

# The Contract of Employment as a Central Institution of Labour Law

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Hugo Sinzheimer Lectures

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## 1. INTRODUCTION\*

It is a great honour to have been invited to Amsterdam as one of a pair of Sinzheimer lecturers for 2007<sup>1</sup>, and it is a great pleasure to be here to deliver my lecture and to take part in the discussions which are due to follow. I should like to begin by identifying the occasion as a particular kind of family gathering, figuratively speaking, of scholars in the field of labour law, social law, and employment relations.

This family has its revered ancestors, none more obviously on this occasion than Hugo Sinzheimer himself. In this place, it is scarcely necessary, indeed it is quite superfluous, to identify him as one of the founding fathers of labour law both as an academic discipline and as a branch of practical law-making, not only in his original home country, which was Germany, but also in Europe more generally and I am sure not least in the Netherlands and in which he passed the last part of his life until his death in 1945.

As the end of his life coincided almost exactly with the beginning of mine, I could not of course have known him personally; nevertheless, I feel a strong sense of intellectual kinship with him – in fact, I regard him as a kind of intellectual grandfather. With all due modesty I trace that intellectual ancestry through Otto Kahn-Freund, for whom Sinzheimer was the intellectual mentor and inspiration, just as Kahn-Freund became for me when I went to Oxford as one of his doctoral students in the mid-1960s. Kahn-Freund had been Sinzheimer's student and later assistant in Frankfurt in the 1920s, and it is in a larger sense no coincidence that Kahn-Freund fled Germany for England in the same year of 1933 as Sinzheimer's departure for Holland.

Although I suppose that in the darkening days of the later 1930s and in the grim times of the 1940s, Sinzheimer did not have the opportunity to develop a whole new

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\* I wish to acknowledge that the generosity of the Leverhulme Trust in awarding me a Major Research Fellowship made possible the research project to which I refer and upon which I have drawn in this lecture.

<sup>1</sup> One of two Sinzheimer lectures for 2007, given at the University of Amsterdam on 8 November 2007

intellectual relationship with the legal system of his new host country in the way that Kahn-Freund so conspicuously did, I nevertheless imagine that he succeeded in carrying with him and before him the memorably progressive spirit of Weimar social democracy. It is therefore a very special pleasure to come to an occasion organised by the Institute named after him.

This notion of an intellectual kinship among those concerned with socially progressive labour law could also be extended to others involved in today's occasion; among my contemporaries here, I include in this family my long-time colleague Colin Crouch who had his academic up-bringing at the London School of Economics while Otto Kahn-Freund was a dominant member of the professoriate there. And I especially regard as part of this cousinhood the Rector Magnificus who shares the honour of this occasion with Sinzheimer himself. There can be no doubt that Paul van der Heijden, both as a scholar and as an actor in public administration, has been a pillar of the community of labour law both within the Netherlands and internationally.

As a final use of this metaphor of intellectual kinship, and I hope not an over-use of it, I then reflect upon the younger generation, and the ways in which they are maintaining the family traditions. This brings me to Evert Verhulp and his colleagues now working in the Sinzheimer Institute. The essential vigour of their contribution to this continuing enterprise of labour law is very well instantiated in their various writings, and not least by the work on the contract of employment<sup>2</sup> which they have prepared as a tribute to Rector Professor Paul F. van der Heijden.

The substance of my lecture represents an appreciation of that work, and a consideration of how it has helped me to develop a European comparative perspective upon the role and functioning of the law of the contract of employment, this being a centrally important question for both the historical and the contemporary understanding of labour law. In the course of my discussion, I will attempt to identify some connections between this work on the contract of employment in the labour law

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<sup>2</sup> R. Knegt (ed.) and others (2008)

of the Netherlands, and the contribution of Hugo Sinzheimer to the theory of the law of the contract of employment.

## 2 The contract of employment as a central institution of labour law

In order to develop this appreciation of the book which Evert Verhulp and his colleagues have written, I need, if I may be allowed, to spend a moment or two describing my own current research project, and identifying the view which I have arrived at about the particular sense in which the contract of employment is a central institution of labour law. To assert that the contract of employment is a central institution of labour law is, in and of itself, not a novel proposition – in fact, that has for a long time been almost a truism for labour law theory. But it is nevertheless still very important to consider how and why this became a truism for labour law, and, even more so, what are the effects of this centrality of the contract of employment on contemporary labour law and what are the implications for the future development of labour law.

If I allow myself to address those questions in a way which is initially autobiographical, that is because the issue and implications of the centrality of the contract of employment to labour law are ones with which I have been concerned throughout my whole career in labour law – during which time, and especially in recent years, my position with regard to this issue has gone through a number of shifts, and now seems to be going through further shifts. Initially, and for many years, my aim was to develop and refine the doctrinal analysis of the contract of employment as the central organising category or conceptual framework of English labour law. I then became convinced that it was important to challenge the boundaries of that doctrinal analysis, by framing and investigating a broader category of personal work contracts, which I denominated as ‘the personal employment contract’.

My current project is that of examining that broader category on a European comparative basis, and trying to construct a conceptual framework for a common

understanding of the different types of personal work contract and personal work nexus which are recognised in the various legal systems of Europe. This represented a conscious attempt to escape from the conceptual domination of labour law by the contract of employment. However, and perhaps in a rather paradoxical way, I have increasingly found that in order to carry out that task satisfactorily, it is necessary to conduct a yet deeper analysis than I had previously effected of why and how the contract of employment functions as the key analytical and normative category of labour law – in short as a central institution of labour law systems.

You will have noted that, when thus identifying the contract of employment as a central institution of labour law, I introduced the suggestion that this was because it functioned not only as an *analytical* category but also as a *normative* one. It is this duality of function which gives the contract of employment its particular significance as a legal, economic and societal institution. In order to make this point more clearly, may I reflect for a moment on what we mean by institutions; and may I for this purpose quote from my fellow-lecturer who in latest and I think seminal book has offered a definition of institutions and a gloss upon that definition:-

'Institutions will be defined here as: patterns of human action and relationships that persist and reproduce themselves over time, independently of the identity of the biological individuals performing within them. Sociologists have long understood such a concept, but much of this earlier history has been ignored by recent political scientists and others who have come autonomously to the idea of the institution as they have sought to convey the idea of behaviour being shaped and routinized, fitting into patterns, which are not necessarily those that would be freely chosen by a rational actor needing to decide what to do.'<sup>3</sup>

Legal concepts or formulations often become institutions in that particular sense; they often have the complex functionality of identifying patterns of behaviour, analysing those patterns of behaviour in particular ideological ways, and shaping those patterns of behaviour according to those ideologies. Let me illustrate this by an example. For a long time and in many legal systems, legislators have wished, often picking up on

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<sup>3</sup> Crouch 2005 at p 10.

religious precepts, to impose upon a weekly day of rest upon societal arrangements for employment, trading and public entertainment. In Britain, such legislation took place under the heading of 'Sunday Observance'.<sup>4</sup> We can see ways in which 'Sunday observance' became and functioned as a legal and social institution, with a normative impact which was complex and extensive. More recently, a contrasting ideology has come to prevail in many of those legal systems which is much more permissive towards exceptions to requirements of 'Sunday Observance'. In Britain, that greater permissiveness has been embodied in legislation on 'Sunday Trading'. Quite quickly 'Sunday Trading' has become a distinctive or countervailing legal institution – indeed an institution with a normative drive or impact, which is about the encouragement of a licensed but quite significant amount of commercial and employment activity on Sundays.

That was actually rather an eclectic and minor illustration of my theme. The fact is that this capacity of legal concepts or formulations to assume the character of normative institutions has few more widespread or significant illustrations than in the case of 'the contract of employment'. That is why, in the theoretical games which labour lawyers (and labour economists and sociologists) play about the concept and formulation of the contract of employment, the stakes have always been and remain sky-high. When I advance that rather colourful proposition, I am referring not so much to the precise way in which we seek to draw the elusive, indeed to my mind imaginary, dividing line between the 'contract of employment' (between 'employer' and 'employee') and the 'contract for services' (between a person or enterprise and an independent contractor). I am referring to what is for me the enormously greater significance of characterising personal or individual and dependent employment relations in terms of 'the contract of employment' in the first place – that is to say, the choosing of *this contractual category* with which to characterise the law of personal work relations, which might otherwise be described and understood in other ways, such as, in historically older and now widely discredited usage 'the law of master and

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<sup>4</sup> This principally stemmed from the Sunday Observance Act 1780, section 1 of which famously provided that :-A house, room or other place opened or used for public entertainment or amusement ... upon any part of the Lord's day, and to which persons are admitted by payment of money or by tickets sold for money is to be deemed to be a disorderly house or place. The idea of the 'disorderly house' affords another example of an emergent legal institution.



servant', or, more acceptably to modern sensibilities, 'the law of employer and employee'.

Please note that I speak of the 'choosing' of the category of the contract of employment with which to characterise what might otherwise have evolved, for example, as 'the law of employer and employee'. I do not use this notion of 'choosing' to denote a single decisive legal enactment or doctrinal pronouncement. I use it rather to indicate the general evolution of a strong preference for this mode of conceptualisation among the makers and theorists of labour law in the various European legal systems in general and labour law systems in particular. This was an evolution the timing and extent of which varied between those systems; and my point is that the lack of uniformity in this evolution reminds us that this way of characterising the law of individual dependent personal work relations was not a self-evident one, or a mere adoption of a sort of universal item of legal vocabulary.

I emphasise this point because, even after the publication of valuable scholarly work indicating the contingent and circumstantial evolution of 'the contract of employment'<sup>5</sup>, it is still all too easy to fall into or fall back into a habit of mind in which 'the contract of employment' and the binary division of the law of personal work relations into 'the contract of employment' and 'the contract for services with an independent contractor' are viewed as fixed stars in the firmament of labour law, observable today and, in the view of some, in a recognisable form since the beginning of recorded time. I have found that my work on personal work contracts in European comparative law has served to administer a powerful antidote to that misconception, and I devote the rest of this lecture to explaining my efforts to arrive at a more nuanced understanding of this evolution, and also the ways in which the Van der Heijden Festschrift has helped me in those efforts.

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<sup>5</sup> Especially Veneziani (1986), Deakin and Wilkinson (2005) chapter 2 'The origins of the contract of employment'.

### 3 Institutional unity and normative diversity

I seek to develop this more nuanced understanding of the evolution of the contract of employment as a central institution of labour law by concentrating on the significance of thinking about the contract of employment as a *legal institution*, and by identifying the possibility, indeed the actual presence, of very real normative diversity between different ways of modelling the contract of employment as a legal institution. I have written before now about what I have described as the ‘false unity’ of the contract of employment<sup>6</sup>. At that time I mainly had in mind the enormous diversity of practical forms of personal work relations which are often somewhat artificially bracketed together in the single category of the contract of employment. I now have in mind a more profound kind of diversity which relates to the different ways in which the contract of employment may function as a legal institution.

By this I mean as follows: that there seem to me to be a variety of different ways in which the contract of employment may be used and deployed as a model, or a characterisation, or a conceptualisation, of the legal analysis of individual dependent personal work relations. As I have indicated earlier, this diversity may have very important normative implications; that is to say, the particular way in which a legal institution is modelled and developed may have normative purposes and may have normative effects. The lesson from European comparative reflection seems to be there can be few if any legal institutions which are richer in normative diversity in that sense than is the contract of employment.

That is an observation which may seem to be too general to be interesting; but it may be more useful if I develop it to the point of saying that, within this rich variety of models of or for the contract of employment as a legal institution with normative implications, there seem to me to be two divergent or even contrasting types of model. That is to say, to put it bluntly, that there is one type of model the normative implication of which is broadly to favour the worker, and a contrasting type the normative implication of which is broadly to favour the employer. So I suggest we may identify and contrast the worker-protective models (WPMs) and the enterprise-

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<sup>6</sup> Freedland (2003) at pp 15 et seq.

protective models (EPMs) of the contract of employment as a legal institution. (In my usage of 'enterprise-protective', the ambiguity between the more concrete connotation of 'enterprise' as 'employing enterprise' or 'employer' and the more abstract connotations of 'the spirit of enterprise' or 'the quality of being enterprising' was not consciously sought but is nevertheless satisfactorily part of what I want to convey.)

I should say something about the way in which I am distinguishing between WPMs and EPMs. This is of necessity a broad-brush distinction. I do not pretend to have a way of assessing whether any given contract of employment strikes a 'fair balance' between the interests of the worker and those of the employer or employing enterprise, or in particular whether the wage-work bargain is a 'fair' one in the sense that the relation between work and reward is equitable or appropriate. Instead I have in mind a notion of EPMs as identifying a type or types of contract of employment whose structures and mandatory or default provisions emphasise and maximise the control or flexibility which the employer or employing enterprise has over or towards the worker. By contrast, I think of WPMs as a type or types of contract of employment whose structures and mandatory or default provisions emphasise and maximise the welfare or security of the worker.

This contrast is, of course, between two ideal types; it does not provide an easy way of classifying the composite set of structures or mandatory or default provisions in any given contracts of employment. But, although this is a contrast between ideal types, it does help us to characterise the way in which the contract of employment evolves as a legal institution in actual legal systems, and to analyse the predominant normative implications of those evolutions. For that purpose, it is also useful to distinguish between two kinds or stages of evolution of the contract of employment as a legal institution in actual legal systems. Those two kinds or stages of evolution of the contract of employment as a legal institution are, on the one hand, the evolution of the contract of employment within and as part of general private or contract law (GPL), and, on the other hand, the evolution of the contract of employment as specialised labour law (SLL).

Armed with that latter distinction, we may be able to discern some trends or tendencies as to how the contract of employment has evolved as a legal institution in

actual legal system, and as to whether and when that has resulted in enterprise-protective or worker-protective models. An initial question in this respect is whether that evolution has tended to be more enterprise-protective or worker-protective when it has occurred on the one hand within and as part of GPL or on the other hand as SLL. In order to answer that question, it will be useful to attempt some generalisations about the actual experience in this respect of some European legal systems.

A fairly safe generalisation of that kind would be that a general tendency can be discerned among European legal systems for individual dependent personal work relations to be increasingly characterised as various forms of contract of employment in the course of the nineteenth and early twentieth centuries. That tendency can be seen as a manifestation of the general evolution 'from status to contract'; and more particularly as part of an increasingly clear articulation of general private law and general contract law within most of those legal systems during that period. So that tendency represents the evolution of the contract of employment within and as part of GPL.

Should we regard evolutions of that kind as resulting in EP models or WP models of the contract of employment? There was of course a well-established liberal rhetoric which identified the evolution 'from status to contract' and the articulation of civil and contract law as a mark of progress and enlightenment. From within that discourse, the evolution of the contract of employment might be seen either as WP in that it tended to liberate workers from the constraints of statuses akin to serfdom, or at least as neutral in equally vindicating the social and economic contractual freedom of employers and workers.

However, there has also been a countervailing set of arguments questioning the application of the liberal ideal of freedom of contract, in the form and embodiment of GPL, to dependent personal work relations, and regarding the claim that this produces either neutral or WP outcomes, as an inherently naïve or disingenuous one, because the alleged equality between worker and employer upon which it depends is only a formal equality and not a real one. From that critical discourse or standpoint, it would appear and often has appeared that the evolution of the contract

of employment as part of GPL is inherently likely to give rise to EP models of the contract of employment, so that the only way of realising an ambition of evolving WP or even neutral models would consist in the development of the institution of the contract of employment as or within a framework of SLL.

It is unsurprising that theorists of labour law have generally espoused the latter view; it forms part of the very *raison d'être* of the discipline. I am myself generally speaking of that same view; but I have some ambivalence about it. In particular, I feel sceptical about a proposition which is sometimes tacitly accepted as a corollary. The tacitly accepted corollary is to the effect that an evolution of the institution of the contract of employment as or within a framework of SLL can systemically or at least quite reliably be expected to give rise to WP models of the contract of employment. I have come to believe that this often tacitly accepted corollary is actually rather dubious, and may in some situations be misleading. That is to say, I think that the evolution of the institution of the contract of employment as or within a framework of SLL may at times, despite (or perhaps even because of) the apparent WP orientation of SLL, actually support the preservation of underlyingly EP models of the contract of employment. In particular, for example, notions of mutual loyalty between worker and employer may be presented as WP concepts but are in reality apt to operate as EP ones. The remainder of my lecture will be concerned with the tracing of this difficulty and other similar difficulties through various episodes of the evolution of the institution of the contract of employment in Europe during the last and present centuries.

#### 4. The institution of the contract of employment through the eyes of Sinzheimer and Kahn-Freund

May I begin that discussion by considering the ways in which both Hugo Sinzheimer and Otto Kahn-Freund had to struggle with this particular set of difficulties, as theorists of labour law each intimately concerned with its practical and political development as an apparatus for the protection of the dignity and welfare of workers. We have the benefit of an excellent optic through which to observe those intellectual and practical struggles, in the shape of a learned edition and translation into English by Roy Lewis and Jon Clark of a selection of Kahn-Freund's German writings<sup>7</sup> which includes an extended appreciation of Sinzheimer's life and work originally published in 1976.

Through this multi-layered set of writings, in which Kahn-Freund participates in the translation of and commentary upon his own writings about the work of Sinzheimer, we get a vivid sense of the complex theoretical shifts and compromises in which these architects of labour and social law had to engage in order to take part in the foundation and maintenance of this new discipline, in the case of Sinzheimer in Weimar Germany and then in the Netherlands, and in the case of Kahn-Freund in Germany and then as the *doyen par excellence* of British labour law.

The focus of the work of Sinzheimer, and indeed of Kahn-Freund, was upon collective bargaining; it was especially of the collective labour law of the Weimar Republic that Sinzheimer was the architect, by means both of his writings and his political activity. But Kahn-Freund's in his essay about Sinzheimer shows how his mentor understood the crucial importance of the rigorous intellectual construction of the contract of employment as a central plank in the institutional platform upon which collective bargaining law would be constructed. Kahn-Freund had of course in the intervening years taken this crucial understanding to Britain and had done critically important things on the basis of it; and it is fascinating to read the terms in which he pays this particular intellectual debt to Sinzheimer in that essay (as, in turn, I am endeavouring to do to both of them in this lecture).

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<sup>7</sup> Kahn-Freund (1981).

Kahn-Freund regarded Sinzheimer as having made his crucial contribution to the analysis of the contract of employment in his book on the *Basic Outlines of Labour Law* which first appeared in 1921, of which Kahn-Freund says that:-

'Reading this study today, one is most struck by the analysis of the contract of employment as one of the most original and influential elements of his whole work. The linking of the element of subordination (*gewaltrechtlich*) and of exchange (*schuldrechtlich*) in the contract of employment – sometimes he referred to the element of subordination in the manner of Gierke as the “status” (*personenrechtlich*) element – was one of Sinzheimer's most decisive theoretical insights, distinguishing his ideas from those of many other important labour lawyers, including those of Lotmar.'<sup>8</sup> And later on Kahn-Freund reasserts that:-

'The idea of the dual nature of the employment relationship as one of subordination and exchange was a cornerstone of Sinzheimer's theoretical system.'<sup>9</sup>

Kahn-Freund is thus very conscious that this insight on the part of Sinzheimer, although crucially important in Kahn-Freund's view, is nevertheless a theoretical and abstract one rather than an immediately practical one (though he does go on to show that Sinzheimer was also not lacking in practical wisdom in this field of law). However, nobody was more conscious than Kahn-Freund of the potential juridical and political importance of theoretical socio-legal analyses of the contract of employment, and he is obviously to be credited with having realised that potential in and by his own work. And I am in no doubt of the continuing value of the socio-legal insights which Sinzheimer and Kahn-Freund offered to us; in particular, I find that the notion of the duality of subordination and exchange in the contract of employment, although at one level now taken for granted as part of the canonical wisdom of labour law, nevertheless still has a freshness and a penetrating quality which displays itself when one tries to distinguish between EP and WP models of the contract of employment, and when one tries to consider that distinction against a background of difference between those models according to whether they are cast in the mould of GPL or of SLL.

The essential difficulty with which Sinzheimer and Kahn-Freund were concerned was the following one. They were precursors in addressing a paradox which confronts

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<sup>8</sup> Kahn-Freund (1981) at p 10.

<sup>9</sup> Op cit at p 11.

theorists who wish to advance the development of worker-protective labour law in general and WP models of the contract of employment in particular. Such theorists generally find and conclude that the development of the contract of employment by and within the doctrinal framework of GPL would not tend towards WP formulations; as I argued earlier, the doctrinal formulations of GPL will tend to generate either neutral or EP models of the contract of employment. So they need to find a rationale for the development of the contract of employment by and within a doctrinal framework of SLL.

Sinzheimer and Kahn-Freund were strongly of the view, which has been widely accepted and shared by their successors, that this rationale was to be found in the subordination of the worker to the employer or employing enterprise, for it was the redressing of the oppressive aspects of that subordination which constituted the very *raison d'être* of SLL. So by a curious paradox, the theorists of SLL have to embrace, almost to celebrate, the subordination of workers as a key feature of the contract of employment in order to be allowed to create WP models of the contract of employment. It was that paradox which Sinzheimer sought to resolve by emphasising the duality between subordination and exchange in the construction of the contract of employment; and I think that insight has in one form or another endured as a useful and important one.

## 5. The institution of the contract of employment in European comparative law

All that said, one has to admit that the discussion about the duality between subordination and exchange is very much at the philosophical extreme of the discourse about the evolution of the contract of employment. Both Sinzheimer and Kahn-Freund were well aware of this, and had other more practical pre-occupations with regard to the contract of employment. For example, Kahn-Freund shows that Sinzheimer attached much importance to attacking the sharp status differentiations between different types of employment relations or employment contract such as were to be found in German law at the period in question; and Kahn-Freund manages politely to suggest that even his hero Sinzheimer found it difficult and took a long time to convince himself of the need to attack that most deeply embedded of



distinctions in German employment law between the public official as recognised in and governed by public law, the *beamte*, and the ordinary dependent worker (*arbeitnehmer*) employed under a private law contract of employment.

This reminds us that the evolution of the contract of employment as a legal institution takes place both at the theoretical and the practical levels of law-making, and, moreover, that it consists of a combination of elements which are more or less universal across different legal systems, with other elements which may be highly contingent and specific to particular legal, social, and economic systems. I have found the Van der Heijden Festschrift extremely valuable in helping me to distinguish between the universal and the system-specific in the evolution of the contract of employment as a legal institution in Europe. Before turning to describe the various ways in which I have found that to be the case, may I take a moment or two to present a comparative hypothesis which I have been trying to formulate in order to address that very interesting problem.

My hypothesis is that it may be possible to identify a generic divergence, perhaps even a systemic contrast, between the patterns of evolution of the contract of employment as a legal institution in, on the one hand, Anglo-Saxon common-law-based systems (Anglocoms), and on the other hand, continental European civilian-based systems (Eurocivs). This hypothesis rests upon an incomplete but nevertheless real basic contrast as between the two sets of systems in the methodology of law-making and of the creation of legal doctrine. That is the contrast between Anglocoms as being typically grounded in judge-made common law, and Eurocivs as being typically grounded in (frequently codified) legislation.

The first part of my hypothesis is that, partly by reason of this typical methodological contrast, the institution of the contract of employment has tended to evolve somewhat differently in the two types of system. In Anglocoms, the law of the contract of employment has tended to evolve in a relatively fluid and casuistic way, while in Eurocivs the law of the contract of employment has been subject to a higher degree of codification, and in a more far-reaching sense of *standardisation*. This codification and standardisation often consists of a deeper and more complete integration of legislative norms and of norms derived from collective bargaining into

the law of the contract of employment than we tend to find in Anglocoms. So we have a hypothesis of weak standardisation in Anglocoms and strong standardisation in Eurocivs.

That hypothesis has to be a very cautious one. Even more tentative and experimental is a further possible proposition, which concerns the question of which of these two approaches or methodologies is more likely to produce EP models of the contract of employment, and which on the other hand is more likely to produce WP models. My further hypothesis is that it is in Eurocivs that the more WP models have tended to evolve, while the methodology or approach of Anglocoms has tended to produce more EP versions of the contract of employment as a legal institution. Let me immediately make it clear that this hypothesis does not draw any such evaluative contrast between Eurociv and Anglocom labour law systems *as entire systems*; it addresses the more specific topic of the ways in which they are apt to treat and construct the contract of employment itself.

Let me admit straight away that there is a real danger that these hypotheses may be based on too small a sample of legal systems to be able to lay claim to very much utility or validity. In fact, I am the first to admit that my observations about Anglocoms, formed in the context of my European comparative law research project, are very much based upon the English legal system (though I can see ways in which they do actually apply to Anglocoms more broadly, especially to the law of the contract of employment in the USA). That said, I think it is possible to demonstrate from the history and indeed the actuality of the English law of the contract of employment a pattern of evolution in which often archaic visions of dependent personal work relations remain strongly embedded in the texture of primarily judge-made law.

There are, of course, rather different but sometimes equally great, dangers of the embedding of archaism in the more codificatory Eurocivs. Here again, I am conscious of the limitations of my sample; I am aware that my hypotheses, despite my best efforts to be more universal in my scholarship, are very significantly formed by my longer and deeper acquaintance with French, German and Italian law than with that of other continental European legal systems. That is why it has been quite

invaluable for me to read the in-depth account of the evolution of the contract of employment in the law of the Netherlands which the Institute team have produced. So I devote the rest of my lecture to a consideration of what I have learned from that, and of whether this has strengthened or weakened my own hypotheses.

## 6. The employment contract as a legal institution and as an 'exclusionary device'

I have in fact learned an immense amount from reading this book, not least because the inquiry which this team of writers has carried out with regard to Dutch law turns out, quite independently of course, to have a great deal in common with the inquiry which I have been seeking to carry out for European legal systems more broadly or generally. I think the authors regard the contract of employment as a legal institution in much the same way as I am identifying it as such. I find that their understanding of the contract of employment as a framework or vehicle for the norms of employment relations is a very keen and well-developed one, and the notion of it as the 'atom' of the legal structure or conception of those relations is a very attractive one.

I have also been very interested by their critical method for their examination of the functioning of the contract of employment in Dutch law. This critical method consists of evaluating whether the contract of employment functions as an 'exclusionary device' or in an 'inclusionary' way. The first impression given by this terminology is not encouraging; it sounds as if their intention is simply to add to the by now almost over-familiar discussion as to whether the contract of employment is so defined as to result in an unduly narrow personal scope for employment legislation which confines its application to workers employed under such contracts.

But not a bit of it; the authors have in mind a much more far-reaching critique of the law of the contract of employment which they seek to encapsulate in that terminology. In fact as I read on, I became increasingly convinced that their distinction between an 'inclusionary' and an 'exclusionary' functioning of the law of the contract of employment actually coincided reasonably closely with my own contrast between WP and EP models of the contract of employment, perhaps indeed

amounting to a richer version of the antithesis which I have been attempting to identify. And I think their question as to whether the contract of employment continues to provide an 'adequate' basis for the law of employment relations amounts to the question of whether a sustainable balance has been found between WP and EP models of the contract of employment.

The first two chapters of the book succeed well in establishing this particular critique of the contract of employment, and in describing its pre-history as a legal institution by depicting the very different legal institutional arrangements for personal employment relations which prevailed before the nineteenth century. The third chapter is especially interesting for me from the perspective of my comparative hypothesis about the codificatory approach of Eurociv systems, because it identifies Dutch law as something of a precursor in explicitly using the contract of employment as the conceptual framework for WP legislation from as early as 1907, the year of the Employment Contracts Act. I would say incidentally that British legislation did not reach a comparable stage as to its formal and technical methodology until the enactment of the Contracts of Employment Act in 1963; and even that proved in my view proved to be a transient flirtation with that particular method of framing WP legislation, whereas the use of this methodology seems to have been an enduring practice in the Netherlands.

That enduring practice is considered in detail in the succeeding four chapters, which concern themselves with the ways in which the law of the contract of employment has adapted, or at least has been called upon to adapt, to demands for significant re-casting of its content and even structure in the areas of (1) continuity of income during sickness or disability, (2) provision for workers to discharge care responsibilities, (3) training for employability, and (4) pension provision. I believe that my colleague Professor Crouch will concentrate on these topics as representing specific locations of 'struggles over the distribution of uncertainty', so I will largely leave that territory to him. I will not however do that without first commending these authors for the very imaginative and creative way in which they have identified and reflected upon what are the emergent new problems for and new sets of approaches towards the constituting of individual personal work relations in largely post-industrial, and somewhat post-welfare-state, economies and societies in Europe.

## 7. Conclusion

This brings me to the conclusion of the Van der Heijden Festschrift and of my lecture. In the Conclusion to the book, Robert Knegt elegantly draws the threads together. From the general history and analysis of the first part of the book, and from the examination of special topics in its second part, he depicts the contract of employment in Dutch law as a legal institution which is under enormous tension. The question which he poses is whether the contract of employment can meet society's need for an 'inclusionary' conceptual and practical framework for its labour law and its social law, when it is faced with a number of economic pressures to function in an 'exclusionary' way, especially by excluding more and more workers from the expectations which it served to protect during the heyday of the post-war welfare state, or even from their post-welfare-state equivalents.

That question, posed in this book as an issue for the labour law and social policy of the Netherlands, is of course one which presents itself, in some shape or form, to all European labour law systems. It is in the end the same one as that which I have sought to articulate in terms of the contestation between WP and EP models of the contract of employment. It is really the technical and doctrinal part or aspect of the whole large European policy debate about how to realise the ideal of 'flexicurity' in labour and social law, that is to say how to reconcile the competing demands of flexibility for employing enterprises and security for workers.

The authors of the Van der Heijden Festschrift do not, very understandably, have any clear predictive answer about the capacity of the contract of employment, as a central institution of Dutch labour law, to bear the strains which are being placed upon it. But they signal occasional flashes of optimism in this respect, and their own work provides some signs of encouragement. It is especially valuable to be able to experience that kind of cautious optimism and slight encouragement in the current environment of discussion about labour law in Europe. For, if I may revert for a moment to my hypothesis about the contrast between Anglocom and Eurociv systems, it happens all too frequently that Eurociv labour law systems are written off as over-rigid ones, ossified in the out-dated models of the welfare-state or Fordist

eras, and are contrasted with Anglocom systems as the harbingers of adaptability and resilience. I am grateful to the authors of this book for having provided some ammunition with which to combat this simplistic contrast.

In order to place that conclusion in an even broader socio-legal context, may I finally invoke a wonderfully rich set of ideas about institutional adaptation which were presented by Professor Colin Crouch in his recent and major contribution to the debate among sociologists and economists about 'varieties of capitalism'. His contribution to that discourse is a rather iconoclastic one; he feels that the neo-institutionalist approach, which informs much of the 'varieties of capitalism' discourse, is too deterministic in that it depicts political economies as locked into their various respective patterns of operation by their respective 'institutions'. In his view, that discourse understates the capacity of societies and their institutions to mutate or 'recombine' as he puts it.<sup>10</sup>

This gives rise to his notion of recombinant governance, and he identifies those who function as the agents of re-combination, whether in the capacity of theorists or of practical actors, as 'institutional entrepreneurs'.<sup>11</sup> Perhaps it could be said that the evolutions in the contract of employment as a dominant institution of labour law, which I have been discussing in this lecture, and which are the subject of the Festschrift, provide examples of the possibilities of 're-combinant governance'; and perhaps what I have been depicting is the work of a succession of 'institutional entrepreneurs'. Obviously Hugo Sinzheimer and Otto Kahn-Freund were the founding fathers of that succession; I suggest that we can also see Paul van der Heijden and the current researchers of the Sinzheimer Institute as directly in the line of descent. That has been the essence of my argument in this lecture.

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<sup>10</sup> Crouch (2005) at p 3.

<sup>11</sup> Ibid.

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