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The Law of the Labour Market

Industrialization, Employment and Legal Evolution

Oxford Monographs on Labour Law

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The Law of the Labour Market

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SIMON DEAKIN
and
FRANK WILKINSON

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General Editors' Preface

The aim of our series of labour law monographs has been to publish works which are, on the one hand, of the highest quality of scholarship, and which are, on the other hand, innovative or experimental, serving to expand the boundaries of the subject or to throw bright new light upon established areas of discussion. We have been fortunate in having contributors who have enabled that high standard to be maintained. On this occasion we feel very confident that the work we are introducing will be judged to have done so. Some years ago we had the opportunity to arrange for the eventual publication of a projected monograph, still very much in the making, to be co-authored by a labour lawyer, Simon Deakin, and an applied economist specializing in labour economics, Frank Wilkinson. Their interests were already converging upon the economic and legal theory of labour and management studies, and have continued to do so more and more closely. Their project involved the drawing together or interweaving of various strands of history and theory in the fabric of employment and social security law—within the canvas, therefore, of what would be conceived of as 'social law' in continental European legal taxonomies. They could deploy both a deep knowledge of and a novel insight into the interrelations between the law of the contract of employment and other parts of individual and collective labour law, the poor law and its antecedents and successors in social security provision, and the evolution of the theory and the practice of labour economics.

The remarkable phenomenon is that, in various ways, while their project was developing, so that study and theory of labour law was tending in the same general direction, increasingly breaking its banks and flooding over the same broad plains. Despite their apparently eclectic choice of particular topics, Simon Deakin and Frank Wilkinson were in fact at the head of, perhaps even ahead of, the field in the task of generalizing and theorizing this tendency. They arrive at their destination in time to present what is, despite their disclaimers, a very convincing expansion and recasting of (British) labour law as the law of labour market regulation. We are very pleased to present the resulting work, which we are sure will come to be viewed as a very distinguished addition to our series of monographs.

Paul Davies, Keith Ewing, and Mark Freedland
November 2004

Preface

We live in a time in which the predominant currents of thought tend to venerate and mystify the market. The market is seen, in essence, as pre-institutional; that is to say, as somehow natural or primordial. The efforts of public and collective actors to regulate market processes and outcomes are presented as illegitimate 'interferences' or 'distortions'. The result is to call into question all institutions which operate according to a non-market logic. For some, the application of the principle of deregulation must continue until every obstruction to the operation of free competition and exchange has been removed.

In truth, the market itself is an institution, a complex system of interlinked practices, conventions and norms. While some of these norms have a spontaneous and customary quality, many others are codified and expressed in a public–regulatory form. The most basic economic exchanges presuppose a minimal normative order for the protection of expectations; the highly advanced division of labour which supports the productive capacity of modern, industrialized societies requires a correspondingly extensive and articulated institutional framework for its coordination.

Legal *rules* encapsulate information capable of aiding decision making by agents acting under conditions of uncertainty, thereby enhancing efficiency in exchange. A legal *system* has, in this regard, a wider function, namely the preservation and reproduction of categories of knowledge which make economic coordination possible. The emergence, through legislation and adjudication, of a conceptual language or discourse which is distinctively legal or 'juridical' is one aspect of this process. In this respect, as in others, the legal system may complement the institution of the market, without thereby being reduced to it.

Industrialization is the process through which modern societies have been able to mobilize previously untapped human and material resources, making possible a step-change in the level of economic development. The relationship between legal change and industrialization is understood, at best, only incompletely. The dominant tradition was established early on, in the political economy and historiography which accompanied the industrial revolution in the first industrial nation, Britain. Industrialization was identified with the removal of the last vestiges of 'medieval' legal controls over production and exchange, while the progress of society was measured by the extent of its movement from status to contract.

Today, that tradition is alive and well in the neoliberal claim that it is both possible and desirable to return to a market order based on the relations of private law alone. For developed countries, the regulatory state, and, more precisely, the welfare state of the mid-twentieth century, should be stripped away, to reveal once again the institutions of property, contract and tort on which a free economy and a just social order depend. For developing countries, protection for property rights and the shrinking of the public realm are presented as the institutional preconditions of economic growth.

These claims have obscured an alternative narrative which stresses the public–regulatory character of the legal changes accompanying industrialization. The role of publicly-organized forms of legislation and bureaucratic regulation in shaping economic relations is evident, above all, in the pivotal case of the labour market. The transition from an agricultural economy based on the use of the land to provide subsistence income, to one in which the vast majority of the population was dependent on wage labour in the context of an urbanized and industrial economy was not brought about by reliance on contract and property alone. In Britain, two disciplinary mechanisms—the master–servant regime and the poor laws—complemented the emergence of 'free labour' throughout the period of industrialization, and informed the structure and content of the emerging juridical forms through which the law gave expression to wage labour.

However, it was not until the advent of the welfare state, in the first decades of the twentieth century, that the concept clearly recognizable to modern labour lawyers as 'the contract of employment' was definitively established as the foundation of the law governing the labour market. The juridical form of the contract of employment had embedded within it the societal compact of that time: in effect, inequality within the enterprise (the employee's 'subordination' to managerial prerogative) was traded off in return for certain social guarantees of stable employment and protection against risks arising from injury, illness, unemployment and old age. The employment model took shape against the background of the vertical integration of the enterprise and the traditional division of labour within the nuclear family. The power of the nation state to regulate social and economic relations through legislation was more or less taken for granted. In all these respects, the contract of employment was a product of a particular mid-twentieth century consensus which is now being called into question. The disintegration of the enterprise, changing family structures, and the realization of limits to the effectiveness of social legislation together mean that the employment model is increasingly unable to fulfil its essential role of ensuring social protection and cohesion while also providing a framework for the governance of work relations.

There are two possible responses to this situation. One is to hasten the end of the employment model, on the grounds that it has outlived its usefulness. That is the path of labour market deregulation. The neoliberal objective of a completely 'free' or 'flexible' labour market, untainted by regulation, is, of course, unattainable. One of the deepest paradoxes of deregulatory policies, in Britain as in other countries over the past two-and-a-half decades, is the sharp increase in the volume and intensity of regulation which they have produced. This is not an accident, but a structural feature of neoliberal political economy and its forebears. History shows us that the legal regulation of labour has been at its most restrictive (and on occasions repressive) in precisely those periods when free market ideas were regarded as orthodoxy by intellectuals and policy makers.

The alternative path is to consider ways in which the function of the contract of employment, and the values which it expressed, can be renewed in a new form. This implies the reinvention of the welfare state and the inscribing of fundamental

social rights at the core of work relations. This book is intended as a contribution to that task of institutional reconstruction.

We have incurred many debts in the course of completing this work. We are very grateful for the support which we have received over the long course of the project from the editors of the Oxford Monographs on Labour Law series, Paul Davies, Keith Ewing and Mark Freedland, and above all to Mark for his advice on both the structure and substance of the book, which has been invaluable at every stage. We would also like to thank Catherine Barnard, Jude Browne, Bill Cornish, Jackie Cremer, David Feldman, Richard Hobbs, Sue Konzelmann, Dave Lyddon, Gill Morris, Ulrich Mückenberger, Wanjiru Njoya, Ralf Rogowski, Robert Salais, Paul Smith, Alain Supiot and Noel Whiteside for most helpful discussions on particular aspects of the research. We have benefited greatly from the institutional support provided for interdisciplinary work by the Centre for Business Research at Cambridge University and we would like to thank its director, Alan Hughes, and our other CBR colleagues for providing a stimulating and collegiate research environment. We are, in addition, deeply indebted to Gwen Booth and John Louth of OUP for allowing us the time and flexibility we needed to finish the work and for their advice on the completion of the manuscript, and to Louise Kavanagh for overseeing the final production stages.

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Simon Deakin and Frank Wilkinson
Cambridge
15 November 2004

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1

Labour Markets and Legal Evolution

1. Introduction

The idea of a 'labour market' implies not just competition and mobility of resources, but more specifically the institution of 'wage labour' and its legal expression, the contract of employment. This book studies the evolution of the contract of employment in Britain through an examination of mutations in legal form since the period of industrial revolution. We will argue that, in respect of work relations, the nature of the legal transition which accompanied industrialization and the subsequent rise of the welfare state in Britain was more complex than has hitherto been thought. What emerged from the industrial revolution was not a general model of the contract of employment which could be applied to all wage-dependent workers, but instead a hierarchical model of service, which originated in the Master and Servant Acts and was assimilated into the common law. It was only gradually, as a result of the growing influence of collective bargaining and social legislation and with the spread of large-scale enterprises and of bureaucratic forms of organization, that old distinctions lost their force, and that the term 'employee' began to be applied to all wage or salary earners. The concept of the contract of employment which is familiar to modern labour lawyers is thus a much more recent phenomenon than is widely supposed. This has important implications for the way in which we conceptualize the modern labour market and for the way in which proposals to move 'beyond' the employment model are addressed.

The scope of our study is wider than that conventionally ascribed to the term 'labour law' that is used to describe the forms of legal regulation of work relations which are found in market economies. The discipline of labour law derives from the early twentieth century and its structure reflects its origins in a particular political project of social reform.[1] It has more recently been acknowledged that the accepted parameters of labour law do not necessarily capture a wide range of phenomena which are associated with the construction and governance of labour markets. For some, this gives rise to a need to 'redefine' the scope of the discipline;[2]

[1] See B. Hepple (ed.) *The Making of Labour Law in Europe* (London: Mansell, 1986); A. Supiot, *Critique du droit du travail* (Paris: Presses Universitaires de France, 1994), ch. 1.

[2] R. Mitchell (ed.) *Redefining Labour Law* (Melbourne: Centre for Employment and Labour Relations Law, 1995).

for others, labour law's 'productive disintegration' implies an engagement with other disciplines and areas of study.[3] While these perspectives are not universally accepted, there has undoubtedly been, since the early 1980s, a reorientation of research and scholarship towards the labour market as a focus of study for labour lawyers.[4] This reorientation can be understood as a response to the relative decline in the importance of collective bargaining as a mode of regulation over this period, and to the corresponding rise of individual employment law, the growing influence of the European Union, the role played by active employment policy, and, more generally, the efforts of successive governments to align legal rules with the policy goals of 'deregulation' or, in some contexts, 're-regulation' of the labour market.

There is not, as yet, general agreement on the contours of a 'law of the labour market' which might offer a new juridical frame of reference for labour market regulation. We can, however, see that if we wish to understand the legal forces which influence labour market structure, we have to look beyond the core labour law institutions of collective bargaining and the individual employment relationship. In particular, it is necessary to incorporate into the analysis some aspects of social security law and active labour market policy, in so far as they seek to regulate, or have the effect of regulating, the conditions under which individuals enter the labour market. Certain features of commercial, competition and company law may be relevant since they serve to define the legal form of the business enterprise. Fiscal law and family law may also have an impact on labour market structure. It is not our aim to chart, in detail, all the areas of law which may have a bearing on the labour market, although reference to certain aspects of those just cited will be made at various points in the text. Nor do we aim to cover every aspect of 'core' labour law. We will concentrate instead on those aspects of legal doctrine which have had a particularly prominent role in determining the juridical nature and structure of the employment relationship, as the core institution of the labour market. In this respect, the link between labour law and social security law will be of particular importance to our study. This is in keeping with the historical perspective which we seek to adopt: the poor law, dating from the late Middle Ages, reformed and revised at regular intervals and completely abolished only in 1948, played a pivotal role in regulating the labour supply throughout our period of study. The incomplete separation of wages and poor relief for much of this period was reflected in the tendency for the poor law to be simultaneously a law governing the work relationship and a body of regulation

[3] H. Collins, 'The productive disintegration of labour law' (1997) 26 *Industrial Law Journal* 295–309.

[4] See in particular P. Davies and M. Freedland, *Labour Law: Text and Materials* (London: Weidenfeld and Nicolson, 1st ed., 1980, 2nd ed., 1984); B. Hepple, 'A right to work?' (1981) 10 *Industrial Law Journal* 65–83; M. Freedland, 'Labour law and leaflet law: the Youth Training Scheme of 1983' (1983) 12 *Industrial Law Journal* 220–235; Lord Wedderburn, 'Labour law now—a hold and a nudge' (1984) 13 *Industrial Law Journal* 73–85, and *The Worker and the Law* (Harmondsworth: Penguin, 3rd ed., 1986), ch. 1.

determining access to non-waged income. Thus it is above all to the poor law that we have to look in order to understand the way in which the law described labour market relationships in the period when, in Britain, the transition to the first industrial society and economy was taking place.

Legal concepts consist of the abstract categories and formulations which make up the building blocks of legal discourse; as such they provide an epistemological frame of reference, a 'cognitive map' of social and economic relationships.[5] The historical record of decided cases and statutory texts, together with the wider body of public discourse on legislative policy in the form of reports of select committees, boards of inquiry, governmental commissions, and so on, provides us with an opportunity to study how this juridical map of the labour market has changed over time. These legal and institutional texts will provide the principal raw material of our study. This does not mean that we will neglect the role played by factors outside the law, ranging from political movements and ideologies to the influence of technology on the form of production, and the role played by economic theory. Nor are we suggesting that an analysis of legal concepts necessarily provides us with a *direct* understanding of the conditions under which the law 'in action' was operating at a particular time or in a particular place. Our starting point is the observation that an examination of changes in legal form over time—*legal evolution*—may provide an important source of knowledge of the historical processes which accompanied the emergence of modern labour markets. Notwithstanding the enormous body of historical research which exists on industrialization and the growth of the welfare state, and in particular the important contributions which a number of economic and legal historians have made to our understanding of the role of legal change within these processes, the evolutionary analysis of law, in the sense that we intend to use it here, remains an under-utilized resource. In particular, the observation that there have been different conceptual maps of the work relationship at different periods is, we believe, one with the potential to throw new light on the nature of the transition to an industrial society, a process which, in fundamental respects, is still going on today.

At the centre of our analysis will be an examination of the concept of the contract of employment, its antecedents, and its current evolutionary path. Against the background of claims that the employment model does not adequately describe a wide range of work relationships, and that its inability to do so threatens to undermine not only its own effectiveness but that of the various forms of labour law regulation which depend upon it,[6] this choice of perspective might seem hard to defend. In fact, it is justified by the very same concerns which inform the contemporary critique of the employment model. It is precisely because the contract of employment no longer seems fitted to its purpose that it is relevant to examine the historical conditions under which it emerged and by

[5] G. Samuel, *Epistemology and Method in Law* (Aldershot: Ashgate, 2003).

[6] See P. Gahan, 'Work, status and contract: another challenge for labour law' (2003) 16 *Australian Journal of Labour Law* 249–258.

virtue of which it came to occupy a focal point in the conceptual structure of labour law (and also of related aspects of social security and tax law). From this perspective, the problems which the employment model is currently encountering are the result, not simply of a changing labour market environment, but of the contingent and specific historical circumstances which accompanied its emergence. It also remains the case that forms of work which fall on the edges of, or completely outside, the scope of the employment contract—forms such as self-employment, outwork or homework, agency work, temporary work and (to some degree) part-time work—derive their seemingly marginal or excluded status by reference to the particular features of that model. Thus to understand the causes of the fragmentation and conceptual confusion currently afflicting labour law, it is necessary, paradoxically, to look more closely at the paradigm form whose disintegration is now being so widely anticipated.

This chapter sets out the framework of our analysis. The following section considers the nature of the employment model, and to this end combines functional and historical perspectives. We then look more closely at the meaning of the term 'industrialization' in economic and legal history and consider the relevance to our theme of the timing and nature of industrial change in Britain and the subsequent rise of the welfare state. Finally we set out in more detail what we mean by the expression 'legal evolution' and discuss a number of methodological issues arising from our approach.

2. The Institutional Nature of the Contract of Employment

It is no exaggeration to think of the classification of work relationships as the central, defining operation of any labour law system. This is not just an abstract process, it is also a practical one. Without classification, the law cannot be mobilized. It is an operation which any agent acting in a legal context—a category which may include not just judges and practising lawyers, but also labour inspectors, trade union officers, shop stewards, personnel managers, and so on—must inevitably undertake when considering the application of a labour law norm to a given set of facts. The outcome may, in the vast majority of cases, be obvious, or the process may require only a minimal investment of resources for the result to become clear, but in either case the process cannot be avoided *if* the rule is to be applied in a consistent way. Classification is therefore both condition and consequence of the maintenance of 'system order'. The requirement of legal consistency provides a built-in mechanism by which the law's internal 'cognitive map'—the juridical taxonomy through which social and economic relations are described and understood—is continuously being reproduced and renewed.

That 'cognitive map' need not, and in practice almost certainly will not, correspond precisely to the meanings which are ascribed to a given set of social practices by actors outside the context of the application or implementation of the

law. The principal reference point here is not the external 'reality' of, for present purposes, work relationships, but what autopoietic theories of law refer to as the legal system's self-constructed rule of internal order. As Gunther Teubner puts it,

> law refers to social meanings in a variety of ways, as well as to constructs of reality and social values. In a self-referentially closed legal system, however, these forays into current social values assume the guise of normativisation in its legal form. Their normative content is produced from within the law itself, by constitutive norms which refer back to those values. It is a condition of all forays into current social values that they be subject to legal reformulation. As soon as they are in dispute, a decision has to be made about them according to criteria established by the law itself.[7]

Thus the conceptual framework of the law is not simply, or even principally, a reflection of a wider social or economic reality; it is, above all, the result of a search for the internal consistency which is an aspect of the fundamental value of 'legality', a notion, as Philip Selznick has suggested, can be thought of as a 'synonym for the rule of law':[8]

> The effort to see in law a set of standards, an internal basis for criticism and reconstruction, leads us to a true *Grundnorm*—the idea that a legal order faithful to itself seeks progressively to reduce the degree of arbitrariness in positive law and its administration. By 'positive law' we mean those public obligations that have been defined by duly constituted mechanisms, such as a legislature, court, administrative agency, or referendum. This is not the whole of law, for by the latter we mean the entire body of authoritative materials—'precepts, techniques and ideals'—that guide official decision-making.[9]

The existence of an internal legal discourse based on distinctive 'precepts, techniques and ideals'[10] is at the core of a certain type of law, one based on the value of rationality and calculability. Concepts are linguistic devices which inform legal decision making; they are a means by which consistency, and hence legitimacy in the exercise of authority, are sought. If this ideal of the rule of law is one which serves to underpin what Max Weber called 'the modern form of capitalism, based on the rational enterprise',[11] it is also, as Selznick stresses, part of a wider legal-political project, founded on 'aspirations that distinguish a developed legal order

[7] G. Teubner, *Law as an Autopoietic System* (Oxford: Blackwell, 1993), at p. 81. A very important contribution in demonstrating the applicability of autopoiesis to labour law is that of Ralf Rogowski and Ton Wilthagen, 'Reflexive labour law: an introduction', in R. Rogowski and T. Wilthagen (eds.) *Reflexive Labour Law* (Deventer: Kluwer, 1994).

[8] P. Selznick, *Law, Society and Industrial Justice* (New Brunswick, NJ: Transaction Books, 1980), at p. 11.

[9] Ibid., at p. 12.

[10] This reference, quoted by Selznick, ibid., is to R. Pound, *Jurisprudence* (St. Paul, MN: West Publishing Co., 1959), at p. 107. See Teubner, *Law as an Autopoietic System*, op. cit., at p. 44: 'abstract legal thought, dogmatics, and construction as self-descriptions of the legal system have to become central to legal-sociological analyses in such a way that would have appeared impossible in the wake of sociological disillusionment over law'.

[11] M. Weber, 'The origins of industrial capitalism in Europe', in W.G. Runciman (ed.) and E. Matthews (transl.), *Max Weber. Selections in Translation* (Cambridge: Cambridge University Press, 1978), at p. 339 (originally published as *Gesammelte Aufsätze zur Religionssoziologie* (Tübingen: Mohr, 2nd ed., 1922)).

from a system of subordination to naked power'.[12] In this context it is relevant to note that:

> even a cursory look at the legal order will remind us that a great deal more is included than rules. Legal ideas, variously and unclearly labeled 'concepts', 'principles' and 'doctrines', have a vital place in authoritative decision.[13]

It is undoubtedly the case that 'the development and application of these materials requires a continuing assessment of human situations' and that 'the transition from general principle to specific rule requires a confrontation of social reality'.[14] The doctrinal content of legal thought cannot afford to become too far detached from the features of the social relationships which the law seeks to regulate. However, this is very far from saying that the law can or should map *directly* on to those particular features. On the contrary, the value of legal consistency requires that doctrinal descriptions of the 'external' world must be mediated through those linguistic forms which represent the principles or precepts which guide legal judgment.

It follows that a legal concept can be regarded as describing a certain social relationship without being reducible to, or becoming synonymous with, that relationship. Thus the juridical notion of 'employment' can be understood as linked to, but at the same time separate from, notions of employment which operate outside the legal frame of reference, in the context of economic exchange or of enterprise-level relations.

The terms used by labour lawyers to describe and define the employment relationship—expressions such as 'mutuality of obligation', 'integration', 'control'—arise in the context of attempts to classify work relations for regulatory purposes. They have a juridical meaning which arises in a particular normative context. The definitions of employment which are used in the social sciences do not have this particular purpose or rationale. In various ways, they try to capture the meaning attributed to employment by social actors for whom the concept serves as a reference point for practice. One particularly influential approach is that of new institutional economics. This offers an account of how the practice of employment could emerge as the result of the interactions of individual agents engaged in the repeated exchange of work for wages. More specifically, this body of work offers a functional account of the employment relationship as a transaction-cost minimizing device which facilitates large-scale production within the vertically integrated firm. It is this functionality which, in turn, is said to account for the prevalence of employment as a social practice. As David Marsden puts it:

> Two great innovations lie behind the rise of the modern business enterprise: limited liability and the employment relationship. The first revolutionized company finance, opening up a vast new supply of capital. The second has revolutionized the organisation of labour services, providing firms and workers with a very flexible method of coordination and a platform for investing in skills. Today, nine tenths of workers with jobs in industrialized

[12] Selznick, *Law, Society and Industrial Justice*, at p. 8. [13] Ibid., at p. 27. [14] Ibid.

countries are engaged as employees. Despite the sometimes rapid growth in contingent employment, there is no evidence that the open-ended employment relationship is about to lose its preeminence.[15]

This analysis combines two ideas, both of which are familiar to labour lawyers, even if the terminology used is different. The first is the suggestion that the employment form offers the employer inherent flexibility which derives from the power to alter the mode of work organization after the employment has begun. Viewed from a contractual perspective, employment minimizes the costs which would otherwise arise from the need to renegotiate the contract in the light of changing circumstances. This is the idea which labour lawyers refer to as 'managerial prerogative' and which some economists, following R.H. Coase,[16] call the 'organising authority' which is present in employment but absent from the independent provision of labour services. Employment gives management the implicit power to direct labour, as Coase puts it, 'within certain limits',[17] the limits being determined, informally, by the parties' mutual expectations of the nature of the 'job' being undertaken and, more formally, by the express terms of the contract they enter into.

The second idea builds on this observation: this is the claim, advanced by Herbert Simon,[18] that the employment form offers something to the employee, namely a certain degree of continuity and security of employment. In legal terms, this is characterized by the open-ended and indeterminate duration of the contract of employment. The expectation of continuity makes it possible for the employee to invest in firm-specific skills which have limited value in other economic contexts, and more generally to offset some of the social and economic risks, in terms of exposure to loss of income and employment, which arise from dependence on one particular employer.

More generally, the employment contract can be understood as embodying a set of social norms or tacit conventions which together represent solutions to the problems of strategic interaction which arise when economic agents engage in a pattern of repeated economic exchange. These conventions make it possible for the parties to engage in a form of complex cooperation which generates a surplus by comparison to other modes of work organization. The nature of the relevant conventions can, it is claimed, be deduced from first principles, that is to say, by starting from certain assumptions about the ability of the parties to contract and about the context or environment in which they find themselves, assumptions which are realistic enough to command general assent while also being straightforward enough to generate predictive models of behaviour.[19] One crucial assumption is

[15] D. Marsden, *A Theory of Employment Systems: Micro-Foundations of Societal Diversity* (Oxford: Oxford University Press, 1999), at p. 4. Our argument here builds on S. Deakin, 'The many futures of the contract of employment', in J. Conaghan, R.M. Fischl and K. Klare (eds.) *Labour Law in an Era of Globalization* (Oxford: Oxford University Press, 2001) 177–196.

[16] R.H. Coase, 'The nature of the firm' (1937) 4 *Economica* (NS) 386–405.

[17] Ibid., at p. 391.

[18] H. Simon, 'A formal theory of the employment relation' (1951) 19 *Econometrica* 293–305.

[19] Marsden, A *Theory of Employment Systems*, op. cit.

that the parties are 'boundedly rational', that is, that they act in a calculative manner to further their self-interest, while at the same time being aware of the limits to calculation: they know that they cannot necessarily foresee the future and, above all, that they cannot accurately compute the costs and benefits of all relevant future courses of action. In addition, they operate in an environment which is characterized by a high degree of uncertainty. Under these circumstances, the parties know that they can profit from cooperation based on reciprocity, but each one also knows that the cooperation of the other cannot be guaranteed; it may be in the self-interest of each to act uncooperatively at some future point. The employment form serves to counter this threat of 'opportunism' or non-reciprocation.[20]

The precise source of the norms or conventions upon which cooperation within employment depends can be understood in a number of different, if possibly complementary, ways. One approach is to assume that the parties to the employment relationship simply strike a deal each time labour is hired, the terms of which reflect the basic trade-off between coordination and continuity. But a more realistic suggestion is that the social norms which are associated with employment arise, to a large degree, independently of the will of the parties in any particular case. This reflects the sense, which conforms to empirical observation, that there is a generally accepted understanding, in industrial societies, of what employment entails: a certain irreducible element of continuity and security on the one side and the right to manage on the other. Although the parties are free to negotiate, either individually or through their representatives, *within* the framework of this understanding, in the absence of one or, arguably, both of these elements, the relationship would not be one of employment, but would instead fall into the category of the independent provision of labour services.

One of the most important claims made by proponents of the new institutional economics or 'comparative institutional analysis' in the course of the past two decades is that social norms of this kind can form in the absence of any centralized legal or other rule-making authority. Norms or conventions, understood as regular patterns of behaviour, may arise 'spontaneously' on the basis of repeated interactions between boundedly rational agents.[21] In the absence of a major change in the external context or environment, inter-related behavioural strategies may take on the character of stable equilibria, because no individual agent has a good reason to believe that any of the others is going to change their strategy in the future. Once established, norms can spread thanks to the presence of 'network externalities': a norm may be worth following for any given agent, simply because large

[20] O. Williamson, M. Wachter and J. Harris, 'Understanding the employment relation: understanding the economics of idiosyncratic exchange' (1975) 6 *Bell Journal of Economics and Management Science* 250–278; O. Williamson, *The Economic Institutions of Capitalism* (New York: Free Press, 1985), ch. 9.

[21] See, in particular, A. Schotter, *The Economic Theory of Social Institutions* (Cambridge: Cambridge University Press, 1981); R. Sugden, *The Economics of Rights, Cooperation and Welfare* (Oxford: Blackwell, 1986); and H.P. Young, *Individual Strategy and Social Structure: An Evolutionary Theory of Institutions* (Princeton, NJ: Princeton University Press, 1998).

numbers of others are doing the same. The transaction costs of searching from scratch for a new solution may be too great, even if, in theory, the search might result in a superior pay-off.[22]

From this point of view, an economic institution arises from a combination of behavioural strategies and rational expectations. In this very basic sense, it is simply 'the equilibrium outcome of a game',[23] that is, of a process of strategic interaction. As such, an institution contains in a 'compressed' form the information which agents need to coordinate on a successful plan of action: 'information compression embodied in an institution will make it possible for boundedly rational agents to efficiently collect and utilize the information necessary to their actions to be consistent with changing internal and external environments'.[24] In the context of the labour market, this type of analysis has been used to explain, among other things, the emergence of norms relating to job definitions and patterns of skill formation,[25] and conventions governing the supply of labour, such as the 'reservation wage' below which unemployed workers will refuse offers of employment.[26]

What are the implications, for our understanding of the law, of a theory which claims to account for the emergence and stabilization of social norms without reference to intervention by a public, authoritative law-making body? It does not necessarily follow, from this approach, that the law can only ever be a peripheral force in shaping employment relations. It may well be the case that the law is indeed quite often peripheral to the conduct of workplace relations, but there is nothing in the theory to rule out an instrumental role for law in certain instances, even if, to be effective, the law has to go with the grain of social norms. However, there is another, more fundamental point being made here by the proponents of comparative institutional analysis. This is that the law itself should properly be regarded as a kind of 'meta-convention' which arises on the basis of multiple layers of iteration between agents. From a sociological or economic perspective, law is not an external or exogenous 'given' whose existence can simply be assumed; it is endogenous to the same processes of norm formation which give rise to non-binding conventions. The law is just as much a product of a given society as an instrument for shaping it. It follows that there is a limit to what formal law can achieve in determining outcomes:

> the effectiveness of formal third-party mechanisms may lie primarily in their complementary support of private-order mechanisms but less so in entirely replacing them. Thus the role of the government in market governance may be viewed as endogenously determined by its overall arrangements rather than an autonomous determinant of it.[27]

[22] For a more detailed explanation of the relevant game-theoretical concepts of 'Nash equilibrium', 'subgame-perfect equilibrium' and 'evolutionarily stable strategy', see M. Aoki, *Toward a Comparative Institutional Analysis* (Cambridge, MA: MIT Press, 2001), ch. 1.

[23] Ibid., at p. 2. [24] Ibid., at p. 14.

[25] Marsden, *A Theory of Employment Systems*, op. cit.

[26] R. Solow, *The Labour Market as a Social Institution* (Oxford: Blackwell, 1990).

[27] Aoki, *Towards a Comparative Institutional Analysis*, op. cit., at p. 89.

But is law then simply a reflection or consequence of the underlying strategies of the actors? In claiming, as Masahiko Aoki does, that 'statutory laws or institutions may induce an institution to evolve, but they themselves are not institutions',[28] is new institutional economics in danger of reproducing, in a fresh context, the Marxian distinction between an economic 'base' which represents the 'real foundation' of society, and a legal 'superstructure' which is one of a number of 'ideological forms'?[29] That distinction is problematic because it implies that legal change is only ever a symptom or expression of an underlying economic logic: 'laws and legal systems are regarded as mere surface phenomena'.[30] To take a sceptical view of this claim is not necessarily to deny the role of spontaneous forces in the formation of institutions, or the limits of legal regulation, or, indeed the potential significance of certain long-run historical forces shaping capitalist economic relations; it is simply to question whether such reductive approaches adequately capture the significance of law as an independent site of social and economic change.

If 'institutions' can, in general, be understood as bundles of norms and conventions of varying degrees of formality and rigidity, which function to guide the behaviour of agents, then juridical institutions such as the contract of employment are institutions of a particular type.[31] The 'compressed information' which they contain is 'encoded' on the basis of specifically legal processes, in particular litigation, adjudication and legislation. A social convention, however widespread, can only be 'instituted' in legal form once it has been mediated through these processes, just as the influence of a legal idea on society depends upon the presence of mechanisms, at the level of the enterprise or industry, for the reception and 'translation' of juridical notions. Thus the appearance of a convention or social norm of 'employment' at the level of social or economic relations offers only a partial explanation for the emergence of 'employment' as a juridical category. We cannot directly infer the nature of one from that of the other. Just as we should resist the temptation to imagine that social relations are instrumentally shaped by

[28] Aoki, *Towards a Comparative Institutional Analysis*, op. cit., at p. 20.

[29] K. Marx, *A Contribution to the Critique of Political Economy* ed. M. Dobb, transl. S. Ryazanskaya (London: Lawrence and Wishart, 1971) (originally published 1859), at pp. 20–21.

[30] G. Hodgson, 'The enforcement of contract and property rights: constitutive versus epiphenomenal conceptions of law', paper presented to the CRIC Polanyi conference, Manchester, October 2002, at p. 2.

[31] It would be consistent with Aoki's approach to regard legal institutions, in common with others, as norms in the sense of a set of shared beliefs concerning strategies and interactions, while acknowledging, as he does (in *Toward a Comparative Institutional Analysis*, op. cit.), that the public–legal sphere constitutes a distinctive 'domain' in which the state appears as a unique, focal agent, endowed with a set of action choices which are asymmetric to other, 'private' agents. The relationship between the 'domain' of the state and those of 'organization' (including the firm) and 'trade' (including the market) is defined by Aoki in terms of co-evolving 'complementarities' across institutions. This view is perhaps capable of reconciliation with the one we advance in the text; however, we would not go as far as Aoki appears to go in positing an all-embracing logic of individual interaction which ultimately defines *both* the economic *and* the legal domain. See further our discussion of the methodology of social systems theory, Section 4, below.

legal concepts drawn from abstract categories of juridical thought, so we should also avoid reducing legal categories to the level of 'surface' phenomena which simply 'express' the 'underlying reality' of the economic relationships to which they superficially correspond.

From this perspective, a major problem with the new institutional economics is that it affords too little weight to the role of formal, public institutions in shaping market relations. An alternative view would start from the proposition that labour markets and capital markets are, in part at least, legally and institutionally constituted.[32] This pattern of 'constitution' or institutional formation is too complex, and too specific to particular constraints of time and space for its nature to be deduced axiomatically from first principles. Thus law and the economy stand on the same ontological plane:

> 'the economy' is no more real than 'legal ideas'. It's an assemblage of conventions of which 'legal ideas' such as property, contract, promissory and fiduciary obligation, not to mention money itself, are indispensable elements and propagators.[33]

This point of view, in turn, has epistemological implications, in the sense of informing our understanding of what we can know about society through an examination of the law. If law is one of a number of 'constitutive' elements in the formation of market relations, the forms of legal–conceptual thought are, in and of themselves, evidence for the basic structure of a society or economy:

> it is just about impossible to describe any set of 'basic' social practices without describing the legal relations among the people involved—legal relations that don't simply condition how the people related to each other, but to an important extent define the constitutive terms of the relationship, terms such as lord and peasant, master and slave, employer and employee, ratepayer and utility, and taxpayer and municipality . . . in actual historical societies, the law governing social relations—whenever invoked, alluded to, or even consciously much thought about—has been such a key element in the constitution of productive relations that it is difficult to see the value (aside from vindicating a wholly abstract commitment to 'materialist' world views) of trying to describe these relations apart from the law.[34]

If, in addition, there is no set of economic forces to which the law must conform, since the law is one of the constitutive forces which create 'the economy' and the institutions within it, it further follows that close attention should be paid to the historical conditions shaping the development of the law. There is no single, or pre-ordained, evolutionary path for the law, either as a result of the deterministic effects of historical forces, or by virtue of a supposedly inherent tendency for it to

[32] See F. Wilkinson, 'Productive systems' (1984) 7 *Cambridge Journal of Economics* 413–29, and 'Productive systems and the structuring role of economic and social theories', in B. Burchell, S. Deakin, J. Michie and J. Rubery (eds.) *Systems of Production: Markets, Organisations and Performance* (London: Routledge, 2003) 10–39. The account of the law–economy relation which we outline in the text builds on the 'productive systems' analysis; see further ch. 5, below.

[33] R. Gordon, 'Critical legal histories' (1984) 36 *Stanford Law Review* 57–125, at p. 117.

[34] Ibid., at pp. 102–4.

reproduce or express 'efficient' solutions to coordination problems. Instead, legal institutions are shaped by the historical circumstances of their formation; a *teleological* analysis, stressing evolution to efficiency, is replaced by a *genealogical* one, stressing the importance of origins and initial conditions.[35]

In this respect, Marsden's comparison between limited liability and the employment relationship is a highly revealing one. Each of these 'institutions' can be seen, in broad terms, as having a functional relationship to the emergence of the large-scale, vertically integrated enterprise. An argument can therefore be made for regarding each of them as an efficient response to the needs of economic agents for mechanisms which could overcome opportunism. In each case, however, the historical record suggests not just that public–legal interventions played a highly significant role in 'instituting' the social and economic practices on which these outcomes depended but, in addition, that the process was very far from being one of smooth adaptation of the law to economic needs. In each case, economic forms were 'instituted' by legal processes which were conditioned by historical circumstances and which subsequently evolved alongside the economic relations which they were regulating.[36]

Limited liability is one of a number of features of the modern business corporation to which functional analysis ascribes the role of reducing the costs of contracting, in particular the 'agency costs' which arise from asymmetries of information in long-term economic relations:

> Consider, in this regard, the basic legal characteristics of the business corporation . . . there are five characteristics, most of which will be easily recognizable to anyone familiar with business affairs. They are: legal personality, limited liability, transferable shares, delegated management under a board structure, and investor ownership. These characteristics are . . . induced by the economic exigencies of the large modern business corporation. Thus corporate law everywhere must, of necessity, provide for them.[37]

Limited liability for shareholders makes it possible for equity investors to subscribe their capital to the enterprise without facing the possibility of personal claims for the firm's trading debts (beyond the amount of any share capital not yet

[35] W.N. Njoya, 'Employee ownership and efficiency: an evolutionary perspective' (2004) 30 *Industrial Law Journal* 211–241.

[36] This is an illustration of what Mark Harvey, building on Karl Polanyi's work, calls 'instituted economic process': see M. Harvey, 'Productive systems, market and competition as "instituted economic process"', in B. Burchell, S. Deakin, J. Michie and J. Rubery (eds.) *Systems of Production: Markets, Organisations and Performance* (London: Routledge, 2003) 40–59; K. Polanyi, 'The economy as instituted process', in K. Polanyi, C. Arensberg and H. Pearson (eds.) *Trade and Market in the Early Empires* (New York: Free Press) 243–270. Harvey points out that an 'instituted' view of economic relations is fundamentally different from one which stresses their 'embeddedness' in interpersonal relations, a view which he suggests has the effect of 'sociologising the economy out of existence' ('Instituted economic process', at p. 43). The principal reference for the 'embeddedness' approach is M. Granovetter, 'Economic action and social structure: the case of embeddedness' (1985) 91 *American Journal of Sociology* 481–510.

[37] H. Hansmann and R. Kraakman, 'What is corporate law?', in R. Kraakman, P. Davies, H. Hansmann, G. Hertig, H. Kanda, K. Hopt and E. Rock (eds.) *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford: Oxford University Press, 2003), at p. 1.

paid up). Because shareholders now no longer have to monitor each other's wealth or behaviour, the potential pool of risk capital available to companies is greatly expanded.[38] Yet, for reasons we shall explore in more detail in Chapter 2 below, for most of the period of early British industrialization, limited liability was simply not available to the vast majority of firms. It was not possible for parties to contract for it, because of the existence of significant legal obstacles, and although there were substitutes which came close to replicating its effects, they were deficient in a number of ways, and recognized as such at the time.[39] The constituent elements of what later became recognized as the standard corporate form originated independently of each other, and only converged in stages. The institution of joint stock, the forerunner of freely transferable shares, had origins in the structure of the chartered corporations, some of which dated from the late sixteenth and early seventeenth centuries; however, for much of the period prior to the mid-nineteenth century, share ownership did not confer limited liability. In a period when incorporation via royal charter was highly restricted, most early industrial enterprises were run as 'unincorporated companies', in effect partnerships under which owner-managers and investors retained personal liability for debts of the business. It was only in 1844 that a low-cost registration procedure made incorporation generally available, and as late as 1856 that it was followed by the provision of limited liability, without significant strings attached, for this new corporate form.[40] Thus public–legal intervention, in this case in the form of legislation, was the precondition for the emergence of this pivotally important mechanism for the mobilization of risk capital. Even then, its use remained limited in most manufacturing industries; it was only in the last decades of the nineteenth century that a significant movement towards consolidation began. Thus it is difficult to see the enactment of corporate laws underpinning the business enterprise as an efficient response to economic needs. Whatever its efficiency properties may have been, during this period the limited liability form evolved in a way which was distinctly out of synch with the evolution of the business enterprise. Moreover, as we explore in more detail later, this 'asynchronic' evolution had real effects, both for the law and for the development of industrial enterprise in Britain.[41]

The same prominence for public–legal intervention and the same kind of asynchronic relationship with economic and social change can also be seen in the development of the contract of employment. The innovation of the

[38] See F. Easterbrook and D. Fischel, *The Economic Structure of Corporate Law* (Cambridge, MA: Harvard University Press, 1991), ch. 2.

[39] See R. Harris, *Industrializing English Law: Entrepreneurship and Business Organization 1720–1844* (Cambridge: Cambridge University Press, 2000), ch. 1.

[40] By virtue, respectively, of 7 & 8 Victoria c. 110, and 19 & 20 Victoria c. 47. See W.R. Cornish and G. de N. Clark, *Law and Society in England 1750–1950* (London: Sweet & Maxwell, 1989), at pp. 254–257; Harris, *Industrializing English Law*, op. cit., ch. 10, and our discussion in Ch. 2, below.

[41] The idea of asynchronic evolution is extensively developed in the context of English company law by A.S.Y. Lee, 'Law, economic theory, and corporate governance: the origins of UK legislation on company directors' conflicts of interests, 1862–1948' Ph.D. thesis, University of Cambridge, 2002.

contract of employment was not simply a matter of matching the law to economic needs. Rather, it depended upon a public articulation of a societal compromise or compact which went beyond the level of the enterprise, described by Alain Supiot, writing in the context of western European labour law as a whole, as follows:

> 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.[42]

In the same way that the different elements of the legal concept of the corporation converged in a series of steps, the employment contract was the result of several, distinct steps in legal evolution. The concepts used by nineteenth century British judges and legislators to describe employment relationships in the common law world—independent contractor, casual worker, servant, labourer, workman—do not map neatly on to 'binary divide'[43] between employees and the self-employed which labour lawyers are familiar with today. In both the common law and the civil law, the apparently fundamental classification between employment and self-employment only assumed its modern form at the end of the nineteenth century.

Employment relations in the early phases of industrialization were only partially 'contractual'. 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 of control were with some difficulty grafted on to the traditional Roman law concept of the contract of hire (the *locatio conductio*).[44] Both in Britain and on the continent, criminal law provisions and sanctions defined the extent of managerial prerogative, rather than contract alone. In time, the employer's right to give orders became rationalized, 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, starting in the 1870s, at which criminal sanctions for breach of the contract of service were repealed in most of the common law world. As we shall see in more detail in Chapter 2, it is highly doubtful that nineteenth-century judges regarded the source of the employer's unilateral power as contractual.

[42] A. Supiot, 'Introduction', in A. Supiot (ed.) *Au delà de l'emploi. Transformations du travail et devenir du droit du travail en Europe* (Paris: Flammarion, 1999) 7–24, at p. 10.

[43] This expression is explained and developed by M. Freedland, 'The role of the contract of employment in modern labour law', in L. Betten (ed.) *The Employment Contract in Transforming Labour Relations* (Deventer: Kluwer, 1995) 17–27, at p. 19.

[44] B. Veneziani, 'The evolution of the contract of employment', in B. Hepple (ed.) *The Making of Labour Law in Europe* (London: Mansell, 1986) 31–72.

The 'contractualization' of the employment relationship was associated above all 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. Contractualization, in this sense, had two aspects: the placing of limits on the employer's legal powers of command, limits which, as we have just noted, 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. This process made it more plausible for the courts to visualize employment as a 'relational' contract, based on mutual commitments to maintain the relationship over a period of time.[45]

The role of the vertical integration of the enterprise in this process was a complex one. The emergence of large-scale business provided the occasion for the extension of social protection within the model of the employment relationship, at least as much as the functional necessity for it. As vertical integration replaced sub-contracting as the predominant form of economic organization, 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.[46] These rules were a response to the increase in employer power which arose with the end of the subcontracting system and the associated removal of many traditional forms of workers' control over the pace and organization 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'.[47] The solutions found—such as the categorization of grades according to work tasks, craft skills, professional qualifications and, more recently, to 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 organized 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

[45] On the notion of the 'relational' contract, see I. Macneil, 'The many futures of contracts' (1974) *Southern California Law Review* 691–816.

[46] See S. Jacoby, *Employing Bureaucracy: Managers, Unions, and the Transformation of Work in American Industry 1900–1945* (New York: Columbia University Press, 1985); P. Cappelli, 'Market-mediated employment: the historical context', in M. Blair and T. Kochan (eds.) *The New Relationship. Human Capital in the American Corporation* (Washington DC: Brookings Institution, 2000) 66–90; Marsden, *A Theory of Employment Systems*, op. cit.; J. Saglio, 'Changing wages orders: France 1900–1950' in L. Clarke, P. de Gijsel and J. Jansenn (eds.) *The Dynamics of Wage Relations in Europe* (Dordrecht: Kluwer, 2000) 44–59.

[47] D. Marsden, 'Breaking the link: Has the employment contract had its day?' *Centrepiece* (1999) winter, 20–25, at p. 21.

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'.[48]

Labour law gradually came to support 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, but the single most significant form of legislative intervention in the labour market was in the area of social security law, and, more specifically, the law of social insurance. The growth of large-scale enterprise provided the opportunity for redistributive policies which operated through the mechanisms of taxation and social security system, of which national insurance became the most prominent. As individuals and households became increasingly dependent on continuous, waged employment for access to income, they were vulnerable to the effects of any prolonged interruptions to earnings. State intervention, by imposing responsibility for these wider social risks on employers, then provided further incentives for the growth, in its turn, of the vertically integrated firm, which was best placed to deal with the costs of regulatory compliance.

This is not to deny that the contract of employment has been 'a remarkable social and economic institution';[49] but it is to suggest that, in seeking to understand the nature of its current trajectory, an analysis of its public–regulatory character is at least as important as one which is focused on enterprises and industries, and that an historical perspective should be incorporated into functional analyses. When the public–regulatory dimension is taken into account, it becomes clear that the state became the implicit third party to the contract, channelling the risks of economic 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 then 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 the dysfunctionality which some contemporary critiques identify,[50] which above all requires explanation.

[48] D. Marsden, 'Breaking the link: Has the employment contract had its day?' *Centrepiece* (1999) winter, 20–25, at p. 22. [49] Ibid., at p. 20.

[50] See H. Collins, 'Independent contractors and the challenge of vertical disintegration to employment protection law' (1990) 10 *Oxford Journal of Legal Studies* 353–380, at p. 369 ('dysfunctional'), and 'Market power, bureaucratic power and the contract of employment' (1986) 15 *Industrial Law Journal* 1–15, at p. 2 ('artificial and unpersuasive doctrinal explanations'); J. Clark and Lord Wedderburn, 'Modern labour law: problems, functions and policies', in Lord Wedderburn, R. Lewis and J. Clark (eds.) *Labour Law and Industrial Relations: Building on Kahn-Freund* (Oxford: Clarendon Press, 1983) 147–242 ('anarchy' and 'crisis of concepts').

What we have called a 'genealogical' analysis makes it possible to see why it is that the contract of employment could be, at one and the same time, the 'cornerstone'[51] 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 crises 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 project of democratic emancipation which it embodied.

This was because, in the first place, the contract of employment looks back to the model of economic subordination which was contained in the master–servant relation. This has meant, among other things, that many of the objectives of economic democracy and worker participation in decision-making within the enterprise which inspired labour law reform at the turn of the twentieth century have remained unfulfilled; they have been 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.

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 formalizing 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.

Finally, the contract of employment has been premised on a model of regulation which makes a series of assumptions about the power of legal centralism which no longer hold. Part of this represents the undermining of the idea 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 and social citizenship,[52] was a strategy principally addressed to national government. The focus, for

[51] O. Kahn-Freund, 'Servants and independent contractors' (1951) 14 *Modern Law Review* 504–509.

[52] W. Beveridge, *Full Employment in a Free Society* (London: Liberal Publications Department, 1944, and Allen and Unwin, 2nd ed., 1967).

example, on *national* insurance set clear jurisdictional limits to the notion of social inclusion which the contract of employment was capable of representing. When, in the 1970s, governments began to liberalize rules on the movement of capital, the bases upon which they had previously assumed powers of regulation and taxation were undercut. In practice, the extent to which the increasing inter-dependence of national economies from the point of view of trade makes it more difficult for them to regulate labour and product markets is an open question. It is possible that governments are no longer able to coordinate their national macroeconomic policy interventions as they did in the past; however, many of the institutional changes which have led to a weakening of national regulatory regimes were initiated by these same national governments. More generally, legal centralism as a form of regulation is challenged by the perception that there is a set of rival and competing modes of regulation or governance, ranging from transnational codes of practice to forms of professional and occupational self-regulation which no longer take the state as their point of reference. The result is a 'de-centred' labour law system, within which not just mandatory social legislation but also established modes of collective bargaining have come under challenge.[53]

Thus an historical, and even more precisely, an *evolutionary* perspective, is essential for understanding the current 'crisis of concepts' in labour law. The emergence of the contract of employment has been a complex process involving many actors and influences. It was not 'invented' by a single draftsman or judge, nor even as the result, solely, of the collective efforts of lawyers and advocates. Pressures and opportunities for legal change were derived from outside the legal system in the form of political mobilization, and changes in the predominant form of economic organization, and shifts in the structure of the family and the composition of the labour force. These made up the background against which strategies for legal change were formulated and implemented. Instead of the adjustment of legal rules to economic needs, there has been at best a confusing, at times disjointed, and fundamentally asynchronic *co-evolution* of legal and economic forms.[54] The functional and dysfunctional features of the contract of employment alike are the consequence of this very particular trajectory.

3. Industrialization and Freedom of Contract

The implication of the analysis which we have just presented is that the juridical form of the contract of employment is the result of two linked, but historically distinct, developments. The first was the process of industrialization which led to

[53] U. Mückenberger, 'Alternative mechanisms of voice representation' presentation to joint Columbia University/Institute of Advanced Legal Studies seminar, London, July 2004 (using the term 'decentration').

[54] See Lee, 'Law, economic theory and corporate governance' op. cit. for a similar argument in the context of company law.

the institution of formally free labour, as workers were separated from the land and other traditional sources of subsistence, and labour became the subject of exchange relations but also of a specific, hierarchical form of legal control. The second was the advent of the welfare state, which provided a basis for organizing and spreading the risks inherent in the shift to an industrial society, in which wage labour had become the principal source of subsistence for the large majority of the population. The contract of employment reflects within its structure the tension between these two ideas, between, that is, the two functions of economic coordination on the one hand and risk redistribution on the other. This structural tension is, moreover, the result of a particular historical process of institutional formation, in which the new model of employment was superimposed on the older notion of service.

What does this analysis imply for our understanding of the legal transition which accompanied industrialization? This is a pivotal issue for British legal and economic history. The British industrial revolution, suggests E.A. Wrigley, 'is the centrepiece of world history over recent centuries, and *a fortiori* of the country in which it began'.[55] In the historiography of the industrial revolution, moreover, the role of legal and institutional factors has played a major part from the very inception of the field. Arnold Toynbee, the first historian to use the term 'industrial revolution' in lectures he gave in the 1880s, defined it by reference to several, linked features: the marked increase in the overall size of the population in the course of the eighteenth and early nineteenth centuries; the decline of the agricultural population during the same period and the growth of towns; the replacement of the domestic system of manufactures by the factory; the expansion of trade which was made possible by improvements in communication; and those 'altered conditions in the production of wealth' which 'necessarily involved an equal revolution in its distribution'.[56] But in Toynbee's view, the most fundamental change of all was *institutional*: 'the essence of the Industrial Revolution is the substitution of competition for the medieval regulations which had previously controlled the production and distribution of wealth'.[57]

Toynbee's analysis has particular resonance in the context of the removal of legislative support for guild controls and the abolition of statutory wage fixing, which occurred in 1814 and 1813 respectively. Together with the laws governing poor law settlements, these were measures which Adam Smith, writing in the mid-eighteenth century, had described as 'obstructions' to the 'free circulation' of labour and stock.[58] In addition, the poor law Amendment Act of 1834,[59] which

[55] E.A. Wrigley, *Continuity, Chance and Change: The Character of the Industrial Revolution in England* (Cambridge: Cambridge University Press, 1988), at p. 8.

[56] A. Toynbee, *Lectures on the Industrial Revolution in England*, ed. with an introduction by T.S. Ashton (Newton Abbott: A.M. Kelley, 1969) (originally published 1884), at p. 92.

[57] Ibid., at p. 85.

[58] A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. with an introduction by J.S. Nicholson (London: T. Nelson and Sons, 1886) (originally published 1776), volume 1, ch. 10, at p. 57.

[59] 4 & 5 William IV, c. 76. See further Ch. 3, below.

put an end to the allowance system of the old poor law and instituted the principle of 'less eligibility', was for Toynbee 'perhaps the most beneficent Act of Parliament which has been passed since the Reform Bill [of 1832]'.[60] The idea that the industrial revolution was characterized by a shift from protection to competition, from regulation to contract, and from collective to individual forms of property, has remained a point of reference in the debate ever since.

One reason for this association is that the period between 1760 and 1830 which is often regarded as the critical period of economic transition was, undeniably, a period of intense institutional change during which the liberalizing influence of the theory of political economy was particularly strong. In the 1960s, W.W. Rostow's theory of the 'take-off' into industrial growth identified industrialization with the same period,[61] thereby adding further force to the link between economic growth and the removal of regulatory 'constraints' on production. More recent scholarship has revised the 'take-off' theory. It is now generally agreed that the half century after 1750 was one of relatively slow rates of growth, in terms of both output and incomes per head, in comparison to the period from the mid-seventeenth to the mid-eighteenth century, which had seen rapid improvements in agricultural productivity, allowing the movement of population into towns and cities.[62] The economy as a whole did not grow at more than three per cent per annum until the 1830s, and the pace of industrial change and the adoption of machine technologies, outside a few industrial sectors, were limited up to this point.[63] By 1850, relatively few workers were employed in factories; only a small proportion worked in technologically advanced industries such as cotton, iron and steel, and metalworking; and the full impact of steam power in transport and production was yet to be felt.

By the mid-nineteenth century, a decisive shift had nevertheless occurred in the direction of an industrialized economy in which sustained increases in output per head were able to support a growing population, which, in a virtuous circle, provided a source of rising demand. As Wrigley explains, the process by which this was arrived at was a complex and protracted one, involving a transition from an 'advanced organic economy' which, notwithstanding the rise in agricultural productivity, remained dependent upon limited resources to sustain a growing population, to a 'mineral-based energy economy' in which the use of coal and steam-based technologies released new productive powers:

> The essential nature of the contrast . . . was that between negative and positive feedback systems. An organic economy, however advanced, was subject to negative feedback in the

[60] *Lectures on the Industrial Revolution*, op. cit., at p. 111.

[61] W.W. Rostow, *The Stages of Economic Growth, A Non-Communist Manifesto* (Cambridge: Cambridge University Press, 1961).

[62] Wrigley, *Continuity, Chance and Change*, op. cit., ch. 1; M. Daunton, *Progress and Poverty: An Economic and Social History of Britain 1700–1850* (Oxford: Oxford University Press, 1995), ch. 2.

[63] N.F.R. Crafts, *British Economic Growth during the Industrial Revolution* (Oxford: Clarendon Press, 1985).

sense that the very process of growth set in train changes that made further growth additionally difficult because of the operation of declining marginal returns in production from the land…Each step taken made the next a little more painful to take. In parts of an organic economy, because of the effect of the specialisation of function, increasing returns were available, and positive feedback existed, but, since each round of expansion necessarily increased pressure on the land by raising demand for industrial raw materials, as well as food, in the system as a whole negative feedback tended to prevail. In a mineral-based energy economy, in contrast, freed from dependence on the land for raw materials, positive feedback could exist over a large and growing sector of economic activity. Each step taken made the next easier to take. The system as whole could gain an increasing momentum of growth. Real wages were not permanently constrained to remain close to the minimum set by the prevailing norms of society.[64]

This more complex view of the timing of industrial development implies a reconsideration of the nature of the legal transition to industrialization, in which the role of the old poor law is pivotal. As we examine in greater detail in Chapter 3, up to 1750 the system of poor law settlements functioned to provide poor relief in the event of an interruption to earnings through sickness, old age, or other loss of employment. Income replacement rates were high by modern standards, expenditure was on a greater scale than in any other western European country at the time, and although administration was carried out at parish level, national legislation provided a public–institutional framework for the collection of the local taxes on which the system depended. Labour mobility was encouraged by the legal guarantee that a young, unmarried worker could acquire a settlement by hiring under a yearly contract of service, and by a system of certificates under which 'home' parishes undertook to meet the costs of poor relief administered by 'host' parishes. Although the settlement system began to decline after 1750, its demise was the result of increasing casualization of employment and the effects of rural overpopulation, rather than any readjustment of the economy towards a more market-orientated legal framework. On the contrary, the old poor law can be seen as underpinning the emergence of wage labour at a time when reduced access to the land and related legal and social changes were increasing the degree of wage dependence experienced by the still largely rural population:

It might be nearer the truth to say that the development of capitalism in England was conditional upon the existence of an efficient and ubiquitous welfare system than to say that it could only flourish by undermining the old system of welfare provision. The system of support created by the old poor law covered much the same range of life-cycle hazards as are covered by the state today, sometimes on a scale uncannily similar to that current nowadays . . . Viewed in this light the creation and elaboration of the poor law system from the reign of Elizabeth onwards was an important reason for the development of a capitalist system in England, affording the kind of provision for those in need which gave individuals a degree of protection against the hazards of life that in typical peasant cultures was provided by kin.[65]

[64] *Continuity, Chance and Change*, op. cit., at pp. 29–30. [65] Ibid., at p. 120.

Thus the state had, in effect, already replaced the extended family as the basis for welfare support, *prior to* the period traditionally identified with industrialization.

When the framework of relief through poor law settlements began to break up, it was replaced by various versions of the allowance or 'Speenhamland' system, under which outdoor relief, paid by reference to a sliding scale based on the price of bread, was used to subsidize low-paid and casualized forms of employment. How far the allowance system was the cause, and how far the consequence, of the break-up of stable employment in agriculture, continues to be a matter of dispute between historians.[66] What is not in doubt is that the widespread adoption of the allowance system filled a void left by the demise of annual service and the *de facto* ending of wage regulation in agricultural areas in the 1790s. The subsequent substantial rise in poor relief was a principal factor in the pressure which eventually led to the legislative abrogation of the old poor law and the adoption of the principle of 'less eligibility' in the administration of poor relief, following the passage of the poor law Amendment Act 1834. Statutory and administrative enforcement of 'less eligibility', while slow to take effect in the years following 1834, had achieved considerable momentum by the 1870s, and was to form the centrepiece of poor law policy up to, and in some ways even beyond, the first national insurance legislation of the early twentieth century.

How is this process of institutional change to be assessed by reference to the concept of industrialization? Was the old poor law a vestige of pre-industrial regulation? In *The Great Transformation* Karl Polanyi presented Speenhamland as holding back the emergence of a modern labour market: 'during the most active period of the Industrial Revolution, from 1795 to 1834, the creating of a labour market in England was prevented through the Speenhamland law'.[67] The outcome was a social catastrophe: 'the attempt to create a capitalistic order without a labour market had failed disastrously'.[68] The new poor law was designed on the assumption that once outdoor relief was denied to those able to work (the 'able-bodied' poor), wages would once again rise to a level which reflected subsistence needs. In that sense, the Act of 1834 was indeed the harbinger of a labour market based purely on exchange relations, in which there were no impediments to the free operation of supply and demand. But there is also a sense in which Speenhamland was a mechanism for the destruction of a system of poor relief, based on the twin institutions of settlement and the yearly hiring, which had been complementary to the emergence of a modern labour market. As Polanyi himself put it, 'if human society is a self-acting machine for maintaining the standards on which it was built, Speenhamland was an automaton for demolishing the standards on which any kind of society could be built'.[69] The reaction to the negative consequences of the allowance system (which were real enough to contemporaries, however imaginary

[66] See our discussion of this point in Chapter 3, below.

[67] K. Polanyi, *The Great Transformation. The Political and Economic Origins of our Time* (Boston: Beacon Press, 1957) (originally published 1944), at p. 77.

[68] Ibid., at p. 80.

[69] Ibid., at p. 99.

some now claim them to have been) was so severe that the idea of wage regulation and the use of the poor relief system to underpin basic labour market standards was ruled out for the rest of the nineteenth century, in favour of dogmatic adherence to the precepts of classical political economy; and while 'less eligibility' was intended to be an expression of the doctrine of laissez-faire, in practice it required the creation of an extensive bureaucratic apparatus of poor law administration for the ideal of a self-regulating market to be made effective.[70]

What of the law regulating the content of the employment relationship and the organization of work during this period? The political economists of the period saw the removal of guild controls and the suppression of centuries-old constraints on the use of machinery as part of the process of freeing up productive forces. Later commentators, including those critical of or sceptical towards laissez-faire such as Polanyi, have tended to regard mechanization and contractualization as the linked processes which brought about an irrevocable shift from household and guild forms of labour to factory employment.[71] E.P. Thompson's account of the cultural shift from a 'moral economy' of customary rights to a system of 'political economy',[72] in which the formality of contractual relations was coupled with the new time-based work-discipline of factory labour, is in a similar vein.[73]

Weber, likewise, described the transition from pre-modern forms of service to 'formally free labour' as lying at the foundations of the emergence of industrial capitalism. The 'modern West', he argued, displayed 'a completely different form of capitalism, which has developed nowhere else in the world: the rational capitalist organization of (formally) free labour'. The rational organization of the capitalist enterprise would not have been possible without 'the separation of the household from the place of work'.[74] Echoing this point, Selznick has influentially drawn a contrast between the master–servant law of the pre-industrial age, and the contractual model of the employment relationship, which he dated to the early nineteenth century. On the one hand:

> The old law of master and servant looked to the household as a model and saw in its just governance the foundation of an orderly society. The household model made sense in an overwhelmingly agricultural economy where hired labour, largely permanent, supplemented the work of family members and all were subject to the tutelage of the father-manager. The model also fit the early pattern of work and training among skilled artisans. In this setting, the relation of master and servant was highly diffuse and paternalistic. Work was carried out in the house of the master or in a small shop nearby. The workman lived as a member of the household and often remained for life with the same master. It was against this background that the law of master and servant developed.[75]

[70] See generally Ch. 3, below. [71] Polanyi, *The Great Transformation*, op. cit., at p. 75.
[72] E.P. Thompson, 'The moral economy of the English crowd in the eighteenth century' (1971) 50 *Past and Present* 76–136.
[73] E.P. Thompson, 'Time, work-discipline, and industrial capitalism' (1967) 38 *Past and Present* 36–97. [74] 'The origins of industrial capitalism in Europe', op. cit. at p. 336.
[75] *Law, Society and Industrial Justice*, op. cit., at p. 123.

The arrival of industrialization marked the removal of legal obstacles to freedom of contract:

> A truly contractual theory of employment did not emerge until the concept of a free market gained ascendance in economic life. In the late eighteenth and early nineteenth centuries, the idea of contract heralded a new age in politics as well as in trade. Contract was the solvent and the surrogate for a new political community rooted in traditional and unquestioned authority. It was the key to growth and freedom for an economy bound and fettered by privileged guilds, chartered corporations, and the heavy hand of state control. With contract as master image and touchstone of legitimacy, the old constraints on political freedom, freedom of movement, and freedom of trade could be removed.[76]

This description is not necessarily inaccurate as the representation of the movement from one ideal type of production to another. However, it truncates a process of historical development which, in practice, was both more complex and considerably more elongated than the passages just quoted appear to suggest. In the England of the seventeenth or eighteenth century, just prior to industrialization, the extended family had ceased to be common: 'the small conjugal family had been the normal co-residential unit in England for many centuries'.[77] Service in the course of a yearly hiring was normally undertaken prior to marriage and so was not intended to give rise to a permanent or lifelong employment, but was just one part of the customary life cycle of employment. Employment in the form of day labouring or on the basis of a weekly hiring was already common by this point.

Nor is the description an accurate account of what happened as industrialization began to gather pace, at the turn of the nineteenth century. As we explain in more detail in Chapter 2 below, the role of the master–servant law did not *diminish* as industrialization gathered pace; significant legislative innovation in the course of the eighteenth and nineteenth centuries meant that the scope, force and severity of this body of law *intensified* at this point. It was not until the 1870s that criminal sanctions were removed from the law of the individual service relationship, and even then a form of specific performance at the employer's behest remained in place. Conceptually, too, contract played a limited role in governing the work relationship for most industrial and agricultural workers; the source of the master's right to give orders was conceptualized as an adjunct of the particular status created by the legislation.

Three points stand out from the critique that we develop in more detail in later chapters. The first is that there was a labour market in England *before* the transition to an industrial society and economy took place. Land enclosure and the movement of the population into towns and cities ensured that a substantial proportion of the population was already dependent on wages, directly or indirectly, for subsistence. Secondly, the institutions of wage labour were supported by legal provisions of various kinds, many of which gave expression to customary

[76] *Law, Society and Industrial Justice*, op. cit., at p. 130.
[77] Wrigley, *Continuity, Chance and Change*, op. cit., at p. 118.

expectations, but which at the same time supported market mechanisms. The poor law provided a framework for the encouragement and regulation of labour mobility and the provision of welfare support; guild rules and apprenticeship regulations sought to regulate competition in production and maintain standards of quality. These were not simply remnants of a medieval pattern of economic regulation; they had evolved to meet the conditions of an emerging industrial economy. Thirdly, although the period between 1750 and 1830 did indeed see the removal both of the poor law (in its traditional form), the repeal of guild-based forms of apprenticeship and labour regulation and the suppression of attempts, such as those of the Luddites, to maintain traditional controls over production, this was not a process which can be straightforwardly characterized in terms of 'contractualization' or, in modern terminology, 'deregulation'. What was involved here was the *redefinition* of property rights and the *reconstitution* of public–regulatory law, rather than a simple shift from paternalist control to market-based contractualism. As Martin Daunton has recently put it:[78]

> The response of workers should not be interpreted in terms of disorder and ineffectuality, but as part of a well-developed and articulate 'corporate discourse' which stressed stability, regulation, and the need to observe strict limits to innovation which threatened independence and accountability. Workers threatened by the rise of 'dishonourable trades' appealed for the state to protect their property in skill in the same way as other property, and to recognize their social value. The rejection of legislative support for this set of assumptions was political, and workers continued to press for its restoration. Luddites who continued to urge the implementation of laws which no longer existed were, according to some historians, not adjusting to new realities. This fails to comprehend their attitudes and assumptions, and gives priority to the ideology of their opponents.

To sum up: the relationship between industrialization and the emergence of the contract of employment was a complex and multi-layered one. To argue that, at the time of the industrial revolution, there was a fundamental shift from status to contract, which was then reversed with the advent of the welfare state, is far too simplistic. Whatever the validity of such a claim in other contexts,[79] it does not apply to the labour market; and given the importance attached to the labour market and in particular to the institution of 'free labour' in the historical analysis of the emergence of capitalism, this is a matter of wider significance. The conceptual history which we will present in greater detail in later chapters indicates that throughout the evolution of the law governing work relationships, it is at each point the *conjunction* of contract and status which stands out. In the nineteenth century it was the status of *service* which was grafted on to the contractual form of

[78] *Progress and Poverty*, op. cit., at p. 499.

[79] See generally P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979). Recognizing the exceptional nature of employment within his larger thesis, Atiyah writes, at p. 523: 'I must begin with the process by which freedom of contract came to apply to contracts of employment in the first place, and we shall then observe the curious fact that this process was never wholly completed at all'. See further our analysis in Ch. 2, below.

the relationship; in the twentieth, the rights-based status of social insurance and employment protection law, a category which approximated to a notion of *social citizenship*. As Supiot has suggested, in the wider context of a comparative analysis of the systems of western Europe, 'the coupling of contract and status should not be understood in the sense of an historical passage from one to the other, but instead in terms of a fundamental structural ambiguity which characterizes labour law'.[80] This 'structural ambiguity' is also a deep-seated functional feature of capitalist labour relations, in which, as Polanyi recognized, public regulation is the inevitable precondition of the operation of the market:

> in respect to business, a very similar situation existed as in respect to the natural and human substance of society. The self-regulating market was a threat to them all, and for essentially similar reasons. And if factory legislation and social laws were required to protect industrial man from the implications of the commodity fiction in regard to labour power, and if laws and agrarian tariffs were called into being by the necessity of protecting natural resources and the culture of the countryside against the implications of the commodity fiction with respect to them, it was equally true that the central banking system and the management of the monetary system were needed to keep manufactures and other productive enterprises safe from the harm involved in the commodity fiction as applied to money. Paradoxically enough, not human beings and natural resources only but also the organization of capitalistic production itself had to be sheltered from the devastating effects of a self-regulating market.[81]

4. Legal Evolution

The long-run movement towards industrialization was accompanied not just by substantive changes in the content of the law, but by a gradual shift in the nature of law itself, a movement towards the kind of 'rational structure of law and administration' which made it possible to have 'a rational private enterprise economy with fixed capital and sure calculation'.[82] This in turn implied 'a "rational" legal procedure, based on formalized legal concepts'.[83] The aim of internal conceptual unity was an aspect of the separation, or autonomy, of the legal system, and both arose from, among other things, the growing use of law as an instrument of labour market regulation. This began in England in the later Middle Ages. The administrative and judicial reforms which led to the emergence of a unified system of common law in the twelfth century also stimulated the growth of a formalized type of legislation and the recognition of the distinction between statutory and

[80] *Critique du droit du travail*, op. cit., at p. 33.
[81] *The Great Transformation*, op. cit., at p. 132.
[82] Weber, 'The origins of industrial capitalism in Europe', op. cit., at p. 329.
[83] Weber, 'The development of bureaucracy and its relation to law', in Runciman (ed.) and Matthews (transl.) *Max Weber: Selections in Translation*, op. cit., 341–354 (excerpted from Weber, *Wirtschaft und Gesellschaft*, 4th ed., Tübingen: Mohr, 1956 (first published in 1922)), at p. 352.

judge-made law.[84] The Black Death of 1346, and the ensuing labour shortage, was the catalyst for the first national labour legislation, the Ordinance of Labourers of 1349 and the Statute of Labourers of 1351. Prior to this point, wage regulation had been local and largely customary in character. Labour legislation encouraged the growth of the common law writ of *assumpsit* which came to form the basis for the enforcement of promissory undertakings; already, by the second half of the fourteenth century, '*assumpsit*, thus allied with the Statute of Labourers, was part of a considered and controlled governmental policy of coercing working people to work well'.[85] The policy of using legislation and the courts to regulate the labour market continued into the early modern period. Even if there is a sense in which even the great statutes of the Elizabethan period, the Statute of Artificers of 1562[86] and the Poor Relief Act of 1601,[87] were merely formalizing practices which had begun at a lower level,[88] once enacted they were regarded as sources of law in their own right, and active efforts were made to ensure consistency of interpretation and application. The first treatises written by and for the justices of the peace who were principally responsible for the local enforcement of this body of law appeared in the late sixteenth century.[89] By the eighteenth century the image of the justice as the 'gentleman volunteer' was being displaced, a shift symbolized by Richard Burn's legal manual, *The Justice of the Peace and Parish Officer*, which in its very structure 'implicitly reminded the justice that he was preeminently part of the English legal system'.[90] With the development of the prerogative writs, the Court of King's Bench acquired the power to supervise the administration of the law by the justices and in particular, through the writ of *certiorari*, to quash decisions made in excess of jurisdiction.[91] One of the by-products of this process was the extensive (and extensively reported) litigation under the Settlement Acts through which the service relationship acquired its early juridical character.[92]

The autonomy of the legal system creates the material for our study: the emergence of distinctive legal practices and an autonomous body of legal doctrine based on legal continuity makes it possible to trace the evolution of legal concepts over long periods. What exactly is the nature and significance of this evidence?

[84] See P. Brand, *The Making of the Common Law* (London: Hambledon, 1992).

[85] R. Palmer, *English Law in the Age of the Black Death, 1348–1381: A Transformation of Governance and Law* (Chapel Hill, NC: University of North Carolina Press, 1993), at p. 213.

[86] 5 Elizabeth I, c. 4. [87] 43 Elizabeth I, c. 2.

[88] See, for discussion of how far this was the case, R.H. Tawney, 'Assessment of wages in England by the Justices of the Peace' in W. Minchinton (ed.) *Wage Regulation in Pre-Industrial England* (Newton Abbot: David & Charles, 1972) (originally published in 1913).

[89] William Lambard's *Eireanarcha: or the Office of the Justice of the Peace* was first published in 1581 and Michael Dalton's *The Country Justice* in 1618.

[90] N. Landau, *The Justices of the Peace*, 1679–1760 (Berkeley: University of California Press, 1984), at p. 340. For a full account of the judicial system of England during the period of industrialization, see W.R. Cornish and G. de N. Clark, *Law and Society in England 1750–1950*, op. cit., at pp. 17–53. [91] See Landau, *The Justices of the Peace*, op. cit.

[92] See below, Ch. 3.

Douglas Hay rightly reminds us that while legal doctrine is 'important for an understanding of both judicial thinking and political conflict', judicial decisions including 'the cases that appear in the Law Reports are highly unrepresentative, in many ways, and especially as guides to enforcement'.[93] Legal concepts are linguistic devices, cultural artefacts which are used for the purposes of determining and applying legal rules. They are not intended to be models for action and they are not synonymous with the social and economic relations which they purport to describe. But nor are they timeless creations of some judicial imagination.

The juridical record which, in the case of English law, has come down to us as the result of several centuries of continuous legal development, is the result of institutional pressures which have brought about the persistence or survival of certain ideas or precepts at the expense of others. The reported decisions are only a fraction of those decided by courts, and these in turn represent a tiny segment of the instances in which disputes were resolved and agreements struck in the shadow of legal rules. If what survives is, almost by definition, unrepresentative of the range and type of relations operating in a society at any given time, it is the very fact of their survival which has the potential to inform us about the society which created them and which ensured their continuation within the body of the public discourse of the law.

To that end, an evolutionary study of the law requires us to take a dual approach: on the one hand, an internal understanding of internal juridical modes of thought and conceptualization; and, on the other, an external perspective on the law as a social institution or mechanism, one which is at times capable of being an active instrument of change, but which is also shaped by the society in which it is located. In this sense, our study, while it takes the body of legal doctrine as its focus, is an interdisciplinary one, which seeks to locate the law with reference to the wider framework of social relations, and which to that end draws on a range of material from beyond the law, concerning changes over time in the organization of work, the structure of worker representation, and the development of the state as an actor in labour market regulation.

The question of whether, and how far, legal institutions matter to economic development in the sense of having substantial and lasting effects on patterns of growth, is an open one, currently much discussed and debated by historians and economists. The argument which we have presented up to this point, and which we expound at greater length in the rest of the book, does not try to claim that legal change is always and everywhere capable of determining, in an instrumental way, a certain set of social and economic outcomes. Nor, conversely, are we attempting to show that the path of legal evolution is rigidly predetermined by the wider social and economic context within which the legal process is located. Both of these possibilities are equally plausible, at first sight. Thus it is entirely possible

[93] D. Hay, 'Master and servant in England: using the law in the eighteenth and nineteenth centuries', in W. Steinmetz (ed.) *Private Law and Social Inequality in the Industrial Age: Comparing Legal Cultures in Britain, France, Germany and the United States* (Oxford: Oxford University Press, 2000) 227–264, at p. 232.

to argue, of any particular legislative measure or common law rule, that it may have had certain effects upon the growth path of the economy, and to test such a proposition using quantitative or case study techniques. It is equally possible to argue that a change in the law was itself the product of economic changes which led to the formation of interest groups in a position to lobby for legislation or litigate for a change in case law. Did the passage of the Conspiracy and Protection of Property Act in 1875, for example, cause the subsequent growth in trade union membership by lifting the most significant legal constraints on strike action?; or was the Act itself the result of a combination of economic and political factors, such as the extension of the democratic franchise and the growth of early forms of joint regulation of industry, which together brought about the accommodation, within legislation, of trade union interests, and which led in turn to the further expansion of collective bargaining over the following decades?

Each hypothesis is just as plausible as the other, and there is no straightforward *a priori* way to choose between them. Nor are we greatly helped by the various accounts of evolutionary adaptation which are in common use by historians and economists. If we say that the 'legal system had to adapt to its environment in order to survive', why not reverse the sequence by arguing that 'the environment could also be adapted to the system'? We arrive very quickly at a tautology: 'systems could adapt to the environment if the environment were adapted to the system, and vice versa'.[94] It is not possible to escape from this tautology by simply assuming that it is the system which adapts to its environment, since this introduces an implicit causal sequence, once again reducing the 'legal' to a sub-category of the 'economic'. This technique is what unites instrumentalist Marxist accounts which view law as an element of a 'superstructure' constructed on a base of economic relations, and neo-functionalist law and economic accounts which view legal evolution as the outcome of a selection process dictated by economic requirements, and which in each case severely limits their power to explain legal change.

There is a need, in contrast to these approaches, for a methodological position which can account for the distinctiveness and specificity of legal processes, while recognizing that they are lodged within a wider set of social and economic relations; which can pinpoint the role of contingency in bringing about institutional change, without falling back on ad hoc causal explanations; and which can explain comparative institutional divergences between systems which nevertheless share the common experience of industrialization and the transition to a market-based economic order. This methodology is one in which *legal and economic history* is understood in terms of the *evolution of social systems*.[95]

[94] N. Luhmann, *Social Systems*, translated by J. Bednarz Jr. with D. Baecker (Stanford, CA: Stanford University Press, 1995) (originally published in 1984 as *Soziale System. Grundriss einer allgemeinen Theorie* (Frankfurt am Main: Suhrkamp)), at p. 31.

[95] See M.T. Fögen, 'Legal history—history of the evolution of a social system. A proposal' *Rechtsgeschichte* (2002) September, available on line at: http://www.mpier.uni-frankfurt.de/Forschung/Mitarbeiter_Forschung/foegen-legal-history.htm.

When the process of legal evolution is considered over an extended period of time, as it is in this book, it becomes clear that its relationship to social and economic change is complex and multi-linear. It is not generally possible to posit simple relations of cause and effect, in either direction. Nor do we observe the precise synchronization of legal and economic change. Thus while it is possible to argue, for example, that the advent of the welfare state was a factor in the emergence within labour law of the binary divide between employment and self-employment, this did not happen overnight with the adoption of the first legislative measures of workmen's compensation and social insurance. On the contrary, it took several decades for the modern test to emerge, and it did so in stages, as distinctions between manual and non-manual workers gradually disappeared from the law, and as the language of 'employment' replaced that of 'service'.[96] Nor was this an outcome which the framers of the welfare state necessarily intended to occur, or even gave much thought to. The closest we come to an instrumental relationship between political direction and legal change at the level of conceptual categories is the anticipation, in Beveridge's 1942 report on social insurance, of the separation between employees (Class 1 contributors) and the self-employed (Class 2 contributors) which was later reproduced in the National Insurance Act 1946.[97] Yet even in this case, it is not possible to see Beveridge's report in isolation. Once the report was completed and the decision taken to legislate on the basis of its recommendations, it still remained for the draftsman to make use of particular statutory formulae, and for the courts to give these an interpretation which reflected the classification which the Act had aimed to put in place.[98] It was, at one and the same time, a process which aligned British practice with that of other systems, in both the common law and civil law world, which were also in the process of adopting a binary classification of labour relationships during this period, but also one which reflected institutional and legal practices which were specific to the British courts and Parliament.

The example of the role of the Beveridge report in helping to instantiate the binary classification of employment and self-employment illustrates the *genetic* aspect of legal-conceptual evolution. By this we mean that conceptual mutation occurs as a result of a particular kind of interaction between system, 'code', and environment. This approach has links to biological analogies of the kind which have been developed within systems theory and memetics,[99] and with evolutionary economics, in particular the theory of path dependence.[100] At its core is the

[96] See Chapter 2, below. [97] See Chapter 3, below. [98] See Chapter 2, below.

[99] On autopoiesis, see Teubner, *Law as an Autopoietic System*, op. cit., and Fögen, 'Legal history—history of the evolution of a social system', op. cit.; on memetics, see S. Deakin, 'Evolution for our time: a theory of legal memetics' (2002) 55 *Current Legal Problems* 1–42; W. Njoya, 'Employee ownership and efficiency', op. cit. Memetics offers a theory of *cultural* evolution, and must therefore be distinguished from reductionist approaches to legal evolution which see the evolution of cultural forms, such as law, as the *direct* result of *genetic* processes. This latter claim forms no part of our argument; see Deakin, op. cit., at pp. 34–35.

[100] On path dependence, see, in particular, P. David, 'Clio and the economics of QWERTY' (1985) 75 *American Economic Review* 332–337 and 'Why are institutions the "carriers of history"? Path dependence and the evolution of conventions, organizations and institutions' (1994) 5 *Structural*

idea that legal concepts act as mechanisms of cultural inheritance, which work by 'coding' information into conceptual form.

'Abstraction' is the process by which complex social information concerning the social world assumes a conceptual form; by these means, information concerning the implicit codes of the workplace, or the conventions of labour market exchanges, is translated into legal–conceptual terms such as 'contract', 'employment', 'dismissal', 'wage', and so on.[101] The important point here is that information from the social world can only be retained and transmitted within the legal system once it has been conceptually coded. It must be mediated through legal processes for this to occur. The conceptual framework therefore operates as a repository of information, an interpretive resource, but one of a particular kind. If, in general, the information contained in rules—such as information about what constitutes 'reasonable' or acceptable behaviour, or a breach of the rules governing the employment contract—is principally aimed at the addressees of the law, the social and economic actors, then the information contained in concepts is different in nature—it is information addressed above all to the legal actors whose task is to interpret and apply the rules. Concepts such as these thereby become indispensable linguistic aids in preserving the internal order of the legal system. They are deployed with the goal of ensuring that the body of legal doctrine is held together by a series of interlinked principles, and does not simply consist of a mass of individuated rules. On that basis, they provide the basis for continuity in the legal system, that is, for its reproduction across time and space.

At the same time, the unity of the legal order is able to accommodate innovation; but new information from the external environment has to be assimilated using *existing* conceptual devices. In this way, continuity and change are combined. The substance of the law can change while the form often stays the same—'it is because law has to present the appearance of continuity that change comes about behind such screens as unchanging words';[102] while it is normal for *ex post*, functional explanations to be attached to legal forms whose original justification has ceased to apply—'the rule adapts itself to the new reasons which have been found for it, and enters upon a new career'.[103]

Change and Economic Dynamics 205–220; M. Roe, 'Chaos and evolution in law and economics' (1995) 109 *Harvard Law Review* 641–668.

[101] On the evolutionary significance of abstraction with regard to cultural forms in general, see L. Gabora, 'The origin and evolution of culture and creativity' (1997) 1 *Journal of Memetics* 1–27 and Deakin, 'Evolution for our time', op. cit., which we draw on for our discussion in the text. 'Abstraction' can itself be thought of as a technique which has evolved over time with the development of legal method, mirroring the idea of the 'evolvability' of biological evolution: D. Dennett, *Darwin's Dangerous Idea*: *Evolution and the Meanings of Life* (Harmondsworth: Penguin, 1995), at pp. 221–3.

[102] S.F.C. Milsom, *A Natural History of the Common Law* (New York: Columbia University Press, 2003), at p. 107.

[103] O.W. Holmes Jr., *The Common Law*, ed. M. DeWolfe Howe (London: Macmillan, 1968) (originally published 1881), at p. 8.

Thus to take the case of the Beveridge report: conceptual innovation was triggered by an external event, that is, by a political process set within a wider pattern of far-reaching economic and social changes; on the other, the change occurred through an act of legal interpretation, using procedures specific to the juridical and legal-administrative process. These two sets of explanations are not mutually incompatible. The new rule resulted from the interaction of the legal system with the wider political and economic environment. This interaction can be understood in terms of a particular evolutionary dynamic. Pressures for *selection* came from the external economic and political environment, while the particular stock of precedents available to the draftsman and the courts of the time provided the source of *variation* in the options from which they could choose. The procedures of 'internal' validation within the legal system, in particular the relevant conventions of statutory drafting and rules of precedent for judicial decision-making, constituted the mechanisms of *inheritance* by which the continuity of the new rule (its consistency with existing practice and its binding force for the future) was ensured. The result was a 'new career' for the juridical form of the contract of service, which was in the process of being renamed the contract of employment.

There are a number of implications of this evolutionary approach to understanding legal change. The first is that the logic of linear causation gives way to one of mutual influence between systems. Law and the economy exercise reciprocal influences on each other, in the sense, as we have already suggested, of *co-evolution*. Even then, the impact of change in one system upon the other is unpredictable; a major upheaval in one does not necessarily imply anything for the other.[104] This means that causal claims have to be advanced cautiously, as Marie Theres Fögen explains:

> it is insufficient, or even directly misleading, to say: 'trial by formula developed from the *legis actio* procedure', or 'the origins of the criminal law are to be found in ecclesiastic penalties', or finally, 'the industrial revolution led to the invention of social security'. All these assertions and countless more besides ought to be reformulated as the question: was the *legis actio* procedure one of the conditions of the possibility of establishing the trial by formula? Or, to put it more precisely: did legal structures take shape in the *legis actio* procedure that were capable of further development such that structurally determined selection—in favour of the trial by formula—became possible?[105]

[104] An autopoietic presentation of this idea would insist on the impossibility of *direct* communication between self-referentially closed systems (Teubner, *Law as an Autopoietic System*, op. cit.). However, the notion of 'closure' in this sense does not mean that the system is not open to its environment in the sense of receiving certain communications from it (hence the idea of the system's 'cognitive openness'), nor is it suggested that the environment is anything but open-ended and complex. The function of the boundary between system and environment is to enable the system to organize and reduce this external complexity to terms which it can then internally process. In this sense, the issue, paradoxically, is 'how self-referential closure can create openness' (Luhmann, *Social Systems*, op. cit., at p. 9).

[105] Fögen, 'Legal history—history of the evolution of a social system', op. cit., at pp. 3–4.

Secondly, as we have already suggested, the process of evolution is *genealogical* as opposed to *teleological*: it is one which 'links the present state of arrangements with some originating context or set of circumstances and interpolates some sequence of connecting events that allow the hand of the past to exert a continuing influence upon the shape of the present', as opposed to one which supposes 'that the present shape of things can best be explained by considering their function and particularly their function in some future state of the world'.[106] Thus the process is 'not a necessity, but a product of itself', it 'is not linear and is by no means target-orientated … it "serves" nothing and no-one'.[107]

Thirdly, the process can result—indeed, normally will result—in the survival of sub-optimal rules.[108] Through selection, the influence of the external environment is brought to bear on the internal structure of the system. But the 'code' through which the system maintains its continuity must, of necessity, refer back to existing precedents and known forms. Legal concepts are coded for *past* environments: hence, for example, the negative influence of the 'exaggerated continuity of the common law'[109] in the context of modern British labour law.

Fourthly, the process of legal change implied by this account is indeterminate and open-ended. The evolutionary concept of 'punctuated equilibrium'[110] is more appropriate to describe legal evolution than the idea of a smooth progression or adjustment towards optimality: 'if we examine the social system of law over shorter or longer historical periods, we can observe, as we can in organic systems, that there are periods of "calm" (stasis) and periods of relative "unrest"'.[111] Change is likely to be triggered by chance or contingent events; although it may be possible to reconstruct the relevant process afterwards, 'there is no way of *predicting* when or why such factors may produce changes (or, evolutionarily speaking, "variations") in the law'.[112]

It does not follow from the above that an historical analysis of the conditions which led to the emergence of labour market relations rules out the *qualified* use of a functional logic. Functional reasoning may be useful in explaining why certain patterns of behaviour, and particular institutional forms, persist over time. Thus the explanation offered within company law for the emergence and persistence of the modern corporate form—namely that it corresponds to the economic requirements

[106] David, 'Why are institutions the "carriers of history"?', op. cit., at p. 206.

[107] Fögen, 'Legal history—history of the evolution of a social system', op. cit., at p. 4.

[108] The law and economics idea that a Darwinian theory of 'natural selection' is one which necessarily results in the emergence of optimal forms rests upon a fundamental misreading (or perhaps non-reading) of Darwin's works, as well as those of modern evolutionary theorists. See G. Hodgson, 'Darwinism in economics: from analogy to ontology' (2002) 12 *Journal of Evolutionary Economics* 250–282, and 'Darwinism and institutional economics' (2003) 37 *Journal of Economic Issues* 85–97.

[109] Lord Wedderburn, 'Companies and employees: common law or social dimension?' (1993) 109 *Law Quarterly Review* 220–262, at p. 253.

[110] See S.J. Gould, *The Structure of Evolutionary Theory* (Cambridge, MA: Belknap Press, 2003), ch. 9; Aoki, *Toward a Comparative Institutional Analysis*, op. cit., at pp. 223–4.

[111] Fögen, 'Legal history—history of the evolution of a social system', op. cit., at p. 2.

[112] Ibid.

of the business enterprise—may well be significant for labour lawyers seeking to explain the (in many ways surprising) longevity of the contract of employment. However, there is a difference between an approach which, on the one hand, simply assumes functionality from the persistence of form, and one, on the other, which examines the historical record of institutional evolution to see how particular patterns emerged, at which point they became established, and how they have changed over time. The danger with the first approach is that it 'projects backward from the end of the story'; it becomes exclusively a 'history of winners'.[113] The second approach, by contrast, stresses the variety of alternatives, the uneven and unpredictable quality of institutional change, and the uncertainty of outcomes. In this perspective, there is an important distinction between functionality and optimality: forms which are efficient enough to survive are not necessarily, for that reason, ideally suited to present environments, nor are they inevitably superior to alternatives which, in the passage of time, have not fared as well.

An historical analysis of concepts can therefore be an aid to the understanding of contemporary legal doctrine. A type of *legal* teleology occurs when a judge or drafter adapts an existing conceptual form or precedent to a new use, while making it appear that there is nothing more at stake than the application of an existing rule. The former meaning of the rule or form, and the context within which it first emerged, is then put to one side. This technique is probably a universal feature of judge-made law; in those legal systems, such as the English common law, which have never been systematically codified, it touches virtually all aspects of legal doctrine. In such a system, as David Ibbetson has shown, 'the inventing of the new is rarely combined with the discarding of the old'. Rather,

> legal change occurs through filling in gaps between rules in the way that seems most convenient or most just at the time; through twisting existing rules, or rediscovering old ones, to give the impression that a change in the law is no more than an application of the law that was already in place; through inventing new rules that get tacked on to the existing ones; through borrowing rules from outside the Common Law; through injecting shifting ideas of fairness and justice; and, very occasionally, through adopting wholesale procrustean theoretical frameworks into which the existing law can be squeezed.[114]

This effect is unavoidable in a system which relies upon precedent to ensure consistency and predictability in the application of the law. From the point of view of the practising lawyer or judge, indeed, the capacity to mould existing

[113] Harris, *Industrializing English Law*, op. cit. at p. 14. Harris's suggestion that English company law was more or less 'functional' at different times in its development is compatible with the idea of 'asynchronic' evolution which we have discussed in the text (above). However, rather than suggest, as Harris does, that the law was alternately 'autonomous' and 'functional', it is an implication of our approach that the law was always 'autonomous' and that its separation was in a basic sense a precondition of any functionality which it might have possessed.

[114] D.J. Ibbetson, *An Historical Introduction to the Law of Obligations* (Oxford: Clarendon Press, 1999), at p. 294.

concepts to new needs in this way is essential. But it can also lend to the law an appearance, not simply of continuity, but also of a smooth progression towards an efficient outcome, which may be very far from true to the historical record.[115]

Thus legal concepts assist in the transmission of values which, through their association with the juridical process, assume the status of accepted truths. The term 'legal dogmatics' is frequently used in the civil law world to refer to the internal language of juridical concepts. Assuming the pejorative meaning of the term 'dogma', this carries overtones of a closed system of reasoning, dependent on the mechanical application of formal axioms. However, Alain Supiot has pointed to a prior sense of the term 'dogma', which refers to 'what seems self-evident, and therefore has no need to be demonstrated'.[116] In this sense, legal concepts institute and guarantee those dogmatic beliefs which, notwithstanding their often arbitrary character, aid coordination between social actors. The 'closure' of legal concepts, their partial separation from the social and economic realm, is part of the means by which the values which they embody come to acquire legitimacy.

The historical study of legal concepts is therefore an exercise in reconstructing part of the process by which particular ideas acquire legitimacy in a given society, and by which those ideas are contested in their turn. In the course of an historical analysis, the role of contingency in producing a particular outcome, which otherwise has the appearance of permanence and stability, is clarified. In this context, 'traditional modes of inquiry tend to structure our focus by implicitly accepting the underlying assumptions and values of the doctrines analysed'; thus 'assumptions and values about the economic system and the prerogatives of capital, and about the rights and obligations of employees, underlie many labor law decisions'.[117] An historical approach is an essential antidote to approaches which confer a false impression of inevitability and efficiency in the evolution of legal rules.

But at the same time, an evolutionary analysis of law can help us to see not just the limitations of contemporary labour law, but also its potentialities and capabilities. Encoded in labour law are not simply the managerialist and disciplinary values of the service model and the poor law, but also values which reflect the political project of democratic emancipation on which labour law was first constructed. Part of our task is to understand how those values may be renewed today within the framework of an emergent 'law of the labour market'.

[115] On the difficulties, but also the opportunities, this creates for legal historians, see S.F.C. Milsom, *A Natural History of the Common Law*, op. cit., at p. xvi: 'the largest difficulty in legal history is precisely that we look at past evidence in the light of later assumptions, including our own assumptions about the nature and working of law itself'.

[116] A. Supiot, 'The labyrinth of human rights: credo or common resource?' (2003) 21 *New Left Review* 118–136, at p. 119.

[117] See J. Atleson, *Values and Assumptions in American Labor Law* (Amherst, MA: University of Massachusetts Press, 1984), at p. 4.

5. The Structure and Argument of the Book

In the remaining chapters of the book we develop our method and our argument as follows. Chapter 2 discusses the historical development of the body of law that is concerned with defining and constituting the employment relationship. We develop in detail our argument that the term 'contract of employment' did not begin to enter widespread use as a general description of wage-dependent labour until the twentieth century. We show that the growing adoption of this term by judges and drafters represented a substantive rather than a purely symbolic change. It was, firstly, the juridical equivalent of changes in the form of private and public sector enterprise, which at this point was becoming increasingly integrated. With vertical integration, it made sense to have a unified model of the employment contract, one which subsumed the independent role previously occupied by labour intermediaries and effaced old status-based distinction between manual and managerial workers. Secondly, the rise of the contract of employment took place alongside the introduction of social legislation in the fields of workmen's compensation, national insurance and employment protection. This legislation took as its premise the need to provide mechanisms to offset the social and economic risks of wage dependence. In this way, the modern system of classification based on the 'binary divide'[118] between employment and self-employment came into being.

The transitions from 'servant' to 'employee' and from 'independent contractor' to 'self-employed' were not straightforward. This is because the purposes for which labour relationships were classified shifted over time. The term 'servant' was not the forerunner of the modern 'employee'; in the nineteenth century, it was an *alternative* to the employee, in the sense that both expressions denoted a particular form of wage-dependent labour, differentiated by status. To stress this point is not to suggest that there is anything *necessarily* illegitimate in the process whereby the courts of today borrow and adapt the old case law of 'master and servant' when deciding employment cases. However, there may be occasions on which it is useful for a court to know that when it reads a nineteenth century decision on the definition of labour relationships, it is doing so against a context which is entirely different from that in which the precedent is now being applied. There is, moreover, a deeper, structural sense in which the legacy of the law's past affects decision-making today. One of the most controversial and difficult tasks facing today's judges, namely the application to work relationships of the tests for identifying a contract of employment, is not made any more straightforward by the confusing multiplicity of tests apparently available to the court. From the analysis which is presented in more detail in Chapter 2, it can be seen that these tests originated at different points in the development of the law governing the employment contract, and that each of them responded to a distinct set of

[118] See Freedland, 'The role of the contract of employment in modern labour law', op. cit.

requirements for classification. These in turn are associated with particular phases in the evolution of the enterprise and of the welfare state.

This analysis may help to explain why the current law on employment classifications, consisting as it does of a series of overlapping and potentially contradictory criteria, is quite as confusing as it is, but does it help to clarify it? Perhaps the historical origin of the present-day tests is of no more than antiquarian interest after all. One possible answer to this is that just as 'the medieval ground plan of the Common Law of obligations remains visible'[119] in modern private law, so today's labour law cannot be understood unless the structural influence of successive waves of mutation and adaptation is taken into account. The fact that some of these adjustments are very recent makes it all the more important to appreciate how they came about; such is the pace of legislative change that the memory of certain statutes, such as the Workmen's Compensation Acts of the early twentieth century, has apparently been almost entirely erased from legal consciousness, only decades after their passage.

There is a wider significance in the claims put forward in Chapter 2 which relate to the way in which the role of contract within labour law is understood, and, more specifically, how it relates to conceptions of status. The 'invention' of the concept of the contract of employment can be understood as reflecting, within the sphere of juridical discourse, the institutional tensions which accompanied the rise of a modern labour market. These are to be found within the very conceptual core of labour law. Is the contract of employment based on agreement, or command; is it an exchange, or a relationship; is it a private law transaction or a type of status regulated by public law? Different systems have responded to the challenge of resolving these tensions in particular ways, but they all have in common the 'insertion' of status, in some form, into the framework of the contract.[120]

Thus at every point in the development of the employment relationship in British labour law, contract and status have been intertwined. It has never been possible to give an exhaustive account of the employment relationship using the logic of contract alone. Thus there was no general movement from status to contract at the time of industrialization, nor does the welfare state mark a reversion to pre-modern status forms. In the period of industrialization, contract was complemented by the disciplinary code of master and servant regime and poor law conceptions of the legal duty to work. The effect of the advent of the welfare state and collective bargaining was to add a second, protective element of status, resulting from the application to the individual employment contract of norms deriving from collective agreements, via the concept of incorporation of terms, and social legislation, traditionally through the 'imposition' of extra-contractual obligations but more recently using a wider range of techniques.[121]

[119] Ibbetson, *An Historical Introduction to the Law of Obligations*, op. cit., at p. 295.

[120] Supiot, *Critique du droit du travail*, op. cit., at p. 27 *et seq*.

[121] See Chapter 2, below. It should be noted that while these are the principal mechanisms of adjustment used in British labour law, in French labour law, the notion of *ordre public social* operates in a way which is quite distinct from common law techniques for the application of social legislation,

This theme is developed further in Chapter 3, which considers the evolution of the duty to work from the time of the poor law to the present day. The 'old' or pre-1834 poor law gave expression to a set of reciprocal obligations which linked the legal duty to serve to the expectation of relief from the public authorities to mitigate the effects of joblessness, sickness and old age. While poor relief was coupled with various forms of social control and, on occasion, with physical compulsion to work, the old poor law nevertheless operated to encourage the growth of wage labour in an economy increasingly governed by the market principle. When, however, the framework of customary wage regulation was dismantled at the end of the eighteenth century, the resulting burden on the poor law, exemplified above all by the Speenhamland practice of wage subsidization, threatened to undermine wage labour and to create an unsustainable level of claims for relief. This led to the break-up of the system and its replacement by the restrictive code of the 1834 poor law Amendment Act. The 1834 Act was intended to make poor relief conditional upon a labour-market test, administered where possible through the workhouse, or combined in any event with compulsory labour. Through the principle of 'less eligibility', regulation aimed to set relief at a standard below the lowest level of wages available in the labour market; the result, however, was to instigate a cycle of casualization which threatened, once again, to destabilize the employment relationship. This was only brought to an end by the introduction of labour exchanges and the first forms of social insurance at the beginning of the twentieth century; however, the poor law, and the workhouse, did not completely disappear until 1948.

The poor law looms large in any attempt to provide an evolutionary explanation for trends in the British labour market, and it has given rise to a correspondingly extensive historiography which is particularly rich in studies of local poor law administration. We do not try to replicate that methodology here; our focus is on the juridical forms associated with poor relief and with their relationship to poor law policy. The principal regulatory mechanisms through which the poor law Amendment Act 1834 was implemented—the outdoor relief orders made by successive poor law Boards and Commissions—have been little studied. They merit close study, however, because they illustrate how notions of the employment relationship and the family as an economic unit were being constructed through the poor law at a time when the modern labour market was in the process of formation. Thus the concept of a breadwinner wage, although formulated by way of reaction against the poor law's destabilizing effects on family relations, also drew on poor law notions of subsistence and dependence.

Social insurance legislation likewise provides an important source of information on the evolution of the employment relationship during the twentieth century. Social insurance provided a highly juridified and complex set of mechanisms which underpinned the emerging model of indeterminate or open-ended employment.

and that in German labour law the same function is served to a certain degree by a 'communitarian' conception of the enterprise. See Supiot, *Critique du droit du travail*, op. cit.

The concepts of 'unemployment' and 'retirement', as they developed within social security law, were the mirror image of the conception of employment as a stable or 'permanent' relationship. The decline of social insurance since the early 1980s has been translated into further changes to these core concepts, just as the practice of stable employment has been in decline. The abolition of unemployment benefit, its replacement by the jobseeker's allowance, and the blurring of the line between employment and retirement, are all part of a fundamental policy shift: the post-war goal of full employment, which implied the stabilization and control of the labour supply, has given way to an 'activation policy' aimed at increasing the employment rate, notwithstanding the negative consequences of this move for stability of employment. In the set of beliefs and institutional mechanisms responsible for this shift, it is not difficult to discern the continuing legacy of the poor law.

Chapter 4 is concerned with the core labour market institution of collective bargaining between trade unions and employers, and with its relationship to social legislation governing conditions of employment. It addresses the paradox of British factory legislation: the earliest type of industrial legislation, in the first society to undergo an industrial revolution, did not bequeath a viable legacy to labour law. Within a few decades of the passage of the first Factory Acts, the standards which they set had been significantly improved upon by voluntary collective bargaining. The preference for voluntarism over statutory control was rooted in a legal and industrial relations culture which came to prioritize the values of contract; 'collective laissez-faire' was a logical extension of this wider philosophy to the sphere of industrial relations. By the mid-twentieth century, the triumph of voluntarism, although contested, implied the marginalization of arguments in favour of comprehensive statutory regulation of the employment relationship. That argument had turned not simply on the issue of fair treatment of workers, but also on the expectation that statutory control would suppress the 'parasitic' trades, sectors in which employers profited from low pay and casual employment, the costs of which were felt by the community at large. The failure of economic arguments for a labour code meant that terms and conditions continued to be set through sector-level bargaining by reference to the needs of the least profitable firms in each sector. That outcome has been little changed by the enactment, at the end of the 1990s, of new statutory standards governing the minimum wage and maximum working time; one of the principal criteria by which these new laws have been judged by government is how little they interfere with the business prospects of low-paying employers.

Collective laissez-faire was recognized to be a distinctively British solution to the problem of how to reconcile independent trade unionism with the dictates of a market economy. As such it reflected the conditions under which both industry and trade unionism developed in Britain during the course of the nineteenth and twentieth centuries, in particular the persistence of small-scale and fragmented forms of production past the point where, in other countries, they had largely been displaced through industrial rationalization and vertical integration. In the absence of legal guarantees for employee representation, collective bargaining was

dependent not just upon the varying ability of workers in different trades to control the labour process, but also upon the capacity of employers to control product markets. Much of the stability which collective bargaining achieved by the high point of the middle decades of the twentieth century was the result of fortuitous economic conditions, in particular, full employment and favourable external terms of trade, together with government encouragement for the monopolization and concentration of industry, not least through the post-war programme of nationalization and the expansion of public sector employment. When this particular conjunction of circumstances ceased to hold in the 1980s and 1990s, collective bargaining declined rapidly, exposing employment in large areas of the economy to the unmediated forces of competition.

For British trade unions today, the legacy of collective laissez-faire takes the form of the increasing isolation of the remaining pockets of labour organization. It is also to be found in the relative absence of complementary mechanisms for worker representation of the kind found in other western European systems, which include statutory support for the extension of sectoral collective bargaining and provision for the exercise of employee voice at enterprise level. The experience of implementing the EU Working Time Directive demonstrates that without mechanisms of this kind, there are significant obstacles in the UK to the use of regulatory strategies which have been deployed elsewhere to combine basic labour protections with flexibility of work organization.

The initial conditions attaching to British industrialization were therefore highly influential in shaping the subsequent development of labour market institutions, including those which grew up alongside collective bargaining and the welfare state. This process was reflected in and reinforced by the development of British labour law: it can be seen today in the lingering influence of the master–servant and poor law regimes, the partial and incomplete floor of rights to terms and conditions of employment, and the weakness of mechanisms of collective voice, both for employers and workers. At the same time, the British case can be seen as an illustration of a wider process of adjustment between the legal system and the labour market, which relates to the common experience of all industrializing countries. We have pointed to the 'contingent and circumstantial'[122] nature of the conditions which shaped the emergence of the contract of employment and the binary divide between employees and the self-employed. But this fundamental dichotomy is of course not unique to British labour law; it can be seen as 'a more universal and deeply embedded one which permeates the jurisprudence, as well as the legislation, of many legal systems over very long periods of time'.[123] What are the wider lessons of our analysis for the debate over the future of the contract of employment? In the concluding chapter we consider possible contours of institutional solutions to the current disjunction affecting the employment relationship, solutions suggested by the possible emergence of a 'law of the labour market'.

[122] M. Freedland, *The Personal Employment Contract* (Oxford: Clarendon Press, 2003), at p. 19.
[123] Ibid., at p. 20.