

INSTITUTIONAL SOLUTIONS  
TO PRECARIOUSNESS AND  
INEQUALITY IN LABOUR  
MARKETS

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## **Abstract**

It has become widely assumed that the standard employment relationship (SER) is in irreversible decline in industrialised societies. However, non-standard and precarious work relationships often complement the SER via labour market transitions, and are not displacing it as the focal point of labour market regulation. The coordination and risk management functions of the SER continue to be relevant in market economies, and the SER is adjusting to new conditions. The SER has a complex and evolving relationship to gender and to social stratification. In the European context where the SER originated and achieved its clearest legal expression, institutional solutions to precariousness and inequality are being developed, the most innovative of which avoid simple deregulation in favour of integrated policy responses involving a range of complementary regulatory mechanisms.

**JEL Codes:** J21, J83, K31

**Key words:** employment relationship, labour flexibility, labour law, precarious work, inequality

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## 1. Introduction

The irreversible decline of stable and regular employment in industrialised societies is a stylised fact that has reached the status of a conventional wisdom. But conventional wisdom can be wrong. The standard employment relationship ('SER') continues to be a core legal and economic institution of a market economy. It may have mutated in response to the current globalised and financially-driven variant of capitalism, but it is not withering away. Nonstandard working patterns, even the more precarious, are often complementary to the SER (Schmid, 2010) and do not in general offer a viable alternative to it as a focal point for coordination in labour markets (Deakin, 2013).

There are significant cross-national variations in the incidence of the different types of non-standard work and in trends in their use over time. Precariousness, an often-cited consequence of many forms of non-standard work (Standing 2011), is currently increasing (Stone and Arthurs, 2013). It is suggested that changing social norms, in particular associated with a new household division of labour, along with shifts in modes of production and the impact of globalisation on the regulatory capacity of the state (Arthurs, 1996), have led to labour market segmentation between workers with stable working relationships and those with non-standard and precarious arrangements. Segmentation is associated with inequality, and with it the marginalisation of social groups. The institution of the SER itself is now seen as a barrier to mobility, excluding groups from accessing better paid, more secure employment, and so exacerbating inequality (Boeri and Garibaldi, 2002; Cahuc and Kramarz, 2004; Stone and Arthurs, 2013; Gunderson, 2013). However, this view is ill-founded both empirically and from the point of view of policy design.

The trend in nonstandard working, particularly as embodied in precarious forms of work, is comparatively recent and is not characteristic of all periods of industrial development (Deakin, 2014b). It is due in part to institutional rigidities, associated with the SER, but also to conscious policy choices which have privileged casualisation, wage suppression and the fiscalisation of employment over the promotion of stable work and a living wage (Deakin, 2013b, 2014a); Meardi, 2014; De Stefano, 2014). These policies, which are often presented as 'inevitable' (Stone and Arthurs 2013: 5), are not the unique best response that individual countries can make to the competitive pressures of a globalised market environment, and they have not been universally pursued (Doogan, 2013). Scaled up, they would imply a general race to the bottom, but as it is in the interests of at least some sovereign states, some of the time, to pool their resources to prevent such an outcome, there continues to be a role for transnational regulation in offsetting this effect (Deakin and Wilkinson, 1994).

To understand the likely future evolution of the SER requires a three-stage analysis. The first step is to place the phenomenon of the SER in a historical and theoretical framework which can account for its distinct institutional logic within a market economy. Drawing on evolutionary models of the law-economy relation (see Deakin and Wilkinson, 2005), we will argue (see section 2 below) that the SER performs functions of coordination and risk allocation which have a central place in the organisation of capitalist labour markets. At the same time the SER creates space for fairness norms to operate within the work relationship. The SER reflects social practices but is also a normative point of reference in the construction of systems of labour market regulation through collective bargaining and labour law (Mückenberger, 1985, 1989; Bosch, 1986, 2004; Mückenberger and Deakin, 1989; Deakin and Mückenberger, 1992). As such it mediates the relationship between labour and capital in the system of production, at the same time as altering the distribution of risks and incomes within society. Thus the SER has a complex and evolving relationship to stratification along the lines of gender and social class.

The second stage of our analysis consists of a review of the state of the art in empirical research on the SER and the extent of non-standard work (section 3). To what extent the SER is embodied in legal forms and how it is defined in comparison to precarious work is a consequence of country-specific regulatory strategies and legal categorisations which are embedded in national practices (Schmid, 2010). The message coming from the data is that the core institution of the employment relationship is not being displaced by independent work. Trends in self employment are largely cyclical. Within the broad category of dependent employment relationships, the relative weight of part-time work, fixed-term employment and temporary agency work varies considerably across national contexts. The SER itself is changing: it is being reconfigured by changes in the incidence and character of female labour market participation and by changes in the gender-based division of household tasks (section 4).

The third stage involves a consideration of the potential of the SER as a mechanism for addressing precariousness and inequality in labour markets (section 5). Here we will review recent strategies of legal and institutional reform in European countries. We will argue that two strategies which have been widely adopted – seeking to extend the legal category of the SER to cover non-standard and precarious forms of work, on the one hand, and enacting a limited right to equal treatment between non-standard work and the SER, on the other, are restricted in what they can achieve. The most successful and enduring policies are those which shift the focus of reform away from the deregulation of employment protection law to the use of a range of complementary regulatory mechanisms, including collective bargaining, to normalise and protect nonstandard and precarious forms of work.

Underlying the debate over the future of the SER is a deeper argument over whether the institutions of the social state, including labour law, can do anything more than mitigate the worst inequalities produced by the market, and may even exacerbate them. In the conclusion (section 6) we argue against this view, in favour of the proposition that the SER is evolving in ways which can counter some of the effects of workforce division and stratification: worker-protective labour law continues, we maintain, to have the potential to realise a progressive policy agenda.

In this context, our focus will be on the recent experience of the European systems. While precariousness of work is a global phenomenon, its form can vary considerably. In North America, against a background of weak or non-existent employment protection laws and dwindling union strength, the SER is only weakly embedded in legal and institutional practice (Stone, 2013a). While high and rising earnings inequality, and the absence of an effective safety net in wage or social security, are characteristic of the US labour market, these trends are not as clearly reflected in or potentially exacerbated by the operation of the SER as they are in Europe. In developing economies there is a great diversity of experience relating to ‘informality’ in labour markets, by no means all of which is consistent with the discourse of SER decline (Munck, 2013). Middle income countries, in particular in Latin America, have seen a reversal of trends towards informalisation in the last decade, which is associated with a revival of collective bargaining and innovative use of basic income guarantees (Fraile, 2009; Berg, 2011). In China, the rise of a market economy since the 1980s has seen a decline in stable work forms associated with the state sector (Kuruvilla, Lee and Gallagher, 2013) but, coterminously with the recommodification of labour, a systematic attempt to construct the characteristic institutions of a labour market, including laws governing collective bargaining, social insurance and the individual employment contract (Cooney, Biddulph and Zhu, 2013). Whether these diverse experiences signify the long-term rise of the SER in countries currently undergoing industrialisation, of the kind which parallels the European experience of a century ago (Deakin, 2006), is perhaps too early to say. Nonetheless, the experience of Europe, where the SER originated and reached its clearest expression in law and practice, remains a core case when considering the global trajectory of the SER and its long-run relationship to industrial capitalism. For these reasons, Europe will be the focus of the following sections.

## 2. Origins of the SER: social function and juridical form

Viewed empirically, the SER is a description of a set of linked practices associated with the organisation of work in its *physical* and *temporal* dimensions. Thus the SER may be initially defined as work which is carried out on an integrated physical site, on a continuous or indeterminate basis, by reference to a standard unit of working time such as a complete working day or week. The absence of one or more of these elements may make the work in varying degrees ‘atypical’ or ‘non-standard’. Yet, there is clearly more to the SER than this: in the SER model, work is carried out within the framework of an exchange relationship, which presupposes the prior identification of property rights on either side. Thus viewed analytically, the SER has *economic* and *juridical* dimensions. It is an economic form in the sense that it describes work in a market setting, and a juridical one by virtue of the way in which it is structured as a relation between persons vested with the capacity to contract, a principal means by which the legal system underpins market-based exchange (Deakin and Supiot, 2009).

More specifically, the SER describes a contract of a particular type, namely one in which the worker sells labour power, ‘abstract labour’, in return for wages. In that sense, it is a fundamental institution of a market or capitalist economy. It is inherent in this arrangement that the worker is placed at the employer’s disposal for a certain time and space, and that the employer retains property in the surplus thereby generated. This is not a natural arrangement: ‘labour power was not always a commodity’ (Marx, 1847). For it to become one requires a legal-institutional structure of a certain kind. The ‘great transformation’ (Polanyi, 1944) that western society underwent to get to this point was only partially the result of the removal of ‘obstructions’ to the ‘free circulation of labour and stock’ (Smith [1776] 1999: 83). It was accompanied from the beginning – prior to or contemporaneously with industrialisation – by the construction of institutions for the production and reproduction of the commodity that labour power was in the process of becoming (Deakin and Wilkinson, 2005). These included prototypical forms of social insurance and risk-sharing between workers and employers, which were underpinned from an early stage by the regulatory and fiscal powers of nation states (Lis and Soly, 1979). By the early decades of the twentieth century it was possible to argue that ‘the contract of employment even today... has become socialised and made secure by manifold social rights’ (Renner, [1929] 2010: 295). Thus the SER became a site for social justice and not solely a mechanism of market coordination.

There is no single story of the SER; its evolution has been shaped by country-specific paths of industrialisation and political development throughout the course of the nineteenth and twentieth centuries. The point at which it becomes possible to speak of a legal form known as the ‘contract of employment’, embodying features of the practice of the SER, is revealing. This terminology is found in France (*contrat du travail*) and Germany (*arbeitsvertrag*) in the final decades of the nineteenth century, and in Britain in the early twentieth century (Cottareau, 2000, 2002; Mückenberger and Supiot, 2000; Simitis, 2000; Deakin, 2001; Didry, 2002; Petit and Sauze, 2006). Its appearance in juridical discourse was coterminous with wider developments in society. These included the rise of vertically integrated forms of industrial production, on the one hand, and the regularisation and legal acceptance of collective bargaining as a mode of self-regulation and wage determination in industry, on the other. Employers pressed for a form of wage labour that would give them direct control over the work process and enable them to appropriate the tacit knowledge of skilled workers (Jacoby, 1985; Biernacki, 1995). Industrial unions organised for direct employment to replace outsourced and casual labour (Wilkinson, 1977). These two strategies were not exactly complementary – employers and unions were frequently in conflict over the form of work relationships in this period – but they both informed the stabilisation of the SER as a practice. The legal system was called on to define the employment relationship for the purposes of social legislation which provided protection against workplace accidents and access to unemployment insurance and retirement pensions for wage-dependent workers (Deakin, 2001). These measures formed part of the political programmes of working class parties and were either introduced by them or conceded by liberal and conservative governments, but in both cases were the indirect result of the extension of the democratic franchise and the opportunities it provided for political mobilisation (Wedderburn, 1980).

In the process of incremental institutional change which gave rise to the modern welfare or ‘social’ state (*Sozialstaat*), juridical concepts underwent serial mutations and adaptations (Deakin, 2006). In English law, the concept of ‘service’ initially described a form of wage labour associated with an ordered hierarchy within the enterprise and the use of criminal sanctions to support the exercise of employer power. At the point in the third quarter of the nineteenth century when criminal sanctions were removed and the first modern social legislation enacted, the very same juridical concept was used to determine the scope of laws protecting labour, in the form of workmen’s compensation legislation. The conjunction of disciplinary and protective functions is characteristic of the SER, as is the tendency to select from among categories of work relationships a subset of forms which particularly merit legal protection.



Thus in English judicial decisions of the early decades of the twentieth century, class was used as a signifier of the service contract, separating manual work from high-status occupations in management and public administration: when passing laws for worker protection, ‘the Legislature were contemplating a class of workers who may be described as belonging to the working class in the popular sense of that term: a wage earning class’ (*Simpson v. Ebbw Vale Steel, Iron and Coal Co.* (1905): see Deakin, 2001). In the civil law systems of the European continent, it was common until the middle decades of the twentieth century to distinguish between wage earners by their manual or professional status, and to have a distinct legal regime for managerial cadres (Veneziani, 1986; Deakin, 2006). In all systems, social insurance laws were among the first to institute a single juridical status for all waged or salaried workers, as an aspect of their common integration into general systems of financing for unemployment compensation and retirement pensions (Mansfield, Salais and Whiteside, 1994). In Britain, the division between the ‘dependent’ servant or employee, on the one hand, and the ‘independent’ or self-employed worker, on the other, did not clearly emerge until the passage of the National Insurance Act 1946, which, consistently with the social insurance principle of ‘universality’ (Beveridge, 1942), brought ‘everyone inside... including those formerly above the income limit’ for social security contributions, as well as ‘those exposed to risk but who were outside insurance’ under the pre-war system (Potter and Stansfield, 1949: 18).

As a legal construct, the SER was also gendered from an early stage, in the sense that the identification of a male ‘breadwinner’ presupposed a female ‘care giver’ (Vosko, 2010). Thus even when social insurance law was dismantling legal classifications based on class, it formally disadvantaged women in their role as wage earners (Deakin and Wilkinson, 2005). In Britain, female-dominated industrial trades were excluded from early accident compensation system regimes, at the same time as factory legislation barred women workers from more highly paid occupations on the supposed grounds of the risks posed by industrial processes to female reproductive capacity (Deakin, 1990). When married women were included in social insurance systems, they generally paid higher contributions on the grounds that they represented a greater risk to the financing of schemes. Mostly, however, married women were classed as ‘secondary’ earners whose social security rights were derivative on their husbands’ contribution records. Married women were treated as ‘a special insurance class of occupied persons’ because ‘the great majority of married women must be regarded as occupied in work which is vital though unpaid without which their husbands could not do their paid work’ (Beveridge, 1942: para. 107). The founders of the welfare state were reacting against the poor law of the nineteenth century, in which women and men alike were required to seek out ‘independent’ work in markets characterised by the ‘chronic over

supply of casual labour in relation to the local demand', and where the principle of less eligibility ensured 'a demoralising irregularity of life' for working class families (Webb and Webb, 1909: 193). Replacing the workhouse with social insurance and a living wage underpinned by collective bargaining was a policy designed to ensure that 'the labour market should always be a seller's market rather than a buyer's market' (Beveridge, [1944] 1967: 18), but in the process female wage earners were channelled into part-time and intermittent work which 'did not threaten to disrupt the patriarchal status quo in the household' (Walby, 1986: 205).

There has more recently been a legal de-gendering of the SER. First enacted in the 1970s, sex discrimination laws gradually brought about the removal of laws barring women from certain categories of industrial employment (Deakin, 1990). Equal pay laws ensured that collective agreements could no longer set formally separate wage rates for women and men as they did in Britain until the early 1970s. Married women's derivative social security rights were gradually eroded away (Luckhaus, 1983). These measures were premised on the belief that the security provided by the SER should be available equally to women and men. Formal legal equality did not, however, ensure substantive parity of access to the SER. The loss of married women's derivative social security rights, for example, was not compensated for by access to regular and continuous work of the kind needed to build up adequate pension entitlements (Sainsbury, 1996). The application of the anti-discrimination principle did little to mitigate or remove the effects of occupational segregation in the workplace (Walby, 1988).

In the course of the twentieth century, legal systems responded to the emergence of the social state by adapting the concepts of private law to new ends. Karl Renner's evolutionary Marxism argued that legal forms remained more or less constant even as their functions were being altered by social legislation (Renner [1929] 2010). Juridical concepts were not as unchanging as Renner suggested. The contract of employment which became 'the principal institution of the social regulation of labour' was not exactly the same as the one which during the nineteenth century had been 'denounced as the source of all social suffering' (Renner, [1929] 2010: 295). Recent scholarship has shown that the Roman law concept of the *locatio* was maintained 'in name only' in the modern private law of the continental European systems (Veneziani, 1986), and that the division between the hire of services and the hire of completed work in the French and German civil codes served a different classificatory purpose to the later distinction between 'subordinate' and 'independent' work (Petit and Sauze, 2006). Similarly, the English law variant of the contract of employment, while containing within it elements of earlier juridical forms including the disciplinary service model, was a response to the universalising

tendencies of social insurance legislation (Deakin, 1998), and characteristic of the period in the mid twentieth century when the ‘subordination of market price to social justice’ (Marshall, [1949] 1992: 40) was seen as a plausible goal of public policy. The implication of these studies is that the modern concept of the contract of employment owes at least as much to the redistributive and egalitarian legislation of this period as it does to the classical private law of the nineteenth century. The legal evolution of the contract of employment illustrates its dual functionality in a market economy: not only does it underpin the exercise of managerial prerogative in the workplace, it also serves as a mechanism for controlling and diffusing the risks associated with labour market participation, thereby mitigating, without ever entirely removing, the effects of wage dependency (Deakin and Wilkinson, 2005).

The SER, then, was a compromise, in which the employers obtained powers of coordination and control over workers in return for ceding to them a ‘guarantee of the basic conditions of existence’ (Supiot, 1999). The legal institution of the contract of employment melded private law with the regulatory techniques of the social state. The neoliberal critique of labour law which began to gain ground in the 1970s and came to fruition at the level of public policy and legislative change from the 1980s argued that this process was inherently contradictory. F.A. Hayek’s claim that ‘specific commands (“interference”) in a catallaxy’ – a spontaneous market order – ‘create disorder and can never be just’ (Hayek, 1976: 128) unconsciously echoed the views of Soviet Marxist critics of the welfare state, who had argued that the forms of private law were incapable of being adjusted to address the failings of capitalism: in a market order, social justice is impossible since morality is ‘inferred from the exchange relationship and can have no significance beyond this’ (Pashukanis, [1927] 2009: 161).

The neoliberal programme calls for a return, through deregulation and de-collectivisation, to the ‘private law society’ of the nineteenth century. The concept of the private law society is in fact a mid twentieth-century invention associated with ordoliberal political thought (Böhm, 1966); in the formative years of industrial society, private law was flanked by interventionist mechanisms of various kinds, not least of which was the use of criminal sanctions to enforce labour market discipline (Deakin and Wilkinson, 2005). But despite its empirical and analytical shortcomings, the neoliberal critique of labour law has spilled over into a more general consensus that thanks to globalisation and technological change, the SER is in a state of irremediable decline: ‘it is unlikely that these trends can be reversed any time soon or that we can reinstate the standard employment contract and the worker-friendly regulatory regimes that were built upon it’ (Stone and Arthurs, 2013: 5). More than this, the SER itself is the cause of inequalities and rigidities in labour

markets. The rise of non-standard and precarious employment has been driven by ‘the weight of regulations that are especially costly and may lack strategic fit in the new world of work’ (Gunderson, 2013). Meanwhile, social stratification has returned with the emergence of a ‘precariat’ unable to access the occupational identity and social solidarity available to the dwindling class of wage and salary earners (Standing, 2011). The supposed legal incoherence of the SER is, it is argued, reflected in its inability to function as a mechanism for social justice and market coordination. But, as we shall see, these claims are not clearly supported by evidence.

### **3. The topography of non-standard work**

It is important to clarify exactly what we are referring to in the context of non-standard work. It is not a homogeneous category. Non-SER working arrangements are diverse, and include part-time, fixed term, temporary agency, ‘casual’, on-call, zero hours or self-employment, among others. These categories display a variety of characteristics, and they often overlap. Inconsistency in the use of terminology in the empirical literature makes it particularly difficult to form an accurate picture of both the extent of non-standard work and its quality. This is important because not all non-standard working should be equated with precariousness. There is much variation within and between categories such that some forms of non-standard work – some part time working and many fixed term contracts for example – are often virtually indistinguishable from the SER in terms of the stability and benefits they offer. However, non-standard work can be usefully defined as any working arrangement that lacks one or more of the key temporal or physical dimensions of the SER. To the extent that the SER provides access not just to income but to insurance against labour market risks, the emphasis on precariousness in the context of non-standard work is not misplaced. Even the more regularised and stable forms of (female-dominated) part-time work offer less than complete protection against loss of income through unemployment and incapacity and have to be combined with reliance on a (typically male) partner’s ‘breadwinner’ wage (Esping-Andersen, 1999).

It is true that long term employment and job stability in industrialised economies have declined since the 1970s, while non-standard working arrangements have increased to represent a significant and growing proportion of total employment (Stone, 2013b). However, this broad trend obscures variations within and between countries. The way the welfare state is organised is an important factor influencing male and female labour market participation rates and the nature of non-standard work (Esping-Andersen, 1999). The male breadwinner ideology remains strongly entrenched in the earnings-related social insurance systems of corporatist or conservative welfare states of mainland

Europe and in the family-orientated southern European states, in contrast to social democratic systems, principally the Nordic states, which take active steps to promote female employment through universal childcare and a commitment to equal rights, and liberal market regimes such as the UK and Ireland in which gender roles are not so sharply delineated but governments are more passive in promoting women's work. Whether welfare states contribute to or alleviate the effects of dualisation in the labour market depends partly on the predominant form of benefits and transfers, according to the relative weight of 'universalist' versus 'contributory' and 'selective' elements, and on household structures and the nature of occupational stratification, as well as country-specific legal factors which may encourage the use of particular types of non-standard work (Häusermann and Schwander, 2012).

Despite these wide differences, one common feature stands out: the SER remains the dominant form of the work relationship in European economies. Evidence of a return to forms of autonomous work of the kind which characterised labour markets in pre-capitalist or pre-welfare state societies is weak. The share of self-employment in the UK has doubled since the 1960s and currently constitutes 15 per cent of the total labour force, while recent increases in Eastern Europe have also been pronounced. However, across the EU as a whole there is no clear trend indicating an increase in self-employment, and some member states have seen declines. Outside the southern states, self employment constitutes a small minority of the total labour force, and its incidence is correlated to fluctuations in the economic cycle (Vosko 2010). There are significant variations in country-specific definitions of independent work and the connotations it carries in different contexts. Self-employment is not a homogeneous category: some legal and statistical classifications make a distinction between individualised self-employment, which is often hard to separate from waged work in the degree of economic dependence to which it gives rise, and self-employment in the form of a business through which capital assets are organised and other workers are employed (Burchell, Deakin and Honey, 1999). Much of the recent rise in self-employment in the UK signifies casual and intermittent work at rates of remuneration below those of waged workers, while a significant proportion of those who report self-employment as their main occupational status are also working as employees (Darcy and Gardiner 2014). Thus it is not at all clear that independent or autonomous work is displacing the standard employment contract if that is defined as an arrangement under which labour power or the capacity to work is exchanged for a salary or wage.

A narrower definition of the SER, however, views it as a subset of the employment contract which refers to full-time, indeterminate work on an integrated physical or organisational site; from this perspective, non-standard working arrangements, such as part-time, fixed-term and temporary agency work, are mostly within the broad category of dependent employment, but represent a set of cases under which workers are to a greater or lesser extent detached from the social rights and protections which go with the SER. As we show below, although non-standard work, defined in this way, has been increasing, this growth has occurred in ways which often complement standard employment, rather than substituting for it (Schmid, 2010; Eichhorst and Tobst, 2014; Meardi, 2014). We see this in two main ways. First, non-standard work often helps to bridge the gap between unemployment and standard employment, facilitating access to the SER rather than substituting for it. Second, we see a structural complementarity. This is evident to the extent that the marginalisation associated with non-standard work is often the product of strategies aimed to protect the SER. In addition, the SER continues to be the focal point of reform strategies that attempt to address the problems related to precariousness arising from non-standard work by ‘equalising’ standards of protection by reference to the SER (Deakin, 2013).

### **3.1 Part-time work**

Part-time work is not always associated with precariousness. Nonetheless, part-time work plays a role in reproducing gender segregation and marginalising those with household responsibilities which are hard to balance with full-time work.

Part-time work was already present in most European labour markets in 1980, when it represented just over 16 per cent of employment across the EU. By 2007 it stood at 19 per cent in the EU 27, an increase but not a large one. There is considerable cross-national variation in its incidence. In many countries, the level of part time working has been consistently high, whereas elsewhere increases are more recent. In the Netherlands, part-time work represents around 50 per cent of all employment, having increased by 18 per cent since 2000; in Italy, where the level is only 15 per cent, there has been an increase of 79 per cent increase from 2000 (Stone and Arthurs 2013).

Although male part-time work has been increasing recently, on the whole part-time work remains strongly associated with female labour market participation. It is widespread in the public sector and in occupations previously performed unpaid by women or by non-market forms of enterprise (Berckhout, van den Berg and Hof, 2009; Devine and Waters ,2008)). There has also been an

increase in part-time self-employment for women in some countries. Survey evidence indicates that self-employment and part-time work are seen by women as a means of combining a career with having a family and children, particularly in conservative welfare regimes where traditional gender models are strong (Craig, Powell and Cortis, 2012). However, there is a strong negative correlation between the incidence of full time self-employment and open-ended part-time work. This suggests that the rise in part-time working is not displacing the full-time SER (Schmid, 2010). Considering gender and structural factors together, increases in part-time work can be attributed in several EU member states to women's desire for economic independence, facilitated by state policies including changes to the tax-benefit system and the enactment of work-life balance laws, and by the transformation of formerly unpaid work into market work (Schmid, 2010). Given that transition rates between part-time and full-time work are relatively high, increases in part-time work do not necessarily indicate that the SER is becoming irrelevant, but rather than the SER is becoming more flexible to accommodate female participation in the labour market (Bosch, 2004).

### **3.2 Temporary work**

Temporary work is a broad category that includes both fixed-term and agency work. However, the literature does not always make the distinction clearly. Consequently, it is difficult to discern whether the evidence refers to fixed term work only, or fixed term and agency combined. This is partly due to cross-national variation in terminology. In our discussion of 'temporary work', we do not distinguish between direct temporary employment, and temporary employment through an agency. We refer to 'fixed term' employment to cover temporary employment that does not take effect through an agency. We then deal with the specific situation of 'agency work' separately.

Temporary work increased its share of overall paid employment in the EU from 8.3 per cent to 14.7 per cent between 1987 and 2007, and represents 30 per cent of all new paid jobs created in this period. Over time, involuntary temporary work has become more important (Stone 2013b). Recent data suggest that over 60 per cent of temporary workers in the EU have this status not by choice, but because they could not find permanent employment, with highest proportions of involuntary temporary work in the 15-24 age group (Schmid, 2010). In Spain, over 80 per cent of new hires in the last decade have been in the form of temporary contracts, with Slovenia, Portugal, Poland, Sweden, France, Germany, Finland, Netherlands and Italy presenting similar trends. It is only in Scandinavia and the UK that substantial numbers of temporary workers report that they do not want a permanent contract. This is consistent with studies that have noted that despite widespread use of temporary contracts for low skilled

jobs, in certain countries it is common to see fixed term contracts for managers and other high-skilled professionals, and that where this is the case they offer a significant pay premium over permanent or open-ended contracts.

It is not clear from the evidence that fixed-term work (that is, temporary work not contracted through an agency) plays a counter-cyclical role, absorbing labour in a downturn. While such workers were the first to be laid off in southern European states most affected by the earlier phases of the financial crisis after 2008, this form of employment revived as the effects of the crisis abated, implying pro-cyclical effects (Leschke, 2012). Studies on whether such contracts can act as a stepping-stone into permanent work are ambivalent, with significant cross-country differences and variations by reference to gender, education levels and age (Casale and Perulli, 2013; Kierkegaard, 2014). In Germany, which along with the UK has had a relatively high level of movement from fixed-term work into permanent employment, transitions have nevertheless declined since the 1990s (Eichholt and Tobst, 2014; Casale and Perulli, 2013). There has been a general fall in transitions since 2008, with the chances of finding permanent work below 50 per cent in several countries (Casale and Perulli, 2013).

It is possible that fixed-term work may act as a low-cost alternative to the SER, that is, as a ‘buffer’ which facilitates external or numerical flexibility. Thus there is some evidence that such contracts are used to avoid dismissal costs in countries with stricter employment protection laws (‘EPL’). However, looser EPL is not consistently correlated with more frequent or effective transitions into permanent work (Gash, 2008; Koster and Fleischmann, 2012). Transition rates are low in southern European economies with high levels of EPL but other factors are at play here including social norms underpinning the male breadwinner model and the weakness of active labour market policy measures. Concern over dualisation and segmentation associated with fixed-term work is only in part related to the high levels of employment protection enjoyed by the core workforce; it is also the result of a legal strategy of exempting fixed-term contracts from protections applying to indeterminate employment, which has come to be seen as counter-productive in the sense of reinforcing dualisation of the labour force (Blanchard and Landier, 2002; Cahuc and Postal Vinay, 2002; Garcia-Serrano and Malo, 2013).

There is some evidence that fixed-term contracts act as a screening device for permanent employment. From this perspective fixed-term contracts perform an important role in job matching, and are therefore complementary to the SER, in the sense of facilitating access to, rather than substituting for, the indeterminate employment relationships. Where legally mandated probation periods are shorter than the length of time it takes to assess a worker’s ‘match’ with a job, it



is possible that employers may be using fixed-term contracts to achieve an extended probationary period during which standard employment protections are less extensive (Faccini, 2014).

### **3.3 Agency work**

Agency working, having previously been outlawed or strictly controlled in most EU member states, was well established by the early 2000s, and its development has been further encouraged by the Temporary Agency Work Directive of 2010, which requires a certain degree of liberalisation of the rules around the operation of temporary employment agencies. The formal guarantee of equal treatment contained in the Directive, which was in any case subject to a number of exceptions, is often denied in practice by the complexity of contractual arrangements and the tendency to link employment benefits with seniority. Consequently, agency workers are rarely in positions as advantageous as comparable permanent employees, and employers have a cost advantage in employing them even after taking agency fees into account.

There is a strong gender dimension to agency work, although specific gender distributions are affected by occupational segregation. Where agency work dominates public/private services and retail, women are over-represented. In contrast, in countries where agency work dominates the industrial and manufacturing sectors, it is associated with male labour market participation (Berkhaut, 2013; Voss et al., 2013). However, women are becoming increasingly over-represented in agency work where it is associated with 'marketised' domestic work in the care and service sectors. The gendered division of household labour has thus become reflected in the labour market, reinforcing the tendency for lower wages to be associated with occupations traditionally performed by women in the home (Vosko, 2010).

Studies on temporary agency work show that these contracts can sometimes be important in facilitating the transition from unemployment into waged work in the case of specifically targeted groups. Nonetheless, the specific effect of agency work is more pronounced in relation to those with fewer formal skills or qualifications. The evidence that agency work can facilitate transitions from unemployment to *permanent* employment is more ambiguous. Targeted groups in particular appear to find it difficult to move from agency work into more stable employment, so that agency work often constitutes a dead end (Voss et al., 2013). Few studies look at rates of 'non-transition' or stagnation, thus giving a misleading picture of the effect of temporary and agency contracts. Where temporary agency contracts operate as a 'dead end', their use can exacerbate inequalities, with recent labour market entrants, women and young people facing limited prospects of career progression (Casale and Perulli, 2013).

#### 4. Shifts in the gendered nature of the SER

To the extent that the SER assumed a specific role for men as the breadwinner, and women as the primary performers of household labour, it has been associated with the persistence of gender inequalities in the labour market and at home. Even at its height in the middle decades of the twentieth century, the incidence and nature of the male-breadwinner model varied across countries, and while its effects have been attenuated in most contexts, this process has not been uniform. Broadly speaking, the southern European states, particularly Spain and Italy, continue to adhere strongly to this model; female labour market participation remains low and this is particularly so in the years following childbirth. This trend is accompanied by a strongly gendered conception of social roles which affects the timing of significant life course events and their consequences for labour market participation (Anxo et al., 2011). In liberal welfare states, a higher level of female participation in paid work is nevertheless accompanied by a passive state policy towards gender roles. Full labour market participation is encouraged through work incentives and the operation of the tax benefit system, but public policy does not actively promote or assist a *more equal* household division of labour of the kind which would allow for parity of access to secure jobs. Social democratic systems, and to some extent post-communist countries, more clearly promote a dual breadwinner model, so that in these countries female employment tends to be full-time and there is a greater alignment of male and female household roles, but here too there are limits to the equalisation or interchangeability of gender roles.

Across all systems, as the level of female participation in the labour market has increased, unpaid female working time, that is, female household labour, has fallen, while the duration of unpaid male work has increased. However, this trend has now stalled, with studies showing that women continue to perform most unpaid labour in the home even in social democratic regimes (Crompton et al., 2005). The reduction in female unpaid working time is largely attributable to changing norms around housework, together with developments in convenience foods and technologies which have reduced the level of time consumed in routine domestic tasks, rather than to policy or legal change. The increase in male unpaid labour has been partial and selective, and continues to track patriarchal norms. Thus when unpaid male labour is broken down into routine, non-routine and childcare aspects, increases are attributable to greater performance of non-routine domestic work such as DIY and gardening which fits more squarely with traditional gender norms (Kan et al., 2011). Similarly, increased participation in childcare by men is not mirrored by an increase in male participation in routine housework, so that prevailing attitudes towards 'fatherhood' continue to play a role in determining the nature of male domestic working time (Kitterød and Pettersen, 2006)

Moreover, there is no clear evidence that increases in unpaid male labour correlate with increases in the paid working time of women. On the other hand, women do not decrease their unpaid working time in proportion to increases in their paid working hours. The result of this is a new, gendered, division of leisure time (Anxo et al., 2011). Where women have been able to reduce their hours of unpaid work this is largely as a result of public childcare provision. This helps to explain why countries such as Norway, Denmark and Sweden, with widespread and generous public childcare provision, have seen a more substantial reduction in unpaid domestic work by women than other systems. This development is related to a higher overall level of female full time employment (Steiber and Haas, 2012).

There is a clear association between participation in non-standard work and longer overall working time, taking unpaid household labour into account (Craig and Powell, 2011). This trend however, appears to impact unequally across genders. Where men work nonstandard hours, there is a tendency for women to adjust their working routines to accommodate this, and thereby to increase their unpaid labour. Where women work nonstandard working hours, on the other hand, there is a more limited impact on men's unpaid work. This is especially the case in societies which tolerate or encourage a long-hours culture for traditionally 'male' full-time jobs. In contrast to the male experience, nonstandard hours for women act as a mechanism to enable women to 'fit' work around their household duties (Kitterød and Pettersen, 2006). Consequently, while nonstandard working arrangements facilitate labour market participation by women, they may also act to intensify the sex-based segregation of household labour, together with occupational segregation in the labour market. Occupational segregation in the labour market continues to be one of the prime sources of gender inequality because it enables 'formal equality' (often a result of a first wave of equal pay and sex discrimination legislation) to be obscured by the systematic undervaluing of certain skills and professions. This may be the combined result of gendered conceptions of 'women's work' and of the female dominance of professions which are by their nature more accommodating of responsibilities outside work.

This gendered division of household labour appears to persist regardless of regime type. Social democratic states are closest to establishing a dual breadwinner model. Women in Scandinavian countries have achieved high levels of full-time work. This is the result of generous public childcare, progressive gender ideologies reflected in public policy, and the decoupling of taxation and benefits from employment status. However, egalitarian values and specifically tailored benefits and services, while positively affecting labour market participation by women, have a limited impact on the domestic division of labour. Thus the unequal division of labour exists even in the social

democratic and post-communist states where female labour market participation is high and gender equality is an embedded feature of public policy (Crompton, Brockmann and Lyonette, 2005). Evidence from Nordic systems also suggests that women continue to suffer discrimination in the labour market through informal practices which are not well captured by macro-level data (Korvajärvi, 2014).

In the southern European states, women face greater structural obstacles in balancing paid work with the social norms derived from a strong conception of 'motherhood'. In Italy and Spain there are few policies which actively promote gender equality or facilitate the balancing of family responsibilities with paid work. From a comparative perspective, the result of this is that whereas in social democratic, corporatist and liberal welfare state regimes women tend to reduce their hours of paid working time to accommodate parenthood, in the southern European states they are more likely to withdraw from the labour market completely (Anxo 2011). In these countries women find it difficult to access the 'good jobs' associated with the SER on their return to work. The lack of part-time work further limits women's choices. The consequence is that the gendered segregation of occupations is reinforced.

In conservative and corporatist welfare states which maintain a strong version of the male breadwinner norm thanks to its association with the contributory principle in social insurance, nonstandard work enables women to reconcile the demands competing demands of domestic and paid labour. Where women are unable to return to permanent work after having a child, non-standard contracts may be the only route back into employment. These contracts are, however, associated with lower pay, low-skill, and greater volatility, and their concentration in particular segments reinforces the idea that 'female occupations' do not attract a living wage. Thus the gendered division of domestic labour and occupational stratification are mutually reinforcing (Schmid, 2010),

Specific policy initiatives which have attempted to improve female labour market participation in social democratic and corporatist welfare states have sometimes ended up reinforcing gender divisions in new forms. Thus policies aimed at equalising access to higher education and employment have focused on making education and work attractive to women. This has been achieved by the active promotion of the humanities at the expense of maths and technology, and by the introduction of new subjects, home economics and domestic science, that have given rise to a gendered skill bias in the labour market. This has then translated into an over representation of women in the service sector, which has served to confirm and reproduce gendered norms, and maintain occupational segregation (Charles, 2011).

As mentioned above, the problem of occupational segregation continues to have a significant impact on reinforcing gendered divisions in all systems. Even in the Nordic states, 'female' and 'male' jobs are associated with distinct workplace cultures (Kitterød and Rønsen, 2012). Employment in the public sector, particularly in education and healthcare, tends to entail more flexible and shorter working hours. In contrast, male-dominated occupations in the private sector, such as finance and manufacturing, have become associated with inflexible, intensive working hours arrangements, in particular in liberal welfare states which lack effective working time controls for full-time employment. This re-embedding of occupational segregation reinforces gender roles in the household: couples are unable to adjust their division of labour not only because of social norms but because of institutional constraints on male working time. Thus, it is clear that the SER is one of a number of factors that continue to contribute to gender inequalities in society. But to overcome these issues there are a number of barriers, unrelated to the SER, that need to be addressed..

## **5. Reversing the trend**

The rise of non-standard work is not entirely driven by social and technological factors external to the legal system; to a certain extent it is a response to developments within the law and the wider framework of labour market regulation. Thus the tendency for the legal system to define the SER as the focal point for social insurance and employment protection creates pressure for the law to recognise, in turn, the distinct features of forms of which do not correspond to this model (Rogowski, 2013). The stricter the degree of protection for core workers, the more likely it is that part-time work, fixed-term employment and agency work will come to be acknowledged as categories in their own right and regulated as such (Schömann, Rogowski and Kruppe, 1998). Legal analysis of non-standard work began in the early 1980s by recognising that employment protection rules implicitly excluded certain forms of employment, such as part-time work, from the scope of regulation. From around this time the first laws were passed in mainland European countries mandating a degree of equal treatment for atypical workers by reference to those in standard employment. In due course this distinct form of legal recognition for non-standard work was reflected in international labour standards, including the European Directives governing part-time work (1997), fixed-term employment (1999) and agency work (2010).

Since that time, it is possible to identify three types of institutional strategies (which may overlap in the context of particular laws or measures) that have been adopted as ways of addressing the rise of precarious work and its link to inequality and segmentation in labour markets (Deakin, 2013, 2014a; De Stefano, 2014). The first is to extend the coverage of the contract of employment or other legal form of the SER so that it embraces more of the non-standard forms; the second is to align the rules governing the SER with those applying to non-standard work; and the third is to use complementary mechanisms, including collective bargaining and active labour market policy, to normalise and regulate non-standard work. These strategies all involve some degree of liberalisation or deregulation of the core of labour law rules applying to the SER, but in each case deregulation is best understood as ‘the regulation of self-regulation’ (Rogowski, 2013), that is, as a ‘reflexive’ mechanism for devolving rule-making power within a polycentric organisation of governance arrangements, rather than signifying a simple return to private law.

### **5.1 Extending the scope of the SER**

The legal tests for identifying ‘dependent’ or ‘subordinate’ working relationships, which are the focus of protective legislation, are sufficiently flexible in all systems to encompass employment forms which depart from the traditional model of industrial labour in a single physical site organised along hierarchical or bureaucratic lines. Thus in English law the test of ‘personal’ subordination long ago – in the 1950s – evolved to the point of accepting that professionals and managers whose working processes are characterised by a high level of autonomy can be classed as employees (Deakin, 1998). Casual and intermittent work poses a distinct set of problems. Employment protection laws presuppose a certain level of regularity of work in order for notions of job and income security to be operationalised. Thus the passage of unfair dismissal laws tends to induce within a short space of time a legal debate about the application of employment protection standards to casual employment forms, which runs the risk of creating a type of legally induced dualism or segmentation in the labour market (Rogowski, 2013).

Legal systems have responded in various ways to this risk. One route is to adopt looser criteria for identifying subordination, so as to bring within the scope of protection relationships characterised by a high degree of economic, as opposed to personal, dependence. This is characteristic of the French approach to defining the ‘salaried’ status associated with the contract of employment (*contrat de travail*) and which is the gateway to most employment rights. The French courts have taken an expansive and purposive approach to the issue of the personal scope of protective legislation since the 1980s, and this process has been aided by statutory reforms which shift the burden of proof on to the

employer in the 'grey zone' between the categories of employee and self-employed (Freedland and Kountouris, 2011). This strategy has maintained a degree of legal coherence in the application of protective labour standards but has led to concerns that freelance and other independent workers are being misclassified and to extensive litigation on this point.

A different model operates in those systems which have developed new definitional categories, beyond the traditional 'employee', to which only certain core social rights apply. The logic of this approach is that norms which do not require a stable employment relationship, such as the right to the minimum wage, where this is described in terms of an hourly rate of pay, or the right not to be discriminated against in employment or at the point of recruitment, can be applied to certain 'quasi-dependent' workers, leaving employment protection rights exclusively to the domain of the 'employee'. In Britain this takes the form of the non-employee 'worker' category (Burchell, Deakin and Honey, 1999), in Spain the 'autonomously economically dependent worker' and in Italy the concept of 'parasubordination' (Freedland and Kountouris, 2011).

The problem with this approach is that achieves a degree of integration for those in non-standard work, but runs the risk of creating new forms of dualism and division, with the boundary between protected and unprotected forms of work reappearing in a new form. In Italy this has recently led to a reappraisal of the category of 'parasubordinate' workers and a renewed emphasis on the standard contract of employment as the juridical basis of protective labour law (Freedland and Kountouris, 2011). In Britain the operation of the 'worker' concept has not been consistently successful in bringing casual and intermittent work within the scope of minimum wage and working time protection, in part because more traditional legal tests have reappeared in a modified form, and courts have taken a formalistic approach to interpretation which has allowed employers to use contractual boilerplate to deflect the application of protective labour standards (Deakin, 2003). Coupled with the absence of a general labour inspectorate in Britain, this haphazard approach to the enforcement of labour law is in part responsible for the failure of legislation to protect workers in casualised and low-paying occupations (Pollert, 2005).

A related legal technique is to reallocate contractual arrangements which contain one or more nonstandard elements to a juridical category associated with the SER. Thus the ending of a fixed-term contract of employment, which in private law terms would normally be described as a consensual act, can be characterised in labour law as a dismissal effected by the employer's failure to renew the contract in the same terms (Koukiadaki, 2009). Similarly, a temporary contract can be deemed to be open-ended or indeterminate, after a certain passage of time has elapsed. These are techniques first developed at

country level and later incorporated into the Fixed Term Employment Directive. Similarly, a temporary agency contract is a complex multi-party arrangement which, from an analytical perspective, does not resemble a standard contract between an employee and single, clearly defined employer. However, juridical techniques have been developed for allocating the 'risk' and 'coordination' functions normally combined in the legal person of the single employer to the agency and hirer of work respectively. A related technique is to assign liability to multiple employers in a vertical chain of supply, in order to mitigate the cost advantages employers may gain from outsourcing or subcontracting (Deakin, 2003). In these instances, the legal form of the SER is not in itself a barrier to the extension of core labour law protections to nonstandard forms of work. Government policies of promoting labour 'flexibility', and employer lobbying of the kind which led to the dilution of the Temporary Agency Work Directive (Countouris and Horton, 2009), are more plausible explanations for the persistence of legal dualism in the treatment of these employment forms.

Institutional inertia may also play a part in the fragmentation of labour law protections. Wage and hours thresholds, which exclude part-time and intermittent work from certain statutory protections, were in some cases removed in the 1990s as a result of the intervention of European court judgments and directives, but they remain in place in certain parts of employment law. Thus the main factor excluding very precarious and intermittent forms of work, such as zero hours contracts, from legal protection in Britain, is not the requirement of employee or worker status as such, but the application of statutory rules which treat a break in service as cancelling out accrued seniority rights ('continuity of employment'). Since there are minimum qualifying periods in Britain even for such basic entitlements as the right to a written statement of contract terms and conditions, zero hours contract workers who are employed for brief spells of time tend to have few social rights even when they are classed as employees (Adams and Deakin, 2014a).

The continuation of wage and hours thresholds in social security and tax law also reinforces dualism. This is not an inevitable consequence of using the SER as a focal point for protection, but a conscious policy choice driven by neoliberal agenda of suppressing real wages and reducing the influence of collective bargaining over pay. Subsidising low paid and casual employment through the tax system, or 'fiscalisation' (Deakin, 2013a), has been widely used in liberal welfare states, in particular the UK and USA, since the 1980s. Tax credits are used to reduce employers' direct labour costs while ensuring that households continue to receive a subsistence income where, thanks to deregulation of the minimum wage and collective bargaining, there is no longer an effective statutory or contractual floor of rights to wages. Tax subsidies of this kind are mostly targeted on to full-time workers as a means of underpinning



the household income of the main (generally male) earner, thereby mitigating the cost to employers of paying a ‘breadwinner’ wage. Conversely, secondary (generally female) earners may be encouraged to take up low-paid and intermittent work below the level of weekly hours or wage thresholds which determine liability to pay social security contributions. Here the absence of social security taxation operates as an implicit subsidy to very low paid employment. Thus in both cases it is the preservation of wage and hour thresholds as a deliberate policy choice, associated with a neoliberal policy agenda, and not an inherent feature of the SER model, which serves to segment the labour force.

Although fiscalisation began in liberal welfare states, it is becoming more widespread, and was used in Germany to underpin the ‘mini jobs’ experiment of the Hartz IV reforms (2004), a regime of ‘sanction and support’ workfare policies which brought about significant changes to the social security entitlements of the unemployed. In both Britain and Germany, while fiscal mechanisms have been credited with raising the employment rate and with facilitating individual transitions from unemployment into waged work, they have created new forms of dualism and casualisation. High marginal tax rates associated with moving up the wage scale and beyond the range of subsidised employment operate as an ‘income trap’ for workers and households. At the same time, standard employment contracts may be displaced by short-term and part-time jobs. Hence in Germany one effect of the mini-jobs reform has been to casualise the terms and conditions of main (mostly male) earners in low paying occupations. It has had limited success in improving employment transitions for the unemployed (Steiner and Wrohlich, 2005; Bosch and Weinkopf, 2008; Caliendo and Wrohlich, 2010).

## **5.2 Equalising the SER and non-standard work**

A second and analytically distinct technique is to accept the legitimacy of non-standard and precarious forms of work, and their distinct legal status, separate from the SER, while mandating a limited right to equality of treatment for non-standard workers. Since the SER is used as a benchmark these laws are, paradoxically, ‘SER-centric’, so that in the process of recognising nonstandard employment they are also reinforcing the role of the SER as a focal point of labour regulation (Vosko, 2010).

The three EU directives on non-standard work provide the principal illustration of this approach, building on earlier national models. In each case the directive calls on member states to remove constraints on the take-up of non-standard work, such as the formal restrictions on the use of temporary agency work which operated in southern European and, to a lesser extent, ‘corporatist’

systems up to the 1990s. This liberalisation or removal of such laws, with its de-privileging of the SER, is coupled with a qualified right to equal treatment. The entitlement is in each case qualified since it stops short of a right to transfer from nonstandard work into the SER, although the right to transition in the other direction, from the SER to, for example, part-time work, receives clearer legal support.

The inclusion of the right to equal treatment in the directives, notwithstanding its limitations, was an important step in a shift of attitudes to non-standard work. Up to the mid-1990s, member states, particularly in southern Europe, were actively creating exceptions to the SER, in particular through the use of derogations for various types of fixed-term employment, which were explicitly designed to create an under-protected category of work contracts, which would encourage hiring by employers. In the course of the 2000s this trend was reassessed, on the grounds that under-protected forms of fixed term employment contribute to dualism, without bringing significant cost advantages to employers (Garcia-Serrano and Malo, 2013). Over-use of fixed term and temporary agency work is correlated with reduced productivity and innovation at firm level (Zhou, Decker and Kleinknecht, 2011).

Using the equalisation method to address the risk of segmentation has its limits, however. It can cut both ways: raising the condition of nonstandard workers is one option, but reducing the level of protection associated with the SER is another. In liberal welfare states where the SER is not as strongly entrenched through law, it is a more straightforward matter to align unfair dismissal and redundancy protections for fixed-term contract workers and those with indeterminate employment contracts. Thus the British implementation of the Fixed Term Employment Directive was relatively unproblematic. The outcome is, however, that while fixed-term contract workers now enjoy broadly similar protection to those employed indefinitely (Koukiadaki, 2009, neither group enjoys the level of security of tenure which is characteristic of core employees in continental systems.

More recently, dualism in employment law has had a policy revival in the context of the conditions imposed on EU member states in the south of Europe affected by the eurozone crisis, in return for financial assistance. Loosening protections for part-time work, fixed-term employment and agency work has been a consistent feature of the memoranda of understanding agreed between member states and the Troika of the IMF, European Commission and European Central Bank (Koukiadaki and Kretsos, 2012). The policy logic of this position is hard to discern in the light of the equivocal evidence on transitions from nonstandard work into regular employment and the threat of labour market segmentation deriving from such measures; it may reflect little more than

institutional rigidities associated with the defective design of European economic and monetary union and the persistence of a long-standing IMF policy of tying debt relief to ‘structural reforms’ (Adams and Deakin, 2014b; Greer, 2014).

### **5.3 Complementary mechanisms for mitigating dualism: social dialogue, corporate governance, active labour market policy and work-life balance laws**

The most successful strategies for addressing segmentation are those which take an integrated policy approach and use a series of linked regulatory mechanisms to normalise non-standard work. The literature on transitional labour markets (TLM) has advocated this approach since the mid-1990s (Schmid, 1994; Rogowski and Schmid, 1998) and in so far as the EU’s support for a ‘flexicurity’ model of labour market regulation (Commission, 2006) has an empirical foundation it rests on evidence that this type of policy coordination can achieve successful outcomes (Schmid and Gazier, 2002). Although the flexicurity approach is open to criticism as drawing unduly generalised conclusions from the successes of countries whose experience may not be typical, there is scope for experimentation around this model and evidence that it can be translated across different regime types (Rogowski, 2013). Notwithstanding the role of interest groups in resisting institutional change (Thelen, 2012), it is too soon to write off the possibilities of transnational policy learning

The case of the Netherlands highlights the role that a conscious policy switch can play in altering the profile of nonstandard work and its relationship to the SER. In the 1980s, growth in part-time work and agency work was associated with firms seeking to avoid the consequences of the strict law on redundancies which required administrative permission to be obtained before an economic dismissal could be legally valid. In the 1990s the law requiring administrative approval for redundancies was repealed while, at the same time, hours and wage thresholds affecting part-time work were abolished, and social dialogue over the use of nonstandard forms of work was promoted by government. A right to flexible work was introduced which went further than the provisions of the EU directive in providing for transitions from part-time work to the SER, and not just in the other direction. These reforms are seen as regularising part-time work but at the same time reducing its status as a secondary form of labour market participation (Visser and Hermerijk, 1997; Auer and Gazier, 2002).

Work-life balance laws have played a significant role in normalising non-standard work. Enabling workers to balance family responsibilities with work should mean that the pressure to accept lower quality jobs due to a need for

flexibility in working time arrangements is reduced. In Denmark, paid leave laws have been used to encourage a more equal division of labour in the household and also to facilitate transitions, from full-time employment to unpaid family work on the one hand, and from unemployment into waged work on the other. These measures covered a wide range of family situations and life course choices including child-care, educational leave and sabbaticals. The laws underpinning them provide for modification and implementation of schemes through workplace negotiation. A further feature of these schemes is the use of temporary leave schemes to provide placements into waged work for the unemployed (Pfau-Effinger, 1998).

Work-sharing arrangements involving novel corporate governance structures are a related feature of integrated strategies. In France, Belgium and the Netherlands these take the forms of innovative types of social enterprise which organise labour pools for workers alongside an element of mutual insurance. They differ from for-profit employment agencies or businesses in providing for income sharing and risk pooling between workers who are the residual owners of the enterprise. They operate by allocating workers to a network of users and clients often in a particular region or industrial sector, and also provide training and occupational development services (Rogowski, 2013).

The linking of active labour market policy to vocational training laws and active labour market policy is a further feature of recent policy innovations. In Germany, reform of vocational training has been accompanied by the use of tax credits and social insurance system to finance lifelong learning and continuous retraining. In Germany and the Netherlands policy learning has been assisted by the involvement of the social partners in the administration of training and active labour market policy interventions alongside negotiations over the use of nonstandard work (Visser and Hemerijk, 1997).

In each of these cases, the strategy of defending the SER against possible substitution effects deriving from the growth of non-standard work has given way to a strategy of accepting a more diverse range of employment forms while using a variety of mechanisms to regulate and normalise them. There has been some deregulation of employment protection laws, but where this has occurred statutory regulation has been replaced by social dialogue and targeted interventions of active labour market policy and the tax-benefit system, and not by a straightforward return to private law. Although the absence of a legal right to job security in some of the Nordic systems has been cited as a reason for their success in balancing employment with social cohesion (Commission, 2006), this is an over-formal interpretation of the role of EPL. Thus in Denmark, although there is an absence of statutory dismissal protection along the lines found in most other EU countries, a functional equivalent exists in the form of a

national collective agreement which imposes strong de facto constraints on employment terminations, while multi-employer collective bargaining sets a strong de facto wage floor (McLaughlin, 2009). Other Nordic systems have statutory unfair dismissal regimes which do not appear to be below the EU average in terms of strictness (Deakin, Malmberg and Sarkar, 2014). There seems to be no basis for concluding from the northern European experience that employment transitions are most effectively managed in the absence of job security norms of the kind associated with the SER.

More generally, the lesson to draw from policy experimentation within European countries is that reform strategies need to move away from a focus on the supposedly dualistic effects of EPL. The assumption behind ‘single employment contract’ initiatives in Italy (Boeri and Garibaldi, 2002; Casale and Perulli, 2013) and France (Cahuc and Kramarz, 2004) is that legal classifications associated with EPL are the principal cause of labour market segmentation. But many of the legal categorisations currently found in European systems simply reflect factors endogenous to the operation of the labour market, in particular employer strategies (Deakin, 2013b; De Stefano, 2014). ‘Single contract’ initiatives mostly entail simple deregulation of the unfair dismissal rules affecting the SER, making the conditions of core workers much less secure, with no compensating benefits for those in temporary work (De Stefano, 2014). Although all reforms encounter problems of translating policy into practice and resistance from entrenched interests (Thelen, 2012), the most successful appear to be those which couple some liberalisation of EPL with an extension of alternative regulatory mechanisms, including collective bargaining, in an attempt limit the effects of insecurity on all work categories (Voss et al., 2013; Rogowski, 2013).

## **6. Conclusion**

Are the decline of the standard employment relationship (‘SER’) and its displacement by precarious work inevitable features of industrial capitalism? This seems unlikely. There have been extended periods in the recent past when employment was becoming more stable and inequalities in earnings and life experiences were being reduced. Nor is there any reason to believe in a structural force within capitalism which prevents labour market regulation from operating. The historical evidence is entirely otherwise: a legal system is needed to make the labour market work, and the techniques used to actualise this process, encapsulated in the discipline and methodology of labour law, involve a role for fairness norms as well as mechanisms for coordination of exchange.

The loss of the original conditions associated with the emergence of SER, which included the rise of vertically integrated enterprise and the associated emergence of industrial unionism in the last decades of the nineteenth century and the early ones of the twentieth, have undoubtedly undermined its effectiveness as a focal point for labour market regulation. To assume, however, that the SER is in irreversible decline, is to neglect the possibility of its adjustment to changing conditions. Furthermore, it is to ignore the fact that increases in non-standard work, and the recognition of non-standard employment forms as distinct legal categories, often end up reinforcing the SER. The link between nonstandard work and precariousness cannot be divorced from specific policy decisions that can be reversed, and is not an *inevitable* feature of a labour market in which nonstandard working arrangements and the SER can co-exist.

The SER has already evolved to the point where it has lost its historic association with factory-based technologies of production. In the transition from state-centred governance to a polycentric regime of transnational labour regulation, the SER continues to be a reference point for policy learning and innovation in institutional design. The SER has a complex relationship to gender inequality and social stratification. Although class and gender are no longer formal signifiers of protected status as they were in European legal systems up the middle decades of the twentieth century, the operation of SER continues to reproduce inequalities of various kinds in the organisation of the division of labour. But it is only one of a number of institutions which today act as a barrier to addressing these inequalities, and while the search for enduring solutions continues, this is nothing new.

Today, the SER is opposed, as in the past, by a millenarian critique of capitalism which sees evolved institutions as an impediment to social progress. Meanwhile a resurgent neoliberalism seeks to recreate a scaled-down version of a market state which never actually existed. Yet the destructive tendencies of global capitalism and the continuous threat of a race to the bottom make the traditional functions of the SER, fairness and coordination, more important than ever. The SER offers a contingent and imperfect response to the problems posed by industrial society. The adaptive capacity of the legal system and the evolutionary potential of juridical forms associated with the SER suggest, however, that it is more likely to be part of the answers to these problems, than an obstacle to their resolution.

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