> Freedland, 2003, at pp. 19-20.

<sup>65</sup> As in the works by Biernacki, 1995, and Mückenberger and Supiot, 2000, referred to above. More broadly comparative works, such as those, cited above, Veneziani, 1986, and Simitis, 2000, are rare.

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