Addressing the falling labour share in the UK and beyond

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Abstract

Economic studies jointly carried out by the ILO and the OECD, as well as the work of the economist Thomas Piketty has heightened public attention to the fact that the share of GDP in G20 (and other developed and developing) countries paid out as earned income has dropped since the early 1980s, with a corresponding increase in the share going to capital. To what extent can Labour Law contribute to the reversal of this decline in the labour share? Some commentators argue that reforms designed to strengthen trade unions and encourage broader collective bargaining coverage in the working population will lead to a correction. Others have recommended corporate governance reforms that prioritise more worker representational participation on the boards of corporations to promote the interests of labour. This paper will consider both of these suggestions, alongside others, and advance the proposition that inventive modes of regulatory thinking and new labour law solutions are required, which are tailored to the economic and social exigencies of the prevailing system of liberal meritocratic capitalist market exchange. The claim is that careful analysis of the current incarnation of capitalism (liberal meritocratic) can help us to identify the appropriate nature, scope and content of any labour law reforms that are motivated by a desire to resist the labour share decline. This paper will provide a preliminary basic sketch of how those adaptations of the rules of labour law should be configured.
Addressing the Falling labour Share in the UK and Beyond: Labour Law’s Call to Arms

Introduction: Labour Law and the “Standard” Contract of Employment

In this lecture, I would like to share a few thoughts with you on the relationship between the falling labour share of GDP in the UK (and other G20 states) and the likely future shape of employment laws, or more accurately, the law governing the standard contract of employment in the UK. When I use the adjective ‘standard’ in the context of the contract of employment, I am specifically referring to a bilateral relationship between an employee and employer where each of the following six variables are satisfied: first, a full-time contract; second, between a single employee and a single employer where the employee undertakes – thirdly to perform personal services – fourthly - for an indefinite period of time – fifthly - at the employer’s premises – and finally, irrespective of whether the employer has sufficient to work to provide the employee or not.¹ If any one of these six features is missing in a contract for the performance of work, for ease of reference in this lecture, I will treat that relationship as a ‘non-standard’ or ‘atypical’ one.

Having established this definitional point, I would like to begin the discussion by focusing on the importance of the standard contract of employment and its accompanying regulation through law. In essence, what I am seeking to probe in this talk is whether it is possible to envisage a situation or time when the anatomy and physiology of the seminal institution that is known as the contract

of employment that sits at the heart of labour law (and the rules that regulate it),
might experience a set of ‘fading co-ordinates’ in light of radically fluctuating
underlying social, political and economic conditions. In other words, I am
questioning whether there is any scope for the law governing the contract of
employment and the contract itself to become so irrelevant in light of its external
environment that the only plausible response is to abandon it as a legal concept
and social and economic phenomenon. Or alternatively, should I adopt a more
positive outlook and view this institution as pregnant with its own rejuvenative
capacity. In particular, does it have the potential to propel labour law forward in
a way that can respond in some measure to the phenomenon that constitutes the
drop in the labour share of GDP?

The principal claim that I will seek to make in this initial section of the
presentation is that the standard contract of employment – and as a consequence,
the common law, statutory and other rules that govern its recognition, content,
performance, variation, suspension and termination – has and have a more
tenacious outer skin than it or they have hitherto been given credit. Its latent
evolutionary capacity to adjust its anatomy and physiology to ensure the
prolongation of its relevance and secondly, and more importantly, its potential to
influence, modify and adapt the rules governing atypical non-standard contracts
for the performance of work, should not be underestimated. In short, I will not
only seek to persuade you that, like Gloria Gaynor, the contract of employment
is a survivor, but also that it is an innovator.

But on what basis can I assure you of the validity of my claim that the
standard employment contract will continue to thrive despite the changing
composition of the labour market, the permanent changes wrought by Covid-19

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to working life, the intensification of the automation of the workplace, the current cost of living crisis and a myriad of other contemporary challenges? After all, the modification of existing employment rights to make them apt and fit for the future via legislation is a challenging process. It involves time, effort and a large investment of political capital on the part of politicians in Parliament, Congress or Governments. And, in legal systems such as Scotland and England and Wales, as Lord Justice Mummery said in 2008, and Lords Justices Underhill and Elias have reminded us of recently, the tools at the disposal of the judiciary to develop the rules governing the standard employment contract are indeed restricted. But, what are these tools? Of course, here, they are referring to the instrument that Anglo-American lawyers call the “common law”. In brief, the judges can only modify the extant rules by harnessing the underlying doctrinal techniques that the common law provides. And by their very nature, these props are restricted.

In recent times, the growth of alternative personal work contracts in the labour market, such as zero-hours, casual, and gig economy working contracts, is one of the chief reasons for the emergence of the anxiety that the standard contract of employment will become a thing of the past and be overtaken by external events. Whilst employers are adopting such contracts on an increasing basis when hiring labour, I would contend that this substitution is limited and merely operates to nibble away at the incidence of the standard contract of employment. But it is when the growth of atypical working is considered alongside the impact

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6 The Scottish legal system is technically a ‘mixed’ legal system, composed of a Civilian foundation, with Common law rules and techniques cemented on top, on which, see K. Reid, “The Idea of Mixed Legal Systems” (2003) 78 Tulane Law Review 25.
7 James v Greenwich LBC [2008] ICR 545, 558-560.
of other challenges to the labour force such as those raised by the automation and robotization of the workplace with the resultant rising pace in the substitution of capital for labour,\textsuperscript{10} that the traffic would appear to be going only one way in the direction of the obsolescence of the standard employment contract. For example, in 2017, the Guardian newspaper in the UK announced to a shocked world that ‘millions of workers [are] at risk of being replaced by robots’!\textsuperscript{11}

Nevertheless, my argument is that the demise or decline of the contract of employment is unlikely owing to its intrinsic properties and anatomical structure. This allows it to mutate in light of three structural principles, which Mark Freedland has termed “reciprocity”, “exchange” and “integration”.\textsuperscript{12} In the final analysis, its exterior shape and the size of its internal organs may fluctuate, but this self-adjustment and oscillation enables it to adapt to the surrounding environment within which it finds itself. And what this means is that the metaphor of “fading co-ordinates” that I evoked earlier in the discussion is a false analogy in this context. One might say that the standard contract of employment will ‘see off’ the challenge to its status that is presented by the automation of the workplace and the proliferation of atypical non-standard contracts for the personal provision of work. But more importantly, not only will it maintain its primary place ahead of atypical non-standard work contracts, but its structural principles of reciprocity, exchange and integration also have the capacity to be transposed across to facilitate socially progressive adaptations of the rules that govern and


regulate these non-standard contracts. In that way, the latter may be imbued with a greater sense of worker-protective potential. More later on this specific argument.

I would also evoke a second point in support of my claim that the standard contract of employment is unlikely to decline in importance. This concerns its infinite economic value to employers. Standing historical orthodoxy on its head, since the industrial revolution and the onset of modern capitalist enterprise, capital has hired labour, rather than labour hire capital. Within the modern system of exchange, the hiring of labour might resemble the procurement of any other commodity. But labour is not a commodity like raw materials, goods or machinery because ‘in ordinary contracts of sale it is the seller who dictates the price, whereas in the context of wage fixing in a labour relationship, it is usually the purchaser, in other words, the employer who sets the market rate.’

The relevance of the fact that capital hires labour within the modern economic system resides in what it tells us about the likely future and ongoing relevance of the standard contract of employment.

As demonstrated by Ronald Coase in a celebrated article, and applied to the labour market by Zoe Adams, Simon Deakin and Marc Moore within the context of employment law, in economic terms, what this means is that an employer has two options when seeking to procure services in the market. It can either adopt a decentralised market strategy by entering into a commercial contract with an external supplier of labour. The supplier from which the labour is procured may be a self-employed individual sole trader, a zero-hours contract

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worker, or a gig economy worker, or a non-natural legal person, such as a registered incorporated company, a partnership or a limited liability partnership (“LLP”). This process will involve the employer incurring ongoing transaction costs relative to the putting into effect of that arrangement. This will include the costs of finding the supplier, the costs of the contract negotiation, writing and adjustment processes and the costs of monitoring the supplier’s compliance with the contractual terms, as well as the enforcement of that contract in the event of any dispute over its content, meaning or breach. Each or some of these costs will be repeated each time that the commercial contract expires and requires renewal, or the employer returns to the commercial marketplace to source an alternative supplier. And this is obviously expensive in terms of transaction costs.

The second option is for the employer to internalise the costs of such contracting up-front and save on the aforementioned ongoing transaction costs. This can be achieved by hiring an employee at the outset from the labour market to provide the labour under a long-term contract of employment on the basis of an indefinite relationship. The appeal of this second model lies in the extent to which it ‘obviates the considerable transaction costs [the] employer would otherwise have to incur to obtain the same degree of labour by way of a series of individual task-based contracts with outside [commercial] suppliers [of human capital]’. The former contract is one of employment and is governed by labour and employment law, whereas the latter is a commercial agreement and instead is regulated by commercial law.

When the costs, benefits and savings are aligned in a particular direction, it will make more commercial sense for the employer to hire an employee on a

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permanent employment contract to carry out the labour required rather than a service provider, such as a self-employed sole trader, gig economy or zero-hours contract worker, or a registered corporation, partnership or LLP.\textsuperscript{20} For example, if the aggregate of the wages and full economic cost of hiring an employee is $80,000 per annum, compared to the charges of a commercial contractor or zero-hours contract worker that are $60,000 per annum, with associated transaction costs (related to the latter) of $30,000 per annum, then it will make sense for the service recipient to hire an employee. This is simply a matter of economic reality, which renders it extremely unlikely that there will be any erosion in the significance of the standard contract of employment. In fact, the contract of employment will continue to be central to market exchange, if or until the point is reached that labour begins to hire capital again, rather than capital hiring labour.\textsuperscript{21} And despite the hype, the ensuing automation or robotization of the workplace and managerial deployment of deep-learning AI is unlikely to be the catalyst that drives forward any transformational change such that labour begins to hire capital again, just as it did in the pre-industrial feudal system.\textsuperscript{22} As such, what is the moral of this digression: in the words of the labour lawyer Guy Davidov, rumours of the irreversible demise of the standard contract of employment are somewhat exaggerated.\textsuperscript{23}

But why is the future of the ‘standard contract of employment’ and the proliferation of non-standard atypical work contracts, such as zero-hours, gig

\textsuperscript{20} For example, the rise of manufacturing in central factories at the outset of the industrial revolution in Britain reduced the overhead costs associated with formal employment in comparison with the preceding “putting-out” system (which shares some affinities with modern “gig economy” work): see the discussion in D. Landes, The Unbound Prometheus, 2\textsuperscript{nd} edn (Cambridge, CUP, 2003) 54-57 and V. De Stefano, “Introduction: Crowdsourcing, the Gig Economy, and the Law” (2016) 37 Comparative Labor Law & Policy Journal 461, 467-468.

\textsuperscript{21} However, in such circumstances, the standing of the employment contract would be the least of our concerns, since what it would mean is that society and the economy had been reconfigured in such a way that we would be confronting the onset of a system of productive relations that was not capitalist in any shape or form at all: see B. Milanovic, Capitalism, Alone (Cambridge, Massachusetts, Harvard University Press, 2019) 210-211.


economy work, etc. such a significant issue worthy of our attention? The answer is simple and lies in the rapid growth of individual employment rights conferred by legislation on employees working under a standard employment contract over the past fifty years, in other words, statutes passed by Parliaments or Congress. The fundamental point is that it is the standard contract of employment that is the stem upon which those rights have been grafted. In other words, if there is no contract of employment, then subject to some statutory exceptions, there are no rights. That is why the rise in number of atypical non-standard contracts for the provision of work such as gig economy, zero-hours and other contracts is so controversial. Over the same period of time, this surge in individual legislative rights has been matched to some extent by the conferral of common law rights on individual employees, in other words, those with a standard contract of employment. Here, Lord Hoffmann’s statement in the House of Lords decision in Johnson v Unisys is particularly prescient, where he drew attention to the development of common law rights by analogy with employment protection legislation. This feeds into Douglas Brodie’s seminal scholarship on the common law implied duty of trust and confidence, which is a paradigm illustration of the phenomenon that Lord Hoffmann was describing. Of course, Brodie’s writings were expressly endorsed by the House of Lords in recognising the implied term of mutual trust and confidence as a worker-protective

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24 See the language of Lord Justice Sedley in Bournemouth University Higher Education Corp. v Buckland [2010] ICR 908, 913G.
25 Of course, in UK employment law, there are exceptions, such as the statutory categories of the “limb (b) worker” contract and the “contract personally to do work”. These confer some, rather than all, statutory employment rights. They are recognised by section 230(3) of the Employment Rights Act 1996, section 296(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA 1992”), section 54(3) of the National Minimum Wage Act 1998, regulation 2(1) of the Working Time Regulations 1998 (SI 1998/1833), regulation 1(2) of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551), section 88 of the Pensions Act 2008 and section 83(2) of the Equality Act 2010, amongst other statutory provisions.
26 Johnson v Unisys Ltd [2003] 1 AC 518, 539C.
The Fall in the Labour Share of GDP

However, at the same time as I extol the virtues of the standard contract of employment and its capacity to endure, there is a paradox, which haunts the whole discussion. Whilst there have never been more common law employment rights or employment protection rights on the statute book, there is the contradiction of what is referred to as ‘capital shallowing’ in the economy or ‘the labour share drop’. What is seen in the statistics is a sustained and steady decline in the labour share of GDP: in other words, the proportion of a state’s gross national income consisting of wages and salaries paid out to workers relative to the share paid out as a return on capital. As such, the expression “labour share” represents a description of the proportion of a state’s national income consisting of *earned* income reflecting the cost of hiring labour in the economy, which can be contrasted with the “capital share”, i.e. the return on capital, which is basically *unearned* income.

Recent economic studies jointly carried out by the International Labour Organisation (“ILO”) and the Organisation for Economic Cooperation and Development (“OECD”) have heightened public attention to the fact that the labour share in G20 (and other

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30 For example, the decision of the UK Supreme Court on the application of the illegality doctrine in the case of the standard employment contract: Hounga v Allen [2014] UKSC 47, [2014] 1 WLR 2889.
developed and developing) countries has dropped since the early 1980s, with a corresponding increase in the share attributed to capital. The significance of this point lies in the fact that labour has never been cheaper: in other words, when someone sells their labour today, the return on their work when expressed as wages is much lower in real terms than it would have been in 1974, 1954 or 1904 for that matter.\footnote{However, the standard of living and purchasing power of workers may be higher once the effect of falls in the cost of consumer goods and investment goods in the economy are factored into the equation. The amount of GDP will also be higher than in 1974, 1954 or 1904, which together with the standard of living may hide the lower value attributed to work (via wages) in real terms.} Measurements of the rate of the decline in the labour share in the UK vary, with some studies claiming that from 1970 to 2014, the labour share dropped by around 6 percentage points,\footnote{The joint publication by the ILO and OECD, “Labour Share in G20 Economies”, pp 6 and 15, figure 3 and Panel B, available at https://www.oecd.org/g20/topics/employment-and-social-policy/The-Labour-Share-in-G20-Economies.pdf (last visited 2 May 2022).} whilst other research cites a drop of 4% between 1975 and 2018.\footnote{AMECO (2018), “Annual macro-economic database by the European Commission”, available at: ec.europa.eu/economy_finance/ameco/user/serie/SelectSerie.cfm (last visited 2 May 2022).} As for the USA, as shown in figure 1, the fall has been even more marked, standing at 11 percentage points.\footnote{See the joint publication by the ILO and OECD, “The Labour Share in G20 Economies”, pp 6 and 15, figure 3 and Panel C, available at https://www.oecd.org/g20/topics/employment-and-social-policy/The-Labour-Share-in-G20-Economies.pdf129 (last visited 2 May 2022).} Writing in 2014 and adopting a global approach, Karabarbounis and Neiman estimated ‘a 5 percentage point decline in the share of global corporate gross value paid to labor over the past 35 years.’\footnote{L. Karabarbounis and B. Neiman, “The Global Decline of the Labor Share” (2014) 129 The Quarterly Journal of Economics 61, 61.} This abundance of data suggests that something profound is going on. In fact the labour protection index produced by Simon Deakin at Cambridge University’s Centre for Business Research suggests that employment protection rights introduced into employment law over the period from 1980 to date in a range of 117 different jurisdictions have had the effect of offsetting the decline in the labour share by less than 0.1% (0.0374% to be exact).\footnote{Z. Adams, L. Bishop, S. Deakin, C. Fenwick, S. Martinsson Garzelli and G. Rusconi, ‘The economic significance of laws relating to employment protection and different forms of employment: Analysis of a panel of 117 countries, 1990–2013’ (2019) 158 International Labour Review 1, 17 and 20.} In other words, in the absence of such individual
employment rights, the fall in the labour share would have been very slightly higher, albeit a mere drop in the ocean overall.

The phenomenon of the labour share drop suggests that the claim that the proliferation of individual employment rights imposes costs on business is unpersuasive. In other words, if employment rights conferred on individual employees and workers impose restrictions on business, then why has there been a labour share drop? Surely the labour share should have risen in the same period? As such, the decline in the labour share arguably scotches the myth that worker-protective rules governing the contract of employment are nothing but impositions of labour-related overheads on business and that they must be stripped back to enable commercial activity to carry on unimpeded.

To understand the claim I am making here, let’s first accept that substantive employment rights do indeed interfere in labour markets. In response, orthodox economic theory posits that the entire collective of employers operating in (or a particular segment of) the labour market will modify their behaviour in response to the introduction of employment rights by acting rationally and self-adjusting. This may entail alterations to the market for their products in response, for example, by raising prices to offset any costs imposed by the employment rights. If this is an accurate depiction of the economic behaviour of employers in the labour market, then the cost of labour and the cost of capital, both expressed as shares of GDP should remain constant or approximately the same. For example, whilst the return to labour would go up in terms of labour compensation as a result of the modification of the employment right (e.g. increasing the minimum wage, or introducing a right to paid holidays or vacations) this would be offset by the spike in the return on capital enjoyed by the employer as a result of the increase

in the product prices. However, this is *most definitely not* what we see in the data. And, at the very least, what should by no means be observed is a drop in the labour share of GDP.

**Figure 1 – Changes in Labour Shares in G20 Countries (Plus Spain) 1970-2014**

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Figure 2 – International Comparison: Labour Share by Country\textsuperscript{41}

It is striking that so little attention has been paid to the drop in the labour share in the mainstream mass media, but that is perhaps because it suits the proprietors of these various outlets not to publicise the fact too much. After all, proclaiming to the general public that wages and salaries have never been lower when expressed as a percentage of GDP is hardly a ringing endorsement of the current socio-economic and political system under which we all currently live our lives. Indeed, it would likely lead to mass public resentment and unrest.
However, as a phenomenon, why is the labour share fall of itself so remarkable or unusual? The answer lies in the fact that for around 100 years, economists had accepted what was called “Bowley’s law.” Named after Arthur Bowley, an economist and statistician working in the late nineteenth and early twentieth centuries, Bowley’s law stated that the labour and capital shares respectively of GDP were more or less stable. This relative stability had been accepted by twentieth century economists as a ‘stylized fact’ of economic growth. In other words, if earned income went up, then this would be matched by a concomitant increase in unearned income resulting in the stability of the labour/capital ratio. As such, the labour/capital ratio was understood by economists to be a constant and this was a tenet of orthodox economic thinking for around a century.

I digress for a moment to consider two questions that may admit of obvious answers. The first asks whether the decline in the labour share is necessarily a bad thing? The straightforward answer is “Yes, mostly”. By far its most damning effect is the one that is the most apparent, namely that of rising inequality. As the unearned return on capital increases relative to the return on labour measured as wage compensation, the return on assets surges, skewing the distribution of income in favour of high-capital earners. As inequality rises, the economic and political power experienced by those who derive their income from a share of capital is heightened. And this means that the level of power enjoyed by workers in the political, economic and social system regresses. The whole process generates a vicious spiral in the distribution of power and income in favour of those individuals commanding a combination of incomes and capital that ranks

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them at the high end of measurements of GDP, with greater polarisation in income levels.

The second question I pose concerns the relevance of this discussion about the fall in the labour share to the future of labour law, as expressed principally through the regulation of the standard contract of employment? The answer lies in a point I made before in this lecture, which is the fact that the standard employment contract functions as both a lynchpin for the ascription of common law and statutory employment rights and protections, as well as a fundamental institution of economic exchange. In a post-industrial system where capital continues to hire labour, the future of the standard contract of employment is synonymous and bound up with the future of employment law as a distinctive subject. Any exercise that involves addressing one while ignoring the other would be either meaningless or incomplete. And if employment/labour law is one of the fundamental institutions of the law that in part governs the regulation of wages, salaries, remuneration packages and other emoluments of employees and workers, then the deep connection between the labour share drop and the discipline is clear and obvious for all to see.

Factors Contributing Towards the Fall in the Labour Share of GDP

So just to recap where we have got to in this lecture – at the same time as there has been a proliferation of individual labour rights, what we have also witnessed is an economic phenomenon whereby fewer percentage points of a state’s GDP are being paid out as wages or salaries. And this has been more or less a universal phenomenon since the 1970s, with falls consistent throughout, as depicted in figure 2 above. This would appear to suggest that responsibility for the fall in the labour share cannot be laid at the door of the progressive strengthening of individual statutory and common law employment laws. After all, surely
international immigration into the UK and other countries over the past fifty years is a major cause of the labour share fall? Or even rapid technological innovation, globalisation, outsourcing and offshoring, the dogged rise of monopsony in labour markets, or demographic changes with an increasingly ageing workforce, or the drop in productivity of working people over the same period?

However, exonerating the shape, scope and content of our labour laws from culpability for the labour share decline would be too hasty a conclusion. Instead, a more plausible cause may lie in the extent to which the entire collectively industrialized system for the formulation of wages and salaries in the British economy was progressively dismantled in the latter part of the 20th century. For an extended period of time between the 1870s and 1980s, the general approach of the State towards industrial relations and the regulation of the activities of industry and labour interests was encapsulated in the policy and theory of ‘collective laissez-faire’ (‘CLF’). CLF was an institution, or perhaps more

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49 J. P. Pessoa and J. Van Reenen, “The UK Productivity and Jobs Puzzle: Does the Answer Lie in Labour Market Flexibility?” (2014) 124 Economic Journal 433. Or vice versa, i.e. that the labour share drop is responsible for the “productivity gap” in the UK and other developed economies. Of course, some of the referenced potential causes may instead be effects and consequences instead, i.e. reverse causality. For example, it could be argued that globalisation assisted in the demise of the collective laissez-faire system of industrial relations, which itself resulted in greater concentration of labour markets and monopsony.

50 Some of the text in this and the subsequent two paragraphs is reproduced from section C.1.1. of the online resource chapter C of D. Cabrelli, Employment Law in Context, 4th edn (Oxford, OUP, 2020), available at Employment Law in Context 4e Resources (oup.com) (last visited 13 May 2022).
accurately described, as an attitude, that was characterized by ‘voluntarism’ and legal abstentionism. This once prevalent social institution presumed that the industrial parties – namely the trade unions and employers – would jointly regulate their own relationships. As such, the collective parties voluntarily came together within the private sphere to negotiate over wage levels and working conditions, which would culminate in a collective agreement. This process is known as “collective bargaining”. As noted by Ruth Dukes, “[t]rade unions and employers were free to decide not only on the content of negotiated agreements, but also on the methods of their negotiation, interpretation and enforcement.” A key plank of the collective laissez-faire regime was that the State abstained from direct involvement in industrial relations, and instituted indirect mechanisms that were primarily intended to secure the effectiveness of collective agreements. The most obvious was the tacit State support for the institution of the ‘closed shop’, but other indirect ‘auxiliary props’ included organized ‘fair wages councils, extension [mechanisms for] collective agreements [erga omnes] and compulsory arbitration, and State provision of dispute resolution machinery.’ In this way, the lion’s share of employment laws consisted of robust collective labour laws designed to influence the behaviour of trade unions, employers and

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55 Where an employer agrees with a particular trade union (in terms of a “union labour only” agreement) to dismiss any employee who leaves that trade union, this is the “closed shop” in action. The “pre-entry closed shop” is a variant of the “closed shop” to the extent that the union labour only arrangement enjoins the employer not to hire any individual as an employee who is not a member of the trade union and refuses to join it. For a discussion of the “closed shop” before it was banned in the UK, see P. Davies and M. Freedland (eds), Kahn-Freund’s Labour and the Law (London, Stevens & Sons, 1983) 236-270.
57 In other words, where a collective agreement concluded between a trade union and an employers’ association applies to all employers working in a sector, irrespective of whether those employees are members of that trade union or not.
employers’ associations via collective bargaining, rather than individually enforced employment rights.

However, since the 1980s, this once pervasive model of collective-laissez-faire has been demolished incrementally, brick by brick. First, there were the legal reforms that were hostile to trade unions and their recruitment of members. For example, restrictions were imposed on trade unions taking industrial action such as strikes and sympathy strikes, as well as the abolition of the closed shop and the introduction of enhanced members’ rights against trade unions. Some of these measures were rooted in liberal political thought. Unions and their practices were cast as illiberal to the extent that they interfered with the freedom of employers to run their business and also the freedom of the general public to go about their business unhindered. Secondly, Government-mandated privatization of state-owned industries, and the deregulation of such industries incentivised businesses to derecognise trade unions and to refuse to deal with workers’ representatives. Increased foreign competition and globalisation also had a part to play, with managers of corporations simply ‘digging their heels in’ to the demands of union bosses, once they realised that increased labour costs could no longer be passed on to the consumers of their products, and that offshoring production overseas could save materially on labour costs. The process of deindustrialization, with the concomitant transition from industrial manufacturing to a service-based economy also made it more challenging for

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61 See now TULRCA 1992, ss. 146 and 152.

62 See now TULRCA 1992, ss. 63, 64, 108A, 174 and 176.


unions to penetrate workplaces to persuade new members to join. Each of these phenomena also occurred against the subtext of managerial threats to offshore jobs overseas if the position of trade unions in collective negotiations became too demanding.

The significance of the movement in the tectonic plates of the system of industrial relations away from one characterised by the strong collective representation of workers via trade unions to one prioritising the conferral of individual employment rights, can be expressed in terms of the far-reaching nature of its economic consequences. For instance, the influential economist Robert Solow has drawn attention to the coincidence in time between the change in the patterns of income distribution between labour and capital on the one hand and on the other hand, the legacy inherited as a result of the weakening in the relative bargaining power of labour and trade unions via the abandonment of the collective laissez-faire paradigm and its replacement with a scheme of individual labour rights. He has remarked how uncanny it is that the ‘the share of wages in national value added [has] fallen [and that this may be] because the social bargaining power of labor has diminished.’ Solow simply points to the economic data on labour compensation to make his point. His argument is that since the decline in power of the trade unions, the union wage premium which translated into a higher labour share of GDP has been lost, since the replacement for collective bargaining over wages and collective agreements – individual

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67 Ibid.
employment rights – do not secure the same outcome and instead facilitate the growth of the capital share relative to earned income. This ties in with the theory of the ‘trade union wage premium’, whereby by exercising their economic and social muscle, trade unions historically secured a larger share of the firm’s revenues for the workers, principally in the guise of wages set at a level above what they otherwise would have been paid by the employer in the market. As such, from the perspective of wage growth and protection, although individual employment rights are generally a good thing and have filled the void left by collective labour rights negotiated by trade unions for workers, their depth and breadth is very limited, so that the current incarnation is nothing but a pale and anaemic substitute. For example, the content of individual statutory employment rights devoted to wages is restricted to setting a national living and minimum wage, limited wage security provisions and the protection of paid holidays/annual leave. The law could do much better here.

A positive relationship between collective bargaining between trade unions and employers’ organisations over wages and a higher labour share has been borne out by longitudinal statistical studies. For example, Deakin, Malmberg and Sarkar claim that their labour protection index illustrates a positive increase in the labour share where employment laws provide backing for collective bargaining and co-determination systems. Their research with the labour

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69 Such as the proscription of deductions from wages that are not authorised by the worker, and the requirement to make a statutory guarantee payment in the event that the employer decides to lay off its employees.


protection index also teaches us that simply passing legislation or adapting the common law to confer generic individual employment rights is a technique that must go much further than hitherto contemplated if it is ever going to make meaningful inroads into correcting or offsetting the fall in the labour share. Without a combination of strengthened individual common law or statutory employment laws dedicated to the regulation of wages on the one hand and on the other hand, effective enforcement, remedies, meaningful dispute resolution mechanisms and easy and cost-efficient means of accessing justice, simply bestowing employment rights on working individuals is nothing but a cruel game. The effect would be to render those rights nothing more than paper tigers.

In light of all this, the burning question is what can be done through law reform to attempt to reverse the drop in the labour share? After all, if the current situation is left unaddressed, the rich will continue to get richer and the relative earnings of middle and lower earners will experience a sustained decline. For those who question the role of the law here, I would argue that some economic problems are simply too pressing and significant to be left to economists to solve; and the law ought to step in to make a contribution. The areas of law that might be presented as ripe for recalibration are the most obvious ones, such as domestic and international tax laws, international economic laws, social security and welfare laws, corporate laws and international tax avoidance regulations. However, from an employment law perspective, to be more precise, the issue for consideration is what specific role labour law reforms might have to play in making a dent in the drop in the labour share?

Not surprisingly, one prescription that has been called for is the restoration of the CLF system of industrial relations which operated from the 1870s to 1980s

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72 Of course, this question presupposes that law is not “trivial” in dealing with social and economic problems, but is essential to the constitution and operation of the institutions that support capitalist exchange: see S. Deakin, D. Gindis, G. M. Hodgson, K. Huang and K. Pistor, “Legal Institutionalism: Capitalism and the Constitutive Role of Law” (2017) 45 Journal of Comparative Economics 188 and for the importance of the law to capitalist development, see K. Pistor, The Code of Capital (Princeton, Princeton University Press, 2019).
in the UK. As I said earlier, commentators have called into focus the closeness of the correlation between the period when this system was swept away and the initial onset of the drop in the labour share.

Figure 3: The Relationship Between the Fall and Rise in Income Inequality and the Relative Weakness of the Trade Unions in the UK and US

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Ewan McGaughey has illustrated the inversely proportional relationship between income inequality and trade union membership in the UK and the USA: see diagrams 1A and 1B, available at https://blogs.lse.ac.uk/politicsandpolicy/files/2017/11/McGaughey_chart.png (last visited 4 May 2022).
Figure 4: Trade Union Density and Inequality Measures, 1917–2019 in the US\textsuperscript{74}

The argument runs that by supplementing individual employment rights with strong trade unions and broader collective bargaining coverage in the working population, this will lead to a correction by ensuring a larger distribution of GDP is paid out as wages instead of unearned returns on capital. For example, in a study carried out by Harber, Herbst, Kuziemko and Naidu, their findings were that a 10% increase in trade union coverage/density equated to a rise in the labour share of 3.3%. There is undoubtedly a coherent logic to this proposed policy reform. But I am sceptical about it. My anxiety is that this response is too simplistic insofar as it labours under a misconception about the nature and features of the current incarnation and stage of capitalist production that we are now living through. In particular, Branco Milanovic mounts a vital, trenchant and

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persuasive critique of the narrative which presents a revival of trade union power as an appropriate antidote when he remarks ‘that this approach will not do the job in the twenty-first century.’ The existing form of capitalism can be referred to as liberal meritocratic capitalism. And it is global in nature, with the labour pool available to employers having expanded considerably since the demise of the Communist bloc, affecting the dynamics of labour supply and demand, and enabling employers to become less responsive to the demands of trade unions in developed economies. Liberal meritocratic capitalism can be distinguished from its historical predecessors, which are classic capitalism that was operative from the onset of the industrial revolution to the First World War and social democratic capitalism, which characterised the period from the end of the First World War to the early 1980s. It is only by dissecting and then understanding the hallmarks of liberal meritocratic capitalism – and contrasting them with those of its predecessors – that we can claim with any confidence that we have identified the correct shape, content and scope of the employment law and policy reforms that are likely to achieve a measure of success in responding to the labour share drop.

In fact, Milanovic is of the view that weakened labour power and trade unions, globalisation and outsourcing of production are each defining systemic characteristics of liberal meritocratic capitalism. As globalisation has taken hold of production, trade union wage claims (or threats to engage in industrial action


77 I adopt the same classificatory model as Milanovic in B. Milanovic, Capitalism, Alone (Cambridge, Massachusetts, Harvard University Press, 2019) 13. The “varieties of capitalism” strand of scholarship strikes a dichotomy between “liberal market economies” and “coordinated market economies”: see P. A. Hall and D. Soskice, “Introduction” in P. A. Hall and D. Soskice (eds.) Varieties of Capitalism: The Institutional Foundations of Comparative Advantage (Oxford, OUP, 2001) 8 -10; B. Hancké, M. Rhodes, and M. Thatcher, Beyond Varieties of Capitalism: Conflict, Contradictions, and Complementarities in the European Economy (Oxford, OUP, 2007). It should be stressed that a number of linkages and similarities are shared between the former and Milanovic’s “liberal meritocratic capitalism”.

to achieve particular objectives on behalf of their members) have come to ring more and more hollow, as employers have realised that if unions and their demands become unrealistic, they can simply offshore manufacturing overseas to jurisdictions where labour costs are cheaper. This complex reinforcing interaction between globalisation, outsourcing and the domestic and international standing of trade unions is largely responsible for the latter’s enfeeblement. And more fundamentally, globalisation, outsourcing and weak labour unions are central attributes that enable liberal meritocratic capitalism to be distinguished from the Chinese incarnation of state capitalism, the classical form of capitalism in place before the first world war and the social democratic variant of capitalism which was dismantled from the 1980s onwards. If it is accepted that legal reforms that are presented to tackle the decline in the labour share of GDP must be tailored to the economic and social exigencies of the prevailing system of market exchange, then it is my contention that any proposed adjustments to labour laws that do not account for the preceding three variables of outsourcing, weak labour power/trade unions and globalisation, are destined to fail. And as such, as a response to the labour share decline, calling for the reinstatement of the collective laissez-faire system of industrial relations is arguably tone deaf.

The introduction of strengthened workplace representational participation measures are also presented by some commentators as having great potential to reverse the labour share decline.79 There are a number of variations here, ranging from statutory rights in favour of trade unions or workplace representatives to be consulted by employers about proposed changes to working conditions, to statutory rights to participate in the decision-making of the governing board(s) of the company, as well as co-determination rights to a veto over particular courses of action that the company is proposing to take. For example, in the workplace republican strand of civic republican political philosophy considered by Rebecca

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Zahn in the labour law context, scholars such as Gourevitch, Hsieh, Anderson and Gonzales-Ricoy make the point that modern labour laws are insufficient to address the iniquities generated by liberal meritocratic capitalism. They propose radical reforms to labour law that would reorganise and entrench employee voice and democratic control of managerial decision-making in corporate governance, with a binding say on board decisions. However, whilst these contributions are of real theoretical value, in the UK at least, the move towards greater involvement of workers in corporate governance has been somewhat anaemic. For example, although the UK Corporate Governance Code enjoins listed public limited companies to adopt one of three workforce engagement mechanisms in Provision 5, recent research illustrates that corporations (through their directors or shareholders) select what they perceive to be the least intrusive option in terms of shareholders’ interests. The three options – from the strongest to the weakest form of labour-protective measures – range from first, a director being appointed directly from the workforce, to secondly, the company establishing a formal


workforce advisory panel or finally, the company designating a non-executive director as having the remit to look after the interests of labour. Chalaczkiewicz-Ladna, Esser and MacNeil’s findings showed that not a single FTSE-100 company chose the first option in 2019, while around 27.5% and 23% opted for the second and third choices respectively.\(^85\) This simply underscores the point that if voluntary, a corporate governance machinery regime is likely to be implemented half-heartedly (if at all), which is unlikely to further the interests of labour sufficiently robustly to stem the decline in the labour share of GDP.

Another concern about the capacity of state-sanctioned workforce engagement machinery to operate as a panacea for the labour share decline is particular to those jurisdictions with corporate governance cultures and traditions that are unfamiliar with co-determination systems. Here, the danger is that worker or trade union representatives appointed to corporate boards or other representational participation fora either become “captured” by special interest groups at the level of the firm,\(^86\) fail to “fit in”, or are simply marginalised by managerial techniques. The first issue ties in with socio-economic research on the processes by which the targets of regulation and control end up manipulating the very stakeholders that state law has earmarked to monitor, and hold, them to account. For example, where the boards of directors of corporations tame worker representatives into toeing the corporate line.\(^87\) As for the second issue, as noted by Hopt and Leyens, it is very challenging for co-determination to function effectively within a jurisdiction whose company laws and structures of corporate governance prescribe a one-tier regime for the board of directors.\(^88\) And the UK


\(^88\) K. J. Hopt & P. C. Leyens, “The Structure of the Board of Directors: Boards and Governance Strategies in the US, the UK and Germany”, in A. Afsharipour and M. Gelter (eds.), Comparative Corporate Governance 116, 142 (Cheltenham, Edward Elgar, 2021). See also M. Siems
is one of those legal systems. Instead, such regimes fit more naturally within jurisdictions like Germany, which recognise the existence of a two-tier board of directors, i.e. a management board and a separate supervisory board, with the trade union or employee representatives sitting on the latter. The final issue applies where management engages in the practice of “filtering” the information that is provided in briefing papers to labour representatives at board meetings. Ultimately, each of these factors serve to undermine and corrode the state laws which were designed and introduced to maximise social welfare for society, e.g. worker representational participation as a policy mechanism to facilitate the reversal of the labour share drop.

If three of the liberal meritocratic capitalism’s characteristics are globalisation, outsourcing and weakened trade unions, then what are the others? Commentators such as Sandel, Piketty and others have remarked on the existence of a global elite at the heart of the present liberal meritocratic system of capitalism. They have charted how various factors drive the continual rise of this wealthy liberal upper class on the basis of meritocratic criteria (greater levels of education, wealth, occupations, and skill levels) in contrast to the old feudal aristocracy rooted in inherited privileges or family lineage. Because the system is meritocratic, the success of the elite is generally tolerated and even celebrated by society. As the elite become more wealthy and income inequality rises, a growing chasm emerges between this new class and the ‘left-behinds’.

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less fortunate struggling to make ends meet, such as zero-hours contract and gig economy workers or the unemployed, the detriments they experience and the adversities they face are cast as their own fault. In other words, they only have themselves to blame for their misfortune.

The second additional characteristic of the liberal meritocratic variant of capitalism is the heightened role for the state, which plays a central part in imposing legal constraints and policies to prevent opportunism. Here, I suggest proffering an oblique reference to the fading genius of the ‘spirit of capitalism’. Writing in the early twentieth century, the sociologist Max Weber theorised that the inner self-restraint of the wealthy capitalists of his day lay in their devout Christian beliefs. This religious piety had a natural chilling effect on bad behaviour. Instead, it fostered austerity and businesspersons tended to prioritise the reinvestment of surplus profits over rabid consumption and sumptuous ostentatiousness of wealth. It functioned as an internal limitation on behaviour but was also backed up by external forces such as the law. In this way, the classic and social democratic variants of capitalism were characterised by a two-pronged set of controls on unscrupulous behaviour. This is not to argue that unscrupulous behaviour did not arise, but simply that there were two forms of constraints acting to suppress it, i.e. both the internal and the external incarnations.

However, this internal feature of capitalism is now nothing but a historical relic. The lack of inner self-restraint and self-imposed limitations on unscrupulous conduct is all too visible in liberal meritocratic capitalism. The behaviour of financial institutions leading up to the Great Financial Recession of 2008 is an obvious illustration of the point. The current outlook amongst a

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96 As well as events that preceded it: see J. Armour and J. A. Mc Cahery (eds.) After Enron (Oxford, Hart, 2006).
significant minority of businesspeople is that it is acceptable to tread the fine line between legality and illegality in business dealings, leaving one’s moral persuasions at the office door. Of course, the external legal forces are still at work, and continue to police conduct, albeit with varying degrees of success owing to resource, enforcement and adjudication limitations that are inherent in all legal systems. Businesses know this, so are quite prepared to engage in proscribed practices and simply pay compensation, damages, fines or financial penalties, if they get caught. That is because the financial benefits of developing successful cutting-edge technological products, processes or inventions often outweigh the negatives and the likelihood of being caught out by the authorities or the law, including the associated costs. The shift to wealth as a measure of moral worth and one’s place in the social pecking order leads seamlessly to the acquisition of capital for its own sake, or perhaps more accurately, as a sport.

The third further feature of liberal meritocratic capitalism concerns the intensification of atomisation and commodification in commercial exchange. Capitalism seeks out new markets and attempts to persuade us that it is essential that we all acquire newly developed goods and services. For example, how many of us owned a mobile phone in 1993, which to my everlasting distaste, is now an indispensable feature of modern life. This entails the heightened intrusion of external markets into hitherto private spheres, which leads towards atomization and commodification. The various forms of gig economy and zero-hours contract work are simply labour market manifestations of this broader economic trend. Private exchange is being diffused into spheres of human activity that were

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97 This is similar to the approach taken by Oliver Wendell Holmes’s (in)famous “bad man”: O. W. Holmes, “The Path of the Law” (1897) 10 Harvard Law Review 457, 459-462.
99 The rise of the “gig economy” and “zero-hour contract work” is symptomatic of this trend, i.e. the commodification of work and its intrusion into private spaces, e.g. hiring “gig economy” workers to do your cooking, hair or housework: J. Prassl, Humans as a Service (Oxford, OUP, 2018) 2 and 53.
traditionally dealt with domestically in the household. This leads to a transient working population and interchangeable working individuals who, in contrast to workers who had a “job for life” in the classic and social democratic incarnations of capitalism, have much less need to please their customers by investing in sustained, long-term, positive social cooperation and trust in exchange relations.

**The Law Regulating the Contract of Employment**

The question I ought to pose is: what is the relevance of these three characteristics for the law governing the standard contract of employment and employment law? My central claim is that they can help us to produce a basic abstract sketch of the appropriate nature, scope and content of the employment law reforms that incorporate a measure of resistance to the labour share decline. First, if I take the insight that liberal meritocratic capitalism positions wealthy and successful global meritocratic elites on a pedestal and thus denigrates the lack of success of precarious workers in the labour market, there is a persuasive argument that there is a central role for the law regulating the standard contract of employment to respond in a worker-protective direction. This can be achieved by taking the constituent rules, standards and norms in the common law that govern the standard employment contract and transposing them subject to appropriate adaptations to contracts that engage non-standard workers in precarious and more short-term economic and social relations, such as zero-hours, gig economy and casual workers.

Turning to the second additional feature, this draws attention to the point that as inner self-restraint exercising internal constraints recedes in significance as a measure of controlling behaviour in modern capitalism, the importance of the external inhibitory effect of law increases. The result is a corresponding spike

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in the role of the state and the significance of law as an external force or means of constraining poor behaviour.\textsuperscript{102} And in particular, the presentation of the case for legal rules and standards that are mandatory and inderogable, rather than waivable and facilitative, is strengthened.\textsuperscript{103} For example, there is now a growing interest in research into mandatory norms in contemporary law and economics scholarship. Zamir and Ayres have lamented the tendency of derogable rules towards ineffectiveness in their attempts to shape the conduct of employers in ways that are appropriate.\textsuperscript{104} As for the third feature considered, if society wishes to stem or offset the flow of depersonalization in relations of exchange, it will become urgent to adapt the law to reflect these current realities generated by the modern capitalist system. This would entail the acceleration of the process whereby trust and confidence, co-operation and good faith norms are infused throughout existing legal rules. In the context of labour law this would involve the extension of trust and confidence terms to all personal work relations and contracts, as well as heightened research into the implications of transposing relational norms into the law governing the contract of employment.\textsuperscript{105}

If I reiterate the totality of the techniques that these three features of liberal meritocratic capitalism suggest by way of regulatory response in labour law, I can refer to them in shorthand as first, the transposition of the rules regulating


employment contracts into non-standard work contracts, secondly, the crafting of mandatory, inderogable rights in favour of employees and non-standard workers and the imposition of corresponding obligations on the hirers of their labour, and finally, the extension of co-operation and trust and confidence rules from the standard contract of employment to atypical personal work contracts, such as zero-hours, gig economy workers – to address the lack of self-restraint and meet the pressing need for the inculcation of trust and confidence co-operation norms.

It is at this juncture that the technique of harnessing the three structural principles of reciprocity, exchange and integration lying at the core of the standard contract of employment becomes relevant and appealing. These three structural principles are best thought of as a set of inter-related and closely connected normative concepts that characterise, identify and regulate the legal structure of the contract of employment. As such, they have both a definitional and attributive function. This means they can be used to mould the various rules that must be satisfied for the establishment of the standard contract of employment, but also to identify the rights and obligations of the parties to the contract once it has been found to exist. It is the latter attributive or ascriptive function that is most useful within the context of the prescription above, whereby mandatory non-waivable co-operation and trust and confidence employment rights are extended to atypical personal work contracts in a way which is more worker-protective. In particular, the implied contractual terms that shape the behavioural expectations of the employer and employee in the standard contract of employment can cross-fertilize and transpose themselves across to non-standard atypical work contracts. Of course, it is possible that they will present in atypical work contracts in more attenuated form, since they have a much tighter

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exchange-based structure than the reciprocity-based shape of the standard contract of employment. But the important insight is that the reciprocity, exchange and integration structural principles can be deployed to provide an accurate pointer of how reduced the level of stability is in the case of non-standard atypical work contracts. In the final analysis, their utility lies in how they provide a logical roadmap towards charting the content of the employment rights and duties that ought to be provided to and imposed on the parties to atypical work contracts and how attenuated those rights and obligations ought to be.

I can sketch out greater detail on the operative doctrinal techniques that can be used to derive the requisite inderogable behavioural commitments owed by employers to atypical workers engaged on non-standard contracts for the performance of work. To do so, as the paradigm, I must first evoke the employee who has entered into a contract of employment. Here, there is at once a transactional, behavioural and situational set of elements present in that employee’s connection with his/her employer. And these three factors correspond directly to the three structural principles of exchange, reciprocity and integration which can be deployed to ascribe the content, nature and scope of the managerial obligations owed to the employee. In the case of the contract of employment, these three principles are particularly prominent and function to flesh out implied behavioural duties such as the obligations to exercise reasonable care for the employee, the preservation of mutual trust and confidence, and the “Braganza” duty to exercise an express contractual discretionary power or engage in an express contractual decision-making process in a rational and non-arbitrary manner, etc. However, this can be compared with non-standard contracts for the supply of labour, which by definition, are more precarious and less firm in their configuration than an employment contract. Instead, they are generally

characterised by a stronger exchange-based than reciprocity-based structure. For that reason, one, some or each of the three structural principles may be hobbled, hollowed out or less pronounced than their counterparts operating in the more robust contract of employment. Likewise, in the case of such non-standard work contracts at different stages of the working relationship, e.g. whether they are at the beginning, middle or end.

Take the zero-hours contract for work. This is defined in section 27A of the ERA as a “contract under which (a) the undertaking to do or perform work or services is an undertaking to do so conditionally on the hirer making work or services available to the worker, and (b) there is no certainty that any such work or services will be made available to the worker.” Such a contract clearly entails an exchange of some sorts between the zero-hours contract worker and the hirer of his/her labour, albeit one that is less marked or predictable than in the case of the employment contract. To that extent, one would expect to encounter some need for a work-wage bargain in the legal definition of such a contract (the classificatory/definitional function), as well as implied contractual and statutory obligations owed by the hirer of the zero-hours worker that are reflective of the work-wage bargain (the ascriptive/attributive function). For example, it is generally understood that the common law implied contractual terms of the employment contract enjoining the employer to provide work (subject to exceptions) and pay wages where the worker is ready and willing to work are broadly reflective of the exchange principle.\textsuperscript{109} Since a zero-hours contract also envisages such a work-wage bargain, it makes abundant sense to ascribe the same contractual terms to the zero-hours contract worker’s relationship with the hirer of his/her labour, albeit on a non-waivable basis in light of the discussion above. In this way, the core exchange principle fashions useful indicators on the nature

of the obligations that ought to be imposed in terms of non-standard zero-hours contracts.

As for the degree of reciprocity and integration encountered in the case of the zero-hours contract, these tend to be rather diffuse. This can be attributed to the realisation that in general, the behavioural and situational connections between the zero-hours contract worker and his/her hirer are much more tenuous than in the case of the employee-employer relationship. In this way, the result of the adoption of an ascriptive role to the structural principles of reciprocity and integration is such that the extent, content and nature and scope of the hirer’s duties owed to the zero-hours contract worker are more restricted than those in play in the case of the contract of employment.\textsuperscript{110} And the looser the expectations of reciprocity between the end-user and the zero-hours contractor and/or the integration of the latter within the organisation of the former, then the weaker the case for extensive contractual or statutory obligations to be imposed on the hirer. To that extent, the attributive/ascriptive model can be deployed to develop a normative account of the inderogable behavioural commitments that ought to be imposed on the end-users of the labourer’s services, which can be derived from a careful consideration of the factual working relationship.\textsuperscript{111} But in line with the discussion above and for the reasons advanced, it is crucial that all atypical or non-standard contracts for the performance of work incorporate trust and confidence behavioural expectations. To that extent, I would claim that lying at

\textsuperscript{110} Attenuation of the exchange, reciprocity and/or integration principles may also be evident at different stages of the employment relationship, e.g. at the pre-employment, full employment, sub-employment and post-employment modes, on which, see M. Freedland, \textit{The Personal Employment Contract} (Oxford, OUP, 2003) 108 and 405-407.

\textsuperscript{111} Of course, I do recognise that any decision to advocate the reciprocity, exchange and integration principles as the most apt devices to perform the attributive function that I have discussed has the peril that ultimately, it ends up backfiring. In essence, we would be deriving an “ought” from an “is”; the normative from the descriptive. The jeopardy inherent in such an approach is that it enables hirers of non-standard labour to engage in what Hugh Collins has called “organised irresponsibility” (see H. Collins, ‘Introduction to Networks as Connected Contracts’ in G. Teubner (eds), \textit{Networks as Connected Contracts} (Oxford: Hart Publishing, 2011), 66–71). This is in the sense that such end-users of labour may decide to respond to the attributive/ascriptive model of identifying and imposing implied contractual behavioural commitments by employing advance avoidance measures to sidestep the operation of the model in the first place. The potential for “organised irresponsibility” to arise is arguably an Achilles Heel of sorts, to which greater consideration and research ought to be devoted.
the very heart of any working relationship, whether articulated in terms of the standard contract of employment or the less stable zero-hours or gig economy contract, there lies an irreducible core of commitment and obligation on the part of both contracting parties that is devoted to the maintenance of a degree of trust and confidence. In other words, all personal contracts for the performance of work ought to include a minimum content of behavioural norms.

But surely there is more than a hint of incoherence in the prescription for labour law reform advanced in this article? In one breath, there is the stated proposition that introducing individual employment rights is much less effective in worker-protective terms than the historical reliance on collective bargaining to set wage claims and workplace terms and conditions. But, on the other hand, the argument is posited that any return to the collective laissez-faire regime of industrial relations regime is infeasible in light of the extant liberal meritocratic capitalist system and that greater emphasis on protective laws conferring individual rights is warranted. However, this argument from incoherence reckons without, and overlooks, two points. First, the vital inderogability factor. At present, existing individual employment laws are either directly or indirectly susceptible to disapplication or waiver: directly prone, in the sense that statutorily conferred rights often have exceptions and/or eligibility conditions attached; and indirectly prone, however, by simply removing employment status to position a working individual

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112 See the discussion in D. Cabrelli, ‘The Effect of Termination on Post-employment Obligations’ in M. Freedland et al. (eds), The Contract of Employment (Oxford, OUP, 2016) 561, 581. However, in the case of the “limb (b) worker contract” under section 230(3)(b) of the ERA, there is now a doctrinal obstacle. Since the decision of the Court of Appeal in Nursing and Midwifery Council v Somerville [2022] EWCA Civ 229, [2022] ICR 755, it is clear that the reciprocity-infused concept of “mutuality of obligation” is not one of the definitional criteria for the establishment of “limb (b) worker” status. As such, if “reciprocity” ought to be recognised to exactly the same extent in both the definitional criteria for the recognition of, and the attributive behavioural norms and expectations conferred and imposed on, the “limb (b) worker”, its confirmed absence in the classificatory criteria calls into question whether reciprocity-laden attributive/ascriptive rules setting the behavioural commitments of the “limb (b) worker” (such as the implied contractual term of mutual trust and confidence) should apply to the “limb (b) worker contract”.

113 For example, see sections 108, 199 and 200 in the case of the statutory unfair dismissal regime in Part X of the ERA.
as a self-employed contractor. But if all existing and newly conferred statutory and common law individual employment rights were made unconditional, subject to fewer eligibility criteria and truly impervious to direct attempts to derogate (and nonwaivable), then the potential for direct contracting out and displacement would be greatly limited. As for the indirect route of contracting out, the scope for this has become curtailed owing to the jurisprudence of the *Uber* decision: \(^{114}\) since the decision of the UK Supreme Court, if the objective of a hirer (of labour) in structuring the key features of the working relationship, or in inserting a particular written clause into a contract, is to preclude the working individual from enjoying statutory employment rights, the contractual term will be struck down by the courts adopting a “purposive approach” to apply the *Autoclenz* “sham” doctrine. \(^{115}\) But more importantly, the indirect route would also be less feasible by virtue of the fact that the cross-fertilisation of rules governing the standard employment contract to non-standard workers has been put into effect: as a result of such a move, there would be less scope for avoidance.

Secondly, the argument from incoherence also downplays the recent enthusiasm of the domestic courts to adapt employment laws to confer fresh individual rights in a worker-protective direction. As noted by Bogg, “… there are now greater grounds for optimism [in trusting in the courts to develop the common law governing the contract of employment] than [before]…” \(^{116}\) And, to a large extent, the courts are the “only game in town”. For example, it is now more than five years since the Taylor Review, and after umpteen promises by the British government to lay an Employment Bill before Parliament, there is still no

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\(^{116}\) A. Bogg, “Can We Trust the Courts in labour Law? Stranded Between Frivolity and Despair” (2022) 38 *International Journal of Comparative Labour Law and Industrial Relations* 103, 132.
sign of it. This suggests that labour law reform of a structural nature is currently off the radar. In such an environment, the prominence of doctrinal scholarship is accentuated, with the identification of test cases to enable proper systematization of legal rules.

**Conclusion**

In conclusion, the persistence of the longitudinal fall in the labour share of UK GDP represents a pressing challenge for future labour law research. There is a real need for employment lawyers – not only amongst themselves, but also policy-makers and the general public – to promote and develop a much livelier sense of the subject’s central role in tackling income and economic inequality. The justification for this premise is obvious – the labour share decline is equivalent to wage stagnation – and the regulation of wages, terms, conditions and enforceable rights is the “bread-and-butter” of labour law. Of course, tackling wage stagnation demands a contribution from labour law as a part of a much broader package of legal measures – including international economic laws, tax laws, social security laws, corporate laws and international tax avoidance regulation, – to reverse the labour share decline. But this should not distract labour lawyers from the task at hand. The alternative is rising inequality, the growth in resentment amongst those who have “failed” in the meritocratic game and the possibility of more extreme political choices (such as populism) by the “left-behinds”.

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118 A. Bogg, “Can We Trust the Courts in labour Law? Stranded Between Frivolity and Despair” (2022) 38 International Journal of Comparative Labour Law and Industrial Relations 103, 133-134.