IRSH 52 (2007), pp. 287–294 DOI: 10.1017/S0020859007002957

REVIEW ESSAY

Making the Empire a Thinkable Whole: Master and Servant Law in Transterritorial Perspective*

Ravi Ahuja

"[T]he question really comes to this", the Lord Chief Justice, Lord Ellenborough proclaimed during a labour trial before the King's Bench in 1817, "whether the master or the servant is to have the superior authority" (pp. 59–60). The draconian punishment imposed on the accused "servants" by England's highest-ranking judge left no doubts as to his beliefs concerning the answer to this question.

The legal basis for his judgment was what was known as "master and servant law". This instrument, a combination of statutory and case law, was applied in many areas of the English (and, as we will see, not only English) world of work to regulate relations between employees and employers. By Ellenborough's day, this was already a very old form of legal regulation, with origins stretching back to the second half of the fourteenth century. At that time, a massive labour shortage in the wake of the Plague of 1348–1350 had created a need among the dominant classes for state restrictions on labour mobility in England. "Master and servant law" was consolidated in 1562 in the Statute of Artificers. It was repeatedly modified in the centuries that followed, and only abolished in 1875 in response to the fundamental transformation of an industrially organized world of work and protracted trades-union protests.

As the present volume shows, during the half-millennium in which "master and servant law" shaped labour relations, its form, content and functions were repeatedly adapted and revised. Three fundamental characteristics, which survived all changes, continued to mark it, however: first, it defined the relationship between master and servant as a *contractual relationship*, whose subject was the performance of labour and its remuneration. Second, the fulfilment of these contracts was enforced in (generally unrecorded) *summary trials* by one or more justices of the peace

* Review of Douglas Hay and Paul Craven (eds), *Masters, Servants and Magistrates in Britain and the Empire, 1562–1955* (Chapel Hill, NC [etc.], 2004); see also *IRSH*, 51 (2006), p. 142.

or other magistrates (representatives of local judicial authority). Third, breach of contract by the servant was defined as a *criminal offence* punishable by imprisonment, corporal punishment, and fines as well as the forfeiture of all wages for services already performed, while breach of contract by the master was treated as a civil matter, entailing at most the payment of damages to the employee.

Thus "master and servant law" constructed employment relationships as *contractual relationships between formally unequal parties*, parties who were bound by the contract in divergent ways. Medieval concepts of the asymmetrical legal status of master and servant were preserved by giving them new expression in the language of contract law, which unilaterally criminalized servants who breached the contract. "Master and servant law" thus opened up an interactive space in which an astonishing variety of legal forms of labour relationships emerged in the most diverse political and social contexts. The authors of the work reviewed here show how "master and servant law" regulated the employment not only of English artisans and miners, but also of plantation workers in the Caribbean and India, fishermen in Newfoundland, marginal farmers in South Africa, former convicts in Australia and domestic servants in Hong Kong. In all of these employment contexts, despite their extreme diversity, "master and servant law" melded a contractual regulation of relations of exchange between two parties with the legal sanctioning of what Ellenborough called "superior authority", i.e. unequal social status.

This dual nature of actual employment relationships appears to give the lie to all those since the nineteenth century who considered the dichotomy between "unfree" and "free" labour to be a social fact and regarded "free labour" as a salient characteristic of "modernization", that is, to all those who confused the conceptual crutch or normative pointer with living practice. It was, however, precisely in its capacity to provide concrete bridges over the abstract gap between (formal) freedom and servitude, i.e. in the construction and legitimation of an uninterrupted continuum of legally regulated employment relations between slavery and "free wage labour", that the incredible practicality and adaptability and the remarkable longevity of "master and servant law" lay. The low cost and informality of summary trials, which ensured its efficacy, also played their part. "Master and servant law" from the Elizabethan Statute of Artificers to decolonization, which was enacted to regulate employment relations not just in England but also in more than 100 jurisdictions throughout the British Empire on all continents, and was thereby embedded in the most varied political and social contexts and legal cultures, is the subject of the essay collection reviewed here.

This substantial volume presents the initial results of an international, interdisciplinary research programme that the editors, the social and

legal historian Hay and the legal scholar Craven, have been engaged in for a number of years. The excellent introduction by the editors, which combines an overview of the problematic with a synthesis of the most important empirical research findings and theoretical reflections upon them, is followed by fifteen case studies covering the entire period of study or shorter periods within it. Most of these case studies examine concrete incarnations of "master and servant law" in a single area of jurisdiction or region of the British Empire (England, Australia, the British colonies in North America and the Caribbean, Hong Kong, India, Canada, Kenya, South and West Africa). Two of the case studies adopt a supraregional and institutional perspective; Banton directs our attention to a central political institution of the Empire, the Colonial Office, while Mohapatra examines a form of economic organization, the plantation.

The years of cooperation among the authors within an original, sophisticated and clearly conceptualized research programme lift the volume well above the usual level of essay collections in the age of "publish or perish". It is coherent, the various contributions refer frequently to each other, and their empirical value is consistently high. Given all of these rare advantages, it seems almost petty to note that not all of the authors manage to maintain the generally remarkable level of theoretical reflection.

Masters, Servants and Magistrates thus offers rich material and may be read – and reviewed – with profit from a number of standpoints. Because historians, including social historians, usually specialize in the territory of a political entity or "civilization", it would seem logical to place one's own geographical research focus at the centre of a review. Thus I, for example, am particularly tempted to engage in a detailed and combative discussion of Michael Anderson's essay on the "Illusion of Free Labour" in colonial India. I will resist the impulse to take refuge on familiar terrain, however, even if a frequent and wholly legitimate use of the essay collection will doubtless be for historians to examine the historical phenomena of their own areas of geographical and thematic specialization against the background of similar processes in different parts of the British Empire, opening up new analytical perspectives through comparison.

Masters, Servants and Magistrates appears to me, however, to possess relevance beyond narrow (and in part inevitable) specializations, because it contributes to the development of a methodology of transnational (or, more precisely, transterritorial) historiography. The volume might thus have something to say even to historians for whom – like many scholars in the humanities at a time of reawakening (and government-sponsored) elitism – working-class milieus seem even more alien and unedifying than legal texts. In the analysis of concrete material, it demonstrates the potential of a methodology that Craven and Hay have already sketched in

previous articles.[1] What is new about this methodology is certainly not the transterritorial view of legal problems. The essay collection *Private Law and Social Inequality in the Industrial Age*,[2] by scholars associated with the German Historical Institute in London, for example, assumes a decidedly transterritorial perspective, and its editor points to the long tradition of this approach in legal history. This useful work is, like many others, limited to western Europe and the United States, however – a focus justified by academic conventions and institutions rather than the subject as such. The editors of *Masters, Servants and Magistrates*, in contrast, realise that the legal regulation of conditions of employment and other social relationships since the eighteenth century was not an isolated phenomenon of North Atlantic history, but rather that the relevant instruments were produced globally in the context of colonialism and integration in the world market, albeit in a sharply diverging ways. That is *one* difference.

An additional difference of far greater methodological import, however, is that Craven's and Hay's research approach allows for fruitful comparisons between different geographical contexts and legal cultures, without isolating them from each other in advance, and conceiving of them as monads in which linear "path dependencies" are played out – that is, without proceeding from premises that make it difficult to perceive relations of exchange and interdependencies between these contexts. For that reason, they have not chosen legal systems that are based on common, Roman, Islamic, or other law and peculiar to particular territories or regions as the point of departure for their study. They do not begin by distinguishing and separating conceptually the normative "edifices" to be compared, but rather begin by tracing the history of a single "building block" of social regulation. The volume's authors then pursue the winding and ramified paths of the development of "master and servant law" over the long historical span and the broad socio-spatial context of the British Empire. In the process, the complexity of the transterritorial genealogy of this instrument of legal regulation emerges clearly – a complexity that proves the inadequacy of linear models of causation, such as the both tedious and long-lived notion of a unilateral "diffusion" of legal norms or other "boons of civilization" from the European "metropolis" to the colonial "periphery".

The complexity of "master and servant law" is already evident if we ask

1. Paul Craven and Douglas Hay, "Master and Servant in England and the Empire: A Comparative Study", *Labour/Le Travail*, 31 (1993), pp. 175–184, and "The Criminalization of 'Free' Labour: Master and Servant in Comparative Perspective", *Slavery and Abolition*, 15 (1994), pp. 71–101.

2. Willibald Steinmetz (ed.), *Private Law and Social Inequality in the Industrial Age: Comparing Legal Cultures in Britain, France, Germany, and the United States*, Studies of the German Historical Institute, London (Oxford [etc.], 2000).

whose interests it served. To be sure, it primarily served masters: According to Hay, the emergence of this means of regulating employment relations was historically closely associated with the rise of the English gentry, who employed large numbers of people, while its enforcement was guaranteed by local justices recruited from this same gentry. At the same time, however, one can also observe potentials for the appropriation of this form of labour law by servants, especially as regards claims for withheld wages. Hay shows that such opportunities for appropriation were particularly evident in eighteenth-century England and constituted the basis for a certain acceptance of "master and servant law" among the working classes, while the curtailment of these potentials in the nineteenth century undermined its legitimacy (on this, see Frank in the volume under review).

On the sugar plantations of the West Indian colonies, there were far fewer opportunities for appropriation. Mary Turner even goes so far as to argue that the end of slavery and the subsequent introduction of "master and servant law" left indentured labourers in a negotiating position significantly weaker than that achieved by those who had heretofore worked as slaves. The beneficiaries among the masters, too, were heterogeneous and changed over time. Even in England, members of the gentry, master artisans and industrialists had sought solutions in this law for various problems with their employees. How much more the labour conflicts fought out by plantation managers in Assam differed from those faced by Australian sheep farmers or the masters of Chinese domestic servants.

While "master und servant law" had originally served to create a labour market, or to secure contractually the duty to perform wage labour, its function could change or even be transformed into its opposite. In West Africa, India, or Australia, nineteenth-century legislators seem to have been more interested in preventing the emergence of a completely "free" labour market, and particularly in limiting employees' freedom of contract. As a rule, this was justified by pointing to the "immaturity" or "primitive nature" of non-European workers. Often, the objective was simply to restrict the mobility of workers by means of long contracts and draconian punishments, or to allow for a unilateral fixation of remuneration and thus prevent market-driven pricing, which would have led to higher wages. In addition, "master and servant law" also cemented hierarchies in the labour market, and the isolation of "low-wage segments" according to the criteria of age (as Tomlins shows for the early North American colonies), religion (as Bannister demonstrates for Irish Catholics in the Newfoundland fisheries) or more frequently, categories of "racial value" (most extremely in South Africa, as Chanock illustrates). Finally, as Mohapatra reports, for the sugar plantations of Guyana and Trinidad,

this instrument of regulation could also be deployed as a means of discipline in the actual labour process.

The intensity and form of the disciplinary enforcement of "master and servant law", particularly the pursuit of employee breaches of contract, also depended strongly on the context. In Canada, for example, despite a remarkable number of "master and servant" ordinances, Craven finds that it was rather unusual for employees accused of breach of contract to be taken to court: one showed workers the instruments, particularly during labour disputes, but seldom applied them. In the plantation societies of the West Indies or Mauritius, in contrast, in many years of the late nineteenth century approximately one-fifth of all indentured labourers had to appear in court for "master and servant" offences. Matters were quite different in Assam, the tea-growing region in the northeast of the Indian subcontinent. There, few plantation "coolies" went to court for breach of contract, but for quite different reasons than in Canada: Prabhu Mohapatra explains how, well into the twentieth century, the colonial government equipped British plantation managers with extensive punitive powers, including the imposition of imprisonment and corporal punishments. Thus prosecution was privatised here, with the master serving not just as an employer, but also as a police, judiciary and penal authority. The "coolies" accordingly often referred to the plantation as *phatak* (prison). According to David Anderson, in Kenya, "rough justice"– frequently involving a cat-o'-nine-tails – was a dominant method of disciplining servants accused of breach of contract.

"Master and servant law" could be embedded in an astonishing variety of legal cultures. Thus Richard Rathbone argues that the British colonial government tried to ensure a "gradual transition" from slavery to "free labour" by means of a bundle of legislative measures, which included the preservation of local *shari'a* courts as well as the issuing of "master and servant" ordinances. In formerly French Quebec and the one-time Dutch territories of South Africa, this product of English common law could apparently be readily integrated into codes based on Roman law. The embedding of "master and servant law" in the most diverse legal cultures and scenarios of social regulation implied in turn that its meaning and effects could differ from one place and time to the next. Thus Christopher Tomlins stresses that in each of the early British colonies in North America, "master and servant" ordinances operated in a distinctive local context defined by natural and societal factors, which led, under the conditions of comparatively weak central governmental and judicial authority, to particularly marked differences in the importance of these ordinances. For South Africa between the years 1841 and 1920, Martin Chanock emphasizes that "the laws of master and servant were only part of a larger ecology of legal and political mechanisms of labor control, and they are difficult to consider separately from that context" (p. 338). He

demonstrates this thesis by analysing the mutual reinforcement of "master and servant law" and the draconian "pass laws", which sharply restricted the freedom of movement of the majority black population. Similar interdependencies also become evident in other contributions to the volume (see, among others, Hay on England and D. Anderson on Kenya).

As the volume illustrates, the chronology of "master and servant law" was also heterogeneous. Thus, for example, the earliest East African "master and servant" ordinance was enacted in 1906 – more than three decades after the final abolition of this regulatory instrument in its country of origin. In some places, "master and servant law" lost its importance as a means of regulating employment relationships by private law, emphasising contracts between individuals, with the transition to corporatist and social policy regulation after World War I, as Michael Quinlan shows for Australia. Elsewhere, we encounter the simultaneity of the non-simultaneous. Thus while collective bargaining law and arbitration between employers and employees were also established in South Africa in the 1920s based on Australian and Canadian legislation, they applied exclusively to white industrial workers. Labour law was differentiated according to race, and the black majority of labourers continued to be subject to pre-industrial "master and servant law". This demonstrates at the same time the spatial complexity of the transfer of legal norms and regulatives. Various essays in the volume (see, for example, Banton on the Colonial Office), underline that, beginning around the second half of the nineteenth century, these transfers increasingly occurred between Britain's various imperial possessions (between India and Kenya, the Cape Colony and other African colonies, etc.) and that conventional models of a radial spread from the centre to the periphery do not apply.

The volume reviewed here thus leaves no room for doubt about the complexity of the pathways of "master and servant law", and future research will doubtless uncover even more astonishing versatility and adaptability. Despite its substantial size, the volume edited by Hay and Craven has some notable gaps. For example, it gives very short shrift to the Irish and Scottish variants of "master and servant law" as well as its profound effects on maritime labour relations. An announced follow-up volume is intended to close some of these largely unavoidable gaps. Even without this extension, however, the question arises of whether the results of this research programme produce more than a bewildering variety, and whether there is more to the connections between the multifarious forms and applications of "master and servant law" than their common historical origin, which is already evident in the basic characteristics noted above (contractual form, summary trials, and the criminalization of "servants" in breach of contract). Do we really need all of this precise detail if the end results are merely variations on the same theme?

In their introduction, the editors suggest an answer rather in passing.

"Master and servant law", they note, was "one of the many legal ligaments that helped make the British Empire a thinkable whole by the eighteenth century" (p. 2). In what follows they stress that the provisions of labour law are "not an irrelevant gloss on markets: on the contrary, they are crucial constituents of the labor market" (p. 32). They thus recommend that we understand "master and servant law" as a constructive element that made it possible to create relationships between previously unmediated political and economic entities, to generate, for example, an Empire or a labour market, without necessarily promoting homogeneity, symmetry or simultaneity. What emerges here is the potential of a research strategy capable of identifying the diverse, often nondescript building blocks of social and political integration and reconstructing their genealogies. This could prove to be a wide, previously untilled field for a transterritorial historiography dedicated to critical perspectives. For that reason, it is to be hoped that the present volume will reach a broad readership, despite its unfashionable preoccupation with the conditions of the lower classes.