

4

The Employment Relationship

BRUNO VENEZIANI

The aim of this chapter is to describe the evolution of the employment relationship and of the social, economic, ideological and cultural factors that have conditioned its legal structure and essential functions. It is not an historical analysis of the content of the contract of employment or the 'standard employment relationship',¹ ie of terms and conditions as they have been enriched by statute and other labour law sources, such as constitutions, collective agreements, and work rules. Rather, the chosen perspective is to discover if, how and when all those factors have transformed the structure and original function of the contract of employment into a modern economic and social institution of the labour market.

Reconstruction: the Permanent Legacy of the Past (1945–50)

The nineteenth century undoubtedly witnessed the rise of freedom of contract in general, and this was seen as the reaction of liberal laissez-faire societies to the closed autarchy of economies of a guild society based on status. In post-revolutionary Europe the Napoleonic Codes celebrated the freedom of contract and private ownership as essential elements in the protection and full realisation of the individual will.

However, it has been observed that the paradox of this type of freedom lies in the fact that freedom itself is a commodity that is consumed right from the start. Indeed, in stipulating any contract a free person becomes subject to legal obligations. The sanctity of freedom is thus transformed into a sanctity of the obligations arising from the contract. The inevitable corollary of this dogma was

¹ Muckenberger and Deakin (1989) 157.

the rigour of the principle of contractual responsibility (Article 1147 of the Napoleonic Code) and of culpability (Article 1382) as a source of liability.²

This was a widespread phenomenon and was also a consequence of the diffusion of economic liberalism in nineteenth-century society, involving civil law and common law countries alike. While the sanctity of contract was codified by law in the former, support for this expression of laissez-faire ideology came from the legal culture in the latter. The contract as an essential means of exchange of a commodity was not aimed at bringing about substantive justice. It was the expression of individual dominion, the concrete realisation of a person's will, with which true justice was identified.³ But the idea of freedom of contract in liberal societies hid an ambiguity when the principles and theoretical constructions that raised contract to the status of an article of faith were applied to the working world and industrial society. The legal equivocation consisted in the fact that freedom of contract could justify its social function in a society of equals, where goods, capital and people are free to circulate and to engage into freely accepted work. But this presupposes the affirmation of a general principle of the right to work seen as a freedom to work.⁴ This right to work (or equivalent expressions) appeared in some constitutions (France, some German *Länder*, Italy) at the end of the Second World War and in other countries in the second half of the 1970s (Greece, Spain, Portugal) (see chapter 3 above).

It must also be emphasised that traditional legal institutions and culture have affected the evolution of the law of employment relations and labour law in general. In Britain there was a continuing legacy of the master and servant laws. For example, the doctrine of 'common employment' under which the courts held that a master was not responsible to a servant for the tortious acts of a fellow servant continued until 1948, when it was abolished by legislation. German labour law continued to be influenced by the Empire's legislative activity. Ramm maintains that the theoretical construction of the employment relationship is still today full of traces of the conflict between liberal and paternalistic-conservative ideologies reflected in the two concepts of a duty of care and of fidelity in the employment relationship.⁵ Furthermore, the duty of the employee to 'cooperate with the firm, as stated in Article 2094 of the Italian Civil Code of 1942, was strong evidence of the fascist ideology of 'community of interests' embedded in the structure of the contract. The authoritarian regimes during the 1940s in Germany, Italy and Vichy France considered that the contract of employment was founded on the idea of the 'interests of the firm' and the 'higher interests of national production'. That was the guiding principle behind the Italian Civil Code and the Vichy French Charter of Labour of October 1941. The connection between 'work' and 'enterprise' was used by the Italian fascist dictatorship, in order to strengthen the principle of authority also expressed by the *Führerprinzip*.

² Savatier (1959) 7.

³ Atiyah (1979) 103.

⁴ Veneziani (1986) 35.

⁵ Ramm (1989) 39.

in Germany and in the laws of the Spanish Franco regime. In these experiences the legal technique, used to support the predominance of the employer in the firm, was inspired by the idea of a delegation of powers from the state, the only law-making authority in the field of the contract of employment.⁶ So it would have been quite difficult to characterise the employment relationship as a freely stipulated social phenomenon between equals having a real contractual origin.

This weighty heritage of the recent past influenced legal opinion at the dawn of the new era in Europe. The expression 'contractual regime of work' was used in the Programme of the National Council of Resistance of Free France (1946) and a rough definition was included in the two Portuguese laws of 1931 and 1944 on the specific labour contract.⁷ Legal scholars in some countries had debated the nature and origin of employment relationship. There was a lack of a legal definition of 'employment contract' in some civil codes. Although the Dutch Civil Code 1907 contained a clear definition of the category of contract of employment, Germany, Italy and France did not: the *Bürgerliches Gesetzbuch* of 1 January 1900 qualifies the employment contract as a sub-category of the contract of service (*Dienstvertrag*) (Article 611ff) and some criteria of distinction have been formulated later on (Act 6.8.1953) in the Commercial Code (Article 84 al.1, section 3), but only for a special category of workers (commercial agent). The Italian Civil Code does not refer to a 'contract' but provides for a mere definition of 'subordinate employee' (Article 2094), whose discipline is contained in a special Title II under the heading 'work in the enterprise'. Both examples show how heavy the weight of the ideology permeating both codifications was, reinforced by the presumption of the purely formal equality of the two parties. The inevitable submission of the employee would have been tempered or balanced with his duty to cooperate with the employers.

The German 'communitarian' theory, according to which the employment relationship was considered a 'community relationship of persons' living in the establishment, resembled the former law on domestic servants and revived the duties of loyalty and of welfare. This relationship was an alternative to the opposite notion of the contractual relationship of reciprocal obligations, under which the employee has the duty to perform 'promised services' (Article 611), enhanced by the general restoration of liberalism and recognition of individual liberty. Nevertheless, the 'communitarian' doctrine was present in Germany even after 1945 and in the 1950s and 1960s. It has been present in some decisions of the Federal Labour Court due to some continuity of the culture of judges after 1945.⁸ In many countries, such as Portugal, the social legislation on the contract of employment, enacted in the early 1940s, lasted until the 1960s, due to the slow adaptation of economic and social structures⁹ or, as happened in Spain, to the cultural heterogeneity and different economic structures of the regions, 'far from

⁶ For Spain, see Valverde et al (1991) 71.

⁷ Ibid, 354 note 1.

⁸ Seifert (2003) 33.

⁹ Monteiro Fernandes (2004) 39.

the decisions of political milieu'.¹⁰ The dispute between 'communitarian' and 'contractual' views of the origin of the employment relationship in Germany will be rooted in the contrast between the liberal concept of the *locatio conductio operarum* and the pre-liberal concept realised in the former law on domestic servants, and is still extant in the law of state officials (*Beamte*).

The weight given in Greece, Portugal, France, Belgium, Luxembourg and Italy to the civil law of obligations as a framework for the employment relationship is a mirror of the principle of freedom to work, a theoretical pillar of socio-economic liberalism that pervaded most European countries after 1945.¹¹ The enactment of a constitutional right to work in these countries influenced legal opinion. The close linkage between freedom to work and freedom to enter into a contractual relationship is a crucial feature for the development of a coherent system of employment relations and systematic labour law in these countries. Moreover, the presence in the legal systems of continental Europe of civil codes has given a framework of positive rights to the individual parties moving from the general theory of obligations. The birth of the notion of the contract of employment and the distinction between autonomous and dependent employee are the results of this legislative technique.

This marks the striking difference with the evolution of British law, which has used a different technique to analyse the same phenomenon. On the one hand, the British system has suffered from the heavy burden of the past, which slowly conceptualised the legal category of the contract of employment on a case-by-case basis, utilising the pre-industrial conception of 'service'. On the other hand, the repeal in 1875 of the Master and Servant Acts removed a major impediment of the concept of freedom of contract guaranteed by civil sanction alone.¹² British scholars stress the relative slowness of the evolution of the employment contract due to its foundations in the master and servant relationship, which has had a 'lasting impact' on modern law.¹³ A further reason for this sluggishness is linked to legislative technique. Labour legislation enacted piecemeal was never coordinated into a comprehensive system. It was without general principles or uniform legal concepts.¹⁴ British labour law has been marked by the exclusion of those without a 'contract of service' from the scope of protective legislation. In fact, British labour law is much more the history of step-by-step legislation enlarging its personal scope than the evolution of a unitary model of the contract of employment. The latter 'only came into being when further reforms were enacted to social legislation, in particular the extension of social insurance after the Beveridge report of [1942]'.¹⁵ A slightly different analysis is that the British concept of the employment contract is the product of the system

¹⁰ Valverde et al (1991) 56–57.

¹¹ Jamoulle (1994) 71–72; Monteiro Fernandes (2004) 39.

¹² Hepple and Fredman (1986) 40.

¹³ Ibid.

¹⁴ Kahn-Freund (1966) 515.

¹⁵ Deakin (1998) 221.

of uncodified case law. As Kahn-Freund wrote in 1951, the nature of the contract of employment and its distinction from the contract for work and labour 'is not altogether clear'. It depended on the permanent legacy of the past, where the distinction between 'servant' and 'independent contractor' was developed in the law of tort to ascertain the liability of the employer, who was responsible only for the wrongs of a 'servant' and not generally for those of an 'independent contractor'.¹⁶

The differences between common law and civil law countries was grounded in the different legal perspectives and the legal techniques. The common law term 'servant' did not contain any element referring to the nature of the services assumed. Conversely, the expression 'contract of employment' indicates the inner essence and the content of the employee's performance within the framework of the general law of obligations, as is clearly indicated in the Greek (1946) and Italian Codes (1942) and in the French *Code du travail* (Book 1, Articles 19, 23a, 24 and 29).

In both common law and civil law systems the contract of service or employment is the legal device and the social parameter that represents the sphere of application of individual and collective labour law. The contract of service was described by Kahn-Freund as the 'cornerstone' of British labour law. The same was true of the contract of employment in civil law systems: after surveying the sources of the civil law, Camerlynck concluded that the employment contract, as implying a mutuality of obligation and exchange of work and wage, is 'a generally accepted foundation for the individual employment relationship'.¹⁷ The prevalent models in the period of reconstruction are represented by the contract of subordinated employment stipulated for an indefinite period of time or for a fixed term, inherited from the previous codes or regulated and updated by special legislation. Both models were present and functional in the post-war economy. The first step was to temper the consequences of the war on pre-existing contracts of employment. For example, a French Ordinance of 1945 was intended to restore the workforce to the industrial system. A Dutch Decree on Employment Relations 1945 obliged the employer 'to reinstate the employee in his former employment' (Article 4). Other nations had similar legislation. The second step was to renew previous legislation. So a Spanish decree of 1944 represented for that country the first comprehensive text containing a precise definition of the contract of employment as a pure exchange obligation dealing with different categories of workers (seamen, home workers, apprenticeship, young persons). The same path was followed for domestic and agricultural workers (eg Austria, 1948). The third step was the intervention of the state to guarantee equal opportunities for all the unemployed to enter into contracts of employment by having access to the labour market through a public placement service (France, 1945; Luxembourg, 1945; Italy, 1949) (see chapter 3 above).

¹⁶ Kahn-Freund (1952) 193.

¹⁷ Camerlynck (1962) 21.

Welfare State: the Impact of Social Legislation (1950–72)

The legacy of the past did not suddenly disappear in the period of evolution of the welfare state. The new laws were still pervaded by the models inherited from the past. For example, the Belgian Act on the contract of employment of 1960 was a slight modification of the previous ones made in 1900 and 1954; the Luxembourg law on the private employee of 1962 recalls the ones of 1919 and 1937; and the Dutch law on contracts of employment, inserted in the Civil Code 1907, has never been repealed but only amended on various occasions. The Italian law on the contract of employment of private employees of 1924 was collateral to the more general discipline of Book V of the 1942 Code and is still in force today. In the Austrian Industrial Code (*Gewerbeordnung*) of 1973 the employment relationship of employees in industrial or commercial enterprises doing manual work continued to be governed by old versions of 1859 and 1885.

A similar path was followed by legal systems that have suffered from alternation between authoritarian and democratic regimes, like Spain and Portugal, where the modernisation of the law came in in the late 1960s without repealing the previous laws, the survival of which was caused by the influence, at least in Portugal, of legal opinion coming from other European countries.¹⁸ These laws on the contract of employment are evidence of the efforts made by all states to confer autonomy on the employment relationship through different legal techniques mirroring the characteristics of the national legal culture. This goal was attained through specific laws on the contract of employment or specialised codification. The construction of the French *Code du travail* lasted almost 40 years, starting in 1910 and ended provisionally only in 1956, and is still in force today.¹⁹ The Danish legislation on private employees started in 1938 and lasted until 1987, and the body of rules regarding the employment contract is contained in a general framework Basic Agreement of 1898, which was amended in 1960 and 1973 without any major modification.²⁰

A different path was followed by common law countries, like Britain and Ireland. The repeal of the Master and Servant Acts in 1875 removed a major impediment to the development of the notion of freedom of contract between equal contracting parties protected by civil sanctions alone. However, the form of contract that emerged in the nineteenth and early twentieth centuries guaranteed the rule-making power of the employer. The trade unions were content to rely on their considerable political and economic power during and immediately after the Second World War, rather than on legislation, to counter the power of the employers. The first significant legislation since 1875 was introduced by the

¹⁸ Monteiro Fernandes (2004) 39.

¹⁹ Durand and Rouast (1957) 37.

²⁰ Hasselbalch and Jacobsen (1999) 61.

Conservative government in 1963 'and received without enthusiasm by the unions'.²¹ The bulk of British legislation (much of it followed in the Republic of Ireland) in the 1960s and 1970s dealt with the termination of employment (minimum period of notice, 1963; redundancy payments, 1965; unfair dismissals, 1972), but also began to introduce fundamental human rights into the employment relationship (racial discrimination, 1968; equal pay for women and men, 1970; sex discrimination, 1975). Nevertheless, this legislation did not introduce a unitary legal concept of the 'contract of employment' or 'employment relationship'. It was left to the courts to conceptualise 'the contract of employment on a case-by-case basis utilising pre-industrial conceptions of "service"'.²² In other words, British and Irish law followed the opposite trend from the civil law systems, which moved from the general theory of contractual obligations to a specific notion of the autonomy of the contract of employment as a legal 'shell' for the social phenomenon of employment.

The reasons are not limited to the legacy of the past but also to different legal techniques in making labour law. There was a lack of an 'alphabet of concepts'²³ in the English common law and systems derived from it which could resemble the legal category defined by the Italian, Belgian, Greek, Dutch, German Civil Codes and the French *Code du travail*. This tendency 'has become even more pronounced in the [late twentieth century]'.²⁴ The early body of social legislation developed extracontractual liability on employers and did not contain any uniform definition on what an 'employee' or a 'workman' is. The consequence was that 'when the major expansion of statutory individual employment rights took place, it was usually seen as obvious and uncontroversial to confer these rights on employees working under a contract of employment, but not upon other workers', with the exception of the anti-discrimination legislation, which came from a different institutional setting.²⁵

All European countries developed a network of social legislation whose aim was to ensure an embryonic welfare protection of people engaged in an employment relationship. The main feature of this trend was a diversity of regulation—progressively amended—for different categories of workers in different economic sectors (from 1910 to the Industrial Code 1973 for *Angestellte*; agricultural workers, 1948, domestic workers, 1962 and janitors, 1969 in Austria; maritime workers in France from 1926 to 1955; Finland, 1955; Germany, 1952; Norway, 1953; Belgian commercial agents, 1956 and domestic workers, 1970) or according to their professional status as blue-collar (manual) or white-collar (non-manual) workers. A second trend was the progressive extension of the personal scope of welfare legislation to all the people engaged in a 'contractual relationship'. A similar evolution was followed by the common law countries,

²¹ Hepple and Fredman (1986) 46.

²² *Ibid.* 75.

²³ Kahn-Freund (1966) 512.

²⁴ Hepple and Fredman (1986) 75.

²⁵ Freedland (2003) 19.

which, from 1875 to 1946, gave a more comprehensive definition of the personal scope of welfare legislation; extension to all categories of wage earners only occurred when further post-war reforms were enacted, in particular the extension of social insurance which took place in the National Insurance Act 1946.²⁶

A third trend during the 1960s was continuing state control of the labour market through the prohibition of fraudulent use of contract of employment, that is, by hiding a subordinate relationship under the mask of an independent one (eg home work) or continuous employment under the mask of a succession of fixed-term contracts. This explains why legislation tried to limit the use of all forms of work relations not functional for the stability of employment: on the one hand, a severe regulation of fixed-term contracts (Italy, 1962; and prohibition subcontractors or intermediaries, 1960) and home work (Germany, 1951; France, 1957; Austria, 1954–59), and on the other hand, strict provisions regarding individual dismissals (Germany, 1951; the Netherlands, 1953; France, 1958; Greece, 1955; Italy, 1966, 1970) (See chapter 3 above).

The story of the evolution of the various statutes concerning the contract of employment indicates the progressive extension of their scope to cover all professional categories of workers. An example of this tendency is to be found in the 1970s, with a rapid growth of the distributive sector of the economy and, perhaps more importantly with an even more rapid technical development of industry, 'a steadily increasing proportion of the working population has become engaged on non manual work whether clerical or technical'.²⁷ The building of the welfare state in the period from 1945 until the 1970s blurred the distinction between blue collar and white-collar workers. It must be remembered that the first comprehensive statutes on specific categories of workers were those on apprenticeship and white-collar workers. The Italian law of 1924, which is still in force, the Belgian law of 1922, the Luxembourg laws of 1919, 1937 and 1962, the Finnish laws (1949, 1973, 1978)²⁸ and—albeit only for employees with top functions (*leitende Angestellte*)—the German Acts 1952 and 1972 on co-determination were based on the distinction between work that is totally or mainly intellectual for white-collar workers and manual for blue-collar workers. This distinction and its different kinds of terms and conditions were based on the political strategy to consider white collars as part of the intellectual class useful to the ruling establishment. The evolution of society with the emerging class consciousness of white-collar workers as part of a larger working class and the transformation of work started to blur the distinction in the 1970s. The change in composition of the labour force also encouraged unionism among these workers. This led to even more attention by the state to this social class through protective legislation on the contract of employment of white-collar workers.

²⁶ Deakin (1998) 221.

²⁷ Kahn-Freund (1972) 40.

²⁸ Suviranta (2000) 70.

This is evidenced by the Danish legislation on white-collar workers, which enlarged its sphere of application from 1938 to 1974, embracing a different approach to white-collar workers and also containing terms and conditions of their contracts of employment, one of the most comprehensive statutes in Europe. The reform of the Belgian Code in the 1960s included blue collar and white-collar workers; from the beginning, both categories were covered by the Dutch law of 1907 and the Spanish law of 1931. This process of standardisation was not completed everywhere: for instance, although the British employment protection legislation of the 1960s and 1970s introduced important guarantees in the area of income security and termination of employment for both manual and non-manual employees, its impact was limited by qualifying conditions that allowed for the exclusion of certain types of relations to which the notion of contract of employment could not readily be applied.²⁹

An historical-comparative analysis reveals how the provisions of the most important labour law statutes contain exceptions which either enlarge or restrict their personal scope. Finland and a few other countries, such as Denmark (1973),³⁰ also enacted special statutes applicable only to certain enumerated branches of employment according to their relative importance in the national economic and social context, such as seamen (1978) in Finland.³¹ Also, in the Netherlands there are many specific rules for the contracts of employment of seamen, dating back to 1838, reformed in 1931 and amended numerous times subsequently.

However, in most countries there is no clear distinction between a contract of subordinate employment and autonomous employment. The common law system has developed a distinction between those under a contract for services (self-employed workers) and those under a contract of service (employees). Yet this distinction—as has been observed—does not exactly correspond to the civil law distinction between *locatio conductio operae* and *locatio conductio operarum*. The common law category of employee has frequently been interpreted as narrower than the range of persons under a contract of employment in civil law systems.³²

As we shall see shortly, in both common law and civil law the traditional dichotomy between a contract of services and contract for services has been considered controversial. In academic debates it has been disputed whether and how to redraw the borders of conceptual definition in its application to employment legislation.³³

Most civil codes have not defined the category as they did in Belgium.³⁴ In France, for example, the notion was virtually non-existent in the *Code du travail*.

²⁹ Ibid, 224.

³⁰ Hasselbalch and Jacobsen (1999) 34.

³¹ Suviranta (2000) 27.

³² Hepple and Fredman (1986) 75.

³³ Freedland (2003) 23ff.

³⁴ Horion (1965) 166.

Some civil codes have preferred to designate the employment relationship as one in which one party—the employee—undertakes to perform work in the service of the other for remuneration for a given period (Italy, Article 2084, 1942). This is a definition somewhat similar to that in the Greek (Article 648, 1946) and Dutch (Article 7:610) Civil Codes. The lack of a precise formula indicating a list of the individual rights and obligations has meant that the shortcomings of a specific codification have been filled by the interpretative activity of academic writers and the courts. A process started at the beginning of the twentieth century was in continuous evolution and, by the 1970s, progressive and refined intellectual arguments helped to resolve disputes taking place in court.

Economic Crisis: the Uncertain Meaning of Subordination (1973–79)

The expansion of the personal scope of regulatory legislation reflects the growing insight that the contract of employment expresses a special 'human bondage' linking the parties that must be focused, clearly ascertained and legally evaluated. The Italian Civil Code uses the term 'subordinate' activity but does not clarify the concept, and Italian academics and the courts have tried to analyse the role this legal category plays within the contract. In civil law countries subordination is considered as an 'effect' of the formation of the employment contract. It is an essential component of its internal structure and of its social function. This function has changed considerably in the course of history and has been the element that has revealed how fragile the idea of the freedom of contract affirmed in the post-French revolution era was. The concept of subordination moved from the idea of the personal and complete availability of the worker to the will of the 'master' to dependency on the power of control and direction of the work. This reflected the era of expansion of large-scale industry, where the commitment to work lasted for a relatively long period of time, thus presuming a certain stability in the contractual linkage. A further step and shift of meaning occurred during the Nazi and fascist regimes in Germany and Italy, where subordination acquired the 'ethical' flavour of personal loyalty expressed by the duty to co-operate in the interests of the firm and the state.

The new idea which pervaded the post-war period—interpreted in the light of constitutional values (see chapter 1 above) and imperative provisions of the statutes and codes—was to give a purely 'technical' meaning to a subordination which is 'functional' to the task the employee must perform. Many statutes of the 1970s reveal this new process of 'depersonalisation of subordination'. The status of employees requires full protection of their 'personality'. The human values embedded in a contractual link are guaranteed by special imperative rules contained in quasi-constitutional laws, like the Italian (1970) and Spanish (1980).

Workers' Statutes. More recent constitutions, enacted during the age of economic crisis—like those of Spain (1978), Portugal (1976) and Greece (1975)—also expressed this trend. The process of 'constitutionalisation' of labour law (see chapter 1 above) includes the modernisation of the contract of employment, with a new function to protect the employee no longer as a weaker party, but as a social citizen of the enterprise with full rights.

Nevertheless, the intervention of the law still did not clarify the meaning of subordination. The two classic types of work—dependent and autonomous—still predominated in the 1970s. Statutes and codes were vague, and the criteria used to enlighten the concept of subordination were insufficient to cover the profound transformation of professions and skills of the modern labour market that emerged in this period. The expansion of the personal scope of regulatory legislation reflects the growing insight that the relation of subordination between employer and worker is the same 'whether the worker is employed on the assembly line or in the office'.³⁵ EC law made little contribution in this respect because, except in some specific cases (eg migrant worker regulations), the definition of the concept was left to individual Member States. According to the European Court of Justice, the essential nature of subordination is the power of command stemming from the internal structure of the contract.³⁶ This notion is too vague and insufficient to focus on the complexity of the concrete features of dependence.

No German statute defines the concept of employee, but there is a statutory definition of the 'self-employed' as one 'who is essentially free in organizing his work...' (Article 84 of the Commercial Code).³⁷ The amended Dutch Civil Code (Article 7:610, former Article 1637 a) did not alter the anodyne definition of employment contract of the past. More clearly, but not sufficiently precise, the Finnish Employment Contract Act (1970, section 1) stated that the employee undertakes to perform work under 'direction' and 'supervision' of the employer. An analogous trend is observed in the Italian (Article 2094, Civil Code 1942) and Spanish laws (1978), which describe some elements for a useful interpretation (Article 1.1).³⁸ A more exhaustive and complete definition of the contract of employment is to be found in the recent Portuguese *Código do Trabalho* (Title II, Book 1 1.99/2003), which uses the words 'authority and directions' to represent the powers of the firm. Much British legislation (eg on unfair dismissal) was confined to 'employees', that is, those under subordinated contracts of service. But the anti-discrimination legislation (Equal Pay Act 1970, Sex Discrimination Act 1975 and Race Relation Act 1976) covered not only 'employees', but also a wider category of 'workers' who personally perform work, thus including many

³⁵ Kahn-Freund (1972) 41.

³⁶ Case 66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 1986 212.

³⁷ Weiss and Schmidt (2000) 41.

³⁸ Valverde et al (1991) 354.

of those who are self-employed, but specifically excluding those who work for a professional client (eg lawyers and doctors in private practice).³⁹

All these formulae reproduce the idea that the notions of command and subordination are strictly inherent and are almost exclusively to be found in the contract of employment. The Italian Code and the Dutch Code and statutory law clearly lay down the model of 'juridical subordination', according to which the employee must observe the technical rules governing performance of work and directions about order and discipline within the firm, provided that these rules stay within the limits of general provisions of the Code or of the contract. The notion of 'juridical subordination' is closely linked to the idea, inherited from the past, of the stringent correspondence between the contract of subordinate employment and statutory protective labour laws. However, the common trend of civil law and common law has been that legislation has delegated to the courts the task of elaborating the notion of subordination applicable to all kinds of employment contracts.

The ideology of interpretation has been the same in that the socio-economic tendency of the labour market has become similar throughout Europe since the economic crisis from 1973 onwards. The predominance of the archetypical model of the employment relationship has changed considerably, and the pattern of full time and continuous employment in the core of the labour market has been neither prevalent nor unique.

The evolution of the criteria to identify subordination has demonstrated how similar the new technological, social and cultural values of dependent work in all western societies are. In general terms it can be said that the attempt to describe the 'substance' of subordination has evolved from an analysis of 'inner' features of the notion to its more 'external' profile. From the end of the nineteenth century to the twentieth, and particularly in the last 60 years, the emphasis has shifted from the inner elements, like command (Germany), direction and control (Portugal, Belgium, Finland, France, Greece, Italy, the Netherlands and Britain), to the entire activity of the worker. This reflects the passage from a pre-industrial to a Fordist industrial context, and towards more up-to-date insights, like the 'continuity and availability' of the legal obligation of the employee (Italy).⁴⁰ In this last theory the main idea is that subordination must be present in the quality and intensity of the linkage between persons (both workers and employees) and the organisation of the firm. It starts from the assumption that the profound transformation of the European economy after the two oil crises in 1973-77 has obliged enterprises to undergo different kinds of restructuring processes such as outsourcing, sub-contracting and externalisation.

The theory that emerged in civil law systems is that the contract of employment is a legal device to 'organise' the resources and the structure of the enterprise through the recognition of the subjective right of property and of

³⁹ Carby-Hall (2003) 249.

⁴⁰ Ghera (2003) 49ff.

connected powers. The inner sense of subordination is to be found in the linkage between the 'quality of the organisational structure' and the role played by the work of the employee. This linkage has been closely investigated by the Italian *Corte di Cassazione*, according to which the subordination appears, in a conceptual perspective, different from the past, as a performance 'functionally coordinated' to the productive organisation (Cass 6 July 2001, no 9167; Cass 26 February 2002, no 2842).⁴¹ The same perspective was expressed by the Spanish Supreme Court interpreting the Workers' Statute⁴² and the French *Cour de Cassation*,⁴³ developing the link between work and enterprise in the light of the theory of organised work (*service organise*) that can arise even when the firm does not interfere with the worker's performance.

The judicial development of criteria in Britain is paradigmatic. The 'control test' has remained an important factor⁴⁴ and has permeated the minds of judges as the basis to hold the employer vicariously liable for the employee's negligence where the employer has ultimate authority over the dependent's work.⁴⁵ Its applicability derives, in fact, from the organisational power of management in the firm, including the power of selection, control of the method of work, and the right to suspend and dismiss, even though some of these indicia are altogether absent or are present in an unusual form. British judge-made law suggested the different criterion of integration into the organisation (ie how the employee integrates into the firm's structure). This is helpful, although still not exhaustive or comprehensive, 'particularly in cases where the workers provide some equipment or is paid on a piece-rate basis'.⁴⁶ Another criterion which has been used is that of 'economic reality', whereby the ownership of tools and the bearing of financial risks (the 'chance of profit' and 'the risk of loss') are incompatible with the position of an employee under a contract of service.⁴⁷ The general observation is that judges and academic doctrine in all countries have realised that no single criterion is able to resolve the question of definition in an exhaustive manner. If the control test is still used in Britain, it has lost most of its adequacy for distinguishing the contract of employment from other contracts where the essential requirement is the content of the obligation of one of two parties.⁴⁸

A trend common to all legal systems is the debate as to whether the classification of a contract is a question of fact or law investing the judge-made law with the task, on a case-by-case basis, of looking for the criterion that appears to be more consistent with the substantive profile of the case. Italian courts have decided to ascertain if all the criteria are present in the particular case⁴⁹

⁴¹ Ibid, 66.

⁴² Ojeda Aviles (2002) 464.

⁴³ Chauchard (2003) 14-15.

⁴⁴ Carby-Hall (2003) 304, note 445.

⁴⁵ Ibid, 251-52.

⁴⁶ Hepple and Fredman (1986) 76.

⁴⁷ Carby-Hall (2003) 256-57.

⁴⁸ Jacobs (2004a) 47.

⁴⁹ Ghera (2003) 64.

according to the 'typological' method whereby the judge analyses which feature of the facts are closer to the functional basis of the contract (*causa negotii*) and makes a final determination on the basis of the consistency between a 'set of factual indicia' and a 'typical model of subordination', according to the judge's own instincts. The Portuguese courts have also followed this approach.⁵⁰

This evolution mirrors how much the contract of subordinate employment has changed its original function of the pure exchange of mutual obligation (work and remuneration) to become a legal base for social relations not exclusively between persons but between persons and a complex organisation's structure. More precisely, the passage from subordination as command to a model of subordination as 'functional coordination' was a consequence of the movement away from the Fordist division of labour and the emergence of a complex structure of the firm no more hierarchically ordered and no longer ruled by commercial law. Consequently, this approach involved a new theoretical perspective and a new notion of economic subordination. This modern profile of the concept justifies a need for legal protection by the state to temper the inequality of powers between the parties to the contract, above all if the substantial and effective identity of the employer is not clear and labour law seems 'polluted' by the commercial law.

The basic assumption is that in recent times the spheres of influence of commercial law are more restricted than labour law for two reasons. First, there has been a substantial reduction in the economic autonomy of employers, who have become more strongly subjected to the decisions of a wider network of corporate entities. Secondly, the constraints of the economic crisis and the need for flexible production obliged employers to limit their activity to some of the core functions of their enterprises while other functions were dispersed or decentralised outside the enterprise. Commercial law and the contract of employment law follow opposite trends. Employers lose their economic autonomy and employees acquire more independence in performing their subordinate employment. Both processes generate risks and difficulties for protective labour law.

The vertical disintegration of the enterprise and the substitution of small entities only apparently independent could mean that the contract of subordinate employment is frequently fragmented or interrupted. Furthermore, in some cases it loses, at least formally though not substantially, its original shape and profile of subordination. This is particularly the case where one or both parties to the employment relationship choose to place themselves in one category rather than another in order to reap the benefits of a particular tax or social security regime.

From the viewpoint of strict contract theory, the private agreement is conclusive in respect of the intention of the parties. This is clearly expressed by the Italian Civil Code (Article 1362), which states that the content of the contract must be determined by 'reconstructing' the common intentions of the parties.

⁵⁰ Monteiro Fernandes (2004) 143.

However, it is increasingly clear that Italian,⁵¹ Belgian,⁵² Dutch⁵³ and French courts⁵⁴ tend to intervene and look at the 'realities' of the relationship rather than at its form or the name given by the contracting parties to their agreement. The judge of the case is requested to investigate the effective content of the obligations and the real linkage existing between subordination and social powers of the employer. This judicial behaviour is shared by both common law and civil law systems. In both, the judges try to discover whether or not employers, by reducing the cost of labour, hide a subordinate employment disguised under the mask of autonomous work. The use of atypical contracts of employment to escape from labour law became pronounced in the period of economic crisis (see chapter 3 above). In both common law and civil law systems the judges responded by refusing to allow the parties to mask their real intention using a contract scheme that did not correspond to the effective development of envisaged social relations.⁵⁵ Their freedom in respect of employment contracts was thus more limited compared to the other contractual obligations, where the parties were totally free to produce the desired effects. In English case law⁵⁶ employers have not generally been able to escape liability for breach of statutory safety duties to a building worker by pleading that the worker had agreed to be self-employed simply in order to mislead the Inland Revenue.⁵⁷ The emerging model in this period, as defined by a Portuguese scholar, was composed of economic dependence without subordination, ie continuous work done exclusively for one client or autonomous work as part of a production process ruled by others.⁵⁸

The reaction of the state was an attempt to harmonise different legal regimes, enlarging the scope of labour law and social security systems. The category of parasubordinate employees, invented by the Italian law (1973), is a meaningful symptom of the existing grey zone within the traditional dichotomy between autonomy and subordination upon which labour law was built. The parasubordinate employee in the condition of economic dependence was thought to be entitled to enjoy the same protection as other workers as regards health and welfare, as happens in Spain and Germany, where the 'person similar to salaried people' is covered by national social security and collective agreements. Furthermore, according to the German doctrine, they should enjoy protection against unfair dismissal.⁵⁹ In general, the employment contract or social relationship involving work was being considerably enlarged, affecting the original meaning of subordination and the structure of the 'classical' model.

⁵¹ Ghera (2003) 68.

⁵² Jamoulle (1994) vol I, 194.

⁵³ Jacobs (2004a) 42.

⁵⁴ Pélissier et al (2006) 330.

⁵⁵ Constitutional Court, 31 March 1994, no 115; 29 March 1993, no 121.

⁵⁶ Carby-Hall (2003) 262.

⁵⁷ Hepple and Fredman (1986) 78.

⁵⁸ Monteiro Fernandes (2004) 136.

⁵⁹ Sobczack (2003) 316.

Restructuring and Deregulation: Deviations from the Standard Contract (1980–89)

The contract of subordinate employment has been and still is central to the regulation of individual employment relations but is no longer the only one at the core of the legal regulation of the labour market. Originally it reflected a market-based economy in the process of industrial development. It was fairly straightforward: it covered the working life of an adult male who worked in a firm belonging to his employer, who required that the worker should perform a specific task for an unspecified length of time.

The classic model, what we might call the 'Aristotelian rule of labour law' of a pre-technological society, was based on the unities of place and work (work performed on the premises of the firm), of time and work (work carried out in a single temporal sequence), and of action and work (a single occupational activity).

These assumptions, upon which both statutory law and collective bargaining were built, have been undermined. In the period since the 1970s, the contract of employment has carried out an increasing set of functions reflecting the change in duties and obligations of the parties. The structure and dynamic of standard contracts of subordinate employment has been strongly challenged by social and economic changes. All European countries were obliged to face the same variables as labour market internationalisation, high levels of unemployment, transformation of the composition of the labour market (such as feminisation) and counter-inflationary state policies. The traditional scheme of the employment contract was no longer a viable model in terms of representing all the various forms of the employment relationships, such as part-time and fixed-term contracts and home-based telework, that were needed to satisfy the economic demands of employers and social demands by the 'new' workers for flexibility. The increasing shift from industrial society into an information/communication society, challenging the old paradigms of social protection and stable jobs, have multiplied, and continue to multiply, the use of the so-called 'atypical' forms of work, often outside the realm of protective statutes and collective bargaining. From the perspective of labour market policy, this economic approach requires functional 'deregulation' of labour relations, removing (eg Britain) or re-writing (eg Italy) employment rights in the name of a 'market paradigm', that is, the idea that a developed system of stringent rules is an obstacle to productivity and in some way responsible for mass unemployment. This approach affected not only tax and incomes policy and the post-war universal social security schemes, as happened in Germany and Britain for instance (see chapter 6 below), but also provisions regarding employment relations. The effects here were on a secondary segment of labour markets where we find a mixture of employment relations still using the contractual links inherited from the past and new types where one can

identify the deviations from the archetypal. We shall consider five of these deviations.

The First Deviation: the Duration of the Contract

The contract of specified duration (for a fixed period) has been around for a long time and was inherited in the civil law systems in the form of *locatio operarum* from the Napoleonic Codes, where it was a predominant and unique model, the only one capable of protecting the freedom of the parties. The trend was reversed in favour of the contract for indefinite duration in all the civil codes and special statutes in the 1950s and 1960s, as a way to guarantee stability in the social context of mass unemployment and by the needs of post-war reconstruction. The use of fixed-term contracts was rigidly limited to certain sectors and to specific objectives in order to prevent fraudulent use of this typology. This model was widespread—especially after 1974—and found its highest acceptance in France, Germany, Spain and Portugal.⁶⁰

The need to guarantee a flexible use of the workforce in industry and other sectors accelerated the evolution of the typology of fixed duration contracts. In some countries, it was in the direction of extending their applicability to sectors of the economy where this was not previously possible. However, contractual freedom was still limited by legislation or case law demanding the existence of an 'objective' and 'practical' reason, that is, 'reasonable' motive and justifiable by the facts (German case law), 'legitimate' reason (Belgian case law), unusual and exceptional job (Spanish Workers' Statute 1980), and temporary character and nature of work (France).⁶¹ During the 1980s and 1990s the movement was precisely towards the easing of the ties that used to restrict the use of the contractual model. It could be said that legislation restored the will of the parties to the contract, thus squarely putting bargaining back into the free market. The legislative technique was sometimes based on the model of 'collectively negotiated flexibility', ie on the attribution to the trade unions of regulatory powers over the fixed-term labour market.⁶² This model acquired importance in the period of crisis and signified a trend to limit freedom to resort to it only through the scheme of collective authorisation agreements. The function of the fixed-term contract was more and more to create a flexible workforce, but on the conditions agreed by collective social partners in the face of weak legal guarantees. Their weakness is reflected, for example, in uncertainty over the notion of objective cause (Germany), inefficiency of state control (Italy), limited enjoyment of union rights (Portugal) and the vagueness of the notion of fraudulent use of contract (Greece). From the beginning, a trend in all civil law countries was to impose the sanction, where there were frequent renewals of the fixed-term, of conversion of

⁶⁰ Kravaritou (1988) 23.

⁶¹ Veneziani (1993) 206.

⁶² Italy, Law 56/87; Zappala (2004) 103.

the contract into an open-ended one. In Britain and Ireland, by contrast, it was only after EC intervention in the late 1990s that such sanctions were imposed.

A further variation in the fixed-term contract is an agreement whereby it is stipulated that the employer must provide for the worker's training. Generally speaking, the worker traditionally entered the enterprise in order to invest his or her skills in a given job. The agreement to provide job plus training marks the advent of a new kind of labour law, one that acts as an incentive to flexible employment and is no longer limited to guaranteeing the security of an existing post.

In the early 1980s, a new era started when the ideology of reconciliation or compromise between conflicting interests arose out of the economic crisis. The legal system faced the problem reconciling two spheres of interests—that of the workers and that of the firms—since, on the one hand, it sought to promote employment, while, on the other, it permitted reduction of costs and taxation by excluding atypical workers from being considered as part of the firm. This meant that there were no guarantees in terms of social security. In a 1993⁶³ survey, such cases were found in France, Spain, Portugal, Belgium and Italy. In Italy, job plus training contracts were confined to public employment. The most striking characteristic of such contracts lies in the rights and duties of the parties. Importance is attached both to job performance and to the obligation of the firm to train the young worker. Training alternated with periods of actual work; in France this was described as a 'contract of qualification', and in Spain and Belgium, training-job agreement. Being regarded in Spain as a modern-day equivalent to apprenticeship, the contractual model has a strong component of job creation⁶⁴ and is a way to implement Article 40.2 of the Spanish Constitution, which obliges the public authority to 'promote a policy guaranteeing occupational training and retraining'. The Spanish constitutional provision of a right to training shows that training is regarded as a 'personal value' to be included into the contractual scheme. From 1992 onward in France, lifelong training has acquired a status of an 'obligation' of the firm.

The contract of employment is called on to perform a new function to improve the skills that have a genuinely vocational value for the trainee. This is a function which differs from the typical contracts of the mercantile economy, such as apprenticeship. The legal technique has been enhanced by the French *Cour de Cassation* in its innovative rulings,⁶⁵ arguing that *adaptation et reclassement* are implicit obligations in the structure of the employment contract. Observers argue quite rightly that the mechanism is twofold because from one side it tries to combat unemployment while, from the other, it constructs an inventive notion of stability in employment. In the absence of the 'adaptation practice', a dismissal lacks a just cause.⁶⁶

⁶³ Veneziani (1993) 208.

⁶⁴ Rodríguez-Pinero Royo (2004) 18.

⁶⁵ Moreau (2004) 10.

⁶⁶ Sciarra (2004a) 9.

The Second Deviation: the Duration of Work

The duration of performance (content of the legal obligation of the worker) as distinct from the duration of the 'contractual tie' may deviate from a standard contract even though the worker is still subordinate to the firm for an unspecified length of time. A reduction in working hours does not modify the nature of the contract. The need for flexibility requires the reduction of the overall time of performance. Normally we are dealing with new jobs and (where they are regulated by law or collective agreements) contractual formulae based on the principle of solidarity between employed and unemployed workers.⁶⁷ The increase in the volume of part-time work is due to different causes: on the one hand, the changing composition of the labour market due to the increase of female labour and of young persons, and, on the other hand, technological innovation (work at videoterminals, etc). In most cases the contract of employment is now shaped so as to serve as a legal instrument of a labour costs-saving policy. The aim is, on the one hand, to guarantee the protection of the physical person of the worker and, on the other, to ensure that the reorganisation of work is not rigidly structured, which explains the success of this alternative structure of the contract in all countries. It matches the organisational requirements of a firm while also satisfying the needs of certain sectors of the labour market (such as women, students, and older people) that would not be able or willing to accept full-time employment.

Contractual freedom rules supreme as regards the content and ways to organise the contract. This is shown by the variety of forms it may assume. It may be constituted by a reduction in normal working hours (horizontal part-time), by full-time work carried out on alternate days (vertical part-time) or by job sharing, job alternation or early retirement, combined with the part-time job of an unemployed worker with the support of public funds. Between the 1960s and the 1980s some limits were imposed by the law to the freedom of contract—by the courts or by collective agreements and statutes—like a requirement of objective motive (German Federal Labour Court), 'reasons of a technical and economic nature' (Belgian Collective agreement 1972) or necessity not to unbalance 'the employment conditions of a particular profession or branch' (French *Code du travail* Article L.212-4 and 7).⁶⁸ Collective agreements have tried to reduce the risks involved in using this kind of flexibility, indicating, even at the plant level, the maximum percentage of part-time workers who may be engaged as compared to the number of full-timers, classified by skills, or fixing the maximum number of working hours for part-time work in order to gain access to social benefits.

⁶⁷ Blanpain and Kohler (1988) 79.

⁶⁸ Veneziani (1993) 211.

The Third Deviation: the Personal Availability to Work

The progressive diffusion of deviations from the pre-existing contractual framework of employment relations, as analysed in 1985–6,⁶⁹ was evidenced by job performances that were not continuous but alternate, intermittent, cyclical or interspersed with periods of vocational training courses. Here we are dealing with the most sensitive features of the contract of employment, ie the worker's promise to engage his physical energies at a given moment. Of course, when he or she enters into the contract the worker pledges to supply his or her actual energies, which he or she does in concrete terms through the performance of the job; however, it is commonly assumed that subordination consists largely in the worker's legal, and not simply physical, availability. His or her juridical tie remains in force even when he or she is not materially working (eg because of illness). In more recent forms of work, the worker promises a 'potential job' that he or she will perform in the future when the employer decides to 'call' him. Here we are dealing with a sophisticated contractual scheme where subordination is not of a technical-juridical nature but is only socio-economic.

In this case, the contract suffers from alteration of its classic feature and loses its protective function: the worker has no decision-making power over (i) the time of work and life; (ii) the length and continuity of the obligation and its material performance; or (iii) the nature of his obligation (a promise of future performances). The phenomenon became common in the period of deregulation in commerce, service industries, air transport and tourism.⁷⁰

The Fourth Deviation: the Triangular Relationship

The structure of the traditional contract of employment reflects the bilateral relationship between the worker and the employer whose juridical entity is known. Since the early 1970s there has been an increase in the number of socio-economic relationships of a triangular nature involving the employer by whom the worker is employed, the worker, and a third legal or natural person who actually receives the latter's services. The first anomaly of this structure lies in the fact that job performance may be detached from the original contract where it has its roots. Various types of legal links are possible, among which it is worth mentioning the work carried out by a worker employed by a firm (the supplier) for the benefit of another firm (the user).

The singularity of the scheme is that the worker is juridically dependent on the firm that has, so to speak, provided or lent his or her services to the second firm at the latter's request. A further anomaly, from the legal viewpoint, is that the worker works for the firm with which he entered into an agreement whose

⁶⁹ Cordova (1986) 715.

⁷⁰ Kravaritou (1988) 60.

content is his or her promise is to be available to carry out a given task. In fact, from the moment he or she takes on the employment he or she pledges to be available to the other party to the agreement.

We may group together, in the model described above, the contract of employment through an intermediary (*travail intérimaire*), the sub-contracting of the workforce and the lending or temporary attachment of workers, including labour pooling. Undoubtedly, one of the most widespread forms is temporary work through an intermediary. This atypical contract is the clear evidence that there can be a grey zone where labour law meets commercial law, although the respective philosophies are still different. The employment contract is a 'container' of protection of human personality, while commercial law provides for the exchange of commodities or services. The risks involved were understood in legal systems that considered the phenomenon of intermediation in making the employment contract as unlawful. Lawmakers have clearly been on their guard, because of the fear of evasion and fraud in respect of existing protection. The changing regulation of temporary work agencies, from prohibition in some countries, to more limited forms of regulation is examined in chapter 3 above.

The Fifth Deviation: the Work Place

Here we are dealing with a major phenomenon whereby the work is performed outside the central place of production, ie the factory or office. The novelty in this social relationship is relative because home work has existed since before the industrial revolution. In short, it could be said that it constitutes the original economic organisational form of work that was to become factory work. However, the contract has undergone a process of renewal and has become widespread, in no small measure through the contribution of technological developments. Nevertheless, what we are interested in here, from the legal stance, is the performance outside the firm of the productive cycle that normally belongs to the organisation of the firm, and the effect of this on the contractual subordination of the worker. The technological revolution made it possible to decentralise certain functions, such as planning, research, supervision of accounts and know-how. Externalisation may involve different ways of regulating the relationships between the various components of the enterprise. The mere creation of a satellite company in France has posed the problem of identifying who the actual employer is in terms of establishing contractual responsibility towards workers. French case law and the Italian Workers' Statute have both confronted this problem because they are countries where there is no barrier against the decentralisation of parts of undertakings.⁷¹

Telework provides a good example. This is a form of work that makes use of telecommunications and can be carried out either inside or outside the firm. This

⁷¹ Veneziani (1993) 216.

is a kind of work outside the sphere of most protective legislation which aimed at regulating home work for manual activities for the production of quantifiable and fungible goods and material services. German, Belgian and Italian experiences and laws support this conclusion.⁷² One problem that would seem to be common in all cases, both in common law countries and in those with specific ad hoc legislation, is the identification of the criteria characterising the employment relationship that is based on actual experience and on the concept of subordinate employment. According to British and Swedish legislation, home work may be considered, depending on particular circumstances, as a form of either self-employment or of subordinate employment on the basis of whether it is connected to a specific organisation of work under an employer. Italian law, German law and the Belgian Court of Cassation, in deciding on the provision to be applied to teleworkers, resort to the 'nature of work' and the 'stable economic, technico-functional connection with productive cycle of the client firm'.

Another problem with the evolution of the contract of employment in the technological era concerns the change in the role of the parties and the content of their respective subjective rights. In the early capitalist economy the employer is both manager and technical expert, and his or her power of control concerns what, how and when the work is performed. In the modern age, managerial prerogatives, because of the high skills and expertise of the subordinate employees, have rather to do with the way in which a highly skilled worker belongs to the organisation of a firm. The orders of the employer concern when and if, rather than how, the work should be done; this constitutes the substance of the new subordination. In the technological era the power of command does not lose its intensity but its scope is reduced. Thus, according to the Belgian *Cour de Cassation*, the law of July 1978 on the contract of employment could be applied to teleworkers.

Certainly the contract of employment still remains the formal wrapping covering the relationship of the worker to the organization. However, major influences have been derived, especially in northern countries, from statutes and collective bargaining, both of which are concerned with ensuring that the workers have the power to intervene in determining the content of their jobs and also to understand their position within the organisational network. The tendency of collective bargaining is to favour a right of influence by workers coupled with a degree of autonomy far greater than in the past.

The socio-economic function carried out by the contract of employment in these cases is no longer one of mere mercantile exchange between work and remuneration. The agreement now includes the function of control by the individual over his or her performance. However, there is a further problem, namely that technology, especially informatics, potentially threatens the personality of the individual. Statutory law (Italy, Spain) and case law (Germany) have tried to reduce the risks by 'depersonalising' job performance and by banning the use of

⁷² Ibid.

sophisticated surveillance machinery on workers at a distance. The function of the contract of employment is that of allowing the organisation of work through 'depersonalised job performance'.⁷³

Global Capitalism: Setting Minimum European Standards (1990–2004)

Before 1990, the risks of these contractual schemes never disturbed the EC, which was convinced that multiple contracts of employment represented a good way to promote flexibility. However, the abuse of the various forms and the danger of unjustified differences and competitive advantages led to attempts to fix a legal threshold of fundamental principles, such as equal treatment for part-time and fixed-term workers with full-time and permanent ones. Although a weak panacea for social dumping, Directives 97/80/EC on part-time work and 99/70/EC on fixed-term work, and a draft Directive on temporary work in 2002, were seen as providing a minimum base for a European integration policy. This was a path that was also followed by ILO Convention No 181 (1997) in reversing the previous hostility against temporary work agencies (see chapter 3 above). Generally speaking, the EC Directives have led to a more flexible legal framework in the civil law countries, but to greater regulation of part-time and fixed-term contracts in Britain and Ireland.

In fact, the trend since the 1990s, even though not generalised, is towards a progressive relaxation of the legal prerequisites and of the most significant pillars against a distorted use of the atypical contract. On the one hand, Belgium has allowed the stipulation of successive fixed-term contracts without having to give reasons and without having to consider them as permanent contracts; on the other hand, the vagueness of the formula indicating objective reasons—'technical, productive, organisational and other substantive reasons'—adopted by the Italian conservative government in transposing the Directive 97/81/EC (law 6.9.2001, no 368) has widened the scope allowing a major flexibility in the use of the workforce. Objective reasons are not necessary for such contracts for German workers over the age of 52 (2003), and the limit on renewal can be derogated *in pejus* by collective parties. This legal strategy was adopted also by regulations under the British Employment Act 2002, which provide that the conversion of subsequent fixed-term contracts after 4 years into open-ended ones can be overcome by collective or workforce agreements.

It seems that state control on the excessive use atypical contracts is as difficult as it was in the past, because of a deliberate policy of weakening guarantees. However, it also depends, even in the context of rigid protection, on political and

⁷³ Veneziani (1993) 62ff.

financial reasons—as happened in Greece—or on the deliberate attempt to erode the centrality of the traditional classical model. This happened in Italy under a right-wing coalition government, where the ambiguity of the formula (see above)⁷⁴ offered a space manoeuvre for discretionary powers of the firm. This trend stands in opposition to the ideological essence of the European Framework Agreement 1999 on fixed-term contracts, which specifies that the absence of objective reasons constitutes an ‘abuse’.⁷⁵ According to the EC Directive 99/70/EC, which gave legal effect to the European Framework Agreement, contracts for an indefinite period remain the prevalent form in labour market negotiations.

Limits to the structure of part-time jobs were imposed by Greek legislation, influenced by Directive 97/80/EC. This was extended, as it was in Italy, to the public sector. The minimum guarantees were the prohibition not to exceed a certain number of hours a week, the limited duration of the contract (lasting up to 24 months) and renewal after a given interval. The extraordinary success of this kind of contract gave an impulse to a different trend appearing in the Netherlands and in Germany in the 1990s, under the auspices of Directive 1997/80/EC, in the direction of promoting the use of this model. Both countries encouraged workers to voluntarily go part-time and fixed the obligation on the employer to give reasons for a refusal to accept the employee’s request for part-time work, indicating the organisational reasons impeding the reduction in working hours. German laws (Act on part-time work and fixed-term contracts of 1 January 2001 implementing Directive 97/80/EC) reflected, amending some parts, the previous Act of 1985, providing for minimum guarantees. It tries, in effect, to avoid the employer’s risks being transferred to the employees and gives protection against discriminatory practices. However, by the end of the period of this study the question remains whether or not ‘it will contribute to an increase in the quality of part-time work’.⁷⁶

Many doubts were also generated by the collateral trend towards establishing additional flexibility by individualisation of the right to reduce or extend the agreed working time. Britain secured a provision in the EC Working Time Directive to allow for individual contracting-out of the prescribed maximum 48-hour week because of fears that the Directive would undermine Britain’s competitive advantage of a long working-time culture (see chapter 3 above). Similar risks of individualisation of the contractual regime are to be found in Germany and Italy. In the latter country the legislative Decree 2003 no 276 (amending Decree no 61/00 of 25 February 2000) is the result of a policy whose ideological background (contained in the conservative government White Paper on Labour Market Reform, 2000) pays less attention to the request for quality from the supply side than the requests for flexibility from the demand side. The rationale of the two statutes enacted by the same right-wing coalition between 2000 and 2003 is to

⁷⁴ Art 1 of Legislative decree 368/01 and decree 2003/368, Zappalà (2004) 107.

⁷⁵ Vignaeau et al (1999).

⁷⁶ Schmidt (2004) 97.

disregard collective forces and discipline by giving room to individual autonomy to be deployed beyond the collective limits, worsening guarantees dating from 1984. The restoration of individual consent is a device to overcome trade union control. The most evident example is the idea of 'elasticity clauses', ie individual contractual arrangements giving the employer the power to change the time of performance, even in the absence of a collective agreement. The low level of guarantees in Italian statutory regulation and the risk of individualism in labour law for the employee were clarified by the Italian Constitutional Court in 1992 when it judged the compatibility of elasticity clauses with the freedom of the worker. The Court underlined how, in an era of flexibility, the function of the employment contract is not a pure exchange of flexible work for economic remuneration. It involves the freedom of the worker 'to organise his life', which could be severely limited if a contract placed him or her under the power of the employer to alter the work schedule that is or had been previously established by the contract (Constitutional Court 210/1992). The Irish Part-time Act Work 2001 moved in this protective direction as part of family-friendly labour law policy started in that country in 1997.⁷⁷

Excessive flexibility through unilateral modification of working time has an upsetting impact on the original and 'natural' function of the contract. It loses its essential function to plan and make foreseeable all 'personal' costs involved in employment relations. The more fragmented the temporal continuity of the activity and the juridical continuity of the obligation, the more the worker is exposed to the risk of avoidance of any kind of labour and social security protections. National experiences show how sensitive and politically debatable the introduction of work through an intermediary is because of the huge amount of risk for the worker. The job on call is an extreme form of part-time work introduced for the first time in Italy by decree in 2003, and renewed in Germany in 2001, following an earlier law of 1985, where the employer determines unilaterally if and when the employee has to work in the areas of production indicated by collective agreements with the consequence of transferring the employer's risks to the worker. The Italian legislative measure still expresses 'a precise philosophy of individualisation in the employment contract' and the whole equilibrium between collective agreement and individual agreement is jeopardised.⁷⁸ The same impression derives from the German model because the reform of 2001 has restricted the employer's flexibility but it still encourages an individual trade-off between contracting parties, ie the possibility to derogate from some provisions unfavourable to the worker on condition that weekly and daily working hours are specified and a period of prior notice is given.⁷⁹

To enhance the weak position of these workers the Dutch system has proposed a framework of legal regulations inspired by the 1999 'flexicurity' strategy that modified the civil code. The philosophy behind the statute is connected to one of

⁷⁷ Kerr (2004) 4; for England, see Davies and Freedland (2006) 210.

⁷⁸ Sciarra (2004a) 28.

⁷⁹ Schmidt (2004) 80.

the pillars of the EC Lisbon strategy calling for adaptability in the labour market (see chapter 3 above). 'Flexicurity' meant a coordination of measures coupling accepted flexibility and social welfare reform to increase security in the market. The legal technique is based on a web of different sources of law: statutes and deregulated bargaining policies.⁸⁰ The rationale of Dutch reforms of jobs on call is that the original and natural function, to provide work in a specific case for particular and temporary needs of employers, is materially changed by the employer's abuse (repetition of calls, vagueness of working time, violation of minimum wage rate) (Article 7:667–68(a) and Article 7:628(a) Civil Code). The legislative changes were a result of a political compromise: to discourage employers from the use of precarious contracts, such as freelance jobs, jobs on call and zero-hours agreements. This is clearly stated by the Italian law of 2003 (amending a 1997 Act) in the rule that in case of non-compliance with the obligation to sign the contract in writing and lack of detailed information, the worker is considered legally dependent on the user.⁸¹ The hostility of unions to new forms of work can be explained as a reaction to a practice that can exclude them from the control of the labour market. This shows why, in most countries, when the needs for flexibility emerged all interventions of the legislator were preceded by the unions' consent. This happened in France in the case of enactment of laws in 1972,⁸² 1985 and 1990. The same happened in the Netherlands where the Flexibility and Security Act 1999 was anticipated by the national agreement reached in the *Stichting van de Arbeid*.

The framework of rules contained in the Directive 91/83/EC aimed to complete and promote the health and safety of workers on fixed-term contracts and temporary contracts of employment. It describes the relationship existing between the temporary work agency, the user and the worker, where the latter is made available to work for or under the control of a beneficiary firm or plant (Article 2). It is a wide and rather vague definition that crosses various models. The French system has progressively legalised *travail intérimaire* (see chapter 3 above).⁸³ The statutory provisions tried to guarantee equal treatment between temporary workers and permanent employees of the user and to limit the cases of permissible use of this kind of contract. The point of contact between the commercial contract (agency/user) and the employment contract (agency/worker) is represented by the joint liability of the two employers for the payment of remuneration and of social security provision of health and safety measures etc.

Compared to the French, Italian and German schemes, the British system seems more open to flexible work arrangements. The British law does not specify the contractual nature of the relationships with the supplier and hirer. This ambiguity gives rise to a casuistic common law trend in which the courts have a wide

⁸⁰ Caruso (2004) 27.

⁸¹ Ghera (2003) 341.

⁸² Agreement Manpower-CGT 1969, in Verdier et al (2007) 67–70.

⁸³ Ibid, 67.

discretion to decide whether or not the worker is subordinate, under a contract of service, or autonomous, under a contract *sui generis*. On this point a clear legal framework is present in the Italian context, where temporary workers are legally subordinate to the agency by an open-ended or fixed-term contract. In this kind of atypical work the main deviation from the classical prototype does not concern the structure of the contract but the 'multiple' content of the employee's obligation deriving from the split of powers between agency and user. In fact, the worker has promised 'permanent availability' to his or her legal employer (the agency) and to give 'temporary performance' of the job to his real counterpart (the user). The agreement between the original contracting parties (agency and temporary worker) should make it easier to establish an employment relation between the worker and a different party (user).

The parasubordinate employee in the condition of economic dependence enjoys the same protection of workers as regards health and care, as happens in Spain and Germany, where the person 'similar to salaried people' is covered by national social security and collective agreements. Furthermore, according to the German doctrine, they should also enjoy also protection against unfair dismissal.⁸⁴ The concept of 'worker' used by British statutes, such as the National Minimum Wage Act 1998, the Working Time Regulations 1998 and the Employment Relations Act 1998, seems to 'broadly correspond to civil law notions of parasubordination'.⁸⁵ Common law countries offer a significant lesson on the survival of the legal distinctions and the permanence of the old functions of the employment contract. Some scholars question the labour law attempts to shift the boundary of the legal category of dependent labour so as to encompass those apparently self-employed. They suggest that, while these workers may lack a contract of employment based on mutuality of obligation, they are not genuinely in business on their own account (the so-called dependent self-employed).⁸⁶ The Italian labour market reforms of 2003 clearly show how thin the border between autonomy and subordination is. A new 'contract for work by project or by programme' (*contratto a progetto e a programma*) is a special agreement stipulated in writing where a simple project or programme is the content of the obligation carried out by the self-employed instead of continuous and coordinated collaboration, as in the previous legal definition. It has become clear to commentators and in the first case law how important it is to carefully investigate the factual dynamism of the mutual obligations. In this perspective, a special measure has been introduced by the law to prevent abuses. This was also the goal of the 1999 German law on the promotion of self-employed work.⁸⁷ The Italian system of 'certification' is an administrative act issued *erga omnes* at the end of a voluntary procedure, involving a special public (administrative) or private (unions and employers) bilateral commission. The commission provides for a

⁸⁴ Sobczak (2003) 316.

⁸⁵ Deakin (2002) 191.

⁸⁶ Ibid.

⁸⁷ Contouris (2007) 66.

preventive analysis of the real and concrete intention of the parties in forming or modifying the employment contract. The body is not bound by the legal title of the contract given by the individual parties, but indicates all the legal consequences (civil, administrative, of social security) attached to it. The idea underlying the system is the attempt to clarify this 'grey zone' of the atypical labour markets.

Conclusion

The range of the employment contract has been considerably enlarged, and this has affected the original meaning of subordination and the structure of the 'classical' model. The model of the contract of subordinate employment for an indefinite period of time emerged as a prevalent model in post-war European societies. The model was largely functional to a developing economy that needed a stable workforce. The employment relationship, as a contractual category of civil law, was intended not only to be a tool for employers to acquire a workforce but also as a legal device for the working of the enterprise.

Welfare state statutes, like the British National Insurance Act 1946 (covering 'employed earners', including but not limited to those 'being employed under contract of service'),⁸⁸ provide the evidence of the linkage between the contract of employment and the larger phenomenon of the ideology of the welfare state which dominated the post-war period until the beginning of the 1970s, when employment relations and the contractual 'shell' had become strongly influenced by protective legislation enriching its function, if not its structure.

The contract of subordinate employment has provided the social and legal parameters for the sphere of application of labour law and social security systems. In the civil law countries, constitutional rules have promoted the position of the subordinate worker as 'citizen of the enterprise' without touching the traditional structure of the contract. Special statutes in both civil and common law countries have done the same. The traditional 'organisational' function—to link human effort to the organisation's needs—has been coupled with the protective function of treating the worker as a human being. This can be described as a process of 'depersonalisation of subordination' tempering the dominant and intrusive presence of the employer's power of command and control. Statutes against unfair dismissals protecting a sort of 'ownership of the job', banning discriminatory practices and promoting equal pay policies, corroborate this trend towards a more balanced position of the contracting parties. The contract of employment thus becomes a container of a less asymmetrical quality of the employment relationship.

⁸⁸ Deakin (2002) 185.

The same trend was followed by statutes and the constitutions enacted in the 1970s in the new EU Member States (Spain, Portugal, Greece) because of the radical changes of their labour laws and political framework. Nevertheless, throughout the 1970s, a new process of transformation of the economies, induced by the economic crisis, started, along with substantive changes of the enterprise (vertical disintegration, outplacement, outsourcing, etc). This produced a move away from the Fordist model of production of goods and services, given to the acceleration of technological changes and the growing competition in labour intensive industries from low-wage producers in the Third World.

The new labour law system reshaped the structure and functions of the employment contract. It marked the passage from an idea of contract as a source of 'technical depersonalised co-operation' of the employee to the contract as a means of greater adaptability to the changing complex physiognomy of the firm's organisation. The new function required a new structure and a new form of availability of the worker. The key elements of the structure are the place of work, the skills required and the bilateral obligations as to time. The changes involved the different and alternative notions of the duration of the legal obligations (through the diffusion of fixed-term contract) and the different distribution of working time through part-time contracts and reductions in working hours. This exposed the paradox of the classical model of the employment contract, regarded as a container of social citizenship and, at the same time, as a legal instrument for saving labour costs. It was in the name of competitiveness and promotion of employment that state labour policy in the 1980s started to deconstruct the classical scheme and adapt it to perform a plurality of functions mainly in the interests of the company. The contract contained a new trade-off: availability over a more or less continuous period without material subordination against a reduced wage. The distinction between internal and external flexibility becomes quite clear: the former is about the pursuit of productive efficiency (good organisation, innovation); the latter deals with allocative efficiency.⁸⁹ The two kinds of flexibility were reached consciously by all European countries from the 1980s onwards, cultivating the segmentation of the labour market and using different kinds of workers as a part of a 'core-periphery recipe'.

A segmentation of the labour market is a common European trend. The suggested therapy is not to enhance but rather to circumvent the protective legislation on individual dismissals that exists in all European countries (see chapter 3 above) by resorting to atypical contracts that fall outside the sphere of protection. The strategy to reach numerical flexibility touches the nature of the law and its relations with individual and collective agreements deeply: the wave of contracting-out clauses is designed to facilitate possible derogations from statutes by collective parties. France, Italy, the Netherlands, Sweden, Britain and Germany

⁸⁹ Dore (2004) 26.

follow this path, which underlines the function of employment contract as a 'soft' instrument for a deregulation policy.

In its more extreme forms the rationale of strongly neo-liberal labour market regulation can shift towards a more precarious methodology of individualising and liberalising the contract *à la carte*, as an even more direct instrument for a deregulatory policy. The risk is the deeper separation between standard employment relations and marginal personal work relations that could be projected towards grey and peripheral zones of the law or towards an area outside the law affecting the of whole civil society.⁹⁰

All the indicated trends have resulted in demands for a more stable and solid bulk of principles and a floor of fundamental rights that preserve the individual contract of employment from deteriorating from its true protective mission. The road is indicated by several international texts: the elimination of discrimination 'in respect of employment and occupation' is the message of ILO and of EC Directives against discrimination, so as to ensure equal treatment in employment and working conditions (see chapter 5, below). However, the trust in the contract as a source of regulation for every worker is to be found in a precise statement of the Community Charter of Fundamental Social Rights of Workers 1989: 'The conditions of employment of every worker of the European community shall be regulated in laws, a collective agreement or a contract of employment' (point 9). The Nice Charter of Fundamental Rights 2000 enlarges and specifies the scope of the protection. This is a programme for the future work of unions, governments at national and European level, and also presents a challenge for labour lawyers who wish to develop the contract of employment into a guarantee of fundamental rights.

⁹⁰ Davies and Freedland (2006) 240; Freedland (2007) 12; Jeammaud (1988) 176.