THE MANY FUTURES OF THE CONTRACT OF EMPLOYMENT

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Abstract:
The contract of employment heads the list of those labour market institutions whose continued usefulness is called into question by what appear to be fundamental changes in the world of work. However, given the multiple tasks of classification, regulation and redistribution which it has historically been called on to perform, it is the durability of the contract of employment, rather than its supposed ineffectiveness, which requires explanation. From an evolutionary perspective, the employment contract is best understood as a governance mechanism which links together work organisation with labour supply in such a way as to make it possible to manage long-term economic risks. The paper sets out a number of possible futures for the employment contract as a mechanism for risk management, and identifies 'mutations' within the conceptual framework of employment law which suggest possible directions of change.

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1. Introduction

'Myth'; 'figment'; 'riddle'; source of conceptual 'anarchy' and 'crisis'; producer of 'artificial and unpersuasive doctrinal explanations'; 'indeterminate' and 'dysfunctional' in its effects: all these things and worse have been said of that 'fundamental legal institution of Labour Law', the contract of employment.[2] British labour lawyers, in particular, have maintained a 'sceptical discourse' (Freedland, 1995: 19) on the matter more or less continuously since the early 1950s.[3] More recently, social scientists have added their voices to the chorus of discontent. The contract of employment, or its close equivalent the 'standard employment relationship',[4] heads the list of those labour market institutions whose continued usefulness is called into question by what appear to be fundamental changes in the world of work. Vertical disintegration of production, the decline of the 'male breadwinner' family, the ending of 'full employment' as a goal of government policy, and the rise of global regulatory competition, are, it seems, combining to undermine the value of the open-ended employment relationship in which 'subordination' is traded off in return for security. The conceptual inadequacies identified by legal scholars are, perhaps, merely symptoms of a deeper malaise, a basic lack of fit between the techniques of courts and legislators, on the one hand, and the changing reality of employment relations on the other.

Amidst the clamour for a new conceptual framework which accompanies calls for reform from all sides of the policy debate, it is easy to forget that the contract of employment has been 'a remarkable social and economic institution, as important as the invention of limited liability for companies' (Marsden, 1999a: 20). The flexibility inherent in the idea of a 'managerial prerogative' or 'authority relation' was an important source of savings on transaction costs in large, vertically integrated organisations (Coase, 1937). Equally

important was the implicit promise of economic security which the employee received in return for becoming subject to the bureaucratic power of the enterprise (Simon, 1951). This was never a cost borne completely or even principally by individual employers. In most systems, the state became the implicit third party to the contract, channelling the risks of insecurity throughout the workforce as a whole through the social insurance system, and using social security contributions and income taxation to support the public provision of welfare services. The complex interaction of these different governance mechanisms was reflected in the juridical form of the contract of employment. Given the multiple tasks of classification, regulation and redistribution which it was called on to perform, it is perhaps the durability of the contract of employment, rather than its supposed ineffectiveness, which requires explanation.

Part of the explanation may lie in the *evolutionary* character of the contract of employment, that is to say, its capacity for adaptation in the face of changes in economic relations and political imperatives. The contract of employment, as know it today, is a very *recent* innovation.[5] The concepts used by nineteenth century judges and legislators to describe employment relationships – independent contractor, casual worker, servant, labourer, workman – do not map neatly on to 'binary divide'[6] between employees and the self-employed which we are familiar with today. As section 2 below explains, that distinction took the whole of the first half of the twentieth century to emerge, and was only clearly established in national insurance legislation of the 1940s. It was also only in the 1940s that, in Britain at least, intermediate forms of labour subcontracting finally faded away in major industries such as coal and steel. The contract of employment was the result of these parallel processes, in the political and economic spheres, which at this time tended towards the standardisation and stabilisation of the employment relationship.

Understanding the evolutionary processes at work in forming the modern-day contract of employment helps us to see precisely why it

is that the unravelling of the post-war consensus, in politics as in the workplace, has placed the standard model under strain. The re-appearance of subcontracting and outsourcing, now strongly encouraged by the state through measures aimed at extending 'market testing' to previously integrated organisations, is one of the factors which removes the ability of employers to make credible promises of long-term employment. To the extent that short-term and part-time employment become more widespread, the employment relationship becomes less suitable as a vehicle for sharing and redistributing risks among the working population. The idea of a 'breadwinner' wage becomes inappropriate when traditional relations of inter-dependence and division of labour within the family are breaking down. Finally, with globalisation occurring on terms which favour the mobility of capital over that of labour, the state appears to be confined to offering its citizens 'competitiveness' as a proxy for the 'security' which they previously enjoyed, in the hope that footloose capital can thereby be persuaded to stay put.

These developments may give us reason to believe that the employment contract is unlikely to continue indefinitely in its current form. However, it does not follow that the employment contract has no future. The employment contract is best understood as a governance mechanism which links together work organisation with labour supply in such a way as to make it possible to manage long-term economic risks. This highly useful function will be no less useful as a result of the developments referred to above. Viewed in this way, it is possible to envisage a number of different futures for the employment contract,[7] according to the way in these risks are regulated and distributed. It is also possible to identify movements within existing labour law systems, 'mutations' within the conceptual framework of employment law, which suggest possible directions of future change. Some of these tendencies are mapped out in section 3.

2. The contract of employment as an emergent institution

Alain Supiot has described the nature of the employmentrelationship which emerged out of the growth of the welfare state in the following terms:

> 'Under the model of the welfare state, the work relationship became the site on which a fundamental trade-off between economic dependence and social protection took place. While it was of course the case that the employee was subjected to the power of another, it was understood that, in return, there was a guarantee of the basic conditions for participation in society. It is the very foundations of this compact which are now being called into question: economic pressures are stronger than ever (both for those who are in work and for those who are not), but they are no longer compensated for by security of existence' (Supiot, 1999: 8).

Supiot describes here a societal 'contract of employment' whose effects were felt far beyond the immediate parties to the individual employment relationship. The 'trade-offs' involved were extensive and complex. On the one hand, there was the norm of 'subordination', which reserved for the employer a space for discretion in decision-making, beyond any express agreement for the performance of the contract. In common law systems the juridical form of this idea can be found in the 'master-servant' model which reached its height in the mid-nineteenth century while in civilian systems, during the same period, the employer's unilateral powers were grafted on to the traditional concept of the contract of hire (Veneziani, 1986).

In time, the employer's right to give orders became rationalised, in the English common law and in systems closely influenced by it, as an implied contract term, so cloaking managerial prerogative in contractual form. However, this was a twentieth century development which occurred only some time after the point (in the 1870s) at which criminal sanctions for breach of the contract of service were repealed.

It is highly doubtful that nineteenth-century judges regarded the source of the employer's unilateral power as contractual, at least in the sense that it is now understood.[8]

The 'contractualisation' of the employment relationship was associated with the gradual spread of social legislation in the fields of workmen's compensation, social insurance and employment protection. The terms 'contract of employment' and 'employee' came into general use as a description of wage-dependent labour only as a result of this process. Contractualisation had two central aspects: the placing of limits on the employer's legal powers of command, limits which were given a contractual form as either express or implied terms; and the use of the employment relationship as a vehicle for channelling and redistributing social and economic risks, through the imposition on employers of obligations of revenue collection, and compensation for interruptions to earnings.

As we have seen, for many labour lawyers, particularly those influenced by a public law viewpoint, the common law courts' characterisation of the employment relationship as contractual has always struck a false note. However, the model of the open-ended or indeterminate employment contract, based on reciprocal commitments of loyalty and security and lodged within a dense network of organisational and societal rules, is in many ways the paradigm case of what Ian Macneil has termed a 'relational' contract. Here, the 'classical' contract law of discrete market exchange gives way to a model in which exchange is governed by the 'political and social processes of the relation, internal and external', so that the relation becomes situated within 'a mini-society with a vast array of norms centred on exchange and its immediate processes' (Macneil, 1974: 801).

Macneil's idea of the relational contract was taken up in the 1970s and 1980s by the proponents of 'new institutional economics' in a way which may not have been particularly faithful to his essentially inductive and taxonomical methodology, but which nevertheless

initiated an important debate on the comparative efficiency properties of different types of contractual form. Oliver Williamson's influential arguments synthesised elements from the earlier contributions of R.H. Coase (1937) and Herbert Simon (1951). Coase argued that where long-term, repeated exchange was conducted under the 'authority relation' of the firm, it was possible to save on the search and information costs which would arise under conditions of decentralised market trading, although he also acknowledged that there was an important role for contract in setting the limits of managerial power. Simon suggested, conversely, that certain features of the employment relationship in large organisations, such as regular, salaried income and career progression, could be seen as the employee's quid pro quo for agreeing to be subject to the employer's instructions. In bringing these ideas together, Williamson and his co-authors (see Williamson, Wachter and Harris, 1975; Williamson, 1985: ch. 9) were able to offer an explanation both for the pattern of vertical integration and for the spread of institutions of collective employee representation, which were seen as serving to minimise the danger, from the employee's point of view, of employer 'opportunism' during the performance stage of the contract.

The approach of new institutional economics is explicitly functionalist in the sense that it involves an attempt to explain the emergence and persistence of institutions in terms of their adaptiveness to particular environmental conditions. On this basis, the contract of employment may be said to be an 'efficient' response to the particular conditions of contracting in the modern, vertically integrated enterprise. It is not necessary to believe that managers take decisions concerning the size of the firm on the basis of a precise calculation of the costs and benefits of integration, nor that workers decide on which employment packages to accept after weighing up the trade-offs involved over many years or even decades. Individual managers and workers may well make calculations of this kind, but, given the long-term nature of the exchange relationships which are involved and the pervasive uncertainty which is present in such relationships, it is unlikely that they provide a reliable basis for

forming a judgment of the efficiency properties of particular contractual forms. It is more plausible to suggest, instead, that an evolutionary process is at work, under which institutions and forms are selected through mechanisms which are the outcome of the sum total of decisions of individual actors, but which are not directly susceptible to manipulation by any one actor or group of actors.

New institutional economics sees institutions as emerging through a process of competitive selection and deselection: as forms are thrown into competition with one another, the more efficient (in the sense of adaptive) will win out. The most extreme forms of this idea associate adaptiveness with optimality. While individual deviations from optimal forms of organisation are possible, 'over tens of years and thousands of firms' those forms which survive best under the pressure of competition will outlast their rivals (Easterbrook and Fischel, 1991: 6). Adherents of this approach often end up asserting that the rules which we observe, if they are of long standing, must have 'survival value' and therefore must be efficient. This is an argument made, for example, in relation to the doctrine of employment at will (see Epstein, 1984; Rock and Wachter, 1996) and deployed, in the context of American debates, for the purpose of denying any role for legal regulation of the employer's contractual power of dismissal. The claim that employment at will has survival value omits to consider why it might be that this particular juridical form is almost completely unique to the United States – just about every other developed system of labour law has some version of unjust dismissal legislation. It would seem that the conditions for its 'survival' are, at best, highly system-specific, and far from generalisable.

A comparative and historical perspective would immediately suggest an alternative point of view to the strongly functionalist one just outlined. This is that even over long periods of time and with large populations of actors, the pattern of institutional change is not the linear process of adjustment postulated by the accounts of mainstream law and economics analyses: rather, it is historically-contingent, context-specific and cumulative. Among the processes which account

for the emergence of institutions are mechanisms of social learning and cultural transmission. While competition may also have a role in rooting out less useful practices, its effects depend on, and are mediated through, the institutional framework provided by social and legal norms.

The evolution of rules of the workplace can be analysed from this point of view. David Marsden (1999a, 1999b) has suggested that as vertical integration replaced sub-contracting as the predominant form of economic organisation, a process which began in the final quarter of the nineteenth century and was still going on at the mid point of the twentieth century, workplace rules emerged to deal with the problem of how to specify the limits to managerial prerogative within the context of the open-ended employment relationship. These rules can be seen as a response to the dangers of employer opportunism which arose with the end of the subcontracting system, and the removal of many traditional forms of workers' control over the pace and organisation of work. Under these circumstances, 'for workers who distrusted the intentions of particular employers, an open-ended contract would have seemed a recipe for exploitation: and so it only became acceptable as various protections were incorporated into it' (Marsden, 1999a: 21: see also Saglio, 2000). The solutions found – such as the categorisation of grades according to work tasks, craft skills, professional qualifications and, more recently, flexible job functions – were context-specific in the sense that they differed according to the degree to which work in different countries and industries was organised along the lines of 'occupational' or craft labour markets or according to bureaucratic or enterprise-based systems of control. The process was also both contingent and cumulative, in the sense that existing rules and practices were put to new purposes. Hence, in the cumulative manner of 'path-dependent' evolution, rules which had initially been deployed for the purposes of management, such as job classification rules, were then used by unions to defend established working patterns, since 'defining people's jobs also makes clear the limits on their obligations' (Marsden, 1999a: 22). Later, job evaluation systems, another

invention designed to help management, were adapted in a similar fashion to provide the basis for claims to equal pay between male and female workers.

Product-market competition, eliminating less efficient forms of workplace organisation, may well have been one of thefactors which precipitated the decline of subcontracting forms of production while encouraging the growth of vertically integrated enterprises with complex 'internal labour markets'. However, the links between workplace organisation, enterprise performance and corporate success rates were then (and are still) too tenuous and uncertain for product-market competition to be held solely responsible for this transformation. Important additional mechanisms for the transmission of norms across enterprises were provided by industry-level collective bargaining involving employers' associations and trade unions, and by the legal system which in most countries at this time provided encouragement for the adoption of particular forms of employment relationship.

Labour law supported many of the norms arrived at by labour and management by codifying them in the form of terms incorporated from collective agreements, common law implied terms and statutory employment protection rights. For reasons related to the tradition of collective laissez-faire in industrial relations, this process has occurred relatively recently in Britain, but is nevertheless clearly discernible (Brown, Deakin, Nash and Oxenbridge, 2000). Prior to the advent of modern employment protection legislation from the 1960s onwards, the most significant form of legislative intervention in the labour market was in the area of social security law. The growth of large-scale enterprise provided both the opportunity forredistributive policies which operated through the taxation and social security system, and also the need for such interventions, as individuals and households became increasingly dependent on continuous, waged employment for access to income, and vulnerable to the effects of any prolonged interruptions to earnings. State intervention, by imposing responsibility for these wider social risks on employers, provided

further strong incentives for the growth of the vertically integrated firm, which was best placed to deal with the costs of regulatory compliance.

The early solutions provided by the state in Britain took the form of statutory schemes for workmen's compensation and social insurance. These forms of intervention attached mandatory obligations to the employment relationship: employers were required to make compensation payments to injured workers, the risks of which they could then spread through employers' liability insurance, and to pay contributions on behalf of themselves and of their workers into national insurance funds, from which state pensions and unemployment compensation were then paid out. The combination of regulation with both private and social insurance meant that the enterprise became the main conduit for the wider process of risk-sharing which the laws were aiming at.

Social insurance contained the potential for extensive pooling and redistribution of risks within the working population. At the turn of the twentieth century, private insurance schemes for sickness and injury, and occupational arrangements relating to retirement pensions, completely excluded a significant segment of the working population from coverage. The proponents of social insurance aimed to bridge the gap by bringing certain of the excluded groups into state-run systems for unemployment, retirement and illness, while at the same time broadening the contribution base to include groups already in higher-income and more stable employment. However, the state schemes did not initially displace those of the private sector. In the thirty years following the National Insurance Act 1911, state and private schemes operated alongside each other, with private welfare arrangements continuing to cover higher-status employees, and the state schemes being reserved for lower income earners and others were unable to gain access to employer-based or occupational schemes. Many categories of casual employment remained excluded. Just as the period between 1875 and 1950 was one of the increasing integration in the sphere of production, it was also the period during

which the state system of social security and income taxation was gradually extended to cover all wage-dependent workers. It was only with the National Insurance Act of 1946 that the single status of the 'employee' subsumed the older categories of wage-dependent workers (labourer, servant and workman), and that, as a result, the modern contract of employment was born (Deakin, 1998).

Prior to that point, the models of employment used by the courts were based, in part, on conceptions of the business enterprise, but also on conventional understandings of social status. The term 'employee' signified professional or managerial status, in contrast to the term 'workman' which was used for manual workers and others employed under a 'contract of service'. The modern 'binary divide' between employees and the self-employed can be traced to the Beveridge report on social insurance of 1942.[9] In an attempt to expand the contribution base so that it would finally cover the entire labour force, Beveridge envisaged just two categories of contributor: in the language adopted by the National Insurance Act of 1946, these were 'employed earners', a category which included all those 'gainfully employed in employment… being employment under a contract of service', and those employed on their own account. The latter group – the 'self-employed' – paid a lower contribution rate but were, in return, excluded from the unemployment compensation scheme. Tax legislation around the same time adopted essentially the same division between employees, who were subject to compulsory deduction of income tax at source under Schedule E, and the self-employed who, under Schedule D, paid their own tax, in effect retrospectively, while also being able to benefit from various fiscal subsidies not available to employees, such as the right to set off work-related expenses against income. Once the binary divide was established by statute, the courts gradually began to discard the status-based distinctions which were associated with the old 'control' test, in favour of the more inclusive 'integration' and 'economic reality' tests for identifying the contract of employment (see Deakin, 1998).

This overview of the development of the contract of employment suggests a number of insights into the processes by which social and legal institutions emerge. An 'institution' of this kind is in essence a complex bundle of conventions and norms of varying degrees of formality, ranging from tacit understandings which are acted on in everyday situations in the workplace, to juridical concepts which are deployed to various ends by civil servants, courts and legislators. As descriptions or classifications of the social world, institutions may be thought of as 'encoding' information about solutions to coordination problems which have been successful in the past, in the sense of being widely followed and observed. In order for a particular set of social conventions to be encoded in juridical form, they must first be filtered through the processes of litigation and legislation, which are subject to various selective pressures which include the relative strength of particular social groups which support actions before the courts and attempts to change the law through statutory intervention, as well as factors internal to the juridical process. The institution of the 'contract of employment' may therefore be said to be 'emergent' in the sense that it is not the product of any single advocate, judge, policy-maker or drafting committee, but of the sum total of a large number of interactions in terms of economic organisation, dispute resolution, and political mobilisation.

It follows that the pattern of institutional emergence is far more complex than a linear account of the competitive selection and deselection of rules would allow. The cumulative nature of institutional development means that conceptual tools which were appropriate for one purpose end up being adapted for a different one, with results that may be both positive and negative (Balkin, 1998: chs. 1 and 2). 'Network' effects – simply, the benefits to relying on widely-observed standards and guidelines for behaviour – increase the costs of institutional change even when there is general agreement on the limitations of existing arrangements. The speed of environmental change may far outstrip the capacity of norms and legal rules to adjust. For all these reasons, the best we can expect of institutions is that they have a *qualified* adaptiveness – they may be adaptive to the

needs of yesterday rather than today, or to the circumstances of one particularly influential enterprise, industry or country-specific model which has, perhaps for reasons of historical accident as much as anything, served as a model for others to imitate. The non-optimality of institutions means that there will be continuous pressure for redesign, for example, through legislative intervention. However, it is in the nature of such interventions that they result in solutions which fall short of the theoretical optima which their designers envisaged, so that the process begins again under a new set of constraints and possibilities.

Viewed in this way, it is possible to see why it is that the contract of employment could be, at one and the same time, the 'cornerstone'[10] of the modern labour law system, joining the enterprise to the welfare state just as it connected the common law of contract and property to social legislation, *and* the source of anachronisms, confusions and disfunction in the application of the law. On the one hand, it spoke to the inclusive agenda of the welfare state, aiming for an ideal of social citizenship which could mirror the notion of political and civil rights, completing the democratic project by extending the conditions of social existence in the same way that the conditions of civil and political participation were extended through the franchise. On the other, it was constructed on a set of contingent social and economic circumstances which soon began to unravel, thereby endangering the very project of democratic emancipation which it embodied.

This was because, in the first place, the contract of employment looked back to the model of economic subordination which was contained in the master-servant relation. This meant, among other things, that the objectives of economic democracy and participation in decision-making within the enterprise remained unfulfilled; they were addressed neither by the reforms to employment law which aimed to regulate the employer's powers of discipline and dismissal, nor by the predominant emphasis on wage determination and related distributional issues within collective bargaining. At the same time, as subcontracting and outsourcing of production were revived in the

1980s in large part as a consequence of government measures aimed at cutting public expenditure and undermining the floor to wages and conditions of employment, the traditional protective model became a source of weakness: the ability of employers to avoid the indirect employment costs of regulation and taxation was now a major factor of competition in the product market.

Secondly, the contract of employment, at least in its classic form, incorporated an anachronistic notion of the division of household labour. This was done by formalising the notion of the male breadwinner wage through collective bargaining, and by ensuring the primacy of the single (male) earner within social insurance. In the traditional model of social insurance, women were rarely in a position to claim unemployment or retirement benefits in their own right, either because their occupations were excluded from the coverage of the contributory schemes, or because their contributions records were inadequate on account of low earnings and interruptions to employment. Conversely, their most substantial rights were those derived from dependence on a male earner through marriage or other family connection. The gradual abolition of discriminatory provisions in state and occupational social security which began, under the influence of European Community law, in the late 1970s, has just as often assisted male workers as female ones,[11] while doing little or nothing to improve the position of many millions of part-time female employees whose earnings fall around the earnings level for national insurance contributions or whose periods in paid employment lack the continuity necessary to claim benefits which were adequate replacements for benefits.

Finally, the contract of employment was premised on a model of the nation state as a more or less self-contained political entity, insulated from the pressures of transnational economic migration and integration. 'Full employment in a free society', Beveridge's programme for economic inclusion, was a strategy addressed to national government. *National* insurance, the *National* Health Service, the *National* Minimum Wage, set clear jurisdictional limits to

the notion of social inclusion which the contract of employment was capable of representing. When, in the late 1970s, governments began to liberalise rules on the movement of capital, the bases upon which they had previously assumed powers of regulation and taxation were undercut. The increasing inter-dependence of national economies from the point of view of trade made it, paradoxically, more difficult for governments to coordinate their national macroeconomic policy interventions. These were among the factors encouraging governments to replace the post-war goals of demand management and full employment with those of competitiveness and a high employment rate. As this occurred, a vital form of government support for the traditional employment model – the use of employment policy measures to support the indeterminate or open-ended employment relationship and actively to suppress casual hirings[12] – went into reverse, with access to short-term and insecure employment now seen as factors likely to promote the 'employability' of those seeking work.[13]

3. From disintegration to reconstruction?

So much for the decline, and prospective fall, of the contract of employment. Reactions fall into two broad categories. On the one hand, it is possible to envisage a 'de-socialisation' of the employment contract, as governments lift fiscal and regulatory costs from employers in an effort to encourage flexibility and entrepreneurship. A strongly functionalist view would associate such a change with 'selective' pressures derived from global regulatory competition and the adoption of new technologies which shift the boundaries between the firm and the market.

The Supiot report to the European Commission, *Beyond Employment: The Transformation of Work and the Future of Labour Law in Europe*, recently offered a different perspective. While its authors took as their point of departure 'the crisis in the socio-economic model of governance around which labour law has been constructed since the beginning of the [twentieth] century' (Supiot et al., 1999:

291), they did not use this as the occasion to propose the rapid dismantling of systems of social protection. Nor did they consider that a system of fundamental social rights could be put in place without any regard to economic issues. The report accordingly declared itself in favour of a 'third way' [sic][14] which would be based on 'those democratic imperatives which motivated the construction of social law' (Supiot et al., 1999: 293).

It is not possible here to do justice to the full set of proposals advanced, with this end in view, by the Supiot report. For present purposes, the focus will be the report's suggestions with regard to the future of the standard employment contract or relationship. The report rejected the continuation of the existing model on the grounds that, when combined with 'the inexorable flexibilisation of work', this would simply offer encouragement to a dual labour market, in which privileged 'insiders' were required to entrench themselves ever more deeply against excluded 'outsiders'. The group argued instead for 'a reconfiguration of the notion of security', along three lines. The first involves redefining the idea of the worker's *labour market status*[15] so as to focus on participation over the life cycle, rather than on employment stability as such; the second is concerned with the articulation of an extended concept of 'work' in place of the narrow notion of 'employment' as the basis for access to social rights and protections; and the third introduces the idea of 'social drawing rights' which individuals can use to 'manage their own flexibility', making it possible for them to achieve an 'active security under conditions of uncertainty' (Supiot et al., 1999: 297-298).

The Supiot report offers a welcome corrective to rigidly deterministic accounts which insist that labour law must 'adjust' to superior technological and global economic forces if it is to remain relevant. The implicit theoretical position of the report is that these supposedly overwhelming forces do not exist in a state of nature; they themselves are the product of a process of institutional change which has altered the shape and force of competition, and which, in turn, may be susceptible to influence through public action.[16] In this vein, the

report argues (Supiot et al., 1999: 12-13) that the most appropriate role for analysis is 'to identify existing evolutionary tendencies, put them in perspective, and determine their strength; not to assert that a particular future is inevitable, but to outline a number of possible futures'.

What then are the possible futures of the contract of employment:is it destined to be discarded, or can it transform itself in such a way as to renew the project of social inclusion and democratic participation? The evolutionary perspective developed earlier in this paper would suggest that, just as the traditional model built on existing concepts at the same time as adapting them to new ends, so, barring major discontinuities in the institutional framework, a similar process of cumulative change will occur in response to the present transformation of work relations. Signs of this happening will be briefly examines in three related areas: vertical disintegration and the definition of the employment relationship; the importance of changing patterns of labour supply; and the impact of changes in collective bargaining. The analysis will draw on recent empirical research on the changing nature of employment contracts in the British economy.

3.1 Vertical disintegration and the employment relationship

The problem which vertical disintegration poses for labour law is not so much the growth of self-employment at the expense of protected forms of labour; rather it is the blurring of the 'binary divide' itself. As the Supiot report recognised (Supiot et al., 1999: ch. 1), the growth of a 'grey zone' of workers who are neither clearly employees nor self-employed affects all systems which are required to grapple with definitions of the work relationship for fiscal and protective purposes. As recent empirical research in the UK shows (Burchell, Deakin and Honey, 1999), the idea that employees receive security and stability of employment in return for adherence to the rules and requirements of the organisation, while the self-employed trade off security in return for the chance of profit, with some assistance from tax subsidies, is becoming irrelevant for workers in this position, which

approaches one third of the working population. This is because, on the one hand, many employees find themselves excluded both from the 'implicit' employment contract of job security and from the legal categories to which employment protection rights are formally granted. In particular, this is because the numbers employed on fixed-term contracts or through intermediary or agency organisations are increasing very quickly (Burchell, Deakin and Honey, 1999: ch. 5). Conversely, there are many nominally self-employed workers who do not employ others, have little or no access to working capital, and have few business assets other than their own know-how and expertise. For many of them, the opportunities of earning a secure and stable income through contracting are often quite remote. Worse still, many individuals find themselves being classed as self-employed for labour law purposes, but as dependent workers for the purposes of tax and national insurance, so denying them fiscal support.

Most of those seriously affected do not work in new technology industries. The problem is, in essence, an institutional rather a technological one, and to some extent it has generated an institutional response in the form of the 'worker' concept which broadly corresponds to civil law notions such as that of 'parasubordination'. The 'worker' concept involves an attempt to shift the boundary of the legal category of dependent labour so as to encompass those apparently self-employed workers who, while they may lack a contract of employment based on 'mutuality of obligation', are not genuinely in business on their own account (so-called 'dependent self-employed'). The concept was used, in the British context, in the National Minimum Wage Act 1998 and also in the Working Time Regulations of 1999. The Employment Relations Act 1999[17] also contained a significant new power making it possible for the employment status of particular groups of workers to be reclassified by delegated legislation. Assessing the numbers of 'dependent' and 'independent' self-employed in the workforce without depending on self-reporting is, inevitably, a hazardous exercise. However, one estimate is that the numbers of independent self-employed could be as few as 8% of the working population, leaving over 90% in the

'worker' category (which includes both employees and the dependent self-employed) (Burchell, Deakin and Honey, 1999).

In one sense, the 'worker' concept looks back to old ideas of the form of the contract for personal services; indeed, it draws directly on existing statutory precedents. At the same time, it can be seen as a contemporary mutation within employment law, a response to the particular problems of definition which have arisen from the growth in precarious and insecure employment forms since the late 1970s. The longer-term implication of its use may be to dissolve entirely the traditional boundary between employees and the self-employed, leaving only independent entrepreneurs (those with business assets and the opportunity to capture residual profits) outside employment law. However, what is of particular interest is that the response has not taken the form of a de-socialisation of the employment relationship. On the contrary, it is attempt to extend the logic of social protection to certain forms of self-employment.

3.2 Changing patterns of labour supply, working time, and social insurance

Rising levels of female labour market participation, and the diffusion of the principle of equal treatment in employment and social security, evidently necessitate a radical rethink of the post-war model in which full employment and social insurance were constructed on the foundations of the male 'breadwinner' wage. However, it has not been possible to move straightforwardly from an insurance system based on the single male earner, to one incorporating a dual-earner system in which men and women acquire effective earnings-replacement rights on the basis of their individual employment records.

The household continues to be the site for extensive cross-subsidisation of economic activity between family members, on the basis of an uneven division of labour. Few married women have earnings records based on continuous full-time employment across

the life cycle. Most households accordingly operate on the basis of a 'one and half times earner' model (Lewis, 2000). Notwithstanding the removal of the more obvious forms of discrimination against part-time workers both in respect of employment practice and the fiscal system, women who work part-time remain significantly dependent on male earnings for security of income. More flexible working patterns for men, of the kind envisaged by laws on parental leave, have, as yet, barely made an impact. The uneven division of household labour is evident from the reasons given by women for seeking out casual and precarious forms of employment which, while providing little or no income security, nevertheless give them the opportunity to strike a better balance between family commitments and working time than they could achieve if they were employed under an open-ended contract of employment (Burchell, Deakin and Honey, 1999: ch. 7).

Signs of change in the employment relationship may however be seen in the recent strengthening of pregnancy protection laws. This took the form of providing better protection for the right to return to work after the period of maternity leave.[18] In one sense, these laws reinforce the, continuous employment relationship as the principal basis for long-term income security and careerfulfillment, for women as it is for men. At the same time, they contain elements of the 'labour market status' idea of the Supiot report. The right to return to work could be seen as a kind of social drawing right, which is in abeyance during the period of absence form the workplace, but can then be exercised when the period of maternity leave comes to an end. As in the case of the 'worker' concept, then, this recent statutory reform looks both forwards and back.

3.3 Collective bargaining, trade union influence and legal regulation of managerial prerogative

The transformation in the influence of collective bargaining in Britain since the early 1980s has been three-fold: firstly, a reduction in the influence of multi-employer, sectoral bargaining, which in some

senses may be traced to the 1960s, but which accelerated rapidly in the mid-1980s; secondly, a fall in the coverage of collective agreements and other forms of wage determination from over 80% of the employed labour force at the start of the 1980s to around a third of the workforce twenty years later; and, even with organisations where trade unions continued to be recognised for the purposes of collective bargaining, a loss of union influence over traditional areas of negotiation, in particular pay.

How did these various changes affect the employment relationship? It would be easy to jump to the conclusion, from the raw figures on the decline in collective bargaining coverage, that collectivism has given way to a greater emphasis on individual bargaining and hence to some kind of 'recontractualisation' of the employment form. Closer study of organisations in which collective bargaining rights were withdrawn during the 1980s, and a comparison of their experience with that of firms retaining union recognition, reveals a different picture (Brown, Deakin, Hudson, Pratten and Ryan, 1998).

The employment contract has if anything become more standardised at enterprise level, not less, as a result of the diminution of union influence. There is only limited evidence of greater individual differentiation of contract terms. In both unionised and de-unionised firms, the contractual terms of the employment relationship, in terms of job definition, working time and the composition of the wage, now tend to take the form of a standard form agreement which is largely set by the employer. In many cases, job definitions have been widened and controls on working time removed. The main difference is that this process has gone further in the de-unionised firms. Individual *bargaining* is exceptionally rare, and the influence of contract over the performance appraisal systems now widely used to set individual pay, replacing the annual pay round, is minimal, since these systems tend not to take a contractual form. Instead, they are administered under terms which give employers a very wide, extra-contractual discretion.

Given that the role of contract within the open-ended employment relationship was, however imperfectly, to set limits to managerial prerogative, these developments signify a retreat from the relational contract model of employment, and, in that sense, a 'de-contractualisation' of employment (Deakin, 1999a). The weakening of trade union influence has encouraged employers to re-assert control over the pace and direction of work by re-writing job classifications and categorisations which previously protected workers. This is one of the factors contributing to the greater intensification of work in a number of sectors (Burchell, Day, Hudson, Ladipo, Mankelow, Nolan, Reed, Wichert and Wilkinson, 1999).

This process has, nevertheless, been partially offset by the continuing formalisation of contract terms and conditions, under the influence of employment protection legislation, and by the growing recourse of individual employees, with union assistance, to employment tribunals as a source of protection. Rather than seeing regulation give way completely, then, there has been a shift in the *level* of regulation from the collective sphere to that of the individual relationship. This has been accompanied by a change of emphasis in the role of unions, from co-regulators of terms and conditions of employment, to monitors and enforcers of employees' legal rights (Brown, Deakin, Nash and Oxenbridge, 2000). In short, the open-ended employment contract continues to a principal focus of regulation of enterprise-level relations, albeit under conditions where the weakening of union power has exposed 'core' employees to the dangers of unfettered managerial prerogative and growing work intensification. If employees' legal rights are to be made effective in practice, the restoration of collective influence within the workplace would seem to be an essential next step (ibid.).

4. Conclusion

In order to assess the future of the contract of employment, it is necessary to understand its past. The contract of employment emerged at a particular historical juncture at the mid-point of the twentieth

century, when changes in economic organisation, the structure of the family and the regulatory power of the nation state came together to favour the standardisation and stabilisation of labour market relations. The fiscal and regulatory techniques which were used at this time were designed to channel the risks of economic insecurity more widely throughout the working population, at the same time as underpinning relations of production at the level of the enterprise. The normative force underlying this process was a conception of social citizenship, which would extend the bases for social and economic participation in the same way that rights of democratic participation had been extended through political reform.

In evaluating the impact of current transformations in the world of work, it is essential not to confuse the normative aims which are embodied in the institution of the contract of employment, the means chosen to achieve them, and the historical conditions under which they were first put in place. It does not follow, from the unravelling of the historical conditions, that the aim of social citizenship has ceased to be legitimate. Nor is it necessarily the case that the means used – in particular, the channelling and redistribution of social risks and the control of economic power through fiscal and regulatory intervention – are no longer appropriate. The regulatory mechanisms in question must respond to changing environmental conditions if they are to remain of use; but this process is already occurring.

The transformation of the contract of employment into an extended form of 'labour market status', as envisaged by the Supiot report, is one of the many possible futures which can be imagined by extrapolating from recent developments in labour law. These include the use of the 'worker' concept to extend the range of employment protection legislation and the recognition of limited 'social drawing rights' in the context of the balance between work life and family life. More negative implications of the current changes include the intensification of working conditions at organisational level, resulting from the decline of collective employee representation. The future laid out here is one in which contractual restraints on managerial

prerogative are further stripped back, and the implicit contract of job security in return for open-ended commitment is finally revoked. For those outside the organisational 'core', there is the prospect that fiscal controls will be extended without corresponding guarantees of access to the means of economic participation.

There is nothing inevitable, then, about the successful transformation of the contract of employment. It is, nevertheless, worth remembering that the process of institutional construction which culminated in the mid-twentieth century welfare state had begun half a century earlier amidst conditions of growing economic insecurity and the casualisation of work under a globalised trading regime. The aim of a 'public organisation of the labour market'[19] may at times have seemed just as remote to that earlier generation as it sometimes appears to us today. There is good reason to believe, however, that our own experience of engagement and reconstruction will be similar to theirs.[20]

Notes

[1] With apologies to Ian Macneil (see note 7, below).

[2] The quotations in the text are from, respectively, Foster, 1982: 2; Kahn-Freund, 1983: 8; Hepple, 1986: 71; Clark and Wedderburn, 1983: 153; Collins, 1986: 2; Collins, 1990: 353; Wedderburn, 1967: 1.

[3] In this respect, Kahn-Freund's early contribution (1951) appears to have been highly influential.

[4] On the standard employment relationship or SER as a sociological concept, see Mückenberger and Deakin (1989). The juridical form of the SER in the common law context is the contract of employment; in many civilian systems, in which the formal role of contract is less important, it is the employment relationship (in German labour law, *arbeitsverhältnis*). The difference in terminology between 'contract' and 'relationship' of employment conceals to some extent the common experience of both common law and civil law systems, which is that the modern SER combines contractual and status-based elements (see Supiot, 1994: ch. 1); and see further section 2, below.

[5] See generally Deakin, 1998, 2000.

[6] This expression is used by Freedland, 1995.

[7] Ian Macneil's use of the term contract 'futures' in the title of his seminal article 'The many futures of contracts' (Macneil, 1974) has a dual sense which is also relevant to the present paper: the sense in which contracts operate as mechanisms for the governance of long-term future risks, through the technique which Macneil called 'presentiation'; and the sense, more implicit but there nevertheless, in which the institution of contract will continue to perform this role in the future, notwithstanding widespread predictions of its imminent demise.

[8] For a more extensive defence of this claim, see Deakin, 1998, 2000.

[9] *Social Insurance and Allied Services*, Cmd. 6404 (London: HMSO), at para. 314.

[10] The expression used by Kahn-Freund, 1951.

[11] This is one curious effect of the judgment of the European Court of Justice in Case 262/88, *Barber* v. *Guardian Royal Exchange Co. Ltd.* [1990] IRLR 240, particularly as interpreted in Case C-408/92 *Smith* v. *Avdel Systems Ltd.* [1994] IRLR 602.

[12] On this aspect of Beveridge's full employment policy, see Deakin, 1998: 224.

[13] On 'employability' as part of the Third Way in contemporary British labour law, see Collins, 2000.

[14] It is clear that the 'third way' proposed by the authors of the Supiot Report differs radically from the version which Hugh Collins (2000) associates with the labour law policies of the present Labour government in Britain.

[15] The term used in the French-language version of the Supiot report is 'état professionel' which literally translates as 'occupational status', but this does not quite capture the sense in which this new form of status would link social and economic rights to an individual's history of training, education, and participation in socially useful but non-waged work, in addition to their record of waged employment. Accordingly, 'labour market status' is suggested as an (imperfect) alternative.

[16] On the different ways in which the institutional framework can shape transnational regulatory competition, see Deakin, 1999b.

[17] s. 23.

[18] These reforms were introduced through the Employment Relations Act 1999 and SI 1999/3312.

[19] The expression used by the Poor Law Report of 1909, which was heavily influenced by the Webbs.

[20] See Supiot 1999: 14.

References

Balkin, J. (1998) *Cultural Software: A Theory of Ideology* (New Haven: Yale UP)

Brown, W., Deakin, S., Hudson, M., Pratten, C. and Ryan, P. (1998) *The Individualisation of Employment Contracts in Britain* EMAR Research Series no. 4 (London: DTI)

Brown, W., Deakin, S., Nash, D. and Oxenbridge, S. (2000) 'The employment contract: from collective procedures to individual rights' *British Journal of Industrial Relations*, 38: 611-629

Burchell, B., Day, D., Hudson, M., Ladipo, D., Mankelow, R., Nolan, J., Reed, H., Wichert, I. and Wilkinson, F. (1999) *Job Insecurity and Work Intensification: Flexibility and the Changing Boundaries of Work* Joseph Rowntree Foundation *Work and Opportunity Series* (York: York Publishing Services)

Burchell, B., Deakin, S. and Honey, S. (1999) *The Employment Status of Workers in Non-standard Employment*, EMAR Research Series No. 6 (London: DTI)

Coase, R.H. (1937) 'The nature of the firm' *Economica* (NS), 4: 386-405

Clark, J. and Wedderburn, Lord (1983) 'A crisis in fundamental concepts', in Lord Wedderburn, R. Lewis and J. Clark (eds.) *Labour Law and Industrial Relations: Building on Kahn-Freund* (Oxford: Clarendon Press), 110-147.

Collins, H. (1986) 'Market power, bureaucratic power, and the contract of employment' *Industrial Law Journal*, 15: 1-15

Collins, H. (1990) 'Independent contractors and the challenge of vertical disintegration to employment protection laws' *Oxford Journal of Legal Studies*, 10: 353-380

Collins, H. (2000) 'Is there a third way in labour law?', paper presented to the 5th. annual conference of the International Network for Transformative Employment and Labour Law, University of Toronto, September 2000

Deakin, S. (1998) 'The evolution of the contract of employment 1900-1950: the influence of the welfare state', in N. Whiteside and R. Salais (eds.) *Governance, Industry and Labour Markets in Britain and France. The Modernising State in the Mid-Twentieth Century* (London: Routledge), 212-230

Deakin, S. (1999a) 'Organisational change, labour flexibility and the contract of employment in Britain', in S. Deery and R. Mitchell (eds.) *Employment Relations, Individualisation and Union Exclusion: An International Study* (Annandale NSW: Federation Press), 130-152

Deakin, S. (1999b) 'Two types of regulatory competition: competitive federalism versus reflexive harmonisation. A law and economics perspective on *Centros*' *Cambridge Yearbook of European Legal Studies*, 2: 231-260

Deakin, S. (2000) 'Legal origins of wage labour: the evolution of the contract of employment from industrialisation to the welfare state', in L. Clarke, P. de Gijsel and J. Jansenn (eds.) *The Dynamics of Wage Relations in the New Europe* (Dordrecht: Kluwer), 32-44

Easterbrook, F.and Fischel, D. (1991) *The Economic Structure of Corporate Law* (Cambridge, MA: Harvard UP)

Epstein, R. (1984) 'In defense of the contract at will' *University of Chicago Law Review*, 51: 947-82

Foster, K. (1982) 'The legal form of work in the nineteenth century: the myth of contract?', paper presented to the conference on*The History of Law, Labour and Crime*, University of Warwick

Freedland, M. (1995) 'The role of the contract of employment in modern labour law', in L. Betten (eds.) *The Employment Contract in Transforming Labour Relations* (Deventer: Kluwer), 17-27

Hepple, B. (1986) 'Restructuring employment rights' *Industrial Law Journal*, 15: 69-89.

Kahn-Freund, O. (1983) *Labour and the Law* 3rd. ed. by P. Davies and M. Freedland (London: Stevens, 1983)

Lewis, J. (2000) 'Reforming social insurance and social protection', presentation to SASE seminar on *The Transformation of Work and the Future of the Employment Relationship*, LSE, 8 July

Macneil, I. (1974) 'The many futures of contracts', *Southern California Law Review,* 47: 691-816

Marsden, D. (1999a) 'Breaking the link. Has the employment contract had its day?' *Centrepiece*, 1999, winter, 20-23

Marsden, D. *A Theory of Employment Systems. Micro-Foundations of Societal Diversity* (Oxford: OUP)

Mückenberger, M. and Deakin, S. (1989) 'From deregulation to a European floor of rights: labour law, flexibilisation, and the European single market' *Zeitschrift für internationales und ausländisches arbeits- und sozialrecht*, 3: 157-206

Rock, E., and Wachter, M. (1996) 'The enforceability of norms and the employment relationship' *University of Pennsylvania Law Review*, 144: 1913-1952

Saglio, J. (2000) 'Changing wage orders: France 1900-1950', in L. Clarke, P. de Gijsel and J. Jansenn (eds.) *The Dynamics of Wage Relations in the New Europe* (Dordrecht: Kluwer), 44-57

Simon, H. (1951) 'A formal theory of the employment relation' *Econometrica* 19: 293-305.

Supiot, A. (1999) 'Préface', in A. Supiot et al. *Au-delà de l'emploi: Transformations du travail et l'avenir du droit du travail en Europe. Rapport pour la Commission Europeénne* (Paris: Flammarion), 7-15

Supiot, A., Casas, M., de Munck, J., Hanau, P., Johansson, A., Meadows, P., Mingione, E., Salais, R., van der Heijden, P. (1999) *Au-delà de l'emploi: Transformations du travail et l'avenir du droit du travail en Europe. Rapport pour la Commission Europeénne* (Paris: Flammarion)

Veneziani, B. (1986) 'The evolution of the employment relationship', in B. Hepple (ed.) *The Making of Labour Law in Europe* (London: Mansell)

Wedderburn, Lord (1967) *Cases and Materials on Labour Law* (Cambridge: CUP).

Williamson, O. *The Economic Institutions of Capitalism* (New York: Free Press, 1985)

Williamson, O., Wachter, M. and Harris, J. (1975) 'Understanding the employment relation. The economics of idiosyncratic exchange' *Bell Journal of Economics and Management Science*, 6: 250-78