

**RESCUE BEFORE A FALL: AN ANGLO-FRENCH
ANALYSIS OF THE BALANCE BETWEEN CORPORATE
RESCUE AND EMPLOYMENT PROTECTION**

Jennifer Leigh Longstreet Gant

BA MBA LLB(Hons) LLM

A thesis submitted in partial fulfilment of the requirements of
Nottingham Trent University for the degree of

Doctorate of Philosophy

January 2016

Copyright Notice

"This work is the intellectual property of the author (*Note: if there are other owners of the IP, as a consequence of any statement issued under paragraph 12 of Section 14A, they must also be named here*). You may copy up to 5% of this work for private study, or personal, non-commercial research. Any re-use of the information contained within this document should be fully referenced, quoting the author, title, university, degree level and pagination. Queries or requests for any other use, or if a more substantial copy is required, should be directed in the owner(s) of the Intellectual Property Rights."

ACKNOWLEDGEMENTS

Many have provided their support and encouragement while I have worked through this mammoth piece of work. Firstly, I must give my sincerest thanks for my first mentor on this path, Professor David Burdette. David first encouraged me to apply for the PhD programme, supported me as my director of studies every step of the way, has boosted my confidence, and helped me face my fears in ways I could never have imagined. I could not imagine doing this without him on my team. Secondly, Professor Paul Omar has challenged my assumptions, invited me to look beyond the black and white into the web of influences on the law, included me in publication and project, and has become a fast friend. I look forward to years of collaboration and engaging conversation with him. Thirdly, Professor Rebecca Parry has provided a much needed voice of reason, assisting me in the fine tuning of my PhD proposals and other similar work, while providing an in depth knowledge of the intricate workings of academic life to help me put my best foot forward in all things. These three wonderful people have made this entire thing possible.

I must also thank my family for the encouragement and pride that they have shown in me, which has helped me to push through obstacles, though these were thankfully quite few. I would also like to thank some of the greatest inspirations for engaging in this journey: my late grandfather Dr James R. Longstreet, a PhD and Professor of Finance, and my aunt, Dr Diane Longstreet, PhD in Medicine, Dietetics, and Nutrition, who beat me to being the first lady Longstreet PhD in my family. I am proud to add my academic achievement to the Longstreet legacy.

Finally, I must thank my husband, Nicholas Gant BEng, who has been tirelessly patient, self-sacrificing, encouraging and supportive, while also providing a firm tether to keep my head from floating off into the clouds. I could not have done this without him by my side, even though this was often more of a metaphorical presence.

Thanks also to Professor Adrian Walters, Graham Ferris, Dr Alexandra Kastrinou, Professor Rosalind Mason, Professor G Ray Warner, Professor Ian Fletcher, and Associate Professor Jenny Buchan for your advice, references, awards, teaching, and collaborative opportunities that have helped to jump-start my academic career.

To all, you have my most profound thanks.

ABSTRACT

The financial crisis of 2007/8 has had a significant impact on the place of social policy objectives in the Common Market. As laws have been reformed over the years since the failure of Lehman Brothers¹ set in motion a domino effect among high risk investment banks and financial institutions throughout the economically advanced nations of this world, both employment protection and corporate rescue have been found, at times, in the spotlight. While the corporate rescue culture of the European Union² promotes the rehabilitation of businesses in financial distress in preference to liquidation where possible, it also emphasises reducing unemployment and social exclusion.³ The social implications of corporate rescue must therefore be considered, rather than taking a purely economic approach, emphasising creditor wealth maximisation during insolvency proceedings.⁴ EU social policy has generated a number of employment regulations, such as the Acquired Rights Directive,⁵ which are arguably the greatest obstacle to promoting corporate rescue. Thus there is an enduring conflict that subsists between the aims of corporate rescue and employment protection regulation.

Substantial employment protection damages the effectiveness of corporate rescue by deterring acquisitions in view of the potential liability attached to transferring employees.⁶ Ineffective corporate rescue may then have an adverse effect on the economy and job security due to increased company failures and job losses.⁷ Employees attached to the sale of a business in a corporate rescue procedure can represent a liability, reducing the intrinsic value of that business and potentially reducing the number of businesses successfully rehabilitated through the use of corporate rescue mechanisms. The obstruction to successful corporate rehabilitation represented by employment protection must therefore be balanced with corporate rescue in order to successfully promote the rescue culture. An examination of the approaches taken by different jurisdictions, in this case the United Kingdom and France due to their important influence in the EU as well as their archetypically different legal systems should help elucidate how the tension could be managed in order to achieve a balance between them.

The form of examination is particularly important if an effective reform is to be introduced. As such, a comparative historical methodology concentrating on the path dependent legal developments of both jurisdictions will be applied in order to discover the fundamental historical, economic, social, political, and cultural differences between the UK and France that have influenced their approaches to social policy and corporate insolvency law. Legal developments cannot be explained by examining a legal rule in

¹ See The Economist "The Origins of the Financial Crisis: Crash Course" (7 September 2013) <<http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article>> accessed 17 December 2015.

² Hereafter referred to as the "EU".

³ KG Broc and R Parry, *Corporate Rescue: An Overview of Recent Developments from Selected Countries* (Kluwer 2003) 5-6.

⁴ V Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, CUP 2009) 14-15.

⁵ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16 (hereafter referred to as the "ARD").

⁶ H Collins, "Transfer of Undertakings and Insolvency" (1989) 18 ILJ 144.

⁷ Ibid.

isolation, but must account for the social and economic pressures operating on the law from the outside as well as the established ways in which the issues are dealt with internally. Even when economic and social conditions are similar at the time that a parallel rule is promulgated, the differences in historical journeys to arrive at similar rules can explain why different jurisdictions do not approach new problems in the same way.⁸

This thesis will analyse the legal position of employment protection and corporate rescue in the UK and France through a historical comparative analysis of the political, social, and economic developmental context. Based on the understanding of each jurisdiction's path dependent position within the legal framework of the EU, reform of the ARD will be recommended that attempts to balance the aims of corporate rescue and employment protection in the event of business transfers occurring during corporate rescue procedures. Given that the regulation of this policy intersection is made within the EU legal framework, the comparative historical analysis methodology will assist in identifying the most effective reform that will fit within the varied legal systems of the EU Member States, and also help to predict how such a reform may be implemented over time.

This Thesis will provide an innovative contribution to the existing knowledge and literature in the area of social policy in insolvency by using a comparative, historical, path dependent methodology to reveal a potentially effective approach to introducing unique legal reform to the conflicted intersection in the ARD of the promotion of the rescue culture by ensuring effective business transfers in corporate rescue procedures, while providing a balanced protection for employees affected by corporate restructuring.

⁸ J Bell, "Path Dependence and Legal Development" (2012) 87 Tul L Rev 787, 788.

TABLE OF LEGISLATION

United Kingdom

Ordinance of Labourers in 1349 (Ed III)

Statute of Bankrupts 1542 (34&35 Hen VIII c 4)

An Act Against Usurie 1545 (37 Hen VIII c 9)

Statute of Artificers 1562 (5 Eliz I c 4)

Act for the Relief of the Poor 1563 (5 Eliz. I c 3)

Act for the Relief of the Poor 1597 (39 Eliz I c 3)

The Poor Relief Act 1601 (43 Eliz 1 c 2)

An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown 1689 (1 William & Mary Sess 2 c 2)

Bankruptcy Act 1705 (4&5 Anne c 17)

Bubble Act 1720 (6 Geo I c 18)

Truck Act 1725

An Act Preventing the Committing of Frauds by Bankrupts 1732 (5 Geo 2 c 30)

Combination Act 1799 (39 Geo III c 81)

Combination Act 1800 (39&40 Geo III c 106)

Inclosure Consolidation Act (1801) (41 Geo III c 109)

Health and Morals of Apprentices Act 1802 (42 Geo 3 c 73)

Cotton Mills and Factories Act 1819 (59 Geo 3 c 66)

Bankrupts (England) Act 1825 (6 Geo 4 c16)

Combinations of Workmen Act 1825 (6 Geo IV c 129)

Truck Act 1831 (1&2 Will 4 c 37)

Bankruptcy Court (England) Act 1831 (1&2 Will 4 c 56)

Reform Act 1832 (2&3 Will IV c 45)

The Factory Act 1833 (3&4 Will IV c103)

Poor Law Amendment Act 1834 (4&5 Will IV c 76)

The Municipal Corporations Act 1835 (5&6 Will IV c 76)

Joint Stock Companies Act 1844 (7&8 Vict c 110)

Act Facilitating the Winding Up of Affairs of Joint Stock Companies Unable to Meet Their Pecuniary Engagements 1844 (7&8 Vict c 111)

Factories Act 1844. (7&8 Vict c 15)

Joint Stock Companies Winding-Up Act 1848 (11&12 Vict c 45)

The Public Health Act 1848 (11&12 Vict c 63)

Joint Stock Companies Winding-Up Amendment Act 1849 (12&13 Vict c 108)

The Joint Stock Companies Act 1856 (19&20 Vict c 47)

Bankruptcy Act 1861 (24&25 Vict c 47)

Companies Act of 1862 (25&26 Vict c 89)

Master and Servant Act 1867 (30&31 Vict c 141)

Bankruptcy Act 1869 (32&33 Vict c 71)

Employers and Workmen Act of 1875(38&39 Vict c 90)

Conspiracy and Protection of Property Act 1875 (38&39 Vict c 86)

Great Public Health Act 1875 (c 55)

Workshops Act 1878 (41&42 Vict c 16)

Bankruptcy Act 1883 (46&47 Vict c 52)

The Truck Amendment Act 1887 (50&51 Vict c 46)

Truck Act 1896 (59&60 Vict c 44)

Bankruptcy Act 1914 (4&5 Geo 5 c 59)

The Master and Servant Act of 1923

Trades Disputes Act was passed in 1927 (17&18 Geo V c 22)

Truck Act 1940 (3&4 Geo 6 c 38)

Public Health Act 1848 (11&12 Vict c 63)

Contracts of Employment Act 1963

Redundancy Payments Act 1965 c 65

Insolvency Act 1976 c 60

Transfer of Undertakings (Protection of Employment) Regulations 1981, SI 1981 No 1794

Insolvency Act 1986 c 45

SI 1986 No. 1996 The Insolvency Proceedings (Monetary Limits) Order 1986

Employment Rights Act 1996

Enterprise Act 2002 c 40

SI 2006/246 Transfer of Undertakings (Protection of Employment) Regulations 2006

SI 2014 No 16 The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014

France

Code de Commerce

Décret d'Allarde, Loi portant suppression de tous les droits d'aides, de toutes les maîtrises et jurandes et établissement des droits de patente, Décret de l'Assemblée constituante, 2 March 1791

Loi Le Chapelier, l'Assemblée Nationale, 14 juin 1791

Ordonnance du 28 novembre 1838 Du Roi Relative à la Liquidation et au Paiement des Frais de Justice Criminelle

Loi du 24 mars 1841 Relative au Travail des Enfants Employés dans les Manufactures, Usines ou Ateliers

Loi du 25 mai 1864 Abrogation des Art 414, 415 et 416 Du Code Pénal: Suppression du Délit de Coalition

Loi du 22 juillet 1867 Relative à la Contrainte par Corps

Loi du 23 décembre 1874 Dite Roussel sur la Protection des Enfants en Bas Age et en Particulier des Nourrissons

Loi du 11 décembre 1884 Sur les Conseils de Prudhommes

Loi du 4 mars 1889 Portant Modification de la Législation des Faillites

Loi du 9 avril 1898 Concernant Responsabilités dans les Accidents du Travail

Loi du 20 décembre 1906 Relative aux Fêtes Légales Tombant en Vendredi et un Mardi: Aucun Paiement Exigible ni aucun Protêt n'est dressé le Samedi ou le Lundi

Loi du 2 août 1919 Fixant à Huit Heures par Jour la Durée du Travail Effectif des Personnes de l'un et de l'autre Sexe et de tout Age Employées sur un Navire Affecté à la Navigation

Accords de Matignon 1936

Loi du 21 juin 1936 Instituant la Semaine de 40 Heures dans les Etablissements Industriels et Commerciaux et Fixant la Durée du Travail dans les Mines Souterraines

Ordonnance no 45-280 du 22 février 1945 Institution de Comités d'Entreprises

Loi no 50-205 du 11 février 1950 relative aux conventions collectives et aux procédures de règlement des conflits collectifs de travail

Law no 55-583 of 20 May 1955

Loi no 67-563 du 13 juillet 1967 Sur le Règlement Judiciaire, la Liquidation, la Liquidation des biens, la Faillite Personnelle et les Banqueroutes

Law no 85-98 of 25 janvier 1985

Loi no 94-475 du 10 juin 1994 relative à la prévention et au traitement des difficultés des entreprises

Loi no 2005-845 du 26 juillet 2005 de sauvegarde des entreprises

Loi no 2008-776 du 4 août 2008 de modernisation de l'économie (rectificatif)

Loi no 2014-856 du 31 juillet 2014 parue au JO n 176 du 1er août 2014

Loi no 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques (Loi Macron)

European Union

Treaty establishing the European Coal and Steel Community 18 April 1951

Information Service High Authority of the European Community for Coal and Steel Luxembourg, *“The Brussels Report on the General Common Market”* (June 1956) (unofficially referred to as the “Spaak Report”)

Treaty establishing the European Economic Community 28 March 1957

EC Bulletin 10/1972

Resolution Embodying the Opinion of the European Parliament on the Proposal from the Commission of the European Communities to the Council for a Directive on Harmonization of the Legislation of Member States on the Retention of the Rights and advantages of Employees in the Case of Mergers, Takeovers and Amalgamations, [1975] OJ (C 255) 25

Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of businesses [1977] OJ L 61/26

Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer *OJ L 283, 28.10.1980, p. 23–27*

Communication (85) 310 on Completing the Internal Market, White Paper from the Commission to the European Council (Milan, 28-29 June 1985)

Communication (89) 568 from the Commission concerning its Action Programme relating to the Implementation of the Community Charter of Basic Social Rights for Workers (29 November 1989)

Treaty on European Union 7 February 1992

EU Commission White Paper on “Growth, Competitiveness, and Employment” (1993)

Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies *OJ L 225, 12.8.1998, p. 16–21*

Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ L201)

Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts 1 May 1999

Charter of Fundamental Rights of the European Union 2 October 2000

Council Regulation (EC) No 1346/2000 of May 29 2000 on Insolvency Proceedings OJ L 160/1

Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 2232001, pp 16–20

EU Commission White Paper on “Growth, Competitiveness, and Employment” (1993)

000/517/EC: Council recommendation of 19 June 2000 on the broad guidelines of the economic policies of the Member States and the Community *Official Journal L 210, 21/08/2000 P. 0001 - 0040*

Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings

Décision n° 2001-455 DC du 12 janvier 2002 line 46

Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124 of 20052003)

COM (2005) 330 final of 2005-07-20 The Lisbon Strategy for growth and jobs OJ 2005-of 2005-07-20

Communication from the Commission (2010) A Strategy for Smart, Sustainable and Inclusive Growth (3 March 2010) (“EU 2020 Strategy”)

TABLE OF CASES

United Kingdom

Burton v Davy (1437)

Lowther v Earl of Radnor (1806) 8 East 113, 03 ER 287 (KB)

Lancaster v Greaves (1829) 9 B&C 628 (KB)

R v St John Devizes (1829) 9 B&C 896

R v Welch Esquire (1853) 118 ER 800, (1853) 2 El&Bl 357 (QB)

Re The Royal British Bank and the 7&8 Vict c 111 (1857) 28 LTOS 224

Whittle v Fankland (1862) 121 ER 992, (1862) 2 B&S 49 (QB)

Nokes v Doncaster Amalgamated Collieries Ltd [1940] AC 1014

Oakland v Wellswood (Yorkshire) Ltd [2009] EWCA Civ 1094; [2010] BCC 263 (CA (Civ Div))

OTG Limited v Burke & Others [2011] UKEAT 0320/09

Key2Law (Surrey) LLP vs Gaynor De'Antiquis and Secretary of State for Business Innovation and Skills [2011] EWCA Civ 1567

Litster v Forth Dry Dock and Engineering Co Ltd [1988] UKHL 10

Kerry Foods Ltd v Kreber [2000] IRLR 10

Crystal Palace FC Limited and Another v Kavanaugh and Others [2014] IRLR 139, CA

Spaceright Europe Ltd v Baillavoine and another [2011] EWCA Civ 1565; [2012] IRLR 111 (CA)

Spaceright Europe Ltd v Bailiavoine [2013] IRLR 291 (EAT)

Foreningen af Arbejdsledere i Danmark vDaddy's Dance Hall AVS [1998] IRLR

France

Arrêt Groupy Cass Civ 27 February 1934, GA no 62

Cass Ass Plén, 15 novembre 1985, n 82-40301, *Sté Nova Services c/ Groupe Services France et a, et n 8241510, Martin c/ Sté Nettoitout et al*

Cour de Cassation chambre sociale, 12 juin 1986, n de pourvoi : 85-43194 85-43746 85-43787

Décision 1999-423 DC - 13 janvier 2000 - Loi relative à la réduction négociée du temps de travail - Non-conformité partielle

Décision no 2001-455 DC du 12 janvier 2002 Loi de modernisation sociale

Cassation sociale, 18 novembre 2009, n 08-44175, n 2282, FS-P+B, *Syndic général des transports du Rhône CFDT c/ Sté DSV*

European Union

Case C-80/70 *Defrenne No 1* [1971] ECR 445

Case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* 1978 ECR 629

Case C-135/83 *HBM Abels v The Administrative Board of the Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie* [1985] ECR 469

Case C-152/84 *Marshall vi Southampton AHA*

Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891

Case C-24/85 *Spijkers v Abattoir* [1986] ECR 1119

Case C-32/86 *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall* [1988] ECR 739

Case C-324/86, *Tellerup v Daddy's Dance Hall* of 10 February 1988

Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135

Case C-188/89 *Foster v British Gas*

Case C-362/89 *D'Urso and ors v Ercole Marelli Elettromeccanica Generale SpA and ors* [1991] ECR I4105

Case C-209/91 *Rask v ISS Kantineservice* [1992] ECR 5755

Case C-29/91 *Dr Sophie Redmond Stichting v Bartol* [1992] ECR 3189

Case C-932/93 *Webb v EMO Cargo 2* [1994] CMLR 729

Case C-472/93 *Spano and Others v Fiat Geotech and Fiat Hitachi* [1995] ECR I-4321

Case C-319/94 *Jules Déthier Equipement SA v Jules Dassy* [1998] ECR I-1061

Case C-382/92 *Commission v UK* [1994] ECR 2435

Joined Cases C171/94 and C172/94 *Albert Merckx and Patrick Neuhuys v Ford Motors Company Belgium SA* [1996] ECR I-1253

Case C-399/96 *Eurpièces_SA, in liquidation, v Wilfried Sanders and Automotive Industries Holding Company SA* [1998] ECR I-6965

TABLE OF GOVERNMENT REPORTS AND OTHER DOCUMENTS

United Kingdom

The People's Charter, being the Outline of an Act to provide for the Just Representation of the People of Great Britain (London Working Men's Association 1838)

House of Commons, *Report of the Select Committee on Joint Stock Companies* (BPP VII v 1844)

Ministry of Reconstruction, *Interim Report on Joint Standing Industrial Councils* (1917) [Cd 8606]

K Cork, Sir (Chairman) *Insolvency Law and Practice: Report of the Review Committee* (1982) [Cmnd 8558]

The Insolvency Service, *A Review of Company Rescue and Business Reconstruction Mechanisms: Report by the Review Group*, (London: HMSO 1999)

Department of Trade and Industry and HM Treasury, *A Review of Company Rescue and Business Reconstruction Mechanisms*, May 2000

House of Lords, Select Committee on the European Communities, (1996) *Transfer of Undertakings: Acquired Rights Session 1995-1996 5th Report* London: HMSO

France

“Rapport au Président de la République relatif à l’ordonnance no 2014-326 du 12 mars 2014 portant réforme de la prévention des difficultés des entreprises et des procédures collectives”, Journal Officiel de la République Française Texte 2 sur 103

International

Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) 28 June 1919

Declaration concerning the Aims and Purposes of the International Labour Organisation, adopted at the 26th session of the ILO, Philadelphia, 10 May 1944

International Labour Organisation, *Social Aspects of European Economic Co-Operation, Report by a Group of Experts*, (Studies and Reports, New Series No 46 1956) (the “Ohlin Report”)

The “Legislative Guide on Insolvency Law” (2005) United Nations Commission of International Trade Law United Nations Publications

TABLE OF ABBREVIATIONS

General

Acquired Rights Directive	ARD
Court of Appeal	CA
Court of Justice of the European Union	CJEU
Economic and Social Committee	ESC
Economic, Technical, or Organisational	ETO
Employment Appeal Tribunal	EAT
Employment Tribunal	ET
European Coal and Steel Community	ECSC
European Community	EC
European Court of Justice	ECJ
European Economic Community	EEC
European Insolvency Regulation	EIR
European Parliament	EP
European Union	EU
First World War	WWI
International Labour Organisation	ILO
Open Method of Coordination	OMC
Second World War	WWII
Social Action Programme 1972	SAP
Transfer of Undertakings (Protection of Employment) Regulations	TUPE
United Kingdom	UK
United Nations Commission on International Trade Law	UNCITRAL

Journals and Publishers

American Journal of Comparative Law	Am J Comp L
American Sociological Review	Am Soc Rev
Banking Law Journal	Banking LJ
British Columbia International and Comparative Law Review	BC Int'l & Comp L Rev
British Yearbook of International Law	Brit YB Int'l L
Business History Review	Bus Hist Rev
Cambridge University Press	CUP
Canadian Journal of Economics and Political Science	Canadian J Econ and Pol Sci
Colombia Law Review	Colum L Rev
Company Lawyer	Co Law
Comparative Labour Law Journal	Comp Lab LJ
Conveyancer	Conv
Corporate Rescue and Insolvency	CR&I
Economic History Review	Econ Hist Rev
European Journal of Labour and Employment	Eur J Lab&Emp
European Law Journal	ELJ
George Washington Journal of International Law and Economics	Geo Wash J Int'l L&Econ
Harvard International Law Journal	Harv Int'l LJ
Harvard University Press	HUP
Industrial Relations Law Journal	IRLJ
Industrial Law and Practice	IL&P
Industrial Law Journal	ILJ
Insolvency Intelligence	Ins Int
Insolvency Law	Insolv L
International Company and Commercial Law Review	ICCLR
International Corporate Rescue	ICR
International History Review	Int'l Hist Rev
International Insolvency Review	IIR
International Labour Review	Int'l Lab Rev
Iowa Law Review	Iowa L Rev
Journal of Business Law	JBL
Journal of Common Market Studies	J Com Mar St
Journal of Economic Literature	J Econ Lit
Journal of European Social Policy	J Eur Soc Pol
Journal of Finance	J Fin
Journal of International Comparative Law Chicago Kent	J Int'l Comp L Chicago-Kent
Journal of Legal Studies	JLS
Journal of Modern History	J Mod Hist

Journal of Political Economics	J Pol Econ
Journal of Southern Europe and the Balkans	JS Eur & Balkans
Law and Society Review	L&Soc'y Rev
Law Quarterly Review	LQR
Maastricht Journal	MJ
Modern Law Review	MLR
New Zealand Post Graduate Law e-Journal	NZPGLeJ
Nottingham Insolvency and Business Law e-Journal	NIBLeJ
Oxford University Press	OUP
Philosophical Review	Phil Rev
Presses Universitaires de France	PUF
Quarterly Journal of Economics	Q J Econ
San Diego International Law Journal	San Diego Int'l LJ
Texas Law Review	Tex L Rev
The Economic Journal	Econ J
Tulane Law Review	Tul L Rev
Uniform Law Review	Unif L Rev
University College London Journal of Law and Jurisprudence	UCL JL&J
University of Chicago Law Review	U Chi L Rev
University of Chicago Press	UCP
University of North Carolina Press	UNCP
Yale Law Journal	Yale LJ
Yearbook of European Law	YEL
Zeitschrift für Europäisches Privatrecht	Z Eu P

TABLE OF CONTENTS

ACKNOWLEDGEMENTS	II
ABSTRACT	III
TABLE OF LEGISLATION	V
UNITED KINGDOM	V
FRANCE	VIII
EUROPEAN UNION.....	X
TABLE OF CASES	XII
UNITED KINGDOM	XI
FRANCE	XIII
EUROPEAN UNION.....	XIV
TABLE OF GOVERNMENT REPORTS AND OTHER DOCUMENTS	XV
UNITED KINGDOM	XV
FRANCE	XVI
INTERNATIONAL.....	XVI
TABLE OF ABBREVIATIONS	XVII
GENERAL	XVII
JOURNALS AND PUBLISHERS	XVIII
TABLE OF CONTENTS	XX
CHAPTER 1: PATH DEPENDENT COMPARATIVE HISTORICAL ANALYSIS OF EMPLOYMENT PROTECTION AND CORPORATE RESCUE IN THE UNITED KINGDOM AND FRANCE	10
1 INTRODUCTION	10
1.1 OVERVIEW AND AIMS	10
2 METHODOLOGY AND THEORETICAL FRAMEWORK	12
2.1 THE RIGHT METHOD FOR THE PARTICULAR PROBLEM	12
2.2 LEGAL ORIGIN: ALSO NOT A METHODOLOGICAL SOLUTION.....	13
2.3 LAW AND ECONOMICS: NOT BROADLY APPLICABLE.....	16
2.4 INTRODUCING A COMPARATIVE LEGAL HISTORICAL METHOD.....	17

2.5	COMPARATIVE PATH DEPENDENCE: A MODERN METHOD FOR A MODERN PROBLEM..	19
2.6	METHODOLOGICAL PROCESS: A THEMATIC APPROACH	21
3	CONCLUSION.....	24
CHAPTER 2: THE PATH TO LABOUR REGULATION AND CORPORATE		
INSOLVENCY LAW: A JOURNEY THROUGH EARLY FOUNDATIONAL		
HISTORICAL EXPERIENCE		
		25
1	INTRODUCTION.....	25
1.1	HISTORICAL EVENTS AND THE APPROACH TO LEGAL PROBLEMS	25
2	THE EVOLUTION OF THE STATE AND POLITICAL SYSTEM	26
2.1	AN INTRODUCTION: PARALLEL BEGINNINGS	26
2.2	THE DEVELOPMENT OF FEUDALISM.....	28
2.3	THE RENAISSANCE AND STATE SOVEREIGNTY	29
2.4	CATHOLICISM AND THE REFORMATION	30
2.5	THE ENLIGHTENMENT.....	31
2.6	THE “ENLIGHTENED” ENGLISH STATE.....	34
2.7	THE “ENLIGHTENED” FRENCH STATE.....	36
2.8	THE FRENCH REVOLUTION	37
2.9	THE ENGLISH CONSTITUTIONAL MONARCHY AND UNITARY DEMOCRACY	41
3	CONCLUSION.....	43
3.1	DIFFERENT HISTORIES INFLUENCING DIFFERENT LEGAL APPROACHES.....	43
3.2	TRANSITION	45
CHAPTER 3: PROLETARIANISATION, INDUSTRIALISATION, AND THE		
EMERGENCE OF LABOUR REGULATION IN FRANCE AND BRITAIN.....		
		46
1	INTRODUCTION.....	46
1.1	THE HISTORICAL SURVEY IN REVIEW.....	46
1.2	AN INTRODUCTION TO INDUSTRIALISATION AND PROLETARIANISATION	48
2	THEORETICAL UNDERPINNINGS OF THE INDUSTRIAL REVOLUTION..	50
2.1	PRE-INDUSTRIAL ECONOMICS.....	50
2.2	AN ECONOMIC REVOLUTION	51
2.3	THE PROLETARIAN PLIGHT: SOCIAL THEORY	52
2.4	MARXIST LABOUR ECONOMICS	54

3	THE REALITY OF INDUSTRIALISATION	55
3.1	PROTO-INDUSTRIALISATION	55
4	THE BRITISH INDUSTRIAL POWERHOUSE	56
4.1	INTRODUCTION	56
4.2	BRITISH INDUSTRIAL ECONOMICS.....	57
4.3	THE BRITISH LABOURING CLASSES: PROLETARIANISATION	60
5	THE FRENCH INDUSTRIAL CHARACTER	63
5.1	INTRODUCTION: A FRENCH APPROACH TO INDUSTRY	63
5.2	REVOLUTIONARY ECONOMICS AND PHYSIOCRACY: PRELUDE TO INDUSTRIALISATION	65
5.3	FRENCH WORKING CLASSES: A DIFFERENTLY COMPOSED PROLETARIAT.....	66
6	THE EVOLUTION OF LABOUR REGULATION AND SOCIAL POLICY	69
6.1	AN ECONOMIC AND MORAL CONUNDRUM	69
6.2	THE EVOLUTION OF LABOUR LAW AS A CONCEPT: HUGO SINZHEIMER.....	71
6.3	KAHN-FREUND AND BRITISH LABOUR LAW	72
7	THE EMPLOYMENT RELATIONSHIP	73
7.1	THE EVOLUTION OF THE EMPLOYMENT CONTRACT.....	73
7.2	THE EVOLUTION OF THE <i>CONTRAT DU TRAVAIL</i>	76
8	INDUSTRIAL RELATIONS	78
8.1	INDUSTRIAL RELATIONS IN THE UNITED KINGDOM	78
8.2	BRITAIN’S COLLECTIVE <i>LAISSEZ-FAIRE</i> : THE RISE OF LABOUR INTEREST POWER	79
8.3	INDUSTRIAL RELATIONS IN FRANCE	81
9	INDUSTRIAL REGULATION IN THE UNITED KINGDOM	84
9.1	EARLY SOCIAL POLICY AND LABOUR REGULATION	84
9.2	THE FACTORIES ACTS.....	84
9.3	THE TRUCK ACTS	85
9.4	HEALTH AND SAFETY LEGISLATION	85
10	INDUSTRIAL REGULATION IN FRANCE	86
10.1	SOCIAL POLICY AND LABOUR REGULATION	86
11	WORLD WARS AND THE WELFARE STATE.....	88
11.1	WORLD WAR I AND LABOUR REGULATION IN FRANCE AND BRITAIN	88
11.2	THE INTERWAR PERIOD IN BRITAIN	89

11.3	THE LEGACY OF WORLD WAR II AND LABOUR REGULATION	91
11.4	THE GOLDEN AGE OF LABOUR LAW IN BRITAIN	93
11.5	LABOUR POLICY AND POLITICS	95
12	ARGUMENTS, PARALLELS AND CONCLUSIONS.....	97
12.1	PARALLELS AND DIFFERENCES BETWEEN BRITISH AND FRENCH INDUSTRIALISM	97
CHAPTER 4: HISTORICAL PERSPECTIVES ON DEBT, CREDIT, AND		
	INSOLVENCY: AN EXAMINATION OF FINANCIAL EVOLUTION	100
1	INTRODUCTION.....	100
1.1	A REVIEW OF PROLETARIANISATION AND LABOUR REGULATION	100
1.2	CONNECTIONS BETWEEN LABOUR AND CORPORATE INSOLVENCY	102
2	BUSINESS AND FINANCIAL HISTORY – PERSPECTIVES ON DEBT AND	
	CREDIT	103
2.1	DEBT AND OBLIGATION: AN ANCIENT DICHOTOMY	103
2.2	THE ELEMENTS OF INSOLVENCY HISTORY	105
2.3	THE <i>LEX MERCATORIA</i> AND COMMERCIAL LAW	106
2.4	THE FINANCIAL REVOLUTION.....	107
2.5	DEBT: FROM MORTAL SIN TO LEGAL CONDITION	108
3	REVOLUTIONS IN ECONOMY, FINANCE AND POLITICS	110
3.1	THE GLORIOUS (FISCAL) REVOLUTION.....	110
3.2	THE MISSISSIPPI AND SOUTH SEA BUBBLES	112
3.3	FRENCH AND BRITISH BUSINESS ATTITUDES: DIAMETRIC DIFFERENCES.....	113
3.4	COMPANY LAW IN ENGLAND.....	115
3.5	COMPANY LAW IN FRANCE.....	117
4	THE EVOLUTION OF INSOLVENCY LAW	119
4.1	DEBT, BANKRUPTCY, AND IMPRISONMENT.....	119
4.2	EVOLUTION OF BANKRUPTCY LAW IN FRANCE.....	120
4.3	BANKRUPTCY, INSOLVENCY, AND THE FRENCH REVOLUTION	122
4.4	THE EVOLUTION OF INSOLVENCY LAW IN ENGLAND.....	124
4.5	JOINT STOCK COMPANIES AND BANKRUPTCY IN THE 1840s	126
4.6	VICTORIAN BANKRUPTCY REFORMS: THE INFLUENCE OF BUSINESS	128
5	THEORETICAL ASPECTS OF INSOLVENCY LAW	129

5.1	BANKRUPTCY THEORY: THE BENEFITS OF COLLECTIVE ACTION	129
5.2	A PROCEDURALIST APPROACH	131
5.3	BROAD BASED CONTRACTARIANISM	132
5.4	THE TRADITIONALIST APPROACH	132
6	FRENCH CORPORATE RESCUE: A FUNDAMENTAL VALUE	134
6.1	THE EVOLUTION OF THE RESCUE CULTURE IN FRANCE	134
6.2	BUSINESS RESCUE IN THE 1980s	136
6.3	INSOLVENCY REFORM IN THE TWENTY FIRST CENTURY	137
7	CORPORATE RESCUE IN THE UNITED KINGDOM	139
7.1	THE EVOLUTION OF THE RESCUE CULTURE	139
7.2	BUSINESS RESCUE IN THE 1980s	141
7.3	INSOLVENCY REFORM AND THE ENTERPRISE ACT 2002	142
8	THE AIMS OF INSOLVENCY AND SOCIAL POLICY	145
8.1	THE SOCIAL INFLUENCES ON AIMS OF INSOLVENCY AND CORPORATE RESCUE	145
8.2	EMPLOYEES IN INSOLVENCY: ISSUES OF JOB SECURITY AND SOCIAL POLICY	146
9	CONCLUSION:	149
CHAPTER 5: ACQUIRED RIGHTS AND THE INSOLVENCY EXCEPTION: EU		
	SOCIAL POLICY EVOLUTION AND INFLUENCE	151
1	INTRODUCTION	151
1.1	A REVIEW OF THE HISTORICAL CONTEXT OF INSOLVENCY SYSTEMS	151
2	THE HISTORICAL CONTEXT OF THE EUROPEAN UNION	153
2.1	THE GREAT WAR AND SOCIAL CHANGE	153
2.2	A “CARTHAGINIAN PEACE”	154
2.3	THE INTERNATIONAL LABOUR ORGANISATION	156
2.4	BIRTH OF THE EUROPEAN UNION OUT OF THE ASHES OF WAR	157
3	IN THE BEGINNING, WAS THERE SOCIAL POLICY?	160
3.1	EU SOCIAL POLICY	160
3.2	SOCIAL POLICY PHASE I: 1957-1973	161
3.3	SOCIAL POLICY PHASE II: 1973-1983	162
3.4	SOCIAL POLICY PHASE III: 1983-1997	164
3.5	SOCIAL POLICY PHASE IV: 1997-PRESENT	166

4	THE BIRTH OF THE ACQUIRED RIGHTS DIRECTIVE	167
4.1	THE ORIGINAL ARD.....	167
5	EU JURISPRUDENCE AND THE EVOLVING INSOLVENCY EXCEPTION	170
5.1	<i>ABELS</i>	170
5.2	<i>D'URSO</i>	171
5.3	<i>SPANO</i>	171
5.4	<i>DÉTHIERAND EURPIÉCES</i>	172
5.5	THE APPROACH OF THE ECJ	173
5.6	REFORMS TO THE ACQUIRED RIGHTS DIRECTIVE	174
6	IMPLEMENTATION OF THE ACQUIRED RIGHTS DIRECTIVE	175
6.1	PROBLEMS OF DIVERGENT IMPLEMENTATION OF DIRECTIVES.....	175
7	ACQUIRED RIGHTS IN FRANCE	176
7.1	HISTORY	176
7.2	THE OPERATION OF FRENCH ACQUIRED RIGHTS	179
8	ACQUIRED RIGHTS IN THE UK.....	181
8.1	HISTORY	181
8.2	TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 1981	182
8.3	REVIEWING AND REFORMING TUPE	183
9	THE INSOLVENCY EXCEPTION.....	185
9.1	THE PROVISION IN THE ARD	185
9.2	TUPE AND INSOLVENCY: UK JURISPRUDENCE.....	186
9.3	<i>OAKLAND VS WELLSWOOD</i>	187
9.4	<i>OTG v BARKE</i>	190
9.5	<i>KEY2LAW</i>	192
9.6	OPERATION OF TUPE IN CORPORATE RESCUE	194
10	ANALYSIS AND CONCLUSION.....	195
10.1	SOCIAL POLICY, EUROPEAN UNIFICATION, AND THE ARD.....	195
	CHAPTER 6: CONFLICT AND RESOLUTION: PATH DEPENDENT INFLUENCES ON	
	THE EVOLUTION OF ACQUIRED RIGHTS IN CORPORATE RESCUE IN	
	THE UK AND FRANCE	199
1	INTRODUCTION.....	199

1.1	THE EVOLUTION OF A UNITED EUROPE	199
1.2	INTRODUCTION TO CONFLICT AND RESOLUTION	201
2	PARALLEL PATH DEPENDENT DEVELOPMENTS: SUMMARY AND ANALYSIS	203
2.1	COMPARATIVE HISTORICAL ANALYSIS OF PATH DEPENDENT DEVELOPMENT.....	203
2.2	THE EVOLUTION OF THE STATE AND LEGAL SYSTEMS OF GOVERNANCE	204
2.3	SOCIAL POLICY AND LABOUR REGULATION	207
2.4	VIEWS OF DEBT, COMMERCIALISM, AND INSOLVENCY.....	210
2.5	THE EUROPEAN RELATION	212
3	THE CONFLICT BETWEEN CORPORATE RESCUE AND EMPLOYMENT PROTECTION.....	213
3.1	AN INHERENT STRUGGLE.....	213
3.2	THE ACQUIRED RIGHTS CONFLICT	214
3.3	CRITICISMS OF THE IMPLEMENTATION OF THE ARD.....	215
3.4	ROVER: A CONCRETE EXAMPLE	216
3.5	<i>CRYSTAL PALACE FC LIMITED AND ANOTHER V KAVANAUGH AND OTHERS</i>	218
3.6	COLLECTIVE REDUNDANCIES AND TRANSFER OF UNDERTAKINGS (AMENDMENT) REGULATIONS 2014.....	221
4	FRENCH CRITICISM - <i>CHAPITRE IV: TRANSFERT DU CONTRAT DE TRAVAIL</i>.....	222
4.1	THE FRENCH APPROACH.....	222
4.2	FRENCH EMPLOYMENT PROTECTION - CRITICISMS	224
4.3	FRENCH ACQUIRED RIGHTS – A CONFLICT (?)	225
5	PRACTICAL APPROACHES TO THE ARD	227
5.1	INTRODUCTION	227
5.2	TABLE OF SURVEY RESPONSES	228
5.3	EXAMPLES OF THE EFFECTS OF TUPE ON RESCUE OUTCOMES.....	229
5.4	STRATEGIES FOR REDUCING THE IMPACT OF TUPE.....	229
5.5	FRENCH PRACTITIONER STRATEGIES FOR REDUCING THE IMPACT OF TRANSFERS	230
5.6	PRACTITIONER CRITICISM OF THE TRANSFER OF EMPLOYMENT CONTRACTS DURING CORPORATE RESCUE PROCEDURES.....	231

6	THE ACQUIRED RIGHTS DIRECTIVE: AN EXEMPTION FOR CORPORATE RESCUE	233
6.1	THE MODERN RESCUE CULTURE: A NEED FOR A NEW APPROACH	233
6.2	ARGUMENTS ON SOCIAL POLICY, EMPLOYMENT PROTECTION AND THE ARD	234
6.3	HOW TO APPROACH LEGAL REFORM: THE RAWLSIAN PERSPECTIVE	237
6.4	EU METHODS: SOFT LAW OR HARD LAW?.....	240
6.5	REFORMING THE ARD	241
6.6	RECEPTION OF REFORMS IN THE MEMBER STATES	243
7	CONCLUSION.....	246
7.1	CONFLICT AND RESOLUTION: PATH DEPENDENT LEGAL DEVELOPMENT	246
	CHAPTER 7: CONCLUSION	249
1	CHAPTER 1:.....	249
1.1	PATH DEPENDENCY, EMPLOYMENT PROTECTION AND CORPORATE RESCUE.....	249
2	CHAPTER 2:.....	250
2.1	THE PATH TO LABOUR REGULATION AND CORPORATE INSOLVENCY LAW	250
3	CHAPTER 3:.....	254
3.1	PROLETARIANISATION, INDUSTRIALISATION, AND LABOUR REGULATION	254
4	CHAPTER 4:.....	258
4.1	HISTORICAL PERSPECTIVES ON DEBT, CREDIT, CORPORATE LAW, AND INSOLVENCY	258
5	CHAPTER 5:.....	261
5.1	EU SOCIAL POLICY, ACQUIRED RIGHTS AND THE INSOLVENCY EXCEPTION	261
6	CHAPTER 6:.....	263
6.1	PATH DEPENDENT INFLUENCES ON ACQUIRED RIGHTS AND CORPORATE RESCUE.....	263
	BIBLIOGRAPHY	266
	BOOKS	266
	BOOK CHAPTERS	272
	ARTICLES.....	274
	ANNEX 1: SURVEY RESPONSES.....	284
	INSOLVENCY PRACTITIONERS FROM THE UNITED KINGDOM.....	284
	INSOLVENCY PRACTITIONERS FROM FRANCE.....	288

Rescue before a Fall: an Anglo-French Analysis of the Balance between Corporate Rescue and Employment Protection

Jennifer Leigh Longstreet Gant

BA MBA LLB(Hons) LLM

“Lasciate ogne speranza, voi ch'intrate”

~ Dante Alighieri, Inferno

CHAPTER 1:
**PATH DEPENDENT COMPARATIVE HISTORICAL ANALYSIS OF EMPLOYMENT
PROTECTION AND CORPORATE RESCUE IN THE UNITED KINGDOM AND
FRANCE¹**

“The life of the law has not been logic; it has been experience.”²

~ Oliver Wendell Holmes, Jr.

1 Introduction

1.1 Overview and Aims

1.1.1 The financial crisis of 2007/8 and the difficult, slow economic recovery experienced by the European Union³ have invited a renewed focus on the economic impact of business failure and unemployment over the decade that followed.⁴ The EU promotes both a rescue culture that encourages the rehabilitation of businesses in financial distress, and social policies that aim to reduce unemployment and social exclusion.⁵ While social policy regulation and laws relating to the rescue culture are not mutually exclusive in their aims, they are often seen to conflict when regulations dealing with corporate rescue procedures intersect with those aimed at protecting employment. A balance between these two often competing policy areas is necessary to cope with the impact of critical financial circumstances with greater economic efficiency, while promoting social justice in the modern socioeconomic context of the EU. As such, the social implications of

* Please note that where more than one sentence has been used to paraphrase from a single source, footnotes will appear at the end of the group of sentences, rather than after each sentence derived from that single source.

¹ Some content of this chapter was used in a short presentation at the INSOL International Academics Colloquium in The Hague in May 2013, and in a full presentation at the NACIL Global Academics Conference in Amsterdam in May 2013 in a paper entitled “Introduction to Research Focus”.

² The quote continues: “The felt necessities of time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do that the syllogism in determining the rules by which men should be governed.” Oliver Wendell Holmes Jr, *The Common Law* (first published 1881, Gutenberg 2000) <<http://www.gutenberg.org/files/2449/2449-h/2449-h.htm>> accessed 11 June 2015.

³ Hereafter referred to as the “EU”.

⁴ See C Barnard, “The Financial Crisis and the EURO Plus Pact: a Labour Lawyer’s Perspective” (2012) 41(1) ILJ 98; B Vis, K van Kersbergen and T Hylands, “To What Extent Did the Financial Crisis Intensify the Pressure to Reform the Welfare State?” (2011) 45(4) *Social Policy & Administration* 338; D Burdette, R Parry and A Walters, “The Global Financial Crisis and the Call for Reform of Insolvency Law Systems” (2012) 4(1) IRI 13; and B Moro, “Lessons from the European Economic and Financial Great Crisis: A Survey” (2014) 34 *Eur J Pol Econ* s9.

⁵ KG Broc and R Parry, *Corporate Rescue: An Overview of Recent Developments from Selected Countries* (Kluwer 2004) 5-6.

corporate rescue must be considered, rather than taking a purely monetary approach that emphasises creditor wealth maximisation as the fundamental goal of insolvency.⁶

1.1.2 Underpinned by traditionally opposing socioeconomic values, the juxtaposition of corporate rescue and employment protection can be difficult to reconcile. As corporate rescue procedures often require the sale of all or part of a business undertaking, the rules dealing with the preservation of employment in business transfer situations are of particular importance. This specific area is governed by the implementation of the EU Acquired Rights Directive⁷ as interpreted by EU Member States, which contains provisions for the transfer of employment contracts in the event of the transfer of a business undertaking to which those contracts are associated, including those transfers occurring within corporate rescue procedures. The ARD has been met with varying implementation results among the Member States. The United Kingdom⁸ and France provide particularly divergent examples of this implementation, also demonstrating the extreme variance in the fundamentals of legal systems within the EU. In order to strike a balance between the rescue culture and social policy in this precise area, it would be necessary to introduce EU level reform, thus the way in which such reforms are received in Member States is also an important consideration.

1.1.3 This thesis will analyse the legal position of employment protection and corporate rescue in the UK and France through a historical comparative analysis of the political, social, and economic developmental context of the two legal areas. Based on the understanding of each jurisdiction's path dependent position within the legal framework of the EU, reform of the ARD will be recommended, which will attempt to balance the aims of the rescue culture and the provision of employment protection during business transfers occurring during corporate rescue procedures.

1.1.4 The intersection of these legal areas is contentious due to competing interests of social and economic policy, but it is necessary to consider both pressing social issues and the

⁶ V Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, CUP 2009) 14-15.

⁷ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16 (hereafter referred to as the "ARD").

⁸ Hereafter referred to as the "UK".

need for economic efficiency in the analysis of employment protection and corporate rescue in order to achieve a balance between them. Given that the regulation of this policy intersection is formulated within the EU legal framework, the comparative historical methodology described below will assist in identifying the most effective reform that will fit within the varied legal systems of EU Member States, using the UK and France as initial examples, and also help to predict how such a reform may be implemented over time.

2 Methodology and Theoretical Framework

2.1 The Right Method for the Particular Problem

2.1.1 Understanding a legal system is a difficult task, particularly when viewing it as a foreign system from outside the familiar. Legal history, comparative law, positivist and holistic constructs, economic efficiency analysis, and any number of other methodological approaches can help to reveal the underlying purposes of specific legal rules. However, the appropriate choice of methodological construct must be connected to the prospective outcome to be achieved. The proposed outcome of this treatise is to formulate EU level legal reform that will achieve a balance between employment protection and corporate rescue, which can be implemented throughout the EU with the result of preserving competition within the Common Market, rather than allowing the persistence of differing levels of protective regulation. In order to create a new legal framework that will appeal to each Member State as beneficial to their particular systemic approach, a full understanding of their regulatory aims in the area of employment law and corporate rescue procedures is needed.

2.1.2 While the scope of this treatise must be limited to only two jurisdictions, the choice of the UK and France present two systems with significantly different legal foundations that should provide a basis upon which legal reform can be built and potentially applied to the benefit of all Member States. Given the different characteristics that must be considered for the UK and France, it should be possible to create a broad enough framework such that most unique Member State characteristics may also be included. However, it is also envisaged that work following this project will continue to apply the

methodology herein described to other Member States in order to create a tighter framework within which legal reform can be tested.

2.1.3 A comparative method based solely within a positivist⁹ or functionalist¹⁰ approach is limited in its examination to the surface aspects of legal reality.¹¹ As such, a positivist focus on internal legal rules misses external influences on the law that should be taken into account in order to make worthwhile comparisons of legal phenomena. Similarly, if functionalist approaches are solely relied upon, it would be difficult to recognise the purposes and aims of law, which are defined using terms of reference provided by particular cultures that cannot be satisfactorily abstracted or generalised. The meaning of a law may not be apparent on the surface, but deeper inquiries that include context in history, culture, economics, shared beliefs, traditions, and political and social interests may reveal its true meaning.¹² Thus, although comparative law has long searched for functional equivalents as a foundational method, it is not enough to rely only upon this kind of approach to ground an academic analysis in the circumstances of this particular problem, and far less relevant to rely on a positivist approach.

2.2 Legal Origin: Also not a Methodological Solution

2.2.1 The UK and France provide archetypal examples of the common and civil law legal traditions, as such some discussion of the differences in the structure of these two systems is relevant. The structure of a legal system influences how social control is applied to economic life¹³ and can influence national regulatory styles,¹⁴ which will affect jurisdictional approaches to the development of legal rules as well as the effects of implementing EU law. There are a number of systemic characteristics that can be attributed to the legal origin of a jurisdiction.

⁹ See HLA Hart, *The Concept of Law* (2nd edn, OUP 1961).

¹⁰ See R Michaels, "The Functional Method of Comparative Law" in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006).

¹¹ R Cotterrell, "Comparative Law and Legal Culture" in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 710.

¹² *Ibid.*, 710-712.

¹³ R LaPorta, F Lopez-de-Silanes and A Shleifer, "The Economic Consequences of Legal Origins" (2008) 42(2) *J Econ Lit* 286, 286.

¹⁴ S Deakin, P Lele and M Siems, "The Evolution of Labour Law: Calibrating and Comparing Regulatory Regimes" (2007) 46(3-4) *Int'l Lab Rev* 133, 133.

2.2.2 In addition to the fundamental characteristic of legal codification, civil law systems tend to adopt Montesquieu's theory¹⁵ of the separation of powers that gives specific roles to legislators, who create the law, and judges who apply it. Jurisprudence in a common law system can create new legal rules according to specific facts, providing a principal source of law. Common law jurisdictions also apply the doctrine of *stare decisis* that compels lower courts to follow the judgments of higher courts. Judges in civil jurisdictions enjoy the authority of reason, exercising independence in decision-making from similar cases that may have come before. Though previous judgments may at times be viewed as persuasive, they are generally viewed as merely explanatory.¹⁶ Civil law codes also tend to be specific and thorough, while common law jurisdictions can allow an element of vagueness as the judiciary can be depended upon to alleviate most uncertainty. The differences in jurisprudential and legislative approaches between common and civil law systems can be problematic for the implementation of EU law. As EU law tends toward a civil law style, implementation in common law jurisdictions such as the UK can be problematic from an interpretative standpoint.¹⁷

2.2.3 There are also perceived differences in economic aspects of civil and common law countries. Civil law countries tend to have heavier, more economically interventionist regulation, while most common law countries tend toward a more economically liberal style.¹⁸ There are other important historical and cultural factors that also have a significant influence on the regulatory styles of different jurisdictions. The theory of legal origins attempts to explain differences in regulatory style through an examination of the systemic differences between common law and civil law systems and has done so through a number of empirical observations.¹⁹ However, the data has been challenged on the basis that it has failed to take account of functional equivalencies in the formal laws

¹⁵ Charles de Secondât, Baron de Montesquieu, *L'Esprit des Loïs* (first published 1748, Gutenberg 2008) <<http://www.gutenberg.org/files/27573/27573-h/27573-h.htm>> accessed 11 August 2013.

¹⁶ W Tetley, "Mixed Jurisdictions: Common Law vs Civil Law (Codified and Uncodified)" (1999) 4 Unif L Rev 877.

¹⁷ J Bell, "Path Dependence and Legal Development" (2012) 87 Tul L Rev 787, 796.

¹⁸ EL Glassner and A Shleifer, "Legal Origins" (2002) 117(4) QJ Econ 1194.

¹⁹ See R LaPorta and others, "Law and Finance" (1998) 106(6) J Pol Econ 1118; EL Glassner and A Shleifer, n19; R LaPorta, F Lopez-de-Silanes and A Shleifer, n13; R LaPorta and others, "Legal Determinants of External Finance" (1997) 52 J Fin 1131; EL Glassner and A Shleifer, "The Rise of the Regulatory State" (2003) 41(2) J Econ Lit 401; JC Botero and others, "The Regulation of Labour" (2004) 119(4) QJ Econ 1339; and S Deakin, P Lele and M Siems, n14.

measured in the research, leaving too many relevant considerations out of the final analysis.²⁰

2.2.4 The differences in legal origins have made harmonisation difficult due to differences in the foundations of Member State legal systems. Both civil and common law systems are discrete epistemological constructs with differences that are irreducible to the effect that it may be nearly impossible for a civil lawyer to think like a common lawyer, and vice versa.²¹ While a civil lawyer may view the common law as overly traditional, casuistic, and peculiar in the interlocking of equity and law, to the common lawyer the same characteristics are practical, flexible, and securely rooted in national culture, as well as natural and productive in the separation of law and equity.²² The legal cultures of both systems reflect distinctive national traditions formed from a collective will to express a unique and complex historical and social experience of law.²³ While the presence of civil and common law within the EU present one of the fiercest obstacles to closer implementation of EU law, other cultural and historical differences present boundaries among civil law systems that may be just as difficult to surmount as the differences between UK and Irish common law and the civilian systems of Continental Europe.

2.2.5 The legal origins of a jurisdiction forms a part of the fundamental basis upon which legal systems evolve, however, understanding the reasons why systemic legal differences persist among modern Western cultures in this globalised economic world-view cannot be explained by examining legal origins in isolation. Not every civil system underwent the same historical experiences and thus will have evolved on different trajectories that cannot be explained by narrow view of legal origins. As this treatise aims to fully examine the influences on the development of the legal areas under study in the UK and France, it must take a broader view. It is admitted that legal origins have a fundamental effect on the evolution of legal systems and often leads to differences in regulatory styles; however, it is necessary to delve deeper into the socio-cultural,

²⁰ B Ahlering and S Deakin, "Labour Regulation, Corporate Governance and Legal Origin: a Case of Institutional Complementarity?" (2007) 41(4) L&Soc'y Rev 895, 867.

²¹ P Legrand, *Fragments of Law as Culture* (WEJ Tjeenk Willink 1999) 11.

²² R Zimmerman, "Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science" (1996) 112(Oct) LQR 576, 587.

²³ Cotterrell, n11, 729.

political, economic and historical factors that have led to the current state of the law to fully understand it in context. There are too many other variables that the legal origins theory fails to account for, making the theory unviable for broad application without qualification.

2.3 Law and Economics: Not Broadly Applicable

2.3.1 The principles of Law and Economics might also have provided an analytical framework within which a balance between employment protection and corporate rescue could be sought. The basis of an economic approach to legal rules assumes that the people involved in a legal system will act rationally to maximise their own satisfaction. This concept evolved from a utilitarian ideal, supporting the belief that actions are right in proportion to their ability to promote happiness, and wrong as they cause distress.²⁴ The moral worth of a law is thus to be judged by its effect in promoting a surplus of pleasure over pain in aggregate across all citizens.²⁵ In an economic analysis of the law, if two opposing sides of an issue behave rationally, they will find a balance that maximises the benefits/happiness of each side when an outcome is uncertain at the outset.²⁶ Rational maximisation within a legal system suggests that by putting a conceptual price on legal rights and remedies, it will be possible to create legal rules that maximise effectiveness by finding the perfect balance of economic efficiency between competing aims.²⁷

2.3.2 Given the economic and competitive aspects of insolvency law and employment regulation,²⁸ it might be presumed that a Law and Economics approach might be appropriate. However, as the movement was instigated in the United States, and mainly supported by theorists in that country, it may not, in fact, provide an appropriate explanation for the systems under study. While the UK indeed takes a more liberal stance in its legal system, France does not. The claim that economic considerations can explain the law in modern societies is an inherently comparative claim. While true that it

²⁴ JS Mill, *Utilitarianism* (2nd edn, first published 1861, Hackett 2001) 7.

²⁵ RA Posner, "Utilitarianism, Economics and Legal Theory" (1979) 8(1) JLS 104.

²⁶ RA Posner, "Observation: The Economic Approach to Law" (1974) 53 Tex L Rev 761.

²⁷ *Ibid.*, 764.

²⁸ Please note that any mention of insolvency law should generally be taken to include corporate rescue procedures and vice versa; equally mention of employment law or regulation should be taken to include labour law, and vice versa.

is possible to explain legal rules in such a way that can align with the emphasis on economic efficiency, this is largely a retrospective exercise in which Law and Economics legal theorists transpose a theoretical construct onto the historic rule in question. It does not necessarily explain the true history of a legal rule's developmental process.²⁹

2.3.3 The connection between creditor and debtor is a competing economic relationship, as is the relationship between employee and employer, but there are also associated social issues that cannot be resolved by a singular reliance on economic efficiency. The direct application of values to unemployment and business failure based on their financial costs to society would not improve the balance between them when integrating policies of social justice in addition to economic efficiency, the former of which is also an important public policy matter for the EU. The existence of the “welfare state” in the UK and the socialist political system in France makes a pure economic analysis of the effectiveness of employment protection in corporate rescue inappropriate. Such an analysis would work in a market-led society, but the jurisdictions under study fall outside of this description. While employment and insolvency laws have intrinsic economic aspects, it is not enough to judge them according to economic efficiency and then declare them “good” or “bad” in comparison to a benchmark. This assumes that the law of a time or place, or of a particular nation, is an independent subject of study, with its own unitary framework, which can be explained without its context. There is more to the law than economics.

2.4 Introducing a Comparative Legal Historical Method³⁰

2.4.1 Without integrating a study of the historical context of the law into the comparative method, it might be assumed that the law of a given time and place develops in its own way that can be studied in isolation. Correspondingly, a pure comparative approach might assume that laws of each jurisdiction are discrete and coherent rather than an

²⁹ J Gordley, “Comparative Law and Legal History” in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 767.

³⁰ The methodology in this and the following section was articulated in an early formulation for a presentation at the INSOL International Academics Colloquium in San Francisco in March 2015 in a paper entitled “Studies in Convergence? Post-Crisis Effects on Corporate Rescue and the Influence of Social Policy: The EU and the USA”, which earned the Ian Strang Founders Award in 2015 and is awaiting publication in the *International Insolvency Review* under the same title. See Annex 2 Publication 4.

amalgamation of legal solutions developed over time.³¹ Legal developments cannot be explained by examining a legal rule in isolation, but must account for the social and economic pressures operating on the law from the outside as well as the established ways in which the issues are dealt with internally. Even when economic and social conditions are similar in different countries at the time a parallel rule is promulgated, the differences in historical journeys to arrive at similar rules can explain why they do not approach new problems in the same way.³²

2.4.2 Taking a holistic approach that accounts not just for the legal rules in isolation, but with reference to the context within which those rules belong,³³ makes it possible to see the law as a living, evolving subject, rather than just the law as stated in books or observed in action.³⁴ A comparative historical approach situates the law within the jurisdiction it is found and explains the underlying aims and purposes for which a law was instituted, and why it functions the way that it does.

2.4.3 Legal rules and legal texts are typically deeply rooted in the specific economic, social, moral, political, religious, and cultural contexts, which can often only be explained from a historical perspective.³⁵ Comparing different legal system therefore requires an analysis of the historical contexts of the specific areas under study in order to identify the aims of legal rules, whether as a means of achieving social goals, as outcomes of distinctive legal traditions, or as an expression of a specific culture or collective identity.³⁶ Where there are differences in legal rules, context, both legal and non-legal, becomes especially important. Differences in non-legal context can also explain the appearance of diverse legal problems, as well as dissimilar outcomes despite similar treatment.³⁷

³¹ Gordley, n29, 763.

³² Bell, n17, 788.

³³ M Graziadei, "Comparative Law, Legal History, and the Holistic Approach to Legal Cultures" (1999) 7 Z Eu P 531, 538.

³⁴ W Ewald, "Legal History and Comparative Law" (1999) 7 Z Eu P 553, 556.

³⁵ N Jansen, "Comparative Law and Comparative Knowledge" in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 306.

³⁶ *Ibid*, 308.

³⁷ G Dannemann, "Comparative Law: Study of Similarities or Differences?" in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 414.

2.5 Comparative Path Dependence: A Modern Method for a Modern Problem

2.5.1 Law has been described as the most historically oriented, backward looking, and path dependent of the professions, venerating tradition, precedent, custom, ancient practices and texts, wisdom, and an interpretative method that is inextricably linked to history. The characteristic gerontocracy of the profession relies upon ingrained attitudes that are obstacles to attempts to reorient the law to a more pragmatic, coordinated, and efficient direction.³⁸ The fundamental dependence of the law on its history is evident in how precedent functions in common law systems and how codes drafted decades or more in the past continue to provide the foundation of civil law systems.³⁹ The past exerts an inertial force on legal development.⁴⁰ The law is simultaneously influenced by external non-legal factors as well as internal professional practices. Legal doctrine is thus the product of a complex interaction between the internal and the external.⁴¹ While the historical dependence of law is self-evident, its context in the wider history of a jurisdiction also plays an important role in how law develops.

2.5.2 The historicity of law described above is based on the concept of path dependence, a theory suggesting that established traditional legal approaches to resolving legal problems will determine how new situations are dealt with in the present and future.⁴² Path dependency has been used as a method in economics to explain how economic practices are embedded in a society. Economic path dependence implies that the destination, by and large, depends on the precise place from whence a journey began.⁴³ Economies vary. This is due, not just to the interplay of universal economic forces, but also to the way in which present decisions are shaped by the decisions and structures inherited from the past. These past decisions and structures provide a context within which present economic behaviour can be understood.⁴⁴ Applied to law, path dependence assumes that there is not a single perfect legal system to which all systems

³⁸ RA Posner, "Past-Dependency, Pragmatism and Critique of History in Adjudication and Legal Scholarship" (2000) 67(3) U Chi L Rev 573, 573.

³⁹ OA Hathaway, "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System" (2000) 86 Iowa L Rev 601, 601.

⁴⁰ Posner, n38, 587.

⁴¹ Oliver Wendell Holmes Jr, *The Common Law* (first published 1881, Gutenberg 2000) <<http://www.gutenberg.org/files/2449/2449-h/2449-h.htm>> accessed 11 June 2015, 1-2.

⁴² Bell, n17, 787-788.

⁴³ Posner, n38, 583.

⁴⁴ Bell, n17, 797.

should aspire, rather than that there are many coherent sets of legal rules and institutions in a variety of jurisdictions that can effectively deal with the same social problems. While path dependence does not prevent convergence as such, it does explain the difference between legal systems and the routes taken to legal change.⁴⁵

2.5.3 Decisions made by legislators and judges are shaped in specific and systemic ways by the historical path leading up to them.⁴⁶ Thus legal developments can be explained by reference not only to the specific characteristics of the legal system, but also by superimposing the social and economic pressures operating on the law from the outside as well as the established, perhaps culturally motivated, ways of dealing with legal issues within the system. Outside pressures may lead legal systems to adapt themselves toward a convergent centre, although radical change is an unusual phenomenon.⁴⁷ While economic and social conditions may be similar in different countries, the historical paths upon which they have journeyed to arrive at the current set of conditions are not. An understanding of extra-legal factors connected to a country's history will assist in explaining why they do not approach similar, new problems in the same way.⁴⁸ This theory adds to the legal origins hypothesis, which is too narrow to adequately explain all legal differences.

2.5.4 Path dependency demonstrates how history influences the process of legal change. It implies that earlier events affect the possible outcomes of subsequent events occurring.⁴⁹ There is a certain Darwinian effect here, as essentially the success of an outcome in the past will lead to similar choices in the future, theoretically common to differential reproductive success in evolutionary theory.⁵⁰ This is particularly illustrative of UK legal development, though it does share some elements with the French, which reflects more of a “punctuated *equilibria*” of legal development. This second strand of evolutionary path dependence is reminiscent of the long periods of French *status quo*, punctuated by periods of explosive revolution, similar in biology to periods of rapid

⁴⁵ Ibid, 800

⁴⁶ Hathaway, n39, 604.

⁴⁷ Bell, n17, 804.

⁴⁸ Ibid, 787-788.

⁴⁹ WH Sewell, “Three Temporalities: Toward an Eventful Sociology” in WH Sewell, *Logics of Historicity: Social Theory and Social Transformation* (UCP 2005).

⁵⁰ See C Darwin, *On the Origin of Species* (first published 1859, OUP 2008).

adaptation in which changes occur only in fits and starts.⁵¹ Both the UK and France exhibit elements of both of these strands of evolutionary path dependency, but in modern history the French have experienced far more explosive changes in their society and legal developments (consider that France has changed its Constitution no less than a dozen times since 1791).

2.5.5 On the whole, “legal evolution” exhibits a combination of the two, but fundamentally, it is directly constrained by history.⁵² The legal possibilities for today and the future are determined by the evolutionary changes of the past, whether slow and steady or explosive and revolutionary.⁵³ Given the close, if frequently adversarial, relationship that the UK and France have historically shared, and the fact that both have exercised considerable influence in the EU, they present two archetypal examples of how a state’s historical roots influence its approach to legal problems.

2.6 Methodological Process: A Thematic Approach

2.6.1 It must be acknowledged that a historical assessment such as the methodology described herein is an inherently interpretative process. However, by performing a deep investigation into the context of the rules under study, it may be possible to narrow the interpretation. Thus the more history examined relevant to the development of corporate rescue and employment protection, the closer to a “truth” the interpretation may realistically approach.⁵⁴ As such, the Chapters of this treatise will be structured around relevant themes that analysis has revealed to have had a significant impact on the development of how employment protection is balanced with corporate rescue within the implementation of the ARD in the UK and France. These themes revolve around important historic-political events, the evolution of social policy, views of debt, and the relationship with Europe, all of which have shaped the aims and approaches to employment protection and corporate rescue.

2.6.2 The first substantive Chapter of this thesis will explore the path to labour regulation and insolvency systems through a historical survey of the political, legal, economic, and

⁵¹ Hathaway, n39, 607.

⁵² Hathaway, n39, 607.

⁵³ Ibid, 616.

⁵⁴ Posner, n38, 594.

social evolution of the UK and France. It will focus on important historical events that have shaped business and socially oriented legal areas, which in turn have shaped approaches and aims of employment regulation, insolvency law, and approaches to the implementation of EU Law. Although the historical events discussed in Chapter 2 may appear to be remote from the problem to be resolved, their impact on the political, social, economic, and cultural characteristics of each jurisdiction can be seen to have had a significant impact on legal development in the areas under study. The particular historical events that have been assessed as having an important influence on the paths toward the modern legal systems of the UK and France are the diverse impacts of feudalism, absolutism, and the Protestant Reformation; the impact of the Tudors; the Enlightenment; the English Civil War and Glorious Revolution; and the French Revolution. Events occurring during the nineteenth and twentieth centuries are intertwined with the topics that will be discussed in Chapters 3, 4 and 5.

2.6.3 The third Chapter will discuss the foundations of the modern approaches to employment protection in the UK and France, which has been identified as growing out of proletarianisation, industrialisation, and the early emergence of labour regulation. It will deal specifically with the evolution of the proletariat comprising the working classes prior to the evolution of social policies aimed to protect them. The Industrial Revolution in England, its influences on France and the rest of Europe will be analysed, as will the theoretical basis for labour law. Following the emergence of the industrial working classes and eventual acceptance of collective bargaining, protective labour regulation began to emerge, out of which the Acquired Rights Directive would eventually evolve within the framework of the EU. In time, this Chapter will cover the evolution of social policy and labour law up to the point of the creation of the European Economic Community.

2.6.4 The fourth Chapter will explore historical perspectives on debt, credit, and insolvency through an examination of the history of usury, the evolution of the corporate form, and the development of more complex financial markets. Views on debt had a significant impact on legal developments in the area of corporate law, financial instruments, and the ability to invest, which in turn impacted the progress of industrialisation and the

commercial economy. The evolution of insolvency from a punitive process to the development of rehabilitative aims will be explored in each jurisdiction. This Chapter will also discuss the relevant insolvency theories that have influenced the worldwide development of insolvency systems. Path dependent developments in corporate and financial law have had a significant impact on how the aims of insolvency systems and corporate rescue have been legislated.

2.6.5 The fifth Chapter will examine EU social policy evolution and its influence on the Member States, particularly in the passage and reform of the ARD. Some history of the EU will provide context that reveals very different perspectives taken by the UK and France to the purposes and benefits of EU integration. It will discuss the development of EU social policy and the rescue culture and the eventual passage of the ARD, which draws the two areas of law together within the insolvency exception.⁵⁵ The substantive provisions of the ARD relating to insolvency will be introduced and discussed in detail, as well as the relevant case law that has affected the development of the concept of acquired rights in both countries.

2.6.6 The final substantive Chapter will examine the conflict present in the ARD between its social aims and the business needs for flexibility in insolvency, and offer a potential solution through EU level legal reform. It will draw together the paths explored in the first three substantive Chapters to encapsulate the influences on the evolution of acquired rights in corporate rescue procedures within the EU, as implemented by the UK and France. It will also examine criticism of the application of the ARD transfer provisions in corporate rescue procedures by professional organisations, through examples, and from survey responses received from insolvency practitioners. A statutory derogation will be recommended that provides an exemption from the application of the ARD to a selection of specifically identified corporate rescue procedures for a spectrum of companies based on employee numbers and turnover. Finally, the reception of the recommended reform will be discussed in light of the jurisdictional idiosyncrasies that have been revealed through the path dependent analysis given in the previous Chapters.

⁵⁵ Article 5 of the ARD.

3 **Conclusion**

- 3.1.1 This first Chapter has introduced the problem to be resolved: balancing corporate rescue and employment protection as provided for in the ARD and implemented by Member States. This problem is to be resolved through EU level legal reform that is intended to allow for a close implementation that should encourage more effective competition within the Common Market in relation to levels of social protection. Aligned implementation is to be achieved through a fundamental understanding of the jurisdiction-specific elements that affect the reception of law and the aims of regulation. Such fundamental understanding will be acquired through a comparative analysis of the path dependent, historical development of political, social, and economic characteristics that have developed from the historical experiences of each jurisdiction in those areas that directly impact the development of the aims of employment protection and corporate rescue.
- 3.1.2 The next Chapter will explore the historical paths that each jurisdiction has travelled to arrive at their approaches to social policy and business. Important historical events that have shaped corporate law and social policy will be discussed. These historical events have guided the approach and aims of employment protection and corporate rescue and, over time, the approach to the implementation of EU law. Their impact on the political, social, economic, and cultural characteristics of each jurisdiction can be seen to have had a significant influence on legal development in the areas under study. Of particular importance are the diverse impacts of feudalism, absolutism, and the Protestant Reformation; the impact of the Tudor rule in England; the Enlightenment; the English Civil War and Glorious Revolution; and the French Revolution. The impact of these events has helped to build the foundations upon which modern French and British approaches to employment protection and corporate rescue are now based, thus having a concomitant impact on their intersection.

CHAPTER 2:

THE PATH TO LABOUR REGULATION AND CORPORATE INSOLVENCY LAW: A JOURNEY THROUGH EARLY FOUNDATIONAL HISTORICAL EXPERIENCE

“Study the past if you would define the future.”

~ Confucius

“Nescire autem quid antequam natus sis acciderit, id est semper esse puerum.”¹

~ Marcus Tullius Cicero

1 **Introduction**

1.1 Historical Events and the Approach to Legal Problems

1.1.1 A nation’s political history inevitably affects how the modern function of political systems, business and economics, social policy, and regulatory style evolve over time. The purpose of this Chapter is to explore the important historical events that have had a significant impact on the approaches to legal regulation in France and the UK and the paths they have travelled to arrive at their modern employment and insolvency systems. Employment protection regulations evolved out of the need to first control, and then protect, the working classes through the development of labour law. This process occurred in connection with industrialisation, which was highly influenced by the social, political, and economic characteristics unique to each legal system leading up to that developmental event.²

1.1.2 The evolution of insolvency law in Britain and France, and their modern corporate rescue elements, can only be fully understood through their situation within the evolution of commercialism, the corporation, and the views that each jurisdiction has historically had regarding debt and credit. As such, an understanding of the social, political, and economic characteristics that have affected the evolution of commercial

¹ To be ignorant of what occurred before you were born is to remain always a child.

² See Chapter 3 of this Thesis for full development of these ideas.

law is necessary in order to fully understand its unique place and impact upon the legal systems of Britain and France.³

1.1.3 There are a number of path dependent historical events that have guided the approach and aims of employment protection and corporate rescue in the UK and France and, over time, their approach to the implementation of EU law.⁴ The impact of diverse, historic occurrences on the political, social, economic, and cultural characteristics of each jurisdiction have had a significant impact on legal development. Of particular importance is the impact of feudalism, absolutism, and the Protestant and Counter Reformations; the Tudor rule in England; the Enlightenment; the English Civil War and the Glorious Revolution; and the French Revolution. The impact of these events form a part of the foundations upon which modern French and British approaches to social policy and corporate rescue are now based. These experiences have a concomitant impact on the intersecting balance of corporate rescue and employment protection. While there are a number of other important historical events that exerted influence on legal development, those discussed in this Chapter were chosen as major events that have not only influenced legal development, but also have led to the differences inherent in the two legal systems.

2 **The Evolution of the State and Political System**

2.1 An Introduction: Parallel Beginnings

2.1.1 An understanding of the fundamental underpinnings of the state, its purpose, and its political system is an important starting point to understanding the distinctive characteristics that differentiate France and the UK. The French and English⁵ states evolved along parallel courses during ancient times and through the Dark Ages.⁶ Both territories were based on ancient tribal communal societies featuring warrior aristocracies and pagan religious classes with law based on tradition and custom. The

³ See Chapter 4 of this Thesis for a full development of these ideas.

⁴ See Chapter 5 of this Thesis for a full discussion of the Acquired Rights Directive.

⁵ Please note that England will be used in the historical context in which it belongs until such time that it is historically accurate to refer to the nation as Britain, Great Britain or the United Kingdom. The same applies to the use of “English” or “British” in relation to the people of this territory.

⁶ Generally viewed as the 5th to 10th centuries, but also often referred to as the Early Middle Ages.

Roman Empire modernised governments and social structures⁷ and brought Christianity into Gaul and Britannia.⁸ Christianity eventually became a tool of authority and subjugation.⁹ European princes adopted a religious role that tied their subjects to them spiritually as well as politically. The influence of the Catholic Church would also place limitations upon state sovereignty until the Protestant Reformation of the sixteenth century,¹⁰ despite the best efforts of some sovereigns, such as Henry II,¹¹ to assert their independence from Rome.¹²

2.1.2 Following the fall of the Western Roman Empire,¹³ the influence of ancient civilised culture began to fade and progress slowed. Both territories struggled through tribal invasions and migrations,¹⁴ although Britain largely remained a society based along tribal divisions. Christianity was a single common thread that eventually tied the diverse tribal migrants and Britons together. It served to bring unity to individual kingdoms and also to create what would become an English nation. Briton and tribal princes often derived their power to rule disparate kingdoms from their spiritual roles. Religion and government were intertwined, which would lead inexorably to the politicisation of the Church in the sixteenth century.¹⁵

2.1.3 While the Gallo-Roman civilisation was nearly subsumed by the centuries of tribal migrations and invasions,¹⁶ the fundamental bases of the future French nation were also established between the fifth and eighth centuries. The recognisably modern French territory was established under Charlemagne¹⁷ as were the political and social structures of feudalism. It was not until the introduction of feudalism that the more distinctive characteristics of the French and English states begin to emerge.

⁷ P Ackroyd, *The History of Britain Volume 1: Foundation* (Pan Books 2012) 32; C Seignobos, *A History of the French People* (CA Phillips tr, first published 1933, Hesperides 2006) 37.

⁸ Britannia refers to ancient Roman Britain and Gaul to the territory of modern France, Belgium and Luxembourg.

⁹ P Anderson, *Passages from Antiquity to Feudalism* (first published 1974, Verso 2013) 129-133.

¹⁰ C Seignobos, *A History of the French People* (CA Phillips tr, first published 1933, Hesperides 2006) 45-66; Anderson, n9 129-133.

¹¹ 1133-1189, reigned 1154-1189.

¹² See P Ackroyd, *The History of England Volume 1: Foundation* (Pan Books 2011) 130-150.

¹³ 476AD; N Davies, *Europe: A History* (Pimlico 1997) 149-212.

¹⁴ See N Davies, *Europe: A History* (Pimlico 1997) 215-238.

¹⁵ JM Kelly, *A Short History of Western Legal Theory* (OUP 1992) 86 & 114.

¹⁶ Anderson, n9 112-113.

¹⁷ Charles the Great (742-814), reigned 800-814.

2.2 The Development of Feudalism

2.2.1 Feudalism was a fusion of the Roman manorial and Germanic communal modes of production that first evolved in France. It was a legal, military, and social system that introduced greater stability relative to the chaos and violence of the Dark Ages. Feudal social hierarchy, influenced in part by the stratification in Roman society, was created by Charlemagne who granted honours and benefits of land linked to official positions of power to his knights in return for their sworn military service. This fused the honours system with vassalage. Feudal positions were accompanied by immunities that would later become privileges associated with the *ancien régime*.¹⁸

2.2.2 The French political tradition of granting honours filtered through the hierarchy of nobility once infeudation became hereditary, which is when feudalism truly came into operation.¹⁹ Grants of land subdivided noble territories and served to weaken the central power of the king as each subdivision would become a fresh centre of authority.²⁰ The power of some hereditary fiefs would eventually rival the power of the monarchy during the Middle Ages. The feudal kings of France derived their ruling power from a moral authority gained through their traditional religious roles and ecclesiastic validation from the Church. The power of the king was eventually strengthened by the involvement of the French nobility in the Crusades and the nobles' frequent failure to return from them or returning bankrupt, effectively reducing their ability to exercise as much power against the king.²¹ However, true centralisation would not occur until much later.

2.2.3 English society had been evolving independently toward consolidated social hierarchies with a subordinated peasantry since the seventh century. However, the social structure in England prior to the importation of feudalism did not have the fusion of honours for sworn service present in France.²² While contemporaneous kings did exist, the country was effectively centralised in the tenth century. The small regional nobility did not

¹⁸ Anderson, n9, 139-141; The *ancien régime* refers to the feudal social and political structure of France prior to the French Revolution.

¹⁹ Davies, n14, 298-316.

²⁰ Anderson, n9; and C Seignobos, *A History of the French People* (CA Phillips tr, first published 1933, Hesperides 2006) 80-81.

²¹ C Jenkins, *A Brief History of France: People, History and Culture* (Constable and Robinson Limited 2011) 23-29.

²² Anderson, n9, 158-161.

retain the independence nor wield the power common in France.²³ Land was shared communally in a system based largely on German tradition until the eleventh century.²⁴

2.2.4 Feudalism did not fully arrive in England until it was imposed by William the Conqueror²⁵ following his victory in 1066 at the Battle of Hastings, at which time all land was confiscated and distributed among his designated feudal lords. All vassals in the hierarchy were required to swear allegiance, not only to their immediate lords, but also to the conquering sovereign, in contrast to the decentralised feudal duties owed in France. Unlike France, which continued to contain pockets of privately held (“*allodial*”) land, England was placed under the strict feudal doctrine of *nulle terre sans seigneur* (no land without a lord).²⁶ The Anglo-Norman state eventually became the most unified and solidified institutional system in Western Europe.²⁷

2.3 The Renaissance and State Sovereignty

2.3.1 The fourteenth to sixteenth centuries were periods of absolute kings accompanied by a break from the ignorance and superstition of the Dark Ages, with the arrival of Renaissance thinking and humanist methodology.²⁸ Innovations in religion, culture, economics, and statecraft of this period were heavily influenced by the influx of Renaissance ideas, primarily from Italy.²⁹ Scientific discoveries implied knowledge beyond that of the Church, undermining the spectre of its omnipotence.³⁰ The development of Protestantism fragmented the Christian European states to such an extent that a secular Europe eventually replaced Christendom.³¹ The individualist approach of the Protestant Reformation appealed to independent-minded princes as it confirmed the legitimacy and sovereignty of their rule, while maintaining the existing social order.³² It was the end of a religiously unified Europe and the beginning of state sovereignty and individualism.

²³ See DB Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (CUP 2007).

²⁴ RA Brown, *Origins of English Feudalism* (George Allen and Unwin Ltd 1973) 53; P Anderson, n9, 158-161.

²⁵ 1028-1087, reigned in England 1066-1087.

²⁶ RA Brown, *Origins of English Feudalism* (George Allen and Unwin Ltd 1973) 53.

²⁷ Anderson, n9, 158-161.

²⁸ See Davies, n14, 467-575.

²⁹ R Lesaffer, *European Legal History* (CUP 2009) 380-383.

³⁰ Jenkins, n21, 57-58.

³¹ Davies, n14, 471, 496 & 568.

³² *Ibid*, 471-473 & 492.

2.3.2 There was a steady rise and expansion of centralised monarchical governments and their attendant bureaucracies. Humanist principles influenced both the English Tudor and the French Bourbon monarchs. While in England, the progressive (though often selfishly motivated) nature of the Tudors fundamentally changed the social, political, economic, and religious aspects of the country, France retained its fervent Catholic character and kept its social structure closely tied to the feudal structure of the previous century.³³

2.4 Catholicism and the Reformation

2.4.1 The power of the princes of Christendom had been limited by the application of papal authority since the integration of Catholicism into the Roman Empire. However, the power of the papacy over the sovereignty of English kings had slowly been reducing since the fourteenth century through various statutes forbidding *praemunire*.³⁴ Through the sixteenth century and, in particular, during the time of Henry VIII³⁵ the reach of the papacy was greatly curtailed and eventually usurped following the failure to satisfactorily resolve Henry's "*Great Affayre*."³⁶ Papal authority over state affairs was abolished, making it possible to rule with unlimited sovereignty.³⁷ Eventually the Tudors created a lasting version of the Church of England beyond papal control,³⁸ resulting in the authority of the crown being accepted to rule over local authorities and customs. The power of British monarchs was further centralised³⁹ during the reign of Elizabeth I.⁴⁰

2.4.2 Following the Renaissance, French kings pursued a political philosophy of French hegemony, which pushed its rulers and nobility to pursue expansionist policies. Their actions enshrined the notion that France embodied not just national, but universal values and the belief that the primary role of the state was to enforce these values. French society measured itself against ancient societies and desired to surpass them, to establish its own advanced society of grandeur, order, and harmony. It was in part this

³³ Lesaffer, n29, 380-383.

³⁴ The Acts of *Praemunire* prohibited the assertion or maintenance of papal or any other foreign jurisdiction or claim of supremacy in England against the supremacy of the monarch.

³⁵ 1485-1509.

³⁶ Referring to Henry VIII's long debate with Rome for a divorce from his first wife, Catherine of Aragon. See P Ackroyd, n11, 78-90.

³⁷ Ackroyd, n12, 90.

³⁸ Davies, n14, 490-494 & 545.

³⁹ C Hibbert, *The English: A Social History 1066-1945* (Guild Publishing 1987) 176.

⁴⁰ 1558-1603.

fundamental desire to recapture the near legendary social advancement of ancient civilisations that pushed French rulers to pursue wars in Italy and Spain in order to create a new Holy Roman Empire in its own image.⁴¹

2.4.3 While France also suffered through the Protestant Reformation and struggled through a series of Wars of Religion,⁴² which were in reality clever disguises for battles over a weakened crown,⁴³ Catholicism retained its position as the national religion. Although the Edict of Nantes⁴⁴ allowed the French Protestant *Huguenots* (Calvinists) to enjoy certain rights in some areas of France, Calvinism became the religion of a minority continually forced to defend itself against persecution.⁴⁵ Following the Edict that effectively ended the Wars of Religion, Henri IV⁴⁶ was able to restore finances and encourage innovation in industry and agriculture, laying down the groundwork for a successful Bourbon monarchy, which would usher in a century of prosperity and the cultural ascendancy of France in Europe.⁴⁷

2.5 The Enlightenment

2.5.1 The innovative thinking of the Enlightenment pushed Renaissance humanism toward even more rationalist approaches based on human reason and intelligence. Enlightenment attitudes carried profound scepticism towards traditional systems of authority and orthodoxy.⁴⁸ Given the masses of intellectual questioning that occurred during this period, it is not surprising that resistance to the antiquated social organisation of the *ancien régime* would find reflection in the political thought of the Enlightenment. The growth of more than one Christian denomination also began to temper the bigotry, intolerance, and fanaticism that characterised the clashes of the sixteenth century. Enlightened rationalism required the presence of rival beliefs to create a clash of ideas and eventually led to the presence of some level of tolerance within which a rational

⁴¹ Jenkins, n21, 80-83.

⁴² 1562-1598.

⁴³ Jenkins, n21, 59-60.

⁴⁴ 13 April 1598.

⁴⁵ C Seignobos, *A History of the French People* (CA Phillips tr, first published 1933, Hesperides 2006) 220.

⁴⁶ 1589-1610.

⁴⁷ Seignobos, n45, 232; Jenkins, n21, 62-67.

⁴⁸ Kelly, n15, 244-250.

dialogue could take place. Religious unity was no longer necessary to maintain order in a state.⁴⁹

2.5.2 Enlightenment ideals also invited innovations in statehood. The social contract model was used to support both absolutism and limited government, though the perception of man's fundamental qualities differed. For example, Locke⁵⁰ advocated limited government in which powers are separated between legislative and executive branches whose existence is justified through the consent of the governed to achieve specific ends desired by them,⁵¹ but also asserted that man has rights balanced with obligations that human morality is conditioned to keep. He also defended the private ownership of property and supported the extra-political weight commonly given to those possessing greater wealth.⁵²

2.5.3 The perception of human nature became accepted as being more civilised and disciplined, which is a reversal of the previous perceptions of human nature as being naturally competitive and selfish, requiring external control to temper the chaos of the unlimited pursuit of one's desires to achieve the most beneficial position.⁵³ French writers made their impact in exile from the more tolerant European nations. They criticised and encouraged the reformation of their country's outdated regime. Others spoke in defence of absolutism and the divine right of kings.⁵⁴ Montesquieu⁵⁵ believed that, in man's original condition of fear, he would eventually be encouraged to associate for mutual protection. Thus mankind at some time in the past made a conscious collective decision to create a society of humans which became the civil state. Creating a society out of chaos and violence would give humans the ability to assert control over their lives through the institutions created by them to do so.⁵⁶ It was through the will of

⁴⁹ Davies, n14, 596-597.

⁵⁰ 1632-1704.

⁵¹ Lesaffer, n29, 386-388.

⁵² Kelly, n15, 292.

⁵³ T Hobbes, *Leviathan* (first published 1651, OUP 1996) 83-84.

⁵⁴ J-B Bossuet, *Politique Tirée des Propres Paroles d l'Ecriture Sainte* (first published 1709, Gallica Bibliothèque Numérique) <<http://gallica.bnf.fr/ark:/12148/bpt6k103256m/f3.image>> accessed 10 July 2014; and R Filmer, *Patriarcha* (first published 1680, Gallica Bibliothèque Numérique)

<<http://gallica.bnf.fr/ark:/12148/bpt6k833663.r=Patriarcha%2C+or+The+natural+power+of+kings.langEN>> accessed 10 July 2014.

⁵⁵ 1689-1755.

⁵⁶ Kelly, n15, 254-255.

humans to be governed that the state came into existence and through its requirements for order that its leaders achieve their limited power.

2.5.4 Montesquieu applied Locke's concept of separation of powers⁵⁷ to French Enlightenment thinking, along with a separate judiciary branch. He noted that, in an absolutist monarchy, he who commands the execution of the law generally believes that he is above it.⁵⁸ This was a fair reflection on the state of affairs in France at the time. Enforcement during the *ancien régime* was lax and unequal; the government would bend the law to its will in order to facilitate its own ends. The idea that political or legal institutions could be criticised was in itself revolutionary.⁵⁹ At the end of the eighteenth century, government was no longer considered a spontaneous continuation of ancient communities, but had become an ideological construct separate from the dynastic power of the previous centuries.⁶⁰

2.5.5 Rousseau⁶¹ was also an important advocate of the social contract concept, though with radical differences. While his work did not necessarily form a part of the accepted political thinking of the time, his ideas would influence the more radicalised French revolutionaries, as well as justifying some of the autocratic regimes of the twentieth century. He suggested that far from being a bargain to exchange the submission of the governed for protection by the government, it was only in an equitable society that each individual member would give all of his rights and freedoms to the general will of the community. This association creates a corporate body with its own morality composed of a unity of equally empowered voters having a common identity. His social contract is not just an explanation but a justification for the existence of the state, which he envisages as being composed of the general will of the people. While he did not live to see the French Revolution, his communitarian vision is evident in its underlying ideological theme, reacting against the absolutism of the *ancien régime*.⁶²

⁵⁷ See J Locke, *Second Treatise of Government* (first published 1692, printed by Amazon.co.uk, ISBN 1482048167).

⁵⁸ See Charles de Secondât, Baron de Montesquieu, *L'Esprit des Lois* (first published 1748, Gutenberg 2008) <<http://www.gutenberg.org/files/27573/27573-h/27573-h.htm>> accessed 11 August 2013.

⁵⁹ Kelly, n15, 251 & 283.

⁶⁰ A Ozer, *L'Etat* (Flammarion 1998) 55.

⁶¹ 1712-1778.

⁶² J-J Rousseau, *Du Contrat Social* (HJ Tozer tr, first published 1762, Wordsworth 1998) 15.

2.6 The “Enlightened” English State

2.6.1 Until the seventeenth century, the English Parliament, while a legislative institution purposed with curbing royal power, was often used to achieve the personal desires of sovereigns by imposing their wishes upon it.⁶³ Laws were often enacted at the insistence of the royal executive, which failed to recognise parliamentary independence or sovereignty. The English Civil War⁶⁴ occurred in part due to a power conflict between competing camps supporting parliamentary sovereignty against the divine right of kings.⁶⁵ The English Civil War also involved disputes about religion and the discontent of the masses due to levels of taxation, persecution, high prices and low wages, famine, plague, land enclosure, and an inequitable balance of trade.⁶⁶ A brief, violent, and relatively unsuccessful English Commonwealth⁶⁷ was created as a result of the Parliamentarian triumph and a written constitution was issued based on radically religious ideology. The Republic fell to its own ambition after a few short years and a differently composed constitutional monarchy was re-established.⁶⁸

2.6.2 The experience of the Civil War and the Commonwealth raised awareness of the potential for a more democratic society based on separation of powers, in line with the models promoted by Enlightenment philosophers. The presence of these enlightened political ideals is apparent in the resistance to the Stuart power struggles that ended in the Glorious Revolution.⁶⁹ Disagreements about parliamentary sovereignty and the tendency of Stuart monarchs toward an absolutist, Catholic regime resulted in the crowning of the Dutch *stadtholder*, William of Orange,⁷⁰ and Mary Stuart⁷¹ as joint, Protestant rulers of England,⁷² contingent upon their agreement to certain constitutional documents that subjected the power of the throne to parliamentary sovereignty.⁷³

⁶³ Goldman, n23, 146.

⁶⁴ 1642-1651.

⁶⁵ Lesaffer, n29, 395.

⁶⁶ Davies, n14, 550-551.

⁶⁷ 1653-1659.

⁶⁸ Davies, n14, 549-553; J Cannon (ed), *The Oxford Companion to British History* (OUP 2002) 261-263; Hibbert, n39, 254-255.

⁶⁹ 1688-1689.

⁷⁰ 1650-1702, reigned 1689-1702.

⁷¹ 1662-1694, reigned 1689-1694.

⁷² J Cannon (ed), *The Oxford Companion to British History* (OUP 2002) 528-529; Lesaffer, n29, 396.

⁷³ Davies, n14, 629-631.

- 2.6.3 The English Bill of Rights⁷⁴ was a progressive constitutional document that would provide some inspiration for the revolutionary ideals that affected all of Western Europe a century later. Reflected in the political writings of Locke, the Bill of Rights provides that the king is subject to the law and that legislation and taxation was the province of Parliament alone. It took away the monarch's arbitrary powers relating to warfare and imprisonment. It also insisted upon the free election of members of Parliament and guaranteed free speech and debates within Parliament.⁷⁵ The new constitutional arrangements shifted the balance of power away from the crown.⁷⁶
- 2.6.4 The purpose of the Glorious Revolution, rather than being led by disenfranchised, mistreated middle and peasant classes as occurred during the French Revolution, was to save the political and Protestant religious establishment from absolutist and radical proposals made by the Catholic king, James II.⁷⁷ Protestant succession to the throne was enshrined in law and religious toleration was extended to Protestant dissidents, though not to Catholics. It also was here that the fundamental British constitutional value guaranteeing the sovereignty of Parliament was firmly established, carrying with it an abhorrence of absolute, despotic power. This differs significantly from the doctrine of the sovereignty of the people that was adopted following the French Revolution. It also differs fundamentally as it does not operate through a formal constitution, but through an unwritten constitution that includes the Bill of Rights, sundry legislation, and conventions.⁷⁸
- 2.6.5 In the eighteenth century, the role of the British monarchy within the executive branch of the government rapidly declined. While the Hanoverian kings appointed ministers, the composition of the government came to reflect the majority of Parliament, which over time became a constitutional convention persisting to this day. The British model also acted as a source of inspiration for political thinkers on the Continent, but the constitutional monarchy was not copied in any of the democratic republics that would

⁷⁴ 1689.

⁷⁵ Lesaffer, n29, 397.

⁷⁶ Davies, n14, 630-632.

⁷⁷ 1633-1701, reigned 1685-1688.

⁷⁸ *Ibid.*

evolve later.⁷⁹ However, Britain's experience during the American Revolution⁸⁰ would raise issues in the European consciousness regarding fundamental political principals as it challenged the foundation of European monarchies. In fact, the American Declaration of Independence⁸¹ enshrined the Enlightenment ideals of Locke's contract theory, English legalism, Montesquieu's thoughts on the separation of power, and Rousseau's concept of the general will.⁸²

2.7 The "Enlightened" French State

2.7.1 Pre-revolutionary France witnessed the development of the territorial state out of the feudal and dynastic lands of the thirteenth to seventeenth centuries. This was accompanied by the expansion of central government and a de-personification of the sovereign as the government became more specialised, professional, and institutionalised.⁸³ Central state machinery that subordinated local and religious interests to national interests was instituted. Public opinion was controlled by censoring the press and forbidding regional *parlements*⁸⁴ from discussing state affairs.⁸⁵ By the time Louis XIV⁸⁶ took power, the regional princes of France had been reduced to submission, regional *parlements* had been tamed, and he had the advantage of an experienced body of officials who were well trained in the administration of the realm. The absolute monarchy and the power it wielded operated at times arbitrarily and in secret, imprisoning in the Bastille anyone who incurred the displeasure of the throne.⁸⁷

2.7.2 Louis XIV took the Christian absolute monarchy and the divine right of kings to the extreme.⁸⁸ His desire for absolute power extended to the choice of national religion,⁸⁹ revoking the Edict of Nantes in 1685. The consistent persecution and restrictions applied to the *Huguenots* caused the flight of 200,000 into exile, impoverishing the country due

⁷⁹ Lesaffer, n29, 398.

⁸⁰ 1765-1783

⁸¹ 4th July 1776.

⁸² Kelly, n15, 244; Davies, n14, 637.

⁸³ Lesaffer, n29, 382-383.

⁸⁴ Provincial appellate courts of *ancien régime* France. See E Kiser and A Linton, "The Hinges of History: State-Making and Revolt in Early Modern France" (2002) 67(6) Am Soc Rev 889.

⁸⁵ Jenkins, n21, 71-72.

⁸⁶ 1643-1715.

⁸⁷ Seignobos, n45, 247-248.

⁸⁸ Jenkins, n21, 72-78.

⁸⁹ Seignobos, n45, 249-250, 259.

to the heavy loss of economically active merchants and artisans.⁹⁰ By the end of his reign, France's finances were in a ruinous state, weakening the monarchy significantly. The country was left with a debt so heavy that it could not possibly be paid. Unbelievers, philosophers, and sceptics had greater freedom due to the weakness of the king's power and disseminated their opinions openly,⁹¹ eventually influencing the ideals that would inspire the leaders of the French Revolution.

2.7.3 The *Fronde*⁹² was a revolt by the citizens of Paris, the Parisian *parlement*, those of the commercially powerful bourgeois Third Estate held aloof from the government, and the armies returning from Germany, against exploitative tax collection. It exemplified the frustration of the classes who would later lead the French Revolution. French rebels drew some encouragement from the success of the English Civil War in which the English Parliament had managed to defeat the king of England. While the *Fronde* was defeated due to the lack of a united front,⁹³ it was a sign of things to come.

2.8 The French Revolution

2.8.1 The French Revolution was a fundamental turning point in French politics, law, economics, social policy, and culture. It was also a turning point for the nature of Europe and views of the purpose of the state. The influence of Enlightenment ideals challenged the irrational human condition and the status quo,⁹⁴ which French monarchs worked consistently to maintain. French revolutionaries inherited the humanist belief in a universal abstraction of man and felt that they were acting on behalf of all humanity against universal tyranny. A revolution promised liberation from traditional oppression connected to feudal hierarchies and organised religion. It was the beginning of a French national identity. For Europe, it provided a lesson against the dangers of any form of tyranny, whether absolutist, parliamentary, or republican in nature.⁹⁵

2.8.2 The liberal bourgeois leaders of the Revolution combined elements of Enlightenment philosophies and vulgarised them to suit their purposes. In the liberalist ideology, man is

⁹⁰ Jenkins, n21, 79-80.

⁹¹ Seignobos, n45, 260-261.

⁹² 1648-1653.

⁹³ Seignobos, n45, 236-237.

⁹⁴ Jenkins, n21, 106-107.

⁹⁵ Davies, n14, 675-677.

viewed as an independent actor whose behaviour is determined through the operation of certain general and universal natural laws. The first among these is the striving for self-preservation and personal happiness, which if pursued by all people freely, serves the common interest. Despite previous dogma, human nature does not prevent the rational ordering of society and should therefore not be suppressed. Further, man's natural pursuit of individual happiness forms the basis of the wealth of a nation by man's drive to better himself through economic activity. Given the foregoing, the state should not suppress man's natural liberty; rather, it should guarantee it as well as the free workings of the market.⁹⁶ These Enlightenment ideals of reform were summed up in two of the three pillars of the revolution: liberty and equality.⁹⁷

2.8.3 The French Revolution was primarily a rebellion against the pillars of the *ancien régime*. Nepotism and corruption in the appointed public office holders exercising royal control in the provinces was ubiquitous. New institutions were established alongside ancient ones, leading to a confused and expensively redundant bureaucracy. Those engaged in public functions were recruited by the sale of offices, inducing the government to create more offices to increase revenues, which was done prolifically in the seventeenth and eighteenth centuries in order to pay for nearly constant warfare.⁹⁸ French finances had been poorly managed and were near bankruptcy due to defeat in war, frivolous spending of the royalty and an ineffective administration. The fairness of the system of tax collection was questioned, and numerous finance ministers tried in succession to apply certain taxes to the feudal elite (the clergy and nobility of the First and Second Estates) in order to ease the extreme burden on the peasantry of the Third Estate, and to finance the enormous debt accrued in the previous century, but these were always indignantly resisted by the *parlements*. Though the kings recognised the need, they habitually capitulated to the power of the nobility. The kings' weakness in this regard strengthened the power of the *parlements*, which refused to register new taxes or

⁹⁶ Lesaffer, n29 394.

⁹⁷ Seignobos, n45, 278-279.

⁹⁸ Seignobos, n45, 209; Lesaffer, n29, 372-373; Davies, n14, 584.

admit members from the Third Estate, and clung, tightly, to the status quo, while encouraging opposition to the Church and the throne.⁹⁹

2.8.4 The country was in crisis and the ruling elite were incapable of dealing with it, effectively blind to the setting they were creating from their own greed, which would precede their downfall. Due to a lack of political representation, there were no means of gauging public opinion. In the serf populated countryside and proletarian Paris, there were no means of regulating the fear and anger at consistent poverty and deprivation. There were no institutions present in the absolutist regime to affect reforms; as such, the solution generally espoused was to break down the ancient structures entirely and start again.¹⁰⁰

2.8.5 It was a combination of ignorance and indecision in the centre of government, combined with large scale panic among those suffering the most, as well as the unchecked dissemination of revolutionary propaganda¹⁰¹ that provided the catalyst for the catastrophe. The crisis reached its zenith when the bankrupt king summoned his long neglected *états généraux*¹⁰² in order to enlist their aid in resolving the crisis.¹⁰³ A liberal minded bourgeoisie based in the elite of the Third Estate provided the impetus for this first stage of revolution, which was primarily an elitist bid to reform the royal government.¹⁰⁴ However, the aims and means of achieving goals of the Revolution would change frequently and would continue to bring instability to continental Europe throughout the nineteenth century.

2.8.6 The details of the events of the French Revolution are less important than their impact upon the French political system. In spite of the terror and violence, progress was made in the eventual establishment of the modern French state. The mass of the nation was now involved in its political future while the privileged classes were in a minority.¹⁰⁵ The three Estates, privilege, and the entire apparatus of serfdom was abolished, as was

⁹⁹ Jenkins, n21, 92-93.

¹⁰⁰ Kelly, n15, 251.

¹⁰¹ Jenkins, n21, 107.

¹⁰² General Estates - legislative and consultative assembly of the different classes (or states) of French subjects of the *ancien régime*.

¹⁰³ Davies, n14, 693.

¹⁰⁴ Lesaffer, n29, 404.

¹⁰⁵ Seignobos, n45, 282; Jenkins, n21, 102.

indirect and arbitrary taxation and restrictions on trade, including guild requirements.¹⁰⁶ The separation of the executive, legislative, and judiciary was recognised¹⁰⁷ and the independence of the judiciary was guaranteed. All pre-existing courts were disbanded and replaced by a constitutionally designed hierarchy of courts through which administrative and legal unification of the country was achieved and internal sovereignty accomplished.¹⁰⁸

2.8.7 France shrugged off the layered robe of bureaucracy and outdated systems and created new institutions and a system based on a single uniform plan applying to the whole of the realm.¹⁰⁹ By 1815, the bourgeois and landowning classes had emerged as the dominant power in France. Feudalism had been dismantled while social order and contractual relations were consolidated through the Napoleonic Codes, thanks to the rise and fall of Bonaparte.¹¹⁰ The French Revolution also helped to establish democratic institutions such as elections, representative government, and constitutions.¹¹¹

2.8.8 One enduring legal development was the concept of human rights, which was written into constitutional form in the Declaration of the Rights of Man and of the Citizen.¹¹² This document encapsulated the zenith of fundamental human rights in the eighteenth century.¹¹³ It comprised rational, logical, and visionary statements of principle, which were directed toward governing the state. The constitutional protections of fundamental rights and liberties were derived from the belief that as the liberty and power of an individual were limited by the reciprocal duties to the state, and as state power is derived from these duties, then there must also be a limitation on the power of the state.¹¹⁴

2.8.9 The French Declaration went further as it was designed to counter the abuses prevalent during the *ancien régime* by creating specific rights in counterpoint to the primary complaints against which the French Revolution was fought. It proclaimed men free and equal in their rights and identified that the fundamental aim of civil government was to

¹⁰⁶ Seignobos, n45, 291.

¹⁰⁷ Jenkins, n21, 110.

¹⁰⁸ Lesaffer, n29, 408.

¹⁰⁹ Seignobos, n45, 286-287.

¹¹⁰ 1769-1821, first reign 1804-1814, second reign 22 March-20 June 1815.

¹¹¹ Seignobos, n45, 304.

¹¹² 1789.

¹¹³ Kelly, n15, 270.

¹¹⁴ Lesaffer, n29, 387-388.

defend those natural and imprescriptible rights of man: liberty, property, security and resistance to oppression.¹¹⁵ By setting the tone with this document, France would continue to add to the list of legally protected rights while the French people would continue to agitate for better conditions and treatment. It was France who introduced the concept of *droits acquis*,¹¹⁶ which refers to the legal rule that once certain rights have been vested in their beneficiaries under the law, they cannot be taken away. While in the United Kingdom, there are rules against the passing of laws with a retroactive effect, the same protection of vested rights does not exist in such an inviolable form.¹¹⁷

2.8.10 The violence and the political change associated with the French Revolution would continue for twenty five years, would be increasingly radicalised, and eventually would destroy itself and its leaders. However, even this is not the end of the revolutionary impulses of the French people as they would continue to agitate for better political representation, working conditions, and freedom throughout the nineteenth century. The stability of the French state would not be certain until after the First World War, at the end of the so-called “Long Nineteenth Century”.¹¹⁸

2.9 The English Constitutional Monarchy and Unitary Democracy

2.9.1 While France struggled with revolution, republic, empire, and all of the violence and upheaval associated with them, Britain was generally expanding and growing, becoming the greatest economic power of the nineteenth century. British solidarity was enhanced due to a series of naval victories and the constant perceived threat of invasion by continental neighbours. Britain’s colonial, economic, and commercial power was also growing. The General Enclosure Act¹¹⁹ had also greatly accelerated social changes. The Industrial Revolution was in full swing and agitation for labour reform was beginning to occur. The first Luddite attacks occurred in Nottingham in 1811, while Napoleon was still trying to broaden the horizons of his French Empire.¹²⁰

¹¹⁵ Kelly, n15, 268-271.

¹¹⁶ Acquired Rights.

¹¹⁷ G Cornu, *Vocabulaire Juridique* (PUF 2011) 371-372.

¹¹⁸ 1789-1914.

¹¹⁹ Inclosure Consolidation Act 1801 (41 Geo 3 c 109).

¹²⁰ Davies, n14, 737.

2.9.2 Britain largely escaped the effects of the French Revolution by pre-empting similar problems through legislative reactions, as well as all of the international border fluidity that had occurred throughout Europe.¹²¹ However, while free of occupation or conquest, it was shaken by the revolutionary wars taking place on the Continent. Britain had traditionally sought to prevent Europe from being dominated by a single power, which could potentially threaten the sovereignty of Britain and its colonial empire. As the French revolutionary armies, and later Napoleon, advanced across Europe, Britain became an irreconcilable foe of the Revolution and the French Empire out of the need to preserve its own interests.¹²² Despite repelling foreign attacks and waging war against the European threat, there were moments when revolution was a real possibility in Britain. Nearly constant warring with France from the beginning of the Revolution in 1789 made any internal political reforms difficult.¹²³ However, reforms to the electoral system were implemented in the Reform Act of 1832,¹²⁴ which reduced the power of the rural gentry and increased the power of the urban middle classes.¹²⁵

2.9.3 Britain of the eighteenth and nineteenth centuries encapsulated the highpoint of modernity. It was the home of the Industrial Revolution decades before continental Europe would undertake the commercial and economic changes required to encourage industrial progress. Through its dominance of global trade it was able to restrict the wars to Continental territories.¹²⁶ Its form of government had been reasonably settled since the Bill of Rights¹²⁷ set up the constitutional monarchy in 1689. While the voting franchise was yet to be extended fully, Britain enjoyed a stability uncommon to the rest of Europe.

¹²¹ *Ibid.*, 729.

¹²² Lesaffer, n29, 412.

¹²³ Davies, n14, 737.

¹²⁴ (2&3 Will. IV c 45).

¹²⁵ Lesaffer, n29, 422.

¹²⁶ Davies, n14, 728.

¹²⁷ An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown 1689 (1 William & Mary Sess 2 c2).

3 Conclusion

3.1 Different Histories Influencing Different Legal Approaches

3.1.1 While Britain and France evolved along parallel lines in terms of their statehood and political systems from Roman times through to the Middle Ages, they began to diverge as early as the eleventh century. While both were feudal in nature, English feudalism had been imported and imposed by its Norman conquerors.¹²⁸ While the French feudal system evolved somewhat organically as the gifts of land and privilege were disseminated further and further from the centre, effectively dispersing the central authority of the king, the Norman conquerors recognised this as a problem and created a system that circumvented it by requiring that vassals also swear allegiance to their sovereign. Thus, by as early as the eleventh century, the English monarchy was effectively centralised while its French counterparts continued to rely upon a moral authority and loyalty purchased through royal gifts.¹²⁹

3.1.2 The fifteenth century saw further differentiation. Although both regimes effectively consolidated power at this time, France and England diverged in the Protestant Reformation. In England, the creation of a non-Catholic state religion allowed it to sever its dependence upon Rome and become a state of unlimited sovereignty over both politics and religion.¹³⁰ The Catholic faith was retained as the national religion in France, as well as a subtle intolerance for progressive philosophical or religious ideas, keeping the French *physiocrats* from influencing their own country until the French Revolution.¹³¹ English rationalism and individualism would, however, see it through to the first Industrial Revolution years ahead of similar progress in France.

3.1.3 The dissolution of the monasteries also had a profound effect on the economy of England. The suppression of religious houses and sale of their property helped the English economy to grow and increased an enthusiasm for profit as theological attitudes began to change with the separation of the political and spiritual. The Reformation in England had a fundamental effect on attitudes toward capitalism as a focus on

¹²⁸ See above section 2.2.4.

¹²⁹ Ibid, 2.3.2.

¹³⁰ Ibid, 2.4.1.

¹³¹ Ibid, 2.5.

individuality and hard work became a more accepted way of life.¹³² As early as the sixteenth century in England, capitalist behaviours can be observed as the laws of the market steadily replaced custom and tradition. France would never see a widespread acceptance of capitalism, but it would be accepting of liberalism for certain periods during the French Revolution.

3.1.4 While England and France both had highly stratified class systems throughout the Middle Ages, France systematically destroyed its *ancien régime* in a series of more or less decisive acts of revolution.¹³³ The class system in England endured, though its strict feudal character fell away as industrialisation progressed. However, there was not the same violent rejection of class as there was in France. Rather, the countrymen of the regions desired to retain traditional ways, rather than progress away from superstition and subservience. In a sense, the imposition of top down changes during the Tudor era seemed to instil a stronger loyalty to tradition in England, while the opposite was true in France.¹³⁴

3.1.5 Britain was able to evolve gradually toward a more liberal mind set while France suffered immediate and catastrophic changes during the French Revolution. The English Civil War influenced England's dealings with the royal executive in the decades to come, culminating in the Glorious Revolution and the English Bill of Rights.¹³⁵ This in part set the stage for the French Revolution, though without the quantity of violently despotic leaders and the significant death toll. By the time of the French Revolution the United Kingdom had already settled into a constitutional monarchy, though an electoral reform that extended the franchise outside of the wealthy would take nearly 150 years to arrive.¹³⁶

3.1.6 The French republican system and the British unitary democracy within a constitutional monarchy are today not so very different than their histories suggest. However, the events leading to their development differ such that it can be expected that approaches to

¹³² Ibid, 2.6.

¹³³ Ibid, 2.8.

¹³⁴ Ibid, 2.6.1

¹³⁵ Ibid, 2.6.3 and 2.6.4.

¹³⁶ Ibid, 2.6.5.

legal regulation are affected. The socially democratic leanings of France influence the interventionist methods of legal regulation while the more liberal democratic style of the United Kingdom tends to avoid intervention in the market if possible. France also places a constitutional value on the concept of human dignity and individual human rights,¹³⁷ and although the UK recognises these concepts, it is not a central foundation of its legal system. This has led France to present a legal bias toward the individual employee over businesses, while the UK tends to retain an outlook that espouses economically liberal ideals, preferring to leave employee rights to the vagaries of the free market. Thus, the diverse religious, social, economic, and political-historical experiences of Britain and France have had a direct effect on their approaches to social and commercial regulation.

3.2 Transition

3.2.1 The foregoing Chapter has explored several specific historical events that are argued as having a significant influence on the development of legal approaches to regulation. These experiences have impacted upon political views, legal systems, social considerations, and economic aspects of a jurisdiction and are important elements that affect legislative aims. The establishment of the differences between the evolution of these ideals in the UK and France have provided the foundation upon which the evolution of labour regulation and, in due course, insolvency systems can be built.

3.2.2 The next Chapter will explore the proletarianisation of labour in both the United Kingdom and France and the process of industrialisation in both jurisdictions. It is within the framework of the Industrial Revolution that a more recognisably modern regulatory systems emerged. The differences in the regulatory styles of each system also become apparent in how each deals with the social ills occurring as a result of industrialisation. The evolution of labour regulation will then be traced from its genesis in the Industrial Revolution until the emergence of the European Union as an influence on British and French social policy regulation.

¹³⁷ Ibid, 2.8.8.

CHAPTER 3:

PROLETARIANISATION, INDUSTRIALISATION, AND THE EMERGENCE OF LABOUR REGULATION IN FRANCE AND BRITAIN¹

*“Capital is dead labour, which, vampire-like, lives only by sucking living labour,
and lives the more, the more labour it sucks.”*

~ Karl Marx

1 Introduction

1.1 The Historical Survey in Review

1.1.1 While evolving toward modernity in terms of statehood, the law, economics, and society, the UK and France encountered different historical events that influenced the particular characteristics that define each jurisdiction. Differences in feudalism led France into the *ancien régime* practices,² while the centralised character of English feudalism allowed the English state to more effectively consolidate its government in advance of the French state.³ England was further assisted by the separation of the English church from Rome, which established state sovereignty in England and provided a significant financial boon as a result of the dissolution of monastic houses. The late medieval focus on the individual nature of religion in England also encouraged attitudes supporting individual hard work as a means of attaining not only paradise, but also wealth.⁴ The retention of Catholicism in France, in addition to its typically traditionalist character, was coupled with subtle intolerance for progressive ideas, which would effectively slow French economic growth and delay industrial progress, albeit the

¹ Portions of this chapter were presented in conference presentations given at the Socio-Legal Studies Association Annual Conference in Aberdeen and at the Society of Legal Scholars Annual Conference in Nottingham in April 2014. See Annex 2 Publication 5.

² See Chapter 2 section 2.2.2.

³ Ibid, 2.2.3 and 2.2.4

⁴ Ibid, 2.4.1.

same ideas would also inform the philosophical underpinnings of French revolutionaries.⁵

1.1.2 Both jurisdictions underwent social and economic developments, but the means and character of those changes differed on a fundamental level. The catastrophic changes that occurred during the French Revolution led to more immediate and significant changes affecting the rate at which new legislation and legislative reforms took place over time.⁶ Further, the ideological basis of modern France as influenced by revolutionary philosophy has influenced the approach to legal regulation, putting an emphasis on human dignity and individual rights. The Declaration of Rights of Man and the Citizen⁷ started France on a path toward acquiring more and greater social rights. The French system also relies on the policy of *droits acquis*,⁸ which makes it particularly difficult to lessen protective regulation once it has been put in place.⁹

1.1.3 In the UK, the Glorious Revolution, while not a revolution as such, amounted to recognition of a preference for parliamentary sovereignty over absolutism that was integrated into the constitutional underpinnings of the country beginning with the time of the English Civil War.¹⁰ Change came about slowly and gradually in the UK, however, which would be a lasting and fundamental characteristic of the British political system, differentiating it significantly from the French political system. In addition to the civil character of its legal system, the revolutionary character of France helped to justify ongoing interventionist tendencies in areas of law, economics, and society about which the UK would be cautious or otherwise inhibited to duplicate.¹¹

⁵ Ibid, 2.4.3.

⁶ Ibid, 2.8.7.

⁷ 1789.

⁸ Acquired rights.

⁹ Chapter 2, section 2.8.9.

¹⁰ Ibid, 2.6.2.

¹¹ Ibid, 3.1.

- 1.2 An Introduction to Industrialisation and Proletarianisation¹²
- 1.2.1 The differences in approach taken by France and the UK toward labour regulation¹³ during industrialisation influenced their reactions to the social ills caused by it.¹⁴ Industrialisation was an important turning point in French and English attitudes toward the working classes, business, economics, and labour regulation. These attitudes in turn feed into the political, legal, economic, and social policies of each jurisdiction, influencing the aims of regulation.
- 1.2.2 Britain moved organically into an economically liberal mode of production by the early eighteenth century, while France struggled with revolution and autocracy until the end of the First World War.¹⁵ With a political structure based in liberal constitutionalism came the push toward capitalism, the ideals of the free market, and eventually industrialisation. By the time industrialisation occurred in Britain, it had already conquered its colonial and international markets and was largely devoid of any external competitive pressure. In France, industrialisation had to be forced and to some extent managed by the state in order to protect it against the imperialism of Britain's free trade.¹⁶
- 1.2.3 France's process of industrialisation was less revolutionary, resembling a slow evolution of systems, processes, and ideas. As late as the 1880s, the old economic sectors remained the primary source of growth. Agricultural production was still a fundamental aspect of the economy while industry was divided into a small, concentrated, and dynamic modern sector, and a traditional sector that still relied on home craft work and the dispersion of industry in the rural areas. There was never the massive and rapid transfer of manpower from agriculture to the industrial centres in France, such as occurred in Britain a few decades after industrialisation had begun.¹⁷

¹² This section formed part of a paper given at the INSOL International Academic Colloquium conference in Hong Kong in March 2014 entitled "Obstacles to Cross-Border Insolvency and Employment Protection Coordination in the European Union: Examples from the UK and France" which then formed the basis for an article entitled "Path Dependent Obstacles to Cross-Border Insolvency: a Social Darwinian Perspective" 2015 3 NIBLeJ 7. See Annex 2 Publication 3.

¹³ References to labour law or regulation should be taken to include employment law or regulation and vice versa.

¹⁴ B Hepple and P O'Higgins (eds), *The Making of Labour Law in Europe: a Comparative Study of nine Countries up to 1945* (first published 1986, Hart 2010) 5-6.

¹⁵ Hereafter referred to as "WWI".

¹⁶ R Price, *Labour in British Society* (Routledge 1986) 16.

¹⁷ M Despax, J Rojot and J-P Laborde, *Labour Law in France* (Kluwer 2011) 209-210.

- 1.2.4 Britain's early industrialisation meant that the modern business enterprise began to emerge before the legal system could adjust from late-medieval or early modern forms of regulation. The contract of employment and companies limited by share capital had not yet fully developed when industrialisation was well under way. However, in France, private law codes were introduced decades before large scale industrialisation began and were therefore able to support the emergence of industrial enterprises. The differences in scale and speed of industrialisation had profound effects upon the legal and economic development of British and French societies.¹⁸
- 1.2.5 For Britain, one consequence of its unbalanced pace of industrialisation juxtaposed to legal developments was the persistence of the quasi-penal master and servant model of the employment relationship, which served to institutionalise the conception of the enterprise as the unencumbered private property of the employer to which employees were subordinated. The new economic relationship of employer and employee was based upon the capital provided by the employer for the employee to use in order to perform the services for which he was being paid. The employee often became wholly dependent upon the industrial employer, in some cases for food, shelter, and the education of children, as well as for the tools and place of his trade.¹⁹ This can be contrasted with the French concepts of work relations, which moved quickly from penal sanctions to an imposed juridical equality between worker and employer that was embodied in legal codes. The employer's control over employees and an employee's natural position of subordination was tempered by the development of mandatory social legislation, the *ordre public social*.²⁰
- 1.2.6 Labour regulation developed following or in a disconnected parallel to industrialisation. It could, therefore, be surmised that the implementation of labour law was not constitutive of the factors of production, but reflected the economic and social structures of a jurisdiction.²¹ Thus it relates directly to the path dependency of regulatory approach, rather than market and social demands. The modern cultural and social values

¹⁸ S Deakin, P Lele and M Siems, "The Evolution of Labour Law: Calibrating and Comparing Regulatory Regimes" (2007) 46(3-4) Int'l Lab Rev 133, 139.

¹⁹ Ibid, 140.

²⁰ Social Public Order.

²¹ Hepple and O'Higgins, n14, 14-15.

in France have led to a liberal and social conception of labour law, giving a great role to the freedom of association and union activities, encouraging social dialogue, and fighting against every form of discrimination. It also ensures widely guaranteed incomes either at work or in the case of unemployment.²² British labour regulation, however, was instituted after labour interests had become able to wield real and damaging political power. Thus labour regulation was first introduced with broadly economic goals aimed at tempering or even replacing the power of labour interests in order to take control of the labour economy, and later in order to meet minimum limits set by EU law. The purpose of this Chapter is to explore the social, political, economic, and regulatory aspects of industrialisation and proletarianisation in the UK and France in order to understand the methods and purposes through which labour regulation was introduced.

2 **Theoretical Underpinnings of the Industrial Revolution**

2.1 Pre-Industrial Economics

2.1.1 Prior to the Industrial Revolution, a mercantilist economic system was in place in most Western European nations. Mercantilism refers to the conviction that, in order to prosper, the state needed to manipulate every available advantage to create the best environment for prosperity. The mercantilist system discouraged imports through financial restrictions, while encouraging exports and promoting manufacturing at home. It concerned itself with strengthening the sources of economic power while suppressing competition with economic rivals with an emphasis on the government's intervention in the national economy.²³ During the Elizabethan era, England relied upon mercantilism to support its growing international trading aspirations, paving the way for the British global trading empire of the nineteenth century.²⁴ In France, mercantilism reached its peak with Colbert,²⁵ finance minister to Louis XIV. While Colbert encouraged industry and trade, created state owned factories, reorganised state finances and the court system, built up the navy, and founded the East and West Indies Companies, the bourgeoisie were generally uninterested in Colbert's innovative investment opportunities as they

²² Despax, Rojot and Laborde, n17, 33.

²³ L LaHaye, "Mercantilism" (Library of Economics and Liberty: The Concise Encyclopaedia of Economics, 2008) <<http://www.econlib.org/library/Enc/Mercantilism.html>> accessed 25 February 2014.

²⁴ N Davies, *Europe: A History* (Pimlico 1997) 523, 602-605.

²⁵ 1619-1683, in office from 1665-1683.

preferred low risk investments or the purchase of offices.²⁶ His innovative plans ended in bankruptcy.²⁷ The attitudes of the bourgeoisie of this period are reflective of common risk-averse attitudes that continued through to the time of the French Revolution and beyond.²⁸

2.1.2 Mercantilism was not able to support the economic growth for which it had been instituted. In the early eighteenth century, a conviction grew that economic life could not progress further unless states ceased to apply artificial curbs and restrictions on trade.²⁹ In France in particular, revolutionary notions of social welfare were being voiced by notable French intellectuals.³⁰ It was theorised that national economic prosperity could not be assured but through the personal prosperity and liberty of all. The ideas of this group of Frenchmen had a formative influence on the founder of classical economics, Adam Smith.³¹

2.2 An Economic Revolution

2.2.1 The Industrial Revolution invited a new view of political economics and production. In Smith's *The Wealth of Nations*,³² the protectionist philosophy of mercantilism was shattered in favour of a free market. He introduced the concept of *laissez-faire* as a fundamental requirement for the market to function effectively, which would then theoretically foster social harmony. The market is personified as having an 'invisible hand' that keeps economic activity ordered and organised. State intervention in the affairs of business has a detrimental effect, superseding the natural order and restricting the natural liberty of man. The state should confine itself only to guaranteeing the proper functioning of the market. Smith's view was that it is the market rather than the state that creates prosperity, debunking the logic of mercantilism entirely.³³

2.2.2 In Britain, for more than one hundred years prior to the publication of the *Wealth of Nations*, the state was retreating from intervention in the economy. Smith's work gave

²⁶ C Jenkins, *A Brief History of France: People History and Culture* (Constable and Robinson Ltd 2011) 78-79.

²⁷ C Seignobos, *A History of the French People* (CA Phillips tr, first published 1933, Hesperides 2006) 249.

²⁸ HAL Fisher, "The Protectionist Reaction in France" (1896) 6(23) *Econ J* 341.

²⁹ Davies, n24, 602.

³⁰ See F Quesnay, J de Gournay, JP Dupont de Nemours, and J Turgot.

³¹ Davies, n24, 602.

³² A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (first published 1776, Oxford World Classics 2008).

³³ R Lesaffer, *European Legal History* (CUP 2009) 393-395.

expression to the thoughts that had been raised through Britain's international trading and colonial experiences. Setting as its guiding principle the spontaneous choices of ordinary men allowed individualism to succeed and British entrepreneurial spirit to flourish. British capitalism was strengthened by the belief that individuals were capable of creating laws that were as impersonal as those of the natural sciences and that, in so doing, such laws must also be socially beneficial.³⁴ This outlook essentially justified the actions taken by industrial society to promote itself over the best interests of a commoditised labour force.

2.2.3 Smith also introduced the concept of labour as a commodity into common parlance, stating that "the demand for men, like that for any other commodity, necessarily regulates the production of men..."³⁵ This presages the concepts introduced by Malthus concerning population, work, and wages.³⁶ Malthus argued that wages should never be raised above subsistence as the population would continue to grow in numbers as the means of subsistence increased. Raising the standards of mankind would mean feeding population growth in parallel with a commensurate decrease in the value of labour, leading to poverty in the working classes for lack of wage employment, due to it being spread out among a higher number of workers.³⁷

2.3 The Proletarian Plight: Social Theory

2.3.1 Proletarianisation was a process whereby dependence upon the dictates of capitalist relations increased among the labouring classes. It was not solely the subordination of the labouring classes to a technically driven labour process, but a process occurring in the sphere of market relations that involved an increased exposure to the vagaries of market forces. Employees were less able to bargain with their employers and were more dependent on a single source of income, having to work on any terms they could

³⁴ TS Ashton, *The Industrial Revolution 1760-1830* (first published 1947, OUP 1977) 102-113.

³⁵ Smith, n32, 80.

³⁶ Davies, n24, 604-605.

³⁷ T Malthus, *An Essay on the Principle of Population* (first published 1798, Gutenberg 2009) <<http://www.gutenberg.org/files/4239/4239-h/4239-h.htm>> accessed 3 July 2013.

achieve.³⁸ This may seem an unfair predicament; however, early capitalist theorists justified this position with cold, hard logic.

2.3.2 Social theory during the early periods of industrialisation was partly influenced by the views of Malthus. Poverty was often viewed as being a necessary, if regrettable, state of affairs;³⁹ an essential evil for the subsistence of the world. If everyone were rich, none would submit to the demands of another or to the drudgery associated with industrial life.⁴⁰ The insecurity and the standard of life endured by the wage earning poor was attributed to personal defects in character rather than to any faulty social or economic arrangements. A common view was that the poor were the cause of their own suffering through vice, particularly of alcohol consumption and the costs of that habit. There was also a general concern for the irreligiousness and irrationality of the poor as they were viewed as rarely taking account of what might happen in the future.⁴¹

2.3.3 The duty of the poor was to fulfil the role of labourer. Customary morality argued that, for the sake of the well-being of society and stable government, the poor should be provided only with adequate subsistence to fulfil their duties, as the provision of excess wages would lead to their own undoing through drink and debauchery.⁴² In essence, low wages were doing the poor a favour. It was also believed that the only way to impose temperance and industriousness upon the poor, thereby benefitting their character, would be to require them to work all of the time so that any spare time could only be spent resting.⁴³ These views were perpetuated in the UK during much of the early nineteenth century, but were never duplicated in such strong terms in France, due to the parallel development of human rights concepts alongside industrialisation.

³⁸ Price, n16, 21.

³⁹ C Hibbert, *The English: a Social History 1066-1945* (Guild Publishing 1987) 469 & 475.

⁴⁰ See S Jenyns *A Free Inquiry into the Nature and Origin of Evil: in Six Letters to -- --* (first published 1758, Photocopy of original by Syracuse University digitized by Google)
<<https://play.google.com/store/books/details?id=j7QCAAAAQAAJ&rdid=book-j7QCAAAAQAAJ&rdot=1>> accessed 5 March 2014.

⁴¹ TS Ashton, *An Economic History of England the 18th Century* (first published 1955, Methuen 1972) 6 & 201.

⁴² Hibbert, n39, 470-471.

⁴³ Ashton, n41, 202.

2.4 Marxist Labour Economics

2.4.1 Marxist political economy accepts that, from the perspective of capital, labour is indeed a commodity that has to be purchased at its economic cost. However, Marx viewed the freedom of the labour market under capitalism and the commoditisation of labour as resulting in the exploitation of human beings, constituting a barrier to their development, a view fundamentally contrary to Malthusian theory. Workers could gain little within a pure capitalist system; as such, in order to achieve human freedom, a transformative change was required. Given the need of the human being to develop himself through social activity, he required freedom. The need under capitalism to treat labour as a commodity is inconsistent with the labourer's need for personal development, thus a labourer would be naturally resistant to his commoditisation.⁴⁴ This is the source of labour's uncertainty and volatility if treated as a commodity. The commoditisation of labour is one of the root causes of the non-commodity like nature of labour, in addition to the fact that it is inseparable from its human character.⁴⁵

2.4.2 In terms of labour regulation, both neo-classical and the Marxist political economic frameworks agree that within capitalist markets, labour law, if conceived with protective and re-distributional aims, will require a compromise to either economic efficiency or for the ability of employers to advance their interests. Modern labour policy has struggled with the conflicting needs of social welfare and economic efficiency since it came into its modern form following the Second World War. It has caused regulatory dilemmas, particularly within liberal market economies such as the UK, which have continued to resist the advance of protective labour regulation.⁴⁶

2.4.3 Essentially, if one were to rely purely on the movement of market forces, workers could never improve their position. Individual improvements risked decreasing overall standards for workers to maintain balance against the lowest standard. It later became clear that a framework of public services was also necessary if industrial society were to operate without social discomfort, contrary to the firm beliefs present in *laissez-faire*

⁴⁴ See K Marx, *Capital: Critique of Political Economy* (first published 1867, Kindle edn, Penguin 2004).

⁴⁵ E Tucker, "Renorming Labour Law: Can We Escape Labour Law's Recurring Regulatory Dilemmas?" (2010) 39(2) ILJ 99, 105-106.

⁴⁶ Tucker, n45, 100.

economics.⁴⁷ However, industrial society would have to go through dark and uncomfortable times before the need for some regulation was recognised.

3 **The Reality of Industrialisation**

3.1 Proto-Industrialisation

3.1.1 There were a number of elements that had to come together to make it possible to move into an industrial, mechanised, and power-fuelled society. Farming, mobile labour, steam power, machines, mines, metallurgy, factories, towns, communications, finance, and demographics were all important elements that contributed to the potential for industrialisation throughout Europe. Farming needed to increase food production so that more people in cities and towns could be fed from the same land. Large scale farming meant that men could be released, or in some cases evicted, from the land to find other forms of employment. The rising availability of food contributed to rising birth rates, creating a pool of surplus labour and allowing a fall in wages that would serve the requirements of profiteering industrialists.⁴⁸

3.1.2 Commerce and industry expanded throughout Europe during the second half of the seventeenth century, particularly in cottage industries, which were gradually subsumed into larger workshops, set up by investors supplying raw materials who purchased manufactures from cottage workers. Workshops employed scores of day labourers, allowing them to enhance productivity and keep the production process tightly managed. Industries were built upon this workshop structure and their manufactures. However, the introduction of the steam engine initiated a true revolution in the already fast growing industries of urban centres, adding geographic flexibility that had not existed when manufacturing power was dependent on the power of running water. It allowed humans to break through their natural limitations of production, which had previously limited economic growth.⁴⁹ Following the introduction of standardisation, specialisation, and mass production, large plants and factories were built that employed thousands of workers, displacing traditional craft workshops and cottage industries. Fashion began to

⁴⁷ Ashton, n34, 102-113.

⁴⁸ Davies, n24, 679-680.

⁴⁹ Lesaffer, n33, 375.

dictate manufacturing requirements, while mass production made it possible to tailor goods to consumer demand.⁵⁰

3.1.3 Industrial production and trade had become more important than agriculture and led to widespread urbanisation. Old towns expanded while new towns grew up around coal centres and harbours. Due to the importance of trade and commerce in the industrial economy, the demands of investors came to dictate the economic policies of the state, often to the detriment of landowners.⁵¹ In the industrial world, land no longer equated to power, thus the theories of economists of the late eighteenth century took up the concept of commoditisation of the elements of industry. A new and amoral view of what had once been value laden aspects of medieval society characterised the attitudes toward industrial society.

3.1.4 In order to support industrialisation on a large scale, large quantities of capital were also required. Investors had to be willing to take immense risks in order to make potentially immense, though uncertain, gains. Such capital was only available in countries where pre-industrial enterprises had been able to accumulate a ready store of capital.⁵² Such capital was readily available in eighteenth century Britain. The guild system had already begun to break down or was no longer enforced, which made it possible for entrepreneurs to exercise their initiative free from the Elizabethan guild restrictions that had previously inhibited growth and movement within the economy and labour market.⁵³

4 **The British Industrial Powerhouse**

4.1 Introduction

4.1.1 There are a number of characteristics peculiar to the British people, economy, and even geography that contributed to the ability to grow its industry on a grander scale than its continental neighbours. The genius of practical craftsmen coupled with underemployed capital, cheap labour, new techniques of mass production, and a Protestant work ethic

⁵⁰ Lesaffer, n33, TS Ashton, n34.

⁵¹ Lesaffer, n33, 377.

⁵² Davies, n24, 682.

⁵³ Ashton, n34, 9.

helped to push Britain to world economic leadership.⁵⁴ There were a range of new inventions and thousands of patents taken out in the late eighteenth century.⁵⁵ The capital available from the building of the colonial empire, with developments in agriculture, and the cottage industry provided Britain with a large domestic and colonial consumer market. Its economy was also isolated from continental Europe during the Napoleonic wars, which further stimulated British industry.⁵⁶

4.2 British Industrial Economics

4.2.1 The Industrial Revolution was an economic as well as technological affair, consisting of changes in the volume and distribution of resources as well as in the methods of resource allocation toward specific ends.⁵⁷ With the emphasis on commercial and economic power, Britain underwent a number of economic changes preceding and during the Industrial Revolution. The late seventeenth century saw the growth of the permanent institutions of public credit in the Bank of England, the Royal Exchange, and the National Debt, as well as speculation associated with the colonial trade. The existence of the facility to invest and utilise capital as well as the willingness to take financial risk helped make the Industrial Revolution possible.⁵⁸

4.2.2 The Industrial Revolution forced a change in the approach to economic and commercial regulation. Land and labour had to be commoditised in order to support the growth of industry and commerce. The commoditisation of land meant that it could no longer provide the basis for social organisation in British society, leading to a revolution in social hierarchies. An individual's labour had also provided a basis for social organisation as it was deeply imbued with custom and highly regulated by guilds, which required membership in order to learn a trade and possessed local monopolies of their trade products.⁵⁹ Deregulating the labour and property markets effectively subordinated the British economy to the laws of the supply and demand.⁶⁰ The new emphasis on

⁵⁴ JM Kelly, *A Short History of Western Legal Theory* (OUP 1992) 245-246.

⁵⁵ Hibbert, n39, 468.

⁵⁶ Lesaffer, n33, 376.

⁵⁷ Ashton, n34, 76.

⁵⁸ Davies, n24, 582.

⁵⁹ P Anderson, *Passages from Antiquity to Feudalism* (first published 1974, Verso 2013) 206-207.

⁶⁰ DB Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (CUP 2007) 177.

economic growth through innovation and efficiency in industry required a change of approach to national economics.

4.2.3 The change in the approach to economic regulation was also a shift from a morally based economy to a political economy. The mercantilist moral economy was protectionist, not just of national interests, but also of individual interests. The customary requirements of protection by the nobility of its peasantry dictated that agrarian markets should be regulated in order for peasants to have access to what was needed to satisfy their needs before larger buyers could purchase products to resell at a profit. This welfare principle prevented a bulk purchaser from buying more cheaply than a small purchaser in order to satisfy the requirements of human morality. To do otherwise would have allowed larger purchasers to enjoy an unfair advantage over subsistence peasants.⁶¹ The move to a political economy ignored this perceived moral aspect of commerce. Without this moral element, the poorest were left to struggle to buy their needs for subsistence in the same competitive market as commercial agriculturists.

4.2.4 During the 1820s, the classical economic theories of Ricardo⁶² began to influence the economic policy of the state. The labour theory of value, the relationship between wages and profit, and the distinction between productive and unproductive labour began to receive attention. These theories diverted attention from the artisanal ideology prevalent in the eighteenth century, which placed value on custom and habit as well as upon the natural passions of human nature. Modern economic theories reduced the human condition to numbers and sums, allowing capitalist power to subjugate the labourer and exercise influence over every aspect of the working man's life. Artisanal ideology tried to resist the paternal reciprocity of industrial relations; however, labour and industry were progressively abandoned to the uncontrolled effects of mechanisation, free trade, and competition. Only political intervention could change labour conditions, but this was not permitted under the policies of *laissez-faire* economics.⁶³

⁶¹ Goldman, n60, 177.

⁶² See D Ricardo, *Principles of Political Economy and Taxation* (first published 1817, Prometheus Books 1996).

⁶³ Price, n16, 51.

- 4.2.5 In order to accommodate the economic needs of industrialisation, Britain had to replace medieval regulation of the corporation and protectionist statutes that controlled production and the distribution of wealth with free market competition.⁶⁴ Thus the Statute of Artificers,⁶⁵ which had provided fines for individuals who worked outside the craft corporation system, was repealed in 1813-14. Guild and corporation restrictions had previously prevented the division of labour within a single workshop setting, inhibiting the potential for specialisation. The Statute was at odds with the emerging form of factory labour. With the repeal of this Statute, the means were made available to engage in more efficient and modern forms of production and employment.⁶⁶
- 4.2.6 While those within the corporation system rose to defend the Statute as they viewed the approach of industrialisation, division of labour, and the proletarianisation of British working classes as a threat to their relatively protected livelihood, it was recognised by the government as well as economists that the Statute hindered innovation in the ancient trades as only new trades were permitted to take advantage of modern forms of production. Restrictions and controls on trade were contrary to the policy of *laissez-faire*. The remaining powers of city guilds to regulate trades were formally repealed by the Municipal Corporations Act⁶⁷ of 1835.⁶⁸
- 4.2.7 The working classes provided diverse resistance to the transition to unrestrained market relations. In the 1830s, an attempt was made to create a different structure of labour and product markets to those of industrial capitalism through the use of cooperative manufacturing. Robert Owen provided a coherent analysis⁶⁹ of social trends, confirming that the focus on competition is disruptive to decent standards of social peace. He also offered an analysis of economic development that integrated notions of justice and morality rather than the perceived amoral character of competitive capitalism. However, no means of achieving this cooperative society was forthcoming that would replace the

⁶⁴ A Toynbee, *Lectures on the Industrial Revolution in England* (first published 1884, AM Kelley 1969) 92.

⁶⁵ Statute of Artificers 1562 (5 Eliz 1 c 4).

⁶⁶ S Deakin and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (OUP 2005) 54-55.

⁶⁷ The Municipal Corporations Act 1835 (5&6 Wm 4 c 76).

⁶⁸ Deakin and Wilkinson, n66, 57-58.

⁶⁹ See R Owen, "A New View of Society" or "Essays on the Principle of the Formation of the Human Character, and the Application of the Principle to Practice" (first published 1816, Political Economy Reference Archive) <<https://www.marxists.org/reference/subject/economics/owen/>> accessed 10 March 2014.

capitalist system with a restructured industrial and political system that could secure worker independence.⁷⁰ While there was a continual undercurrent of socialist politics in Britain, there was little achievement of socialist aims within the political sphere.

4.3 The British Labouring Classes: Proletarianisation

4.3.1 As early as 1700 the English regions had already been effectively divided into industrial provinces as certain areas specialised in particular industries, owing to specific geographic, geological, or demographic conditions. This led to a growth of industrial towns according to their nature, and was aided by improved methods of transportation for products necessary for an increased population.⁷¹ In 1760, two thirds of British people were still living in the country and agriculture remained the largest occupation; however, Britain was growing phenomenally at this stage.⁷² Trade in the colonies had created the largest free trade area in the world, while a new consumerism saw the rapid increase in demand for consumer goods.⁷³ These were now available at lower costs due to efficiency in production, thus creating demand for higher production levels, which the progress of industrialisation sought to satisfy.⁷⁴

4.3.2 The emergence of a wage dependent class preceded the growth of large scale industry,⁷⁵ as agricultural labourers were forced to rely on day labour, move into the towns to engage in industrial work, or in some cases, rely on the parish poor relief due to the loss of common lands by enclosure.⁷⁶ Enclosure led to evictions and vagrancy, creating a pool of workers that contributed to a body of semi-employed and inefficient labour. Men no longer tied to the soil were now free to devote themselves to other activities that would raise the standard of consumption and the entrepreneurial spirit required for industry to take root,⁷⁷ though in practice, the results were rarely so positive.

⁷⁰ Price, n16, 53-55.

⁷¹ Ashton, n41, 94-95.

⁷² Kelly, n54, 245-246.

⁷³ Hibbert, n39, 466-467.

⁷⁴ Ashton, n34, 1.

⁷⁵ Deakin and Wilkinson, n66, 44.

⁷⁶ Enclosure refers to the parcelling of previously common lands to sell to large landowners or corporate style farmers. See Ashton, n41, 38-39 & 47.

⁷⁷ Ashton, n34, 20-21.

- 4.3.3 Enclosure deprived Britain of the peasants that formed the backbone of most other European nations. Social solidarity, primitive democracy, and a national consciousness that grows from a peasant based community were destroyed. The sense of Britishness was now projected downward from the institutions of the state. Land came into the hands of a small group of farmers and landowners, while British society was comprised of a prosperous loyalist minority and a dispossessed majority who would carry the resentment of their lost traditions and attachment to the soil into the heart of the British class system in the future.⁷⁸ The loss of individualism and independence due to enclosure and reliance on parish systems of support made the steady fragmentation of skill required for specialisation and large scale manufacturing that much easier to accomplish.
- 4.3.4 While the dissolution of ties to land and agriculture granted freedom of movement in principle, the application of Elizabethan Poor Laws⁷⁹ were impediments. Parishes were often unwilling to receive outsiders because they might establish a claim to poor relief in the new parish. In addition, employers, who were often the largest rate payers, would offer work only for a period short of a full year in order to avoid the expense of an individual establishing himself as a parish resident. In the event an individual was not in a parish for the requisite period, he could be sent back to his previous parish should he fall on hard times and require poor relief.⁸⁰
- 4.3.5 The Poor Laws gave expression to a network of reciprocal obligations linked with wage labour, the family, and the wider social order. Service was considered a formal duty for those who did not have an independent means of subsistence. Service was also a means whereby a man and his family might gain the right to poor relief in the event of unemployment or sickness. The Poor Law of 1601 assumed that those in receipt of it had access to some land in order to supplement the funds they received from the settlement. This changed with the development of industrial society as people depended more on wages than on land to live.⁸¹ The poor law system would last into the

⁷⁸ Davies, n24, 632.

⁷⁹ Act for the Relief of the Poor 1563 (5 Eliz I c. 3); Act for the Relief of the Poor 1597 (39 Eliz I c.3); The Poor Relief Act 1601 (43 Eliz I c 2).

⁸⁰ Ashton, n34, 88-89.

⁸¹ Deakin and Wilkinson, n66, 110-111.

nineteenth century, tying wages to settlement, often to the detriment of the working classes. The poor law system of settlement was finally abolished in 1834,⁸² which would facilitate the free movement of generally unskilled workers seeking wage labour in the industrial centres of Britain.⁸³

4.3.6 The saturation of the labour market by unskilled workers as well as the introduction of machinery led to the deskilling of the labour supply. Specialisation and division of labour had further simplified industrial processes, making it easier for workers to move from one occupation to another,⁸⁴ contributing also to the dissolution of the traditional household economy as women and children entered into direct competition with men. Wages reduced as competition rose in the labour market.⁸⁵ Peasant men and women came to live crowded together earning their living as units of the labour force in factories rather than as communal groups of families and neighbours working together to produce from the land.⁸⁶

4.3.7 Initially, it was rare for workers to seek continuity of work as casual hiring methods engendered casual working habits. Essentially, workers sought work when funds were needed to satisfy their subsistence requirements. The preference for leisure time and the fact that most workers were paid by the piece led to the rapid and sometimes negligent or otherwise poor quality production of goods in order to gain the cash in as little time spent working as possible. This led to the requirements of working hours being imposed and standardised in contracts and eventually to the widespread use of employment contracts stipulating standards, hours, and wages. Eventually, workers became inured to the regularity of work, although the process of conditioning the labour force to stricter rules of working was difficult and unpleasant. However, had codes of conduct and working rules not been imposed during the early days of the Industrial Revolution, there could have been no factory system or the rise in output that led to an improvement in working conditions during the nineteenth century.⁸⁷

⁸² Poor Law Amendment Act 1834 (4&5 Will 4 c 76).

⁸³ *Ibid.*, 41.

⁸⁴ Ashton, n34, 1-2 & 41.

⁸⁵ Price, n16, 25.

⁸⁶ Ashton, n34, 1-2 & 41.

⁸⁷ Ashton, n41, 203.

4.3.8 Eventually, all industrial workers lived in fear of losing their jobs as there were usually more people than jobs available. Employees clung to employment so anxiously that their masters were able to exploit their desperation. Men were often required to pay hiring charges to use an employer's tools and were asked to pay for repairs to the employer's own equipment. In true Dickensian style, in some offices, clerks were recommended to bring their own coal to work to provide fuel for the furnace during cold weather. Any complaint was likely to lead to dismissal, which would lead to reliance upon the inadequate and humiliating poor law relief.⁸⁸ In true Malthusian style, wages were generally paid to only a subsistence level based on working most of the year; however, workers were usually unable to work the number of days needed to meet their subsistence needs due to the vagaries of the market. As wage goods⁸⁹ increased in price and wages remained fairly flat, it became more and more difficult for labourers to survive on their daily wage.⁹⁰ Thus the plight of the industrial proletariat became untenable in Britain, though it would be some time before any remedy was made available.

5 **The French Industrial Character**

5.1 Introduction: A French Approach to Industry

5.1.1 France maintained a small scale industrial character while rapid industrialisation was occurring in England. Instead of the decomposition of traditional trades, luxury and fashion trades remained the most common, which encouraged the continuance of small scale artisanal production. French exports were dominated by artefacts associated with these traditional trades until the last quarter of the nineteenth century.⁹¹ Wealth in France generally remained in real property. Large scale industry was not yet common and was only developed as a result of the introduction of English textile manufacturing machinery and new chemical processes. While power rested primarily in the

⁸⁸ Hibbert, n39, 592.

⁸⁹ A wage-good is a basic good that a wage earner might buy.

⁹⁰ Hibbert, n39, 470-472.

⁹¹ M Sonescher, *Work and Wages: Natural Law, Politics and the Eighteenth Century Trades* (CUP 1989) 370-375.

bourgeoisie, that class generally avoided financial risk, which limited investment resulting in slower industrial development,⁹² at least compared to Britain.

5.1.2 France thus took a deliberate approach to industrialisation. There was first a steady expansion of industry in the countryside relying on small scale cottage production that laid the groundwork for large scale industrialisation. Peasants in the countryside relied upon their cottage industries during the slow agricultural seasons, which helped to compensate for excessive divisions of landholdings or the precarious existence of tenant farmers and agricultural labourers. Merchant manufacturers were content to exploit this ready supply of labour. This form of industrial organisation was a resilient French system. However, this type of proto-industrial economy would not be able to keep up with competitors so the transition to a more scientifically and technologically dynamic economy was necessary.⁹³

5.1.3 The quality of French industrialisation was also characterised by a form of flexible specialisation that aimed to develop increasingly sophisticated versions of artisan tools for the use of skilled labour. The new machinery still made heavy demands on the skills of the operative, unlike the specialisation in British industry that mainly required repetitive small tasks of its unskilled labour force. Skill focussed specialisation was, however, well suited to the craft traditions of French labour in catering to creativity and quality. The flexible specialisation could not, however, replace the profit making ability of mass production, despite the fact that it likely produced higher quality and more diverse goods.⁹⁴

5.1.4 France was slow to concentrate production, but an increasing sub-division of tasks eventually led to a de-skilling of the labour force, which reduced individual wages. In comparison to those who continued to work in at least semi-skilled industries, income distribution was increasingly unequal. Such inequality of income distribution acted as a drag on industrial consumption, decreasing economic growth.⁹⁵

⁹² Seignobos, n27 319-321.

⁹³ C Heywood, *The Development of the French Economy 1750-1914* (CUP 1992), 32-33.

⁹⁴ *Ibid*, 33-34.

⁹⁵ *Ibid*, 34.

5.1.5 Early French industrialists relied upon foreign technology, particularly from Britain. The reliance on foreign technology required alignment with local craft practices and expectations. Skills were not immediately present in terms of management, labour, and technical knowledge when faced with utilising new industrial technologies. French industrial progress generally lagged behind British; however, this lag is due not because the French were less motivated, but because of different historical factors connected to the French quasi-commercial psyche.⁹⁶ French industrialisation was undertaken with a different aim and focus than was British industrialisation. While the British quest for profit was king, there appears to have been less of a focus on making money for the sake of it than on fitting the inevitable approach of the industrial economy to the nature and culture of the French.

5.2 Revolutionary Economics and Physiocracy: Prelude to Industrialisation

5.2.1 The French Revolution was a fundamental turning point in French society, politics and economics. The *physiocrats*⁹⁷ held a strong belief in the inevitability of human progress, blaming the remnants of institutional feudalism as impediments to progress.⁹⁸ They emphasised the importance of private property rights as a precondition for the existence of society. Further, they deemed government as being justified only insofar as it was an agent for the protection of private property, adopting a *laissez-faire* philosophy based on self-sufficiency and the free market. The value of property was extended to self-ownership, which serfdom inherently denied. Economically, it was viewed that only a free man could take pride in his work and thus be productive in the market.⁹⁹ Serfdom extinguished competition and kept the lower classes in poverty, which in turn impoverished the realm.¹⁰⁰ While the theoretical ideas of the *physiocrats* reflect some of the elements of the capitalist, liberal economics of the Industrial Revolution, the reality was that property continued to be viewed as the source of true wealth, a conception more closely tied to the reverence of land ownership espoused by the *ancien régime*.

⁹⁶ Ibid, 31-32.

⁹⁷ French intellectuals who believed that the wealth of nations was derived solely from the value of agriculture, and crucially that the market should not be constrained by governments. See ARJ Turgot, Marquis de Condorcet and Francois Quesnay, the latter being the leader of physiocracy.

⁹⁸ JQC Mackrell, *The Attack on Feudalism in Eighteenth Century France* (first published 1973, Routledge 2007) 9-12.

⁹⁹ Ibid, 77-78 & 138-141.

¹⁰⁰ See F Quesnay, "Tableau Economique avec son Explication" in F Quesnay and C Théré (eds), *Œuvres Economiques Complètes et autres Textes en 2 Volumes* (first published 1758, INED 2005).

5.2.2 The reality of the eighteenth century French economy was that it was stagnating in comparison to the British, despite the innovative voices of the *physiocrats*. Owing to the turbulent and Long Nineteenth Century¹⁰¹ and the instability and discontinuities in its development, it is difficult to assess the French economic situation. There were a number of obstacles to economic growth, among which were the handing over of land to inefficient peasant farmers; the reluctance to exploit potentially profitable inventions; the hesitation to expand beyond the limits of the family firm; the preference for overseas investments; and the habit of sheltering behind protectionist tariff barriers. The French were also hesitant to make capital investments due to the bursting of his “Mississippi Bubble” in 1720, setting French banks back by a century and contributing to the relative weakness of capital investment during industrialisation. The lack of long term capital investment placed capital intensive industries at a disadvantage relative to less risk-averse competing countries, such as Britain.¹⁰²

5.2.3 French economic theories were inherently hostile to any remnants of feudalism. Engaging in commerce was itself a sign of the dissolution of the *ancien régime*, particularly for those who would have been considered of the aristocracy prior to the Revolution, as business was not considered an appropriate profession for the upper Estates.¹⁰³ However, the aims of commercial endeavour were rarely capitalistic. The wealth of eighteenth century France was generally used to buttress existing social status rather than forging capitalistic fortunes. Nevertheless, those who undertook industrial enterprises were generally nobly born rather than of the bourgeoisie. Thus, despite the complete changes envisioned by the French Revolution, there was not an automatic transfer to capitalism. The pull of an aristocratic lifestyle was too strong once individuals were able to earn fortunes without the stigma of class prejudice.¹⁰⁴

5.3 French Working Classes: A Differently Composed Proletariat

5.3.1 During the period of the Industrial Revolution in Britain, French society was being torn apart by the French Revolution and the unrest that followed it during the Long

¹⁰¹ Chapter 2 n118.

¹⁰² C Heywood, *The Development of the French Economy 1750-1914* (CUP 1992) 1-2 & 27.

¹⁰³ JQC Mackrell, *The Attack on Feudalism in Eighteenth Century France* (first published 1973, Routledge 2007), 9-12.

¹⁰⁴ *Ibid*, 12-13.

Nineteenth Century. While the line between the nobility and the rest remained sharply drawn,¹⁰⁵ the French Revolution had a profound effect on the makeup of French society. By 1815, the nobility had shrunk significantly.¹⁰⁶ The bourgeoisie had been seriously strengthened, enriched by their purchases of clerical and *émigré*¹⁰⁷ property. They were now occupying almost all public offices. They imitated the way of life that had been common to the privileged classes, living mainly off the incomes from their lands, which were cultivated by tenant farmers. They had essentially replaced the nobles as the upper, privileged class. Public office was still sought, although a profession at the bar or in medicine was often acceptable. However, instead of being based on the hereditary privileges of the *ancien régime*, the privilege of the bourgeoisie and of their families was based upon the hereditary rights of property, which was regarded as a natural human right.¹⁰⁸ Land ownership is one of the few benefits that would also be felt by the lowest peasant classes, although the extent of that benefit is questionable.

5.3.2 The end of feudalism meant not only the destruction of inequality and privilege, but also inefficiencies in agriculture. Due to the lack of motivation for serfs to improve production methods, it was impossible prior to the Revolution to increase their personal prosperity in this way. Once peasants were freed from serfdom, they were able to act in their own self-interest, which would be to improve production methods in order to increase personal prosperity.¹⁰⁹ However, land-owning peasants rarely possessed an amount of land suitable to their needs. Despite the fact that land titles had passed from the nobility to the bourgeoisie, the position of tenant farmers remained precarious, particularly as competition grew due to an increased birth rate among the peasant classes. The peasants who worked the land did not have the capital to invest in modern farming methods and equipment. Instead, they continued to follow traditional methods. Those who were able to employ more modern methods introduced from England were industrial farmers who employed wage labourers on large areas of land.¹¹⁰

¹⁰⁵ Ashton, n41, 20.

¹⁰⁶ Seignobos, n27, 319-321.

¹⁰⁷ Refers to royalists who retreated from France during the French Revolution, often to avoid execution and imprisonment.

¹⁰⁸ Seignobos, n27, 319-321.

¹⁰⁹ Mackrell, n98, 13-15.

¹¹⁰ Seignobos, n27, 324-325.

- 5.3.3 Those peasants who managed to gain ownership of larger plots of land following the Revolution were sometimes able to enrich themselves to the point that they could employ labourers to do the work for them, essentially becoming bourgeois themselves. The plight of those who performed the labour remained subsistence level, being poorly fed, clothed and housed. Thus the peasantry continued to bear the heaviest burdens of society. They provided the lingering nobility and the bourgeoisie with farm hands and servants, the State with military recruits, the church with parish priests, and industrialists with labour.¹¹¹
- 5.3.4 The trade guild and corporation system in France also fell during the French Revolution. Like in Britain, guilds and professional corporations were difficult to access unless a family member was already a member.¹¹² The harsh, rule-bound social existence of civil society under the corporation system was the antithesis of what was sought by French revolutionaries.¹¹³ The coercive powers of corporate regulation were eventually replaced by articles in the Civil Code that passed enforcement powers to the realm of contract. Workers could no longer be physically constrained to complete work; rather, employers were limited to civil action for damages and interest. In addition, the abolition of corporations erased multiple obstacles to entry into the trades. All that was needed was sufficient capital, credit, and connections in order to be successful,¹¹⁴ although these elements were rarely easily found.
- 5.3.5 The industrial proletariat in France evolved slowly. Industry was initially divided into a small modern sector and a traditional one based on home craft activities. Industry was thus populated by a mass of small peasant owners and a large number of independent handicraftsmen spread out among the rural areas and within the budding industrial centres. Like Britain, in what large scale industrial enterprises there were, workers were regarded merely as instruments for performing work and industrialists kept a distant relationship with them. Their conditions of life, food, housing and health were of no concern. Wages were reduced to the lowest possible level in order to decrease the cost

¹¹¹ Ibid, 324-325.

¹¹² Sonescher, n91, 17-21.

¹¹³ Ibid, 74-75.

¹¹⁴ Ibid, 38-39.

of production. Workers were recruited among the most destitute class of people in the poorest regions, where an increase of population had produced a surplus having no means of subsistence. There was no security of employment and not enough money was made to save for the future in working families.¹¹⁵ However, there was no massive transfer from agricultural to industrial centres that characterised industrialisation in the UK. There was instead a slow development of a diversified proletariat by successive strata of a non-homogenous population from different socioeconomic backgrounds constituted by successive waves of farm hands; part time peasants and migrant workers; women leaving home for work; and craftsmen and former self-employed handicraftsmen. The French proletariat was therefore composed of a diverse working class.¹¹⁶

5.3.6 Where once a person's occupation was a part of their social standing, their family, and personal identity, large scale industrial work reduced the humans providing labour to commoditised factors of production. Workers forged few links with their workplace. There were no common traditions or organisations for mutual aid. Workers associations were still forbidden, so the only means to improve their situation was illegal. Workers' were completely dependent upon their employer who fixed their wages and working hours, often arbitrarily. Employers had no responsibility toward their employees if they fell ill or were injured as a result of the work they did.¹¹⁷

6 The Evolution of Labour Regulation and Social Policy

6.1 An Economic and Moral Conundrum

6.1.1 Labour law is primarily concerned with the regulation of social power.¹¹⁸ It is a branch of the legal order of a jurisdiction that deals with the provision of human labour within a framework of production and service processes, organised by an employer to the benefit of the employee. It is an autonomous institutional phenomenon influenced by public

¹¹⁵ Seignobos, n27, 337-338.

¹¹⁶ Despax, Rojot and Laborde, n17, 210.

¹¹⁷ Seignobos, n27, 338.

¹¹⁸ P Davies and M Freedland, *Kahn-Freund's Labour and the Law* (Stevens and Sons Ltd 1983) 12-27.

policy and translated into formal legislation.¹¹⁹ In economic terms, the employer holds the scarce commodity of capital, which is fundamental to working processes, while the employee is one of many individuals who are generally able to provide their labour to satisfy the requirements of the employer. Labour, in and of itself, is a commodity made available on the labour market as an essential and plentiful factor of production.¹²⁰

6.1.2 Labour should, however, be considered a fictive commodity, as it is neither produced as a commodity, nor is its production governed purely by an assessment of its realization on the markets.¹²¹ Further, it has an ineradicable social character that cannot be separated from its product value.¹²² Although labour is provided through a labour market and is institutionally treated as a commodity, the power of labour is derived from human beings who operate outside the direct discipline of the market. They also have the capacity to act individually and collectively to resist the economic compulsion of supply and demand.¹²³ While labour is bought and sold on a daily basis on the labour market, it is unlike other commodities. When labour has been treated as a commodity in the past and sometimes still today, dysfunctional social consequences result in relation to the loss of market balance between employee and employer and the proverbial race to the bottom within the labour market.¹²⁴ The commoditisation of labour is not, therefore, a beneficial economic perspective without certain qualifications.¹²⁵

6.1.3 There are a number of reasons why governments intervene in the labour market. Labour regulations aim to endow workers with some basic rights, mitigating the effects of labour commoditisation. They also regulate employment relationships by restricting the types and terms of contracts that can be associated with employment. Labour unions are empowered to represent workers collectively in response to the imbalance of power in

¹¹⁹ S Deakin and W Njoya, "The Legal Framework of Employment Relations" (2007) ESRC Centre for Business Research - Working Paper no 349 <<http://www.cbr.cam.ac.uk/pdf/WP349.pdf>> accessed 17 November 2012, 3.

¹²⁰ A Goldin, "Global Conceptualisations and Local Constructions" in G Davidov and B Langille (eds), *The Idea of Labour Law* (OUP 2011) 70.

¹²¹ J Fudge, "Labour as a 'Fictive Commodity'" in G Davidov and B Langille (eds), *The Idea of Labour Law* (OUP 2011) 129-130.

¹²² Tucker, n45, 99.

¹²³ Fudge, n121, 129-130.

¹²⁴ Tucker, n45, 99-100, discussing arguments set out in K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (first published 1944, Beacon Press 2001).

¹²⁵ For in-depth discussions on the status of labour in modern economies, see K. Marx, "Economic and Philosophic Manuscripts (1844) in TB Bottomore (ed), *Early Writings* (McGraw-Hill, 1963); K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (first published 1944, Beacon Press 2001); and M Lebowitz, *Beyond Capital* (2nd edn, Palgrave 2003).

the employment relationship. Governments often also provide social insurance against unemployment, old age, disability, sickness, and death.¹²⁶ These are the practical and physical reasons why labour regulation exists. While there is an obvious moral impetus for such intervention, the underlying reason why governments choose to undertake the costs of social legislation in favour of employees requires an examination of the theoretical evolution of labour law.

6.2 The Evolution of Labour Law as a Concept: Hugo Sinzheimer

6.2.1 The first recognised labour theorists were German scholars who participated in a series of studies in 1874, resulting in a new approach to labour regulation that included industrial workers.¹²⁷ The social question that arose from these studies was concerned with the enfranchisement of social groups that had been marginalised due to industrialisation. It resulted in the notion of social rights of citizenship, and the government's assumption of some responsibility for ameliorating the social position of industrial workers.¹²⁸ Lotmar¹²⁹ produced a theory of the collective agreement, forming the foundations for the discipline of labour law. Sinzheimer,¹³⁰ the father of German labour law,¹³¹ built upon Lotmar's work by giving form and content to the discipline.¹³²

6.2.2 Sinzheimer discussed four specific insights that became a driving force behind labour regulation. Firstly, it had to be acknowledged that the object of the transaction in an employment relationship is not a commodity, but a human being,¹³³ a tenet that became one of the founding principles of the International Labour Organisation.¹³⁴ Secondly, the personal dependence that an employee has on an employer requires balance.¹³⁵ The subordinate relationship of the employee due to the employer's ownership of the means of production became the fundamental characteristic of the industrial employment

¹²⁶ JC Botero and others, "The Regulation of Labour" (2004) 119(4) Q J Econ 1339, 1342.

¹²⁷ Hepple and O'Higgins, n14, 7-12.

¹²⁸ G Poggi, *The Development of the Modern State: A Sociological Introduction* (SUP 1978) 114.

¹²⁹ 1850-1922.

¹³⁰ 1875-1945.

¹³¹ R Dukes, "Hugo Sinzheimer and the Constitutional Function of Labour Law" in G Davidov and B Langille (eds), *The Idea of Labour Law* (OUP 2011) 57-68.

¹³² Hepple and O'Higgins, n14, 7-12.

¹³³ H Sinzheimer, "Das Wesen des Arbeitsrechts" in H Sinzheimer, *Arbeitsrecht und Rechtssoziologie Volume I* (first published 1927, Bund Verlag 1976)110.

¹³⁴ Hereafter referred to as the "ILO"; See ILO, *Declaration Concerning the Aims and Purposes of the International Labour Organisation (Declaration of Philadelphia)* (1944) Art 1(a).

¹³⁵ Sinzheimer, n133, 112.

relationship and would become the centre of the development of continental labour systems.¹³⁶ Sinzheimer's third insight was that labour law seeks to protect human dignity, which can be threatened by the imbalance in the employment relationship.¹³⁷ Finally, Sinzheimer suggests that labour law should not only deal with issues of fairness within the employment relationship, but also all those needs and risks associated with employment, including legal regimes dealing with job creation.¹³⁸ Thus, the fundamental purpose of labour law is to protect employees' material needs, their health, safety, and their personal dignity,¹³⁹ which would eventually become a central focus of the regulatory framework for labour law in Europe.¹⁴⁰

6.2.3 France has had elements of labour protection in place since shortly after the French Revolution. The early twentieth century saw the introduction of labour courts, a *Code du Travail* (since 1910), and the *Accords de Matignon*¹⁴¹ in 1936, which laid the basis for the legal promotion of collective bargaining. The UK was a direct beneficiary of the teachings of Sinzheimer through his pupil, Kahn-Freund,¹⁴² who transformed the study of British labour law using Sinzheimer's as well as his own unique theories on the subject. The modern features as developed by Sinzheimer and Kahn-Freund are that labour law is not only created by the state, but also by employers and labour unions; the separation of the contract of employment from ordinary contracts; and the subordination of the individual worker to the capitalist enterprise.¹⁴³ Influenced by Marx's insight that capitalist property constitutes domination over human beings, Sinzheimer's labour law is seen as the law of dependent labour. This view results in the exclusion of the independent labourer and forms the essential subject matter of labour law into its fundamental purpose of seeking to order or control the worker's subordination to the employer.¹⁴⁴

6.3 Kahn-Freund and British Labour Law

¹³⁶ Dukes, n131, 58.

¹³⁷ Sinzheimer, n133, 111.

¹³⁸ *Ibid.*, 110.

¹³⁹ M Weiss, "Re-inventing Labour Law?" in G Davidov and B Langille (eds), *The Idea of Labour Law* (OUP 2011).

¹⁴⁰ Hepple and O'Higgins, n14, 7-12.

¹⁴¹ (1936) Matignon Agreements.

¹⁴² 1900-1979.

¹⁴³ Hepple and O'Higgins, n14, 7-12.

¹⁴⁴ *Ibid.*

6.3.1 Unlike Sinzheimer, Kahn-Freund regarded legal intervention in industrial relations as neither necessary nor desirable, preferring the lack of legal regulation in the British labour market because he perceived that it ensured the independence of trade unions from the state. Both he and Sinzheimer agreed that labour law existed to facilitate the autonomous regulation of employment relations and working life through collectivised labour achieved by the removal from the economic sphere of the otherwise inequitable functioning of private law. The views of Sinzheimer and Kahn-Freund diverged in the degree of autonomy to be enjoyed by collective labour. While Sinzheimer believed that regulation of collective interests was necessary in order to preserve the public interest and to ensure an equitable labour environment, Kahn-Freund was in favour of collective *laissez-faire*, allowing the free play to collective forces of society and limiting the intervention of the law to those marginal areas where the disparity of these forces is so great as to prevent the successful operation of the negotiating machinery.¹⁴⁵ It was his view that the autonomous system of self-regulation in industrial relations should operate on a collective basis in order to achieve balanced bargaining power with employers.¹⁴⁶ Thus, from the very beginning, the UK was influenced by a different set of theoretical foundations than was continental Europe, leading to at least some of the differences that separate the UK from the rest of Europe today.

7 The Employment Relationship

7.1 The Evolution of the Employment Contract

7.1.1 The employment relationship in the UK had long been based on a concept of master and servant, stretching from the Ordinance of Labourers in 1349¹⁴⁷ into the nineteenth century. The master and servant model is connected to the early legal form of social relations, which was a statutory and hierarchical paradigm rather than contractual and common law. This hierarchical form can be traced from the pseudo-feudal roots of the British classist society and the inherent conservatism of the populace. The master and servant form of employment relationship relied upon a command relation with an open

¹⁴⁵ O Kahn-Freund, "Labour Law" in *Selected Writings of O Kahn-Freund* (Stevens Publishing 1978) 8.

¹⁴⁶ Davies and Freedland, n118, 12.

¹⁴⁷ (Ed III); Fixed wages and imposed price controls, required all those under the age of 60 to work, and prohibited the enticing away of another's servants.

ended duty of obedience imposed on the worker, reserving far reaching disciplinary powers to the employer.¹⁴⁸ It constituted a weapon of industrial discipline, as it provided a convenient instrument for quick punishment or intimidation through a wide variety of offences of disobedience. The master and servant model was an important tool of social authority and was used to create social reforms intended to further subjugate the workers to the benefits that tied them to their employers. Effective factory production was achieved through a highly developed social discipline, which was achieved by the re-creation of structures of paternal dependence and reciprocity.¹⁴⁹ Thus, while there were no strict classes, the way in which the employment relationship was managed imposed a class-like structure of master and servant upon those working within industry.

7.1.2 The transition to an industrial economy was also accompanied by a move to freedom of contract as a basis for industrial relations; however, this did not supplant the master and servant ideology. Although the employment relationship was established as relying upon the autonomous wills of both parties to the employment contract, the inherent imbalance in the employment relationship perpetuated a restrictive master and servant code¹⁵⁰ and continued to be promoted by courts in favour of the prerogatives of the new class of employers.¹⁵¹ To that end, a number of master and servant themed acts were passed during the early part of the Industrial Revolution, which, among other provisions, established new crimes of absconding from work and refusing to enter into work under a contract of hiring with penalties of imprisonment for infractions.¹⁵²

7.1.3 The Master and Servant Act of 1867¹⁵³ replaced imprisonment with fines as a principle remedy for breach of the Act and applied them specifically to all¹⁵⁴ servants and labourers, who were defined as having been hired under a term of exclusive service.¹⁵⁵ This is the first appearance of the distinction between a contract *of* service and a contract *for* services, the former now signifying a fundamental factor in defining an individual as

¹⁴⁸ Deakin and Njoya, n119, 7 and Deakin and Wilkinson, n66, 60-63.

¹⁴⁹ Price, n16, 42-43.

¹⁵⁰ Deakin and Wilkinson, n66, 43.

¹⁵¹ Deakin and Njoya, n119, 7.

¹⁵² Deakin and Wilkinson, n66, 60-63. See also S Deakin, "The Contract of Employment: A Study in Legal Evolution" (2001) ESRC Centre for Business Research - Working Paper no 203 <<http://www.cbr.cam.ac.uk/pdf/WP203.pdf>> accessed 16 July 2015.

¹⁵³ (30&31 Vict c 141).

¹⁵⁴ *Lowther v Earl of Radnor* (1806) 8 East 113, 03 ER 287 (KB).

¹⁵⁵ *Lancaster v Greaves* 109 ER 233, (1829) 9 B&C 628 (KB), 631-632.

an employee.¹⁵⁶ Once the poor law requirement of settlement through hiring was abolished,¹⁵⁷ the test of exclusive service was applied more flexibly without the requirement for a ‘servant’ to be at the employer’s disposal at all hours.¹⁵⁸ The concept of mutuality of obligation also began to develop during this period. It was determined that it would be enough to show that the parties had undertaken mutual obligations to serve and to provide work, respectively,¹⁵⁹ and for a defined period.¹⁶⁰

7.1.4 The Master and Servant Acts, while in effect, did not directly acknowledge any reciprocity in the employment relationship. They only applied to industrial and manual workers, while those in managerial, clerical or professional positions fell outside of the discipline they imposed. It was within this latter group of employees that a modern contract of employment based on reciprocity of obligation with limits on the employer’s power and control developed. The extension of these concepts to other groups of workers happened gradually as the influence of the master and servant model waned after its subversion by the provisions of the Employers and Workmen Act of 1875.¹⁶¹ The legacy of the 1875 Act would remain influential, however, as it was assimilated into the common law of a hierarchical and disciplinary model of service within the employment relationship.¹⁶² The old assumptions of unmediated control were still being applied by the courts as they developed the law of employment.¹⁶³ It was well into the twentieth century that contract finally replaced status, paternalism, and direct coercion of workers under the traditional common law of master and servant as the dominant legal paradigm for the employment relationship.¹⁶⁴

7.1.5 The contractual nature of the employment relationship was sacrosanct until it was recognised that the British policy of collective *laissez-faire* in combination with the inherent imbalance in the employment relationship was failing to provide adequate protection to the more vulnerable members of the labour force. The question arose as to

¹⁵⁶ Rather than an independent contractor or self-employed, for example.

¹⁵⁷ 1834.

¹⁵⁸ See *R v St John Devizes* (1829) 9 B&C 896.

¹⁵⁹ See *R v Welch Esquire* 118 ER 800, (1853) 2 El&Bl 357 (QB) and *Whittle v Frankland* 121 ER 992, (1862) 2 B&S 49 (QB).

¹⁶⁰ Deakin and Wilkinson, n66, 65.

¹⁶¹ (38&39 Vict c 90).

¹⁶² Deakin and Wilkinson, n66,74.

¹⁶³ Deakin and Njoya, n119, 7.

¹⁶⁴ See P Craven and D Hay (eds), *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (UNCP 2004).

whether the state should guarantee a basic level of protection for the individual employee. To do so would lead to substantial legal intervention into the employment contract. However, it had become clear that the application of free contract principles to the employment relationship was inadequate. Despite recognition of these factors, it had little impact on the system of collective *laissez-faire* until the outbreak of the Second World War, when social security, workman's compensation, and other protective legislation were introduced.¹⁶⁵

7.1.6 The traditional hierarchy of employer and employee has remained difficult to dislodge from the legal psyche.¹⁶⁶ The open-ended duty of obedience enshrined in the master and servant laws is today characterised by an implied term in the employment contract.¹⁶⁷ Today's labour courts, however, increasingly recognise the role of the express contract terms in placing limits on an employer's managerial prerogative.¹⁶⁸ While this has been tempered since the 1940s and given legal status following the introduction of the Employment Rights Act of 1996,¹⁶⁹ as well as other more progressive employment oriented legislation, the master and servant basis is still evident in Britain's regulatory approach to employment law.¹⁷⁰

7.2 The Evolution of the *Contrat du Travail*

7.2.1 In eighteenth century France there was no general legal framework regulating the terms and conditions of the contract of employment as the corporation system provided the control needed at the time.¹⁷¹ The modern contract of employment was an invention of the late nineteenth and early twentieth century, associated with the rise of the modern business enterprise and the beginnings of a more welfare oriented state. Wage labour initially took on the form of the traditional Roman law concept of the *locatio conductio operarum*¹⁷² in the post-revolutionary codes of the early nineteenth century. In placing labour within this concept, it was grouped with other types of contracts based on

¹⁶⁵ P Davies and M Freedland, *Labour Legislation and Public Policy* (OUP 1993) 48-49.

¹⁶⁶ Deakin and Njoya, n119, 7.

¹⁶⁷ Deakin and Wilkinson, n66, 61.

¹⁶⁸ *Ibid.*

¹⁶⁹ C18.

¹⁷⁰ Lord Wedderburn of Charlton, "The Social Charter in Britain: Labour Law and Labour Courts?" (1991) 54(1) MLR 1, 6.

¹⁷¹ Sonescher, n91, 2-7 & 33.

¹⁷² In Roman Law, this is a consensual contract under which a person is bound to deliver services to another at a fixed price, or to deliver that which is the result of labour.

exchange in the marketplace, leading to its commoditisation. Early labour codes did not recognise the notion of an employee's personal subordination to the employer and his capital.¹⁷³

7.2.2 The early industrial labour relationship was characterised by the power of the employer to give orders, to issue rules contained in the *livret* or work book, which had binding force, and to retain the worker in employment until the employer considered the work ordered to be complete. It was not until the 1880s that the French *contrat du travail* was in common use, though its initial purpose was to satisfy the complaints of industrial employers that a general duty of obedience should be read into all industrial hiring. Its adoption was eventually promoted and systematised with a view to the development of a conceptual framework for collective bargaining and worker protection. Eventually, the concept of subordination came to rest at the core of the employment relationship in which the open-ended duty of obedience was traded in return for the acceptance and absorption by the enterprise of a number of social risks.¹⁷⁴

7.2.3 Today, the power of the state to regulate conditions of work is institutionalised in the legal system through the *ordre public social*, a set of minimum binding conditions applied as a matter of general law to the employment relationship. This concept recognises that there should be a formal contractual equality between employees and employers. In order to ensure that the employment relationship is equitable, the state has had to assume responsibility for establishing a form of protection for individual workers who, by accepting employment, are placed in a position of subordination to employers.¹⁷⁵ Thus, the state assumes a role of calibration in the natural imbalance in the employment relationship.

7.2.4 The *code du travail*¹⁷⁶ differs from French *code civil* as it takes the inequality of the contracting parties as the point of departure, while civil law assumes bargaining equality. The *code du travail* also integrates a dimension for collective relations, while civil law governs individual relationships based on the assumption that, where an

¹⁷³ Deakin and Njoya, n119, 8.

¹⁷⁴ Ibid, 8-9.

¹⁷⁵ Ibid, 9.

¹⁷⁶ The French labour and employment law code covers not only issues of collective labour, but also employment rights.

individual employee cannot bargain on an equal footing with an employer, then trade unions or other collective organisations can do so. The *code du travail* is therefore a special law operating alongside the *code civil*, which is only referred to in those instances where labour law does not cover the issue in question.¹⁷⁷

8 Industrial Relations

8.1 Industrial Relations in the United Kingdom

8.1.1 The Industrial Revolution led to the institution of formally free labour as workers were separated from the land and labour became a factor of production.¹⁷⁸ While the repeal of the corporation and guild system allowed greater access by semi-skilled workers into traditional trades, there was a parallel development of restrictive legislation regulating worker combinations.¹⁷⁹ Although there was a growth at the end of the eighteenth century of friendly societies within the growing factory centres of production, agitating for higher wages remained illegal unless the complaint was made by appeal to the justices of the peace.¹⁸⁰

8.1.2 While unionism was tolerated as long as it remained passive, employers would often petition for an act to put down combinations if a dispute threatened to disrupt business.¹⁸¹ The closeness of the French revolutionary mind-set to those of the unionist persuasion caused fear in the upper classes of British society and led to the passage of a Combination Act in 1799,¹⁸² which made any persons combining for wage increases or reduction of hours liable to be brought before a magistrate and sentenced to three months in prison. The Combination Act of 1800¹⁸³ imposed lighter penalties and was rarely invoked. Rather, workers were indicted for conspiracy under the common law or for breach of some measure relating to a particular trade.¹⁸⁴

¹⁷⁷ Despax, Rojot and Laborde, n17, 36-37.

¹⁷⁸ Deakin and Wilkinson, n66, 18-19.

¹⁷⁹ Ibid, 58.

¹⁸⁰ Hibbert, n39, 478-487.

¹⁸¹ Ibid.

¹⁸² (39 Geo. III, c 81).

¹⁸³ (39 & 40 Geo III c 106).

¹⁸⁴ Ashton, n34, 102-113.

8.1.3 The Combination Acts marked a new stage in the increasingly hostile relationship between employers and workers.¹⁸⁵ They were used to break the resistance of a number of collective actions in the early nineteenth century. As the guild system fell away and workers were free to change jobs, a duty to work was introduced into the employment relationship, which, in concert with the combination laws, was used to suppress resistance of workers striking against the introduction of technology, for wages or for improved working conditions. Early craft union resistance tended to be against capitalist industrialisation and the introduction of capitalist forms of production that threatened traditional production processes. Modern trade unions emerged under conditions in which property rights over the processes of production and the nature of the business enterprise had been fundamentally reconstituted within the capitalist industrial system.¹⁸⁶

8.2 Britain's Collective *Laissez-Faire*: The Rise of Labour Interest Power

8.2.1 Britain embraced the policy of collective *laissez-faire* promoted by Kahn-Freund. The collective bargaining system, therefore, evolved independently of the law and little was done to regulate or even recognise the legal standing of trade unions and their bargains.¹⁸⁷ Thus any mechanisms or procedures created before the middle of the twentieth century to benefit employees were generally implemented through the institutions of collective bargaining. For employees in Britain, this meant that the participants in industrial relations played a much more important role in the regulation of their own activities than they would have done in a more interventionist regime.¹⁸⁸ For example, in the early twentieth century, Britain viewed the duty to regulate working hours as belonging solely to the remit of collective bargaining and was therefore unwilling to ratify the ILO's Convention on the forty eight hour work week.¹⁸⁹ Regulation of the employment relationship was viewed not as a matter for legislators, but for the social institutions of industrial relations.¹⁹⁰

¹⁸⁵ Hibbert, n39, 478-487.

¹⁸⁶ Deakin and Wilkinson, n66, 59-61.

¹⁸⁷ Davies and Freedland, n165, 16-17.

¹⁸⁸ *Ibid*, 8-10.

¹⁸⁹ Wedderburn, n170, 4-5.

¹⁹⁰ Davies and Freedland, n165, 8-10.

8.2.2 Underground unions came into the open in 1824 and put forward applications for advances in wages after many of the common law and statutory restrictions on trade union activities were lifted. While worker combinations were confirmed as being legal in 1825,¹⁹¹ combinations were prohibited unless they were for the specified purposes of determining wages and hours. Early collectivism was viewed as subversive and conspiratorial, impeding competition and regulating output, prices, wages, or the terms of credit, although it was also used as a tool of the free market to combat privilege and monopoly. As this was a time of free market capitalism, such anti-competitive activities were contrary to the goals of liberal economics and were thus discouraged.¹⁹² The 1825 Act prohibited any interference with the labour supply and continued to regard other combinations as common law conspiracies.¹⁹³ The 1825 Act specifically asserted a workplace hierarchy by establishing the rights of employers to manage and direct their business without interference.¹⁹⁴

8.2.3 Due to the injustices of the new Poor Law of 1834¹⁹⁵ and the painfully slow process of union growth, the first truly proletarian social movement arose from the People's Charter of 1838.¹⁹⁶ The Chartists demanded annual parliaments; universal male suffrage and vote by secret ballot; equal electoral districts; an end to property qualifications for Parliament; and the introduction of salaries for parliamentary seats.¹⁹⁷ Chartism was supported by traditional artisanal trades threatened by the rapid growth and efficiency of industrial manufactories. It encompassed an artisan critique of industrial capitalism and sought to capture political power in order to redress social and economic ills perceived as being caused by the Industrial Revolution. It was not only supported by the decaying artisanal trades, but also those involved in the new or expanding urban centres as it sought to improve working conditions overall.¹⁹⁸

¹⁹¹ Combinations of Workmen Act 1825 (6 Geo 4 c 129).

¹⁹² Ashton, n34, 102-113.

¹⁹³ Ibid, 102-113.

¹⁹⁴ Price, n16, 39-41.

¹⁹⁵ Poor Law Amendment Act 1834 (4&5 Will 4 c 76).

¹⁹⁶ The People's Charter, being the Outline of an Act to provide for the Just Representation of the People of Great Britain (London Working Men's Association 1838) Ashton, n34, 102-113 & Price, n11, 56-57.

¹⁹⁷ Hibbert, n39, 494-495.

¹⁹⁸ Price, n16, 56-57.

8.2.4 Particularly problematic was the presumed basis upon which Chartism was built. Its strategic presupposition of radicalism rested upon the possibility of a popular alliance among not only the working classes, but also small businessmen and larger employers. This was based on the assumption that all members of the industrial and working classes would be benefitted by the abandonment of capitalist industry and the assumption of a socialist structure of society. Given the diversity among Chartists, the movement was also impeded by internal political divisions, which eventually led to its failure.¹⁹⁹ Chartism attracted massive support but also was deeply disturbing for the ruling classes. While the movement survived into the later nineteenth century, the reforms sought would be slow to come.²⁰⁰ However, these early social movements also revealed the impact that industrialisation was having upon the populace. It was these early movements that altered class relations and helped to forge the English working classes.²⁰¹

8.2.5 The availability of a conspiracy charge for combinations outside of the topic of wages or hours allowed for frequent indictments against those who agitated for better working conditions. Even if an action did not violate the statute, the agreement to engage in certain activity was indictable as conspiracy. Thus combinations remained troubled by the ease with which the law could be turned against them. In 1875, there was finally a reversal of the assumptions of statute law in the Conspiracy and Protection of Property Act,²⁰² which reversed the negative tradition of the statutes on combinations by permissively defining their actions as legal unless they contravened criminal law. Unified combination activity from that time was presumed to be legal, unless its actions would have been criminal if committed by a single individual.²⁰³

8.3 Industrial Relations in France

8.3.1 The experience of the Long Nineteenth Century left a deep mark that is still visible in the present labour regime in France. Early in the labour movement, there was no strict division of labour organisations between political and union activity. Social reformers,

¹⁹⁹ Ibid, 59-61.

²⁰⁰ Hibbert, n39, 494-495.

²⁰¹ Price, n16, 49.

²⁰² 1875 (38&39 Vict c 86).

²⁰³ Price, n16, 40-41.

economists, and political ideologues were all involved in the labour movement, rendering it fundamentally political in form.²⁰⁴ The labour movement took on a pluralistic character as trade unions in France were divided along ideological lines. Workers at a particular establishment could be members of different unions based on their political or philosophical affinity. However, trade union membership itself attracted only a relatively small percentage of the workforce.²⁰⁵

8.3.2 The corporation system had been suppressed along with all privileges associated with it by the *Décret d'Allarde*²⁰⁶ and the *Loi le Chapelier*.²⁰⁷ They also decreed that every person should be free to exercise whatever profession, art, or skill that they wish under a relevant licence. The economic and political rationale for these changes were linked to the importance of a modern free market economy and the sanctity of the individual being in receipt of certain natural imprescriptible rights, two of the fundamental values promoted by the Revolution.²⁰⁸

8.3.3 The other side of the insistence on individual and market freedom was the prohibition of worker combinations, which was viewed as a constraint on the free market. Such combinations were subject to both civil and criminal penalties.²⁰⁹ Despite the egalitarian motives of the Revolution, workers were still treated less favourably than entrepreneurs and industrialists as their attempts to organise were continually suppressed, while employer organisations were allowed to meet. This imbalance is particularly evident in the law that, in a dispute about wages, the word of an employer is to be taken over the employee in the absence of written proof. Despite the prohibition, workers still attempted to gather to try to improve their standard of living as it was evident that collective organisation would be the only way that they could achieve it.²¹⁰

²⁰⁴ Despax, Rojot and Laborde, n17, 209.

²⁰⁵ M Forde, "Trade Union Pluralism and Labour Law in France" (1984) 33(1) ICLQ 134, 134-136.

²⁰⁶ Loi portant suppression de tous les droits d'aides, de toutes les maîtrises et jurandes et établissement des droits de patente, Décret de l'Assemblée constituante, 2 March 1791.

²⁰⁷ Passed by the l'Assemblée Nationale 14 June 1791, inspired in part by the *Contrat Social* by Jean-Jacques Rousseau, see Chapter 2, n62.

²⁰⁸ J-P Le Crom, *Deux Siècles de Droit du Travail : L'Histoire par les Lois* (Les Editions de l'Atelier/Éditions Ouvrières 1998) 17-20.

²⁰⁹ Ibid, 23.

²¹⁰ Despax, Rojot and Laborde, n17, 194-195.

- 8.3.4 Although a legal prohibition on collective organisation persisted into the middle of the nineteenth century, a new community of working class people allowed a collective consciousness of solidarity to emerge that led to worker organisation through which they could act to obtain guarantees previously lacking. It was in the 1840s that the misery and debilitating working conditions of the working classes was finally recognised. As industrialisation increased its pace along with the misery of the workers, liberal capitalism was blamed by a number of socially progressive groups as well as by the workers themselves.²¹¹ In 1848 most European countries erupted in revolution against the effects of liberal capitalism and while this led to widespread chaos and was eventually repressed, it also brought the idea of social reforms into the political psyche.²¹²
- 8.3.5 The liberal capitalism worshipped by the revolutionary bourgeois would not survive the end of the century.²¹³ The rise of socialism played a part in its demise, as did the attacks made by social Catholics who followed Pope Leo XIII's *Rerum Novarum*,²¹⁴ which condemned the degradation of the industrial working classes. Workers also began to use their vote and striking to improve working conditions and also to obtain changes in the law toward social reform. Despite the suspicion of labour held by the Second Empire,²¹⁵ it passed a Law on 25 May 1864²¹⁶ that eliminated the felony of conspiracy and opened the way toward lawful strikes.²¹⁷
- 8.3.6 The Law of 1884²¹⁸ finally granted a positive right to associate for the purposes of collective bargaining. It also gave the right to choose not to belong to a union. The right to associate (or not) now has the status of a fundamental right in France. The Law of 1884 assured a considerable extension of liberties, such as freedom of association and freedom of the press, as well as affirming the secular nature of the French civil system. The individual was granted the express rights to combine with others if they believed it in their best interests, with the caveat that the general liberal status of the economy must

²¹¹ Despax, Rojot and Laborde, n17, 49-50 & 194-195.

²¹² Davies, 24, 802-812.

²¹³ Despax, Rojot and Laborde, n17, 49-50

²¹⁴ Pope Leo XIII, *Rerum Novarum* or *Rights and Duties of Capital and Labour* (37 of 85 of the pontificate, 15 May 1891).

²¹⁵ 1852-1870

²¹⁶ Loi du 25 mai 1864 Abrogation des Art. 414, 415 et 416 du Code Penal : Suppression du Delit de Coalition.

²¹⁷ Despax, Rojot and Laborde, n17, 49-50.

²¹⁸ Loi du 11 décembre 1884 Sur les Conseils de Prudhommes.

also be respected, which led to a number of restrictions on the means accorded to labour syndicates. They were restricted exclusively to the defence of their economic, commercial, industrial, or agricultural interests. Political or religious aims were prohibited and could at times lead to penal actions against certain syndicates.²¹⁹

9 Industrial Regulation in the United Kingdom

9.1 Early Social Policy and Labour Regulation

9.1.1 In general, the pace of the Industrial Revolution was too rapid for social legislation to remain connected with the position of those working in industry. Most early legislation was aimed at improving the health and safety of the poor, who provided the labour force until the mid-nineteenth century, when it was recognised that there was a need to regulate the conditions of work for industrial labourers. Although it was commonly accepted that the lives of industrial workers were deprived and impoverished, the early period of British industrialisation saw an increased concern for human unhappiness, particularly for children.²²⁰ As early as 1784, concern was pronounced for the terrible conditions of work in the textile industry in Lancashire.²²¹ Concern for the health and well-being of industrial workers and child labourers led to the passage of Peel's Health and Morals of Apprentices Act in 1802,²²² which limited hours of work and prescribed minimum standards of hygiene and education.²²³ While this and Peel's Act of 1819²²⁴ were passed after the worst of the industrial abuses were over, they did provide the basis for the legislative cornerstone of modern industrial society.²²⁵

9.2 The Factories Acts

9.2.1 The Factories Act of 1844²²⁶ and the Factories and Workshops Act of 1878²²⁷ were passed to regulate the conditions of industrial employment, mainly for young children and women who were unable to either contract for themselves or benefit from union

²¹⁹ Le Crom, n208, 61-64.

²²⁰ Ashton, n34, 92.

²²¹ Le Crom, 208, 33.

²²² (42 Geo 3 c 73).

²²³ Ashton, n34, 92.

²²⁴ Cotton Mills and Factories Act 1819 (59 Geo 3 c 66).

²²⁵ Ashton, n34, 92.

²²⁶ (7&8 Vict c 15).

²²⁷ (41&42 Vict c 16).

membership.²²⁸ The Factory Acts were rarely enforced. It was not until the whole apparatus of government had been drastically reformed that a body of qualified public servants could be set to the task of reforming the squalid conditions of industrial centres.²²⁹ However, employers were often warned in advance and used coercion against workers to ensure that no complaint was made.²³⁰

9.3 The Truck Acts

9.3.1 In addition to poor working and living conditions, the paternalistic nature of early industrial businesses led to a practice of truck, a particularly pernicious form of employer control that refers to payment in kind rather than financial remuneration. During the Industrial Revolution, truck evolved to include other employer imposed restrictions on the freedom of the worker. Some employers would dictate where employees must live, how their money should be saved, and even what they should eat and when. In a report published in 1909, the quasi-paternal right to guide and regulate employees out of working hours was strenuously criticised, commenting that an employer should not have the right to regulate an employee's private life just by virtue of the fact that he is paying him a wage.²³¹

9.3.2 A series of Truck Acts²³² attempted to secure regular payment of agreed wages without arbitrary deductions or payment in kind. However, these were generally ineffective as deductions from wages for the rent of tools and machinery and for alleged defects in workmanship were used to control factory workers. Labour discipline was also imposed through the provision of personal and household loans, resulting in indebtedness to industrial employers.²³³

9.4 Health and Safety Legislation

9.4.1 In 1842 a report ordered by the Poor Law Commission presented a horrifying indictment of industrial living conditions and would have far-reaching effects. As factory workers

²²⁸ Deakin and Wilkinson, n66, 92-93.

²²⁹ Ashton, n34, 92.

²³⁰ Hibbert, n39, 589.

²³¹ C Black, "Report of the Departmental Committee on the Truck Acts" (1909) 19(74) Econ J 315, 315-316.

²³² Truck Act 1725; Truck Act 1831 (1&2 Will 4 c 37); The Truck Amendment Act 1887 (50&51 Vict c 46); Truck Act 1896 (59&60 Vict c 44); and Truck Act 1940 (3&4 Geo 6 c 38).

²³³ Deakin and Wilkinson, n66, 73.

were often gathered in close quarters in poorly constructed tenements, life expectancy had been drastically reduced. The findings of this report led to a Public Health Act in 1848,²³⁴ though this was limited in scope and effectiveness. Even the report's findings did not sway some of the more strictly *laissez-faire* attitudes. It was averred by Trevelyan that:

“...suffering and evil are natures’ admonitions; they cannot be got rid of and the impatient attempts of benevolence to banish them from the world by legislation...have always been more productive of evil than good.”²³⁵

9.4.2 The Public Health Act of 1848 did, however, mark an important turning point in views of the purpose of government: state responsibility for the health of its people.²³⁶ Eventually the Great Public Health Act was passed in 1875,²³⁷ which provided a complete statement of the powers and duties of local sanitary authorities, including the prevention of epidemics and the foundation of infirmaries. The annual death rate fell significantly after the passing of the 1875 Act.²³⁸

10 Industrial Regulation in France

10.1 Social Policy and Labour Regulation

10.1.1 While Napoleon decreed in 1813 that no children under the age of ten should work in the mines, this did not stop the use of children in the textile industry once it became an important factor of French commerce. The first major piece of interventionist legislation in industrial relations with a purely social aim was the Law of 22 March 1841,²³⁹ which restricted child labour in factories and workshops. Of great concern was the effect that industrial progress was having on the corruption of morals and family disorder, attributed to a childhood bereft of fundamental education or religious and moral instruction. It was passed in response to a number of inquiries into labour conditions in various French industries that found deplorable living conditions and poor nutrition in working families. Among the most influential of these reports was one presented by Dr

²³⁴ (11&12 Vict c 63).

²³⁵ GM Trevelyan, *English Social History: A Survey of Six Centuries, Chaucer to Queen Victoria* (3rd edn, first published 1946, Ghose Press 2007) 530.

²³⁶ Hibbert, n39, 581.

²³⁷ (38 & 39 c 55).

²³⁸ Hibbert, n39, 581-582.

²³⁹ Loi du 24 mars 1841 Relative au Travail des Enfants Employes dans les Manufactures, Usines ou Ateliers.

Vuillermé in 1840,²⁴⁰ describing in great detail the misery that was essentially destroying the working classes. Child labourers were not being educated, which perpetuated the cycle of poverty. Dr Vuillermé's report was a catalyst for a legal evolution in the area of labour protection.²⁴¹

10.1.2 Liberals in the government continued to impede the success of social legislation; however, there was much agitation in favour of the passage of a law of similar fashion to that passed in 1833²⁴² in England in relation to child workers in the textile industry. At the heart of the argument against such legislation was that it would be irreconcilable with the principle of industrial liberty. It was feared that such regulation would be the beginning of a spate of intervention that would then smother industrial production in bureaucracy. There were also arguments supporting the role of the state to assure a subsistence existence for its workers, which may require intervention in industrial relations.²⁴³

10.1.3 One of the strongest arguments in favour of intervention was made by those occupied with the defence of the country. The health of the lower class industrial workers was deteriorating to a state that they would not make effective soldiers should they be required. Eventually, the law of 1841 was passed, limiting the number of hours children could work at certain ages and prohibited night working in order to allow children to attend school.²⁴⁴ It did not compromise French industrial development, nor did it cause any problems for employers. It did, however, assist in maintaining human potential in order to ensure that there would be good soldiers available for recruitment as well as safeguarding moral and social conscience. The passage of this law also marked the birth of French labour law.²⁴⁵ It was followed by laws in 1874²⁴⁶ and 1892²⁴⁷ also dealing with child and female workers; a law in 1898²⁴⁸ dealing with health and safety and

²⁴⁰ Presented at the Academy of Moral and Political Science.

²⁴¹ Despax, Rojot and Laborde, n17, 49 and Le Crom, n208, 29-35.

²⁴² The Factory Act 1833 (3&4 Will 4 c 103).

²⁴³ Le Crom, n208, 29-35.

²⁴⁴ Ibid.

²⁴⁵ Ibid, 36-41.

²⁴⁶ Loi du 23 décembre 1874 Dite Roussel sur la Protection des Enfants en Bas Age et en Particulier des Nourrissons.

²⁴⁷ Décret du 31 décembre 1892 Qui Fixe les Indemnités de Residence Due au Personnel Enseignant des Ecoles Primaires Publiques

²⁴⁸ Loi du 9 avril 1898 Concernant Responsabilités dans les Accidents du Travail.

industrial accidents; a law in 1906²⁴⁹ establishing the requirement for weekly rest days for employees; and a law in 1919²⁵⁰ reducing the working day to eight hours. The protections continue to become greater and broader over time.

10.1.4 Since the end of the 19th century in France, the degree of government intervention has been very important owing to the strength of its ideological and philosophical bases. Rather than the value that the British system places on freedom from government intervention, regulation was viewed as a means of liberating the oppressed working classes. Further, France did not distrust state intervention, while the UK preferred to retain its regulatory free area within the sphere of trade unionism.²⁵¹ Rather, France chose the route of direct government regulation of the terms and conditions of employment for all employees, whether unionised or not. Early French labour organisations were also more politically oriented, having become accustomed to accomplishing their aims through political action rather than negotiation. Collective agreements themselves have occasionally become the subject of statute, eventually binding all companies, even those that did not agree to its terms.²⁵²

11 World Wars and the Welfare State

11.1 World War I²⁵³ and Labour Regulation in France and Britain

11.1.1 The requirements of WWI precipitated the abandonment of the distance traditionally maintained between the state and industrial relations. Both Britain and France were forced to become highly involved in labour during this time in order to ensure that the war machine was suitably fuelled. The state professionalised the conciliation of industrial relations and displaced the essentially voluntary policy of labour mobilisation. Labour policies had become vulnerable to working classes' growing awareness of their own political power. Legislation and policies contrary to militant striking, direct

²⁴⁹ Loi du 20 décembre 1906 Relative aux Fêtes Légales Tombant en Vendredi et un Mardi: Aucun Paiement Exigible ni aucun Protêt n'est dressé le Samedi ou le Lundi.

²⁵⁰ Loi du 2 août 1919 Fixant à Huit Heures par Jour la Durée du Travail Effectif des Personnes de l'un et de l'autre Sexe et de tout Age Employées sur un Navire Affecté à la Navigation.

²⁵¹ Despax, Rojot and Laborde, n17, 56.

²⁵² MA Glendon, "French Labor Law Reform 1982-1983: The Struggle for Collective Bargaining" (1984) 32(3) Am J Comp L 449, 470-471.

²⁵³ Hereafter referred to as "WWI".

confrontation, and an encouragement of arbitration were put in place in both the UK and in France.²⁵⁴

11.1.2 Prior to WWI, the employment relationship in France was governed by basic contract principles and was largely unregulated, heavily influenced by the principle of an individual's liberty to enter freely into service contracts.²⁵⁵ During WWI, it was necessary to bring employers and unions together through arbitration and less formal discussions in order to avoid an interruption in production that would have been detrimental to the war effort. The first widespread contact between employers and unions first occurred under the direction of governmental war-time policy.²⁵⁶

11.1.3 In Britain, the Ministry of Labour was created in 1916, which changed the perception of the role of government in the labour economy. It dealt with industrial relations, manpower planning, and mobilisation during the war period, but then pressed for reformist policies such as the minimum wage once the war was concluded.²⁵⁷ It was also in 1916 that the Whitely Committee was established, recommending in its First Interim Report²⁵⁸ that there should be an establishment of a representative organisation for each industry with the object of regular consideration of matters affecting the progress and well-being of trades from the point of view of all those associated with it.²⁵⁹

11.2 The Interwar Period in Britain

11.2.1 Following the end of WWI, of pivotal importance was the defeat of the miner's strike in 1926, which solidified the economic strategy of the 1920s. The credibility of national economic policy was at stake as defeat would have meant that the direction of industrial and social policy was thrown into doubt. The triumph of the government helped to establish trade unionism as the means whereby the conditions of the working classes could be improved. However, following the general strike,²⁶⁰ the Trades Disputes Act

²⁵⁴ Price, n16, 158-159.

²⁵⁵ CA Scott, "Money Talks: The Influence of Economic Power on the Employment Laws and Policies in the United States and France" (2006) 7 San Diego Intl LJ 341, 348-349.

²⁵⁶ S Eastman, "The Influence of Government on Labour Relations in France" (1954) 20(3) Canadian J Econ and Pol Sci 296.

²⁵⁷ J Tomlinson, *Public Policy and the Economy Since 1900* (OUP 1990) 57-58.

²⁵⁸ Ministry of Reconstruction, *Interim Report on Joint Standing Industrial Councils* (Cd 8606, 1917).

²⁵⁹ Davies and Freedland, n165, 38.

²⁶⁰ 1926.

was passed in 1927²⁶¹ hobbled the Labour Party's political power by imposing restraints on financial contributions by way of political support from trade unions. The intention of the Act was to set in the law a separation of industrial and political action.²⁶²

11.2.2 In the 1930s, industrial policy veered away from *laissez-faire*, despite government rhetoric insisting on the application of that policy. The government engaged in a number of *ad hoc* interventions in the 1920s to deal with problems of efficiency in various industrial sectors. It attempted to encourage rationalisation through the use of tariffs, which had the opposite effect as industries went toward defensive cartelisation. The government did little to substantially interfere with cartelisation and restrictive practices, however, which is contrary to a free market policy. The legacy of the industrial policy of the 1930s is the substantial emphasis on anti-monopoly policies during wartime and post-war policy discussions.²⁶³

11.2.3 France, the Interwar Period and the *Accord Matignon*

11.2.4 It was not until after WWI that the employment relationship began to change in favour of the employee when, in 1926, the Supreme Court of France recognised a cause of action in relation to unfair dismissal when based on malicious intent. From that point on, the French government became highly interventionist in employment relationship. Economic power began to shift in favour of employees.²⁶⁴ The election of the *Front Populaire* in 1936 was the beginning of even greater legislative intervention in the labour market, as well as legal recognition of collective action. The *Accord Matignon* recognised the right of the worker to join the union of his choice; promised the immediate negotiation of collective bargaining contracts; and established employee delegates tasked with representing the workforce to the management. The *Accord* laid the basis for a system of collective determination of wages and working conditions, as

²⁶¹ (17&18 Geo 5 c22).

²⁶² Price, n16 166-169.

²⁶³ Tomlinson, n257 131.

²⁶⁴ Scott, n255, 348-349.

well as improved communication between workers and employers within the firm itself.²⁶⁵

11.2.5 The *Accord Matignon* was followed by the passage the Law of 1936²⁶⁶ that gave the government an active role in encouraging the negotiation of collective bargaining contracts. It constituted the first legal recognition of the institution of *délégués de personnel*.²⁶⁷ It required that all employers accept the immediate establishment of collective working contracts and extended the variety of collective agreements that could be entered and their coverage to more than just the parties to the agreement.²⁶⁸ The *Front Populaire* government also undertook more direct regulation in working conditions, including the provision of vacation and limitation of working hours. It intervened to extend collective bargaining contracts due to fear that the negotiations for their renewal would lead to conflict between labour and management. Due to the risk-averse nature and paternalistic intervention of the *Front Populaire*, employers and unions failed to learn to work together, leaving the legacy of a new system of regulation, rather than increased harmony or understanding in industry that could have been achieved through negotiation and conflict resolution. Interventionist tendencies during this period acted as a disincentive to unions and employers to work together at all.²⁶⁹

11.3 The Legacy of World War II²⁷⁰ and Labour Regulation

11.3.1 During WWII, the Vichy government²⁷¹ introduced the *Charte du Travail*, which established a hierarchy of industry specific associations from the local to the national level. Employees and employers were compulsorily enrolled in separate associations. The compulsory nature of the association membership weakened the power of trade unions further. The hierarchy of associations also facilitated government control.²⁷² The introduction of this corporatist system had been contrary to the French national character

²⁶⁵ Eastman, n256, 297-298.

²⁶⁶ Loi du 21 juin 1936 Instituant la Semaine de 40 Heures dans les Etablissements Industriels et Commerciaux et Fixant la Duree du Travail dans les Mines Souterraines.

²⁶⁷ Employee delegates.

²⁶⁸ Le Crom, n208, 129-139.

²⁶⁹ Eastman, n256, 298-300.

²⁷⁰ Hereafter referred to as WWII.

²⁷¹ 1940-1944.

²⁷² Ibid, 300-301.

since the abolition of corporations in 1791.²⁷³ The legacy of the occupation during WWII was a new schism within the labour movement between leaders of those organisations that had been created by the *Charte* and those who had remained uninvolved.²⁷⁴

11.3.2 In 1946, a new Constitution was drafted that guaranteed individual and collective rights to workers for the first time. Social rights to organise, strike, and to social security were set out in addition to the political rights in existence since the French Revolution.²⁷⁵ *Comité d'entreprises*²⁷⁶ were established in the Ordinance of 22 February 1945,²⁷⁷ evolving from the *Charte* associations established during the occupation. Today, this appears to have been a development created by both the Resistance and the *Charte* movement. It is based on the principle that employees have the right to representation to an employer, limiting patrimonial absolutism in terms of both economic and social actions.²⁷⁸

11.3.3 A dual system was established in which the *comité d'entreprises* would exist alongside personnel delegates. The delegate's task was to present individual and collective complaints to the employer in relation to wages, professional classifications, worker protection, and health and safety. The *comité d'entreprise* was limited to information and consultation on the plans of employers. As the trade unions have gone into decline in recent years, the *comité d'entreprise* has become the major institution that governs industrial relations in France. The ordinance under which it was passed is still in effect and the consultative role of the *comité d'entreprises* remains more or less unchanged.²⁷⁹

11.3.4 Governmental control of many phases of economic life was common during the Reconstruction period. Rather than allowing the free resumption of collective bargaining in France, contracts had to pass governmental approval in order to prevent any conflict with the economic policies and controls promoted by the government of the time. Then

²⁷³ Despax, Rojot and Laborde, n17, 50.

²⁷⁴ Eastman, n256, 300-301.

²⁷⁵ Despax, Rojot and Laborde, n17, 50.

²⁷⁶ Works councils.

²⁷⁷ Ordonnance no 45-280 du 22 février 1945 Institution de Comités d'Entreprises.

²⁷⁸ Le Crom, n208, 165-174.

²⁷⁹ Ibid, 165-174.

once such an agreement was affirmed, not only was it binding upon the parties who created the agreement, but was extended to be binding on all firms falling within the geographical and industrial boundaries set by the negotiations. Until 1950, the labour market in France was regulated by a number of governmental controls in an effort to improve industrial relations. However, as economic and social conditions improved, the conditions necessitating the controls disappeared,²⁸⁰ but once in place they would be difficult to remove.

11.3.5 The Law of 11 February 1950²⁸¹ renewed the liberty of collective negotiation in conjunction with the creation of a minimum wage. This was influenced by the financial difficulties experienced following the end of the Second World War that justified maintaining a narrow control over economic factors. The Law of 1950 confirmed both the pre-eminence of the state as well as the compromise of the collective autonomy to the public order of the state. The combination of the freedom to negotiate with the acceptance of state intervention by and large formed the foundations of the modern *ordre public social*.²⁸² Such governmental controls are antithetical to the role of collectivism. The interventionist and risk adverse nature of France following the war helped to subvert the cause of truly free collective bargaining.

11.4 The Golden Age of Labour Law in Britain

11.4.1 WWII marked a turning point for labour law in Britain.²⁸³ It saw the renewed mobilisation of the British nation and a revival of restraints on collectivism. A vast raft of labour regulation was promulgated in 1940. State regulation enormously diminished the prerogatives and powers of employers as they were no longer able to arbitrarily dismiss employees and even relatively minor offences were subject to arbitration. Thus disciplinary issues tended to become the province of official work committees in order to avoid the intervention of National Services Order. Legislation also restricted strikes

²⁸⁰ Eastman, n256, 301-303.

²⁸¹ Loi no 50-205 du 11 février 1950 relative aux conventions collectives et aux procédures de règlement des conflits collectifs de travail.

²⁸² Le Crom, n208, 179-181.

²⁸³ B Hepple and B Veneziani (eds), *The Transformation of Labour Law in Europe* (Hart 2009) 13.

and industrial action. Relative labour peace during the war, however, was not due to the efficacy of the law as there was a reluctance to invoke its full power.²⁸⁴

- 11.4.2 The Ministry of Labour again ascended in prominence and given the primary objective of successfully handling labour with an improvement upon WWI labour unrest. Labour was a key constraint on the war effort as manpower proved to be the ultimate limit on the capacity to fight it. The Labour Ministry, led by Minister Bevin,²⁸⁵ represented itself as being a part of the working classes and trade unionism, which played a part in securing Labour's consent to the war. Compulsion and conscription into national service was introduced when the labour shortage arrived in 1941. However, one striking observation of this period is the absence of any state regulation of wages. Voluntarism was the policy of the day along with the continuation of normal collective bargaining and arbitration²⁸⁶
- 11.4.3 The post-war period was marked by the consolidation and final breakthrough of labour law as a separate legal discipline throughout Western Europe.²⁸⁷ Master and servant laws in England were supplanted and the contract of employment emerged as the primary instrument governing the employment relationship. It was between 1944 and 1970 that labour law entered its golden era under the maxim that 'labour is not a commodity.'²⁸⁸ After the WWII, labour law's primary purpose was recognised as addressing the imbalance inherent in the employment relationship, exhibiting a fundamental redistributive goal in terms of economic power.²⁸⁹
- 11.4.4 In Britain, the advent of the welfare state and the extension of collective bargaining led to employment law taking a different direction.²⁹⁰ While Britain was reliant upon the collective bargaining system into the 1950s, little was done in the legal system to ensure that such a system was in place. There were no legal requirements for employers to recognise and bargain with trade unions. In addition, collective agreements were not

²⁸⁴ Price, n16, 190-192.

²⁸⁵ 1881-1951, Minister of Labour and National Service 1940-1945.

²⁸⁶ Tomlinson, n257, 145-147.

²⁸⁷ Hepple and Veneziani, n283, 13.

²⁸⁸ As stated in the Declaration of Philadelphia by the ILO.

²⁸⁹ Fudge, n121, 121-122.

²⁹⁰ Deakin and Njoya, n119, 8.

legally enforceable as contracts. They were binding in honour only and enforceable only through social sanctions such as striking. While agreements between employees and employers had the force of contract, the terms of collective agreements did not have any special legal status in respect of the individual contract of employment. Even when terms of collective agreements were incorporated, this did not guarantee continued observance due to the common law emphasis on the autonomy of the parties and the individual contract being at the centre of its conceptual structure.²⁹¹

11.4.5 Despite the lack of legal enforceability for the terms of most collective agreements, collective bargaining had been recognised as the normal means of settling wages and working conditions since the 1870s. The development of voluntary organisations was viewed as the central factor in the growth of industrial relations with any legislation relating to it as secondary. Although the two World Wars present two periods of active state intervention in collective bargaining that have been viewed as temporary, they did lead to a readier propensity to interfere in the process. Following the WWII, the government recognised that the voluntary system of collective bargaining was failing to achieve the goals to which it attached priority. So while the rhetoric continued to promote voluntarism so that official unionism could be seen to offer an effective alternative to the militant and unofficial enterprise level workers movements, it was not indifferent to the gaps the system left in achieving government policy goals. Thus in the post-war period questions were raised about the effectiveness of voluntary collective bargaining and the potential role that law might play in redressing those inadequacies.²⁹²

11.5 Labour Policy and Politics

11.5.1 Around the turn of the twentieth century, independent labour politics began to emerge that reflected the dissolution of Victorian social relations. At a local level the paternalism of political authority was dissolved as industrial social relations were altered. Politics were realigning with an emphasis on labour as a new political estate. There was also an intellectual revival of socialism and stirrings of anti-free-trade debates within Conservative politics that signified the commencement of a search for new

²⁹¹ Davies and Freedland, n165, 16-20.

²⁹² *Ibid*, 44-47.

policies to address the repercussions of the changing world economy. Classical liberalism was progressively abandoned by British political parties. WWI intervened to resolve the uncertainties present in the British political system, leading to the full destruction of the ideological integrity of liberalism. The War also raised the question of the position of labour within the national politics of Britain.²⁹³

11.5.2 One result of the victory in WWII was that it closed off any questioning of the traditional institutional, political, and social relationships in the country. The viability of traditional structures was, in fact, reinforced as the British political establishment had not been discredited through defeat or occupation. The war essentially ratified the soundness of Britain, British class, and the imperial system, which though faded in glory, was restored following the war. WWII also served to confirm the traditional patterns of class relations at the point of production. Unlike France and other European nations, British labour had escaped the burden of fascism and had been accorded equal partnership in political and economic mobilisation. There was no debate or struggle about the nature or basis of political and social relations as there was in France. The political consensus had shifted to a set of progressive assumptions that reflected the general interests of British labour. The fact that there was no attempt to reconsider the basis of industrial relations did not precipitate a return to the weight of employer prerogatives. Rather, the balance tended toward labour and was protected by any counter attack by the political environment of the time. The welfare state and the commitment to full employment in Britain entrenched the power of labour within British society.²⁹⁴

11.5.3 Labour policy has since become a tool of political power in both the UK and France. The course of British labour policy has been circuitous with far more violent swings in policy than was experienced in France. This can be explained in part through the more general social causes affecting each jurisdiction, but also by reference to the legal culture itself. The British common law system is infinitely malleable in comparison to the French codified system²⁹⁵ and can thus be easily affected by political shifts. British conservatism in the 1980s emphasised the need to liberate labour markets in order to

²⁹³ Price, n16, 134-136.

²⁹⁴ Ibid, 214-215.

²⁹⁵ Wedderburn, n170, 12.

compete in the global economy, which led to a substantial weakening of the power of labour interests in favour of their replacement by regulation. As governments have changed between political parties, so has the strength of labour regulation, making the area of employment law one of the least reliable and most changeable in the UK legal system. Similarly, in France, as socialism gained ground in the 1980s, labour reforms also became increasingly protective.²⁹⁶

12 Arguments, Parallels and Conclusions

12.1 Parallels and Differences between British and French Industrialism

12.1.1 The preceding Chapter has discussed important elements of social history that have influenced the evolution of labour regulation in the UK and France. Theoretically, labour is a part of the capitalist market and could be treated as a commodity; however, its inherent human quality carries with it moral implications as well as an uncertainty that undermines expected market behaviours.²⁹⁷ While both the UK and France have incorporated this ideology into their labour policies, there are a number of ways in which the jurisdictions continue to differ.

12.1.2 The proletariat in the UK evolved out of a more or less homogenous group of lower class peasants, while French workers came from a diversified industrial proletariat issued from different socioeconomic backgrounds, resulting in a segmented, diversified working class.²⁹⁸ The French labour movement thus had to answer to diverse interests of a non-homogenous working class as well as the different ideologies which coexisted among them,²⁹⁹ while the British working class presented a less complex force. Collective bargaining became an important mechanism through which employment relations were managed in France, leading to the institution of enterprise level *comité d'entreprises* and the election of representatives, which placed a legal obligation upon the employer to inform and consult employee representative groups.³⁰⁰ While in Britain, the organisation of the workplace was voluntary, and generally still reliant on collective

²⁹⁶ Deakin, Lele and Siems, n18, 145-146.

²⁹⁷ See section 6.

²⁹⁸ See sections 5.3 and 4.3.

²⁹⁹ Despax, Rojot and Laborde, n17, 210.

³⁰⁰ See section 8.3.

laissez-faire, continental workplaces tended to be organised according to legal principles.³⁰¹

- 12.1.3 The loosening of trade union restrictions eventually invited a stronger position for trade unions in both the UK and France. However, while the function of trade union rights in the UK is similar to those of other continental democracies; the form that they take is different.³⁰² Rather than protecting the freedom of association through the granting of positive rights, the UK has generally granted immunities for certain trade union activities which could otherwise constitute civil law liabilities,³⁰³ such as conspiracy. Employees remain bound by their employment contracts, regardless of the immunities that may exist for strike action, meaning that breaches can still occur regardless of employee union activity,³⁰⁴ demonstrating the UK's continued adherence to the freedom of contract as a fundamental constitutional value.
- 12.1.4 Because of Britain's rapid pace of industrialisation, the master and servant relation continued to have power, even in the modern employment relationship.³⁰⁵ During the Industrial Revolution, the employee was often wholly dependent upon the industrial employer for even the bare necessities of life.³⁰⁶ In contrast, French concepts of work relations imposed a juridical equality between worker and employer which was embodied in legal codes. In France, the employer's control over employees was tempered by the development of mandatory social legislation.³⁰⁷ The resistance to regulation in the area of labour law in the UK is endemic to the nature of the labour movement in Britain. Given the development of trade unions outside the political sphere and the far reaching freedom to act that they had been given through immunities, it is not surprising that they were not supportive of the encroachment of the law into industrial policy.³⁰⁸ Britain's adherence to orthodox economic beliefs in the free market, collective *laissez-faire*, and the lack of political ambitions in early unionist dogma

³⁰¹ Davies and Freedland, n165, 16-17.

³⁰² See Section 8.1.

³⁰³ Wedderburn, n170, 3.

³⁰⁴ *Ibid*, 8.

³⁰⁵ See section 7.1.1.

³⁰⁶ Hepple and O'Higgins, n14, 12-13.

³⁰⁷ Deakin, Lele and Siems, n18 133.

³⁰⁸ See section 11.2.2.

meant that there was little support for any progressive labour regulation.³⁰⁹ This non-interventionist stance has remained popular in British politics, though successive Labour governments have tempered this with more progressive legislation, particularly in view of Britain's acceptance of the EU Social Chapter.³¹⁰

12.1.5 In the UK, an emphasis has remained on the importance of some form of economic liberalism and the free market, while France has steadily drawn away from these ideas toward the social democracy, which is characteristic of it today. France has manifested a reserve about the market economy and capitalism through its political and economic policies.³¹¹ Clearly, the French system has taken a view on the importance of social protections and this view is imposed upon any legislative act that may affect society. Britain, however, has continued to resist interference in the labour market where possible,³¹² despite the influence of EU social legislation. The labour systems of the UK and France were developing on subtly different themes throughout the industrial age, though they began to exhibit some similarities during the early twentieth century due to the effects of the two World Wars. However, that soon changed as both recovered, reconstructed, and entered into the golden years of the 1950s with ideas of full employment.³¹³

12.1.6 The next Chapter will explore the evolution of insolvency systems through an examination of historical views on debt and credit; the financial revolutions needed to support a modern corporate and investment culture; the development of the corporate culture and company law; and the evolution of insolvency and the rescue culture.

³⁰⁹ R Lowe, "Hours of Labour: Negotiating Industrial Legislation in Britain, 1919-39" (1982) 35(2) *Econ Hist Rev* 270.

³¹⁰ See Chapter 5 section 3.4.

³¹¹ Despax, Rojot and Laborde, n17, 33-34.

³¹² See section 11.5.3.

³¹³ See section 11.4.

CHAPTER 4:
HISTORICAL PERSPECTIVES ON DEBT, CREDIT, AND INSOLVENCY: AN
EXAMINATION OF FINANCIAL EVOLUTION

“Artificial wealth comprises the things which of themselves satisfy no natural need, for example money, which is a human contrivance.”

~ St Thomas Aquinas

1 Introduction

1.1 A Review of Proletarianisation and Labour Regulation

1.1.1 While the concept of debt and bankruptcy have formed a part of social, commercial and legal history for millennia, the idea that workers need some form of protection, whether through regulation or collectivism, is a relatively new concept having its origin in the era of the Industrial Revolution, ostensibly as a means to compensate for the earlier suppression of collective action.¹ However, the fundamental aims of both labour and insolvency laws are closely connected to the socioeconomic and cultural characteristics of individual jurisdictions. The liberalism espoused by European society in the approach to industrialisation was built upon individual egoism and selfishness that was then counterbalanced and controlled through the regulation of the power relationship of employer and worker. It was believed that competition between all factors of production which, at the time, included labour, would maximise social welfare. This approach eventually proved to be a failure both in terms of the economy and the dehumanisation of workers. It is with the failure of unimpeded capitalism that the history of the state protection of labour began.²

1.1.2 The previous Chapter explored the process of industrialisation and the changes that occurred in relation to labour as a component of the free market. A purely liberal economy required a mobile proletariat that could adjust naturally to labour demands

¹ B Hepple and P O’Higgins (eds), *The Making of Labour Law in Europe: a Comparative Study of nine Countries up to 1945* (first published 1986, Hart 2010) 112.

² *Ibid.*, 75.

throughout the industrial centres, but completely free labour led to a “race to the bottom” of wages and working conditions, resulting in mere subsistence living for many industrial families.³ It was eventually recognised that there was a social, and indeed, economic need for a minimum of labour rights to satisfy various human and economic needs such as health, safety, and dignity, though it took some time for this recognition to translate into changes in industrial attitudes. Labour regulation eventually evolved in both jurisdictions, though with fundamentally different aims.⁴

1.1.3 The labour forces in each jurisdiction were affected by jurisdictional political, social, and economic structures. Due to France’s more socially oriented culture, industrialisation occurred in parallel with the preservation of traditional trades and methods of production.⁵ The French proletariat was generally imbued with more political power and afforded a level of dignity that was often lacking in the UK. The evolution of the factory system, standardisation, and mass production in industry furthered the rapidity of progress and profit. It was also these developments that initiated the deskilling of the labour force in both jurisdictions, eventually leading to a cycle of poverty for industrial workers as the labour pool grew beyond the demand of the labour market.⁶ Once employed, workers were generally desperate to remain so, leading to the acceptance of subsistence wages or worse, in addition to inhumane working and living conditions.⁷

1.1.4 Collectivism eventually became a tool for change in both jurisdictions, though the UK took a distinctly “hands off” approach, allowing free bargaining between unions and employers without any positive regulation in that area. The power of union interests eventually rose to challenge the power of the UK government, leading to restrictions on union power, replaced by some basic employment guarantees.⁸ While union

³ See Chapter 3 section 4.3 and 5.3.

⁴ Ibid, 6.

⁵ Ibid, 5.1.1.

⁶ Ibid, 4.3.6 and 5.1.4.

⁷ Ibid, 4.3.8.

⁸ Ibid, 8.2.

membership has never been extensive in France, the collective power of workers remains a powerful force in the French labour system.⁹

1.1.5 Eventually, the employment contract was developed in both jurisdictions, though in the UK it was viewed as a normal contract between individuals of equal bargaining power until much later. While penal elements were removed, it retained many of the master and servant elements that had long characterised that relationship.¹⁰ In France, the *contrat du travail* was created within a legal framework, specific to the employment relationship, within the *ordre public social*, which assured greater juridical equality in the employment relationship and alleviating the subordinate position of employees.

1.1.6 A series of laws in both the UK and France was introduced to protect the worker in areas such as health and safety, working hours, and payment terms. For France in particular, social policy legislation aimed at providing a minimum level of worker protection. The introduction of such legislation in the UK generally had the aim of protecting the workforce from injury and increasing the efficiency of labour, while in France there was a greater element of social compassion and a belief in the need to protect human dignity that influenced the development of social legislation. The World Wars then saw massive changes to the nature of labour regulation in both jurisdictions, laying the groundwork for what would be recognisable as modern labour law.

1.2 Connections between Labour and Corporate Insolvency

1.2.1 Prior to large scale industrialisation, a financial revolution occurred in the Netherlands and England to accommodate the needs for colonial trade.¹¹ Without the financial revolution, as well as the evolution of paper money, credit, debt, banking, and the parallel development of the joint stock company, large scale industrialisation would not have been possible. England's highly developed financial sector of the middle eighteenth century allowed for rapid and massive industrial development. In addition, the modernisation of both credit and debt allowed for greater risks to be taken in business, which also led to a greater risk of insolvency. Thus, as modern financial

⁹ Ibid, 8.3.

¹⁰ Ibid, 7.1.

¹¹ See JH Munro, "The Medieval Origins of the Financial Revolution: Usury, Rentes and Negotiability" (2003) 25(3) Intl Hist Rev 505.

markets evolved, providing a forum in which to invest in growing commercial enterprises, so too did the need for insolvency systems that worked not only on a national level, but also internationally. Cross border colonial trade was a catalyst for the evolution of the modern global marketplace, owing to the need for a financial system that could deal with a variety of currencies, products, and legal systems.

1.2.2 This Chapter will explore the historical context of the evolution of insolvency systems, which will include philosophical and moral aspects of debt and credit, an examination of business markets and the financial revolution, as well as the eventual shift from debt as a moral issue to a legal matter. It will also examine insolvency theory and the development of corporate rescue as a legal and socially influenced concept, and the interplay between workers and other social considerations of insolvency.

2 **Business and Financial History – Perspectives on Debt and Credit**¹²

2.1 Debt and Obligation: an Ancient Dichotomy

2.1.1 Debt and credit have an extraordinarily long history lying well outside their financial aspects. The origin of modern debt and credit lies in a sense of human community, mutual obligations, and morality.¹³ It has been viewed as a product of humanity's existential condition owed by virtue of the natural, mutual protections afforded by living in a society or, from a religious standpoint, the existential debt owed to a supreme being.¹⁴ Those living proper and moral lives were obliged to constantly repay the existential debts owed to one another. This evolved into a social obligation over time related to a reputation for honesty and charity.¹⁵ Debt requires a relationship between individuals who do not consider each other fundamentally different and who are potentially equals. The balance of debt and credit addresses this equality in the sense that the urge to repay a debt is also the need to reinstate the equality between the debtor and creditor. If one is then unable to reinstate that equality, the person who is in debt

¹² Part of this section was used in a conference presentation at the INSOL Europe Academic Forum in Berlin in September 2015 based on a paper entitled "The Cost of Bank Insolvencies: A Socio-Economic Rights Analysis" to be published in the conference proceedings by P Omar (ed) *Banking and Financial Insolvencies* to be published 2016. See Annex 2 Publication 6.

¹³ D Graeber, *Debt: the First 5000 Years* (Melville 2011) 1-19.

¹⁴ This is a primordial debt "owed by the living to the continuity and durability of the society that secures their individual existence" from G Ingham, *The Nature of Money* (Polity Press 2004) 90.

¹⁵ Usury is defined as the exaction of interest or of any specified return beyond the principal value of a loan; see D Graeber, n13, 56-57 and Munro, n11, 506.

must be at fault. Thus a debt is an exchange between individuals that has not yet been reciprocated.¹⁶ Given the association of creditworthiness with reputation for honesty and integrity, financial debt obligations became indistinguishable from moral obligations in the Middle Ages.¹⁷

2.1.2 The primeval, moral quality of debt and interest was absorbed into the Abrahamic religions and given an immoral status associated with the sins of theft and sloth. It was considered slothful as there was no labour to which the profit of interest could be attributed. The thieving nature of lending was related to the idea that money, as a representation of value in goods or services, should not be required without a relevant exchange. Therefore, interest equated to taking money from an individual for nothing in return, hence theft.¹⁸ The perceived sinful or immoral character of debt influenced early views of credit and lenders in the religious and legal prohibitions against usury.¹⁹

2.1.3 Lending with the intention to make profit was considered an assault on Christian charity and the injunction to give freely without expectation of return.²⁰ Money is a symbolic, political commodity that represents an abstract unit of measurement of something given to another in the faith that such a debt would eventually be repaid by something of equal value.²¹ Whether in coins, shells, or the abstract of numbers on a computer screen, money is not in itself useful. It is only accepted because it is assumed that others will also do so, thereby giving it a value based upon the measure of trust one has in other human beings.²² It was also viewed that treating money as an end in itself defied its true purpose as a representation of a physical or moral obligation. Charging interest was unnatural as it treated mere metal as an entity capable of reproducing itself.²³ Usury was

¹⁶ Graeber, n13, 120-121.

¹⁷ W Hunt, *The Puritan Moment: the Coming of Revolution in an English County* (HUP 1983) 146.

¹⁸ Graeber, n13, 289.

¹⁹ *Ibid*, 59-66.

²⁰ “And if you lend to them of whom you hope to receive, what thanks are there to you? For sinners also lend to sinners, for to receive as much. But love ye your enemies: do good, and lend, hoping for nothing thereby: and your reward shall be great, and you shall be the sons of the Highest; for he is kind to the unthankful, and to the evil.” Luke 6:34-35, *The Holy Bible, Douay Rheims Version* revised by Bishop Richard Challoner AD 1749-1752 (James Cardinal Gibbons 1899) (Tan Books and Publishers Inc 2000) The New Testament, 72.

²¹ AM Innes, “The Credit Theory of Money” (1914) *January Banking LJ* 151, 155.

²² Graeber, n13, 46-47.

²³ Described and condemned in Aristotle’s *Politics* 1258b and his *Nicomachean Ethics* 1121b. See O Langholm, *The Aristotelian Analysis of Usury* (Universitetsforlaget 1984).

therefore regarded as contrary to commutative justice²⁴ and natural law.²⁵ Without shedding this negative and prohibitive perspective on borrowing and lending, modern systems of credit and the financial revolution would have been impossible, and insolvency systems therefore irrelevant.

2.2 The Elements of Insolvency History

2.2.1 The history of insolvency does not begin only with evolution of credit and debt, but importantly with the recognition that in order for financial risks to be taken by cautious investors, some element of reward must be made available to mitigate that risk. In order for this to happen, debt and bankruptcy had to move from the category of a moral wrong to a legal and financial condition. The negative view of debt would not change until some element of secularity could be applied to financial transactions; as such, the Reformation²⁶ played an important part in the necessary financial paradigm shift. Approaches varied greatly according to religious views and acceptable methods to circumvent the “evils” of usury.²⁷

2.2.2 Apart from the important debt aspect of insolvency, the necessity for some formal regime would not be required until the development of an exchange economy based to some extent on credit and recognisable business structures. While markets, credit, and debt have been in existence since ancient times, the Middle Ages saw the expansion of regional markets and fairs that attracted merchants from all over Western Europe and the Mediterranean. The ever widening lens of profit-seeking entrepreneurs led to longer term ventures over greater distances with higher risks, leading to a need to attract investors to support such expensive endeavours.²⁸ This led to the development of business structures that could limit liability and mitigate the risks associated with colonial trading.

²⁴ Defined as justice bearing on the relations between individuals especially in respect of the equitable exchange of goods and fulfilment of contractual obligations: Merriam Webster Online Dictionary: <<http://www.merriam-webster.com/dictionary/commutative%20justice>> accessed 29 July 2014.

²⁵ Munro, n11, 510.

²⁶ See Chapter 2 Section 2.4.

²⁷ See Graeber, n13; Ingham, *The Nature of Money* (Polity Press 2004) JH Munro, n11; and G Davies, *A History of Money* (University of Wales Press 2002).

²⁸ ES Hunt and JM Murray, *A History of Business in Medieval Europe 1200-1550* (CUP 1999) 23-26.

2.3 The *Lex Mercatoria* and Commercial Law

- 2.3.1 As regional markets grew and began to attract merchants from all over Europe, a new means of exchange and rules governing merchant behaviour were required. The great Champagne *foires*²⁹ transcended the regional to become the first truly international marketplaces in the thirteenth century, providing a catalyst for the evolution of the *lex mercatoria*.³⁰ The *lex mercatoria* provided a set of globally agreed rules observed in all civilised places engaged in trading that evolved to satisfy the needs of the large regional fairs that attracted merchants from a variety of jurisdictions.³¹ It provided an expeditious procedure outside of the time-consuming common law procedures with lower transaction costs.³²
- 2.3.2 As there was no truly uniform system of mercantile law administered throughout Western Europe, the *lex mercatoria* derived its rules and regulations from many different countries owing to the unifying effect of the law of the fairs.³³ By the end of the Middle Ages, the *lex mercatoria* had become the foundation of expanding commerce throughout the Western world.³⁴ Today, the modern *lex mercatoria* is similar in every jurisdiction, transcending the division of the world into sovereign states, whether with free market or centrally planned economies, and whether those states have civil or common law traditions.³⁵
- 2.3.3 The *lex mercatoria* also evolved to satisfy the legal certainty that was needed for commercial transactions. Neither the Roman nor Germanic legal systems provided certainty or protected against the claims of an original owner against a merchant who had purchased stolen or lost merchandise, regardless of good faith. Ancient laws protected the rights of an original owner against third parties, whether they had acquired possession in good faith or not.³⁶ It was eventually recognised that commercial business

²⁹ Fairs or markets.

³⁰ The “Law Merchant”; Hunt and Murray, n26, 23-26.

³¹ From G Malynes *Consuetudo, Vel, Lex Mercatoria* (1686) as cited in W Mitchell, *An Essay on the Early History of the Law Merchant* (CUP 1904) 1.

³² Munro, n11, 550.

³³ W Mitchell, *An Essay on the Early History of the Law Merchant* (CUP 1904) 2-21 and C Schmitthoff, “The Unification of the Law of International Trade” (1968) JBL 106.

³⁴ NE Hatzimihail, “The Many Lives – and Faces – of the *Lex Mercatoria* : History as Genealogy in International Business Law” (2008) 71 LCP 169, 177.

³⁵ *Ibid*, 176.

³⁶ W Mitchell, *An Essay on the Early History of the Law Merchant* (CUP 1904) 93-94.

could not be done if title to goods was constantly under suspicion.³⁷ Thus, the concept of *bona fide* possession came to be a part of the *lex mercatoria* and eventually extended to any purchase.³⁸ It is also in the religious and moral overtones of good faith that the beginnings of a modern concept of contract can be observed.³⁹ These elements of commercial and contract law are fundamental to the existence of modern business and therefore fundamental to the need for insolvency systems.

2.3.4 The international *foires* also revealed a need for a simpler and less risky form of money. The larger scale trading during the Middle Ages required large transfers of physical coins. This was problematic due to the costs of transportation and the fluctuating exchange rates. Lengthy travel times could result in arriving with less value in coinage than when a merchant began the journey due to the common practice of currency debasement by impecunious sovereigns. The earliest financial institutions were designed to avoid these wasteful exercises by arranging paper transfers. Merchants developed a payment system based on *lettres de foire*, credit instruments that recognised the sales of merchandise, but specified payment at a later fair, when the total of debits and credits for a season could be calculated and resolved between buyers and sellers. These letters of credit became transferable and made the carriage of large quantities of coinage unnecessary, reducing the risk and expense of travel. Out of this evolved the bill of exchange from which the first negotiable financial instrument would develop. The use of paper transfers rested upon the reputation, trust, and confidence of all parties to a transaction that the others would honour their commitments. Merchant good faith was the foundation of the commercial revolution in Western Europe.⁴⁰

2.4 The Financial Revolution

2.4.1 The foundations of the financial revolution derive from the response of thirteenth century municipalities and merchants to the increasingly severe obstacles erected by the Church and the state to inhibit lending for profit, impeding international financial transactions due to the lack of incentive for financial risk taking. Thirteenth century

³⁷ From Sir T Scrutton, *Elements of Mercantile Law* (1891) 23 as cited in Mitchell, n36, 2-21.

³⁸ Mitchell, n36, 99.

³⁹ Mitchell, n36, 108-111.

⁴⁰ Hunt and Murray, n28, 29-30; 56-65.

Europe was caught between a commercial revolution and a vigorous campaign against usury for both individual and commercial investments.⁴¹ A number of illicit means were devised to circumvent the ban on usury. These were disguised as annuities, *rentes*,⁴² and other devices that cloaked loans in sales contracts stipulating a single price that included an uplift for interest specifying a future payment, but that would be usurious if agreed in terms of credit.⁴³ As these transactions could attract a risk of prosecution and social stigma, participants knew that they were potentially committing both usury and fraud.⁴⁴ A defaulting debtor would also have the opportunity to claim that he had been the victim of extortion as there were no contractual protections for such transactions.⁴⁵ It was the response to the restrictions on usury that provided the foundations for more complex modern financial instruments.

2.4.2 Overseas discoveries and the emergence of long distance colonial trade also influenced developments in financial markets and business structures. In order to accommodate the long distances travelled and the periods of time required for them, innovations in finance business were needed. England and the Netherlands led this revolution, implementing and improving them into more efficient forms of financial instruments.⁴⁶ Once the bill of exchange became legally negotiable, following the case of *Burton v Davey*,⁴⁷ modern financial markets were able to develop with greater swiftness and certainty.⁴⁸

2.5 Debt: From Mortal Sin to Legal Condition

2.5.1 As credit became a necessity with the expansion and internationalisation of regional markets, it was tied to the fundamental social value of mutual aid in order to justify its existence against the prohibitions on usury.⁴⁹ By the sixteenth century, attitudes toward interest and usury began to change. The removal of the prohibition on usury was not just a matter of pleasing the rising commercial interests of the gentry, lawyers, and

⁴¹ Munro, n11, 506-507.

⁴² These were contracts based on bequests of land, often to monasteries, for which the donor would receive an annual income in kind or in money, which was deemed as a “fruit” of the property to be paid for life to the donor and his heirs. See Munro, n11.

⁴³ C Wyffels, “L’Usure en Flandre au XIIIème Siècle” (1991) *Revue Belge Philologie et d’Histoire* 855, 859-871.

⁴⁴ JT Noonan, *Scholastic Analysis of Usury* (HUP 1957) 35-36.

⁴⁵ Munro, n11, 512.

⁴⁶ EE Rich and C Wilson (eds) *The Cambridge Economic History of Europe, Volume 5: The Economic Organisation of Early Modern Europe* (CUP 1977) 290-392.

⁴⁷ 1437 – adjudicated by the Mayor of London’s Law Merchant Court in 1436: Munro, n11, 551-553.

⁴⁸ Munro, n11, 556-561.

⁴⁹ Graeber, n13, 330.

merchants, but also a matter of protecting the livelihood of ordinary villagers and farmers, who were easily exploitable by corrupt money-lenders. The protection of the poor from the unscrupulous trader in part explains why the ban on usury was maintained into the late Middle Ages, in addition to the religious and cultural implications.⁵⁰

2.5.2 The Reformation helped to hasten the breakdown of preconceptions of loans at interest. The process of questioning the foundations of the Church in Tudor England raised questions among the public that the Church failed to answer with any clarity. Following England's final break with Rome, there was no longer any ecclesiastical impediment to the legalisation of interest. The growth of the commercial enterprise also helped to spur on the change in medieval attitudes toward usury as loans were more often made for commercial rather than charitable purposes. In 1545, an Act⁵¹ was passed that legalised the payment of interest, allowing payment for credit as long as the rate did not exceed ten percent per year.⁵² Though usury would fall in and out of favour for decades to come, depending on the religious persuasion of the Monarchs of England, culminating today in an almost completely free system in terms of the interest that can be charged, France retains its prohibitions to a certain extent. The French Revolution resulted in a short period where loans at interest were not limited, but today interest rates are strictly limited for individual loans and, though there are some exceptions available, interest rates remain limited in commercial loans as well.⁵³

2.5.3 The origin of capitalism not only heralded the gradual collapse of economic reliance upon traditional communities in the growing power of an impersonal market, but also relied on the conversion to a credit economy in which interest could become a fundamental factor in financial transactions. There was a gradual transformation of moral networks by the intrusion of impersonal market rules and the powers of the state. The legalisation of interest led to the evolution of signed legal bonds agreeing terms of loans, which in turn required the evolution of a court system that could deal with the

⁵⁰ G Davies, *A History of Money* (University of Wales Press 2002) 219-222.

⁵¹ An Act Against Usurie (37 H 8 c 9).

⁵² Davies, n50, 219-222.

⁵³ See A Ashta and L Attuel Mendes, "French Legislation and the Development of Credit Availability for Microenterprise" (2008) 2(2) *Global J Bus Research* 123, 127 and E Cafritz and O Tene, "Why French Usury Law Must Change" (2002) *December IFL Rev* 32.

influx of commercial claims.⁵⁴ While today debts and credits have taken on an impersonal and purely financial character within a specific legal framework, their derivation is in good faith, socially acceptable behaviour, and reputation that create the “credit” of an individual in society.⁵⁵

3 **Revolutions in Economy, Finance and Politics**

3.1 The Glorious (Fiscal) Revolution

3.1.1 The Glorious Revolution of 1688 in England not only changed the balance of political power, but it also ushered in a fiscal revolution that provided the financial foundations for the Industrial Revolution.⁵⁶ The institution of parliamentary sovereignty gave the legislature a primary role in financial matters. The royal prerogative was sharply curtailed and subordinated to the common law. The reduction in the arbitrary powers of the crown also served to secure political rights, a key element in the protection against arbitrary violations of economic rights,⁵⁷ thus progressing toward economic stability and financial certainty.

3.1.2 Parliament was also constrained against taking up the Crown’s absolute power due to the diversity of views within the institution and the embedded economic and political freedoms in the law. The political independence of the courts enabled them to exercise unchallenged authority in large areas of economic activity, making mercantilist regulation like that of Colbert in France impossible. The creation of a politically independent judiciary also had the result of expanding the government’s ability to credibly bond itself under financial agreements. The ability to raise money through loans was strengthened through the restriction of its ability to renege on them.⁵⁸

3.1.3 The institutional changes that occurred as a result of the Glorious Revolution permitted the drive toward British dominance of the world. England could not have succeeded in the wars against France without making funds available through debt. England’s

⁵⁴ Graeber, n13, 332-333.

⁵⁵ Ibid, 56-57; Munro, n11, 506.

⁵⁶ PGM Dickson, *The Financial Revolution in England: A Study of the Development of Public Credit 1688-1756* (Macmillan 1967).

⁵⁷ DG North and BR Weingast, “Constitutions and Commitments: the Evolution of Institutional Governing Public Choice in Seventeenth-Century England” (1989) 49(4) J Econ Hist 803, 815-816.

⁵⁸ Ibid, 818-819.

financial position gave it the edge to become the major power in the world in the nineteenth century while France's economy continued to struggle due to unresolved institutional contradictions that eventually led to the country's bankruptcy and the French Revolution.⁵⁹

3.1.4 The French government was rigid and inadaptably to the changes that were occurring during the seventeenth and eighteenth centuries. It lacked a representative body where the polity's consent to measures could be obtained in advance. As such, changes were made arbitrarily and at the whim of the Crown and its advisers. Had France possessed an effective legislative body, the legal and fiscal injustices occurring during the eighteenth century prior to the French Revolution would have been difficult to perpetrate and reform might have been introduced more effectively. The monarchy might then have been able to develop along similar lines to England, presenting a more competitive rival than it did.⁶⁰

3.1.5 The British and French empires were set on very different foundations. The French raised funds through plunder and taxation of the areas conquered by Napoleon, while the British economy relied upon debt financed by government bonds.⁶¹ While there are a number of reasons why this came to be, certain roots of this difference can be attributed to two different experiences of early investment banking. The financial revolution culminated in the development of the joint-stock limited liability corporation that protected investors from losing all of their wealth should a venture fail.⁶² Limited liability and investment in shares attracted the interest of profit hungry investors who would lead the world into the first stock market bubbles.

⁵⁹ Ibid, 830.

⁶⁰ Dickson, n56, 14.

⁶¹ N Ferguson, *The Ascent of Money: A Financial History of The World* (Penguin 2008) 80.

⁶² T Guinnane and others, "Putting the Corporation in its Place" (2007) NBER Working Paper Series - Working Paper 13109 <<http://www.nber.org/papers/w13109.pdf>> accessed 16 June 2014.

3.2 The Mississippi and South Sea Bubbles⁶³

- 3.2.1 Both the UK and France underwent a market bubble cycle in colonial trading around 1720. The South Sea Bubble occurred contemporaneously with France's Mississippi Bubble, but was significantly smaller and caused less financial ruin. Both experiences did, however, have a profound effect on French and English approaches to finance and business.⁶⁴ The differences between the Mississippi Bubble and the South Sea Bubble help to explain why French and English approaches to financial markets diverged at this time. The South Sea Company had to contend with competition from the Bank of England, driving up the terms they had to offer to annuitants. They also had to contend with political opposition within Parliament, something that was not present in absolutist France. They could also not establish monopolistic positions in the stock or credit markets as there was a rush of new companies seeking to raise capital in the same way. Additionally the bank notes issued by the company bank⁶⁵ in England were never legal tender. Thus, there were not the same inflationary results as the Mississippi Bubble. There was no lasting systemic damage to the financial system apart from constraints on future joint stock company formation. Government debt conversion was not reversed and foreign investors did not turn away from England, unlike France.⁶⁶
- 3.2.2 French experiences with speculative financing beginning with the failure of John Law's system in 1720 and the bankruptcies and inflation precipitated by the French Revolution led to a cautious approach to economic and monetary policy by the governments of the Long Nineteenth Century. Despite the spread of liberal economic ideas, the French government exercised guardianship over a considerable part of the economy. These controls were justified by the public's interest in them, but while the state wished to encourage economic growth, it was also concerned with the potential ramifications of

⁶³ See AM Davis, "An Historical Study of Law's System" (1887) 1(3) QJ Econ 289; FH Beach and MJ Wasserman, "Some Neglected Monetary Theories of John Law" (1934) 24(4) Am Ec Rev 646; TE Kaiser, "Money, Despotism and Public Opinion in Early Eighteenth Century France: John Law and the Debate on Royal Credit" (1991) 63(1) J Mod Hist 1; EJ Hamilton, "Prices and Wages at Paris under John Law's System" (1936) 51(1) QJ Econ 42; and AE Murphy, *John Law: Economic Theorist and Policy Maker* (Clarendon 1997).

⁶⁴ E Chancellor, *Devil Take the Hindmost: A History of Financial Speculation* (Plume Books 1998) 64.

⁶⁵ The Sword Blade Company.

⁶⁶ J Hoppit, "The Myths of the South Sea Bubble" (2002) 12 Transactions of the Royal Historical Society, Sixth Series 141; L Neal, *The Rise of Financial Capitalism: International Capital Markets in the Age of Reason* (CUP 1990) 90-111; and Davies, n47, 263-283.

such growth.⁶⁷ The government played a paternalistic role in the economy, providing security and shelter for French businessmen. This relationship can be contrasted with the more predatory outlook common to business in the UK.⁶⁸ However, mercantilist protectionism eventually became an impediment to French industrial and economic growth resulting in its failure as an economic model.⁶⁹

3.3 French and British Business Attitudes: Diametric Differences

3.3.1 Though France lagged behind Britain in its pace of industrialisation, it had intentionally adopted a slow and methodical approach, avoiding high concentrations of labour and other excesses common in British industry. The French people continued to favour individualism and had an obstinate determination to possess land, eschewing positive attachments to business and industry,⁷⁰ due to the businessman's perceived inferior social position. The materialistic qualities of businessmen were set against the perceived un-materialistic values of French gentlemen; restless ambition against the prestige of birth; the capricious efficacy of money against the economic stability of land; diligence and austerity against the dignity of leisure and the pomposity associated with upper class living. The fundamental aims in business were generally to make enough money to be able to sell the business and then live in gentlemanly luxury and possibly attain a secure and heritable official or professional position for the next generation.⁷¹

3.3.2 French entrepreneurs remained on the whole independent. Expansion was achieved through the use of company revenues rather than capital investment and, at times, through the wealth of relatives and friends. The family nature of most French firms also meant that they were of an inherently cautious nature, due to the risks of speculating with the family inheritance. In addition, there is an overwhelming emphasis on the preservation of wealth alongside the desire to create it.⁷² Most French companies remained smaller family concerns. There were only a few large joint stock companies with a more modern administrative structure. There was only a minority of ambitious

⁶⁷ F Caron, *An Economic History of Modern France* (Methuen and Co Limited 1979) 40-41.

⁶⁸ DS Landes, "French Entrepreneurship and Industrial Growth in the Nineteenth Century" (1949) 9(1) *J Econ Hist* 45, 50.

⁶⁹ ML Leboyer, "Les Banques Européen et l'Industrialisation Internationale dans la Première moitié du XIXème Siècle" (1968) 23(3) *Annales, Économies, Sociétés, Civilisations* 616.

⁷⁰ R Price, *An Economic History of France 1730-1914* (Macmillan 1981) 225.

⁷¹ Landes, n68, 54-56.

⁷² *Ibid*, 48.

French industrialists during the nineteenth century who pursued a true industrial capitalism.⁷³

3.3.3 Most French businessmen were apathetic about new industrial techniques and few were willing to make the capital investments needed. There was an innate conservativeness in the French psyche that preferred proven techniques and had a distaste for the unknown. The French attachment to security in financial matters would continue to make it difficult to engage in large scale industrial activity.⁷⁴ Capital was limited by geography, due to the nature of French banking. Banks also exercised restrictive and anachronistic control over credit. They were suspicious of borrowing and unwilling to lend unless against a high percentage of reserve.⁷⁵

3.3.4 New businessmen in the eighteenth and nineteenth centuries in England were encouraged by an individualistic self-help philosophy. There were, however, few individuals who had the funds or fortune to go into business on their own. The possibility of self-help was compromised by the economic reality that financing was generally only available within an elite group of businessmen among whom there was fundamental trust. These elite groups of businessmen collaborated extensively to reduce the transaction costs associated with the high level of risk and uncertainty existing at the time. It was therefore unlikely that individuals without an already trusted reputation would be able to insinuate themselves into these business networks.⁷⁶ This web of credit became a vital feature of the business scene from the mid eighteenth century based on the high trust culture of English businessmen.⁷⁷ This system would allow businessmen to reinvest profits into the business instead of tying up scarce resources in stocks facilitating the process of self-generated fixed investment.⁷⁸

3.3.5 British business culture was characterised by a personal capitalism revolving around commitment towards the family firms during the first phases of industrialisation. British

⁷³ Price, n70, 143-147.

⁷⁴ Caron, n67, 35-39 and Landes, n68, 48 & 53.

⁷⁵ Price, n70, 153-154.

⁷⁶ JF Wilson, *British Business History 1720-1994* (MUP 1995) 24-25.

⁷⁷ S Pollard, "Fixed Capital in the Industrial Revolution in Britain" in F Creuzet (ed) *Capital Formation in the Industrial Revolution* (Methuen 1972) 154.

⁷⁸ Wilson, n76, 52.

business firms extolled the virtues of gifted amateurs with liberal arts educations rather than professionally trained managers. There was also a pursuit of gentrification by the middle classes, which sometimes led to the fading of industrial companies, while the families running them found enough funds to support a quasi-aristocratic lifestyle. However, it was preferable to place those of a more gentlemanly character into top positions rather than those who had trained in business skills. Unlike France, however, this pursuit of gentrification existed in parallel with the idea that a business profession could be an end in itself, rather than a stepping stone to bourgeois leisure and the pursuit of functionary and governmental positions.⁷⁹

3.3.6 Large scale industrialisation was impeded by deeply rooted attitudes held by the government and ruling classes in France. Credit was viewed as too easily misused, causing bankruptcies and economic crises. There was a desire to protect savers from risky investments⁸⁰ and an acute resistance to any risks associated with capital investment and debt.⁸¹ Investment decisions were influenced by a desire for revenue, for security, for social status and for financial inertia. Only a small minority possessed the knowledge or capital to make well informed investments. Most decisions were reflected in a broad consensus of opinion among investors. Business failures, however, were too common to make industrial investment attractive to those without a large amount of disposable income.⁸² However, the majority of Frenchmen preferred to depend on land to provide an adequate income, prestige and security for old age as well as an inheritance for their children. It was security that influenced most investment decisions rather than the potential for profit.⁸³

3.4 Company Law in England

3.4.1 Towards the end of the seventeenth century, some elements of modern company organisation had developed in England, though there was no legal recognition or regulation of it. Company institutional development was impeded following the

⁷⁹ Wilson, n76, 113-117.

⁸⁰ Caron, n67, 49-63.

⁸¹ Price, n70, 147-148.

⁸² Landes, n68, 51.

⁸³ Price, n70, 150-151.

experiences of the South Sea Bubble and the passage of the Bubble Act,⁸⁴ which aimed to prevent corporate fraud by requiring the royal authorisation of all joint stock companies.⁸⁵ However, the impact of the Bubble Act has been a matter of debate. The individual nature and importance of personal relationships in business of this period would have meant that limited liability companies would not necessarily have been popular.⁸⁶ It has also been observed that despite the limitations imposed by the Bubble Act, large scale industry did develop after the 1770s.⁸⁷ The restrictions on joint stock company formation may also have encouraged innovation with other forms of organisation.⁸⁸ The Act may have exercised a deterrent psychological effect on company promotion⁸⁹ and forced the average businessman to try alternative methods for financing their ventures. The Bubble Act was, in any event, a factor that helped to prevent the emergence of a form of limited liability over the 150 years that followed.⁹⁰

3.4.2 In 1825 the Bubble Act was repealed, extending the availability of joint stock company status. However, firms still required an Act of Parliament before limited liability could be granted.⁹¹ The Joint Stock Companies Act of 1844⁹² was passed with the purpose of encouraging honest joint stock trading and to protect the public against the often fraudulent purposes of company establishment.⁹³ The Joint Stock Companies Act made it possible to automatically constitute a company without permission from the Crown.⁹⁴ Companies would only then be established if they were founded on sound financial calculations, sound management organisation and structure, and an honest (non-fraudulent) objective in the opinion of the Registrar of Companies.⁹⁵ However, it was not until 1856⁹⁶ that limited liability was introduced, which served to provide an effective form of security for both investors and businessmen.⁹⁷

⁸⁴ Bubble Act 1720 (6 Geo I, c 18).

⁸⁵ RR Formoy, *The Historical Foundations of Modern Company Law* (first published 1923, Sweet and Maxwell 2010) 1-6.

⁸⁶ LS Presnell, *Country Banking in the Industrial Revolution* (Clarendon 1956) 19.

⁸⁷ TS Ashton, *An Economic History of England: The Eighteenth Century* (Methuen 1955) 102.

⁸⁸ AB DuBois, *The English Business Company after the Bubble Act 1720-1800* (OUP 1938) 16.

⁸⁹ BC Hunt, *The Development of the Business Corporation in England 1800-1867* (HUP 1936) 9.

⁹⁰ Wilson, n76, 45.

⁹¹ *Ibid.*, 48-49.

⁹² (7&8 Vict c 110).

⁹³ Formoy, n85, 60.

⁹⁴ *Ibid.*, 67.

⁹⁵ House of Commons, *Report of the Select Committee on Joint Stock Companies* (BPP VII v 1844) 3.

⁹⁶ The Joint Stock Companies Act 1856 (19&20 Vict c 47).

⁹⁷ Wilson, n76, 48-49.

3.4.3 The Companies Act of 1862,⁹⁸ a consolidating act, refined the joint stock legislation, precipitating a flood of applications for joint stock company status. However, British businesses tended to adopt joint stock status while practising a private form of joint stock company that retained equity within the family. While securing limited liability, British family run operations were able to keep the company within the family, though this also prevented outside capital from coming into the company. There was an initial resistance within British company culture to separating ownership from control.⁹⁹

3.5 Company Law in France

3.5.1 A careful legal framework was created for France's economic development in the nineteenth century based in part on an earlier partial codification in an edict of 1673. Joint-stock companies had been outlawed during the Revolution, but were recognised by the drafters of the *Code de Commerce* of 1807 as a necessary evil for the efficient organisation of large business enterprises. However, the memory of Law's infamous system led to the imposition of significant restrictions on the creation of joint stock companies.¹⁰⁰ The incorporation instruments were viewed as requiring close regulation in order to inhibit abuse and corruption. Not only did the people need to be protected from the greed of some of the early financiers, but successive governments also wished to control the wealth produced through these instruments in order to promote internal development. The history of French corporate development is a series of compromises between the need for an expanded and liberal business enterprise and the fear of regular abuses of it.¹⁰¹

3.5.2 The *Code de Commerce* of 1807 provided for the creation of several types of company.¹⁰² The *société en commandite*¹⁰³ was a partnership between a business manager with unlimited liability and a financial investor, who only contributed money with liability limited to the amount of capital invested. It was through this institution that aristocratic or aspiring bourgeois could participate in business ventures without

⁹⁸ (25&26 Vict c 89).

⁹⁹ Wilson, n76, 119-120.

¹⁰⁰ CE Freedeman, "Joint-Stock Business Organisation in France 1807-1867" (1965) 39(2) Bus Hist Rev 184, 185.

¹⁰¹ J Adelson, "The Early Evolution of Business Organisation in France" (1957) 31(2) Bus Hist Rev 226, 226-227.

¹⁰² Price, n70, 147.

¹⁰³ Code de Commerce, Article L222-1.

stigmatising their reputation with a profession in business.¹⁰⁴ It was also due to this organisation in part that full limited liability of the *société anonyme*¹⁰⁵ was delayed. The *commandite* served as a substitute for free incorporation. It would not be until the 1860s that free incorporation would be accepted in France.¹⁰⁶

3.5.3 The *société anonyme* was a corporation in the modern sense, designed to fit the requirements of large scale enterprises with its total capital divided into easily transferable shares.¹⁰⁷ In order to avoid abuse of this structure, it was subject to authorisation in accordance with a lengthy procedure dependent upon a decision by the *Conseil d'Etat*. The authorisation process required copious correspondence as the *Conseil* carefully determined whether the enterprise was useful, its promoters substantial citizens, and if success was probable.¹⁰⁸ The funding of the *société anonyme* was also difficult as all capital was required to be paid before the company could be registered, which immobilised large quantities of capital for a long time, considering how long the application process generally took. The rigorous requirements were justified by reference to the fact that the *société anonyme* enjoyed the benefit of limited liability; as such, the creditors, public, and ordinary shareholders had to be protected.¹⁰⁹

3.5.4 In 1863, the restrictive procedure governing the creation of limited liability *société anonyme* was abolished and replaced with a law allowing the unauthorised creation of *sociétés à responsabilité limitée*,¹¹⁰ though these were limited in terms of capital. In 1867, this restriction was removed and the authorisation procedure, which had been a serious obstacle to company creation, was abolished. Prior to 1867, the main form of business was the *société en commandite*, which, though it did not grant limited liability to all parties, provided a halfway house that encouraged some capital investment. The development of this instrument, while partially created in order to protect personal

¹⁰⁴ Caron, n67, 41-42.

¹⁰⁵ Code de Commerce, Livre deuxième, titre II, chapitre V.

¹⁰⁶ Freedeman, n100, 195-196.

¹⁰⁷ Caron, n67, 41-42 and Freedeman, n95, 186.

¹⁰⁸ Freedeman, n100, 188.

¹⁰⁹ Ibid, 188-189.

¹¹⁰ Code de Commerce, Art L223-1 à L223-43.

reputations from the stigma associated with business, was a more favourable development than had been available under English legislation at the same time.¹¹¹

4 The Evolution of Insolvency Law

4.1 Debt, Bankruptcy, and Imprisonment

4.1.1 Pre-modern bankruptcy law in Western Europe was preceded by an ancient Roman law, *manus injectio*, derived from Emperor Justinian's¹¹² twelve tables. The debtor was seized by the creditor and brought before magistrates, after which the debtor had a period within which to make payment. If the debtor failed to do so, the creditor could take possession of both the person and the property.¹¹³ The debtor was subject to the good graces of the creditor, who could choose to put the debtor to work as a slave, sell the debtor into slavery, or even put him to death. The sale of the debtor's possessions and of the debtor himself served to satisfy the debts owed to the collective of creditors.¹¹⁴ This precursor to modern bankruptcy procedures was softened somewhat during the decline of the Western Empire, when it became more common to distinguish between those debtors guilty of fraudulent bankruptcy and those who had found themselves indebted through honest unfortunate circumstances.¹¹⁵

4.1.2 The term "bankruptcy" is derived from the Italian *banca rotta*, meaning "broken bench".¹¹⁶ In mediaeval times, this referred to a physical breaking of the bench of the merchant who was unable to pay his debts in order to deny him the ability to continue exercising his craft.¹¹⁷ It later came to indicate the commercial ruin of the merchant. A bankrupt merchant was no longer permitted to sit in the assembly of merchants, essentially destroying his reputation as a merchant in the local area. The French also use the word "*faillite*" to signify insolvency, which is derived from the Latin, *fallere*, which means to fail or to fall, referring to the merchant's fall from grace in the commercial

¹¹¹ Caron, n67 42-43.

¹¹² 482-565, reigned 527-565.

¹¹³ D Desurvire, *Histoire de la Banqueroute et Faillite Contemporaine* (L'Harmattan 1992) 11.

¹¹⁴ B Soinne, *Traité des Procédures Collectives: Commentaires des Textes Formules* (2nd edn, Editions Litec1995) 3.

¹¹⁵ Desurvire, n113, 19.

¹¹⁶ Soinne, n114, 3.

¹¹⁷ P Omar, "The Future of Corporate Rescue Legislation in France: Part I: History and Reforms" (1997) 8(4) ICCLR 129, 129.

arena, resulting from being prohibited to pursue business activities. Thus the term of *faillite* has a penal character that assumes some element of wrongdoing in bankruptcy.¹¹⁸

4.1.3 Individual bankruptcy in England was also penal in nature. It was viewed that non-traders' losses were due solely to their own extravagance or misjudgement and thus their own fault.¹¹⁹ It was viewed as an unjustifiable practice for any person apart from a trader to encumber himself with debt.¹²⁰ Thus, imprisonment was a common penalty in England. Bankruptcy procedures began from a premise of guilt and fault and treated those engaged in it as either criminally or civilly wrong.

4.2 Evolution of Bankruptcy Law in France

4.2.1 French bankruptcy provisions were heavily influenced by the *lex mercatoria*, which had fashioned bankruptcy into an open ended flexible instrument to resolve a debtor's estate.¹²¹ Its largely penal character is evident in the severe penalties applied under the edicts of François I in the *Ordonnance* of 1536 and the *Ordonnance* of 1560 of Charles IX.¹²² The latter ordinance assigned an extraordinary capital punishment to those found guilty of fraudulent bankruptcy. Henri III continued this severity of punishment in his *Ordonnance de Blois* in 1576, stating that fraudulent bankrupts should be publicly and exemplarily punished. It was viewed that severe punishments were needed in order to protect public morality, but also to satisfy the exigencies of the church, which had pronounced in 1570 that fraudulent bankrupts should be subject to excommunication and suffer pain of death. The capital punishments meted out to fraudulent bankrupts were often indiscriminately applied to simple bankrupts as well.¹²³

4.2.2 The *Ordonnance* of 1667 to some extent recognised the paralytic effects that the severity of punishments for bankruptcy was having on the evolution of commerce, industry, and modernity. As such, it abrogated the use of imprisonment for more than

¹¹⁸ Soinne, n114, 3.

¹¹⁹ VM Lester, *Victorian Insolvency* (OUP 1995) 88.

¹²⁰ W Blackstone, *Commentaries on the Laws of England* (5th edn, first published 1753, The Online Library of Liberty 2011) <http://files.libertyfund.org/files/2140/Blackstone_1387-01_EBk_v6.0.pdf> accessed 1 July 2014, Chapter XXXI 581.

¹²¹ J Sgard, "Bankruptcy, Fresh Start, and Debt Renegotiation in England and France (17th to 19th Century)" in TM Safley (ed), *The History of Bankruptcy: Economic, Social and Cultural Implications in Early Modern Europe* (Routledge 2013) 224-225 and "On Market Discipline: Bankruptcy, Debt Discharge and Renegotiation in England and France (17th - 19th Century)" (ISNIE Annual Conference, Reykjavik, 2007).

¹²² Soinne, n114, 4.

¹²³ Desurvire, n113, 26-27.

four months for civil debts. This abrogation, however, did not apply to foreign debtors. Foreign merchants, often engaged in the regional fairs throughout Western Europe, were viewed as having the ability to easily escape their debts due to their itinerant lifestyle. Thus any findings against foreign merchants would tend to apply more severe punishments.¹²⁴

4.2.3 More modern institutions of French bankruptcy law were set out in Title XI of the *Ordonnance sur le Commerce* of 1673 under the reign of Louis XIV, which provided for amnesties and letters of royal pardon to alleviate the punitive nature of insolvency, as well as providing methods for liquidating a debtor's estate.¹²⁵ However, the rules remained markedly penal as bankrupts could still be exposed upon the pillory or placed in shackles.¹²⁶ The 1673 ordinance also codified the customs and rules of the *lex mercatoria*.¹²⁷ The procedures of *faillite* contained in the 1673 ordinance were available only to merchants, including the potential for discharge by royal pardon.¹²⁸ The 1673 ordinance also gave a certain modern and humane aspect to the means whereby goods could be seized by creditors by limiting the times when execution could be carried out against a debtor's property and requiring witnesses to confirm such execution was performed in a dignified and respectful manner.¹²⁹

4.2.4 In order to avoid being pursued as a fraudulent bankrupt under the 1673 ordinance, debtors were required to provide their books, registers and other business papers that could show how the business had been run prior to the bankruptcy. If the records showed that the bankrupt had come into difficulty through no fault of his own, then the debtor's good faith could be established by an assembly of his creditors. It was the duty of the debtor to convince his creditors that he had acted honestly and that it would be in their interests to enter into an agreement for collective debt repayment. It was assumed that a simple bankruptcy could achieve the satisfaction of all benefitting parties through

¹²⁴ Ibid, 29.

¹²⁵ P Omar and A Sorensen, *Corporate Rescue Procedures in France* (Kluwer 1996) 22-23.

¹²⁶ Soinne, n114, 4.

¹²⁷ J Sgard, "Bankruptcy, Fresh Start, and Debt Renegotiation in England and France (17th to 19th Century)" in TM Safley (ed), *The History of Bankruptcy: Economic, Social and Cultural Implications in Early Modern Europe* (Routledge 2013) 224-225.

¹²⁸ Soinne, n114, 4.

¹²⁹ Desurvire, n113, 31.

an amiable settlement without the intervention of the court, while fraudulent bankrupts were frequently punished by death.¹³⁰

4.3 Bankruptcy, Insolvency, and the French Revolution

4.3.1 As in many political, social and economic areas prior to the French Revolution, the Enlightenment *physiocrats* also commented on the state of bankruptcy and the plight of the debtor. Montesquieu was moved with compassion in relation to the material ruin of honest French citizens. The secularity of the *physiocrats* assisted in the separation of Christian morality from the borrowing of money, allowing them to view the individual debtor with greater sympathy than might have been acceptable previously. Montesquieu believed that indebtedness gave an inherent superiority to a lender over a debtor. He queried why the state should augment this servitude through imprisonment or other subjugating penalties. He also noted that those engaged in business under contracts were not punished with the same severity and insisted that imprisonment was in any case never the appropriate course for the enforcement of debt against a citizen. Essentially, the liberty of an individual was a far more important consideration than the ease of another.¹³¹ However, the severity of punishment of fraudulent and innocent debtor alike would remain in place until the passage of the Napoleonic Code.¹³²

4.3.2 Following the French Revolution and the years of instability that followed it, Bonaparte¹³³ was able to take advantage of the chaos as a justification to impose order through the development of his Civil Code, which by 1808 included provisions on insolvency. The 1808 insolvency code offered a menu of options to the parties. The nature of the legislation retained its former repressiveness, giving courts wide powers of arrest and authorising the detention of insolvent debtors.¹³⁴ However, it made provision for unfortunate debtors presumed of good faith that allowed them to abandon all of their property to their creditors in order for their creditors to find a way in which the debtor's

¹³⁰ Ibid, 39-43.

¹³¹ Charles de Secondât, Baron de Montesquieu, *L'Esprit des Lois* (first published 1748, Gutenberg 2008) <<http://www.gutenberg.org/files/27573/27573-h/27573-h.htm>> accessed 11 August 2013, livre XII chapitre XXI; livre XX chapitre XV.

¹³² Desurvire, n113, 44.

¹³³ Ruled from 1804-1814 and for 100 days in 1815.

¹³⁴ Omar and Sorensen, n125, 23.

debts could be paid.¹³⁵ This was an obligation for debtors who wished to preserve their liberty as this transfer operated to discharge any liability to imprisonment. However, this provision was contradicted by article 1270 of the Code Napoleon that stated a debtor could not be acquitted of his debts even if he had given up all he possessed to meet them. Creditors could continue to pursue the debtor for real property. The debtor could also not avoid his “civil death,” resulting in the exclusion of the debtor’s civil rights and the prohibition from exercising a trade until all creditors had been satisfied.¹³⁶ Until 1838, most insolvencies would occur outside the civil process through an agreement among creditors to engage in an amiable liquidation by using extra-legal expedients. It was believed by many creditors that “*un bon arrangement vaut mieux qu’un mauvais procès!*”¹³⁷ The reform of 1838¹³⁸ would assist in improving the procedures to some extent.¹³⁹

4.3.3 The reform of 1838, though severe by modern standards, represented the first softening of French bankruptcy law, initiating a gradual disappearance of criminal liability in bankruptcy, except for those bankruptcies caused by fraud.¹⁴⁰ The 1838 law reduced the costs of registering a bankruptcy and softened the regulation of the procedure, although legislators also employed more rigour in relation to the transparency of the role and functions of bankruptcy trustees.¹⁴¹ The Law of 1867¹⁴² then created the foundations for corporate institutions, which was followed by a humanitarian Law of 1889.¹⁴³ It introduced the system of *liquidation judiciaire*,¹⁴⁴ designed to improve the situation of luckless, good-faith debtors. The history of modern French insolvency institutions begins here.¹⁴⁵ By abolishing penal and civil sanctions, it acknowledged that the bankrupt was no longer regarded as guilty, but rather as misfortunate or perhaps incompetent.¹⁴⁶ The modern version of French insolvency law would not be

¹³⁵ Desurvire, n113, 44-45.

¹³⁶ Ibid, 44-45.

¹³⁷ A good arrangement or understanding is better than a poor procedure.

¹³⁸ Ordonnance du 28 novembre 1838 Du Roi Relative a la Liquidation et au Paiement des Frais de Justice Criminelle.

¹³⁹ Desurvire, n113, 48-50.

¹⁴⁰ Omar, n117, 129.

¹⁴¹ Desurvire, n113, 51.

¹⁴² Loi du 22 juillet 1867 Relative a la Contrainte par Corps.

¹⁴³ Loi du 4 mars 1889 Portant Modificaaion de la Legislation des Faillites.

¹⁴⁴ Liquidation subject to court supervision, translated as “judicial liquidation”.

¹⁴⁵ Omar, n117, 129.

¹⁴⁶ Caron, n67, 43.

recognisable until legal reform occurred in the 1960s¹⁴⁷ when some forms of corporate rescue would also appear.

4.4 The Evolution of Insolvency Law in England

4.4.1 Bankruptcy laws in England and France through the Middle Ages were adapted in part from the *Venditio Bonorum* used in commercially minded Italian city states, under which a debtor's property was equitably divided among his creditors.¹⁴⁸ England's *An Acte againste suche persones as doo make Bankrupte*¹⁴⁹ adopted a species of this law, thus the first appearance of the *pari passu* principle in English law.¹⁵⁰ Until reforms of the eighteenth century, however, English insolvency laws had the sole purpose of debt collection through the seizure of a debtor's assets, functioning as continuation of private remedies with some collective aspects.¹⁵¹ The common law system was beneficial only to those individual creditors who acted promptly in collecting their accounts as no provision was available under the common law for securing or distributing the debtor's estate for the benefit of all creditors. A turning point occurred in 1705 when Parliament enacted a law¹⁵² providing relief by way of discharge of bankruptcy, provided the debtor surrendered himself and his property to his creditors. The debtor would be discharged as bankrupt as long as he was seen to cooperate with his creditors.¹⁵³

4.4.2 Because insolvency rules were an exception to the common law principles of contract in the enforcement of debt, changes to the law were initiated through changes in statute. In 1732, a consolidating act¹⁵⁴ was passed that became the statutory basis for bankruptcy law for the rest of the eighteenth century. It provided for the appointment of an assignee to manage the affairs of the bankrupt estate generally chosen from among the creditors. As the eighteenth century progressed, the number of insolvencies increased, revealing weaknesses in the system illuminated by the burden placed upon it.¹⁵⁵

¹⁴⁷ Omar and Sorensen, n125, 23.

¹⁴⁸ See Blackstone, n120, Chapter XXXI 581 and Lester, n119 88-122.

¹⁴⁹ 1542 (34&35 Hen VIII, c 4).

¹⁵⁰ Lester, n119, 14-15.

¹⁵¹ J Sgard, "On Market Discipline: Bankruptcy, Debt Discharge and Renegotiation in England and France (17th - 19th Century)" (ISNIE Annual Conference, Reykjavik, 2007) 6-7.

¹⁵² Bankruptcy Act 1705 (4&5 Anne c 17).

¹⁵³ Lester, n119, 13-18.

¹⁵⁴ An Act Preventing the Committing of Frauds by Bankrupts 1732 (5 Geo 2 c 30).

¹⁵⁵ Lester, n119, 18-21.

4.4.3 The eighteenth century was a period of law reform influenced by Bentham's¹⁵⁶ support of codification and simplification of the British legal system. Bankruptcy law reform became an important subject during this period due to the abuse of the system in place and the frauds committed under it. It also left those who engaged in the process stigmatised and financially ruined. Early reforms made little difference to the problems inherent in the system until the Act of 1825¹⁵⁷ consolidated all previous acts and introduced administrative concepts that would form a part of all future bankruptcy legislation. The 1825 Act instituted the concept of a composition of the debt agreed between the debtor and a majority of creditors that would allow the debtor to continue his business as long as he complied with the new repayment terms.¹⁵⁸ This composition procedure is perhaps the first appearance of a procedure with a goal of potentially rescuing a business in financial difficulty, rather than just relying on its liquidation to satisfy debts due.

4.4.4 Reforms were introduced in 1831 that departed significantly from the previous bankruptcy system and sought to address many of the issues businesses had encountered in the administration of bankrupt estates. It introduced a new interventionist style of bankruptcy that included an element of government involvement, contrary to the popular economic philosophy of *laissez-faire*. However, these reforms were promoting a refined *laissez-faire* that encouraged positive state action that was both acceptable and necessary in certain well-defined situations. In the case of insolvency, government intervention was justified due to creditors' consistent failure to properly administer an insolvent estate, despite the shared common interests of all creditors. The Act of 1831¹⁵⁹ included the views of classical economists, a Benthamite spirit of reform and practical suggestions of those working within the bankruptcy system at the time.¹⁶⁰ While these reforms caused some controversy among traditionalists, its promulgation was significant due to the introduction of "officialism." The reforms were also in part a result of the

¹⁵⁶ 1738-1842.

¹⁵⁷ Bankrupts (England) Act 1825 (6 Geo 4 c 16).

¹⁵⁸ Lester, n119, 21-37.

¹⁵⁹ Bankruptcy Court (England) Act 1831 (1 & 2 Will 4 c 56).

¹⁶⁰ *Ibid*, 40-48.

growing influence of the business community, which would only increase in the reforms of the 1840s.¹⁶¹

4.5 Joint Stock Companies and Bankruptcy in the 1840s

4.5.1 The origin of modern corporate insolvency law is linked to the development of the joint stock company in the nineteenth century.¹⁶² On the same date as the Joint Stock Companies Act 1844, a Winding Up Act¹⁶³ was also passed. The object of the Winding Up Act was to enable a company to be made bankrupt like an individual without bankrupting the individual members of the company. This Act also aimed to ascertain the causes of business failure and discover abuses of the joint stock company form. However, the bankruptcy proceedings did not affect the right of action a creditor may have against the person or property of an individual member, thus shareholders could remain personally liable for the debts of the company.¹⁶⁴ There were no options for compositions or arrangements that might have allowed the company to continue to trade, only the recourse to company funds and assets to satisfy the debts owed to creditors.

4.5.2 The Act of 1844 was followed by bankruptcy acts in 1848 and 1849, passed to amend the procedure for the winding up of companies since winding up was becoming an important legal aspect of business. The Act of 1848¹⁶⁵ transferred the winding up jurisdiction from the Court of Bankruptcy to the Court of Chancery, enabling company investors to petition for a winding up and to give the Court of Chancery a detailed procedure through which to carry out the winding up, particularly the enforcement of calls for payments from investors. The Act of 1849¹⁶⁶ further amended the Act of 1848, extending its application to all partnership associations and companies consisting of not less than seven persons.¹⁶⁷

¹⁶¹ *Ibid*, 53-64.

¹⁶² See the Joint Stock Companies Act 1844 (7&8 Vict c 110).

¹⁶³ Act Facilitating the Winding Up of Affairs of Joint Stock Companies Unable to Meet Their Pecuniary Engagements 1844 (7&8 Vict c111).

¹⁶⁴ Formoy, n85, 73-75.

¹⁶⁵ Joint Stock Companies Winding-Up Act 1848 (11&12 Vict c 45).

¹⁶⁶ Joint Stock Companies Winding-Up Amendment Act 1849 (12&13 Vict c 108).

¹⁶⁷ Formoy, n85, 88-89, 93.

- 4.5.3 The Act of 1849 introduced several reforms that favoured creditors. The simple principle behind these creditor friendly reforms was that, *prima facie*, the creditor was innocent, while the debtor was at fault. The Act made a debtor's failure to comply with his summons an act of bankruptcy in itself. This bill also introduced a means of distinguishing between different types of debtors: the virtuous debtor, whose insolvency was attributed to unavoidable losses or misfortune; the unfortunate debtor whose conduct was generally satisfactory; and the speculating or fraudulent debtor.¹⁶⁸ This ranking indicates a close tie to the prevailing moral perception of bankrupts and the Victorian values of thrift, self-help, and individual effort.¹⁶⁹
- 4.5.4 Although the 1849 Bankruptcy Act seemed to ameliorate the problems and improve the way the bankruptcy system functioned,¹⁷⁰ the Acts of 1844, 1848 and 1849 produced a conflict of jurisdiction between the Court of Bankruptcy and the Court of Chancery, leading to significant confusion as petitions could be brought by various stakeholders to either court.¹⁷¹ In addition, the provision of the 1844 Act allowing creditors to pursue the property of each individual member of the company once the property of the company was exhausted not only defeated any presumption of limited liability, but also disrupted *pari passu*¹⁷² distribution.¹⁷³ The introduction of true limited liability in 1856¹⁷⁴ resolved the problem of both conflicts of jurisdiction and the pursuit of individual shareholders outside of bankruptcy by allowing the Chancery Court to refer its winding up orders to the appropriate bankruptcy court. Limited liability was also a catalyst for creditors to look to the assets of a company for security when considering their lending habits.¹⁷⁵
- 4.5.5 Despite the rise of officialism and the codification of the bankruptcy system, formal bankruptcy was undesirable due to costs and delays. Creditors would instead often work out arrangements or schemes with the insolvent debtor to avoid bankruptcy processes,

¹⁶⁸ Lester, n119, 67-70.

¹⁶⁹ R Bellamy, *Victorian Liberalism: Nineteenth Century Political Thought and Practice* (Routledge 1988) 7.

¹⁷⁰ Lester, n119, 70.

¹⁷¹ See *Re The Royal British Bank and the 7&8 Vict c. 111* (1857) 28 LTOS 224 and Formoy, n81, 93-95.

¹⁷² Originally defined by Henry VIII in the Statute of Bankrupts 1542 (34&35 Hen 8 c 4) as "a portion, rate and rate alike, according to the quantity of their debts."

¹⁷³ Formoy, n85, 95-97.

¹⁷⁴ The Joint Stock Companies Act 1856 (19&20 Vict c 47).

¹⁷⁵ Lester, n119, 223-225.

leading to a private liquidation with each creditor being paid his *pro rata* share of the assets. At times, the debtor would continue to operate his business under agreed creditor imposed restrictions.¹⁷⁶

4.6 Victorian Bankruptcy Reforms: The Influence of Business

4.6.1 The Bankruptcy Acts of 1861¹⁷⁷ and 1869¹⁷⁸ emphasised creditor control and minimised the role of the judiciary in the collection and distribution of company assets. The business community exercised considerable influence on the content of this Act and reformers believed that a system designed by those having the most at stake would be more likely to succeed. Officialism had fallen out of fashion, despite its effective operation for twenty five years. This was due in part to changes in the power structure within society to favour the middle class as well as the involvement of individuals from the non-legal or political arena in discussions about reform. The current bankruptcy system was viewed as a means of securing immunity for dishonest speculators and was in need of substantial changes.¹⁷⁹

4.6.2 The Joint Stock Companies Winding-Up Act,¹⁸⁰ the Bankruptcy Acts¹⁸¹ and the Companies Act of 1862¹⁸² introduced and reinforced modern concepts of insolvency, such as the statutory regime for preferential debts, the *pari passu* principle, separated administrative from judicial functions in bankruptcy, subjecting to public examination persons responsible for the insolvency and associated losses to creditors and specific court led procedures for winding up.¹⁸³ A number of acts were passed and cases heard that helped to develop the law of insolvency further. Some of these reforms were even influenced by the recognition that some species of public good was both desirable and could be achieved by providing a means of collective action in the liquidation and distribution of bankrupt estates.¹⁸⁴ However, the quantity of bankruptcy reforms during the nineteenth and early twentieth century resulted in layers of law that were difficult to

¹⁷⁶ Ibid, 78-79.

¹⁷⁷ Bankruptcy Act 1861 (24&25 Vict c47).

¹⁷⁸ Bankruptcy Act 1869 (32&33 Vict c71).

¹⁷⁹ Ibid, 123-131.

¹⁸⁰ 1844 (7&8 Vict c111).

¹⁸¹ In addition to the above, includes the Bankruptcy Act 1883 (46&47 Vict c52); and Bankruptcy Act 1914 (4&5 Geo 5 c59).

¹⁸² (25 & 26 Vict c89).

¹⁸³ R Goode, *Principles of Corporate Insolvency Law* (Student edn, Sweet and Maxwell 2005) 6-9 and Lester, n119, 227.

¹⁸⁴ Lester, n119, 293-294.

operate and prone to manipulation and would attract the attention of reformers in the 1970s.¹⁸⁵ It would not be until the 1980s that true corporate rescue would be introduced in the United Kingdom.

5 **Theoretical Aspects of Insolvency Law**¹⁸⁶

5.1 Bankruptcy Theory: the Benefits of Collective Action

5.1.1 Bankruptcy theory is often approached within a theoretical framework of Law and Economics.¹⁸⁷ The utilitarian maximisation of “happiness” was replaced to some extent by the maximisation of wealth, which could perhaps be equated on a metaphorical level, considering the Western world’s focus on consumerism and profit-making. Though Bentham’s utilitarian concepts were developed during the early phases of industrialisation, consumerism and profit had not yet subjugated the civilised world. Eighteenth century middle class values were still influenced by a desire for a perceived aristocratic life of leisure as a goal for the ambitious pursuit of industrial profit. Today, however, profit alone has become an end in itself.¹⁸⁸

5.1.2 There have been a number of arguments in favour of the collective approach taken in bankruptcy and insolvency law. Many of these revolve around the idea that if creditors were left to pursue their contractual rights to enforce a debt, then a race to the court would ensue that would result in an inequitable result for the collective creditors, for the debtor company, and potentially for peripheral stakeholders¹⁸⁹ who could be affected by an inefficient resolution of a company’s financial distress. One explanation for the justification of collective proceedings, against the natural exercise of market forces, is derived from the Rawlsian¹⁹⁰ concept of a creditor’s bargain.¹⁹¹ In this bargain, it is assumed that creditors of a company having equal ranking in rights to debt enforcement would be expected to mirror a negotiated agreement among themselves had they been

¹⁸⁵ V Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, CUP 2009) 12-13.

¹⁸⁶ Portions of this section have been incorporated from this author’s LLM Thesis: “Employment Protection and Business Rescue: Social Necessity or Obstacle to Economic Efficiency” Nottingham Law School, Nottingham Trent University (2011) (unpublished).

¹⁸⁷ See JS Mill, *Utilitarianism* (first published in 1861, 2nd edn, Hackett Publishing Company Inc., 2001) and RA Posner, *The Economics of Justice* (HUP 1981) 48-87.

¹⁸⁸ See RA Posner, *The Economics of Justice* (HUP 1981).

¹⁸⁹ The word “stakeholder” should be understood to include: the debtor, owners, management, creditors, employees, guarantors, suppliers, legal, commercial and social institutions, and practices.

¹⁹⁰ See J Rawls, *A Theory of Justice* (HUP 1971).

¹⁹¹ DR Korobkin, “Contractarianism and the Normative Foundations of Bankruptcy Law” (1993) 71 Tex L Rev 541, 559.

able to do so with prior knowledge of the bankruptcy occurring in the future. While this idea relies on an entirely hypothetical situation in order to justify the imposed collective regime of insolvency law, its results may lead to a more efficient resolution.¹⁹²

5.1.3 By ensuring equitable treatment of all creditors, each with the power to participate in the resolution of the financial situation, an element of certainty is introduced, as the individual free-for-all is replaced by a certain outcome due to the identical relationship shared by all creditors with the debtor. This system may eliminate the strategic costs associated with the legal expense of racing to place individual claims and reduces the potential variance in recoveries, which may satisfy certain risk-averse creditors. When left to individual action, results will be derived only from individual self-interest and competition, leading to faulty decision making as a group collectively. Each creditor, unless assured of mutual cooperation, would have an incentive to take whatever advantage there may be in individual collection remedies before the other creditors are able to act. As a group, most creditors would not wish to take risks that would jeopardise the optimal recovery of what they are owed, thus there is logic in the concept of collective action for bankruptcy.¹⁹³

5.1.4 Collective action may also result in more optimal outcomes for the business. As individual remedies lead to the piecemeal dismantling of a debtor's business, a holistic process is more likely to increase the aggregate pool of assets, providing greater advantage to both the company and the creditor groups.¹⁹⁴ The same applies to the potential for reorganisation over liquidation. Without the stay on individual action, the optimisation of a company's value for its sale to a third party would also not be possible. A reorganisation procedure can provide enough time to give all stakeholders a chance to assess their positions and organise their affairs. It may also make it possible to sell a company as a going concern, rather than as an assortment of assets.¹⁹⁵

¹⁹² TH Jackson, "Non-Bankruptcy Entitlements and the Creditor's Bargain" (1982) 91(5) Yale LJ 857, 860-866.

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ DG Baird, "The Uneasy Case for Corporate Reorganisations" (1986) 15 JLS 127, 136.

5.2 A Proceduralist Approach

5.2.1 There are also certain areas that have been viewed as specifically outside of the purview of bankruptcy law, although financial distress has more far-reaching effects than just those within the economic sphere.¹⁹⁶ For example, proceduralists view employment protection and wider community interests as residing outside the concern of insolvency laws and that it should not be within the ambit of insolvency law to reorder substantive entitlements. Rather, insolvency law has a single overriding goal: to allocate the common pool of assets in such a way as to maximise benefits to the creditors of an insolvent estate.¹⁹⁷ The creditor wealth maximisation approach avoids the first come first served dilemma by imposing a single joint action on the creditors such that they act as a single entity. This approach maintains pre-insolvency entitlements, despite any inherent imbalance between the creditors subject to the bargain.¹⁹⁸ The proceduralist philosophy is justified on the supposition that if creditors were free to choose their own mechanism of enforcement in insolvency, they would inevitably agree on a collectivist arrangement.¹⁹⁹

5.2.2 The creditor wealth maximisation view is not internally consistent, however, as it is justified only by presupposing what it has set out to prove. Assumptions are made about the creditors and there is no explanation as to why the parties would inevitably agree on a collectivist regime.²⁰⁰ Further, the goal of simple creditor wealth maximisation does not take into account the legitimate interests of other stakeholders, such as employees and the community. The proceduralist would argue that it is not the fundamental function of insolvency law to do so. It treats the problem of corporate insolvency as isolated only to those parties contractually connected to the business benefitting from a sale of assets for the creditors. This fails to treat business failure as an economic and social problem,²⁰¹ overlooking the fact that certain problems confronting claimants

¹⁹⁶ R Goode, *Principles of Corporate Insolvency Law* (Student edn, Sweet and Maxwell 2005) 42-43.

¹⁹⁷ See Jackson, n192, DG Baird and TH Jackson, "Corporate Reorganisations and the Treatment of Diverse Ownership Interests" (1997) 51 U Chi L Rev 97; Baird, n195; and T Bose, "Resolving Financial Distress: Justice as Fairness and Reciprocity" (2004) 11 UCL JL&J 230.

¹⁹⁸ K Luttikhuis, "The Effectiveness and Efficiency of Corporate Insolvency Law – Part Two" (2009) 18 IIR 237.

¹⁹⁹ Finch, n185, 32-33.

²⁰⁰ T Bose, "Resolving Financial Distress: Justice as Fairness and Reciprocity" (2004) 11 UCL JL&J 230, 241.

²⁰¹ Finch, n185, 33-34.

outside of the common pool of creditors arise specifically because of a company's insolvency.²⁰²

5.3 Broad Based Contractarianism

5.3.1 Broad based contractarianism is a philosophy based on the tradition of the social contract that evolved in part from the theory of “justice as fairness,” according to the philosophy of Rawls.²⁰³ The contractarian approach similarly promotes wealth maximisation, though it is presumed that together a broader set of stakeholders will agree to rules relating to insolvent entitlements, while ignorant of real contractual entitlements or the actual status of the company at the time. This agreement would include representatives of all stakeholders, rather than restricting it to creditors with contractual entitlements.²⁰⁴

5.3.2 The contractarian vision accommodates a variety of stakeholder interests,²⁰⁵ but also makes assumptions about human behaviour with no evidence to support those assumptions. In short, both the proceduralist and the contractarian theories rely on the presence of a “veil of ignorance”, which is not a realistic metaphor for the true relationship that exists between stakeholders of an insolvent company. Creditors are not naturally likely to cooperate and stakeholder relationships are far from equitable; it is far more likely that they will act with their individual best interests in mind, regardless of how a self-interested approach might affect the level of distributions to the entire collective of stakeholders.²⁰⁶

5.4 The Traditionalist Approach

5.4.1 The economic approach to bankruptcy law has been challenged as being unrealistic according to the needs of the modern business and its associated stakeholders. The goal of creditor wealth maximisation has been viewed as flawed, as it does not take into account certain values that have helped to give bankruptcy law its shape. In particular,

²⁰² Goode, n183, 44.

²⁰³ Rawls, n190.

²⁰⁴ Goode, n183, 38.

²⁰⁵ United Nations Commission of International Trade Law United Nations Publications (UNCITRAL), *The Legislative Guide on Insolvency Law* (2005) page 9 para 1.

²⁰⁶ Finch, n185, 33-34.

the economic approach does not account for the potential to discharge any part of the debt owed, as this goes against any natural bonds of financial agreements. Rather, bankruptcy law has been said to exist, not in a vacuum, but as a response to certain conditions of human life. It goes beyond the simple mechanism of debt collection to implicate certain moral, political, personal, social, and economic values.²⁰⁷

5.4.2 The purpose of modern insolvency law is generally accepted as existing to replace the chaotic creditors' free for all pursuit of the enforcement of debt obligations with a statutory regime suspending creditor rights and remedies, while procedures are initiated to provide for the orderly collection and realisation of assets and their distribution among creditors in accordance with a scheme of distribution.²⁰⁸ It has been convincingly argued that other interests should be considered in insolvency, in addition to the creditors, and that an emphasis purely on wealth maximisation is an oversimplification of the broader effects of insolvency.²⁰⁹ It has often been debated whether it is necessary to strike a balance between stakeholder interests as well as social, political, and policy considerations that may have an impact on the economic and legal goals of insolvency law.²¹⁰

5.4.3 Neither the broad based contractarian nor the proceduralist approach relying on the veil of ignorance can explain the current preferences given to corporate rescue over liquidation, which has become an important aim of insolvency globally. The traditionalist approach allows for this. Traditionalists reject the notion that insolvency law exists only to serve creditors' financial interests. Rather, traditionalists promote a stakeholder oriented approach, giving weight to the concerns of all stakeholders, even those outside of contractual relationships of the business. It recognises a wider purpose for insolvency procedures, considering employment protection, the interests of the community, and equitable treatment of creditors as legitimate goals of insolvency law.²¹¹

²⁰⁷ DR Korobkin, "Rehabilitating Values: A Jurisprudence of Bankruptcy" (1991) 91(4) Colum L Rev 717, 719-725.

²⁰⁸ Goode, n183, 5.

²⁰⁹ See E Warren, "Bankruptcy Policy" 54 U Chi L Rev 775.

²¹⁰ N205, page 9 para 1.

²¹¹ Korobkin, n191, 554.

5.4.4 A traditionalist view of insolvency allows for some redistribution of value, so that high priority creditors are required to give way to some extent to other creditors. This vision also permits an emphasis on the survival of a business instead of only promoting wealth maximisation principles or contractual entitlements.²¹² The influence of other stakeholder interests is evident in the diverse approaches to insolvency. It is this traditionalist approach that the UK and France have espoused in insolvency law, although France has continued to take the redistribution of rights to a higher level. While insolvency laws throughout the world have a similar function, the fundamental aims of insolvency regimes can differ. These aims can be oriented around a light touch regulation to support a liberal economy, the preservation of businesses, the protection of employment, or other aims that are generally influenced by the cultures within which insolvency regimes are situated. Social policy has had a particular influence on the development of corporate rescue mechanisms that aim to preserve or rehabilitate a business. The reality is that European insolvency laws inevitably consider broader socio-political issues in a traditional framework than the pure forms of the Rawlsian creditor's bargaining position would have them consider.

6 French Corporate Rescue: A Fundamental Value

6.1 The Evolution of the Rescue Culture in France

6.1.1 It has been said that liberalism teaches that bankruptcy is the method whereby the economic cycle is sanitised.²¹³ However, so-called liberal governments have regularly taken decisions opposed to this idea. There are certain social and economic imperatives that have led to a consensus that legislation in this area is necessary. Indeed corporate rescue legislation arose out of the need to artificially prevent the demise of enterprises that would otherwise be moribund.²¹⁴

6.1.2 The Law of 1955²¹⁵ accentuated the distinction between the civil and penal forms of the bankruptcy procedure.²¹⁶ For those bankrupts who were found to have acted

²¹² Finch, n185, 41.

²¹³ K Kharroubi, "Cessation des Paiements et Overture des Procédures Collectives" (These en Doctorat, Paris II 1984) 16.

²¹⁴ Desurvire, n113, 55.

²¹⁵ Law no 55-583 of 20 May 1955.

²¹⁶ Soinne, n114, 5.

inappropriately, it was no longer possible to enter into a *concordat* with creditors, a procedure that had been regularly abused as a means of blackmailing creditors into agreeing to lose only a portion of what they were owed in an informal arrangement or otherwise to engage in a judicial procedure in which they would likely recover none of it.²¹⁷ The procedure of *règlement judiciaire*²¹⁸ was introduced, which was a substitute for judicial liquidation, providing for two alternative results. Firstly, the procedure could result in the reestablishment of the debtor's business and the partial or total payment of his creditors through a composition that involved the collection and realisation of the debtor's assets, followed by the dissolution of the company. The second procedure, *faillite*, was used in the event that the corporate insolvency was the fault of the business manager. Under this procedure, the debtor's assets would be sequestered and the company forced into liquidation in order to drive the culpable businessman out of business. Unfortunately, the results of these procedures were not always fair, as some businesses were unnecessarily dissolved, while others were allowed to linger on with detrimental social and economic consequences before finally collapsing.²¹⁹

6.1.3 The modern concept of corporate rescue in France arrived with the Law of 1967.²²⁰ This law broke with traditional approaches to bankruptcy legislation in which the head of the enterprise was identified with the enterprise itself. The law distinguished the patrimony of the company from the physical personality of its directors. Thus the idea that an enterprise could be disengaged from the men who ran it became a part of the bankruptcy code. In addition, the failure of a judicial settlement would no longer necessarily lead to the inevitable bankruptcy of the company and its grave consequences for the company and its stakeholders. Rather, there was now a procedure available in which a transfer of business assets could be made, making it possible to continue the activities of the enterprise.²²¹

²¹⁷ Desurvire, n113, 55.

²¹⁸ Translated as "judicial settlement."

²¹⁹ Omar, n117, 129.

²²⁰ Loi no 67-563 du 13 juillet 1967 Sur le Règlement Judiciaire , la Liquidation, la Liquidation des biens, la Faillite Personnelle et les Banqueroutes.

²²¹ Desurvire, n113, 56.

6.1.4 The Law of 1967 provided for either a *règlement judiciaire* or a *liquidation judiciaire*.²²² The former was chosen if the result of the process was likely to be a composition agreement with creditors, while the debtor continued to trade, “rescuing” the business from liquidation. The latter was chosen if there was little likelihood of survival and resulted in the liquidation of the debtor’s assets. The Court would choose from these options based on their view of the viability of the business. The law of *redressement*²²³ was introduced later in 1967 and was aimed at businesses whose insolvency would be damaging to the economy and were, while insolvent, not irretrievable. It included a moratorium, a mechanism for the settlement of debts, and repayment. The reforms of 1967 were, however, designed to meet the requirements of a relatively prosperous France. The general outcomes were poor, saving few businesses from collapse and causing detriment to creditors, employees, and shareholders alike. While many attempts at reform were made, a new law on insolvency was only passed in 1985 and whose basic structure would remain untouched for almost a decade.²²⁴

6.2 Business Rescue in the 1980s

6.2.1 Both England and France saw changes to their insolvency systems in the mid-1980s that shifted the focus from liquidation to the rescue or rehabilitation of companies. A more social approach to insolvency had developed among European nations that left scope for, and indeed justified, rescue activities according to the individual values contained within the corporate rescue principles of each jurisdiction.²²⁵ In France, the reforms of the 1980s had as one of their fundamental objectives the protection of employment.

6.2.2 The Law of 1985²²⁶ was passed with the objective of protecting employment at the risk of sacrificing creditors’ rights. It envisaged three possible outcomes: (1) a plan for continuing the business; (2) a plan for its sale; or (3) winding up with court supervision.²²⁷ It was mandatory, at least ideologically, to attempt the first of these outcomes before resorting to the second and third in order to provide the greatest chance

²²² Translated as “judicial liquidation.”

²²³ Often translates as “recovery”/“restructuring”.

²²⁴ Omar and Sorensen, n125, 24.

²²⁵ Finch, n185, 245-246.

²²⁶ Law no 85-98 of 25 January 1985.

²²⁷ P Thery, “The Evolution of Insolvency Law in France” in W-G Ringe, L Gullifer and P Thery (eds), *Current Issues in European Financial and Insolvency Law: Perspectives from France and the UK* (Hart 2009).

for employees. The law reduced creditors' rights in favour of focusing on saving the business and the jobs associated with it. This approach was later viewed as too biased in favour of labour and unsuited to allowing the French economy to evolve in the highly competitive global market.²²⁸ Further, the results achieved under this legislation were mediocre, owing in large part to creditors' lack of interest in prevention or rescue procedures.²²⁹ However, the focus on employment protection and business rescue has not been lost in subsequent reforms to the French insolvency code.

6.2.3 In the 1990s, France was witness to a number of high profile cases in the business world centring chiefly on the misuse of corporate assets. Due to the close-knit nature of the business community, there was an absence of transparency and objective checks on the exercise of the power in French companies. This was viewed as particularly acute in insolvency proceedings where the failure of companies also had political, economic and social implications.²³⁰ France therefore underwent another set of reforms to its insolvency system in 1994.²³¹ The purpose of this reform was the reinforcement of those measures available during the pre-insolvency stage, to redress some of the rights of creditors during insolvency proceedings, and to ensure greater equity in the plans resulting in the sale of a business. The 1994 reforms were aimed at creating balance between the interests of the company and its creditors.²³² However, business corruption would not stop with this reform. A number of technical and administrative changes were made during the 1990s, but the most significant reforms would not take place until 2005, following a number of episodes of corruption and scandal in the French business community.²³³

6.3 Insolvency Reform in the Twenty First Century

6.3.1 In addition to increasing transparency and integrity of the French insolvency system, the balance between the rights of employees and creditors has been a consideration in

²²⁸ JR Silkenat and CD Schmerler, *The Law of International Insolvencies and Debt Restructurings* (Oceana Publications 2006) 143.

²²⁹ I Didier, "Creditors Rights in France after the Reforms of 26 July 2005 – Part I" (2007) 4(4) ICR 178, 178.

²³⁰ P Omar, "Reforms to the Framework of Insolvency Law and Practice in France: 1996-2006" in KG Broc and R Parry (eds), *Corporate Rescue: An Overview of Recent Developments from Selected Countries* (Kluwer 2004) 114.

²³¹ LOI no 94-475 du 10 juin 1994 relative à la prévention et au traitement des difficultés des entreprises.

²³² Omar and Sorensen, n125, 28.

²³³ Omar, n230, 115-116.

attempts to reform the insolvency code,²³⁴ leading to the Law of 2005.²³⁵ In the period leading up to the promulgation of this law, it was observed that the previous insolvency code had in many instances failed to keep a company from falling into a terminal financial condition. Other pressures for reform included the coming into force of the EC Insolvency Regulation²³⁶ and a view that the French insolvency regime was too debtor-friendly, particularly when this view is coupled with the perennial French concern for employee job security.²³⁷

6.3.2 The Law of 2005 was designed to improve the balance between employee and creditor rights by enhancing the protection of creditors generally. It takes creditors' interests into account and involves them directly in the restructuring plans for the company in financial distress through mediation or other remedial procedures. The spirit of the reforms were therefore cooperative in nature, encouraging company directors and company creditors to find a mutually beneficial solution to the financial problems of the company without resorting to previously confrontational procedures that frequently led to the failure of the company as a whole.²³⁸ The hope for rehabilitation became a driving force within the insolvency system in France, in part to protect the economy from the effects of business failures but also to protect those employed by failing companies, preserving jobs.²³⁹

6.3.3 The Law of 2005 includes an entirely new procedure, the *sauvegarde*,²⁴⁰ which is available to debtor companies before the formal *cessation de paiements*²⁴¹ situation occurs. It was designed as an anticipatory debtor-in-possession rescue procedure where the business could benefit from a moratorium while conceiving of and proposing a plan to creditors with a view to restructuring the business.²⁴² This Law was reformed by ordinance in 2008,²⁴³ partly as a result of the poor utilisation of the *sauvegarde* procedure. In large part, the 2008 ordinance addresses perceived inefficiencies in this

²³⁴ P Omar, *European Insolvency Law* (Ashgate 2004) 129.

²³⁵ LOI n 2005-845 du 26 juillet 2005 de sauvegarde des entreprises.

²³⁶ Council Regulation (EC) 1346/2000 of May 29 2000 on Insolvency Proceedings [2001] OJ L160/1.

²³⁷ C Dupoux and D Marks, "French Bankruptcy Law: Putting the Safeguards in Place" (2006) 3(4) ICR 207.

²³⁸ Didier, n229, 178.

²³⁹ See JLL Gant, "Social Policy and Insolvency: Struggles toward Convergence" (2014) 2(1) NIBLeJ 4.

²⁴⁰ Translated as "preservation."

²⁴¹ Translated as "payment failure."

²⁴² P Omar, "Preservation and Pre-Packs a la Francaise: the Evolution of French Insolvency Law" (2011) 22(8) ICCLR 258.

²⁴³ LOI n 2008-776 du 4 août 2008 de modernisation de l'économie (rectificatif).

procedure with the aim of encouraging recourse to upstream rescue by clarifying the criterion for access to the procedure, the functioning of creditors' committees and their role in the procedure. It also aims at enhancing the operation of other insolvency procedures such as conciliation and judicial liquidation.²⁴⁴

6.3.4 A further decree in March 2014 made additional modifications to the *sauvegarde* procedure aimed at facilitating the anticipation of worsening financial difficulties, enhancing process efficiency in relation to the roles of creditors, debtor, and shareholders, and to more realistically treat those situations that are irrecoverable in relation to the rights of creditors and debtor. It also aims to improve the procedural rules in relation to security, simplicity and efficacy.²⁴⁵ In addition, the *Loi Macron*,²⁴⁶ passed in late 2015, is likely to have a number of interesting effects on French social policy and insolvency as its aim is generally to create more business friendly policies in line with the post-financial crisis need to liberalise the French economy.²⁴⁷

7 Corporate Rescue in the United Kingdom

7.1 The Evolution of the Rescue Culture

7.1.1 In the 1970s, a Darwinian approach to corporate rescue was espoused in the UK, whereby the promotion of a market driven economy acknowledged that a certain level of corporate failure is inevitable and necessary for the proper functioning of a free market economy.²⁴⁸ Thus, the UK was slower in its adoption of the rescue culture. At a time when France was focussing on rescue and rehabilitation, in the UK the focus of insolvency legislation remained to a certain degree maximising returns to creditors by replacing the chaotic pursuit of individual claims with a statutory regime suspending creditors' rights and providing a mechanism for the orderly collection and realisation of

²⁴⁴ Omar, n242.

²⁴⁵ Rapport au Président de la République relatif à l'ordonnance no 2014-326 du 12 mars 2014 portant réforme de la prévention des difficultés des entreprises et des procédures collectives, JORF n 0062 du 14 mars 2014 p 5243 texte 2 sur 103. See also P Omar, "A Reform in Search of a Purpose: French Insolvency Law Changes (Again!)" (2014) 23(3) IIR 201.

²⁴⁶ Loi no 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économique.

²⁴⁷ See for example, The Economist, "Macron's Gambit" available from <<http://www.economist.com/news/europe/21635835-economy-minister-must-convince-brussels-his-reforms-are-liberal-and-paris-they-are-not-macrons>> accessed 26 December 2016. For a more in-depth discussion, see JLL Gant and A Kastrinou, "The Road to Recovery: A Comparative Analysis of the Impact of the Financial Crisis on Rights of Workers in Greece, Portugal, France and the United Kingdom and their Insolvency Legal Systems", in R. Parry (ed), *Designing Insolvency Systems* (INSOL Europe 2016) 31-54.

²⁴⁸ S Frisby, "In Search of a Rescue Regime: the Enterprise Act 2002" (2004) 67(2) MLR 247, 248.

assets and their distribution.²⁴⁹ However, changes in the market, social policy, and the economic climate eroded this paradigm of British insolvency law,²⁵⁰ resulting in the initiation of massive reforms culminating in the Insolvency Act of 1986.²⁵¹

7.1.2 The prospective entry of the UK into the European Community²⁵² in the 1970s also demanded that the UK should be capable of negotiating with other Member States under a coordinated insolvency convention. The committee assigned to deal with the EC insolvency convention was a precursor to the committee convened in the 1980s to consider UK insolvency law reforms. The process of assessing the compatibility of an EC insolvency convention with the UK approach to insolvency law had the effect of focussing the attention of lawmakers on the need for reform, which resulted in the Insolvency Act of 1976.²⁵³ Its provisions were useful, but not fundamental in reforming the UK system.²⁵⁴

7.1.3 The lack of fundamental reforms and the recognition that this may be necessary led to the appointment by the Secretary of State for Trade of the Insolvency Law Review Committee, chaired by Sir Kenneth Cork, in 1977.²⁵⁵ The Cork Committee was tasked with reviewing the law of insolvency, considering required reforms, examining the potential for formulating a comprehensive insolvency system, suggesting possible less formal procedures, and making any other relevant recommendations. A report of the Cork Committee²⁵⁶ was published in 1982 containing detailed and critical examination of all the existing procedures as well as a number of recommendations aimed at procedures that catered for rescue and rehabilitation of companies in distress.²⁵⁷ It stressed that a comprehensive review of insolvency was required not only for the purposes of negotiating with other Member States, but also due to the poor state of the law,²⁵⁸ which “has been tinkered with, patched and extended by false analogies so that

²⁴⁹ Goode, n196, 5.

²⁵⁰ Silkenat and Schmerler, n228, 387.

²⁵¹ 1986 c 45 (hereafter referred to as the IA1986); M Hunter, “The Nature and Functions of the Rescue Culture” (1999) November JBL 426, 455.

²⁵² Hereafter referred to as the “EC”.

²⁵³ C60.

²⁵⁴ M Hunter, “The Nature and Functions of the Rescue Culture” (1999) November JBL 426.

²⁵⁵ Hereafter referred to as the “Cork Committee”.

²⁵⁶ Hereafter referred to as the “Cork Report”.

²⁵⁷ *Ibid.*

²⁵⁸ Finch, n185, 13-14.

today it is replete with anomalies, inconsistencies and deficiencies.” Further, the law was viewed as no longer fulfilling its obligation to the demands of fairness and justice in a modern society.²⁵⁹

7.2 Business Rescue in the 1980s

7.2.1 One result of the Cork Report was a new definition of the aims of a good modern insolvency system, which should aim to:-

“...recognise that the effects of insolvency are not limited to the private interests of the insolvent and his creditors, but that other groups in society are vitally affected by the insolvency and its outcome, and to ensure that these public interests are recognised and safeguarded.”²⁶⁰

7.2.2 This was an entirely new approach and perception of the aims of insolvency law in the UK, including a truly social message that was recommended to be incorporated in the imminent reforms. The Cork Report also recognised and formulated the concept of a rescue culture, stating that the failure of commercial enterprises has wide repercussions for a variety of stakeholders, including but not limited to creditors, shareholders, employees, suppliers, and others who would be adversely affected by business failure. A legitimate aim of insolvency laws should be to have concern for the livelihood and well-being of those dependent upon an enterprise.²⁶¹ In the view of Cork Committee, the rescue culture would manifest itself in policies directed at the more benevolent treatment of insolvent legal entities as well as the more draconian treatment of the unscrupulous abusers of the system. It would also mean the steady removal of the stigmatising effect of bankruptcy.²⁶² Though beneficent in their view of what the future should hold for insolvency, the Cork Committee’s more socially oriented recommendations would not find immediate implementation.

7.2.3 The publication and consideration of the Cork Report by parliamentary legislators resulted in the passage of a new IA1986, preceded briefly by an Insolvency Act 1985.²⁶³ The IA1986 put into practice many of the suggestions published in the Cork Report.

²⁵⁹ K Cork, Sir (Chairman), *Insolvency Law and Practice: Report of the Review Committee* (Cmnd 8558 1982) 10 para 9.

²⁶⁰ *Ibid*, ch 4 para 198.

²⁶¹ *Ibid*, ch 4 para 203-204.

²⁶² Hunter, n254, 26.

²⁶³ 1985 c 65.

Cork's philosophy was, among other things, in favour of increasing the emphasis on rehabilitation of the company,²⁶⁴ as such, he recommended an administration procedure aimed at corporate rescue which would also ameliorate the plight of the unsecured creditor, who generally received nothing in previous procedures. Administration was introduced as a court based procedure designed specifically for corporate rescue rather than asset realisation, focussed on the interests of unsecured creditors.²⁶⁵ Cork qualified the rehabilitative approach, saying that the "corporate rescue mechanisms are not intended to maintain inefficient firms that are not economically viable."²⁶⁶ Essentially, insolvency law should not undertake to rescue all companies, but only those which possess an inherent viability.²⁶⁷ While Cork's broad policy was aimed at the rehabilitation of the company, the IA1986 did not go as far as he perceived was necessary to achieve this end.²⁶⁸

7.3 Insolvency Reform and the Enterprise Act 2002²⁶⁹

7.3.1 Since the turn of the millennium, fundamental changes have occurred in the legislative and commercial approaches to insolvency, moving from responding to corporate crises in a reactive manner to actively managing financial risk to avoid failure.²⁷⁰ Legislators, creditors, and corporate personalities have become serious about corporate rescue, seeking to intervene at earlier stages of corporate distress. As such, there has been a movement away from simple debt collection towards monitoring corporate risk and taking pre-emptive action.²⁷¹ The Labour government²⁷² was moved to foster a rescue culture due to the perception that powerful secured creditors were all too willing to put a company into administrative receivership, a process which can be hostile to enterprises and to the interests of unsecured stakeholders.²⁷³

²⁶⁴ Finch, n185, 15.

²⁶⁵ *Ibid.*, 21.

²⁶⁶ The Insolvency Service, *A Review of Company Rescue and Business Reconstruction Mechanisms: Report by the Review Group*, (London: HMSO 2000).

²⁶⁷ Frisby, n248, 248.

²⁶⁸ Finch, n185, 754-779.

²⁶⁹ 2002 c 40 (hereafter referred to as the "EA").

²⁷⁰ V Finch, "Corporate Rescue in a World of Debt" (2008) 8 JBL 756, 756.

²⁷¹ V Finch, "Doctoring in the Shadows of Insolvency" (2005) November JBL 690.

²⁷² 1997-2010.

²⁷³ V Finch, "Re-Invigorating Corporate Rescue" (2003) November JBL 527.

- 7.3.2 The passage of the EA introduced significant changes, implementing a number of reforms designed to assist troubled companies and foster the growth of the rescue culture.²⁷⁴ In British terms, the rescue culture refers to the idea that insolvency legislation should adopt a positive and protective role rather than a corrective and punitive role. Interpretation of socioeconomic statutes should be deliberately inclined towards giving a positive and socially profitable meaning, rather than a negative and socially destructive one.²⁷⁵ The EA was aimed at the furtherance of the rescue culture, encouraging companies to consider insolvency risks in advance of a final financial crisis.²⁷⁶
- 7.3.3 During its journey through the House of Commons, it was noted that the bill should strengthen the foundations of the enterprise economy by establishing an insolvency regime that would encourage entrepreneurs to try again. The reforms also addressed the fear of business failure which had been a significant barrier to entrepreneurialism, and also prevent companies from failing unnecessarily. The goal was to make the UK a better place to do business by lifting barriers and creating a culture of encouragement for entrepreneurs.²⁷⁷
- 7.3.4 The Insolvency Service Review Group in 2000²⁷⁸ recommended that the law should be changed to remove the rights of the floating charge holder to veto the making of an administration order. A moratorium would apply to debenture holders, rendering it impossible for a floating charge holder to stop an administration procedure by instructing a receiver. Administrative receivership was effectively abolished,²⁷⁹ while the administration procedure was completely rewritten,²⁸⁰ replacing the previous procedure with a new schedule B1 that introduced a specific priority of objectives.²⁸¹ The administration procedure was also streamlined to make it easier and less expensive to use and also to give unsecured creditors more rights.

²⁷⁴ Finch, n270, 756.

²⁷⁵ Hunter, n254.

²⁷⁶ Finch, n185, 255.

²⁷⁷ Finch, n273, 530.

²⁷⁸ N266.

²⁷⁹ Finch, n185, 366 and 380; Finch, n273, 531.

²⁸⁰ D Milman, "Moratoria on Enforcement Rights: Revisiting Corporate Rescue" (2004) March/April Conv 89, 104.

²⁸¹ Finch, n270.

7.3.5 An administrator was now required to perform his duties according to three hierarchical objectives: (1) to rescue the company as a going concern; (2) to achieve a better result for creditors in a winding up; or, (3) if the first two are not reasonably practicable, to realise property for the benefit of secured or preferential creditors.²⁸² The administrator's duties are then subject to the caveat that his actions do not unnecessarily harm the interests of the creditors of the company as a whole.²⁸³ This new approach to administration pushes business rescue firmly to the fore of the objectives to be achieved. As such, the approach to insolvency law has moved away from a selective Darwinian approach, settling on pure rescue as the default model for desired insolvency outcomes.²⁸⁴ However, while the existence of rehabilitative procedures and their priority in usage is uncontested, some insolvency practitioners have informally expressed their disillusionment with them in practice. In the experience of one anonymous practitioner, what actually happens in the prioritising of outcomes in administration procedures is not necessarily what one would expect from the letter of the law or the findings in cases.

7.3.6 The changes made to insolvency law in the last ten years demonstrate that the policy of business rescue is now being given precedence over traditional creditor wealth maximisation and debt recovery.²⁸⁵ Rescue strategies supported by the current legislation are based upon a utilitarian approach, predicated on the premise that the interests of the few are outweighed by the needs of the many. The interests represented now also include the wider community, as well as social and political objectives of full employment. These interests can often be better served through the rescue of a business than asset realisations followed by *pari passu* distributions of what remains after secured creditors and liquidators are paid their share.²⁸⁶

²⁸² IA1986 sch B1 para 3.

²⁸³ IA1986 sch B1 para 3(4).

²⁸⁴ Frisby, n248, 249.

²⁸⁵ Milman, n280, 104.

²⁸⁶ *Ibid*, 89.

8 **The Aims of Insolvency and Social Policy**²⁸⁷

8.1 The Social Influences on Aims of Insolvency and Corporate Rescue

8.1.1 Prior to the introduction of the concept of corporate rescue in the United Kingdom, the purpose of insolvency was based primarily on a collective regime aimed at achieving the best possible outcome for creditors.²⁸⁸ These aims were tempered by some element of social consideration first by the introduction of administration in the IA1986 and then in the EA with the introduction of procedures aimed at rescuing a business as a priority. In addition to concern for unsecured creditors, employees enjoy a degree of preference in the distributions of insolvency: an imposition upon the economic purity of insolvency procedures.²⁸⁹

8.1.2 Although insolvency law has traditionally aimed to satisfy more economic interests, issues of fairness have now been accepted as necessary considerations in the UK insolvency system. Among these considerations are the ranking of wages as preferential debts, access to social security for repayment of arrears, rules dealing with continuity of employment, and laws stipulating the mandatory transfer of contracts on the transfer of a business as a going concern.²⁹⁰ The last of these protections is derived from EU law, but has been in existence elsewhere on continental Europe for decades. In particular, social policy issues, such as the application of acquired rights, are fundamental factors that influence the regulatory style in France.

8.1.3 In France, the aims of insolvency have encompassed social policy matters since the development of a modern insolvency regime in 1967.²⁹¹ The emphasis on social policy has encouraged a move to the maintenance of businesses over liquidation. In the 1980s, the harmful effects of unemployment caused by business failures in recessionary times were an influence on the creation of a corporate rescue policy heavily biased toward the

²⁸⁷ A portion of this section formed part of a paper given at the INSOL International Academic Colloquium conference in Hong Kong in March 2014 entitled "Obstacles to Cross-Border Insolvency and Employment Protection Coordination in the European Union: Examples from the UK and France."

²⁸⁸ Goode, n196, 5.

²⁸⁹ Finch, n185, 15.

²⁹⁰ *Ibid.*, 15.

²⁹¹ See above section 6.1.3.

protection of employment and the rehabilitation of the business.²⁹² The French system exhibits redistribution tendencies that are recognisable as characteristics endemic to its version of social democracy. Creditors' rights have been made secondary to the preservation of the business in difficulty and the jobs dependent upon it.²⁹³

8.2 Employees in Insolvency: Issues of Job Security and Social Policy

8.2.1 Employees are one of the most vulnerable stakeholders whose lives can be fundamentally affected by the insolvency of their employer. They are often the lost voice in bankruptcy proceedings, having little influence or bargaining power outside of collectivism. However, it must be queried whether there is a justification for giving special treatment to employees above those of trade creditors. One argument is that employees have not generally assumed the risk that their employer may fail to pay them and are typically left with no recourse. Trade creditors, however, can factor payment defaults into pricing and interest rates on lending and also have access to the financial and economic data of the debtor, making it easier for them to manage their risks. The effects an employer's insolvency can have on an employee's life and future are thus significant and can also have other far-reaching societal effects. Thus, employee entitlements in insolvency deserve some kind of attention in government policies in order to manage the larger impacts that ignoring this area may cause.²⁹⁴ However, the social policies that influence how employment entitlements in insolvency systems are approached differ significantly between the UK and France.

8.2.2 The French concept of personal dignity is a strong influence on how it deals with employment rights, among many other fundamental values. The dignity of the individual is an overarching value to which all legislation must bow. In the UK, history has shown a resistance to compromising the operation of free market to the rights of individuals. While this has changed over the last half century, much of these changes are due to factors that have little to do with social rights to full employment or individual dignity. For example, the first health and safety legislation was implemented with a

²⁹² Omar and Sorensen, n125, 26.

²⁹³ Silkenat and Schmerler, n228, 143.

²⁹⁴ GW Johnson, "Insolvency and Social Protection: Employee Entitlements in the Event of Employer Insolvency" (Fifth Forum for Asian Insolvency Reform, Beijing China, 2006) 2-3.

view to protecting an employer's investment in functioning and healthy employees without whom their businesses could not operate. Other protections did not emerge until the 1960s, as the view prior to that time was that collective bargaining should be capable of dealing with any issues that labour may have in relation to the employment relationship. The Redundancy Payments Act 1965²⁹⁵ was the first major piece of legislation that provided protections for employees subject to the effects of the financial distress of their employer, although it only guaranteed payment rather than any security.²⁹⁶ Further, unfair dismissal legislation was initially implemented in reaction to the disassembling of union power in the 1980s in order to provide something to replace the protections that unions had previously provided for their constituency.

8.2.3 While employees are still generally considered unsecured creditors of the employer with the usual rights of a normal contracting party,²⁹⁷ their position is now protected in relation to up to four months wages occurring prior to the insolvency, ranking as a preferential debt subject to a maximum amount of £800, an amount set in 1986²⁹⁸ and, to date, unchanged. Employee claims beyond the preferred portion rank equally to that of other unsecured creditors. An employee also has the right to claim some amounts due from the Secretary of State, which is paid out of the National Insurance Fund.²⁹⁹ In the event the business continues, an insolvency practitioner steps into the role of the employer and must deal with the adopted employment contracts appropriately. Where the business is sold, provisions apply that will transfer employment contracts to the purchaser.³⁰⁰ It is this latter provision that particularly conflicts with the equality of creditors' rights in insolvency procedures.

8.2.4 France's insolvency system provides numerous procedures that allow for arrangements to be made to allow a business to continue with the primary aim of preserving employment.³⁰¹ Employees in France are also afforded a priority above other

²⁹⁵ C 65.

²⁹⁶ A Baker and I Smith, *Smith & Woods Employment Law* (10th edn, OUP 2010) 3-4.

²⁹⁷ D Pollard, *Corporate Insolvency: Employment and Pension rights* (4th edn, Bloomsbury Professional Limited 2009) 1.

²⁹⁸ SI 1986 No. 1996 The Insolvency Proceedings (Monetary Limits) Order 1986 para 4.

²⁹⁹ Baker and Smith, n296, 202-203.

³⁰⁰ Pollard, n297, 1.

³⁰¹ Silkenat and Schmerler, n228.

stakeholders subject to business rescue processes.³⁰² The Law of 1967 guaranteed employment debts occurring as a result of a judicial settlement or liquidation. Employees were also able to invoke other special privileges, including participatory rights in the insolvency process.³⁰³ The Law of 1985 did not change the rights afforded to employees, but made it a legislative priority to resuscitate a business in financial distress in order to artificially preserve employment and to safeguard the economic potential of the enterprise.³⁰⁴

8.2.5 While the most recent reforms have softened the draconian treatment of creditors relative to employees, apart from heavier consultation obligations issued from the most recent decree, the social objectives of protecting employment continue to affect the way in which courts deal with specific insolvency cases. In general, there is an emphasis on employment preservation in the French system. At times, there are compromises made between the social objectives and financial objectives in cases of business sold as going concerns.³⁰⁵ This can result in choices that favour employees but result in reduced funds available in distributions to creditors. Thus, the social objectives of employment protection and their costs reduce the value of a business being sold; thereby reducing the distributions available to creditors, but this is generally acceptable due to the French emphasis on workers' rights.

8.2.6 In addition, France has placed an importance on the acquired rights of employees since legislation was put in place in 1928.³⁰⁶ The law required that where there was a change in the juridical situation of an employer, such as the transfer of a business, all employment contracts would continue between the new employer and employees of that enterprise.³⁰⁷ In contrast, the first UK legislation conferring continuity of employment on a business transfer³⁰⁸ would apply only if the employees were voluntarily retained by the purchasing firm. There was no concept of automatic transfer as this would conflict

³⁰² C Barnard, *Employment Law* (3rd edn, OUP 2006) 620.

³⁰³ Soinne, n114, 1815-1817.

³⁰⁴ Desurvire, n113, 61.

³⁰⁵ R Stevens, "Comments and Discussion Report" in W-G Ringe, L Gullifer and P Thery, (eds), *Current Issues in European Financial and insolvency Law: Perspectives from France and the UK* (Hart 2009).

³⁰⁶ Today found in article L1224-1 du code du travail.

³⁰⁷ Barnard, n302, 620.

³⁰⁸ Contracts of Employment Act 1963.

with the fundamental freedom of contract.³⁰⁹ UK law has taken a liberal attitude toward creditors' rights, self-help and the use of contractual remedies, but has also seen a steady erosion of workers' rights since the 1970s.³¹⁰ It would not be until the UK accepted the Social Chapter of the EU treaty that it would be required to amend this stance.

9 **Conclusion:**

9.1.1 While the focus of a large part of eighteenth and nineteenth century British culture and society was on the perceived progress of industrialisation, the majority of French society retained conservative values of land, leisure and the security of knowledge and tradition. This is not to say that progress for the sake of progress served Britain better, as the resulting labour poverty can tell, but the fact remains that French and British views of industrialisation as a form of progress differed on a fundamental level. Their values affected their respective views of "progress" leading to the British embracement of change, a characteristic that had occurred with frequency in relation to both government and religion. Though the French Revolution precipitated catastrophic change, the tenacity of the monarchy and the steadfastness of *ancien régime* values demonstrate that far from changeable, France tended to try to establish and retain equilibrium. This is evident throughout most of French history apart from the short period of the Reign of Terror, which caused and seemed to revel in chaos. The memory of this upheaval in combination with the propensity to attach to security and tradition had a profound influence on French resistance to British "progress".

9.1.2 There are a number of differences between the UK and France in relation to how the elements of industrialisation, commerce, and big business evolved. Prohibitions on usury and the moral resistance to reliance on credit as a business mechanism lasted far longer in France. Further, France continues to retain resistance to unbridled debt as allowable levels of interest remain restricted. France was also more severely affected by the results of the Mississippi Bubble as the French economy was linked to the future of the company. Once it failed, the effects on the French economy were catastrophic, leaving a lasting memory and influencing resistance to speculation and financial risk,

³⁰⁹ Baker and Smith, n296, 541.

³¹⁰ G Pitt, *Employment Law* (7th edn, Thompson Reuters 2009) 3.

and further entrenching French attachment to security and tradition. Britain's more adventurous financial spirit led to a colonial and eventually corporate empire that would overshadow French growth for centuries.

9.1.3 Insolvency laws developed with fundamentally different aims, the French taking pity on the unfortunate debtor while the UK retained a punitive approach, favouring the creditors owed by bad businessmen. France's debtor friendly approach encompassed a concern for other stakeholders who would be affected by business failures, in particular employees. This approach led to a natural affinity for rehabilitating or rescuing businesses, sometimes at the expense of creditor entitlements. While the UK has also undertaken corporate rescue as an additional aim for insolvency procedures, its approach remains more focussed on resolving creditor debts, though the social aspects of insolvency have become a consideration in recent years. Membership of the European Union has had a significant influence on changes to the UK approach to insolvency, particularly in relation to the social elements that had previously been left to other areas of the law. It is the influence of the EU on the legal systems of the UK and France as well as how the focus on employment protection, influenced in part at least by EU law, began to conflict with insolvency that will be explored in the next Chapter.

CHAPTER 5:
ACQUIRED RIGHTS AND THE INSOLVENCY EXCEPTION: EU SOCIAL POLICY
EVOLUTION AND INFLUENCE

*“Someday, following the example of the United States of America,
there will be a...United States of Europe.”*

~ George Washington

*“Competition has been shown to be useful up to a certain point and no
further, but cooperation, which is the thing we must strive for today,
begins where competition leaves off.”*

~ Franklin D. Roosevelt

1 Introduction

1.1 A Review of the Historical Context of Insolvency Systems

1.1.1 Bankruptcy laws have existed since ancient times, though their sometimes punitive nature has long been influenced by moral perspectives on debt.¹ Prohibitions on usury were relaxed in England largely as a result of the Reformation, during which England gained a new and more dubious perspective on Catholic rules and dogma, including views on lending with interest.² Thus, it was in England where the criminal and immoral aspects of debt first began to give ground to more commercially viable approaches to lending.³ These changes in attitude on finance and debt led to a more stable, but also flexible framework that preceded English commercial dominance in the world.⁴

1.1.2 Seventeenth century France, however, remained rigid and inadaptable to change as capricious absolute monarchs contributed to unstable social and economic conditions that eventually provided the catalyst for the French Revolution.⁵ Despite the liberalism promised during the French Revolution, the French generally remained attached to fiscal security and were inherently risk-averse,⁶ while English businessmen were self-reliant, but also willing to cooperate to accomplish commercial goals, such as colonial

¹ See Chapter 4 section 2.1.

² Ibid, 2.5.2

³ G Davies, *A History of Money* (University of Wales Press 2002) 219-222.

⁴ See Chapter 4 section 3.1

⁵ Ibid, 3.1.4 and 3.1.5.

⁶ Ibid, 3.3.1, 3.3.2, and 3.3.3

commerce.⁷ French attitudes toward credit remained geared towards distrust and distaste, while Britain's colonial and industrial empires were eventually built upon the foundations of credit and debt.

- 1.1.3 Despite the differences in attitude toward business risk in the UK and France, both developed modern corporate structures, including limited liability and separate corporate personality, in the mid-nineteenth century.⁸ Utilisation of these corporate forms varied, however, in no small part due to the significant restrictions placed on the creation of joint stock companies in France, which led to a variety of compromised corporate forms.⁹ There were also a number of restrictions present in the British company law system influenced by resistance to separating company ownership from control.¹⁰
- 1.1.4 As the corporate form evolved in complexity, eventually benefitting from a separate legal personality that protected investors behind a corporate veil, so too did the need for effective insolvency law. Britain underwent numerous bankruptcy reforms during the Victorian age, though reforms generally retained the creditor friendly approach that has historically characterised the British insolvency system.¹¹ Nineteenth century French insolvency law was no friendlier towards debtors; however, many insolvencies were resolved outside of the civil process in order to avoid draconian results, a characteristic that is reflective of the modern emphasis on collective arrangements.
- 1.1.5 Corporate rescue became an important aspect of insolvency systems for both the UK and France following the Second World War.¹² France was the first to recognise that the penal nature of bankruptcy laws was not necessarily good for business. Regular reforms followed in addition to procedures aimed at encouraging the safeguarding of companies in order to protect employment and bolster the economy.¹³ It was not until the 1980s that the UK would follow France on a path toward a rescue culture with any significant

⁷ Ibid, 3.3.4.

⁸ Ibid, 3.4 and 3.5.

⁹ See R Price, *An Economic History of France 1730-1914* (Macmillan 1981); CE Freedeman, "Joint-Stock Business Organisation in France 1807-1867" (1965) 39(2) *Bus Hist Rev* 184; and F Caron, *An Economic History of Modern France* (Methuen 1979).

¹⁰ See Chapter 4 section 3.4.

¹¹ Ibid, 4.4.

¹² Hereafter referred to as "WWII".

¹³ Ibid, 6.1.

reforms to their insolvency system.¹⁴ Changes were heavily influenced by the UK's prospective entry into the European Community,¹⁵ rather than any fundamental change in the UK perspective on insolvency, although the acceptance and continued prevalence of the Cork Report¹⁶ recommendations demonstrate the UK's eventual, if begrudging, embrace of the rescue culture.¹⁷

- 1.1.6 While the state of the British and French insolvency systems are not so very different today, the historic influence of European Union¹⁸ policy and practices on domestic law is also evident. The same can be said for legislation in the area of social policy, particularly for the UK, though it is in this area that most of the modern controversy relating to UK membership in the EU resides. In addition, the UK and France have had significant influence on how policy has been implemented during the life of the EU. The purpose of this Chapter is to examine the influence of EU law and policy in the area of employment protection within the context of corporate rescue.

2 **The Historical Context of the European Union**

2.1 The Great War and Social Change

- 2.1.1 The First World War¹⁹ was a catastrophic turning point in European politics, economics, and intellectual priorities. After the highpoint of the Age of Reason, the wealth and comforts made available by industrialisation, and one hundred years of relative peace, WWI brutally ended any hopes for an enlightened and peaceful Europe.²⁰ However, the war also provided a catalyst for the state machinery of “war socialism” as socialists and trade union leaders joined the government and rallied around the cause of patriotism. Thanks to wartime solidarity, employees, governments, and unions were willing to collaborate in order to provide the best results for war effort.²¹ The inroads in this new area of social policy would be the seed that would eventually grow into the pan-

¹⁴ Ibid, 7.2.

¹⁵ Ibid, 7.1.2; hereafter referred to as the “EC”.

¹⁶ See Chapter 4, n259.

¹⁷ Ibid, 7.1.3 and 7.2.

¹⁸ Hereafter referred to as the “EU”. Please note that unless the discussion relates to a specific historical event, the term EU will generally be used throughout this Chapter.

¹⁹ Hereafter referred to as “WWI”.

²⁰ R Lesaffer, *European Legal History* (CUP 2009) 483-484.

²¹ B Hepple and P O'Higgins (eds), *The Making of Labour Law in Europe: a Comparative Study of nine Countries up to 1945* (first published 1986, Hart 2010) 25.

European system in existence today. In addition, WWI provided a catalyst for European cooperation, though this would be decades in the making.

2.2 A “Carthaginian Peace”

2.2.1 While the EC did not fully come into existence until several years after the end of WWII, the impetus for its creation can be found in the widely held desire not to repeat the mistakes made at the end of WWI, which were viewed as having led to the instability of the German economy that precipitated the rise of the Nazi party and the outbreak of WWII. The Treaty of Versailles²² contained the terms for peace, which were principally agreed to by the Germans on the understanding that it would be based on President Wilson’s magnanimous Fourteen Points.²³ However, only the victors were represented during the negotiations and the Fourteen Points were poorly supported, which resulted in what the Germans viewed as a dictated peace, very different from the terms agreed in the armistice. It included reparation costs and schedules of repayment that were impossible to meet and hobbled German industry and military in an attempt to render its existence distinctly harmless and subordinate.²⁴

2.2.2 Among the delegates at the Paris Peace Conference was Keynes, who at the time was working for the British Treasury. Keynes rather prophetically outlined the potential economic outcomes of the Peace Treaty as it was agreed, and was also intensely critical of the Council of Four²⁵ and what he viewed as their guiding principles for a negotiated peace, all of which were significantly influenced by the perceived needs and wants of the political requirements of the jurisdictions they represented.²⁶ The meeting of these minds is a microcosm of the cultural and political differences existing among European and world powers at the time, differences that have not disappeared with the passage of time. There was little sense of solidarity, as the Americans expected that the French and British had imperialist designs, while the British suspected the French of Napoleonic

²² Treaty of Peace between the Allied and Associated Powers and Germany 28 June 1919.

²³ N Davies, *Europe: A History* (Pimlico 1996) 925.

²⁴ Davies, n23, 926-927 & 943. See also O Lang, “Why has Germany Taken so Long to Pay off its WWI Debt?” BBC News Website <<http://www.bbc.co.uk/news/world-europe-11442892>> accessed 18 July 2015.

²⁵ Comprised of American President Wilson, British Prime Minister Lloyd-George, French Prime Minister Clemenceau, and Italian Prime Minister Orlando.

²⁶ JM Keynes, *The Economic Consequences of the Peace* (first published 1920, Gutenberg 2005) <<http://www.gutenberg.org/files/15776/15776-h/15776-h.htm>> accessed 2nd January 2015.

tendencies, and European nations, not unrealistically, suspected America's commitment.²⁷

2.2.3 The cynicism, stubbornness, and vengeful outlook led to an inability to negotiate without significant bias, resulting in a "Carthaginian Peace,"²⁸ which did not augur well for peaceful stability in Europe. Thus, during the interwar period, Europe failed to escape the shadow of WWI.²⁹ Social upheaval, mass unemployment, and political violence, caused in no small part by the effect of the Treaty terms, ultimately lead to the rise of the Nazi party, which paradoxically fused the radical socialists of the far left, who fed on mass unemployment and the dire effects of hyperinflation, and the radical nationalists on the far right, who fed on the humiliation of war guilt and resistance to reparations.³⁰

2.2.4 The economic impact of the Treaty of Versailles not only negatively affected the German economy, but was felt throughout Europe. It was Keynes' view that:

"You cannot restore Central Europe to 1870 without setting up such strains in the European structure and letting loose such human and spiritual forces as, pushing beyond frontiers and races, will overwhelm not only you and your "guarantees", but your institutions and the existing order of your Society."³¹

2.2.5 The depression of the 1930s supports Keynes' controversial hypothesis. There were no provisions in the Treaty for economic rehabilitation in Europe; no means of reconciling wartime enemies; nothing to stabilise the new European states; nor did it promote any kind of economic solidarity or restoration of the finances of those countries hardest hit. It was an Old World treaty that failed to account for New World requirements.³²

²⁷ Davies, n23, 927 and Lesaffer, n20, 498-499.

²⁸ The imposition of a brutal "peace" by completely crushing the enemy, derived from the peace imposed on Carthage by Rome after the second Punic War.

²⁹ Davies, n23, 928 & 938.

³⁰ Ibid, 942.

³¹ Keynes, n26, 15.

³² Ibid, 91.

2.3 The International Labour Organisation³³

2.3.1 Notwithstanding its defects, the Treaty of Versailles contributed to the development of an international framework for the promotion of workers' rights by providing for the establishment of the ILO.³⁴ Its purpose was to establish internationally recognised labour standards concerning employment and working conditions through the mechanism of coordinated collective bargaining.³⁵ While members of the ILO are obliged to observe the basic principles of its constitution, to submit conventions to the competent authority and to make reports to the International Labour Office, national sovereignty is fully respected. Rather than making any enforceable enactments, the ILO merely declared methods and principles that were to be deemed of special and urgent importance.³⁶

2.3.2 Not surprisingly, the establishment of the ILO precipitated a wave of labour legislation in 1919, the *annus mirabilis* of labour law.³⁷ The ILO adopted 67 conventions and 66 recommendations in the subsequent twenty years. It became the creator of social policy, publishing its work in an International Labour Code. While the flurry of legislation slowed during the Great Depression, it picked up again during and after WWII.³⁸ Despite the fact that the ILO lacked any means of enforcement, an important step had been taken through which the fundamental rights of workers had become the new foundation of labour law.³⁹

2.3.3 The ILO conference in 1944 resulted in the Declaration of Philadelphia,⁴⁰ in which a constitution was created in place of the previous methods and principles. While affirming the original principles, the ILO Constitution also emphasised that labour is not a commodity; that freedom of expression and of association are essential to sustained progress; and that poverty anywhere constitutes a danger to prosperity everywhere. The

³³ Hereafter referred to as the "ILO".

³⁴ Part XIII.

³⁵ C Brewster and P Teague, *European Community Social Policy and its Impact on the UK* (Institute of Personnel Management 1989) 5-6.

³⁶ Hepple and O'Higgins, n21, 282.

³⁷ *Ibid*, 25.

³⁸ B Hepple, *Labour Laws and Global Trade* (Hart 2005) 31.

³⁹ Hepple and O'Higgins, n21, 284.

⁴⁰ Declaration concerning the Aims and Purposes of the International Labour Organisation, adopted at the 26th session of the ILO, Philadelphia, 10 May 1944.

organisation as a whole viewed social justice as inseparable from the objective of lasting peace, but also that social justice should be a distinct objective in its own right. Social rights and human rights were inextricably linked in the ILO Constitution. In addition, social objectives were seen by the organisation as being paramount aims of economic development. The preamble to the Constitution also recognised that unequal labour conditions between member nations would be an obstacle to the improvement of conditions overall,⁴¹ ostensibly due to the unequal economic competition that such diverse conditions would create.⁴²

2.4 Birth of the European Union out of the Ashes of War

2.4.1 A “European movement” has been in existence since the seventeenth century, but individual national ambitions have often stood in the way of any true federalism. The devastating aftermath of WWII and the loss of imperial territories and hopes thereof were necessary before European cooperation and peace could be agreed throughout the Continent.⁴³ Thus, in the aftermath of WWII came a process of economic, social, and political integration throughout Europe. This was motivated by a desire to avoid further warfare between western European countries as well as forming a coordinated front against the perceived Soviet threat. Though predominantly economic in form, European integration was prompted by these geopolitical objectives.⁴⁴

2.4.2 There was an opportunity following WWII for the UK and the United States to take the lead in the formation of European institutions. Churchill⁴⁵ was personally involved in the initial discussions, which boded well for official British support. He was quite vocal in support of cooperation and appealed for a “United States of Europe” in order to subvert the proliferation of atomic weapons into the hands of divisive governments. He encouraged reconciliation and indeed a partnership between Germany and France, and believed that the future of Europe depended on the “resolve of millions to do right

⁴¹ Hepple, n38, 33.

⁴² See G Foggon, “The Origin and Development of the ILO and International Labour Organisations” in P Taylor and AJR Groom (eds) *International Institutions at Work* (Frances Pinter 1988).

⁴³ Davies, n23, 1064.

⁴⁴ Lesaffer, n20, 503-504.

⁴⁵ 1874-1965, Prime Minister 1940-1945 and 1951-1955.

instead of wrong”, a moral rather than economic argument for unification.⁴⁶ He even chaired the Summit of The Hague in 1948, called to ponder the problems of European disunity, which also further revealed the inner contradictions among various pro-European movements.⁴⁷

2.4.3 It was recognised during the debates, however, that a principle of supranationality would need to be a formational element of any community institutions. Member States would have to surrender part of their sovereignty in the interests of common institutions. However, France enjoyed a dominant position in Europe at the time, which made other nations reluctant to release sovereignty for fear of French dominance. This was mitigated by transferring the monopoly of initiative to a third party, the European Commission, whose independence was assured. This, along with the rotating presidency of the Council of Ministers, guaranteed that Member States would enjoy equality within the EC. These institutions made it impossible for a single state to occupy a hegemonic position.⁴⁸

2.4.4 There were also economic arguments in favour of union. The post-war economic boom motivated the idea of European unification further, given the potential prosperity a unified Europe might achieve over competition between individual nations.⁴⁹ However, it became apparent that the ruling Labour Party in Britain had no desire to become involved in a pan-European community. Thus, it fell to the French to explore this option fully, which they did through four successive French presidencies, eventually finding success in Schumann’s presidency during which a plan⁵⁰ was conceived that would result in the formation of the European Coal and Steel Community⁵¹ in 1951.⁵²

2.4.5 The Schumann Plan was based on a premise of Franco-German reconciliation and included far-reaching economic, military, and political institutions. It was designed to prevent the reappearance of a separate military industrial base in each member

⁴⁶ Davies, n23, 1065.

⁴⁷ P Magonette, “European Democracy Between Two Ages” in C Barnard (ed), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (OUP 2007) 14.

⁴⁸ Ibid, 16.

⁴⁹ Davies, n23, 1066.

⁵⁰ The Schumann Plan.

⁵¹ Hereafter referred to as the “ECSC”.

⁵² Davies, n23, 1083-1084; J Fairhurst, *Law of the European Union* (Pearson Education Limited 2010) 5.

country.⁵³ The Treaty of Paris,⁵⁴ under which each signatory agreed to abide by common regulations governing the manufacture, competition and, in times of crisis, the price and production of coal and steel, was signed by France, West Germany, Luxembourg, Belgium, the Netherlands and Italy. Britain did not participate.⁵⁵

2.4.6 While the ECSC had lofty ambitions for European unification, it was limited to economic integration as a result of the Messina Conference of 1955,⁵⁶ during which a report was produced that jointly and unanimously proposed the drafting of a treaty to establish a common market and an atomic community.⁵⁷ The Treaty of Rome,⁵⁸ signed in 1957, created the European Economic Community,⁵⁹ which extended the Common Market to all commercial and economic sectors of the six signatories, and created the EURATOM.⁶⁰ The ECSC, EEC and EURATOM together formed the EC.⁶¹ The aim of the Common Market was, *inter alia*, to eliminate barriers to free competition and to encourage the mobility of capital, labour, and business.⁶² The EEC became a free trade zone with significant integration of economic and monetary policy, and a supranational character that differentiated it from other regional organisations.⁶³

2.4.7 Britain remained hesitant to fully engage in European integration. Due in part to the fact that Britain had not suffered to the extent that continental Europe had during WWII, they continued to prefer sovereignty and self-sufficiency. In addition, they still retained much of the Commonwealth, which joining the Common Market would complicate in terms of commercial preferences. Britain also continued to place a greater value on its relationship with America and its place in the United Nations. They did, however, apply in both 1961 and 1967 to join the EC, but their applications were vetoed by De Gaulle.⁶⁴ The French were reluctant to accept British membership as it was feared that they would

⁵³ Ibid, 1083-1084.

⁵⁴ Treaty establishing the European Coal and Steel Community 18 April 1951.

⁵⁵ Davies, n23, 1083-1084.

⁵⁶ Ibid, 1085.

⁵⁷ *Brussels Report on the General Common Market* 1956 (The Spaak Report); see R Bertrand, "The European Common Market" (1956) 10(4) Int'l Org 559.

⁵⁸ Treaty establishing the European Economic Community 28 March 1957.

⁵⁹ Hereafter referred to as the "EEC".

⁶⁰ Davies, n23, 1085.

⁶¹ Lesaffer, n20, 504.

⁶² Davies, n23, 1085.

⁶³ Lesaffer, n20, 504.

⁶⁴ Davies, n23, 1085-1086.

try to continue to prefer its Commonwealth trade connections and its close relationship with America, which were thought would obstruct French efforts to create a European defence community free from trans-Atlantic dominance.⁶⁵ It was not until 1970 that, following De Gaulle's departure from office, the British application was accepted, leading to admission in 1973.⁶⁶ This began the process of UK integration into the EC, a conflicted path that has led to controversy and resistance from the inception of membership. Several treaties have followed the Treaty of Rome as well as numerous enlargements, but the details of these are not relevant to this Thesis. However, a number of EU social policy directives have affected business interests, particularly the Acquired Rights Directive.⁶⁷

3 **In the Beginning, was there Social Policy?**

3.1 EU Social Policy

3.1.1 Social policy at national level has generally been viewed as serving a role of helping to attain social justice or cohesion, often referred to as a “market-correcting” role. It involves the use of political power to supersede, supplement, or modify the operations of an economic system in order to achieve results that an economy could not naturally achieve if left unregulated.⁶⁸ Traditionally, the employment environments of the world have been viewed as being strictly national jurisdictional matters, as employment policy has been determined by national political, economic and social environments, and the history particular to individual countries.⁶⁹

3.1.2 The EC early recognised that social policy was an important aspect of its structure, though it was founded on the premise of creating a common economic market. Thus, it first approached social policy as having a “market-making” role to ensure only that competition was not distorted and to prevent social dumping and other anti-competitive activities by seeking to harmonise labour costs throughout the EC.⁷⁰ Its jurisdiction on social protection was limited to employment related matters insofar as they affected the

⁶⁵ J Fairhurst, *Law of the European Union* (Pearson Education Limited 2010) 8.

⁶⁶ Davies, n23, 1085-1086.

⁶⁷ Hereafter referred to as the “ARD”.

⁶⁸ TH Marshall, *Social Policy* (Hutchinson 1975) 15.

⁶⁹ Brewster and Teague, n35, 12-13.

⁷⁰ C Barnard, *Employment Law* (3rd edn, OUP 2006) 51.

functioning of the Common Market, excluding social policy issues such as pensions, unemployment, housing, family, the disabled, and the young. This market-making policy was only concerned with the civil right to enter contracts and not with industrial and social rights, so was not really a social policy at all.⁷¹ However, social policy has developed and become more inclusive over time. It is now possible to trace the evolution of EU social policy in four distinct phases since the creation of the EC.

3.2 Social Policy Phase I: 1957-1973

3.2.1 Social policy in a pan-European context was first officially discussed in the Ohlin Report,⁷² a document created by a group of experts set up by the ILO to examine whether or not the proposed European economic integration should also have a social dimension.⁷³ While unfair competition due to differentials in labour standards was a significant fear of economic integration, the Ohlin Report argued that such differences broadly reflected differences in productivity.⁷⁴ It was believed that any distortions in competition would be corrected by the market,⁷⁵ relying on accepted neo-liberal doctrine of the day. The experts were strongly of the view that an active interventionist social policy was not a necessary element of the proposed economic arrangement in Europe.⁷⁶ However, it was argued, particularly by France that, in its absence, the efforts of some countries to improve social conditions might be frustrated due to the competition of countries with lower wages or poorer working conditions. While the experts recognised this argument, they felt that its importance should not be exaggerated; taking the view that there was no economic reason why the establishment of a free market should lead to a “race to the bottom” of labour standards.⁷⁷

3.2.2 The Spaak Report,⁷⁸ commissioned just prior to the signing of the Treaty of Rome, broadly agreed with the findings of the Ohlin Report. While the report argued for

⁷¹ W Streeck, “Neo-Voluntarism: A New European Social Policy Regime” (1995) 1(1) ELJ 31, 40.

⁷² International Labour Office, “Social Aspects of European Economic Cooperation” (1956) 74 Int'l Lab Rev 99.

⁷³ International Labour Organisation, *Social Aspects of European Economic Co-Operation, Report by a Group of Experts*, (Studies and Reports, New Series No 46 1956) (the “Ohlin Report”).

⁷⁴ Brewster and Teague, n35, 52.

⁷⁵ Barnard, n70, 6.

⁷⁶ A Philip, “Social Aspects of European Economic Co-Operation” (1957) 76 ILR 224, 249 and Brewster and Teague, n35, 53.

⁷⁷ International Labour Office, n72, 111.

⁷⁸ Information Service High Authority of the European Community for Coal and Steel Luxembourg, “The Brussels Report on the General Common Market” (June 1956) (unofficially referred to as the “Spaak Report”).

transnational harmonisation in some areas of social policy, such as equal pay, it rejected a general harmonisation of social policy in the EC.⁷⁹ Rather, both the Ohlin and Spaak Reports argued that, once market barriers fell, a natural coordination of social policies would occur, whether at parliamentary or at the level of collective labour, favouring the latter over social legislation due to its perceived greater effectiveness. The improvement of living and working standards were summarily returned to the remit of collective labour organisations.⁸⁰ As a result, the primary focus of the Treaty of Rome was economic.⁸¹

3.2.3 The Treaty limited action in the social policy field to ensuring the elimination of gross distortions in competition, a market-making role, while setting out a mere customs union with a broader unwritten objective of developing common economic policies and an eventual convergence of national economies.⁸² This was encouraged by Articles 117-128, obliging Member States to work towards harmonisation of their social systems, while making continuous improvements to living standards. The Commission only had power to promote close cooperation between Member States in the social field and not to propose legislation.⁸³ The European Court of Justice⁸⁴ would, however, extend the remit of EC social policy to include a market-correcting role, recognising that along with preventing distortions in competition and social dumping, the Treaty also aimed to promote social progress.⁸⁵ This gave EC social policy a new influence within the Treaty framework.⁸⁶ However, it would not be until the 1970s that social policy would find significant influence in EC legislation.

3.3 Social Policy Phase II: 1973-1983

3.3.1 By the 1970s, the social dimension of the EC had begun to grow in importance, recognising that a philosophy of economic growth based on neo-liberal ideology was not

⁷⁹ Barnard, n70, 5-6.

⁸⁰ A Philip, n76, 251-252.

⁸¹ Treaty of Rome, arts 2 and 3.

⁸² Brewster and Teague, n35, 19-20.

⁸³ C Barnard and S Deakin, "In Search of Coherence: Social Policy, the Single Market and Fundamental Rights" (2000) 31(4) IRLJ 331, 332-333.

⁸⁴ Hereafter referred to as the "ECJ".

⁸⁵ See Case 80/70 *Defrenne No. 1* [1971] ECR 445.

⁸⁶ Barnard, n70, 51-53.

capable of addressing the social problems consequential to economic integration.⁸⁷ The EC had begun to adopt a market-correcting role in its approach to social policy, going so far as to state that “vigorous action in the social sphere is to them just as important as achieving economic and monetary union.”⁸⁸ The Social Action Programme⁸⁹ of 1974 introduced a number of measures, creating the perception that a comprehensive market-correcting social policy at Community level had arrived.⁹⁰ Social policy became a dichotomy, combining market-led employment regulation with some recognition of its market-correcting function.⁹¹ While it could be that these market-correcting elements were unintended consequences of legislation aimed at eliminating distortions in competition, their social relevance is evident.

3.3.2 The French approach to Europe in the 1980s shifted from a platform for foreign policy manoeuvring, to a means of achieving domestic policy goals hidden behind the mask of EC integration. The French began to adapt their domestic politics and institutions to the aims of European integration, while intentionally engineering the EC itself to further French interests. These endeavours can be seen in constitutional revisions in the Maastricht Treaty⁹² and in the economic and monetary policies designed to direct the French economy toward a convergence with the criteria needed to join the Common Market. The French were also instrumental in shaping the EC in such a way as to imbue social policy with a higher profile within it. This eventually resulted in the Employment Title in the Amsterdam Treaty of 1997,⁹³ though it would be consistently impeded by UK obstinacy.⁹⁴

3.3.3 Social policy initiatives faded into the background in the 1980s, due in no small part to the UK’s continued resistance to the encroachment of EC social policy into its sovereignty. The ruling UK Conservative party was in favour of labour market deregulation to ensure maximum labour market flexibility and maintained a minimalist

⁸⁷ Ibid, 8-21.

⁸⁸ EC Bulliten 10/1972 para 6.

⁸⁹ Hereafter referred to as the “SAP”.

⁹⁰ Streeck, n71, 42.

⁹¹ Barnard, n70, 53-54.

⁹² Treaty on European Union 7 February 1992.

⁹³ Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts 1 May 1999.

⁹⁴ R Ladrech, “Europeanization and French Social Democrat” (2001) 3(1) JS Eur & Balkans 37, 40-41.

stance toward Europe. Anything that went beyond market integration towards collective interventionism or convergence was persistently rejected. EC social legislation fell far outside the minimalist approach.⁹⁵

3.3.4 The UK position was not assisted by the fact that there are significant differences between the UK labour system and those on the Continent. In particular, there was no legal basis to support the adoption of the European Charter of Fundamental Human Rights,⁹⁶ such as an entrenched Bill of Rights. There was also no institutionalised system of worker representation and no requirement for employers to recognise or to bargain with labour unions.⁹⁷ Essentially, the UK system was and perhaps still is so different from the labour and employment regimes in continental Europe that the way in which Directives were drafted did not fit with the mechanisms of UK law.⁹⁸

3.4 Social Policy Phase III: 1983-1997

3.4.1 Inroads into social policy were continued in the Maastricht Treaty that included a new social chapter, though in a separate protocol to satisfy UK demands.⁹⁹ This Social Policy Agreement was limited to implementation of the 1989 Social Charter on the basis of the “*acquis communautaire*”. This protocol afforded the Community an enlarged competence to legislate in the area of social policy and increased those areas to which qualified majority voting would apply to include health and safety, though unanimity would still be required for areas of social security and the social protection of workers.¹⁰⁰ It was thought that the absence of the UK veto would allow the EC to introduce significant social reforms in the area of social policy, but the UK dissociation with the EC in this fundamental area meant that such an exemption could become a routinely applied device for individual dissenting countries to achieve their self-interested ends. Social policy might then become further fragmented with different laws applying to different jurisdictions with the resulting differences in law between Member

⁹⁵ Brewster and Teague, n35, 120.

⁹⁶ Charter of Fundamental Rights of the European Union 2 October 2000.

⁹⁷ B Hepple, “Social Rights in the European Economic Community: a British Perspective” (1989) 11 Comp Lab LJ 425, 435-437.

⁹⁸ See J Bell, “Path Dependence and Legal Development” (2012) 87 Tul L Rev 787.

⁹⁹ Fairhurst, n65, 11; Barnard, n70,17; and J Kenner, “Employment and Macroeconomics in the EC Treaty: A Legal and Political Symbiosis?” (2000) 7(4) MJ 375, 377.

¹⁰⁰ Streeck, n71, 46.

States.¹⁰¹ Essentially, the UK opt-out emasculated the EC competence and legitimacy to produce laws in this area. Social policy was once again relegated to an ineffectual compromise.¹⁰²

3.4.2 The EC focussed on social policy only insofar as it was concerned with cross-border mobility and market making¹⁰³ until the UK veto lost its power with the introduction of qualified majority voting in the area of health and safety. This change provided a means of circumventing the unanimity required for some social policy legislation by qualifying many new Directives as having a health and safety dimension.¹⁰⁴ The Community Social Charter was introduced in 1989, and was signed by all Member States except Britain. Due to Britain's resistance, the Charter was adopted merely as a proclamation of fundamental social rights and had no independent legal effect. The Social Charter Action Programme¹⁰⁵ resulted in several important pieces of social legislation, though these were woefully short of the propositions recommended in the White Paper for Completing the Internal Market.¹⁰⁶ The resulting Directives amounted to an eclectic body of employment law, adding specificity rather than general rules that could serve as a means of harmonising social policy throughout the EC.¹⁰⁷

3.4.3 The existence of a "two track social Europe" was relatively short lived, as the UK Labour Party came to power in 1997 with the promise of social justice and inclusion. In addition to a number of labour reforms, the government also chose to accept the Social Chapter of the Maastricht Treaty and would take the necessary steps to bind itself under it.¹⁰⁸ The Treaty of Amsterdam then incorporated the provisions of the Social Chapter directly in 1997 in the Employment Title, which set a high level of employment as a central objective of the EU. In 1999, employment policy moved to the forefront of the

¹⁰¹ Ibid.

¹⁰² CA Ball, "The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Community's Legal Order" (1996) 37 Harv Int'l LJ 307, 331.

¹⁰³ Barnard, n70, 41.

¹⁰⁴ Ibid, 12.

¹⁰⁵ Communication (89) 568 from the Commission concerning its Action Programme relating to the Implementation of the Community Charter of Basic Social Rights for Workers (29 November 1989).

¹⁰⁶ Communication (85) 310 on Completing the Internal Market, White Paper from the Commission to the European Council (Milan, 28-29 June 1985).

¹⁰⁷ Barnard, n70, 13-15.

¹⁰⁸ Fairhurst, n65, 16.

agenda in the EU,¹⁰⁹ admitting through its inclusion that there were increased interdependencies between economic policy of the EU and national social policies. If national markets were closed and independent, social policy could remain a domestic concern. However, once the European Monetary Union was created with a common currency, social policy in one country became relevant to other states as it can affect the integrity of the currency and the competitiveness of the larger trans-national market.¹¹⁰

3.5 Social Policy Phase IV: 1997-Present

3.5.1 The current phase of EU social policy is characterised by a softer approach to convergence and a distancing from harmonisation, though the turn of the millennium began with a declaration that was clearly beyond the market-making underpinning of the original Treaties. The aims of the Lisbon Strategy¹¹¹ were for the EU to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth, with more and better jobs, and greater social cohesion.¹¹² These aims appear to be irreconcilable with the market-making social policy objective, embracing a market-correcting approach that encompassed traditional social policy values of redistribution and social justice.¹¹³ The Lisbon Strategy also introduced the Open Method of Coordination¹¹⁴ as a means of spreading best practice and achieving greater convergence by helping Member States to develop their own policies in line with EU goals.¹¹⁵ However, OMC requires a significant degree of cooperation, which was defeated by the isolating effects of the financial crisis of 2007-2008.

3.5.2 The financial crisis revealed that the targets prescribed by the ambitious Lisbon Strategy were extravagant and unachievable, as it wiped out any gains made in economic growth and job creation. The methods of implementing the strategy were a failure as there was a fundamental lack of commitment from many Member States to the Strategy, which was

¹⁰⁹ JT Addison, "In the Beginning, there was Social Policy: Developments in Social Policy in the European Union from 1972 through 2008" (2009) The Rimini Centre For Economic Analysis - Professional Report 01_09 <http://www.rcfea.org/RePEc/pdf/pre01_09.pdf>.

¹¹⁰ D Trubek and L Trubek, "Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Coordination" (2005) 11(3) ELJ 345.

¹¹¹ 000/517/EC: Council recommendation of 19 June 2000 on the broad guidelines of the economic policies of the Member States and the Community *Official Journal L 210*, 21/08/2000 P. 0001 – 0040.

¹¹² Barnard, n70, 26-27.

¹¹³ M Daly, "EU Social Policy after Lisbon" (2006) 44(3) J Com Mar St 461, 470.

¹¹⁴ Hereafter referred to as the "OMC".

¹¹⁵ Barnard, n70, 26-27 and Daly, n113, 472.

often seen as merely a bureaucratic exercise with little effect on their governments or legal systems. The EU2020 Strategy¹¹⁶ was introduced in 2010 with priorities of smart, sustainable, and inclusive growth, aims that are far less ambitious than the Lisbon Strategy of the previous decade.¹¹⁷ While OMC remains an important method of achieving Treaty aims, a special appeal has also been made to companies' sense of corporate social responsibility to promote best practices in line with the Strategy from within. It is thus expected that companies voluntarily commit to social policies that go beyond common regulatory and conventional requirements in order to raise the standards of social development.¹¹⁸

4 **The Birth of the Acquired Rights Directive**¹¹⁹

4.1 The Original ARD¹²⁰

4.1.1 Business insolvency and restructuring have been of fundamental concern in the emergence of an EU employment law since the creation of the ECSC.¹²¹ It was recognised then that the establishment of a common market could have adverse effects on employees. Following the SAP of 1972, a number of Directives were passed aimed at assisting the process of restructuring in order to facilitate the emergence of more efficient undertakings, while addressing the social consequences of the process.¹²²

4.1.2 Among the measures arising from the SAP was the ARD 1977, the purpose of which was to enable workers to maintain the rights acquired in their employment relationship prior to the business transfer and to transfer those rights to the new employer. The ARD 1977 was born partly out of a growing concern about the absence of a “social face” to the Common Market¹²³ as well as the fact that the prevailing frameworks in both Germany and France already provided for the protection of employment related

¹¹⁶ Communication from the Commission (2010) A Strategy for Smart, Sustainable and Inclusive Growth (3 March 2010) (“EU 2020 Strategy”)

¹¹⁷ Barnard, n70, 111-113.

¹¹⁸ Barnard, n70, 120.

¹¹⁹ Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses [1977] OJ L 61/26; (Generally referred to as the “Acquired Rights Directive”) Hereafter referred to as the “ARD”.

¹²⁰ Hereafter referred to as thye “ARD 1977”.

¹²¹ B Hepple and B Veneziani (eds), *The Transformation of Labour Law in Europe* (Hart 2009) 38.

¹²² M Frank, “The Rights of Employees in the Event of the Employer’s Insolvency: A Comparative Approach to the Rights of Employees during Restructuring in the United States and Europe” (2005) 1 NZPGLeJ 5.

¹²³ Barnard, n70, 619.

acquired rights and were consequently in a potentially disadvantageous competitive position to those Member States lacking similar protection.¹²⁴ It was justified by reference to the rapid increase in the concentration of undertakings due to numerous business mergers in the decade preceding the SAP, resulting in the “Europeanisation” of industry in the EC.¹²⁵ It was recognised that such industrial concentrations would have significant consequences on the social situation of workers employed by the undertaking concerned as Member State employment protection regimes did not always take adequate account of workers’ interests in such situations.¹²⁶

4.1.3 Following recommendations from the European Parliament¹²⁷ and the Economic and Social Committee,¹²⁸ the Council enacted the ARD 1977, though it was less generous than the provisions advocated by the EP. However, while the ESC was favourable of the Commission’s draft with a few minor changes, it also stressed that it should not hamper corporate restructuring and profitability, but admitted that the adverse effects of restructuring were generally borne by workers alone.¹²⁹ Thus, the ARD 1977 was drafted in part to facilitate restructuring businesses with a view to making enterprises more efficient and competitive, while encouraging a degree of industrial democracy, and providing some social protection.¹³⁰ In addition to the transfer of the employment relationship to the new employer, it also provided for the protection of workers against dismissal, and included information and consultation obligations for both new and old employers.¹³¹

4.1.4 The premise of the ARD 1977 was to provide necessary protection for employees in the event of a change of employer, in particular, to ensure that their rights were safeguarded.¹³² It operated to transfer employment contracts to the buyer of a business

¹²⁴ N Adnett, “The Acquired Rights Directive and Compulsory Competitive Tendering in the UK: and Economic Perspective” (1998) 6(1) *Eur J Lab&Emp* 71.

¹²⁵ M Sargeant, “Business Transfers and Corporate Insolvencies – the Effect of TUPE” (1998) 14(1) *IL&P* 8.

¹²⁶ Hepple and Veneziani, n121, 619.

¹²⁷ Hereafter referred to as the “EP”.

¹²⁸ Hereafter referred to as the “ESC”.

¹²⁹ M Henderson, “The Institutional and Normative Significance of the European Union’s Acquired Rights Directive” (1996) 29 *Geo Wash J Int’l L&Econ* 803, 809.

¹³⁰ Fairhurst, n65, 313-353.

¹³¹ Hepple and Veneziani, n121, 77.

¹³² Third recital, ARD 1977.

undertaking or part of a business undertaking,¹³³ effectively granting employees a property right in their job.¹³⁴ Rights and obligations arising under employment contracts transferred to the buyer and both buyer and seller remained jointly and severally liable in respect of those obligations arising prior to the transfer. Member States were given latitude in relation to any duty to notify a buyer of the rights and obligations connected with the transferring contracts. The terms of collective agreements also transferred, though Member States were given the option to limit the period for observing those terms and conditions. Pension rights were excepted from the operation of the ARD 1977 and would not transfer unless a Member State provided otherwise.¹³⁵

4.1.5 The ARD 1977 was surrounded by controversy that reflected the larger struggle within the EC between proponents of a strong centralised European government with expansive jurisdiction over social and economic policy, and those with a more modest vision of European unity.¹³⁶ The EP recognised that differences in Member State policies on business transfers were a hindrance to harmony in the Common Market because Member States with more protective legislation and associated increased labour costs were at a competitive disadvantage.¹³⁷ However, the ambiguous provisions of the ARD 1977 led to many ECJ cases the results of which provide definitions, explanations, and criterion under which the ARD 1977 would apply.¹³⁸ The operation of the ARD 1977 in insolvency situations was a frequent subject of EU jurisprudential interpretation.

¹³³ ARD 1977, art 1.

¹³⁴ N Adnett and S Hardy, "Entrepreneurial Freedom versus Employee Rights: the Acquired Rights Directive and EU Social Policy Post-Amsterdam" (1999) 9 J Eur Soc Pol 127, 127.

¹³⁵ ARD 1977, art 3(4).

¹³⁶ Henderson, n129, 803.

¹³⁷ Resolution Embodying the Opinion of the European Parliament on the Proposal from the Commission of the European Communities to the Council for a Directive on Harmonization of the Legislation of Member States on the Retention of the Rights and Advantages of Employees in the Case of Mergers, Takeovers and Amalgamations, [1975] OJ (C 255) 25.

¹³⁸ See Case 24/85 *Spijkers v Abattoir* [1986] ECR 1119 that set out the decisive criterion for establishing the existence of a transfer; Case 32/86 *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall* [1988] ECR 739 confirming the application of the Directive to the transfer of a lease; Case C-209/91 *Rask v ISS Kantineservice* [1992] ECR 5755 in which the distinguishing of ancillary from core parts of a business for the purpose of the directive's application was denied; Case C29/91 *Dr Sophie Redmond Stichting v Bartol* [1992] ECR 3189.

5 EU Jurisprudence and the Evolving Insolvency Exception

5.1 *Abels*¹³⁹

5.1.1 The ARD 1977 did not expressly exclude business transfers during insolvency from its scope.¹⁴⁰ This lacuna in the ARD 1977 was first confronted by the ECJ in *Abels*, a Dutch referral, in which the applicability of the ARD 1977 transfer provisions to a business sale during a non-liquidation insolvency procedure was in question.¹⁴¹ The ECJ took a purposive approach, looking at the aims of insolvency, the objectives of the rescue culture, and the purpose of the ARD 1977. The ECJ stated that the purpose of the ARD 1977 was to ensure that the restructuring of undertakings would not adversely affect the employees. Taking this view, the ECJ was initially unsure if the application of the ARD 1977 to insolvency situations would be favourable or prejudicial to employees. While employees of an insolvent employer are probably at the highest risk, extending the ARD 1977 to insolvent transfers could have the effect of dissuading purchasers from acquiring an undertaking on terms favourable to creditors. In such a case, liquidation may be the outcome, which would result in a greater loss of jobs, contrary to the purpose of the ARD 1977.¹⁴² Thus its application in such situations could actually undermine the Directive's objective of promoting job security.¹⁴³

5.1.2 The ECJ concluded that the ARD 1977 did not require Member States to extend the transfer requirements to those taking place in the context of insolvency proceedings instituted with a view to the liquidation of the company, essentially creating an exception for insolvent liquidations. Another reason for relaxing the rules was attributed to the special nature of insolvency laws, designed to weigh up the competing interests involved. It was accepted that insolvency rules could derogate at least in part from social policy.¹⁴⁴ It was felt that, had the drafters of the ARD 1977 meant for it to apply to

¹³⁹ Case C-135/83 *HBM Abels v The Administrative Board of the Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie* [1985] ECR 469 (hereafter referred to as "*Abels*").

¹⁴⁰ M Sargeant, "TUPE – the Final Round" (2006) September JBL 549, 560-561.

¹⁴¹ "*Surséance van betaling*".

¹⁴² G Casale and A Perulli (eds), "Compliance with Labour Legislation: Its Efficacy and Efficiency" (2010) International Labour Organisation - Working Document No 6 <http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_140685.pdf> accessed 1st March 2015, 39-40.

¹⁴³ *Abels* para 20-21.

¹⁴⁴ Barnard, n70, 647-648 .

insolvency situations, an express provision in the legislation would have been included to that effect.¹⁴⁵

5.1.3 The *surséance van betaling* procedure in *Abels* was deemed to fall outside of the definition of liquidation proceedings as it aimed to safeguard assets of the insolvent undertaking and, where possible, to continue the business of the undertaking by means of a collective suspension of debt payments, with a view to agreeing a composition plan that would enable the business to continue trading in the future.¹⁴⁶ Following *Abels*, it was thought that all business transfers occurring through insolvency proceedings would be removed from the scope of the ARD 1977. However, subsequent decisions demonstrated otherwise.¹⁴⁷

5.2 *D'Urso*¹⁴⁸

5.2.1 *D'Urso* also questioned whether a specific insolvency procedure, in this instance the Italian “special administration procedure,” would attract the application of the ARD 1977. The ECJ determined that the decisive test to establish applicability should be the purpose of the procedure. It went on to clarify, much to the chagrin of insolvency practitioners, that, while the ARD 1977 would not apply to those procedures instituted with a view to the liquidation of a company, it would apply if the purpose of the procedure was to continue trading and safeguard assets. Further, the application of the insolvency exception was not strictly dependent upon the exercise of judicial or administrative authority, but on the purpose of the insolvency procedure in question. In this judgment, the ECJ not only confirmed its previous approach in *Abels*, but took a step toward extending the scope of the ARD 1977 in corporate rescue procedures.¹⁴⁹

5.3 *Spano*¹⁵⁰

5.3.1 The question posed by the Italian court in *Spano* was whether a provision of the Italian Civil Code applying to undertakings declared by the Ministerial Committee for the

¹⁴⁵ AL DaSilva, “Directive 77/187: The EEC’s Attempt to Protect Employees upon the Sale or Transfer of Businesses” (1988) 11(1) BC Int’l & Comp L Rev 147, 152.

¹⁴⁶ *Abels* para 28.

¹⁴⁷ Casale and Perulli, n142, 40-41.

¹⁴⁸ Case C-362/89 *D’Urso and ors v. Ercole Marelli Elettromeccanica Generale SpA and ors* [1991] ECR I4105.

¹⁴⁹ Casale and Perulli, n142, 41-42.

¹⁵⁰ Case C-472/93 *Spano and Others v Fiat Geotech and Fiat Hitachi* [1995] ECR I-4321.

Coordination of Industrial Policy to be in critical difficulty attracted the application of the ARD 1977. This declaration was contingent on the submission of a recovery plan. In the ECJ's view, as the purpose of the declaration was to enable the undertaking to try to recover from its financial difficulties, continue the business, and to preserve jobs, then failing to protect the rights of employees by not transferring their contracts to a purchaser of the undertaking would defeat the purpose of the ARD 1977. Again, the determining factor was the purpose of the procedure in question.¹⁵¹

5.4 *Déthier*¹⁵² and *Eurpièces*¹⁵³

5.4.1 The Belgium court referred a question to the ECJ in *Déthier* regarding a law outlining the winding up procedure following the dissolution of a commercial company. The procedure was designed to allow a company to continue trading until it could conclude its transactions. It was, however, precluded from engaging in any new business. Furthermore, a company was not required to be technically insolvent to use the procedure. Companies under this procedure were merely marking time until dissolution could be completed. The Advocate General in this case was of the opinion that the purpose of the procedure was not enough to determine the applicability of the ARD. Rather, the fact that the company continued to trade at all, regardless of the reason it continued to trade, in this case for the purpose of liquidation, must be the determining factor. That the purpose of the procedure was liquidation or the fact that it was continuing to trade with a view to the liquidation of the company was not enough to justify the loss of rights that its employees would suffer should the business be sold without ARD 1977 protection.¹⁵⁴

5.4.2 The ECJ followed the opinion of the Advocate General, concluding that, in deciding the applicability of the ARD 1977, and where the purpose of a procedure is not immediately clear, account should be taken of the form of the procedure. The court then examined the characteristic features of the procedure in question and determined that the objective of the Belgian winding up procedure was to realise assets for the benefit of the company

¹⁵¹ Casale and Perulli, n142, 42-43.

¹⁵² Case C-319/94 *Jules Déthier Equipement SA v Jules Dassy* [1998] ECR I-1061.

¹⁵³ Case C-399/96 *Eurpièces SA, in liquidation, v Wilfried Sanders and Automotive Industries Holding Company SA* [1998] ECR I-6965.

¹⁵⁴ Casale and Perulli, n142, 43.

and its creditors, but that the company was not required to be in financial distress for the procedure to apply. Liquidation in this case was being used outside of an insolvency procedure. There was no justification for depriving employees of their acquired rights as, despite the fact that liquidation was to be the end result, there was little doubt that the undertaking would continue trading upon its transfer.¹⁵⁵

5.4.3 *Eurpièces* was another Belgian case that closely followed the facts in *Déthier*. The query related to circumstances in a voluntary liquidation where a company had transferred all or part of its assets to another company. The court found that this procedure had even less in common with an insolvency procedure and that the transfer provisions of the ARD 1977 would definitely apply.¹⁵⁶ A similar approach was taken in *Sophie Redmond*¹⁵⁷ and *Merckx*,¹⁵⁸ in which procedures were undertaken outside of insolvency or were otherwise comparable to insolvency, but were not in fact insolvency procedures.

5.5 The Approach of the ECJ

5.5.1 The definitions “clarified” in the above judgments left much to be desired. The approach in *Abels* has been described as ultimately unsatisfactory and even incoherent.¹⁵⁹ The ECJ drew a distinction between insolvency and pre-insolvency proceedings that was based on a false premise. It failed to recognise that the reason why many companies engage in pre-insolvency procedures is that they may be able to sell off part of their undertaking with the result of preserving jobs within what is retained, which is precisely the reason why the insolvency exception was introduced.¹⁶⁰ The application of acquired rights in procedures that are taken with a view to recovering the business risks deterring potential purchasers from acquiring an undertaking, potentially resulting in a total loss of business integrity and job security. The ARD 1977 was aimed to balance the protection of employees with commercial realism, but the above jurisprudence has shown a bias in the ECJ in favour of employee protectionism. As such, the original

¹⁵⁵ *Ibid.*, 44.

¹⁵⁶ *Ibid.*

¹⁵⁷ Case C29/91 *Dr Sophie Redmond Stichting v Bartol* [1992] ECR 3189.

¹⁵⁸ Joined Cases C171/94 and C172/94 *Albert Merckx and Patrick Neuhuyts v Ford Motors Company Belgium SA* [1996] ECR I-1253.

¹⁵⁹ P Davies, “Acquired Rights, Creditors’ Rights, Freedom of Contract and Industrial Democracy” (1989) 9 YEL 21, 45.

¹⁶⁰ Barnard, n70, 620-621.

purpose of the ARD 1977, designed in part to facilitate business transfers, acts to prevent these by creating a financially disadvantageous climate for a potential purchaser.

5.6 Reforms to the Acquired Rights Directive

5.6.1 In 1994, the Commission proposed amending the ARD 1977 due to its perceived inadequacies, ambiguities, and uncertainties as demonstrated by the ECJ's strong law-making role in determining how the Directive should apply.¹⁶¹ The predominant concern for the amendment of the ARD 1977 was to better articulate the basic individual rights created by it within certain commercial transactions that proved to be troublesome,¹⁶² including the codification of the insolvency exception.¹⁶³ During the UK's presidency of the Council during the first half of 1998, the Labour government at the time proposed to take the opportunity to seek to make further progress and bring the negotiations on reforming the ARD 1977 to a conclusion.¹⁶⁴ The UK had a particular national interest, as it intended to overhaul its TUPE Regulations¹⁶⁵ and a revised supranational text would provide the ideal platform. The UK presidency was a perfect opportunity to ensure that the two pieces of legislation would closely correspond.¹⁶⁶

5.6.2 The 1998 Directive,¹⁶⁷ consolidated in the Acquired Rights Directive¹⁶⁸ in 2001, expressly excluded transfers of insolvent entities, unless otherwise provided for by Member States, as articulated in Article 4a. It incorporated the ECJ's case law distinguishing between the liquidation of insolvent companies and other insolvency procedures.¹⁶⁹ Compared to the ARD 1977, these were substantial derogation options that allowed Member States to opt into an exception to the application of the ARD in

¹⁶¹ G Barrett, "Deploying the Classic 'Community Method' in the Social Policy Field: the Example of the Acquired Rights Directive" (2009) 15(2) ELJ 198, 205.

¹⁶² S Hardy, "Some TUPE Implications for Insolvency Lawyers" (2001) 4(Sept) *Insolv L* 147, 150.

¹⁶³ *Ibid.*, 150.

¹⁶⁴ AJ Ahanchian, "Reducing the Impact of the European Union's Invisible Hand on the Economy by Limiting the Application of the Transfer of Undertakings Provision" (2002) 2 *J Int'l Comp L Chicago-Kent* 29, 45.

¹⁶⁵ Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246, hereafter referred to as "TUPE".

¹⁶⁶ J Hunt, "Success at Last? The Amendment of the Acquired Rights Directive" 24(3) *ELR* 215, 217-224.

¹⁶⁷ Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses [1998] *OJ L* 201/88.

¹⁶⁸ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] *OJ L* 82/16 (hereafter referred to as the "ARD").

¹⁶⁹ P Davies, "European Developments – Amendments to the Acquired Rights Directive" (1998) 27(4) *ILJ* 365.

insolvency situations of the first kind unless Member States elected otherwise.¹⁷⁰ At the time of its drafting, there were still differences remaining in the Member States regarding the extent to which employees are protected. It was recognised throughout the EU that such differences should be reduced to level the competitive playing field among the Member States.¹⁷¹

6 Implementation of the Acquired Rights Directive

6.1 Problems of Divergent Implementation of Directives

6.1.1 Prior to the introduction of the ARD 1977, European law was divided on how to deal with employment contracts upon the transfer of a business. In the UK, employment contracts were subject to the normal rules of contract, considered personal to the employer and employee and non-transferable.¹⁷² France has required the transfer of employment rights on the transfer of a business undertaking since passing a law to this effect in 1928.¹⁷³ The provision was introduced following the requests of employers who wished to ensure that business transfers not only meant the transfer of assets, but also the transfer of a skilled and experienced labour force that knew how to operate them. France has been particularly innovative on this point and the ARD has typically favoured the French position.¹⁷⁴

6.1.2 The implementation of the various versions of the ARD has had diverse effects throughout the EU, principally due to the results of the limitations set on the competence of the EU to legislate in the area of social policy. The legislative form of Directives that social policy generally takes is a fundamental factor in the differences in implementation. Member States have a wider margin of discretion as to how the results of directives are achieved,¹⁷⁵ which has led to a variety of implementations. The Court of Justice of the European Union¹⁷⁶ has therefore had to take a broad approach to

¹⁷⁰ Ibid.

¹⁷¹ Hepple, n38, 172.

¹⁷² Frank, n122, 7.

¹⁷³ Originally drafted in article L122-12 of the *Code du Travail*.

¹⁷⁴ Barnard, n70, 578.

¹⁷⁵ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629.

¹⁷⁶ Hereafter referred to as the “CJEU” the European Court of Justice changed to the Court of Justice of the European Union subsequent to provisions in the Lisbon Treaty agreed in 2009.

decisions regarding whether individuals could rely on Directive provisions in national courts, even though Member States retain flexibility of implementation.¹⁷⁷

6.1.3 A further obstacle to convergence in social policy is the fact that directives are limited to vertical direct effect,¹⁷⁸ or under some circumstances, indirect effect.¹⁷⁹ Thus, while private individuals cannot generally rely on the provisions of a directive to, for example, sue their employer for non-compliance; they can sue the state for failing to interpret national law consistently with the requirements of a directive. However, the principle of indirect effect has been manipulated by the UK through the denial that indirect effect could be applied to national legislation preceding the directive and by arguing that indirect effect cannot be used to distort the meaning of national legislation. Following the CJEU's decision in *Marleasing*,¹⁸⁰ the first of these arguments has been dropped, but the latter has been further expanded in *Webb v EMO Cargo*,¹⁸¹ insofar as it was stated that UK courts would only interpret domestic legislation consistently with EU law if such interpretation would not distort the meaning of domestic legislation.¹⁸² Thus, the mode of legislation itself allows for a wide scope of interpretation in the implementation process, which has contributed significantly to the differences in transposition effects.

7 Acquired Rights in France

7.1 History

7.1.1 Before the introduction of the French transfer of undertakings provisions, employment contracts affected by a business transfer would not be transferable to a new employer, as they were considered personal in nature, essentially a freedom of contract position.¹⁸³ This position was heavily influenced by concepts of personal liberty. However, in 1926, the employment relationship in France began to change in favour of the employee.¹⁸⁴ The concept of acquired or maintained rights was borne out of this legislative shift. It

¹⁷⁷ E Szyszczak, "Future Directions in European Social Policy Law" (1995) 24(1) ILJ 29, 26.

¹⁷⁸ Direct effect refers EU legislation that can be enforced in national courts overriding any inconsistent national provisions..

¹⁷⁹ Indirect effect refers to the requirement of national courts to interpret national law in such a way this does not conflict with the provisions of an unimplemented or incorrectly implemented EU law .

¹⁸⁰ Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

¹⁸¹ Case C-932/93 *Webb v EMO Cargo* 2 [1994] CMLR 729.

¹⁸² Szyszczak, n177.

¹⁸³ M Desepax, J Rojot and J-P Laborde, *Labour Law in France* (Kluwer 2011) 175.

¹⁸⁴ CA Scott, "Money Talks: The Influence of Economic Power on the Employment Laws and Policies in the United States and France" (2006) 7 San Diego Intl L J 341, 348.

was legally recognised in 1928 that the broad application of the contractual freedom principle in employment relationships was dangerous for employees who risked losing their job security in the event of any business transfer. The law was designed to ensure the job security of employees, who at the time of the original law were often family members, when a company changed hands. It was therefore prescribed that employment contracts should be preserved in the event of a transfer of undertaking.¹⁸⁵ This became an element of public policy leading to the compulsory nature of the transfer for the transferor, transferee, and employees.¹⁸⁶

7.1.2 In the 1934 *Groupy*¹⁸⁷ case, the new text on the transfer of undertakings was interpreted widely, insofar as it was judged to be applicable even to successive service providers of public services associated with city lighting. It was considered that taking up a service of this nature using identical means would be sufficient for the application of the transfer of undertakings law. The result of this case meant that a business would not require a legal contractual relationship between successive operators in order for the law to apply. The text of this law did not change until the 1980s. It was later included in Article L.122-12 of the Code of 1973.¹⁸⁸ Today, the transfer provisions in the French *Code du Travail* must be interpreted according to the provisions of the Acquired Rights Directive,¹⁸⁹ though this has caused few problems considering the close alignment already subsisting between the ARD and the French provision.

7.1.3 In the 1980s, the Court of Cassation recognised that applying the law on transfers of undertakings to what was essentially a service provision change was problematic. Even the Commission denounced the blanket application of Article L.122-12 to service provision changes as contrary to free competition because it distorted the means of access to a market in the course of renewal. In addition, a company taking on contracts of employment in such a situation might be completely unaware of the number of

¹⁸⁵ Desepax, Rojot and Laborde, n183, 175.

¹⁸⁶ J Debost, "France: Outsourcing and Transfer of Undertaking under French Law: Protection of Employee Rights and Obligations towards the Works Council" (2007) Gide Loyrette Nouel <<http://www.mondaq.com/x/50228/Workforce+Management/Outsourcing+And+Transfer+Of+Undertakings+Under+French+Law+Protection+Of+Employee+Rights+And+Obligations+Towards+The+Works+Council>> accessed 17 November 2012.

¹⁸⁷ *Arrêt Groupy* Cass Civ 27 February 1934, GA no 62, 304.

¹⁸⁸ Desepax, Rojot and Laborde, n183, 175.

¹⁸⁹ Y Chagny, "Procédures Collectives et sort de l'Emploi Salariés «Ordinaires » Journée des juristes de droit du travail – Paris – 7 décembre 2007.

employees or the terms of their employment. In a 1985 case, it was found that a change in cleaning service provider in Nimes would not draw the application of the transfer provisions with the Court of Cassation, stating that a change in the juridical situation of an employer defined in the law cannot simply be indicated by a loss of a service contract. In short, the simple change of the recipient of a service would not be enough for the application of the transfer provisions. The fact that the same activity continues with another employer would not cause the transfer of contracts unless that activity constituted an autonomous economic entity.¹⁹⁰

7.1.4 In 1986, the court further narrowed the scope of the transfer provisions in a case brought to an employment tribunal by employees against two companies, one of which had lost a work contract on the railway to the other. The employees of the former company claimed that their employment contracts should have transferred to the company now hired to do the work. However, the court found that the change in juridical position of an employer that would attract the application of the transfer provisions implies that there is some legal connection between successive employers, which in that case meant that over one hundred contracts of employment would not transfer to the new service provider.¹⁹¹ While this made economic sense, the decision caused genuine consternation among trade unions and workers as it introduced a great instability in employment during a period in which restructuring was common.¹⁹²

7.1.5 The ECJ then undertook the issue of legal connection in a case that has become known as *Daddy's Dance Hall*.¹⁹³ It was found that it was not necessary for there to be a juridical link between two successive employers in a case where the transfer of employment contracts was implicated. This influenced the Court of Cassation to abandon its unpopular stance and return to more protective solutions, though not to the broad extent of the previous approach to the law. It incorporated the approach of the ECJ by stating that, while a legal connection was not necessary to establish the application of the transfer provisions, a mere loss of service contract would not be

¹⁹⁰ Cass. Ass. Plén., 15 novembre 1985, n. 82-40.301, *Sté Nova Services c/ Groupe Services France et al*; et n. 82.41.510, *Martin c/ Sté Nettoitout et al*.

¹⁹¹ Cour de Cassation chambre sociale, 12 juin 1986, N° de pourvoi: 85-43194 85-43746 85-43787.

¹⁹² Desepax, Rojot and Laborde, n183, 176.

¹⁹³ Case 324/86, *Tellerup v Daddy's Dance Hall* [1988] ECR 739.

adequate. It would be necessary also to show that there was a transfer of an entity that has preserved its identity and the activity of which is pursued or resumed.¹⁹⁴ Today the transfer provisions are contained in Article L.1224-1 of the Labour Code.

7.2 The Operation of French Acquired Rights

7.2.1 The French position is fairly straightforward compared to the UK position. All employment contracts transfer in the event that there has been a transfer of an autonomous economic entity that retains its identity, regardless of any extenuating circumstances, including insolvency. The notion of “autonomous economic entity” implicating the transfer of employment contracts extends to an organised grouping of individuals functioning as a unit that exercises an economic activity pursuing an identifiable objective. Thus, the existence of an economic entity is independent of any corporate rules of organisation, function, or management tied to corporate entities. Essentially, a distinct activity associated with a company can constitute an autonomous economic entity.¹⁹⁵ While these provisions appear to be broad and present a potential obstacle to the freedom of enterprise, they also coincide with French policy and constitutional principles regarding the right to work.

7.2.2 Given the frequency with which companies are reconstructed in the modern corporate world, France has recognised the need to maintain some stability for employees in addition to the flexibility of business enterprises. In a decision by the Constitutional Court in January 2000,¹⁹⁶ the importance of social cohesion was emphasised. It was stated that, according to Article 34 of the Constitution of 1946, the legislature is required to determine fundamental principles of labour law, to assure that the economic and social principles listed in the Preamble of the Constitution are put in place, while ensuring that these principles are reconciled with constitutionally guaranteed freedoms. In complying with the constitutional requirement to ensure that everyone has the right to obtain employment, it is also possible to limit freedom of enterprise, but only insofar as

¹⁹⁴ Desepax, Rojot and Laborde, n183, 176.

¹⁹⁵ F Breton and C Perez, “Comment les Salaries Sortent-ils de l’Entreprise? Les Ruptures de Contrat de Travail en Contexts, Changements Organisationnels et Marges de Manoeuvre des Salaries” (2012) HAL Archives Ouvertes <hal-00665371> 19.

¹⁹⁶ Décision 1999-423 DC - 13 janvier 2000 - Loi relative à la réduction négociée du temps de travail - Non conformité partielle

the result is not disproportionate to the objective pursued.¹⁹⁷ In consideration of the French approach to employment protection and the rights of labour, the explicit recognition that this may sometimes interfere with freedom of enterprise is not surprising. However, such limitations ensure that employees benefit from a high level of protection in times of economic turmoil, which includes extensive information and consultation requirements as well as the specific protection of employment contracts with their terms and conditions.

7.2.3 While dismissals by reason of the transfer itself are considered ineffective, dismissals for economic reasons can still be made if they satisfy all of the requirements contained in the labour code. Various insolvency procedures provide for such dismissals if required. These can occur with the authorisation of the *juge-commissaire* during the period of observation during a *redressement judiciaire* procedure. An administrator will be obliged to consult the works council or employee representatives¹⁹⁸ and must inform the competent administrative authority.¹⁹⁹ A plan conceived during the process of *redressement* may also provide for justified economic dismissals, but these carry with them requirements for compensation and attempts to find alternative employment for those employees whose jobs are under threat. Plans that envisage economic dismissals can also not be approved by the court until a works council or employee representatives have been consulted and the administrative authority informed. The same applies to economic dismissals envisaged prior to or following a business transfer or during *sauvegarde* procedures. Economic dismissals are of particular importance in a *sauvegarde* procedure given that its aim is the reorganisation of a company, as such, economic dismissals will often be one result of the changes required to increase competitiveness.²⁰⁰

¹⁹⁷ Décision n° 2001-455 DC du 12 janvier 2002 Loi de modernisation sociale, line 46.

¹⁹⁸ *Code du Travail* article L 321-9.

¹⁹⁹ *Ibid.*

²⁰⁰ Chagny, n189.

8 Acquired Rights in the UK

8.1 History

8.1.1 Prior to the adoption of the ARD 1977 and its implementation in the UK, the House of Lords Select Committee on the European Communities considered the new Directive and reported that existing British legislation afforded adequate and comprehensive protection for employees, without the need for new requirements applicable on the transfer of a business. Further, the EC proposals were of little value given that the legislation on mass redundancies was deemed sufficient. However, the ARD 1977 was to go far beyond the procedural aspects of collective redundancies as it conferred substantive individual rights on workers. While the position in Britain provided some limited statutory rights in the event of a change of employer, there was no blanket protection of employment continuity or contractual transfer.²⁰¹

8.1.2 The position of employment contracts upon the transfer of a business relied upon rules of contract. Employment contracts were personal in nature and could not be transferred to a new employer that was not already a party to that contract.²⁰² Individuals have a negative freedom not to consent to a change in employer, as the requirement of automatic transfer would be against the principle that a man cannot be compelled to serve a master.²⁰³ Thus, a purchaser of a business could not generally expect to receive a trained workforce, nor could employees be assured of any job security in such situations.²⁰⁴ The first UK legislation conferring continuity of employment on a business transfer²⁰⁵ would apply only if the employees were voluntarily retained by the purchasing firm. There was no concept of automatic transfer, as this would conflict with the fundamental freedom of contract²⁰⁶ as well as with fundamental human rights against forced labour.²⁰⁷ The ARD 1977 and its implementation changed the common law position in the UK, essentially subverting fundamental rules of contract law.²⁰⁸ The

²⁰¹ B Hepple, "Workers Rights in Mergers and Takeovers: the EEC Proposals" (1976) 5 ILJ 197, 197-199.

²⁰² C Barnard, *Employment Law* (4th edn, OUP 2012) 578.

²⁰³ See *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014.

²⁰⁴ Barnard, n202, 578.

²⁰⁵ Contracts of Employment Act 1963.

²⁰⁶ A Baker and I Smith, *Smith & Woods Employment Law* (10th edn, OUP 2010) 541.

²⁰⁷ G Pitt, *Employment Law* (7th edn, Thompson Reuters 2009) 305.

²⁰⁸ Baker and Smith, n206, 541.

implementation of the ARD 1977 would mean the end of the legal fiction of the personal, non-transferable nature of an employment contract, replaced by the principle of an automatic transfer, which essentially reflects the reality of modern working life.²⁰⁹

8.2 Transfer of Undertakings (Protection of Employment) Regulations 1981²¹⁰

8.2.1 With its labour friendly stance, the UK Labour government of 1974 to 1978 agreed to the ARD 1977, but it failed to implement the Directive before the election in 1979 when the Conservatives came into power under Thatcher.²¹¹ The ARD 1977 was unwanted by the Conservative regime, thus it is unsurprising that the Commission had to threaten taking action to motivate them to implement TUPE 1981, but the lack of enthusiasm affected the form of the Regulations.²¹²

8.2.2 TUPE 1981 came into force in May 1982, more than three years after the expiry date of the two-year implementation period.²¹³ Little was made to integrate the ARD 1977; it was simply placed on top of existing UK law,²¹⁴ which caused a number of problems. As EU law is generally modelled in the style of Continental legal practice, many of the clauses of TUPE 1981 were unclear and obscure, making them difficult for UK courts to interpret. In addition, the form that the implementation took had its own problems. Most EU law up to that time had been implemented through Acts of Parliament, but as Regulations, TUPE 1981 did not amend existing legislation as would have been the case with an Act.²¹⁵ While it would seem that the devices used in implementing the Directive should limit its impact in Britain, it also created legal confusion that caused chaos for industrial tribunals interpreting the status of the law in that area. The legislation instead undermined the coherence of worker protection in transfers of undertakings. Little would be done to ameliorate this during the Conservative governance of the 1980s.²¹⁶

²⁰⁹ B Hepple, n201, 210.

²¹⁰ Transfer of Undertakings (Protection of Employment) Regulations 1981, SI 1981 No 1794. (Hereafter referred to as “TUPE 1981”).

²¹¹ Brewster and Teague, n35, 130.

²¹² *Ibid.*

²¹³ *Ibid.*, 161.

²¹⁴ Baker and Smith, n206, 541-542.

²¹⁵ Brewster and Teague, n35, 162.

²¹⁶ *Ibid.*, 163 and B Bercusson, *European Labour Law* (2nd edn, CUP 2009) 57.

8.2.3 The introduction of ARD 1977 provisions would also have significant impact on the process of privatization that was to occur under the Thatcher administration.²¹⁷ It had been believed that the transfer of state-owned enterprises from public ownership to private control would not attract the application of the ARD 1977. However, in *Commission v UK*,²¹⁸ it was found, among other things, that employees in non-commercial undertakings would also be protected by the Directive, endangering the privatisation initiative.²¹⁹ As such, an effective implementation of the ARD 1977 would have significant impact due to the costs that would accompany the mandatory transfer of employment contracts. Despite rote copying, TUPE 1981 had failed to comply with the Directive in application. For the Conservative government in power at the time of the Directive's initial implementation and well into the discussion of its reforms, the ARD 1977 was a classic example of how EU social policy prevented the utilisation of competitive forces to eliminate government failure. Rather, it helped to preserve pockets of inefficiency, while inducing distortive creative compliance behaviour among the Member States.²²⁰

8.3 Reviewing and Reforming TUPE²²¹

8.3.1 At a House of Lords review in 1996, the Business Services Association pointed out that the ARD 1977 had:

“resulted in substantial and unforeseen compensation and business costs, significant legal costs, and [...] the diversion of a significant proportion of management time to TUPE related issues.”²²²

It also concluded that the primary need for any revision of the law was clarity.²²³ Although the ARD was consolidated and updated in 2001, it was not until 2006 that the UK followed suit. A number of changes were made prior to the passage of the new regulations. In 1999, the UK government created a special legislative power to extend TUPE beyond normal TUPE situations. In 2000, it used a Cabinet Office Statement of

²¹⁷ Henderson, n129, 819.

²¹⁸ Case C-382/92 *Commission v UK* [1994] ECR 2435.

²¹⁹ Henderson, n129, 819.

²²⁰ Adnett, n124, 69-70.

²²¹ Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246 (hereafter referred to as “TUPE 2006”).

²²² House of Lords, Select Committee on the European Communities, *Transfer of Undertakings: Acquired Rights. Session* (1995-1996 5th Report London: HMSO).

²²³ Adnett, n124, 79.

Practice as a dictate to declare that all transfers from the central government would be subject to TUPE 1981 controls even when it would not normally be indicated, for example in an internal transfer with no change in an employer's identity. When contracting out, administrative codes required that all contractors respect the existing terms and conditions of transferred staff and to pay any who join no less favourably, thus attempting to avoid a two tier workforce.²²⁴ TUPE 1981 was expanded significantly in the years preceding the passage of TUPE 2006. It is unsurprising that it has caused controversy as a regulation that inhibits a flexible labour market in the UK and, in particular, successful corporate rescue.

- 8.3.2 Prior to the passage of TUPE 2006, a government consultation document stated that the purpose of the legislation would be to assist in managing change resulting from the reorganisation or restructuring of businesses and public sector modernisation by encouraging partnership and a cooperative approach to such changes. While TUPE 2006 may have streamlined some processes, given the amount of problems encountered by employers and the generally litigious feel to the operation of TUPE 2006 between employer and employee, they have not promoted as much cooperation as might have been anticipated.
- 8.3.3 TUPE 2006 repealed and replaced TUPE 1981 and made a number of substantial changes to the law on business transfers. It includes service provision changes as being subject to TUPE, a position already supported in CJEU case law, and clarified the effect of acquired rights in relation to transfer related dismissals and changes to employee terms and conditions. TUPE 2006 introduced information obligations for the seller in relation to employee liabilities. Importantly it allows for greater flexibility in cases where a transferor is insolvent, ostensibly to bring the TUPE 2006 provisions in line with the UK government's policy of encouraging the rescue culture.
- 8.3.4 In November 2011, the UK government called for evidence on the effectiveness of TUPE 2006 as concerns had been raised that it was overly bureaucratic and

²²⁴ NC Johnson and K Williams, "Transferring Employment between the Public and Private Sectors in the UK: Acquired Rights and Revising TUPE" (2007) Sheffield Hallam University Research Archive 10.

ineffective.²²⁵ The response to the consultation was published by the Department for Business Innovation and Skills in 2013 and contained some controversial suggestions for change; however, few of these changes have a bearing on the application of TUPE in corporate rescue situations. The changes envisaged were intended to realign the wording of the Regulations to make it closer to the wording of the Directive and to avoid going further than required.²²⁶ The new Regulations²²⁷ have, however, aligned Regulations 4 and 7 with the ARD in so far as contractual variations and dismissals are only legislatively prohibited if the sole or principal reason for them is the transfer, but no longer will reasons connected with the transfer fall within this prohibition.²²⁸

9 The Insolvency Exception

9.1 The Provision in the ARD

9.1.1 The ARD contains the option to exclude its application in certain cases of insolvency, codifying much of the case law that issued from the ECJ during the currency of the ARD 1977. The ARD allowed its application to be disapplied to transfers in the context of liquidation proceedings. It would, however, continue to apply in non-liquidation proceedings, though the ARD also contained some relaxation on the requirements that would apply upon a transfer. However, the distinction between procedures focuses on the ultimate fate of the transferor, rather than on the position of employees and the transferee when viable businesses are sold. It has been argued that this distinction is inconsistent with the primary aims of employment protection contained in the Directive and that it provides an incentive for insolvency practitioners to adopt a terminal rather than rehabilitative approach. The Trade Unions Congress pointed out that it would not always be clear at the outset of a procedure whether it might lead to rehabilitation or

²²⁵ J Naylor, "TUPE Transfers in Insolvency – Where to Now?" (2012) 25(8) *Insolvency Intelligence* 124.

²²⁶ D Newman, "Perspective: the Government's Proposals for TUPE Reform Examined" March 2013 *Employers Law 10* & J McMullen, "TUPE: Ringing the (Wrong) Changes. The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014" (2014) 43(2) *ILJ* 149, 155.

²²⁷ The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014, SI 2014 No 16.

²²⁸ J McMullen, "TUPE: Ringing the (Wrong) Changes. The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014" (2014) 43(2) *ILJ* 149, 155.

liquidation, thus the distinction within the insolvency exception is based on unstable grounds.²²⁹

9.1.2 The insolvency exception states that:

“Unless Member States provide otherwise, Articles 3 and 4 shall not apply to any transfer of an undertaking business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority)”²³⁰

9.1.3 The insolvency exception allows Member States to derogate from the provisions of the ARD in certain, though ambiguously defined, circumstances. This ambiguity has led to several cases in which the provision had to be interpreted by the Court in order to clarify its application in various insolvency procedures that were not purely liquidation oriented. The same controversy is not present in the French system given that there is a blanket application of the transfer provisions, regardless of the financial circumstances of the action.

9.2 TUPE²³¹ and Insolvency: UK Jurisprudence

9.2.1 Generally, the allocation of employee liabilities arising from the application of TUPE in a business transfer can be a matter of agreement between the buyer and seller of a business undertaking through the use of warranties and indemnities in the purchase agreement. However, in business transfers occurring out of insolvency it is of much greater concern to employees to ensure that their contractual rights and obligations have transferred to the buyer of the business. The buyer is more likely to be solvent and will thus be in a stronger position to ensure that the contractual obligations owed to the transferring employees can be met in full.²³² As such, the question as to whether contracts will transfer in the various insolvency procedures available in the British system has been important to determine.

²²⁹ Hardy, n162, 150.

²³⁰ ARD, art 5.

²³¹ Refers in this section to current Transfer of Undertakings provisions in the UK as of 31 December 2015.

²³² D Pollard, “TUPE and Insolvency: Part 1” (2006) 19(6) *Insolvency Intelligence* 81.

9.2.2 The insolvency exception was adopted in TUPE 2006.²³³ The exception was drafted to support and to promote a business rescue philosophy. TUPE Regulation 8 operates to exclude the application of the rules on the transfer of contracts of employment and the prohibition on dismissal by reason of a transfer. This exception is available in the event that the transfer in question is the subject of bankruptcy proceedings or any analogous insolvency proceedings that have been instituted with a view to the liquidation of the assets of the transferor.²³⁴ Given that TUPE 2006 failed to clarify which specific insolvency proceedings would be exempt from its application, it has been the duty of the courts to determine the applicable tests.

9.2.3 The decision in *Abels* did not assist the UK with the incongruity of its insolvency definitions. In particular, as administration has three options, the last being liquidation when the first two have been exhausted, it would seem that administration can be instituted with a view to the liquidation of the business. However, the hierarchy of purposes in administration implies that priority should be given to rescuing the company. This lack of clarity resulted in litigation in the UK to provide a test for business transfers out of insolvency. The lacuna on definitive insolvent situations where transfers will attract the application of TUPE is difficult to comprehend as insolvency procedures often result in business transfers and thus indicate its operation.²³⁵ The insolvency profession has criticized both the lack of presence of any provision for insolvency situations as well as the CJEU's approach to terminal and non-terminal insolvencies.²³⁶

9.3 *Oakland vs Wellswood*²³⁷

9.3.1 *Oakland* is the first in a series of UK cases that have extended the reach of acquired rights in corporate rescue. In *Oakland* the Employment Appeal Tribunal²³⁸ found that administration proceedings, in particular pre-pack administrations instituted with a view

²³³ W Derbyshire and S Hardy, *TUPE: Law and Practice* (2ns edn, Spiramus Press 2009) 65.

²³⁴ TUPE 2006 reg 8(7).

²³⁵ Sargeant, n140, 560.

²³⁶ M Sargeant, "More Flexibility for Insolvent Transfers- the Amended Acquired Rights Directive" (1999) 15(1) Int'l Lab Rev 6

²³⁷ *Oakland v Wellswood (Yorksire) Ltd* [2009] EWCA Civ 1094; [2010] B.C.C. 263 (CA (Civ Div)).

²³⁸ Hereafter referred to as the "EAT."

to liquidating the company, would benefit from the insolvency exception in TUPE.²³⁹ Employees subject to a pre-pack administration would therefore not automatically transfer to the buyer of the business package. The company was deemed as being in a form of terminal insolvency and therefore subject to relevant bankruptcy proceedings as required for the insolvency exception to apply.²⁴⁰

9.3.2 The administrators in *Oakland* had declared that rescuing the company, Wellwood Yorkshire Limited, as a going concern would be impossible and instead concentrated their efforts on achieving a better outcome for creditors by commencing negotiations on the terms of a pre-pack. An onward sale could then be structured before entering formal insolvency so that the business could be more easily continued by the buyer. As the business could not be rescued as a whole, it was decided to sell it off in parts as separate undertakings.²⁴¹ This action was taken to swell the assets of the company to improve distributions to creditors upon its liquidation.²⁴²

9.3.3 An employee who had continued to work for the business following the business transfer claimed unfair dismissal against his new employer less than a year following the sale on the basis that TUPE had applied to the transaction. It was found that TUPE did not apply and the employee therefore did not have sufficient continuity of employment to claim unfair dismissal.²⁴³ Rather, the insolvency exception was found to apply because the company was subject to relevant insolvency proceedings when the transfer was affected so his contract was deemed terminated with the original employer while being rehired anew by the purchasing employer. The EAT justified its position by concluding that its construction of the Regulations accorded with the policy of encouraging the rescue culture whereby a purchaser of a business out of insolvency is not deterred by TUPE liabilities.²⁴⁴

²³⁹ A Kastrinou, N Shah and O Gough, "Corporate Rescue in the UK and the Effect of the TUPE" (2011) 32(5) Co Law 131, 136.

²⁴⁰ D Pollard, *Corporate Insolvency: Employment and Pension rights* (4th edn, Bloomsbury Professional Limited 2009).

²⁴¹ R Parr, "The Rescue Culture and TUPE" (2009) 22(6) Ins Int 91.

²⁴² *Oakland* para 19.

²⁴³ In order to claim for unfair dismissal under UK employment law, an employee at this time was required to have had at least one year of continuous employment.

²⁴⁴ *Oakland* para 20.

- 9.3.4 The EAT judge commented that as Parliament had declined to specify which particular insolvency proceedings should be characterised as being instituted with a view to the liquidation of a company's assets, there was no test against which to measure the instant case. As such, he found that it was a question of fact for the tribunal. The facts in this case lead the judge to rule that as the administrators had immediately recognised the impossibility of rescuing the business as a going concern and took immediate steps to sell its assets, it was clear that the administrators believed that the liquidation of the company would result in the optimum returns for creditors.²⁴⁵ In addition, this construction accorded with the concept of the rescue culture as the insolvency exception had effectively protected the buyer of the company, giving it an opportunity to try to restructure it without the financial risks occasioned by TUPE. Jobs were preserved and creditors benefitted from what administrators had deemed as the best available option.²⁴⁶
- 9.3.5 The case set before the Court of Appeal²⁴⁷ avoided discussion of whether the insolvency exception would apply in a pre-pack situation, finding for the claimant on the basis of rules on continuity of employment contained in the Employment Rights Act 1996.²⁴⁸ The CA expressed regret that the question of the applicability the insolvency exception was not set before it. *Obiter*, Moses LJ said that there were strong grounds for believing that both the first and second tier tribunals were incorrect in their interpretation of the insolvency exception.²⁴⁹
- 9.3.6 Despite the *obiter* comments of Moses LJ, the result of *Oakland* gave some hope to insolvency practitioners that the potential impact of TUPE would no longer place jobs at risk or suppress the value of the assets of a company when an administrator is seeking a buyer for a part of the business.²⁵⁰ The case determined that it was possible to distinguish between two types of administration: one with the purpose of rescuing the business as a going concern and one where the intent is to cease trading completely and

²⁴⁵ *Oakland* para 19.

²⁴⁶ *Oakland* para 20.

²⁴⁷ Hereafter referred to as the "CA".

²⁴⁸ Employment Rights Act 1996 c18 s 218 states that where a business undertaking is transferred to another (assuming that the employee transfers or is taken on by the business) then the period spent in the business prior to the transfer will count as continuous employment and the transfer will not operate to break that continuity.

²⁴⁹ *Oakland* paras 10 and 20.

²⁵⁰ R Russell and P Mudd, "The EAT Upholds the Rescue Culture: Will the Government do the Same?" (2009) 2 CR&I 61.

liquidate.²⁵¹ ECJ jurisprudence also seemed to support this idea insofar as a business is not preserved as a whole, but broken up and sold in different parts, essentially a liquidation of assets, even where those individual parts might be regarded as undertakings under the ARD.²⁵² The decision in *Oakland* was, however, contrary to the guidance issued by the Department for Business Enterprise and Regulatory Reform at the time, which stated expressly that the insolvency exception should not apply to administration. The EAT referred to the guidance, but derived no assistance from it. Rather, the conclusion of the tribunal accorded with the policy of the rescue culture whereby a purchaser should not be inhibited by the effects of TUPE.²⁵³

9.4 *OTG v Barke*²⁵⁴

9.4.1 The primary issue in *OTG* was to answer the question that was left out of the CA judgment in *Oakland*. The facts are similar. An employee brought a claim for unfair dismissal following a termination occurring around the time of a pre-pack transfer. The appeals gave the EAT the opportunity to clarify whether the administration procedure²⁵⁵ constituted “insolvency proceedings instituted with a view to the liquidation of the assets of the transferor” within the meaning of Regulation 8(7) of TUPE. Two approaches were suggested: an absolute approach contending that the insolvency exception could never apply to administrations, or a fact based approach depending on the intentions of the administrator.²⁵⁶

9.4.2 It was argued that an absolute approach catered to the true form of administration procedures, the default purpose of which is to rescue the company as a going concern. Only if this primary purpose is unattainable should the second two options be considered, both of which lead to liquidation. The fact that the results of these options that appear later in the hierarchy of choices allow for liquidation does not defeat the

²⁵¹ *Derbyshire and Hardy*, n233, 67.

²⁵² *Parr*, n241.

²⁵³ *Russell and Mudd*, n250.

²⁵⁴ *OTG Limited v Barke & Others* [2011] UKEAT 0320/09.

²⁵⁵ IA 1986 sch B1.

²⁵⁶ *OTG* para 1.

character of the procedure when it is instituted, that of rescuing the business if at all possible.²⁵⁷

9.4.3 Alternatively, it was countered that the fact that there was a hierarchy of purposes in administration did not defeat the argument that a fact based approach should be taken when deciding cases of this type. The purpose of every administration is not to rescue the business. At times it is immediately recognised that rescue will not be possible, as in *Oakland*, and that the best option for stakeholders will be either selling the assets for distribution or the immediate liquidation of the company. The proponent for this argument used pre-packs as an example, submitting that in these cases administrations are undertaken in circumstances where there is never a real prospect or intention of rescuing the company as a going concern.²⁵⁸

9.4.4 In *OTG* a pre-pack was instituted in order for the business undertaking of the company being sold to continue trading. It was decided that it was irrelevant that at some later date the company might be subject to liquidation.²⁵⁹ Rather, the second tier tribunal determined that in any business sale by a company in administration, employees would automatically transfer to the buyer of that business, preferring an absolute approach.²⁶⁰ The view of the EAT was that due to its very nature, administration proceedings can never be instituted with a view to liquidation.²⁶¹ The EAT described five distinct reasons why they believed this was the appropriate finding:

1. “The distinction made within the provisions of the insolvency exception is more likely intended to depend on the legal character of the procedure rather than the object of the individuals operating it;
2. The TUPE insolvency exception is specifically concerned with the object of the proceedings at the time that they are instituted. As the obligation placed on administrators under Schedule B1 is, at the point of appointment, to consider first the primary objective to rescue the business as a going concern, then the institution of proceedings must always be with this consideration in mind;

²⁵⁷ *OTG* para 19.

²⁵⁸ *OTG* para 20.

²⁵⁹ S Brooks and C Davies, “Employment Law: Insolvent Transfers” April 2011 Accountancy Magazine.com.

²⁶⁰ P Cranston, “Case comment: Absolutism over realism” (2011) 24(3) *Insolvency Intelligence* 47.

²⁶¹ “Transfer of Undertakings – No Exemption for Administrations” (2011) 94(February) *Technical Bulletin* s 94.8.

3. There is also no requirement for an administrator to declare his intentions upon the initiation of proceedings;
4. The fact based approach increases the likelihood of disputes as to who is liable for a transferor's obligations, which will increase the costs of proceedings, result in delay and create uncertainty; and
5. The purpose of the Directive is to protect employees in the event of their employer's insolvency. An absolute approach goes further to reach this end than would the more flexible fact based approach."²⁶²

9.4.5 Underhill J goes on to explain his disagreement with Judge Clarke's assessment in *Oakland*. Judge Clarke had argued for a fact based approach, saying that the approach accords with the policy underlying the insolvency exception in both the ARD and its implementation in TUPE. It promotes a rescue culture under which potential purchasers should not be deterred from purchasing an undertaking out of insolvency as a result of transferring employee liabilities. Underhill J agreed with taking a purposive approach, but believed that it should be applied to the fundamental purpose of the Directive as a whole: to safeguard the rights of workers. While in insolvency related transfers there is an undeniable tension between the rights of employees and the aims of the rescue culture, and while it is true that the loss of some employee rights may in effect protect the business as a whole and its associated jobs, the Directive proceeds on the premise that employment should be protected in these business transfers instituted not with a view to the liquidation of the assets of the company. As such, distinctions were made between terminal and non-terminal insolvencies. Despite the need for balance as recognised in previous CJEU and UK jurisprudence, Underhill J found that the purpose of the Directive is biased toward the rights of employees and does not allow them to be trumped except in very specific circumstances.²⁶³

9.5 *Key2Law*²⁶⁴

9.5.1 In *Key2Law*, the ET followed the reasoning in *Oakland*, asserting that the application of the insolvency exception in an administration would be a question of fact for the tribunal

²⁶² *OTG* para 21.

²⁶³ *OTG* para 23.

²⁶⁴ *Key2Law (Surrey) LLP vs Gaynor De'Antiquis and Secretary of State for Business Innovation and Skills* [2011] EWCA Civ 1567.

and that due to the fact that the proceedings in this case were not instituted with a view to liquidation, the insolvency exception would not apply. While the ET Judge came to a final conclusion that the EAT agreed with, his reasoning was disputed. The EAT followed the reasoning set out in *OTG* for an absolute approach, finding that administrations in their nature are not instituted with a view to liquidation.²⁶⁵

9.5.2 It was argued on appeal that it was right to take a fact based approach, despite the hierarchical structure of the administration procedure. It was unrealistic to regard rescuing a company as a going concern as reflecting a primary objective in administration. In practice, there are cases where there is no prospect for such a rescue, as such the sole objective of an administration in such circumstances would result in the realisation of assets in the best interests of creditors.²⁶⁶ While this case was not a pre-pack situation, the order was made for the purpose of disposing of the undertaking to a third party for consideration, which would enable a distribution to creditors. It was argued that the administration order was therefore made with a view to liquidation and therefore fell within the intendment of the insolvency exception.²⁶⁷

9.5.3 The CA disagreed, finding that in principle it was unsatisfactory to depend on evidence leading up to the making of an order as key in determining whether or not an administration procedure should be considered as having been taken with a view to liquidation. The fact based argument produces uncertainty regarding the objective to be achieved by any administrative appointment, which is to firstly try to find a means of rescuing the company. The CA also regarded it as wrong to identify the purpose of an administrative appointment by reference to the objectives of their pre-appointment considerations. It must look to the purpose of the procedure triggered by the making of the order, rather than the intention of the people involved in the making of it. To this end, the purpose of an administration is clearly set out in Schedule B1 of the Insolvency Act 1986 and its headline purpose is to try to rescue the business, only resorting to the liquidation of assets if that primary purpose proves impossible to achieve.²⁶⁸ In all cases,

²⁶⁵ *Key2Law* para 82.

²⁶⁶ *Key2Law* para 88.

²⁶⁷ *Key2Law* para 89.

²⁶⁸ *Key2Law* para 101.

it is this first objective with which all administrators must formally engage in before resorting to any others.²⁶⁹ The CA therefore solidified the approach to TUPE and administrations, firmly applying an absolute approach as it has the merit of achieving legal certainty: all involved will know where they stand upon the appointment of an administrator.²⁷⁰

9.6 Operation of TUPE in Corporate Rescue

9.6.1 Given that the status of the law is currently such that TUPE will apply in most if not all corporate rescue situations, it is relevant to consider how it operates. There is some relaxation in the Regulations for those procedures that fall short of the exception but that are nonetheless still insolvency situations, thus ostensibly promoting the rescue culture despite the application of TUPE.²⁷¹ Similar to other transfers, in the event that pre or post-transfer dismissals are required for economic, technical, or organisational reasons entailing changes in the workforce,²⁷² such dismissals will usually be permissible, whereas those dismissals that are conceived of by reason of the transfer will be considered automatically unfair. However, any liability incurred for ETO dismissals if improperly done will then pass to the transferee, but those dismissals done legally will remain with the transferor.²⁷³

9.6.2 While the effect of TUPE usually means that any contractual changes conceived of by a transferee related to the transfer are prohibited, those changes arising in relation to a transfer occurring out of a relevant insolvency proceeding will not be caught by this prohibition. Permitted variations are allowed if those variations are by reason of the transfer or for a reason connected with the transfer that is not an ETO reason and is designed to safeguard employment by ensuring the survival of the undertaking subject to the relevant transfer.²⁷⁴ A relevant insolvency proceeding is defined as an insolvency

²⁶⁹ *Key2Law* para 102.

²⁷⁰ *Key2Law* para 103.

²⁷¹ CJ Nicol, "TUPE—a Change for the Better?" (2006) 17(10) *Constitutional Law* 6.

²⁷² TUPE 2006 reg 7(2); hereafter referred to as an "ETO" reason.

²⁷³ D Pollard, "TUPE and Insolvency Part 2" (2006) 19(2) *Insolvency Intelligence* 102, 102.

²⁷⁴ TUPE 2006 reg 9.

proceedings that has been opened not with a view to liquidation.²⁷⁵ This would therefore cover most corporate rescue procedures commenced under the UK insolvency system.

9.6.3 Nonetheless, not all liabilities transfer with the employment contracts. Those liabilities covered by the UK National Insurance Fund under the statutory provisions of the Employment Rights Act 1996 do not pass to the transferee.²⁷⁶ Employees retain their claims against the Fund while any excess will transfer to the purchaser. Such claims include statutory redundancy pay, arrears of pay for up to eight weeks, amounts due for failure to give the minimum notice period, holiday pay, and basic compensatory awards for unfair dismissals.²⁷⁷

9.6.4 While the foregoing exceptions for insolvency are helpful, they do not ameliorate the significant impact that transferring employment contracts will often have. Chapter 6 will explore the criticism that has been levelled against the ARD and TUPE. The costs of employee liabilities have been seen to reduce the value of a going concern to the point of making a purchase unviable. While the ability to change contractual terms and conditions; increased flexibility for employee dismissal; and the availability of the guarantee fund for employment costs, the overall effect of TUPE in corporate rescue has been viewed as fundamentally negative in the UK. The same is true in France, although the political status of employment rights makes criticism generally fruitless and change extraordinarily difficult. As such, a new approach may be called for that attempts to balance the needs of job security and the integrity of the rescue culture.

10 **Analysis and Conclusion**

10.1 Social Policy, European Unification, and the ARD

10.1.1 The implementation of the ARD in the UK and in France differs fundamentally due to two very different approaches and perspectives on the need to protect employees over the interests of business. These approaches are heavily path dependent as evidenced in the examination of how both countries viewed their place and exercised their influence

²⁷⁵ TUPE 2006 reg 8(6).

²⁷⁶ TUPE 2006 reg 8(5).

²⁷⁷ Pollard, n273, 106.

in the early days of the EC and on its approach to issues of social policy. Social policy in Europe has had a long and varied development and has been heavily influenced by the two great wars in the first half of the twentieth century. The personalities involved in the peace negotiations at Versailles were singular microcosms of their particular jurisdictions, with the French highly concerned for specific French interests, an individualist perspective illustrative of the French cynicism toward any lasting change or, indeed, peace following the war. The British, while exhibiting some passing interest in international cooperation, were also more concerned with maintaining their distance from Continental problems.²⁷⁸ While the outcome of the treaty contributed to the causes of the WWII, the treaty also created the ILO, which would provide a further impetus for social policy in Europe, though each individual state would create their own jurisdiction specific regimes of labour and employment protection.²⁷⁹ This jurisdiction specific approach would be reflected in the EU approach to social policy in the 1950s.

10.1.2 As WWI provided the catalyst for war socialism, most continental countries continued it to some degree during the interwar period, while the UK reversed direction, preferring a liberal economy during peace time, though this was not without some serious social consequences in terms of unrest.²⁸⁰ The development of a unifying process following WWII was supported by the UK and the US, though the UK has taken an outsiders stance from the very beginning of European integration processes, with Churchill recommending a “united states of Europe,” of which the UK would not, admittedly, be a part.²⁸¹ The lack of interest of the UK and the US for a European unification process meant that the French would take the lead, which would have significant impact on the form that unification would take, as well as its approach to social policy, though the latter would be tempered by the more liberal stance of the German government.²⁸²

10.1.3 Since the first steps toward some type of European collective were taken in the ECSC, it has been recognised that the creation of a combined market would have far reaching effects on individual citizens, particularly due to the effects of market integration on

²⁷⁸ See above, section 2.2.

²⁷⁹ Ibid, 2.3.

²⁸⁰ Ibid, 2.4.1.

²⁸¹ Ibid, 2.4.2.

²⁸² Ibid, 2.4.5.

European business. This led to specific provisions in the ECSC that allowed for financing activities aimed at mitigating the consequences of restructuring on workers affected by the integration of the coal and steel industrial markets.²⁸³ While this approach would not be fully utilised in the Treaty of Rome, which took a distinctly market-making stance to social policy in the Community,²⁸⁴ some of the first social policy directives occurring in the wake of the SAP would be passed specifically to deal with employees affected by the insolvency of their employers in the Collective Redundancies Directive,²⁸⁵ the Employers in Insolvency Directive²⁸⁶ and the Acquired Rights Directive.²⁸⁷ However, British liberalism and protection of its sovereignty would provide constant obstacles to any advances toward a market-correcting role for social policy in Europe, though this role would be specifically recognised by the Attorney General in his opinion in the *Defrenne No. 1* case. The fact that the Attorney General was French only supports the perception that France has always had a more redistributive social policy in mind for Europe, ostensibly to protect itself against the anti-competitive nature of differentials in social costs between Member States.²⁸⁸

10.1.4 While the adoption of the Social Chapter by the UK would mean an end to any significant obstacles that the UK could continue to present, its implementation strategies in terms of social policy directives has lacked enthusiasm and, at times, legal effectiveness.²⁸⁹ While France was actually the impetus for the creation of a law that would deal with employees' acquired rights,²⁹⁰ the ARD was one of the many EU directives that caused problems for the UK legal system. The UK's failure to implement it initially led to threats of a lawsuit by the European Commission. Then its inadequate implementation and failure initially to apply it in cases of privatisation led to a CJEU decision requiring its application.²⁹¹ Thus, the UK has struggled to comply with the requirements of EU social policy, due not only to its economically liberal stance and

²⁸³ Ibid, 2.4.6.

²⁸⁴ Ibid, 3.2.

²⁸⁵ Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies *OJ L 225, 12.8.1998, p. 16–21*.

²⁸⁶ Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer *OJ L 283, 28.10.1980, p. 23–27*.

²⁸⁷ Ibid, 3.3.

²⁸⁸ Ibid, 3.3.2 and 3.3.3.

²⁸⁹ Ibid, 3.5.

²⁹⁰ Ibid, 7.1.1.

²⁹¹ Ibid, 8.2.

desire to maintain its sovereign power, but also to the differences between Continental civil systems and the British common law approach, the former upon which much EU law is based.²⁹²

10.1.5 The ARD has caused problems on a European level as well, in no small part due to its original failure to deal with circumstances of insolvency. A number of cases considered how the Directive should apply in corporate rescue situations, which were eventually resolved with the distinction between those procedures entered with a view to liquidation or those that are not so initiated. This distinction has meant that any procedure entered with a view to continue trading, even in those situations that may eventually lead to liquidation, any business transfers occurring would not be exempt from the operation of acquired rights.²⁹³ The UK has also had a number of cases dealing with this problem, resulting in the application of TUPE to all insolvency procedures that allow the business to continue trading.²⁹⁴ This has caused controversy at both an EU as well as a national level, however, the current Directive and its implementation throughout the EU mean that this problem cannot be solved without significant reforms in the provisions relating to the insolvency exception.²⁹⁵

10.1.6 The following Chapter will analyse the path dependency of the position in relation to the ARD in the UK and France, explore the controversy caused by the application of transfer provisions during corporate rescue including the opinion and experience of insolvency practitioners, and present a recommended solution that will allow Member States to essentially opt out of the transfer provisions in certain circumstances of corporate rescue where to do otherwise would mean the failure of the company.

²⁹² Ibid, 8.3.

²⁹³ Ibid, 5.

²⁹⁴ Ibid, 9.2.

²⁹⁵ Ibid, 9.6.4.

CHAPTER 6:
CONFLICT AND RESOLUTION: PATH DEPENDENT INFLUENCES ON THE
EVOLUTION OF ACQUIRED RIGHTS IN CORPORATE RESCUE IN THE UK AND
FRANCE

*“Of all the differences between men and the lower animals, the moral sense
or conscience is by far the most important...it is the most noble of all the
attributes of man.”*

~ Charles Darwin

“The arc of the moral universe is long, but it bends towards justice.”

~ Martin Luther King

1 Introduction

1.1 The Evolution of a United Europe

1.1.1 The previous Chapter explored the evolution of the European Union¹ from its roots in the conflict of colonial competitiveness during a time when conservatism, nationalism, and imperialism dominated national psyches, aided by fervent national activists who sought to recruit people by plundering history, religion, folklore, and racial theories to demonstrate a nation’s ancient and aboriginal struggle for its rights and its lands.² The passions of nationalism fuelled the conflicts that arose in the first half of the twentieth century.³ It was these conflicts that began Europe on a path towards a confederal unification that would eventually become the present EU.⁴ Despite the negative effects of the Treaty of Versailles in its heavy reparations that would play a large part in the recommencement of hostilities in 1939,⁵ it also provided for the first international efforts toward social policy in the creation of the ILO.⁶

¹ Hereafter referred to as the “EU”.

² N Davies, *Europe: A History* (Pimlico 1997) 881-896.

³ See Chapter 5 section 2.

⁴ *Ibid.*, 2.4.

⁵ *Ibid.*, 2.2.

⁶ *Ibid.*, 2.3, see chapter 5 n33.

- 1.1.2 The end of the Second World War⁷ saw the first real impulse to create a European community, though this was mainly to ensure that power in Europe could remain balanced by not allowing the German industrial machine to regain supremacy.⁸ The ECSC⁹ created a sectorial market community in the coal and steel industries. Though limited in scope, it provided a framework that could be applied to the common economic community created by the Treaty of Rome.¹⁰ While, initially, Britain was not willing to part with its sovereignty in order to join the European Community,¹¹ it was eventually prevailed upon to do so, though Britain's presence has been a frequent obstacle to a fuller European integration.¹²
- 1.1.3 European social policy initially had a market-making role to ensure that competition would not be distorted within the Common Market.¹³ However, the current phase of European social policy has come to embrace a market-correcting role, as the aims of the EU are not only to create and maintain a common economic market, but also to encourage social cohesion and fuller employment.¹⁴ However, the financial crisis of 2007-2008 has been the cause of a paradigm shift in European social and economic integration, due to Member State introspection precipitated by the economic upheaval.¹⁵ While the current preferred methods of implementing policy is through soft law mechanisms,¹⁶ the subject of this treatise, the Acquired Rights Directive,¹⁷ is a relic of an earlier phase of European social policy.¹⁸
- 1.1.4 The ARD, borne out of the Social Action Programme in the 1970s and amended in 2001, aims to protect employees affected by business transfers.¹⁹ France has had transfer provisions in place since 1928, which have only been minimally impacted by the

⁷ Hereafter referred to as "WWII".

⁸ Ibid, 2.4.2.

⁹ Chapter 5, n51.

¹⁰ Ibid, 2.4.5 and 2.4.6.

¹¹ Hereafter referred to as the "EC".

¹² Chapter 5, section 2.4.7.

¹³ Ibid, 3.2.

¹⁴ Ibid, 3.5.

¹⁵ Ibid, 3.5.2.

¹⁶ Ibid, 3.5.1.

¹⁷ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16 (hereafter referred to as the "ARD").

¹⁸ Chapter 5 section 3.3.

¹⁹ Ibid, 4.1.2.

implementation of the ARD.²⁰ However, the implementation of the ARD in the UK forced a shift in the common law position in which employment contracts followed the standard contractual rules. By requiring the transfer of employment contracts, traditional rules of contract were subverted.²¹ Thus, it is no surprise that its implementation in the UK was met with considerable resistance that continues to be felt today.

- 1.1.5 The operation of the ARD in insolvency has caused significant controversy, both on a European level and within the UK.²² While the amended Directive contained an exception for those procedures instituted with a view to the liquidation of a company, corporate rescue procedures remain outside of this exception.²³ France has not opted to take on the insolvency exception and its emphasis on social protection is reflected in this choice.²⁴ While the exception was implemented in the UK, the wording of most corporate rescue procedures leaves them outside its remit. This is because, as a general rule, no rescue procedure will be engaged with a view to the liquidation of the company, as this is fundamentally contrary to the aims of rescue.²⁵ While there is some alleviation for rescue procedures in terms of the ease of changing contractual terms and conditions, the possibility of making dismissals by reason of redundancy (i.e. for an economic, technical or organisational reason), and the availability of the National Insurance Fund to cover certain liabilities that do not transfer with employment contracts,²⁶ the costs of employee transfers have continued to cause controversy.²⁷

1.2 Introduction to Conflict and Resolution

- 1.2.1 The following Chapter will examine the path dependent relationships of social policy and corporate rescue that this treatise has explored thus far, with a focus on the differences between developments in the UK and France over time. This historical analysis will reveal the conflict between employment protection and corporate rescue, which will be analysed in detail in view of practitioner and academic commentary.

²⁰ Ibid, 7.1.

²¹ Ibid, 8.1.2.

²² Ibid, 5 and 9.2.

²³ Ibid, 5.5 and 9.6.

²⁴ Ibid, 7.2.1.

²⁵ Ibid, 9.6.1.

²⁶ Ibid, 9.6.2 and 9.6.3.

²⁷ Ibid, 9.6.4.

Surveys conducted among current practitioners will add an updated and practical element to the historic analysis and will also help to identify how this conflict may be balanced in the law. Reform of the ARD will be recommended to achieve the balance sought in the form of an amendment to the current wording of the insolvency exception. Such reform should effectively account for the importance of the rescue culture that has become an integral policy position within the EU today, a focus that was not present during the last iteration of the ARD.

1.2.2 The comparison of the UK and France has illuminated a particularly interesting characteristic of their individual historical development. The governmental system of the UK has generally developed on a steady process of incremental adjustment, while France has tended toward sudden and catastrophic change.²⁸ For example, although the English Civil War was a time of particular turmoil, it resulted in measured changes that were a logical result of the historical paths leading to that point in time. While similar could be said of the period leading up to the French Revolution, the results of the Revolution were explosive changes that would be followed by additional catastrophic changes over the century up to the First World War,²⁹ illustrating a kind of “punctuated equilibria” of legal development.³⁰ This form of legal development is reminiscent of long periods of the French status quo, punctuated by the many episodes of explosive revolution, similar in biology to periods of rapid adaptation in which changes occur only in fits and starts.³¹

1.2.3 The path dependency identified in the previous Chapters demonstrates how history influences the process of legal change, showing that the events of an earlier point in time affect the outcomes of a sequence of events occurring at a later point in time.³² The legal possibilities for today and for the future are determined by the evolutionary changes of the past, whether slow and steady or explosive and revolutionary. The effects of these changes in the UK and France have had a significant impact on how social policies,

²⁸ Chapter 1 section 2.5.4.

²⁹ Hereafter referred to as “WWI”.

³⁰ See C Darwin, *On the Origin of Species* (first published 1859, OUP 2008).

³¹ Chapter 1 section 2.5.5.

³² WH Sewell, “Three Temporalities: Toward an Eventful Sociology” in WH Sewell, *Logics of Historicity: Social Theory and Social Transformation* (UCP 2005).

labour regulation, views of debt, commercial development, and insolvency laws have progressed.

2 **Parallel Path Dependent Developments: Summary and Analysis**

2.1 Comparative Historical Analysis of Path Dependent Development

2.1.1 An analysis of how the historical context of the social and commercial developments of the UK and France has influenced approaches to corporate rescue and employment protection calls for a legal history methodology crossed with comparative law. This method reveals not only the systemic differences that have led to different approaches to the law, but also the factors that have contributed to those differences. Conversely, by using a comparative method in the service of legal history, assumptions depending solely upon the history of a single place can be avoided by examining them in the context of another jurisdiction during the same historical period. Because legal rules acquire their structure over time, comparative law needs a foundation in history in order to reveal the true context of legal development, while legal history is clarified by comparing laws of a certain time and place to other jurisdictions, thereby making it possible to identify which rules of a particular historical era were characteristic of it.³³

2.1.2 The methodological approach of the following analysis is therefore based on the concept of path dependence as a sub-category of legal history and comparative law. Path dependence suggests that established traditional legal approaches to resolving legal problems will determine how new situations are dealt with in the present and in the future.³⁴ Decisions made by legislators or judges are shaped in specific and systemic ways by the historical paths influencing them.³⁵ Thus, legal developments can be explained by reference not only to the specific characteristics of the legal system, but also by superimposing the social and economic pressures operating on the law from the outside, as well as the established, perhaps culturally motivated, ways of dealing with

³³ J Gordley, "Comparative Law and Legal History" in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006).

³⁴ J Bell, "Path Dependence and Legal Development" (2012) 87 *Tul L Rev* 787, 787-788.

³⁵ OA Hathaway, "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System" (2000) 86 *Iowa L Rev* 601.

legal issues within the system. While economic and social conditions may be similar in different countries, the differences in the paths on which legal systems have journeyed are not. An understanding of extra-legal factors connected to a country's history assists in explaining why they do not approach similar, but new problems in the same way.³⁶ As such, an examination of the elements of law that have combined to form the current regimes of employment protection and corporate rescue in the UK and France are fundamentally dependent upon the historical paths of politics, corporate law, social protection law, and the influence of the EU.

2.2 The Evolution of the State and Legal Systems of Governance

2.2.1 The first major divergence impacting the historical development of the French and English states in terms of their approaches to social and commercial matters was the feudal system during the Middle Ages. The systems were differently constituted both in duration as well as structure. France's feudalism was constructed as a multi-layered hierarchy of duties, resulting in a decentralised power centre. This differed significantly from the feudalism in England, wherein every vassal, regardless of his position in the power hierarchy, was required not only to swear allegiance to his direct lord, but also to the sovereign.³⁷

2.2.2 The structure of English feudalism led to the most unified institutional system in Western Europe. It also faded away with greater ease due to the retention by the English people of their culture and customs and the adaptation of the institutions introduced by Norman rule to English norms. The strictures of the system were never fully entrenched in the English state,³⁸ while in France it remained so. Feudalism inhibited progress as there was no motivation for French serfs to innovate due to the inability to advance within the strict class structure.³⁹ The persistence of French feudalism can be tied directly to the development of *ancien régime* privilege, the tumult of the French Revolution, and the relative lag with which France adopted industrialisation.

³⁶ Bell, n34, 787-788.

³⁷ See Chapter 2 Section 2.2.

³⁸ *Ibid.*, 2.2.3 and 2.2.4.

³⁹ *Ibid.*, 2.2.2.

- 2.2.3 The reign of Henry VIII had a significant impact on the evolution of the English State. Albeit often from a self-interested perspective, he created a precedent for using the law to support an argument, due to the influence that concepts of humanism had on his thinking and philosophy, an early recognition of the importance of the rule of law. He also continued the tradition of his ancestor, Henry II, by pushing back against the primacy of Papal authority over state sovereignty. Henry VIII and the Tudor rulers that followed him changed the social, political, economic and religious aspects of the country, while France retained its Catholic and absolutist orthodoxy, a characteristic that would also serve to inhibit the reception of industrialism.⁴⁰
- 2.2.4 As the English eschewed papal supremacy, France embraced what it viewed as universal values and applied state power to enforce them. While England looked forward, though often out of a self-interested desire to become a powerhouse of Europe, France looked into the past with a desire to recapture the glory of advanced classical societies, which was an influence on the Enlightenment ideals, originating in France.⁴¹ In addition, the Protestant Reformation had an enormous impact on the English legal system as regulation replaced ecclesiastical control.
- 2.2.5 The late seventeenth century in England was a turning point of the English state structure as the English Civil War changed the power balance of English government. Constitutional concessions subjected the monarchy to parliamentary sovereignty. An early form of the constitutional monarchy and parliamentary sovereignty that is still in existence today was created and time has seen a steady reduction of any monarchical powers. The eighteenth and nineteenth centuries were periods of British expansion in the world as it embarked on colonial pursuits, industrialised on a massive scale, and encapsulated the high point of modernity.⁴²
- 2.2.6 The French state followed over a century later, inspired in part by the revolutionary concepts introduced by the Glorious Revolution in Britain, though through a fundamentally different process resulting in a different form of constitutional

⁴⁰ Ibid, 2.4.

⁴¹ Ibid, 2.5.

⁴² Ibid, 2.6.

government. The French Revolution set the tone for the nineteenth century throughout Europe. The conflict resulted in fundamental change in French politics, economics, social policy and culture and would influence the approach to French legal thought. It resulted in the separation of government into three distinct institutions, implementing the “checks and balances” of power recommended by Montesquieu.⁴³ France recreated itself, but it would do this on multiple occasions during the Long Nineteenth Century. The belief in popular sovereignty, democracy, and the importance of protecting human dignity influences socio-political ideals today. However, changing the French psyche took longer than the rhetoric indicates.⁴⁴ While France struggled to find itself, Britain was taking over the world, both physically and economically.

2.2.7 While the French republican system and British unitary democracy within a constitutional monarchy are not so very different functionally, the means it took to arrive at these systems varied drastically. The events that led to the modern states in both jurisdictions have affected approaches to legal regulation and the aims thereof. The socially democratic leanings of France influence the interventionist methods of legal regulation while the more liberal democratic style of the United Kingdom tends to avoid intervention in the market if possible.

2.2.8 The legal systems of England and France also differ on a fundamental level. While the French legal system was originally based on the *droit écrit*, influenced by Roman law, and later reconstructed in the Napoleonic Code, the English system has been firmly entrenched within the developing common law system. This was influenced to some extent by the Medieval Germanic legal tradition owing to the numerous invasions and migrations, while France benefitted from Roman presence for a much longer period of time.⁴⁵ In addition, predominance of the Catholic Church had a more lasting influence in France, attributing to the development of human rights, which became a constitutional matter in France,⁴⁶ something that has yet to occur in the UK.

⁴³ Ibid, 2.5.

⁴⁴ Ibid, 2.8.

⁴⁵ Ibid, 2.8.7 and 2.9.

⁴⁶ Ibid, 2.8.8.

2.2.9 The lack of a written constitution and incorporated human rights have resulted in a flexible legal system that is capable of adapting with relative ease to changes in the needs of society. The codification of law, constitutionality of human dignity, and fundamental rights in the French system have led to a more rigid system of regulation with a fundamental guiding principle of protecting the individual from injustice. Codified law tends to be more difficult to amend as it is precise and rigid, while the common law system is generally more flexible, relying on less precise legislation. Further, the judicial interpretation available under common law tends to create a more malleable legal system

2.3 Social Policy and Labour Regulation

2.3.1 The roots of modern social policy and labour regulation lie in the process of industrialisation.⁴⁷ Both jurisdictions underwent industrialisation within different frameworks due to their historical process of development. In England, hourly-paid wage workers derived from the day-labouring classes that were forced off their common lands following the dissolution of the monasteries and Acts of Enclosure formed the basis of the British proletariat.⁴⁸ The UK benefitted from a more mobile labouring class, while French serfdom continued beyond the time when the UK was industrialised and did not stabilise in any significant way until the century of revolution during the Long Nineteenth Century finally settled.

2.3.2 While enclosure in England created a disenfranchised proletariat that became the working classes, the peasantry in France enjoyed a reversal of fortune as wealthy landholders were deprived of their landholdings, which were distributed among the liberated serfs during the French Revolution. While this allowed more for movement between classes, and motivation to improve production methods, the goal of profit was rarely a driving factor by itself. Rather, the aims of profit were often to attain enough to engage in a life of leisure and security for family and future generations, rather than becoming part of a commercial class. As such, even though the French Revolution

⁴⁷ Chapter 3 section 1.2.6.

⁴⁸ *Ibid*, 4.3.

provided an opportunity to completely break the class system, the French generally retained the ambition for achieving an aristocratic-like status.⁴⁹

2.3.3 Thus industrialisation occurred within different contexts due to the differently composed proletariat, the different aims of production, whether agricultural or industrial, and essentially conservative French ideals as opposed to generally progressive English, at least in terms of risk-taking and innovation. The UK developed industry quickly and with little resistance, while France took a more measured approach, protecting its traditional industries and modes of production.⁵⁰ The UK essentially swept away the old and replaced it with mechanisation and mass production.⁵¹ The French government continuously intervened in the economy to protect its interests,⁵² while the UK embraced the free market. The free hand that the UK gave to economic growth, commercialism, and industry allowed the UK to become the economic superpower of the eighteenth century.⁵³ Though France also grew and developed its industry, its risk-averse nature, backward looking ambition, and protectionist stance made it difficult to compete with the British commercial machine.⁵⁴

2.3.4 While social policy legislation began upon a similar premise in both the UK and France with the protection of children and women,⁵⁵ it soon diverged, due to different economic and social perspectives. Because the UK system was based on the freedom of contract, employers and employees were left to bargain freely, despite the inherent imbalance in that relationship.⁵⁶ France recognised that the natural subordination of the worker needed to be mitigated by state intervention to preserve worker dignity and rights. As such, limits were imposed on employers in order to protect employees, lifting them from commodity to human being. Labour regulation in France has a market-correcting role as it introduces balance into the employment relationship.⁵⁷ While the UK now also has legislation that protects workers in a similar fashion, its natural impulse was not to

⁴⁹ Ibid, 5.3.

⁵⁰ Ibid, 5.1.1.

⁵¹ Ibid, 1.2.2.

⁵² Ibid, 1.2.3.

⁵³ Ibid, 4.2.

⁵⁴ Ibid, 5.

⁵⁵ Ibid, 9.1 and 10.1.

⁵⁶ Ibid, 7.1.

⁵⁷ Ibid, 7.2.

intervene in the labour market, rather allowing individuals to create their own rights and benefits through collective bargaining.⁵⁸

2.3.5 The UK embraced a *laissez-faire* attitude toward workers' rights, relying on collectivism, once legalised, to achieve rights and benefits from their employers.⁵⁹ During the nineteenth century, France recognised that collective bargaining would not be enough to achieve what it viewed was owed to French workers. Concepts of equality, fraternity and human dignity came to characterise the provisions of the French *Code du Travail*.⁶⁰ These concepts were borne directly out of the French Revolution and have no parallel development in UK history. As such, the UK would lag behind France and the rest of Continental Europe in developing a cohesive social policy aimed at protecting workers until it joined the EC.

2.3.6 Broadly speaking, the French legal system embraces an individualistic ideology, placing importance on individual freedom, liberty, and dignity over the collective. Thus labour regulation is present to ensure that these rights are protected.⁶¹ While such protections exist in the UK as well, frequently due to the implementation of EU directives, it is still more corporatist than individual in its nature. France had summarily rejected corporatist ideals, beginning with the Revolution of 1789 and continuing until WWI. The UK, however, while never engaging in corporatism to the extent that the fascist states did during WWII, retained a corporatist element that influenced how its labour market was regulated, with negative rights, such as the right not to be prosecuted for conspiracy in instances of strike action,⁶² while France favours positive rights.⁶³ It is in the individualism of France versus the liberal yet corporatist characteristics of UK society where the aims of labour regulation are fundamentally different.

2.3.7 France also has developed a structure of works councils that must be consulted on matters of import to employees.⁶⁴ The UK has never evolved an obligatory system of

⁵⁸ Ibid, 8.1.

⁵⁹ Ibid, 8.2.

⁶⁰ Ibid, 7.2.3.

⁶¹ Ibid, 10.1.4.

⁶² Ibid, 8.2.

⁶³ Ibid, 8.3.

⁶⁴ Ibid, 11.3.2.

consultation. Rather, such obligations have arisen only due to the UK implementation of EU law such as the Collective Redundancies Directive and the Acquired Rights Directive.⁶⁵ Such directives were often influenced by French social policy, as, generally, such provisions had already existed in France prior to their introduction into EU law.⁶⁶ As such, France has had a significant influence on the evolution of EU social policy and thus its impact on the UK. Implementation in the UK is challenging due to its fundamental differences from the rest of Continental Europe, as well as its common law system, which does not always transpose EU law in a way that is easily interpreted.⁶⁷

2.4 Views of Debt, Commercialism, and Insolvency

2.4.1 English and French views on debt have helped to form their individual approaches to the corporate form and, subsequent to that, the aims of insolvency law. Prohibitions on usury in both jurisdictions initially slowed the progress of investment in business enterprises, which required funding, and therefore borrowing. Because interest was prohibited, there was little incentive to lend, making large scale business enterprises difficult to establish.⁶⁸ The Protestant Reformation helped to break down the barriers to loaning with interest, but, because France retained its Catholic conservative character, debt retained the sinful aspect that had faded from the English system at a much earlier stage. While the French financial system eventually grew to accept the need for loans and interest in order to promote commerce, it continues to limit interest rates on individual and commercial loans, though the latter does benefit from some flexibility.⁶⁹ It could be argued that the limitation of avarice is not a bad thing, however the greater flexibility in the British financial system today continues to allow it to outpace the French.

2.4.2 The English financial system was revolutionised well in advance of the French due to the political changes away from absolutism, as well as a less restrictive view of debt and a nature that was not so averse to taking business risks. In addition, the first investment bubbles had varying impacts on the UK and France, with the French economy being

⁶⁵ Chapter 5 section 3.3.

⁶⁶ *Ibid.*, 6.1.1.

⁶⁷ *Ibid.*, 8.2.3.

⁶⁸ Chapter 4 section 2.5.1.

⁶⁹ *Ibid.*, 2.5.2.

destroyed by the monopolistic nature of the business structure of the Mississippi Company.⁷⁰ As the French floundered in debt and unrest, the institutional changes in England toward a constitutional monarchy with the highest respect for parliamentary sovereignty permitted the drive toward British dominance in the world. The fact that the English could raise funds through debt also gave them the funds needed to succeed against France in war, further contributing to French sovereign debt and the concomitant increased taxation against the already bereft populace, a contributing factor of the French Revolution.⁷¹ France's financial mishaps contributed to their suspicion of investment risk, debt, paper money and other attributes of a modern economy. French culture was also not favourable of business as an occupation, preferring to make money only in order to gain security and legacy such that future generations could enjoy the spoils of the upper classes.⁷² Thus France continued to lag behind England in financial and commercial progress as it refused to use the tools necessary to compete.

- 2.4.3 The aims of corporate rescue and insolvency are heavily influenced by the views on the role of government and the position that social protection should occupy. Since the 1980s, France has specified that one of the primary aims of corporate rescue procedures is the protection of employment.⁷³ This emphasis can be traced back to ideals of human dignity and fundamental human rights derived from the French Revolution.⁷⁴ Personal dignity and freedom are fundamental concepts of which all French law must account. It is not uncommon for social objectives to take precedence over financial objectives in the cases of business sales as well, at times to the detriment of an overall corporate rescue procedure.⁷⁵ The UK has never placed employees at the centre of their corporate rescue regime, although the protection of employment is often a result of a rescue procedure. The rescue culture evolved in both jurisdictions contemporaneously, though the UK has continued to take a far more economically liberal view of the process, in line with the way in which it has evolved over the centuries as a liberal economy. The influence of Europe added another layer of regulation that has both complicated the analysis and

⁷⁰ Ibid, 3.2.2.

⁷¹ Ibid, 3.1.4.

⁷² Ibid, 3.3.

⁷³ Ibid, 6.2.2.

⁷⁴ Ibid, 2.8.9.

⁷⁵ Ibid, 8.2.2

brought into sharp relief how the differences in historical paths have influenced that relationship.

2.5 The European Relation

2.5.1 France has been involved in the creation of a European community since the first days of the ECSC, at which time the UK typically chose to stand on the fringes, offering advice and encouragement while holding onto its Commonwealth Empire to secure its trade supremacy.⁷⁶ However, as Commonwealth countries gained independence, the benefit of a European Common Market became more attractive. As the EU grew into an ever closer economic and social union in the 1970s, the UK joined with a fundamentally economic reason.⁷⁷ This resulted in conflict due to the UK's economically liberal stance, in opposition to the growing social policy of the EC.⁷⁸

2.5.2 France often tried to influence EU social policy with a view to raising standards of other Member States to meet its own, thereby levelling competitiveness that would otherwise be lessened by France's higher social costs.⁷⁹ One example of this influence is the introduction of the ARD, a legal regime that France adopted in 1928.⁸⁰ The UK implementation was apathetic and led to problems in application and interpretation. While reforms in the EU and in the UK TUPE Regulations have cleared up some of the murkiness of the legislation, its drafting continues to cause problems. This is partly attributable to the fact that the UK labour system is structured differently to every other labour system in Continental Europe: there are no statutory collective groups. In addition, most EU law is based on a foundation of civil law, thus it is often drafted in a way that is unfamiliar to the UK's common law system.⁸¹

2.5.3 The fact that the UK is a common law system in the civil law orientated EU, has a differently composed labour system, and has the most liberal economy are some of the fundamental differences that have caused difficulties for UK implementation of EU social policy legislation. The UK has struggled continuously with the implementation of

⁷⁶ Chapter 5 section 2.4.

⁷⁷ *Ibid*, 2.4.7.

⁷⁸ *Ibid*, 3.4.

⁷⁹ *Ibid*, 3.3.2

⁸⁰ *Ibid*, 7.1.

⁸¹ *Ibid*, 8.2.2

social policy directives, resulting in many tribunal cases, references to the CJEU, practitioner and academic commentary, not to mention complaints by entrepreneurs and business owners. France has generally benefitted from such legislation as it has often been an innovator in the area of social policy. The creation of employment rights and benefits at EU level has helped to elevate the social policy of many other EU jurisdictions to what was often already present in France. The introduction of the EU into the equation has brought the UK and France closer together in what their legal systems offer, but fundamental differences attributable to their variable evolution can explain the different ways in which the conflict between employment protection and corporate rescue have been perceived and handled.

3 **The Conflict between Corporate Rescue and Employment Protection**

3.1 An Inherent Struggle

3.1.1 There is an inherent struggle between the aims of employment protection and the rescue culture. Jurisprudence to date has weakened the ability of insolvency practitioners to negotiate freely with purchasers of going concerns.⁸² Collins posited in the early days of acquired rights jurisprudence that, although in *Litster*⁸³ the House of Lords was anxious to ensure that employees were protected even in insolvency, such a policy was bound to subvert the rescue culture. Potential purchasers might be deterred from buying going concerns out of insolvency where acquired rights restrictions applied, due to the potential cost of compensation for infringing them. Fewer businesses were likely to be saved, resulting in an adverse impact on job security and on the economy. Prices paid for businesses would be lower to the detriment of all creditors, while employees would transfer with all of their contractual rights, giving them a super priority over all other creditors. Collins viewed this as tipping the balance toward employee protection and away from rescue, usurping the interests of normal creditors, and placing the welfare of the economy as a whole at risk.⁸⁴ The suggestion that the rescue culture is hindered by the operation of TUPE 2006 has continued to resonate with both practitioners and

⁸² See Chapter 5 sections 5 and 9.2.

⁸³ *Litster v Forth Dry Dock and Engineering Co Ltd* [1988] UKHL 10.

⁸⁴ H Collins, "Transfer of Undertakings and Insolvency" (1989) 18 ILJ 144, 158.

academics, particularly in view of the most recent case law making it impossible for administrators to escape its operation.⁸⁵

3.2 The Acquired Rights Conflict

3.2.1 Shortly after the ARD was introduced, it was met with arguments that it distorted competitive forces in the Common Market. Successive British Conservative governments argued that the ARD would serve to restrict entrepreneurial freedom by championing employee rights, restricting the potential benefits from increased competition in the Common Market due to the progress of integration. The UK felt that this approach to the problem of employee rights in business transfers would result in the preservation of pockets of inefficiency, while inducing creative compliance behaviour that would produce further distortions elsewhere in the economy. This argument is not surprising, considering the position of the UK as a largely liberal economic state. However, the rest of the EU had effectively rejected the UK's *laissez-faire* attitude for the conservative-corporatist model prior even to the creation of the EU, though this direction was based on political and social grounds, rather than the economic ones upon which the UK based most of their arguments.⁸⁶ Thus, from the very beginning, the UK and the Continent were arguing on completely different premises, making any true compromise unlikely, if not impossible.

3.2.2 The European social model has since been justified on an economic basis, though this argument is not without its critics. Employee rights are said to assist in creating high average tenure in the labour market, which encourages socially beneficial investment in human capital.⁸⁷ This social model now provides regulations and institutions encouraging lasting relationships of trust. In order to develop these perceived economically efficient social relationships, employees had to be encouraged by the provision of some kind of security, such as the continuity of employment guaranteed by the transfer of employment contracts pursuant to the provisions of the ARD.⁸⁸ It was this

⁸⁵ M Sargeant, "More Flexibility for Insolvent Transfers- the Amended Acquired Rights Directive" (1999) 15(1) Int'l Lab Rev 6; D Pollard, "TUPE and Insolvency Part 2" (2006) 19(2) Insolvency Intelligence 102, 104.

⁸⁶ N Adnett and S Hardy, "Entrepreneurial Freedom versus Employee Rights: the Acquired Rights Directive and EU Social Policy Post-Amsterdam" (1999) 9 J Eur Soc Pol 127, 129.

⁸⁷ This premise was adopted in the EU Commission White Paper on "Growth, Competitiveness, and Employment" (1993).

⁸⁸ Adnett and Hardy, n86, 130.

cooperative aspect of the EU social policy model, and the hope of a more collectively collaborative future of labour relations, that led it to provide the protections that are now under analysis. However, given the foregoing Chapters and the extremely different contexts from which the aims of regulation derive in the UK and France, and indeed perhaps the rest of the EU, the same arguments for the social policy model in the EU do not necessarily translate.

3.3 Criticisms of the Implementation of the ARD

3.3.1 The Association of Business Recovery Professionals⁸⁹ was quite vocal about the implementation of the ARD in the TUPE Regulations. While the government asserted that the adoption of the generic wording of the ARD was necessary to avoid legal challenges to the implementation of the ARD, R3 disagreed, arguing that the wording of the ARD was implemented inaccurately and that rote adoption of the wording was unnecessary and misconceived. Further, the ARD gave Member States discretion to adapt the spirit of the Directive⁹⁰ to their particular insolvency procedures. The UK failed to make this determination by replicating the phraseology of the insolvency exception exactly, leaving it open to extensive and costly litigation. This has been particularly problematic for corporate rescue procedures,⁹¹ in particular administration as this procedure could often benefit from the insolvency exception. However, Parliament chose to distinguish administration from liquidation proceedings, the latter being termed specifically as a collective procedure undertaken for the benefit of all creditors, implying that the purpose of administration is not to achieve the same thing.⁹²

3.3.2 The judiciary has now determined that the main purpose of administration is not with a view to the liquidation of the assets, as the hierarchy of objectives places rescuing the company as a going concern as a priority. This is despite the fact that rescue would often not be a practical result. R3 argued that, while rescue is the first objective of administration, it is not necessarily the sole purpose, as rescue is not always feasible. The purpose of administration is frequently achieved through the second objective: to

⁸⁹ Hereafter referred to as “R3”.

⁹⁰ Art 5.

⁹¹ S Hubert, “R3 Response to Government about TUPE” (2006) 22 IL&P 190.

⁹² *Ibid.*

achieve a better result for the creditors than if the company were wound up.⁹³ The second objective is often achieved by the exercise of the third objective: the realisation of property. The property realised could be a particular business entity of the insolvent company.⁹⁴

3.3.3 R3 argued that it was difficult to see how the realisation of assets, in this case a specific identified business of the company, can be viewed as anything but a liquidation of assets, as a separate business can also be an asset of a company. Thus, according to R3's explanation, the government incorrectly interpreted the insolvency processes in question, the result being a situation that makes the achievement of business rescue more difficult.⁹⁵ While these arguments are meritorious, the jurisprudence is now certain: the insolvency exception cannot apply in corporate rescue situations where the business continues to trade at all.⁹⁶

3.4 Rover: A Concrete Example

3.4.1 The sale of the Rover Group by BMW in May 2000 is an example of the potential effect of acquired rights on corporate rescue. Rover was set to be liquidated in the event that a buyer of the unsustainable business could not be found which would result in full payment to the creditors, but with thousands of job losses. Alchemy, a venture capital fund with a reputation of saving companies in financial distress,⁹⁷ began to negotiate for the sale of Rover in secret in 1999.⁹⁸ Alchemy planned to rebrand the company, which would involve significant job losses.⁹⁹ As such, its bid was opposed by the trade unions as well as by the local authorities who, in addition to opposing the job losses, did not approve of the rebranding exercise that would result in losing the affiliation of the Rover name with West Midlands industry.¹⁰⁰

⁹³ Insolvency Act 1986 Schedule B1.

⁹⁴ Hubert, n91.

⁹⁵ Ibid.

⁹⁶ See *Key2Law (Surrey) LLP vs Gaynor De'Antiquis and Secretary of State for Business Innovation and Skills* [2011] EWCA Civ 1567.

⁹⁷ "Alchemy shies away from Rover risk" BBC News (2000) <<http://news.bbc.co.uk/1/hi/business/679554.stm>>.

⁹⁸ J Armour and S Deakin, "Commentary – The Rover Case (2) – Bargaining in the Shadow of TUPE" (2000) 29(4) ILJ 395.

⁹⁹ "Row over Rover bid" BBC News (2000) <<http://news.bbc.co.uk/1/hi/business/709123.stm>> accessed January 2016.

¹⁰⁰ J Armour and S Deakin, "Insolvency, Employment Protection and Corporate Restructuring: The Effects of TUPE" (2001) ESRC Centre for Business Research - Working Paper No 204, 35-36.

- 3.4.2 Despite a complex, multi-layered sale process involving a number of subsidiaries, share sales, and clever contractual ploys to ensure that the employees would not transfer with the subsidiaries to which they were actually associated,¹⁰¹ it was determined that it would count as a single transaction for the purpose of TUPE.¹⁰² Ownership of Rover and the associated employment contracts were imputed to the UK holding company. Upon the transfer of Rover to Alchemy, though on the face of it a share transfer, only part of the business would be sold and would take effect as an asset sale and include all associated employment contracts.¹⁰³
- 3.4.3 Due to the company's plan to avoid the application of TUPE, no information or consultation was undertaken with the employees of Rover either in respect of the transfer or for the post transfer redundancies threatened by Alchemy. Failure to inform and consult could have amounted to substantial protective awards that would also be transmitted to the buyer of the business.¹⁰⁴ Unions lodged applications for protective awards covering thousands of employees. Numerous applications for unfair dismissal were also made. The potential value of the claims exceeded £300 million.¹⁰⁵
- 3.4.4 It was against the background of the considerable potential liability that Alchemy withdrew from the negotiations a day before the deadline for finalising the deal. BMW was insisting on an indemnity from Alchemy requiring that it assumed liability for any compensation claims arising as a result of the Rover purchase, for which both parties would otherwise remain jointly and severally liable following the transfer.¹⁰⁶ Alchemy was only going to pay £50 million for the company, making the acceptance of such huge liability commercially ridiculous.¹⁰⁷ As a result of the operation of TUPE in this case, the sale of the business to Alchemy failed.¹⁰⁸

¹⁰¹ *Ibid*, 35-36.

¹⁰² TUPE 2006 reg 3(6).

¹⁰³ *Armour and Deakin*, n100, 35-36.

¹⁰⁴ *Kerry Foods Ltd v Kreber* [2000] IRLR 10.

¹⁰⁵ *Armour and Deakin*, n100, 35-36.

¹⁰⁶ TUPE 2006 Regulation 15(9).

¹⁰⁷ *Armour and Deakin*, n100, 35-36.

¹⁰⁸ A Kastrinou, N Shah and O Gough, "Corporate Rescue in the UK and the Effect of the TUPE" (2011) 32(5) *Co Law* 131, 133.

3.4.5 Rover was eventually sold to the Phoenix Consortium for a nominal £10.¹⁰⁹ Unfortunately, the losses incurred during the four years following the sale resulted in Rover being placed in administration with a loss of 6,000 jobs.¹¹⁰ Thus, due to the operation of TUPE, in addition to rather unscrupulous actions by the company directors in relation to the structure of the sale attempting to avoid TUPE entirely, neither the rescue culture nor the preservation of employment were triumphant. The failure to complete the deal with Alchemy shows how significant the operation of TUPE liabilities could be on the sale of a business. This can only be compounded in the situation of insolvency as the failure to sell a business could result in the ultimate liquidation of the entire entity with considerable associated job losses.¹¹¹

3.5 *Crystal Palace FC Limited and Another v Kavanaugh and Others*¹¹²

3.5.1 UK case law has determined that TUPE will apply in circumstances of corporate rescue, regardless of its final result.¹¹³ However, there is also now some judicial acknowledgment for the onerous burden this can place on businesses in financial difficulties going through the process of rehabilitation. In *Crystal Palace*, a question arose in relation to the dismissal of staff prior to a transfer of the undertaking and whether those dismissals were automatically unfair due to being related to the transfer itself, or if they could be described as being dismissals made for an economic, technical or organisational reason entailing changes in the workforce.¹¹⁴ If the former, the transferee would inherit liabilities for any resulting claims. If the latter, any liabilities would be retained by the transferor.¹¹⁵ In the case of a purchase out of administration, the acquirer would need to be able to assess the extent to which it would inherit any liabilities as a result of dismissals made for a reason related to the transfer. Such liabilities could materially affect the price it then offers for the purchase of the business, which would then reduce the distributions that could be made to creditors on its sale.

¹⁰⁹ Armour and Deakin, n100, 35-36.

¹¹⁰ "Moving on after the death of MG Rover" AM Online (2011) <<http://www.am-online.com/news/2011/7/8/moving-on-after-the-death-of-mg-rover/29289/>>.

¹¹¹ Armour and Deakin, n100, 35-36, 45-46.

¹¹² [2014] IRLR 139, CA.

¹¹³ Eg Chapter 5 Section 9.2 – 9.5.

¹¹⁴ TUPE 2006 reg 7(1).

¹¹⁵ TUPE 2006 reg 7(2); The recent reforms to TUPE in the Collective Redundancies and Transfer of Undertakings (Amendment) Regulations 2014 have softened the approach to those dismissals that are merely related to the transfer, narrowing the scope of TUPE in those situations to dismissal made by reason only of the transfer. However, the findings in *Crystal Palace* remain important illustrations of the court's approach.

Such liabilities could also affect a purchaser's willingness to enter into a sale at all,¹¹⁶ so this element of TUPE obligations can be quite significant.

3.5.2 In the circumstances of *Crystal Palace*, the reason for dismissal was not straightforward. The claimant employees were dismissed by the administrator at a time when the possibility of a successful sale seemed remote and complicated, thus it seemed that liquidation was a distinct possibility. The employees argued that their dismissals were made in order to make the club more attractive to a prospective purchaser, a classic example of a reason related to the transfer. The administrator argued that the dismissals were made because the club could no longer afford to pay all the employees, thus a reduction in the workforce was necessary in order to "mothball" the club until such time that a purchaser might be found.¹¹⁷ While the administrator's reason has the hallmarks of an economic, technical or organisational reason, the intention still appears to be to sell the undertaking, even if at a later date.

3.5.3 Despite the *prima facie* reason for the dismissals, the ET determined that, while the dismissals were connected with a subsequent future transfer, there was also an economic, technical or organisational reason for those dismissals. A distinction was made between the administrator's reason for dismissing the employees as a need to reduce the wage bill in order to continue the business, and his ultimate procedural objective, to be able to sell the business in the future. Further, the employment tribunal found that the administrator's reasoning for dismissing the employees was not specifically in contemplation of the fact that it would facilitate the sale of the business, as, at the time of the dismissals, the Club was facing considerable obstacles to this goal.¹¹⁸

3.5.4 The EAT found the first instance decision to be untenable by reference to its own factual findings, following previous case law, given that on the facts the dismissals were for the purpose of selling the business, albeit in the contemplation of a future sale to an

¹¹⁶ C Wynne-Evans, "TUPE and Mothballs: Crystal Palace FC Limited and Another v Kavanaugh and Others" (2014) 43(2) ILJ 185, 186.

¹¹⁷ *Ibid.*, 187.

¹¹⁸ *Ibid.*, 187-188.

unknown purchaser.¹¹⁹ The Court of Appeal,¹²⁰ however, took issue with the blanket interpretation and application of the findings in *Spaceright*,¹²¹ upon which the EAT relied, which found that in order for an ETO reason for a dismissal to be available, there:-

“...must be an intention to change the work force and continue to conduct the business as distinct from the purpose of selling it. It is not available in the case of dismissing an employee to enable the administrators to make the business of the company a more attractive proposition to the prospective transferees of a going concern”¹²²

The CA determined that this was fact specific, and did not apply to the facts of *Crystal Palace*. The dismissals were found to be due solely to cash-constraints in an effort to avoid liquidation. The EAT had relied too heavily on the “mothballing” concept of the administrator, which it viewed as indicating that the dismissals were in any event made with a view to a sale.¹²³

3.5.5 The determination of the CA essentially permitted a fact-sensitive, interpretative approach to cases involving pre-transfer dismissals. This decision was particularly valuable as it presents a legitimate, nuanced distinction, acknowledging that, while the ultimate objective of an administrator may be the sale of a going concern, the reasoning behind dismissals may at the same time be merely a reduction in the workforce in order to enable a company to continue.¹²⁴ This decision had the capacity to give administrators the greater security that they could make dismissals for ETO reasons, despite their intention to sell the business, reducing the employee liability burden that would potentially affect the purchase price and concomitant distributions to creditors.

3.5.6 The approach of the CA also revealed an acknowledgement of the balance that must be struck between the employment protection policy of TUPE and the policy of administration to achieve better results for creditors than would have been achieved in

¹¹⁹ *Spaceright Europe Ltd v Baillavoine* [2013] IRLR 291 (EAT) para 31.

¹²⁰ Hereafter referred to as the “CA”.

¹²¹ *Spaceright Europe Ltd v Baillavoine and another* [2011] EWCA Civ 1565; [2012] IRLR 111 (CA).

¹²² *Spaceright*, para 47.

¹²³ Wynne-Evans, n116, 188-189.

¹²⁴ *Ibid*, 189.

liquidation.¹²⁵ Further, the viability of transferee liability for pre-transfer dismissals was questioned in relation to its impact on distributions in insolvency. The court expressed concern that the propensity for TUPE to result in recovery against transferees by those dismissed pre-transfer by administrators called for “an anxious consideration of the relationship between the two regimes of TUPE and insolvency.”¹²⁶ The position of the court in *Crystal Palace* is not surprising considering the reforms to TUPE that came later that year.

3.6 Collective Redundancies and Transfer of Undertakings (Amendment) Regulations 2014¹²⁷

3.6.1 While the findings of the CA in *Crystal Palace* appear to coincide with the recognition that TUPE can cause problems for the success of corporate rescue, it is constrained by the provisions of the ARD and its failure to take account of specific rescue procedures. Thus domestic reforms and judicial interpretation cannot dilute the safeguards provided for employees by the ARD.¹²⁸ National law must be applied and interpreted, as far as possible, in the light of the wording and the purpose of the Directive in order to achieve the intended result of the Directive.¹²⁹ As such, the only circumstances under which the provision of TUPE can be disapplied are set out pursuant to Article 5 of the ARD, which unequivocally states that proceedings benefitting from the exemption must have been instituted with a view to the liquidation of the assets of the transferor. As such, no revision made to the TUPE regulations while the current ARD is still in force will be able to truly alleviate the weight of TUPE on corporate rescue provisions, as the preceding discussion of case law in this area has illustrated.

3.6.2 The 2014 reforms have, however, instituted some relaxation in the TUPE regime in the area of corporate rescue. In particular, the 2014 TUPE Regulations have instituted a revision to Regulations 4 and 7 accounting for the concerns discussed by the Court of Appeal in *Crystal Palace*. These regulations have now been brought into line with the

¹²⁵ *Crystal Palace*, per Maurice Kay LJ para 11.

¹²⁶ *Crystal Palace*, per Briggs LJ para 23.

¹²⁷ SI2014 No 16.

¹²⁸ Wynne-Evans, n116, 191.

¹²⁹ As initially determined in Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891 para 26.

wording of the ARD and with ECJ case law,¹³⁰ providing that variations of contract and dismissals are only prohibited if the sole or principal reason for them is the transfer, as opposed to being a reason connected with the transfer.¹³¹ While this does not resolve the underlying issue of the impact of TUPE transfers of the success of corporate rescue, it does introduce legally certain security for insolvency practitioners to exercise more flexibility in relation to their treatment of employee contracts in the context of corporate rescue.

3.6.3 The court's approach and the recent reforms do, however, reflect a continuing concern as to whether the levels of employment protection contained in the ARD are still appropriate. Given the current focus of EU labour law on "flexicurity"¹³² following the financial crisis, and the fact that the ARD was borne out of the 1970s focus on the social face of the EU, it is questionable as to whether the strict approach to the transfer of acquired rights, particularly in insolvency situations, is still valid.¹³³ In order to introduce a more modern approach to the social protections provided by the ARD while safeguarding the purposes of the rescue culture itself, reforms to the ARD itself will be necessary, proposals for which will be discussed in detail below.

4 **French Criticism - *Chapitre IV: Transfert du Contrat de Travail***

4.1 The French Approach

4.1.1 The French approach to social protection is unique in the EU. While it is true that France is a liberal and democratic country, developing its labour regime with a significant role to freedom of association and encouraging social dialogue, it also manifests a widely held reserve against capitalism. French tradition favours intervention of the state in social issues, explaining the peculiar development and the importance of French labour law codification as well as the importance of maintaining the rights and benefits granted to individuals throughout the history of the labour law regime.¹³⁴ Thus,

¹³⁰ See Case 32/86 *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall* [1988] ECR 739, para 31.5.

¹³¹ J McMullen, "TUPE: Ringing the (Wrong) Changes. The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014" (2014) 43(2) ILJ 149, 155-156.

¹³² Refers to a policy combining labour market flexibility in a dynamic economy and security for employees.

¹³³ Wynne-Evans, n116, 193.

¹³⁴ M Despax, J Rojot and J-P Laborde, *Labour Law in France* (Kluwer 2011) 33-34.

while the conflict between the social and the commercial exists in principle, it does not cause the controversy that it has in the UK.

- 4.1.2 The foundation of the French labour code is based on the idea that the provision of social protection provides a balance to the natural subordinated position that employees must take in relation to their employer. One justification for a protective labour code is that it civilises social relations, replacing force and subjugation with rights, liberty, and equality. The natural position of subordination endured by an employee deprives him of liberty, placing him in an unequal position in relation to his employer who retains most of the power in the relationship.¹³⁵ The descriptors used are emotive, illustrating a moral view of the obligation for a civil society to provide an embankment for the loss of liberty and equality that would otherwise occur in a purely contractual employment relationship.
- 4.1.3 In the 1980s, France had similar discussions as the rest of the EC about the need to add flexibility to the labour market by deregulating it to some extent. Economically, diffusion of the sources of law from the state to enterprise level through collective bargaining would help enterprises to adapt more quickly to changes in technology and the modernisation of the institutions of business. Flexibility would also allow individuals to more easily diversify their ambitions, which corresponds with the disaffection with traditional institutional frameworks. Politically, flexibilisation of the labour market through deregulation correlated with a commonly held ideological preference for limited government, rather than remaining highly interventionist.¹³⁶
- 4.1.4 Despite these philosophical discussions, its system has retained an overall socially protective character relative to EU Member States.¹³⁷ This separation of ideology from reality seems to be characteristic of the French culture. The greatest philosophers of the Enlightenment were French, but were forced into exile due to state opposition to their ideas. In similar fashion, the philosophies of French bourgeois revolutionaries were diametrically opposed to what occurred during the *Terreur*, using territorial expansion to

¹³⁵ A Supiot, *Critique du Droit du Travail* (PUF 1994) 151-152.

¹³⁶ *Ibid*, 170-172.

¹³⁷ Despax, Rojot and Laborde, n134, 51.

spread *liberté, égalité et fraternité*. There appears to be a frequent disconnect between ideas and actions in French culture and politics, which may in part explain why change is often so difficult to effect.

4.2 French Employment Protection - Criticisms

4.2.1 Despite the comfort that the French socially protective system provides, it is not without its critics. Enterprises complain that the costs of dismissals and the complexity and uncertainty of the current system make it difficult for them to adjust to technological changes and the rapid changes in demand that characterise the modern economy. While making enterprises responsible for their decisions to dismiss employees seems logical, it may also reduce the amount of positions that can be created due to social costs associated with those already in existence. Further, this responsibility may also lead to enterprises making risk-averse decisions when employing people, resulting in discrimination against those candidates who may present a greater risk, such as older and younger candidates and those with less experience. In addition, requiring that enterprises pay the costs of dismissal during times of financial stress can render their situation even more precarious. Such costs may inhibit their ability to finance such investments that are necessary in order for them to survive, or even cause the insolvency of that enterprise.¹³⁸

4.2.2 While most employees will argue for keeping their protections in place, maintaining the same level of employment protection, this has an adverse effect on the reduction of unemployment. This position is supported by the opinions of economists and multilateral organisations, such as the OECD¹³⁹ and IMF¹⁴⁰, who believe that overly high levels of employment protection produces inefficient results and adversely impact the reduction of the level of unemployment. It is, however, difficult to change the position in France, due to the political power of unions and employees who wish to maintain the status quo. The governmental reaction has been to compromise on reform

¹³⁸ O Blanchard and J Tirole, « Protection d l'Emploi et Procédures de Licenciement » (2003) La Documentation Française, Report produced for the Conseil d'Analyse Economique 7-9.

¹³⁹ Organisation for Economic Co-operation and Development.

¹⁴⁰ The International Monetary Fund.

in order to avoid the high political costs associated with anything more drastic. Any reforms in this area tend to be limited and poorly defined in their objectives.¹⁴¹

4.2.3 Empirical evidence¹⁴² confirms that employment protection can have negative macroeconomic effects. A strong negative correlation is present between the level of employment protection and the flow between jobs and into and out of unemployment. The level of protection and the duration of unemployment also correlate; the duration of unemployment often being elevated in those jurisdictions that provide heightened employment protection. Essentially, high levels of employment protection reduce flexibility and the ability to reallocate employees in order to gain efficiency. In addition, it increases the duration of unemployment, is ineffective at reducing it, and renders it particularly difficult for those who are exposed to it.¹⁴³ Thus, the evidence suggests that France is in need of reform in the general area of employment protection. However, little has been done to achieve this end due to the political risks associated with such changes, though the recent *Loi Macron*¹⁴⁴ may see reforms occurring in this area in the near future.

4.3 French Acquired Rights – A Conflict (?)

4.3.1 Despite the manifestly more socially protective character of the French system, the transfer provisions in L. 1224-1 of the *Code du Travail* have not been without controversy, even prior to the introduction of the ARD in EU jurisprudence. The scope of the transfer provisions has been widened and narrowed a number of times. In the 1980s, it was narrowed, recognising that the economic consequences that could ensue with too broad an interpretation might be too heavy a burden on businesses, resulting potentially in failure and job losses. Despite the sound economic logic, the narrowing of employment protection in these circumstances caused consternation among trade unions and workers, as it was perceived as introducing instability into employment security during a period of restructuring.¹⁴⁵ However, subsequent EU jurisprudence allowed

¹⁴¹ O Blanchard and J Tirole, n138, 7-9.

¹⁴² Ibid.

¹⁴³ Ibid, 13-14.

¹⁴⁴ Loi no 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques (Loi Macron).

¹⁴⁵ Despax, Rojot and Laborde, n134, 175-177.

France to widen its application yet again.¹⁴⁶ In all cases, the French transfer provisions will apply in insolvency, though the administrator is permitted to modify terms and conditions in order to safeguard employment and to ensure the survival of the enterprise.¹⁴⁷

4.3.2 Some employers in France have found it difficult to harmonise benefits when transferring employees, though it is very difficult for purchasers to amend the conditions of the transferring employment contracts. While this limitation is alleviated in certain corporate rescue procedures,¹⁴⁸ it does not completely solve the difficulties for employers. In addition, because French social policy mandates that all employment contracts must transfer, valid dismissals connected with the transfer are severely limited and must be for a:

“non-personal reason stemming from the suppression or transformation of the employee’s position or from the substantial modification of the employee’s employment contract that are themselves induced by economic difficulties or technological mutations.”

This reason is fairly close in definition to the “economic, technical or organisational” reason provided for by UK law. Dismissals connected with the transfers are liable to a claim for reinstatement with the transferee or may obtain damages from the transferor.¹⁴⁹

4.3.3 The focus of corporate rescue and insolvency in France is also centred on employment protection. Research has revealed that French administrators actively work to facilitate the continuation of a business and to preserve employment rather than opting for liquidation. Continuing the business remains the easiest and most direct means to preserve employment in insolvency situations. While there have been arguments that this focus on rescue does not always lead to efficient results, it has also been determined that on average, reorganisation plans and sales do not generate a lower global recovery rate for creditors than do liquidations. However, the French judiciary also has the ability

¹⁴⁶ See Case 324/86, *Tellerup v Daddy’s Dance Hall* [1988] ECR 739.

¹⁴⁷ P Rodiere, *Traité de Droit Social de L’Union Européenne* (Librairie Générale de Droit 2008) 390-391.

¹⁴⁸ See *Code du Travail* art L1224-2, noting the “*Procédure de sauvegarde, de redressement ou de liquidation judiciaire*”.

¹⁴⁹ CA Scott, “Money Talks: The Influence of Economic Power on the Employment Laws and Policies in the United States and France” (2006) 7 *San Diego Intl L J* 341, 370-371.

to choose between rival purchasers, a choice that is often made on the basis of which social plan is most beneficial to the employees, although the courts do still consider the financial aspects. Higher bids will often be selected as they will lead to a better outcome for all stakeholders.¹⁵⁰

4.3.4 A recent decree of 28 October 2014 on the application of the *Loi sur l'Economie Sociale et Solidaire*¹⁵¹ requires additional consultation obligations. In the event that a sale is affected through the transfer of a business or through the transfer of shares or other securities granting access to the purchaser of the majority of the shareholding, such actions must be disclosed to employees. They must be given an opportunity, whether individually or collectively, to make an offer to purchase the business or the shares. These new rules may impact future transfers as, in the event that such information is not disclosed, an employee can apply to the court for an annulment of the transfer within two months of the publication of the notice or the date on which the employees have been informed. This obligation may cause delay in any transfer process due to the two-month grace period within which employees may apply for an annulment.¹⁵² Thus, the position of corporate rescue in France has been further complicated by adding another layer of consultation obligations due to employees in the event that an entrepreneur wishes to dispose of his business in some way.

5 Practical Approaches to the ARD

5.1 Introduction

5.1.1 A short online survey was undertaken to assess professional opinion with regard to the effects of the ARD in corporate rescue situations and query whether there are any practical methods of circumventing adverse effects. While the response was not statistically significant, the written responses offer interesting examples of real circumstances in which the application of acquired rights provisions have impacted the effectiveness of a corporate rescue procedure. In addition, the responses have offered

¹⁵⁰ R Blazy and others, "Employment Preservation vs Creditors' Repayment under Bankruptcy Law: The French Dilemma?" (2011) 31 Int'l Rev L&Econ 126, 128.

¹⁵¹ Loi n° 2014-856 du 31 juillet 2014 parue au JO n 176 du 1er août 2014.

¹⁵² A Sorensen, "France: Storms Gathering fort Restructuring Group Entities Underscore Need for Up-to-Date Advice" (2015) Electronic Newsletter of INSOL International.

interesting perspectives that might otherwise not have been available through a purely academic analysis.

5.1.2 Out of 86 survey requests sent to individual French insolvency practitioners among personal contacts and from the INSOL International practitioner directory, 6 responses were received from France. Out of the entire R3 constituency in the UK, 17 responses were received. The survey questions referred to the specific implementation of the ARD in each jurisdiction (TUPE and Article L.1224). The table below generalises the questions by referring only to [the ARD].

5.2 Table of Survey Responses

Questions	English Responses 17	French Responses 6
	YES	
1. Have you or your firm been involved in any business rescue procedures in which business transfer negotiations have been put at risk of failure due to the transfer of employment contracts occurring under [the ARD]?	82%	YES
	NO	100%
	18%	
	YES	
2. Have you or your firm been involved in any business rescue procedures in which business transfer negotiations have failed owing to the application of [the ARD]?	59%	YES
	NO	100%
	41%	
	YES	YES
3. In your experience generally, have TUPE transfers had an adverse impact on the rescue of businesses?	53%	50%
	NO	NO
	47%	50%

5.3 Examples of the Effects of TUPE on Rescue Outcomes

5.3.1 The English survey revealed a number of examples in which the application of TUPE had adverse effects on the outcome of corporate rescue procedures. A common theme running through these responses was the fact that TUPE liabilities will generally affect transfer negotiations by lowering the purchase price, with the associated effect of reducing the distributions available to creditors following the sale. This situation can lead to liquidation being preferred by creditors over administration due to the greater recoveries that creditors can make by making the workforce redundant. This preference can influence the decisions taken by practitioners in their approaches to solutions for insolvent companies.

5.3.2 There are also a number of examples showing that TUPE has been the central cause of the failure of transfer negotiations taking place in both administration and pre-pack procedures, leading to large scale redundancies. It has also had a negative impact on the interest of foreign investors in acquiring businesses out of insolvency. Retail businesses are a particularly vivid example as purchasers will not generally wish to inherit the entirety of a business operating from a number of retail locations, preferring only to continue to trade out of the more profitable branches. The risk of TUPE transfers from all locations has led to significantly detrimental impacts on the purchase price, lowering creditor returns, including the sums owed to employees who were made redundant. While businesses may have been successfully transferred, jobs were lost and creditor returns reduced as a result of TUPE liabilities, which have led to a result contrary to the aims of the ARD legislation with a negative impact on all stakeholders involved. The negative impact on employment also impacts public finances due to the reliance of employees on the National Insurance Fund to pay their redundancy entitlements.

5.4 Strategies for Reducing the Impact of TUPE

5.4.1 Most practitioners responded with suggestions that correlate to ensuring that the TUPE consultation and information requirements are satisfied as far as it is reasonably practicable within the time and resources available to the client company. They also suggest advising clients to that effect in order to avoid the risk of protective awards.

However, there is a conflict between the required consultation period and what is indeed possible. Notice periods may challenge the ability for a company to continue paying employees for the duration of the period. The requirements for pre-packs can also conflict with the required consultation periods, creating complexities that are a distraction during insolvency planning.

5.4.2 Some have also recommended potential solutions such as resolving the situation through a pre-pack liquidation, though, if the end goal is to create a new business free of the liabilities of TUPE, this may be counter-productive, due to the need to sustain a non-trading period that may result in a loss of goodwill. An insolvency practitioner may also negotiate compromise agreements with employees in order to avoid their transfer to the purchasing company, particularly high-earning employees, though this strategy also carries costs with it, while perhaps being of lower risk. Stakeholders' expectations should also be managed with regard to expected returns that reflect the reality of risks, costs and price implications associated with TUPE. Attempting to circumvent TUPE is a high risk strategy that may attract liability that will transfer to the purchaser and, in the event of failure, to the creditors and the state.

5.4.3 While one practitioner stated unequivocally that the principle of protecting employee rights should be maintained, most practitioners responding to the survey felt that the ARD and its implementation in the UK was contrary to the rescue culture. The UK regime provides insolvency practitioners with real problems due to the conflict between employment and insolvency law. The insolvency exception as implemented in the UK was also described as being inadequate to avoid this conflict. The suggestion was also made that TUPE should be relaxed further in insolvency situations in order to encourage more effective corporate rescues.

5.5 French Practitioner Strategies for Reducing the Impact of Transfers

5.5.1 French practitioners responding to this question have mainly listed the processes available within the legal framework of insolvency and the transfer provisions as it is difficult to circumvent any of the legal provisions implicated. Collective procedures favour corporate rescue, to which the transfer provisions will apply. A business transfer

will aim to ensure some or all of the jobs transfer with it and dismissals for economic reasons are difficult to contest, which is not problematic as the guarantee fund can support costs associated with economic dismissals. However, this does place an additional burden on the state and tax-payers. Business transfers and restructuring processes can only succeed through a collective negotiation procedure, but the negative impacts of transfers can also be mitigated through consultation with creditors and the authorisation by the court to derogate from the obligatory nature of transfers. A reduction of the impact of the transfer of employment contracts can be made with the consent and collective negotiation of all stakeholders.

5.5.2 In business transfers, it is up to the court to decide among purchase bids. The issue of employment contracts is considered by the court among a number of other elements, including the amount of the offered purchase price, the continuation of the business, the characteristics of the recovery plan, and the transfer of business contracts such as leases, loan agreement, and supply agreements, as well as the number of employment contracts that the potential purchaser intends to retain. Once the purchaser and its offer is approved by the court, the rights and obligations of the employment relationship will be imposed on the new employer, including the advantages acquired as a result of the transfer regarding limitations on dismissals that by reason of the transfer.

5.6 Practitioner criticism of the Transfer of Employment Contracts during Corporate Rescue Procedures

5.6.1 The high level guarantees for unpaid employee debts accrued in relation to dismissals are a factor that favours corporate rescue. In one practitioner's opinion, the difference in treatment between those procedures instituted with a view to liquidation and those engaged to save a business is justified as it prevents the use of the latter procedure as a means to avoid the application of employment protection rules. However, the obligation on administrators to attempt to reclassify employees and the formalities imposed are too severe. The role of administration can also constitute a factor that inhibits the transfer of enterprises. Consultation during administration is obligatory as is the approval of dismissals by employee representatives.

- 5.6.2 The maintenance of all employee rights following a transfer can result in the loss of jobs. The obligatory character of the contractual transfer can also limit the offers that may be made for the purchase of an undertaking, as well as reducing the overall potential value for which an undertaking may be purchased. The transfer of contracts can also be a factor of uncertainty in the transaction as the actual costs relating to potential dismissals are revealed at a later time and may then constitute a higher economic hazard than initially estimated.
- 5.6.3 There is an abundance of jurisprudence that has turned around the decision to dismiss employees prior to a transfer, even in the event of *liquidation judiciaire* that has already been authorised by a judge. Dismissals made for economic motives by a liquidator prior to a transfer have been deemed at times ineffective and in violation of the public order dispositions of Article L.1224-1 of the *Code du Travail*. The foundation of these judicial decisions is that such a transfer authorised by a bankruptcy judge constitutes the transfer of the autonomous economic entity in which that activity is continued or resumed by the purchaser, consequently employment contracts should continue with the purchaser and any dismissals are rendered irrelevant. In such a case the employee whose dismissal has been rendered ineffective can demand that his contract should either continue or for compensation from the liquidator. Thus even when dismissals associated with a liquidation procedure are approved by a judge, this may not guarantee that those dismissals cannot be overturned subsequently. While the *sauvegarde* procedure alleviates this uncertainty somewhat, a sale is not always possible, in which case the transfer provisions provide a real obstacle to the resumption of the business, sometimes causing the buyer to choose not to continue the purchase.
- 5.6.4 There are also some sectors in which the constraints on dismissals are heavier than in others, such as the journalism sector in France. Thus the criticism is not necessarily over the whole of the system, but only in relation to those sectors that are rendered particularly inflexible due to their specific protective character. However, practitioners have also acknowledged that any arguments against laws currently in force are pointless, given their place of importance in French social policy. Going against the status quo in France is difficult due to the primacy of vested rights. In addition, some practitioners

favour the maintenance of acquired rights, but would like to see a restructuring procedure that is more in line with the economic needs of a business rather than with the protected status of individual employees. The problem is not only the maintenance of acquired rights, but the impossibility overall of creating a framework that is compatible with every need within the system, in particular in the field of restructuring and with regards to workers, ensuring job security and rights of association.

6 **The Acquired Rights Directive: An Exemption for Corporate Rescue**

6.1 The Modern Rescue Culture: a Need for a New Approach

6.1.1 When the last ARD was passed in 2001, the rescue culture was not quite a ubiquitous element of EU legal framework, though it was growing in importance. The European Insolvency Regulation only came into force in 2002 and, while the turn of the millennia saw a number of reforms among many of the original Member States, including the UK and France, these were occurring at the same time that the ARD was being implemented.¹⁵³ The new emphasis on the rescue culture thus could not be accounted for in the amended ARD drafted in 2001. The financial crisis of 2007-2008 focussed legislators further on the need to provide a robust insolvency system that included corporate rescue as a preferred option. This focus was not only due to the need to combat insolvencies precipitated by the crisis, but also due to the requirements set by Memoranda of Understanding for some Member States who were forced to resort to the troika of the International Monetary Fund, European Commission and the European Central Bank for rescue packages to alleviate their sovereign debt obligations.¹⁵⁴ Thus, since the introduction of the amended ARD in 2001, the rescue culture has changed significantly throughout the EU.

6.1.2 The ARD does have a place in corporate rescue and restructuring as there has been a recognised need for social protection in this area since the foundation of the ECSC.

¹⁵³ See P Omar, *European Insolvency Law* (Ashgate 2004) and “Four Models for Rescue: Convergence or Divergence in European Insolvency Laws? Part 1” (2007) 18(4) ICCLR 127; P Omar, “Four Models for Rescue: Convergence or Divergence in European Insolvency Laws? Part 2” (2007) 18(5) ICCLR 171.

¹⁵⁴ For a more detailed discussion of the financial and sovereign debt crises and their impact on corporate rescue and workers’ rights, see JLL Gant and A Kastrinou, “The Road to Recovery: A Comparative Analysis of the Impact of the Financial Crisis on Rights of Workers in Greece, Portugal, France and the United Kingdom and their Insolvency Legal Systems”, in R. Parry (ed), *Designing Insolvency Systems* (INSOL Europe 2015) 000 (forthcoming).

However, where the application of social protections risks total failure of a rescue process, resulting in liquidation and loss of all jobs, a balance must be struck that will save the most jobs and provide the best result for the economy as a whole by encouraging successful business rescues and reduce unemployment. The TUPE implementation of the ARD has been often criticised on the basis that it undermines insolvency procedures and interferes with the rescue process. French employers have also proffered complaints as to the onerous obligations required by their transfer provisions, with French practitioners citing the obstacles to sales that the transfer provisions frequently present.¹⁵⁵ It is submitted that a better more balanced approach would be to allow employee acquired rights to be waived in certain circumstances in the interests of preserving employment overall. While the most preferred option for employers might be to transfer a business free of the burden of employee liabilities, this would be outside the protections provided for in the ARD.¹⁵⁶ A more nuanced approach is required that fits in with the aims and purposes of EU social policy, the ARD and the rescue culture.

6.2 Arguments on Social Policy, Employment Protection and the ARD

6.2.1 There are a number of arguments in favour of employment regulation generally, as well as in favour of the ARD in particular. However, given the academic and practical criticisms of the ARD in its interference with the rescue culture, it is clear that some relief is needed. However, there remain economic and social arguments in favour and against the retention of some level of protection in the event of business transfers, if not its complete application in corporate rescue situations.

6.2.2 The neo-classical economist's commoditisation of labour is no longer an acceptable assumption for an economic system and should not therefore be relied upon in arguments for economic efficiency.¹⁵⁷ While free market economists may decry the establishment of centrally coordinated labour standards, arguing that equity and

¹⁵⁵ Armour and Deakin, n100.

¹⁵⁶ J McMullen, "An Analysis of the Transfer of Undertakings (Protection of Employment Regulations 2006)" (2006) 35(2) ILJ 113, 133-134.

¹⁵⁷ BE Kaufman, "Labor Law and Employment Regulation: Neoclassical and Institutional Perspectives" in KG Dau-Schmidt, SD Harris and O Lobel (eds), *Labor and Employment Law and Economics: Volume 2, Encyclopedia of Law and Economics* (2nd edn, Edward Elgar 2009) 14-16.

efficiency are best secured when labour markets are allowed to operate freely,¹⁵⁸ this ignores the problem of human behaviour and the reality of imperfectly competitive markets. Marx described the commoditisation of labour as leading to exploitation and constituting a barrier to free human development.¹⁵⁹ He also distinguished between situations in which commercial contracting parties negotiate under conditions of juridical equality, from an employment relationship in which the hierarchical relation of “master and servant” remains.¹⁶⁰ Even Smith admitted that there was an inequality of bargaining power between employers and employees, particularly in relation to an employee’s ability to hold out for better terms:

“Many workmen could not subsist a week, few could subsist a month, and scarce any a year without employment. In the long run, the workman may be as necessary to his master as his master is to him; but the necessity is not so immediate.”¹⁶¹

6.2.3 It has been argued by proponents of efficiency in the Law and Economics movement that social legislation is an illegitimate interference with market relations.¹⁶² While freedom, autonomy, liberty and individualism are central to the benefits perceived in following a neo-classical economic model, giving individuals choices free from constraint and coercion,¹⁶³ these positive effects are not always accessible. It is not reflective of the real position of employees in the labour market. In terms of welfare economics, upon which the labour markets of the EU are built, if markets are competitive, information must be perfect in order to reach a true competitive equilibrium. This presumes that government intervention should not be necessary in order to maintain market efficiency in an optimal competitive situation.¹⁶⁴

6.2.4 The premise that perfect competition can exist within the labour market is spurious, at best. The labour market is imperfectly competitive due to inequality of bargaining

¹⁵⁸ S Deakin and F Wilkinson, “Labour Law and Economic Theory: A Reappraisal” (1998) ESRC Centre for Business Research - Working Paper no 92, 10-11.

¹⁵⁹ See K Marx, “Economic and Philosophic Manuscripts” in TB Bottomore (ed), *Early Writings* (first published 1844, McGraw-Hill 1963) 76, discussed at length in E Tucker, “Renorming Labour Law: Can we Escape Labour Law’s Recurring Regulatory Dilemmas?” (2010) 39(2) ILJ 99, 105-106.

¹⁶⁰ Deakin and Wilkinson, n158, 15.

¹⁶¹ A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (first published 1776, Oxford World Classics 2008) 65.

¹⁶² S Deakin and F Wilkinson, “Rights vs Efficiency? The Economic Case for Transnational Labour Standards” (1994) 23(4) ILJ 289, 292.

¹⁶³ Kaufman, n157, 6-9.

¹⁶⁴ D Fourage, “Costs of Non-Social Policy: Towards an Economic Framework of Quality Social Policies – and the Costs of not Having them”(2003) Report for the Employment and Social Affairs DG 9.

power, unequal access to information and resources, and unequal balance of rights that exist within it. While employment regulation often impedes the perceived efficiency of the free market, it is justified as restoring balance to an otherwise exploitative and imbalanced relationship that, without control, would be socially inefficient and unjust due to the unilateral reduction in wages and conditions of labour.¹⁶⁵ The informational problems present in the labour market provide a justification for a welfare state that functions to correct the imbalance in competition that it causes. Market failures owing to informational problems that cause an inefficient allocation of resources provide a premise for the argument in favour of social policy as a factor for improving that market efficiency.¹⁶⁶ The early days of the industrial revolution throughout Europe exemplify this imbalance in competition. While it could be argued that the same moral conditions do not exist today, it is only necessary to observe the exploitation of workers that occurs in developing countries to realise that such conditions persist.

6.2.5 The welfare state also gives human dignity a place of central importance.¹⁶⁷ Its presence coincides with the Marxist distaste for the exploitation tendency present in purely capitalist markets. Insofar as an unregulated market economy does not secure or protect human dignity, it falls to the state to do so.¹⁶⁸ The concept of social justice, fair income distribution and even job security can be linked to the need of the welfare state to preserve and protect human dignity.

6.2.6 Labour regulation can also be justified by reference to the stabilisation it can provide to the labour market. Unrestrained competition in the labour market can lead to adverse macroeconomic effects due to the potential for higher unemployment. Fuller employment allows for greater consumer purchasing power, and protection adds security that allows consumers to spend with less fear of losing their livelihood.¹⁶⁹ Employment regulation can also promote greater economic efficiency and growth. Research has demonstrated that when norms of fairness in the workplace are violated, workers will retaliate by reducing productivity, resulting in reduced profits and

¹⁶⁵ Kaufman, n157 30-41.

¹⁶⁶ Fourage, n164, 20.

¹⁶⁷ See Article 1 of the Charter of Fundamental Rights: "Human dignity is inviolable. It must be respected and protected."

¹⁶⁸ Fourage, n164, 14.

¹⁶⁹ Kaufman, n157, 36-49.

efficiency in the company.¹⁷⁰ Social policies allow a state to strike a balance between capital resources and labour and can be a productive factor that contributes to political stability.¹⁷¹ However, social protection must also be balanced with the needs of business, else a new imbalance is introduced that will have an adverse impact on economic efficiency.

6.2.7 In justifying the existence of the ARD within EU law, the argument turns on equality of competition within the Common Market. Because the Member States of the EU all operate on differently constituted legal systems with diverse aims and purposes for regulation, their approaches to labour regulation also vary, sometimes significantly. If competition within the common market is to be maintained, it must be endowed with a level playing field and parity of costs must be established. Labour standards provide a “floor of rights” to prevent destructive competition.¹⁷²

6.2.8 Employers in one state operating at lower social standards gain a competitive advantage to those countries with higher standards due to the costs associated with the level of social protection.¹⁷³ In addition, it is the creation of the common market itself and the competition that it embraces that presents risks for employees. The conditions of competition lead inevitably to restructuring and other changes to businesses, making dismissals and redundancies a reality. If there are no controls on those standards, an industry in a country with less stringent rules will be given an incalculable advantage within the common market.¹⁷⁴ Thus, EU social policy is justified and, in particular, those regulations directly impacting the reorganisation of companies, such as the ARD.

6.3 How to Approach Legal Reform: The Rawlsian Perspective

6.3.1 Having established that there is a need for reform to balance corporate rescue and the application of the ARD, the question arises how best to approach it to balance the objective interests in it. If it were left only to businesses to decide how best to approach this reform, it is probable that they would choose to repeal the ARD in its entirety in

¹⁷⁰ E Falk, E Fehr and U Fischbacher, “On the Nature of Fair Behavior” 41(1) *Economic Enquiry* 20-26; see also Deakin and Wilkinson, n158.

¹⁷¹ Fourage, n164.

¹⁷² Deakin and Wilkinson, n162, 301

¹⁷³ Lord Wedderburn of Charlton, “The Social Charter in Britain: Labour Law and Labour Courts?” (1991) 54(1) *MLR* 1, 16.

¹⁷⁴ GF Mancini, “Labour Law and Community Law” (1985) 20(NS) *Irish Jurist* 1, 12.

order to increase the flexibility with which they could approach reorganisation and the disposal of employees. However, if left only to labour and employment interests, the remit of the ARD might be extended in such a way as to remove the flexibility that already exists within it to alleviate the financial burdens borne by businesses due to its application. A middle ground is necessary to balance these countervailing interests. John Rawls offers a potential model that could be applied in these reformatory circumstances.

6.3.2 Rawls considered how individuals might approach the creation of a fair justice system from an original position of ignorance. The premise is that self-interested individuals, when coming together to create a system of rules that would treat all individuals equally could best achieve this from a position behind a “veil of ignorance” that obscures each individual’s characteristics that come together to define a person’s unique self-interest. The original position is intended to eliminate prejudice and self-interest in order to achieve a fair result, which is why the veil of ignorance is necessary. If every individual were allowed to bargain on their own terms in the circumstances of business interests as against employment interests, the inequalities of bargaining power would reassert themselves.¹⁷⁵ While this hypothetical “original position” may not be a realistic premise upon which to construct an entire society due to its overly simplistic approach that fails to account for factors that, once in place, would cause the system to fail,¹⁷⁶ Rawls’ theory may provide a tool with which to create balanced reform between two traditionally polarised interests,¹⁷⁷ particularly if applied within a narrowly defined field of law. In this case, the ARD insolvency exception provides the narrowly defined legal area upon which this theory can be applied.

6.3.3 The needs and wants of business interests as opposed to employment or labour interests can be described with reasonable clarity, particularly if this is done within one specific legal framework that is based on a distinct set of legal and moral values. The ARD within the framework of EU law provides just such circumstances. The aims and purposes of the Directive are reasonably clear, particularly if jurisprudence is included as interpretative guidelines, and, in general, the needs and wants of businesses and

¹⁷⁵ J Rawls, “Fairness to Goodness” (1975) 84(4) *Phil Rev* 536, 537.

¹⁷⁶ See T Nagel, “Rawls on Justice” (1973) 82(2) *Phil Rev* 220.

¹⁷⁷ See J Rawls, *A Theory of Justice* (HUP 1971); “Justice as Fairness” (1958) 67(2) *Phil Rev* 164; and n175.

employees as defined groups within the EU can be described with clarity. Knowing that both self-interested groups are likely to construct a model with their sole interests in mind, and the reasons for them, it may be possible to construct a reform that compromises between the two interested parties, thereby creating a balance that could be equated to the fairness of Rawlsian theory.¹⁷⁸

6.3.4 The Rawlsian conception of justice can be viewed as deriving from a basis of efficiency, which implies that achieving justice is a matter of weighing advantages and disadvantages, or specific interests, each having an intrinsic value in the satisfaction of the interests to which they are connected.¹⁷⁹ Employment and labour interests will generally prioritise employment security, protected rights, protection from unequal or unfair competition in the labour market and, above all, remaining employed, over the interests of the business employing them. Businesses will want to take advantage of flexibility, maximise profitability, efficiency, success, growth and will also want an effective workforce. While these aims are not diametrically opposed, they will often conflict. However, the interests are clear and known. Rawlsian theory presumes that self-interested actors, in this case employee and business interest groups, will also act rationally in accordance with their wants and needs and with an understanding of the consequences of adopting one practice over another. If the knowledge to which group these “rational self-interested actors” belonged was obscured when negotiating reform to the ARD that would balance the conflict between corporate rescue and employment protection, but the understanding of the opposing interests of each group was retained, both groups would be forced to adopt a reform that achieved a middle ground between the opposing interests. Neither would want to create a reform that would provide an advantage to the other group, as no one would know at the time of negotiation which group would benefit from such an advantage. This balance could be considered on the level with the Rawlsian concept of “fairness”.¹⁸⁰

6.3.5 In the interests of continued employment and also presuming that knowledge of redundancy risk is also obscured, it is arguable that employees would agree to relinquish

¹⁷⁸ Rawls, n175.

¹⁷⁹ J Rawls, “Justice as Fairness” (1958) 67(2) *Phil Rev* 164, 188.

¹⁸⁰ See Rawls, n179.

their rights to the transferral of their employment contracts to the purchaser of a business were that business to be put at great risk of failure due to the contract transfers. While their employment security may be reduced, they would be more likely to retain their employment, particularly if the only alternative was liquidation. What the Rawlsian position does for business interests is that it forces them to acknowledge and experience the unequal position of employment interests by hypothetically placing them in the shoes of employees subject to the risks of reorganisation processes. It is unlikely that a self-interested employee would ever opt for fewer protections if that option did not in some way offer an alternative protection for their employment, i.e. a successful corporate rescue. By any analysis, employees as a group will be better off with a successful corporate rescue than with liquidation. On the basis of the foregoing discussion, it could be deduced that the “fairest” way to provide balance in the ARD with regard to corporate rescue would be to allow some relaxation of the transfer provisions in the event that the transfer of employment contracts puts a corporate rescue procedure at high risk of failure.

6.4 EU Methods: Soft Law or Hard Law?

6.4.1 EU legal reform can take any number of forms. Soft law approaches and the open method of coordination tend to be the preferred approaches in EU social policy regulation in the current political climate. The OMC radically differs from the top-down, rule-based, centralised approach used in the Community Methods¹⁸¹ of legislating social policy as it emphasises action plans, objectives, recommendations, and guidelines rather than legislation requiring implementation.¹⁸² Since 2010, coordination and benchmarking have become the preferred method; however, the financial crisis made this method difficult to use due to the more individualist character taken on by many Member States. In addition, the ARD is part of the old Community Method. Changing methods to reform it may carry obstacles to coordination that would otherwise be unforeseen due to its current implementation among the Member States.

¹⁸¹ Community Method refers to decision-making processes in the EU emphasising the roles of supranational institutions such as the European Commission, European Parliament and the Court of Justice of the EU.

¹⁸² D Trubek and L Trubek, “Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Coordination” (2005) 11(3) ELJ 345.

6.4.2 The Community Method is not without its weaknesses. In particular, the adoption of the ARD was diluted in terms of the level of protection provided due to the need to agree with a final hard law format. This is due in part to the broad differences in Member States' labour systems, including the extreme differences in collective labour law, which is likely to have led to a weaker version of the requirements for information and consultation.¹⁸³ It is essentially necessary to reach some lowest common denominator in terms of what can be agreed among a disparately composed federation of sovereign states. The difficulty in agreeing this standard results in the aforementioned dilution, but also vagueness and difficulties in establishing fundamental concepts due to different perspectives of interpretation,¹⁸⁴ as evidenced by the significant amount of litigation that has taken place with regard to the ARD. However, given that the reform suggested herein is a direct diversion from the ARD, though also in line with social policy and the rescue culture, it is necessary to create provisions that closely align with it. As such, an amendment according to the classic community method is likely the only approach that will suffice.

6.5 Reforming the ARD

6.5.1 It is recommended that an amending directive be drafted to include provisions that reduce the impact of the ARD transfer provisions on high risk corporate rescue procedures. This exemption carries with it the caveat that contracts must transfer unless it can be shown that to do so would cause the failure of the relevant procedure and result in business failure. This should appear within the insolvency exception located in Article 5 of the current ARD and specify a selection of corporate rescue procedures nominated by Member States and contained within Annex A of the European Insolvency Regulation.¹⁸⁵ This annex is a readily accessible list of insolvency and rescue procedures that would provide a reasonable tool with which to apply the new derogation; however, the different aims of the EIR as opposed to the ARD may call for a bespoke list in the ARD itself at some point in the future.

¹⁸³ G Barrett, "Deploying the Classic 'Community Method' in the Social Policy Field: the Example of the Acquired Rights Directive" (2009) 15(2) ELJ 198, 199-200.

¹⁸⁴ *Ibid*, 202.

¹⁸⁵ Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (hereafter referred to as the "EIR").

- 6.5.2 The alleviation of obligations to retain contractual terms and conditions located in Article 5(2) remains an adequate provision for those corporate rescue procedures that are not at significant risk of failure owing to the transfer of employment contracts. It allows for bargaining among employee organisations and employers to reduce the liabilities that may transfer by changing the terms and conditions in contracts or agreeing to other flexible changes. This provision helps circumvent the otherwise self-defeating aspects of the acquired rights provisions and has been seen to result in a successful business transfer that may otherwise have failed if employee liabilities were to be taken at face value without recourse to negotiated settlements or other changes.¹⁸⁶
- 6.5.3 The exemption will include several contingent conditions. Due to current EU policy regarding the more protective treatment of small and medium enterprises, the suggested derogation should provide for a blanket exemption for companies fitting the small enterprise definition.¹⁸⁷ Medium sized enterprises will benefit from the exemption if it can be shown that the transfer of employment contracts to the purchaser of a business will cause the rescue procedure to fail and result in liquidation. Finally, larger companies will have to satisfy a threshold test to determine if they can make use of the exemption. The threshold determined below is based on the findings of various empirical studies;¹⁸⁸ however, the determination of a perfect threshold will require a bespoke empirical study to determine the most likely ratio of costs to value that balance on the cusp between success and failure, which is outside the remit of this treatise. The recommendations contained herein are an example of a balancing provision that would satisfy the aim of resolving the conflict between corporate rescue and employment protection, based on the foregoing path dependent historical comparison of the two example jurisdictions that exhibit a range of differences in the evolution of their legal systems.
- 6.5.4 The exemptions will be available as long as a company has made every effort to ensure that the actions taken do not unfairly deprive the affected employees of the protection of

¹⁸⁶ J Armour and S Deakin, "Insolvency and Employment Protection: the Mixed Effects of the Acquired Rights Directive" (2002) 22 *Int'l Rev of L & Econ* 443, 460-461.

¹⁸⁷ See Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124 of 20.05.2003).

¹⁸⁸ Armour and Deakin, n186, n100; and n98.

the ARD, as stated in Article 5(4), which provides a legal basis for employees to challenge any actions taken or rights deprived as a result of the application of the corporate rescue exemption. Article 5 of the current ARD provides that Member States may exempt certain insolvency proceedings from the application the ARD transfer provisions if instituted with a view to liquidation of the transferor's assets. It is recommended that an additional paragraph be added to the current ARD through an amending directive that accounts for the EU rescue culture and the impact that heavy social protections have upon it in the following format:

“1A. Unless Member States provide otherwise, Articles 3 and 4 shall not apply to any transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or analogous insolvency proceedings which have been instituted with a view to continuing the business of the undertaking and or rescuing the company as a going concern and are listed in Annex A of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings if the circumstances of the relevant transfer satisfies one of the following conditions:

(a) the undertaking employs fewer than 10 persons and whose annual turnover and or annual balance sheet total does not exceed Euro 2 million;¹⁸⁹ or

(b) the undertaking employs fewer than 250 persons and whose annual turnover does not exceed Euro 50 million or whose annual balance sheet total does not exceed Euro 43 million¹⁹⁰ and the impact of the application of Articles 3 and 4 to the relevant transfer would result in the failure of bankruptcy or analogous insolvency proceedings which have been instituted with a view to continuing the business of the undertaking and or rescuing the company as a going concern; or

(c) the undertaking employs more than 250 persons and whose annual turnover exceeds Euro 50 million or whose balance sheet total exceeds Euro 43 million and the cost of transferring employment contracts exceeds [25%] of the value of the undertaking and the impact of the application of Articles 3 and 4 to the relevant transfer would result in the failure of bankruptcy or analogous insolvency proceedings which have been instituted with a view to continuing the business of the undertaking and or rescuing the company as a going concern.

6.6 Reception of Reforms in the Member States

¹⁸⁹ See n187.

¹⁹⁰ Ibid.

- 6.6.1 Transposition of EU law is affected by the interests, institutions and individuals of Member States: it is by and large a political process.¹⁹¹ Thus, in order to ensure that Member State laws in this area closely resemble each other following the transposition process, it is necessary to consider how individual states may implement them. Transposition depends upon institutional factors stemming from the characteristics and the configurations of the institutions involved in the implementation of the law; political factors relating to the interests, manipulation of power and choices between competing values; and substantive factors concerning the nature of the objective to be achieved.¹⁹² These are complex factors influenced by a myriad of jurisdiction specific characteristics relating to their legal and political systems. To this end, the study of the historical, economic, social, and political contexts of the areas of law implicated in the suggested reforms to the ARD will assist in forecasting how individual states may choose to implement it. While it may not be possible to “break” the path dependent influences on implementation of the suggested reforms, it is submitted that the approach set out above will allow for a slow convergence of systems through market pressures to equilibrate competition.
- 6.6.2 The UK would likely be more than willing to accept and implement a reform of this kind given the widely held view that the interference of the ARD in corporate rescue procedures has caused more economic and social harm than good. France, however, may choose not to change anything in their system given the fact that once a right is in place, it is difficult to reduce it despite the good it may do the French economy. This is due in part to the French concept of “vested rights”, a concept that is present throughout the EU but that in France has evolved to encompass a much broader spectrum of “rights”. Once a right has been created and used by individuals, it has essentially obtained the status of being “vested” in the populace. At one time statutory provisions and rights resting on a special title of acquisition, such as human rights, were distinguished from one another in France. However, over the course of time many French jurists became loathe to distinguish between the two, thus any right given,

¹⁹¹ DG Dimitrakopoulos, “The Transposition of EU Law: Post-Decisional Politics and Institutional Autonomy” (2001) 7(4) ELJ 442, 443

¹⁹² *Ibid.*, 445.

whether by statute, which could by definition potentially be taken away, or by other means, becomes vested and difficult to reduce or destroy.¹⁹³ Thus any reduction in the rights conferred by L.1224 of the *Code du Travail*, which has existed since 1928 and has suffered very few changes, will be difficult to implement from a political perspective.

6.6.3 Despite the political obstacles that the French system of “*droits acquis*” creates, the financial crisis and rising deficits have forced France into the sights of the European Commission due to its failure to reduce its deficit in line with EU requirements. While the rest of the EU has continually reduced employment entitlements following the financial and sovereign debt crises, particularly those countries on the periphery who have been forced to resort to loans from the troika,¹⁹⁴ France has introduced additional protections and assistance for their unemployed¹⁹⁵ and has maintained the highest level of protection for temporary workers, despite an apparent need to deregulate temporary work to increase flexibility in the labour market to help reduce unemployment rates like the rest of the EU.¹⁹⁶ France has not followed the same harsh prescriptions for cutting public expenditure to stimulate growth, preferring to protect its social welfare over reducing budget deficits.¹⁹⁷ France has continued to create obstacles for businesses through oppressive taxes, stultifying labour regulations, and complex regulatory controls on production, which has burdened the French economy and thwarted efficiency, depressed productivity and generally reduced France’s competitiveness in the Common Market. Its rigid labour rules tend to disrupt economic dynamism and efficiency by limiting the flexibility of French businesses.¹⁹⁸ While the French implementation of the ARD reform would only be a small part of the problem, its reform would provide some level of increased flexibility, particularly in relation to the efficient rescue of viable businesses. Though sparse, the commentary gathered from practitioners on this matter supports this contention.

¹⁹³ G Kaeckenbeeck, “The Protection of Vested Rights in International Law” (1936) 17 Brit YB Int’l L 1, 2.

¹⁹⁴ Greece, Portugal, Spain, Italy and Ireland.

¹⁹⁵ D Clegg, “Labour Market Policy in the Crisis: the UK in Comparative Perspective” (2010) 181 The Policy Press 5, 9.

¹⁹⁶ T Vlandas, “The Politics of Temporary Work Deregulation in Europe: Solving the French Puzzle” (2013) 41 Politics & Society 425, 426-417.

¹⁹⁷ C Lemke, “Challenging the Ever Closer Union: Political Consequences of the Eurozone Crisis” (2014) 36(1) American Foreign Policy Interests: The Journal of the National Committee on American Foreign Policy 18, 21.

¹⁹⁸ M Ezrati, “Les Misérables” (2013) November/December, The National Interest 25.

6.6.4 Given the push toward flexibility in Europe, and the importance laid at the feet of both robust rescue procedures and a flexible labour market, France may be forced toward closer convergence with the rest of the EU. The existence of a more flexible ARD in its application in corporate rescue situations, while only a microcosm of the overall social and economic issues facing the EU, may provide an impetus for Member States to voluntarily harmonise in the area of acquired rights by implementing the recommended reform. It may influence the direction that paths in this area take by creating a system that many Member States could eventually adopt, creating greater flexibility and encouraging less flexible states, such as France, to better align its rules in order to equalise competition in the common market. Competitive disadvantage due to higher social costs is something that France has often complained of over the history of the EU. While France generally adheres to a system with higher social costs, it is also dissatisfied with its lower competitive character within the EU. However, history has demonstrated that while on the surface France may exhibit commercial ambition, it is constrained by its social nature. Regardless, taken as a whole, the EU would generally benefit by a relaxation of the application of transfer provisions in corporate rescue procedures. Whether individual Member States take up this advantage is a matter of their relative flexibility with regard to their path adherence.

7 **Conclusion**

7.1 Conflict and Resolution: Path Dependent Legal Development

7.1.1 The purpose of the foregoing Chapter was to examine the path dependent relationships of social policy and corporate rescue in the UK and France in the implementation and functioning of the ARD. French individualism and values of human dignity arising from the developments arising from the French Revolution have had a lasting effect on the place of social policy in the French legal system.¹⁹⁹ The UK has retained its economically driven system with an emphasis on market freedom and efficiency, though under the EU it has had to raise its labour standards to the minimum standards required in the EU.²⁰⁰ While France has enjoyed the levelling of the competition that European

¹⁹⁹ See section 2.3.6.

²⁰⁰ Ibid, 2.3.5.

social policy has played in the common market, the UK has struggled and resisted the interference of EU social policy due in part to its fundamentally different conception of its place in the legal framework, as well as the way in which EU law is articulated, generally in line with civil legal structures. As a common law country, transposition of EU law out of a civil law framework has caused a number of problems, as the level of jurisprudence in the area of directive implementation has demonstrated.²⁰¹

7.1.2 The conflict surrounding the ARD is indicative of one of the fundamental dividing factors among EU Member States: those in favour of strong centralised government and those favouring a loose, con-federal format wherein Member States retain overall autonomy while enjoying the benefits of a free trade area. The conflict between the ARD transfer provisions and corporate rescue procedures is reflective of this dichotomy: social justice versus free enterprise. The implementation saga of the ARD in the UK evidences the fact that the jurisdiction fits uncomfortably within the EU, particularly with regard to “social Europe”.²⁰²

7.1.3 In addition to obstacles to implementation, the ARD also presents an inherent conflict between the interests of the rescue culture and employment protection. A number of cases have demonstrated that rescue processes can indeed fail if the costs of transferring employment contracts are too high. Fact dependent jurisprudence has shown judicial acknowledgement of this problem when it was able to find that employees would not transfer in a situation where they were dismissed for the reason of the company no longer being able to afford to pay them, despite the fact that a buyer was found shortly thereafter. While this situation would seem to indicate that TUPE would be implicated, the CA opted for a fact-sensitive approach that inadvertently acknowledged the imbalance between the two policy areas. Recent reforms to TUPE have alleviated some of the onerous conditions of TUPE, but it remains difficult to reconcile with the rescue culture.²⁰³

²⁰¹ Ibid, 2.5.3.

²⁰² Ibid, 3.2.

²⁰³ Ibid, 3.3.

- 7.1.4 While France has not had the same controversy, French employers have nonetheless complained about the restrictions that the provisions create for their ability to deal with their enterprise as they see fit. The French practitioner response has borne out this criticism, citing a number of problems caused by the transfer of undertakings provisions. The system causes complexity and uncertainty, making it difficult for entrepreneurs to adapt to changes in technology or to reorganise according to market requirements. The high level of protection in French social policy also have negative macroeconomic effects by creating rigidities in the labour market, keeping people unemployed for longer periods of time due to the inability to shift the workforce easily. While this has been acknowledged by French politicians, economists, academics and others, it retains its inflexible approach due to the social protection of “vested rights,” regardless of whether those rights are provided by statute or are natural.²⁰⁴
- 7.1.5 The reactions of practitioners in both jurisdictions, the fact of the conflict, and the effects of the economic crisis have made it clear that reform is needed in order to alleviate the burdens that the ARD places on business.²⁰⁵ While it remains important to protect employees in situations of reorganisation, too stringent an application results in business failure on occasion, leading to a self-defeating result: the loss of all jobs. As such, reform was recommended that allows for an exemption from the application of the ARD provisions for micro enterprises, for medium enterprises that are at risk of failure, and for large enterprises subject to a specific threshold test on the ratio of employee liability costs to business transfer value.²⁰⁶ While the fact is that France is unlikely to implement any serious changes in this regard,²⁰⁷ a number of other EU Member States are likely to do so, especially the UK and other, more economically liberal countries, such as Germany and the Netherlands. Given the economic issues France is having following the financial crisis that are blamed at least in part on the inflexibility of its labour market, it is not unreasonable to suspect that over time even France will shift in order to find balance between the rescue culture and the ARD.²⁰⁸

²⁰⁴ Ibid, 4.2.

²⁰⁵ Ibid, 5.

²⁰⁶ Ibid, 6.5.

²⁰⁷ Ibid, 6.6.3.

²⁰⁸ Ibid, 6.6.4.

CHAPTER 7: CONCLUSION

“The whole is greater than the sum of its parts.”

~ Paraphrase of Aristotle in the Metaphysics

1 Chapter 1:

1.1 Path Dependency, Employment Protection and Corporate Rescue

1.1.1 Economic disasters, financial crises, and sovereign debt in the EU have, since 2007, brought a renewed focus on the economic impact of business failure and unemployment.¹

While social policy regulation and corporate rescue procedures are not mutually exclusive in their aims, they are often seen to conflict where they intersect. A balance between these two often competing policy areas is necessary in order to cope with the impact of critical financial circumstances with greater economic efficiency, while promoting social justice in the modern socioeconomic context of the EU. As such, the social implications of corporate rescue must be considered, rather than taking a purely economic approach that emphasises creditor wealth maximisation as the fundamental goal of insolvency.²

1.1.2 Underpinned by traditionally opposing socioeconomic values, the juxtaposition of corporate rescue and employment protection can be difficult to reconcile. As corporate rescue procedures often require the sale of all or part of a business undertaking, the rules dealing with the preservation of employment in business transfer situations are of particular importance; as such, the varied implementation of the ARD is significant. The UK and France provided particularly divergent examples of this implementation, also demonstrating the extreme variance in the fundamentals of legal systems within the EU.

1.1.3 In order to strike a balance between the rescue culture and social policy, reform is needed, but such reform that can be received by the Member States and closely align their legal

¹ See C Barnard, “The Financial Crisis and the EURO Plus Pact: a Labour Lawyer’s Perspective” (2012) 41(1) ILJ 98; T Hylands, B Vis and K van Kersbergen, “To What Extent Did the Financial Crisis Intensify the Pressure to Reform the Welfare State?” (2011) 45(4) Social Policy & Administration 338; D Burdette, R Parry and A Walters, “The Global Financial Crisis and the Call for Reform of Insolvency Law Systems” (2012) 4(1) IRI 13; and B Moro, “Lessons from the European Economic and Financial Great Crisis: A Survey” (2014) 34 Europ J Pol Econ s9.

² V Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, CUP 2009) 14-15.

systems. Such an alignment should serve to encourage more level competition within the Common Market in relation to levels of social protection in this specific legal area. Aligned implementation should be achieved through a fundamental understanding of the jurisdiction specific elements that affect the reception of law and the aims of regulation. The foregoing Chapters analysed the legal position of employment protection and corporate rescue in the UK and France through a historical comparative analysis of the political, social, and economic developmental context of employment law and corporate insolvency law. Based on the understanding of each jurisdiction's path dependent position within the legal framework of the EU, it recommended reform to the ARD aimed at balancing corporate rescue and employment protection in the precise circumstances of employment contracts transferring during corporate rescue procedures. The intersection of these areas of law is contentious due to competing interests of social and economic policy. It is necessary, however, to consider both social policy and economic efficiency in the analysis of employment protection and corporate rescue in order to account for the aims of both. Given that the regulation of this policy intersection is made within the EU legal framework, a comparative historical methodology assists in identifying the most effective reform that will fit within the varied legal systems of the EU Member States, and also helps to predict how such a reform may be implemented over time.

2 **Chapter 2:**

2.1 The Path to Labour Regulation and Corporate Insolvency Law

2.1.1 The political history of nations has inevitably affected how the modern function of political systems, business and economics, social policy, and regulatory style evolved over time. The second Chapter explored the historical events that have had a direct impact on the approaches to legal regulation in France and the UK and the paths they have travelled to arrive at their modern employment and insolvency systems. Employment protection regulations evolved out of the need to first control, and then protect, the working classes through the development of labour laws. The modern employment law systems developed largely in connection with industrialisation and were influenced by the

characteristics of the working classes, which in turn affected and were affected by the social, political, and economic characteristics unique to each legal system.³

2.1.2 The unique characteristics of insolvency laws in Britain and France and their modern corporate rescue elements could only be understood through their situation within the evolution of modern corporate law and the particular views that each jurisdiction has historically had regarding debt and credit. Regulations on business initially evolved out of a desire to protect capitalist endeavour within individual states and eventually to embrace certain free market ideals, though the extent to which this was achieved has varied over time among different jurisdictions. It is through the regulation of commercial transactions and their fundamental importance to modern economies that a need to normalise insolvency procedures was recognised; as such, an understanding of the social, political and economic characteristics that have affected the evolution of commercial and insolvency laws was necessary in order to fully understand their unique aims within the legal systems of Britain and France.⁴

2.1.3 There are a number of historical events that have guided the approach and aims of employment protection and corporate rescue and, over time, the approach to the implementation of EU law. Diverse historical occurrences relating to the political, social, economic, and cultural characteristics of each jurisdiction have had a significant impact on legal development. Of particular importance are the diverse impacts and experiences of feudalism, absolutism, the Protestant and Counter Reformations; the impact of the Tudor rule in England including the dissolution of the monasteries; the Enlightenment; the English Civil War and Glorious Revolution; and the French Revolution. The impact of these events has helped to build the foundations upon which modern French and British approaches to social policy and corporate rescue are now based. It is the differences in these historical experiences and their influence that are of particular importance as they help to explain the differences in approach that exist today.

2.1.4 While Britain and France evolved along parallel lines in terms of their statehood and political systems from Roman times through to the Middle Ages, they began to diverge as

³ Please see Chapter 3 of this Thesis for full development of these ideas.

⁴ Please see Chapter 4 of this Thesis for a full development of these ideas.

early as the eleventh century.⁵ While both were feudal in nature, English feudalism had been imported and imposed by its Normans conquerors. The French feudal system evolved somewhat organically as the gifts of land and privilege were disseminated further and further from the centre, the Normans recognised this as a problem and created a system that circumvented it. The dispersal of central power was avoided by requiring that vassals accepting gifts of land must also swear allegiance to the supreme sovereign. Thus, by as early as the eleventh century, the English monarchy was effectively centralised while its French counterparts continued to rely upon a moral authority and loyalty purchased through royal gifts.⁶

2.1.5 The fifteenth century saw further differentiation. Although both regimes effectively consolidated power at this time, France and England diverged during the Protestant Reformation. In England, the creation of a non-Catholic state religion allowed it to sever Rome's control and become a state of unlimited sovereignty over both politics and religion.⁷ The Catholic faith was retained as the national religion in France. The retention of Catholicism and a subtle intolerance for progressive philosophical or religious ideas kept the great French Enlightenment *physiocrats* from affecting their own country until their ideas were co-opted by the French revolutionaries of the eighteenth century.⁸ However, English rationalism and individualism would see it through to the first Industrial Revolution well in advance of similar progress in France.

2.1.6 The dissolution of the English monasteries had a profound effect on its economy. The riches gained from dissolution helped the English economy to grow and encouraged an enthusiasm for profit as theological attitudes began to change with the separation of the political and spiritual. The Reformation in England had a fundamental effect on attitudes toward capitalism as a focus on individuality and a belief in hard work became a more accepted way of life. As early as the sixteenth century in England, capitalist tendencies can be observed as the laws of the market steadily replaced custom and tradition. France

⁵ See Chapter 2 Section 2.1.

⁶ Ibid, 2.2.

⁷ Ibid, 2.3 & 2.4.

⁸ Ibid, 2.5.

would never see a widespread acceptance of capitalism but it would be accepting of liberalism for certain periods during the French Revolution.⁹

2.1.7 While England and France both had highly stratified class systems throughout the Middle Ages, France systematically destroyed its *ancien régime* in a series of more or less decisive acts of revolution.¹⁰ The class system in England endured, though its strict feudal character fell away as production methods advanced over time. However, there was not the same violent rejection of class as there was in France. Rather, the countrymen of the regions tended to desire to retain traditional ways rather than progress away from superstition and subservience.¹¹ In a sense, the imposition of top down changes during the Tudor era¹² seemed to instil a stronger loyalty to tradition in England while the opposite was true in France as evidenced in the tumult of the French Revolution.¹³

2.1.8 Britain was able to evolve gradually toward a more liberal mind set while France suffered immediate and catastrophic changes during the French Revolution. The English Civil War was a learning experience for England that would influence its dealings with the royal executive in the decades to come, culminating in the Glorious Revolution and the English Bill of Rights.¹⁴ The Glorious Revolution in England provided some inspiration for the French Revolution, though it did not have the violently despotic leaders or significant death toll. By the time of the French Revolution the United Kingdom had formed with the combination of the English and Scottish crowns and had settled into a constitutional monarchy, though an electoral reform that extended the franchise outside of the wealthy would take nearly 150 years to arrive.¹⁵

2.1.9 The French republican system and the British unitary democracy within a constitutional monarchy are today not so very different as their histories suggest. However, the events leading to their development differ such that it can be expected that approaches to legal regulation are affected. The socially democratic leanings of France influence the

⁹ Ibid, 2.7.

¹⁰ Ibid, 2.8.

¹¹ Ibid, 2.9.

¹² Ibid, 2.3

¹³ Ibid, 2.8.6.

¹⁴ Ibid, 2.6.

¹⁵ Ibid, 2.9.

interventionist methods of legal regulation while the more liberal democratic style of the UK tends to avoid intervention in the market if possible. France also places a constitutional value on the concept of human dignity and individual human rights, and although the UK recognises these concepts, it is not a central foundation of its legal system. This has led France to present a legal bias toward employees over businesses, while the UK tends to retain an outlook that espouses economically liberal ideals that prefer to leave employee rights to the free market. Thus, the diverse religious, social, economic and political historical experiences of Britain and France have had a direct effect on their approaches to social and commercial regulation.¹⁶

3 Chapter 3:

3.1 Proletarianisation, Industrialisation, and Labour Regulation

3.1.1 Theoretically, labour is a part of the capitalist market and could be treated as a commodity; however, its inherent human quality carries with it both moral implications as well as an uncertainty that undermine expected behaviours of commodities in the market.¹⁷ While both the UK and France have incorporated this ideology into their labour policies, there are a number of ways in which the jurisdictions continue to differ. The differences in approach taken by France and the UK toward labour regulation during the period of industrialisation have influenced their approaches and reactions to the social ills caused by it. While these differences are connected to historical experiences, industrialisation is an important turning point in French and English attitudes toward the working classes, business economics and labour regulation. These attitudes in turn feed into the political, legal, economic and social policies of each jurisdiction, influencing the aims and means of regulation.

3.1.2 Britain moved organically into an economically liberal mode of production by the early eighteenth century, while France struggled with revolution and autocracy until the end of the First World War.¹⁸ By the time industrialisation occurred in Britain, it had already conquered its colonial and international markets and was largely devoid of any external

¹⁶ Ibid, 3.1.

¹⁷ Chapter 3 Section 2.3 and 2.4.

¹⁸ Hereafter referred to as “WWI”.

competitive pressures.¹⁹ France's process of industrialisation was less revolutionary, resembling a slow evolution of systems, processes and ideas. As late as the 1880s, the old economic sectors remained the primary source of economic growth. Agricultural production was still a fundamental aspect of the economy while industry was divided into a small, concentrated, and dynamic modern sector, and a traditional sector that still relied on home craft work and the dispersion of industry in the rural areas. There was never the massive and rapid transfer of manpower from agriculture to industrial centres in the cities in France, such as occurred in Britain a few decades after industrialisation had begun.²⁰

3.1.3 Britain's early industrialisation meant that the modern business enterprise began to emerge before the legal system could adjust from late-medieval or early modern forms of regulation. The contract of employment and companies limited by share capital had not yet fully developed when industrialisation was well under way. However, in France, private law codes were introduced decades before large scale industrialisation began and were therefore able to support the emergence of the large industrial enterprises. The differences in scale and speed of industrialisation had profound effects upon the legal and economic development of British and French societies.²¹

3.1.4 The proletariat that evolved in France was composed differently than it was in the UK. Instead of a homogenous group of lower class peasants who were forced to flee the enclosed English countryside to find work in the cities and towns of industrial Britain, the population of French workers formed a diversified industrial proletariat issued from different socioeconomic backgrounds, constituted by successive waves of farm hands, part time peasants, migrant workers, women leaving home for work, craftsmen and former self employed handicraftsmen, which resulted in a segmented and diversified working class. The French labour movement therefore had to answer to diverse interests of a non-homogenous working class as well as the different ideologies which coexisted among them.²²

¹⁹ Chapter 3, section 4.2.

²⁰ M Despax, J Rojot and J-P Laborde, *Labour Law in France* (Kluwer 2011) 209-210.

²¹ S Deakin, P Lele and M Siems, "The Evolution of Labour Law: Calibrating and Comparing Regulatory Regimes" (2007) 46(3-4) *Int'l Lab Rev* 133, 139.

²² Despax, Rojot and Laborde, n20, 210

- 3.1.5 For Britain, one consequence of its unbalanced pace of industrialisation was the persistence of the quasi-penal master and servant model in the employment relationship, which served to institutionalise the conception of the enterprise as the unencumbered private property of the employer to which employees were subordinated.²³ The industrial employment relationship was based upon the capital provided by the employer for the employee to use in order to perform the services for which he was being paid. The employee became wholly dependent upon the industrial employer, in some cases for food, shelter, and the education of his children as well as for the tools and place of his trade.²⁴ This can be contrasted with the French concepts of work relations, which moved quickly from penal sanctions to an imposed a juridical equality between worker and employer that was embodied in legal codes. The employer's control over employees and an employee's natural position of subordination was tempered by the development of mandatory social legislation, the *ordre public social*.²⁵
- 3.1.6 Collective bargaining became an important mechanism through which employment relations were managed in France by the official institution of enterprise level *comité d'entreprises*.²⁶ In Britain, the organisation of the workplace was based on the voluntary organisation of trade unions and their negotiations with employers,²⁷ continental workplaces tended to be organised according to legal principles.²⁸ Thus, the function of trade union rights in the UK is similar to those of other European nations; the form that they take has traditionally been different. Rather than protecting the freedom of association through the granting of positive rights, the UK has generally granted immunities for certain trade union activities which could otherwise constitute civil law liabilities,²⁹ such as conspiracy, emphasising the importance British courts and law makers place on the sanctity of contract.
- 3.1.7 The resistance to regulation in the area of labour law in the UK is endemic to the nature of the labour movement in Britain. Given the development of trade unions outside the

²³ Chapter 3 section 7.1.

²⁴ B Hepple and P O'Higgins (eds), *The Making of Labour Law in Europe: a Comparative Study of nine Countries up to 1945* (first published 1986, Hart 2010) 12-13.

²⁵ Deakin, Lele and Siems, n21, 140.

²⁶ Chapter 3 Section 11.3.

²⁷ *Ibid*, 8.2.

²⁸ *Ibid*, 8.3.

²⁹ Lord Wedderburn of Charlton, "The Social Charter in Britain: Labour Law and Labour Courts?" (1991) 54(1) MLR 1, 3.

political sphere and the far-reaching freedom to act that they had been given through immunities, it is not surprising that they were not supportive of the encroachment of the law into industrial policy. Britain's adherence to orthodox economic beliefs in the free market, collective *laissez-faire* and the lack of political ambitions in early unionist dogma meant that there was little support for any progressive labour regulation.³⁰ This non-interventionist stance has remained popular in British politics, though successive Labour governments have tempered this with more progressive legislation, particularly in view of Britain's acceptance of the EU Social Chapter.³¹

3.1.8 In both jurisdictions labour regulation developed following or in parallel with industrialisation, reflecting the economic and social needs of each jurisdiction,³² thus relating directly to the path dependency of regulatory approach rather than market and social demands. The modern cultural and social values in France have led to a liberal and social conception of labour law, giving a great role to the freedom of association and union activities, encouraging social dialogue and fighting against every form of discrimination. It also ensures widely guaranteed incomes either at work or in the case of unemployment.³³ British labour regulation; however, was instituted after labour interests had become able to wield real and damaging political power. Thus labour regulation was introduced first with broadly economic impulses aimed at tempering or even replacing the power of labour interests in order to take control of the labour economy, and later in order to meet minimum limits set by EU law.³⁴

3.1.9 In the UK, an emphasis has remained on the importance of some form of economic liberalism and the free market, while France has steadily drawn away from these ideas toward the social democracy which is characteristic of it today. France has manifested a reserve about the market economy and capitalism through its political and economic policies.³⁵ Clearly, the French system has taken a view on the importance of social protections and this view is imposed upon any legislative act that may affect society.

³⁰ R Lowe, "Hours of Labour: Negotiating Industrial Legislation in Britain, 1919-39" (1982) 35(2) *Econ Hist Rev* 270.

³¹ Chapter 3 Section 12.1

³² Hepple and O'Higgins, n24, 14-15.

³³ Despax, Rojot and Laborde, n20, 33.

³⁴ Chapter 3 Section 11.4.

³⁵ Despax, Rojot and Laborde, n20, 33-34.

Britain, however, has continued to resist interference in the labour market where possible, despite the influence of EU social legislation.³⁶

4 **Chapter 4:**

4.1 Historical Perspectives on Debt, Credit, Corporate Law, and Insolvency

4.1.1 There are a number of differences between the UK and France in relation to how the elements of industrialisation, commerce, and big business evolved. Prohibitions on usury and the moral resistance to reliance on credit as a business mechanism lasted far longer in France.³⁷ Further, France continues to retain resistance to unbridled debt as allowable rates of interest remain restricted.³⁸ France was also more seriously affected by the results of the Mississippi Bubble as the French economy was tied to the company. Once it failed, the effect on the French economy were catastrophic, leaving another long memory influencing resistance to speculation and financial risk, and further entrenching French attachment to security and tradition.³⁹ Britain's more adventurous financial spirit led to a colonial and eventually corporate empire that would overshadow French growth for centuries.⁴⁰

4.1.2 Prior to large scale industrialisation, a financial revolution occurred in the Netherlands and England to accommodate the needs of colonial trade.⁴¹ Without the financial revolution as well as the evolution of paper money, credit, debt and banking, and the parallel development of the joint stock company, large scale industrialisation would not have been possible. It was in part England's highly developed financial sector of the middle eighteenth century that allowed for rapid and massive industrial development. In addition, the modernisation of both credit and debt allowed for greater risks to be taken in business, which also led to a greater risk of insolvency. Thus, as modern financial markets evolved, providing a forum in which to invest in growing commercial enterprises, so too did the need for an insolvency system that worked not only on a national level, but also

³⁶ Chapter 3 Section 12.

³⁷ Chapter 4 Section 2.1.

³⁸ *Ibid.*, 2.5

³⁹ *Ibid.*, 3.2.

⁴⁰ *Ibid.*, 3.3.

⁴¹ See JH Munro, "The Medieval Origins of the Financial Revolution: Usury, Rentes and Negotiability" (2003) 25(3) *Intl Hist Rev* 505.

internationally. Cross-border colonial trade was a catalyst for the evolution of the modern global marketplace owing to the need for a financial system that could deal with a variety of currencies, products and legal systems.⁴²

4.1.3 Despite the differences in attitude toward business risk in the UK and France, both developed a species of modern corporate structure including limited liability and separate corporate personality in the mid-nineteenth century.⁴³ Utilisation of these corporate forms varied, however, in no small part due to the significant restrictions placed on the creation of joint stock companies in France, a reactive characteristic also influenced by the experience of Law's infamous investment scheme.⁴⁴ This led to a variety of compromised corporate forms utilising some limited liability to encourage investment, while relying on unlimited liability to keep the person in charge of business operations honest.⁴⁵ There were also a number of restrictions present in the British company law system influenced by resistance to separating company ownership from control, also influenced by the scandals of the 1720s.⁴⁶

4.1.4 As the corporate form evolved in complexity and eventually evolved a separate legal personality that protected corporate investors behind a corporate veil,⁴⁷ so too did the need for effective insolvency law. Britain underwent numerous bankruptcy reforms during the Victorian age, though the reforms generally retained the creditor friendly approach that has historically characterised British insolvency system.⁴⁸ Nineteenth century French insolvency law was no friendlier towards debtors. However, many insolvencies were resolved outside of the civil process in order to avoid the draconian results of insolvency procedures at the time, a characteristic that is reflective of the emphasis on collective arrangements that is a prevalent aspect of the French insolvency

⁴² Chapter 4 Section 3.1.

⁴³ *Ibid.*, 3.4 and 3.5.

⁴⁴ *Ibid.*, 3.2.

⁴⁵ See R Price, *An Economic History of France 1730-1914* (Macmillan 1981); CE Freedeman, "Joint-Stock Business Organisation in France 1807-1867" (1965) 39(2) *Bus Hist Rev* 184; and F Caron, *An Economic History of Modern France* (Methuen 1979).

⁴⁶ *Ibid.*, 3.2.

⁴⁷ *Ibid.*, 3.4 and 3.5.

⁴⁸ *Ibid.*, 4.4.

system today as evident in the blanket term that refers to French insolvency procedures: *les procédures collectives*.⁴⁹

4.1.5 Corporate rescue became an important aspect of insolvency systems for both the UK and France following World War II.⁵⁰ Of the two, France was the first to recognise that the penal nature of bankruptcy laws was not good for business, which was reflected in the Law of 1955, which was followed regularly by reforms and the addition of procedures aimed at encouraging the safeguarding of companies in order to protect employment and bolster the economy.⁵¹ Britain had generally espoused a Darwinian approach to corporate survival. Reforms to this approach were, however, heavily influenced by the UK's prospective entry into the European Community, rather than any fundamental change in the UK perspective on insolvency, although the acceptance and continued prevalence of the Cork Report recommendations demonstrate the UK's eventual, if begrudging, embrace of the rescue culture.⁵²

4.1.6 French society placed a higher value on individualism, which is evident from the slow and methodical approach to industry and its growth in parallel with the protection of traditional production methods. Insolvency laws developed with fundamentally different aims, the French taking pity on the unfortunate debtor while the UK retained a punitive approach favouring creditors who were owed by bad businessmen. France's debtor friendly approach encompassed a concern for other stakeholders who would be affected by business failures, in particular employees. This approach led to a natural affinity for rehabilitating or rescuing businesses, sometimes at the expense of creditor entitlements. While the UK has also undertaken corporate rescue as an additional aim for insolvency procedures, its approach remains more focussed on resolving creditor debts, though the social aspects of insolvency have become a consideration in recent years. Membership in the European Union has had a significant effect on changes to the UK approach to

⁴⁹ Ibid, 4.2 and 4.3.

⁵⁰ Hereafter referred to as "WWII".

⁵¹ Chapter 4, section 6.1.

⁵² Chapter 4, section 6.2 and 6.3.

insolvency, particularly in relation to the social elements that had previously been left to other areas of the law.⁵³

5 Chapter 5:

5.1 EU Social Policy, Acquired Rights and the Insolvency Exception

5.1.1 While the state of the British and French insolvency systems are not so very different today, the influence of EU policy and practices on domestic law is also evident. The same can be said for legislation in the area of social policy, particularly for the UK, though it is in this area that most of the modern controversy relating to UK membership in the EU resides. In addition, the UK and France have had significant influence on how policy has been implemented during the lifetime of the EC.

5.1.2 The implementation of the ARD in the UK and in France differs fundamentally due to two very different approaches and perspectives on the need to protect employees over the interests of business. These approaches are heavily path dependent as evidenced in the examination of how both countries viewed their place and exercised their influence in the early days of the EC and on its approach to issues of social policy. Social policy in Europe has had a long and varied development and has been heavily influenced by the World Wars. The personalities involved in the peace negotiations at Versailles were singular microcosms of their particular jurisdictions, with the French highly concerned for specific French interests, an individualist perspective illustrative of the French cynicism toward any lasting change or, indeed, peace following the war. The British, while exhibiting some passing interest in international cooperation, were more concerned with maintaining their distance from Continental problems. While the outcome of the treaty contributed to the causes of the WWII, the treaty also created the International Labour Organisation, which would provide a catalyst for social policy in Europe, though each individual state would create their own jurisdiction specific regimes of labour and employment protection. This jurisdiction specific approach would be reflected in the EU approach to social policy in the 1950s.⁵⁴

⁵³ Ibid, 6 and 7.

⁵⁴ Chapter 5 Section 2.1, 2.2, and 2.3.

- 5.1.3 As WWI provided the catalyst for war socialism, most continental countries continued it to some degree during the interwar period, while the UK reversed direction, preferring a liberal economy during peace time, though this was not without some serious social consequences in terms of unrest. The development of a unifying process following WWII was supported by the UK and the US, though the UK has taken an outsiders stance from the very beginning of European integration processes, with Churchill recommending a “united states of Europe” of which the UK would not, admittedly, be a part. The lack of interest of the UK and the US for a European unification process meant that the French would take the lead, which would have significant impact on the form that the union would take, as well as its approach to social policy, though the latter would be tempered by the more liberal stance of the German government.⁵⁵
- 5.1.4 Since the first steps toward some type of European collective were taken in the European Coal and Steel Community,⁵⁶ it has been recognised that the creation of a combined market would have far reaching effects on individual citizens, particularly due to the effects of market integration on European businesses. This led to specific provisions in the ECSC that allowed for financing activities aimed at mitigating the consequences of restructuring on workers affected by the integration of the coal and steel industrial markets.⁵⁷ While this approach would not be fully utilised in the Treaty of Rome, which took a distinctly market-making stance to social policy in the Community, some of the first social policy directives occurring in the wake of the Social Action Plan of 1972 would be passed specifically to deal with employees affected by the insolvency of their employers in the Collective Redundancies Directive, the Employers in Insolvency Directive and the Acquired Rights Directive.⁵⁸ However, British liberalism and protection of its sovereignty would provide constant obstacles to any advances toward a market-correcting role for social policy in Europe.⁵⁹
- 5.1.5 While the adoption of the Social Chapter by the UK would mean an end to any significant obstacles that the UK could present, its implementation strategies in terms of social policy

⁵⁵ Ibid, 2.4.

⁵⁶ Hereafter referred to as the “ECSC”.

⁵⁷ Chapter 5, section 3.3.

⁵⁸ Ibid, 3.3.

⁵⁹ Ibid, 3.43.2.

directives has lacked enthusiasm and, at times, legal effectiveness.⁶⁰ While France was actually the impetus for the creation of a law that would deal with employees' acquired rights,⁶¹ the ARD was one of the many EU directives that caused problems for the UK legal system. The UK's failure to implement it initially led to threats of a law suit by the European Commission, and then its inadequate implementation and failure initially to apply in cases of privatisation led to an ECJ decision requiring its application.⁶² Thus, the UK has struggled to comply with the requirements of EU social policy, due not only to its economically liberal stance and desire to maintain its sovereign power, but also to the differences in the Continental civil law systems as compared to the UK common law system, on the former of which much EU law is based.⁶³

5.1.6 The ARD has caused problems on a European level as well, in no small part due to its original failure to deal with circumstances of insolvency. A number of cases considered how the directive should apply in corporate rescue situations, which were eventually resolved with the distinction between those procedures entered with a view to liquidation or those that are initiated not with a view to liquidation. This distinction has meant that any procedure entered with a view to continuing trading, even in those situations that may eventually lead to liquidation, any business transfers occurring would not be exempt from the operation of acquired rights.⁶⁴ The UK has also had a number of cases dealing with this problem, resulting in the application of TUPE to all insolvency procedures that allow the business to continue trading.⁶⁵ This has caused controversy both on an EU as well as a national level, however, the current Directive and its implementation throughout the EU mean that this problem cannot be solved without significant reforms in the provisions relating to the insolvency exception.

6 Chapter 6:

6.1 Path Dependent Influences on Acquired Rights and Corporate Rescue

⁶⁰ Ibid, 6.1.

⁶¹ Ibid, 7.1.

⁶² Ibid, 8.2.

⁶³ Ibid, 8.2.2.

⁶⁴ Ibid, 5.

⁶⁵ Ibid, 9.2.

- 6.1.1 Chapter 6 examined the path dependent relationships of social policy and corporate rescue, with a focus on the differences subsisting between developments in the UK and France over time in this area.⁶⁶ The conflict surrounding the ARD is indicative of one of the fundamental dividing factors among EU Member States: those in favour of strong centralised government and those favouring a loose, con-federal format wherein Member States retain overall autonomy while enjoying the benefits of a free trade area.⁶⁷ The conflict between the ARD transfer provisions and corporate rescue procedures is reflective of this dichotomy: social justice versus free enterprise. The implementation saga of the ARD in the UK evidences the fact that the jurisdiction fits uncomfortably within the EU, particularly with regard to “social Europe”.⁶⁸
- 6.1.2 In addition to the conflict of implementation, the ARD also presents an inherent conflict between the interests of the rescue culture and employment protection. A number of cases have demonstrated that rescue processes can indeed fail if the costs of transferring employment contracts are too high. Fact dependent jurisprudence has shown judicial acknowledgement of this problem when it was able to find that employees would not transfer in a situation where they were dismissed for the reason of the company no longer being able to afford to pay them, despite the fact that a buyer was found shortly thereafter. While this situation would seem to indicate that TUPE would be implicated, the Court of Appeal opted for a fact-sensitive approach that inadvertently acknowledged the imbalance between the two policy areas. Recent reforms to TUPE have alleviated some of its onerous conditions, but it remains difficult to reconcile with the rescue culture.⁶⁹
- 6.1.3 While France has not had the same controversy, French employers have, nonetheless, complained about the restrictions that the provisions create for their ability to deal with their enterprise as they see fit. The French practitioner response supported this criticism, citing a number of problems caused by the transfer of undertakings provisions.⁷⁰ The system causes complexity and uncertainty and makes it difficult for entrepreneurs to adapt to changes in technology to reorganise according to market requirements. The high

⁶⁶ Chapter 6 Section 2.1.

⁶⁷ *Ibid.*, 2.5.

⁶⁸ *Ibid.*, 6.6.

⁶⁹ *Ibid.*, 3.

⁷⁰ *Ibid.*, 5.5

protections in French law also have negative macroeconomic effects by creating rigidities in the labour market, keeping people unemployed for longer periods of times due to the inability to shift the workforce easily. While this has been acknowledged by French politicians, economists, academics and others, it retains its inflexible approach due to the social protection of “vested rights”, regardless of whether those rights are provided by statute or are natural.⁷¹

6.1.4 The reactions of practitioners in both jurisdictions, the fact of the conflict, and the effects of the economic crisis have made it clear that reform is needed in order to alleviate the burdens that the ARD places on business. While it remains important to protect employees in situations of reorganisation, too stringent an application results in business failure on occasion, leading to a self-defeating result: the loss of all jobs. As such a reform was recommended that allows for an exemption from the application of the ARD provisions for micro enterprises, for medium enterprises that are at risk of failure and for large enterprises subject to a specific threshold test on the ration of employee liability costs to business transfer value.⁷² While the fact is that France is unlikely to implement any serious changes in this regard, a number of other EU Member States likely do so, particularly the UK and those other countries with more liberal economies. Given the economic issues France is having following the financial crisis, blamed at least in part on the inflexibility of its labour market, it is not unreasonable to suspect that over time even France will shift in order to find balance between the rescue culture and the protection of employees.⁷³

⁷¹ Ibid, 4.

⁷² Ibid, 6.5.

⁷³ Ibid, 6.6.

BIBLIOGRAPHY

Books

- The Holy Bible, Douay Rheims Version* revised by Bishop Richard Challoner 1749-1752 (James Cardinal Gibbons 1899) (Tan Books and Publishers Inc 2000)
- Ackroyd, P, *The History of Britain Volume 1 Foundation* (Pan Books 2012)
- Ackroyd, P, *The History of England Volume II: Tudors* (Pan Books 2014)
- Anderson, P, *Passages from Antiquity to Feudalism* (first published 1974, Verso World History Series 2013)
- Aristotle, *The Politics* (384-322 BCE) (Penguin Classics 1981)
- Aristotle, *Nichomachean Ethics* (384-322 BCE) (Penguin Classics 2004)
- Ashton, TS, *The Industrial Revolution 1760-1830* (first published 1947, Oxford University Press 1977)
- Ashton, TS, *An Economic History of England the 18th Century* (first published 1955, Methuen & Co Ltd 1972)
- Baker, A and I Smith, *Smith & Woods Employment Law* (10th edn, Oxford University Press 2010)
- Barnard, C, *EC Employment Law* (3rd edn, Oxford University Press 2006)
- Barnard, C, *EU Employment Law* (4th edn, Oxford University Press 2012)
- Bellamy, R, *Victorian Liberalism: Nineteenth Century Political Thought and Practice* (Routledge 1988)
- Bentham, J, *Utilitarianism* (first published 1868, Hackett Publishing Co Inc 2002)
- Blackstone, W, *Commentaries on the Laws of England* (first published 1753, 5th edn, The Online Library of Liberty 2011)
- Bossuet, J-B, *Politique tirée des propres paroles d l'écriture sainte* (Pierre Cox Imprimeur Librairie 1709)
- Bottomore, TB, (ed), *Early Writings* (McGraw-Hill 1963)

- Brewster, C and P Teague, *European Community Social Policy and its Impact on the UK* (Institute of Personnel Management 1989)
- Broc, KG and R Parry, *Corporate Rescue: an Overview of Recent Developments from Selected Countries* (Kluwer Law International 2006)
- Brown, RA, *Origins of English Feudalism* (George Allen and Unwin Ltd 1973)
- Cannon, J, (ed), *The Oxford Companion to British History* (Oxford University Press 2002)
- Caron, F, *An Economic History of Modern France* (Methuen and Co Limited 1979)
- P Craven and D Hay (eds), *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (University of North Carolina Press 2004)
- Darwin, C, *On the Origin of Species*, (first published 1859, Oxford University Press, 2008)
- Davies, P and M Freedland, *Kahn-Freund's Labour and the Law* (Stevens & Sons Ltd 1983)
- Davies, P and M Freedland, *Labour Legislation and Public Policy* (Oxford University Press 1993)
- Davies, N, *Europe: A History* (Pimlico 1996)
- Davies, G, *A History of Money* (University of Wales Press 2002)
- Derbyshire, W and S Hardy, *TUPE: Law and Practice* (2nd edn, Spiramus Press 2009)
- Desepax, M, J Rojot and J-P Laborde, *Labour Law in France* (Kluwer Law International 2011)
- Caron, F, *An Economic History of Modern France* (Methuen and Co Limited 1979)
- Chancellor, E, *Devil Take the Hindmost: A History of Financial Speculation* (Plume Books 1998)
- Cornu, G, *Vocabulaire Juridique* (Presses Universitaires de France 2011)
- Davies, P and M Freedland, *Kahn-Freund's Labour and the Law* (Stevens and Sons Ltd 1983)
- Deakin, S, and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford University Press 2005)
- Despax, M, J Rojot and J-P Laborde, *Labour law in France* (Kluwer Law International 2011)

- Desurvire, D, *Histoire de la Banqueroute et Faillite Contemporaine* (L'Harmattan 1992)
- Dickson, PGM, *The Financial Revolution in England: A Study of the Development of Public Credit 1688-1756* (Macmillan and Company Limited 1967)
- DuBois, AB, *The English Business Company after the Bubble Act 1720-1800* (The Commonwealth Fund/ Humphrey Milford- Oxford University Press 1938)
- Fairhurst, J, *Law of the European Union* (Pearson Education Limited 2010)
- Ferguson, N, *The Ascent of Money: A Financial History of The World* (Penguin Books 2008)
- Filmer, R, *Patriarcha* (Printed for R Chilwell in St Paul's Churchyard 1680)
- Finch, V, *Corporate Insolvency Law: Perspectives and Principles* (Cambridge University Press 2009)
- Formoy, RR, *The Historical Foundations of Modern Company Law* (Sweet and Maxwell 1923) Reprinted under the BiblioLife Project for The Making of Modern Law Print Editions
- Goldman, DB, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (Cambridge University Press 2007)
- Goode, R, *Principles of Corporate Insolvency Law* (Student edn, Sweet and Maxwell 2005)
- Graeber, D, *Debt: the First 5000 Years* (Melville House Publishing 2011)
- Hart, H L A, *The Concept of Law* (2nd edn, Oxford University Press, 1961)
- Hay, D and P Craven (eds), *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (University of North Carolina Press 2004)
- Hepple, B, *Labour Laws and Global Trade* (Hart Publishing 2005)
- Hepple B and P O'Higgins, (eds), *The Making of Labour Law in Europe – A Comparative Study of Nine Countries* (first published 1986, Hart Publishing 2010)
- Hepple, B and B Veneziani, *The Transformation of Labour Law in Europe* (Hart Publishing 2009)
- Heywood, C, *The Development of the French Economy 1750-1914* (Cambridge University Press 1992)
- Hibbert, C, *The English: A Social History 1066-1945* (Guild Publishing 1987)
- Hobbes, T, *Leviathan* (first published 1651, Oxford University Press 1996)

- Hunt, BC, *The Development of the Business Corporation in England 1800-1867* (Harvard University Press 1936)
- Hunt, W, *The Puritan Moment: the Coming of Revolution in an English County* (Harvard University Press 1983)
- Hunt, ES and JM Murray, *A History of Business in Medieval Europe 1200-1550* (Cambridge University Press 1999)
- Ingham, G, *The Nature of Money* (Polity Press 2004)
- Jenkins, C, *A Brief History of France: People, History and Culture* (Constable and Robinson Limited 2011)
- Jenyns, S, *A Free Inquiry into the Nature and Origin of Evil: in Six Letters to -- --* (1758) (Photocopy of original by Syracuse University digitized by Google)
- Kelly, JM, *A Short History of Western Legal Theory* (Clarendon Press Oxford, 1992)
- Keynes, JM, *The Economic Consequences of the Peace* (first published 1920, Project Gutenberg eBook, 2005)
- Langholm, O, *The Aristotelian Analysis of Usury* (Universitetsforlaget 1984)
- Lebowitz, M, *Beyond Capital* (2nd edn, Palgrave, 2003)
- Le Crom, J-P, *Deux Siècles de Droit du Travail : L'histoire par les lois* (Les Editions de l'Atelier/Editions Ouvrières 1998)
- Leboyer, ML, *Les Banques Européen et l'Industrialisation Internationale dans la Première moitié du XIXème Siècle* Publication de la faculté des lettres et sciences humaines de Paris (Presses Universitaires de France 1964)
- Legrand, P, *Fragments of Law as Culture* (WEJ Tjeenk Willink 1999)
- Lesaffer, R, *European Leal History* (Cambridge University Press 2009)
- Lester, VM, *Victorian Insolvency* (Oxford University Press 1995)
- Locke, J, *Second Treatise of Government* (first published 1692, printed by Amazon.co.uk ISBN1482048168167)
- Mackrell, JQC, *The Attack on Feudalism in Eighteenth Century France* (first published 1973, Routledge 2007)
- Malthus, T, *An Essay on the Principle of Population* (first published 1798, Project Gutenberg E Book, 2009)
- Marshall, TH, *Social Policy* (Hutchinson 1975)

- Mill, JS, *Utilitarianism* (first published 1862, 2nd edn, Hackett Publishing Company Inc 2001)
- Mitchell, W, *An Essay on the Early History of the Law Merchant* (Cambridge University Press 1904)
- Montesquieu, Charles de Secondât, Baron de, *L'Esprit des Lois* (first published 1748, Project Gutenberg EBook, 2008)
- Murphy, AE, *John Law: Economic Theorist and Policy Maker* (Clarendon Press 1997)
- Neal, L, *The Rise of Financial Capitalism: International Capital Markets in the Age of Reason* (Cambridge University Press 1990)
- Noonan, JT, *Scholastic Analysis of Usury* (Harvard University Press 1957)
- Omar, P and A Sorensen, *Corporate Rescue Procedures in France* (Kluwer Law International 1996)
- Omar, P, *European Insolvency Law* (Ashgate Publishing 2004)
- Ozer, A, *L'Etat* (Flammarion 1998)
- Pitt, G, *Employment Law* (7th edn, Thompson Reuters (Legal) Limited 2009)
- Poggi, G, *The Development of the Modern State: A Sociological Introduction* (Stanford University Press 1978)
- Pollard, D, *Corporate Insolvency: Employment and Pension Rights* (4th edn, Bloomsbury Professional Limited 2009)
- Polyani, K, *The Great Transformation: The Political and Economic Origins of Our Time* (first published 1944, Beacon Press, 2001)
- Pope Leo XIII, *Rerum Novarum* or *Rights and Duties of Capital and Labour* (37 of 85 of the pontificate, 15 May 1891)
- Posner, RA, *The Economics of Justice* (Harvard University Press 1981)
- Presnell, LS, *Country Banking in the Industrial Revolution* (Clarendon Press 1956)
- Price, R, *Labour in British Society* (Routledge 1986)
- Price, R, *An Economic History of France 1730-1914* (The Macmillan Press Limited 1981)
- Quesnay, F, *Tableau Economique avec son Explication* (1758)
- Rawls, J, *A Theory of Justice* (Harvard University Press 1971)

- Ricardo, D, *Principles of Political Economy and Taxation* (first published 1817, Prometheus Books 1996)
- Rich, EE, and C Wilson (eds) *The Cambridge Economic History of Europe, Volume 5: The Economic Organisation of Early Modern Europe* (Cambridge University Press 1977)
- Rodiere, P, *Traité de Droit Social de L'Union Européenne* (Librairie Générale de Droit 2008)
- Rousseau, J-J, *Du Contrat Social* (first published 1762, HJ Tozer tr, Wordsworth Classics of World Literature 1998)
- Seignobos, C, *A History of the French People* (CA Phillips tr, Jonathan Cape Limited 1933)
- Silkenat, JR and CD Schmerler, *The Law of International Insolvencies and Debt Restructurings* (Oceana Publications 2006)
- Smith, A, *An Inquiry into the Nature and Causes of the Wealth of Nations* (first published 1776, Oxford World Classics 2008)
- Soinne, B, *Traité des Procédures Collectives : Commentaires des Textes Formules* (2nd edn, Editions Litec 1995)
- Sonescher, M, *Work and Wages: Natural law, politics and the Eighteenth Century Trades* (Cambridge University Press 1989)
- Supiot, A, *Critique du Droit du Travail* (Presses Universitaires de France 1994)
- Tomlinson, J, *Public Policy and the Economy since 1900* (Oxford University Press 1990)
- Toynbee, A, *Lectures on the Industrial Revolution in England* (first published 1884, AM Kelley 1969)
- Trevelyan, GM, *English Social History: A Survey of Six Centuries, Chaucer to Queen Victoria* (first published 1946, 3rd edn, Ghose Press 2007)
- Weber, M, *The Protestant Ethic and the Spirit of Capitalism* (first published 1864, Renaissance Classics 2010)
- Wendell-Holmes Jr, O, *The Common Law* (first published 1881, Gutenberg EBook 2000)
- Wilson, JF, *British Business History 1720-1994* (Manchester University Press 1995)

Book Chapters

- Cotterrell, R, “Comparative Law and Legal Culture”, in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 709-737
- Dannemann, G, “Comparative Law: Study of Similarities or Differences?” in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 383-419
- Dukes, R, “Hugo Sinzheimer and the Constitutional Function of Labour Law” in G Davidov and B Langille, (eds) *The Idea of Labour Law* (Oxford University Press 2011)
- Foggon, G, “The Origin and Development of the ILO and International Labour Organisations” in P Taylor and AJR Groom (eds) *International Institutions at Work* (Frances Pinter 1988)
- Fudge, J, “Labour as a ‘Fictive Commodity’” in G Davidov and B Langille, *The Idea of Labour Law* (Oxford University Press, 2011)
- Gant, JLL and A Kastrinou, “The Road to Recovery: A Comparative Analysis of the Impact of the Financial Crisis on Rights of Workers in Greece, Portugal, France and the United Kingdom and their Insolvency Legal Systems,” Chapter 00 in R Parry (ed), *Designing Insolvency Systems* (INSOL Europe 2016) (000-000) (forthcoming)
- Goldin, A, “Global Conceptualisations and Local Constructions “ in G Davidov and B Langille, *The Idea of Labour Law* (Oxford University Press 2011)
- Gordley, J, “Comparative Law and Legal History”, in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 753-773
- Jansen, N, “Comparative Law and Comparative Knowledge”, in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 305-338
- Kahn-Freund, O, “Labour law” in *Selected Writings of O Kahn-Freund* (Stevens Publishing 1978)
- Kaufman, BE, “Labor Law and Employment Regulation: Neoclassical and Institutional Perspectives”, in KG Dau-Schmidt, SD Harris and O Lobel (eds), *Labor and Employment Law and Economics: Volume 2, Encyclopedia of Law and Economics* (2nd edn, Edward Elgar, 2009)3-58
- Magnette, P, “European Democracy Between Two Ages” in C Barnard (ed), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (Oxford University Press 2007)

- Marx, K, “Economic and Philosophic Manuscripts”, in TB Bottomore (ed), *Early Writings* (first published 1844, McGraw-Hill, 1963)
- Michaels, R, “The Functional Method of Comparative Law”, in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 339-382
- Omar, P, “Reforms to the Framework of Insolvency Law and Practice in France: 1996-2006” Chapter 6 in K Broc and R Parry (eds) *Corporate Rescue: an Overview of Recent Developments* (Kluwer 2006) 111-150
- Pollard, S, “Fixed Capital in the Industrial Revolution in Britain” in F Creuzet (ed) *Capital Formation in the Industrial Revolution* (Methuen and Co Ltd 1972)
- Quesnay, F “Tableau Economique avec son Explication” in F Quesnay and C Théré (eds), *Œuvres Economiques Complètes et autres Textes en 2 Volumes* (first published 1758, INED 2005)
- Sewell, WH, “Three Temporalities: Toward an Eventful Sociology” in WH Sewell, *Logics of Historicity: Social Theory and Social Transformation*, (University of Chicago Press 2005) 81-124
- Sgard, J, “Bankruptcy, Fresh Start, and Debt Renegotiation in England and France (17th to 19th Century)” in TM Safley (ed), *The History of Bankruptcy: Economic, Social and Cultural Implications in Early Modern Europe* (Routledge 2013) 223-235
- Sinzheimer, H, “Das Wesen des Arbeitsrechts” in H Sinzheimer, *Arbeitsrecht und Rechtssoziologie, vol I* (first published 1927, Bund Verlag 1976)
- Stevens, R, “Comments and Discussion Report”, in W-G Ringe, L Gullifer and P Therey, (eds), *Current Issues in European Financial and insolvency Law: Perspectives from France and the UK* (Hart Publishing 2009) 207-210
- Therey, P, “The Evolution of Insolvency Law in France” in W-G Ringe, L Gullifer and P Therey (eds), *Current Issues in European Financial and Insolvency Law: Perspectives from France and the UK* (Hart Publishing 2009)
- Weiss, M, “Re-inventing Labour Law?” in G Davidov and B Langille, (eds) *The Idea of Labour Law* (Oxford University Press 2011)

Articles

- “Alchemy Shies away from Rover Risk” BBC News (2000) <<http://newsbbccouk/1/hi/business/679554stm>>
- “Moving on after the Death of MG Rover” AM Online (2011) <<http://wwwam-onlinecom/news/2011/7/8/moving-on-after-the-death-of-mg-rover/29289/>>
- Row over Rover Bid” BBC News (2000) <<http://newsbbccouk/1/hi/business/709123stm>>
- “Transfer of Undertakings – no Exemption for Administrations” (2011) 94(Feb) *Technical Bulletin* 948
- The Economist, “The Origins of the Financial Crisis: Crash Course” (7 September 2013) available from <<http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article>>
- International Labour Office, “Social Aspects of European Economic Cooperation” (1956) Volume 74 *International Labour Review* 99
- Addison, JT, “In the Beginning, there was Social Policy: Developments in Social Policy in the European Union from 1972 through 2008” (2009) The Rimini Centre For Economic Analysis PR 01-09
- Adelson, J, “The Early Evolution of Business Organisation in France” (1957) 31(2) *The Business History Review* 226
- Adnett, N, “The Acquired Rights Directive and Compulsory Competitive Tendering in the UK: and Economic Perspective” (1998) 6(1) *European Journal of Labour and Employment* 71
- Adnett, N and S Hardy, “Entrepreneurial Freedom versus Employee Rights: the Acquired Rights Directive and EU Social Policy Post-Amsterdam” (1999) 9 *Journal of European Social Policy* 127
- Ahanchian, AJ, “Reducing the Impact of the European Union’s Invisible Hand on the Economy by Limiting the Application of the Transfer of Undertakings Provision” (2002) 2 *Journal of International of Comparative Law Chicago-Kent* 29
- Ahlering, B, and S Deakin, “Labour Regulation, Corporate Governance and Legal Origin: a Case of Institutional Complementarity?” (2007) 41(4) *Law and Society Review* 895
- Armour, J and S Deakin, “Commentary – The Rover Case (2) – Bargaining in the Shadow of TUPE” (2000) 29(4) *Industrial Law Journal* 395

- Armour, J and S Deakin, "Insolvency, Employment Protection and Corporate Restructuring: The Effects of TUPE" (2001) ESRC Centre for Business Research, University of Cambridge, Working Paper No 204
- Armour, J and S Deakin, "Insolvency and Employment Protection: the Mixed Effects of the Acquired Rights Directive" (2002) 22 *International Review of Law and Economics* 443
- Attuel-Mendes, L and A Ashta, "French Legislation and the Development of Credit Availability for Microenterprise" (2008) 2(2) *Global Journal of Business Research* 123
- Baird, DG, "The Uneasy Case for Corporate Reorganisations" (1986) 15 *Journal of Legal Studies* 127
- Baird, DG and TH Jackson, "Corporate Reorganisations and the Treatment of Diverse Ownership Interests" (1997) 51 *University of Chicago Law Review* 97
- Barnard, C and S Deakin, "In Search of Coherence: Social Policy, the Single Market and Fundamental Rights" (2000) 31(4) *Industrial Relations Journal* 331
- Barnard, C, "The Financial Crisis and the EURO Plus Pact: a Labour Lawyer's Perspective" (2012) 41(1) *Industrial Law Journal* 98
- Barrett, G, "Deploying the Classic 'Community Method' in the Social Policy Field: the Example of the Acquired Rights Directive" (2009) 15(2) *European Law Journal* 198
- Beach, FH and MJ Wasserman, "Some Neglected Monetary Theories of John Law" (1934) 24(4) *The American Economic Review* 646
- Bell, B, "Path Dependence and Legal Development" (2012) 87 *Tulane Law Review*, 787
- Bertrand, R, "The European Common Market" (1956) 10(4) *International Organization* 559
- Black, C, "Report of the Departmental Committee on the Truck Acts" (1909) 19(74) *The Economic Journal* 315
- Blanchard, O and J Tirole, « Protection d l'Emploi et Procédures de Licenciement» (2003) *La Documentation Française*, Report produced for the Conseil d'Analyse Economique
- Blazy, R, et al, "Employment Preservation vs Creditors' Repayment under Bankruptcy Law: The French Dilemma?" (2011) 31 *International Review of Law and Economics* 126

- Bose, T, “Resolving Financial Distress: Justice as Fairness and Reciprocity” (2004) 11 *University College London Jurisprudence Review* 230
- Botero, JC, S Djankov, R La Porta and F Lopez-de-Silanes, “The Regulation of Labour” (2004) 119(4) *The Quarterly Journal of Economics* 1339
- Breton, F and C Perez, “Comment les Salaries Sortent-ils de l’Entreprise ? Les Ruptures de Contrat de Travail en Contextes, Changements Organisationnels et Marges de Manœuvre des Salaries” (2012) *HAL Archives Ouvertes* <hal-00665371> 19
- Brettle, O, “The EU Acquired Rights Directive and Its Impact on Business Transfers” (2008) White and Case 6
- Brooks, S and C Davies, “Employment Law: Insolvent Transfers” April 2011 *AccountancyMagazine.com*
- Burdette, D, R Parry and A Walters, “The Global Financial Crisis and the Call for Reform of Insolvency Law Systems” (2012) 4(1) *Insolvency and Restructuring International* 13
- Cafritz, E and O Tene, “Why French Usury Law Must Change” (2002) December *International Financial Law Review* 32
- Casale, G and A Perulli, eds, “Compliance with Labour Legislation: its Efficacy and Efficiency” (2010) *International Labour Organisation Working Document* Number 6
- Chagny, Y, “Procédures Collectives et sort de l’Emploi Salariés «Ordinaires» Journée des Juristes de Droit du Travail – Paris – 7 décembre 2007
- Clegg, D, “Labour Market Policy in the Crisis: the UK in Comparative Perspective” (2010) 18(1) *The Policy Press* 5
- Collins, H, “Transfer of Undertakings and Insolvency” (1989) 18 *Industrial Law Journal* 144
- Cranston, P, “Case comment: Absolutism over Realism” (2011) 24(3) *Insolvency Intelligence* 47
- Daly, M, “EU Social Policy after Lisbon” (2006) 44(3) *Journal of Common Market Studies* 461
- DaSilva, AL, “Directive 77/187: The EEC’s Attempt to Protect Employees upon the Sale or Transfer of Businesses” (1988) 11(1) *Boston College International and Comparative Law Review* 147
- Davies, P, “Acquired Rights, Creditors’ Rights, Freedom of Contract and Industrial Democracy” (1989) 9 *Yearbook of European Law* 21

- Davies, P, “European Developments – Amendments to the Acquired Rights Directive” (1998) 27(4) *Industrial Law Journal* 365
- Davis, AM, “An Historical Study of Law’s System” (1887) 1(3) *The Quarterly Journal of Economics* 289
- Deakin, S and F Wilkinson, “Rights vs Efficiency? The Economic Case for Transnational Labour Standards” (1994) 23(4) *Industrial Law Journal* 289
- Deakin, S and F Wilkinson, “Labour Law and Economic Theory: A Reappraisal” (1998) ESRC Centre for Business Research, University of Cambridge, Working Paper No 92
- Deakin, S, “The Contract of Employment: A Study in Legal Evolution” (2001) ESRC Centre for Business Research, University of Cambridge Working Paper No 203
- Deakin, S, P Lele and M Siems, “The Evolution of Labour Law: Calibrating and Comparing Regulatory Regimes” (2007) 46(3-4) *International Labour Review* 133
- Deakin, S, and W Njoya, “The Legal Framework of Employment Relations” (2007) Centre for Business Research, University of Cambridge, Working Paper no 349
- Debost, J, “France: Outsourcing and Transfer of Undertaking under French Law: Protection of Employee Rights and Obligations towards the Works Council” (2007) *Gide Loyrette Nouel*
- Delecroix, J and F Neilson, “The Beloved Myth: Protestantism and the Rise of Industrial Capitalism in Nineteenth Century Europe” (2001) 80(2) *Social Forces* 509
- Didier, I, “Creditors Rights in France after the Reforms of 26 July 2005 – Part I” (2007) 4(4) *International Corporate Rescue* 178
- Dimitrakopoulos, D G, “The Transposition of EU Law: Post-Decisional Politics and Institutional Autonomy” (2001) 7(4) *European Law Journal* 442
- Dupoux, C and D Marks, “French Bankruptcy Law: Putting the Safeguards in Place” (2006) 3(4) *International Corporate Rescue* 207
- Eastman, S, “The Influence of Government on Labour Relations in France” (1954) 20(3) *The Canadian Journal of Economics and Political Science* 296
- Ewald, W, “Legal History and Comparative Law” (1999) 7 *Zeitschrift für Europäisches Privatrecht* 553
- Ezrati, M, “Les Miserables” (2013) November/December, *The National Interest* 25
- Falk, E, E Fehr and U Fischbacher, “On the Nature of Fair Behavior” 41(1) *Economic Enquiry* 20-26

- Finch, V, “Re-invigorating Corporate Rescue” (2003) November *Journal of Business Law* 527
- Finch, V, “Doctoring in the Shadows of Insolvency” (2005) November *Journal of Business Law* 690
- Finch, V, “Corporate Rescue in a World of Debt” (2008) 8 *Journal of Business Law* 756
- Fisher, HAL, “The Protectionist Reaction in France” (1896) 6(23) *The Economic Journal* 341
- Forde, M, “Trade Union Pluralism and Labour Law in France” (1984) 33(1) *The International Comparative Law Quarterly* 134
- Frank, M, “The Rights of Employees in the Event of the Employer’s Insolvency: A Comparative Approach to the Rights of Employees during Restructuring in the United States and Europe” (2005) 1 *New Zealand Postgraduate Law E-Journal* 5
- Freedeman, CE, “Joint-Stock Business Organisation in France 1807-1867” (1965) 39(2) *The Business History Review* 184
- Frisby, S, “In Search of a Rescue Regime: the Enterprise Act 2002” (2004) 67(2) *Modern Law Review* 247
- Fourage, D, “Costs of Non-Social Policy: Towards and Economic Framework of Quality Social Policies – and the Costs of not Having them”, Report for the Employment and Social Affairs DG
- Gant, JLL, “Social Policy and Insolvency: Struggles toward Convergence” (2014) 2(1) *NIBLeJ* 4
- Glassner, EL, and A Shleifer, “Legal Origins” (2002) 117(4) *The Quarterly Journal of Economics* 1194
- Glassner, EL, and A Shleifer, “The Rise of the Regulatory State” (2003) 41(2) *Journal of Economic Literature* 401
- Glendon, MA, “French Labor Law Reform 1982-1983: The Struggle for Collective Bargaining” (1984) 32(3) *The American Journal of Comparative Law* 449
- Graziadei, M, “Comparative Law, Legal History, and the Holistic Approach to Legal Cultures” (1999) 7 *Zeitschrift für Europäisches Privatrecht* 531
- Guinnane, T et al “Putting the Corporation in its Place” Working Paper 13109 NBER Working Paper Series
- Hamilton, EJ, “Prices and Wages at Paris under John Law’s System” (1936) 51(1) *The Quarterly Journal of Economics* 42

- Hardy, S, “Some TUPE Implications for Insolvency Lawyers” (2001) 4 September *Insolvency Lawyer* 147
- Hathaway, O A, “Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System”, (2000) 86 *Iowa Law Review* 601
- Hatzimihail, NE, “The Many Lives – and Faces – of the Lex Mercatoria : History as Genealogy in International Business Law” (2008) 71 *Law and Contemporary Problems* 169
- Henderson, M, “The Institutional and Normative Significance of the European Union’s Acquired Rights Directive” (1996) 29 *George Washington International Journal of Law and Economics* 803
- Hoppit, J, “The Myths of the South Sea Bubble” (2002) 12 Sixth Series *Transactions of the Royal Historical Society* 141
- Hubert, S, “R3 Response to Government about TUPE” (2006) 22 *Industrial Law and Practice* 190
- Hunt, J, “Success at Last? The Amendment of the Acquired Rights Directive” 24(3) *European Law Review* 215
- Hunter, M, “The Nature and Functions of the Rescue Culture” (1999) November *Journal of Business Law* 426
- Innes, AM, “The Credit Theory of Money” (1914) January *Banking Law Journal* 151
- Jackson, TH, “Non-Bankruptcy Entitlements and the Creditor’s Bargain” (1982) 91(5) *The Yale Law Journal* 857
- Johnson, GW, “Insolvency and Social Protection: Employee Entitlements in the Event of Employer Insolvency” (2006) Fifth Forum for Asian Insolvency Reform, Beijing China 2-3
- Johnson, N C and K Williams, “Transferring Employment between the Public and Private Sectors in the UK: Acquired Rights and Revising TUPE” (2007) Sheffield Hallam University Research Archive 10
- Kaeckenbeeck, G, “The Protection of Vested Rights in International Law” (1936) 17 *British Yearbook of International Law* 1
- Kaiser, TE, “Money, Despotism and Public Opinion in Early Eighteenth Century France: John Law and the Debate on Royal Credit” (1991) Volume 63 Number 1 *The Journal of Modern History* 1
- Kastrinou, A, N Shah and O Gough, “Corporate Rescue in the UK and the Effect of TUPE” (2011) 32(5) *Company Lawyer* 131

- Kharroubi, K, *Cessation des Paiements et Ouverture des Procédures Collectives*, Thèse en Doctorat (Paris II 1984)
- Kenner, J, “Employment and Macroeconomics in the EC Treaty: A Legal and Political Symbiosis?” (2000) 7(4) *Maastricht Journal* 375
- Kiser E, and A Linton, “The Hinges of History: State-Making and Revolt in Early Modern France” (2002) 67(6) *The American Sociological Review* 889
- Korobkin, DR, “Rehabilitating Values: A Jurisprudence of Bankruptcy” (1991) 91(4) *Columbia Law Review* 717
- Korobkin, DR, “Contractarianism and the Normative Foundations of Bankruptcy Law” (1993) 71 *Texas Law Review* 541
- Ladrech, R, “Europeanization and French Social Democracy” (2001) 3(1) *Journal of Southern Europe and the Balkans* 37-47
- La Haye, L, “Mercantilism” (2008) *The Concise Encyclopaedia of Economics Library of Economics and Liberty*
- Landes, D S, “French Entrepreneurship and Industrial Growth in the Nineteenth Century” (1949) 9(1) *The Journal of Economic History* 45
- La Porta, R, F Lopez-de-Silanes, A Shleifer and R W Vishny, “Legal Determinants of External Finance” (1997) 52 *The Journal of Finance* 1131
- La Porta, R, F Lopez-de-Silanes, A Shleifer and R W Vishny, “Law and Finance” (1998) 106(6) *Journal of Political Economy* 1118
- La Porta, R, F Lopez-de-Silanes and A Shleifer, “The Economic Consequences of Legal Origins” (2008) 42(2) *Journal of Economic Literature* 285
- Leboyer, ML, “Les Banques Européen et l’Industrialisation Internationale dans la Première moitié du XIXème Siècle” (1968) 23(3) *Annales, Économies, Sociétés, Civilisations* 616
- Lemke, C, “Challenging the Ever Closer Union: Political Consequences of the Eurozone Crisis” (2014) 36(1) *American Foreign Policy Interests: The Journal of the National Committee on American Foreign Policy* 18
- Lowe, R, “Hours of Labour: Negotiating Industrial Legislation in Britain, 1919-39” (1982) 35(2) *The Economic History Review* 270
- Luttikhuis, K, “The Effectiveness and Efficiency of Corporate Insolvency Law – Part Two” (2009) 18 *International Insolvency Review* 237
- Mancini, G F, “Labour Law and Community Law” (1985) 20(NS) *Irish Jurist* 1

- Mazeaud, A, “Transfert d’Entreprise: Sort des Salariés Valablement Licenciés avant la Cession » (2012) Octobre (10) *Droit Social* 948
- McMullen, J, “An Analysis of the Transfer of Undertakings (Protection of Employment Regulations 2006” (2006) 35(2) *Industrial Law Journal* 113
- McMullen, J, “TUPE: Ringing the (Wrong) Changes The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014” (2014) 43(2) *Industrial Law Journal* 149
- Milman, D, “Moratoria on Enforcement Rights: Revisiting Corporate Rescue” (2004) March/April *Conveyancer and Property Law Journal* 89
- Moro, B, “Lessons from the European Economic and Financial Great Crisis: A Survey” (2014) 34 *European Journal of Political Economy* s9-s24
- Morvan, P, “Les Effets du Licenciement “Sans Effet” dans le Transfert d’Entreprise” (2013) February (2) *Droit Social* 135
- Munro, JH, “The Medieval Origins of the Financial Revolution: Usury, Rentes and Negotiability” (2003) 25(3) *The International History Review* 505
- Nagel, T, “Rawls on Justice” (1973) 82(2) *The Philosophical Review* 220
- Naylor, J, “TUPE Transfers in Insolvency – Where to Now?” (2012) 25(8) *Insolvency Intelligence* 124
- Newman, D, “Perspective: the Government’s Proposals for TUPE Reform Examined” March 2013 *Employers Law* 10
- Nicol, CJ, “TUPE—a Change for the Better?” (2006) 17(10) *Constitutional Law* 6
- North, D G and B R Weingast, “Constitutions and Commitments: the Evolution of Institutional Governing Public Choice in Seventeenth-Century England” (1989) 49(4) *The Journal of Economic History* 803
- Omar, P, “The Future of Corporate Rescue Legislation in France: Part I: History and Reforms” (1997) 8(4) *International Company and Commercial Law Review* 129
- Omar, P, “Four Models for Rescue: Convergence or Divergence in European Insolvency Laws? Parts 1 and 2” (2007) 18(4) *International Company and Commercial Law Review* 127
- Omar, P, “Four Models for Rescue: Convergence or Divergence in European Insolvency Laws? Part 2” 18(5) *International Company and Commercial Law Review* 171
- Omar, P, “Preservation and Pre-Packs a la Française: the Evolution of French Insolvency Law” (2011) 22(8) *International Company and Commercial Law Review* 258

- Omar, P, “A Reform in Search of a Purpose: French Insolvency Law Changes (Again!)” (2014) 23(3) *International Insolvency Review* 201
- Owen, R, “A New View of Society” or “Essays on the Principle of the Formation of the Human Character, and the Application of the Principle to Practice” (1816)
- Parr, R, “The Rescue Culture and TUPE” (2009) 22(6) *Insolvency Intelligence* 91
- Philip, A, “Social Aspects of European Economic Co-Operation” (1957) 76 *International Labour Review* 224
- Pollard, D, “TUPE and Insolvency: Part 1” (2006) 19(6) *Insolvency Intelligence* 81
- Pollard, D, “TUPE and Insolvency: Part 2” (2006) 19(7) *Insolvency Intelligence* 102
- Posner, RA, “Observation: The Economic Approach to Law” (1974) 53 *Texas Law Review* 761
- Posner, RA, “Utilitarianism, Economics and Legal Theory” (1979) 8(1) *The Journal of Legal Studies* 104
- Posner, RA, “Past-Dependency, Pragmatism and Critique of History in Adjudication and Legal Scholarship”, (2000) 67(3) *The University of Chicago Law Review* 573
- Radford, M and A Kerr, “Acquiring Rights – Losing Power: A Case Study in Ministerial Resistance to the Impact of European Community Law” (1997) 60(1) *The Modern Law Review* 23
- Rawls, J, “Justice as Fairness” (1958) 67(2) *The Philosophical Review* 164
- Rawls, J, “Fairness to Goodness” (1975) 84(4) *The Philosophical Review* 536
- Russell, R and P Mudd, “The EAT Upholds the Rescue Culture: will the Government do the Same?” (2009) 2 *Corporate Rescue and Insolvency* 61
- Sargeant, M, “Business Transfers and Corporate Insolvencies – the Effect of TUPE” (1998) 14(1) *Insolvency Law and Practice* 8
- Sargeant, M, “More Flexibility for Insolvent Transfers- the Amended Acquired Rights Directive” (1999) 15(1) *International Labour Review* 6
- Sargeant, M, “TUPE – the Final Round” (2006) September *Journal of Business Law* 549
- Schmitthoff, C, “The Unification of the Law of International Trade” (1968) *Journal of Business Law* 106
- Scott, CA, “Money Talks: The Influence of Economic Power on the Employment Laws and Policies in the United States and France” (2006) 7 *Sand Diego International Law Journal* 341

- Sgard, J, "On Market Discipline: Bankruptcy, Debt Discharge and Renegotiation in England and France (17th - 19th Century)" (2007) ISNIE Annual Conference, Reykjavik
- Sorensen, Z, "France: Storms Gathering fort Restructuring Group Entities Underscore Need for Up-to-Date Advice" (2015) *Electronic Newsletter of INSOL International*
- Streeck, W, "Neo-Voluntarism: A New European Social Policy Regime" (1995) 1(1) *European Law Journal* 31
- Stuart, RS, "A 'De Profundis' for Christian Socialism" French Marxists and the Critique of Political Catholicism, 1882-1905" (1999) 22(2) *French Historical Studies* 241
- Szysczak, E, "Future Directions in European Social Policy Law" (1995) 24(1) *Industrial Law Journal* 29
- Tetley, W, "Mixed Jurisdictions: Common Law vs Civil Law (Codified and Uncodified)" (1999) *Uniform Law Review* (NS)
- Trubek, D and L Trubek, "Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Coordination"(2005) 11(3) *European Law Journal* 345
- Tucker, E, "Renorming Labour Law: Can We Escape Labour Law's Recurring Regulatory Dilemmas?" (2010) 39(2) *Industrial Law Journal* 99
- Vis, B, K van Kersbergen and T Hylands, "To What Extent Did the Financial Crisis Intensify the Pressure to Reform the Welfare State?" (2011) 45(4) *Social Policy & Administration* 338
- Vlandas, T, "The Politics of Temporary Work Deregulation in Europe: Solving the French Puzzle" (2013) 41 *Politics & Society* 425
- Warren, E, "Bankruptcy Policy" 54 *University of Chicago Law Review* 775
- Lord Wedderburn of Charlton, "The Social Charter in Britain: Labour Law and Labour Courts?" (1991) 54(1) *The Modern Law Review* 1
- Wyffels, C, "L'Usure en Flandre au XIIIème Siècle" (1991) *Revue Belge Philologie et d'Histoire* 855
- Wynne-Evans, C, "TUPE and Mothballs: Crystal Palace FC Limited and Another v Kavanaugh and Others" (2014) 43(2) *Industrial Law Journal* 185
- Zimmerman, R, "Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science", (1996) 112(Oct) *Law Quarterly Review* 576

ANNEX 1: SURVEY RESPONSES

Insolvency Practitioners from the United Kingdom

Responses to Questions 1-3

Questions	English Responses
	17
	YES
1. Have you or your firm been involved in any business rescue procedures in which business transfer negotiations have been put at risk of failure due to the transfer of employment contracts occurring under [the ARD]?	82%
	NO
	18%
	YES
2. Have you or your firm been involved in any business rescue procedures in which business transfer negotiations have failed owing to the application of [the ARD]?	59%
	NO
	41%
	YES
3. In your experience generally, have TUPE transfers had an adverse impact on the rescue of businesses?	53%
	NO
	47%

Please note that only those respondents who answered the question are listed below for questions 5-8.

Q4: Can you offer any specific (anonymised) examples of the effects TUPE on the outcomes of business transfer negotiations?

R1: A business that had been trading for 40 years with a significant amount of loyal and experienced staff was a failed rescue on the basis of the liabilities contained within the

contracts of employment. This created a liquidation with a significant cost to public funds through the Redundancy Payments Service.

R4: No but generally a discount is necessary to reflect the acquisition of accrued employee rights.

R5: Overseas business looking to acquire failing UK motorsport business. Was not prepared to take on workforce and so pulled out of negotiations.

R6: Retail operator rescues have mean the most obvious cases I have been involved with where TUPE transfers have had detrimental impacts on the outcomes for creditors and proven the most problematic to overcome and secure a business transfer and rescue. Buyers from an insolvency do not want to just inherit the entirety of the business where it operates from a number of retail locations, where some locations are loss-making and part of the reason for business distress. They have wanted to rescue the viable operations and locations. The risk that all employees, from all locations, could have transferred under TUPE has led to significantly detrimental impacts on price, leading to a lower return to creditors including employees who could not be kept on. The cases I have been involved in have resulted in a much lower price, albeit the businesses were successfully transferred, but without helping keep the jobs of affected employees and still being detrimental to creditors, so no-one really gained from the issue. I have had other cases where administration rescue has been ruled out as a strategy, in favour of liquidation, because of the burden of TUPE transfer costs of employees for buyers interested in the business assets.

R7: A purchaser of a business will discount the fair value of the assets to meet the TUPE liability. As a consequence, existing lenders to a business do better if the business is closed, employees made redundant and the assets sold piecemeal.

R8: I cannot. The firm has had many examples but I am not personally involved in them. The general effect is that the purchase price is reduced (or an amount of it placed in escrow) to allow for the likelihood of TUPE claims. Clearly this can reduce the return to creditors.

R9: £50k pre-pack but TUPE liability (mainly family not to be involved in newco) circa 100k. Deal collapsed.

R11: I can think of a case where the workforce was made redundant following the failure of negotiations to sell to a scaled down version of the trading business due to TUPE concerns.

R16: When negotiating with government bodies, they often believe that TUPE does not apply to them.

R17: Reduction in purchase price as redundancies were required short term. This meant there was less return to creditors.

Q5: Given the state of case law in this area and the view of the courts and tribunals that business transfers occurring out of administration procedures and pre-packs in particular will draw the application of TUPE, do you or your firm have a strategy for reducing the impact of the transfer of employment contracts and other protective employment regulations on business transfers occurring out of business rescue procedures? If so, what is your strategy?

R1: No. Strategy in this area may attract liability and the problem remains with the purchaser or, if the rescue fails, the creditors and the state. It is not for the professionals to engineer a bending of the rules.

R4: Careful consideration of whether liquidation is a realistic alternative. Generally it is not because of the need for a non-trading period and the consequent loss of goodwill.

R6: Our advice is to consult so far as is reasonably practicable, within the time and resources available, and ensure key stakeholders' expectations of net returns reflect the reality and risks, costs and price implications associated with TUPE transfers.

R7: Consult as early as possible and use compromise agreements for high earning employees who are not transferring.

R8: Our strategy is to minimise the likelihood of claims. However, you should note that UK law is contradictory in this area and in particular it is not possible always to consult for the recommended time as there are insufficient funds to pay employees for that length of time.

R9: Pre-pack liquidation. Try and compromise employees not to be transferred out. Reduce sale consideration.

R10: Key problem is currently notice periods for consultation, and linking that with obligations under pre-pack legislation. Current strategy is to 'do the best we can', but given that it is rare for an insolvency process to be used purely to cut staff numbers, and given that most IPs seek to maximise the benefits for all creditors, TUPE and other protective legislation are an unnecessary distraction in the heat of insolvency planning.

R14: In some cases, companies have been put into liquidation to avoid the TUPE implications. The liquidator might then sell the assets to a purchaser who takes his chances with the former employees.

R17: We make every effort to assist the Company inform and consult.

Q6: Are there any jurisdiction specific arguments for or against the application of TUPE in business rescue situations?

R4: No. The principle of protecting employee rights should be maintained.

R6: Not that I am aware of.

R8: The UK needs to recognise that, having refused to take advantage of the insolvency exemption in the EU legislation, it is now in a position where two different laws conflict. TUPE should be relaxed in insolvency situations.

R11: Yes, I think there are. Different European Jurisdictions provide for employee rights in an insolvency situation in different ways and the conflict between employment and insolvency law in the UK provides insolvency practitioners with real problems, and is contrary to the rescue culture.

Q7: Is there anything else in the British context that distinguishes the application of employee acquired rights provisions in those particular jurisdictions from others?

All skipped, was not aware or referred to previous responses.

Insolvency Practitioners from France

Questions	French Responses	6
1. Have you or your firm been involved in any business rescue procedures in which business transfer negotiations have been put at risk of failure due to the transfer of employment contracts occurring under [the ARD]?	YES	100%
2. Have you or your firm been involved in any business rescue procedures in which business transfer negotiations have failed owing to the application of [the ARD]?	YES	100%
3. In your experience generally, have TUPE transfers had an adverse impact on the rescue of businesses?	YES	50%
	NO	50%

Q4: Est-ce que vous avez une stratégie en réduisant l'impact du transfert des contrats de travail ou d'autres réglementations visé à protéger les travailleurs sur les transferts d'entreprises envisagés pendant des procédures de sauvetage d'entreprise ? Si vous l'avez, qu'est qu'il est ?

R1: Difficile de contourner les dispositions légales En plan de cession, on peut réduire le nombre de postes de salariés repris et les droits sont pris en charge à la date de jouissance, sauf exception acceptée et pour des montant pouvant être plafonnés.

R3: Les procédures collectives favorisent la restructuration de l'entreprise, car le motif économique du licenciement est difficilement contestable et le fonds de garantie des salaires peut prendre en charge le coût des indemnités de rupture et en faire l'avance à l'entreprise. En liquidation judiciaire, le plan de cession (art L 642-1 et suivant du code de commerce) est dérogatoire de l'article L 1224-1 du code du travail. Il n'est pas imposé au repreneur, le transfert de tous les contrats de travail. En effet, la cession d'entreprise a pour but d'assurer "tout ou partie " des emplois. Ainsi le liquidateur procèdera au licenciement des salariés dans le mois du jugement qui arrête la cession de l'entreprise. Le législateur fixe des objectifs à savoir la pérennité de l'activité, le maintien de l'emploi et l'apurement du passif. Le tribunal apprécie au regard de ces critères, l'offre la meilleure.

R4: Seule la négociation collective permet de sécuriser les transferts et les restructurations. Mais le maintien de tous les droits conduits de fait à plus de suppression de postes. Il y a des domaines et secteurs où les contraintes sont plus lourdes que dans d'autres. La critique n'est donc pas sur tous les secteurs. Les plus critiques sont liés à l'absence d'appréciation des critères sur le bassin d'emploi et non sur tout le pays. Le secteur des entreprises de journalistes est très difficile en raison de leur statut privilégié.

R5: Avec le consentement mutuel de toutes les parties prenantes.

R6: Les articles L 1224-1 et L 1224-2 du code du travail sont considérés d'ordre public. Ils s'imposent au nouvel employeur après le transfert de l'entreprise et s'imposent aussi aux salariés.

En cas de procédure d'insolvabilité, ils s'appliquent aussi pour le cas où la procédure est une procédure de sauvegarde avant cessation des paiements (car cette procédure ne prévoit pas une cession de l'entreprise) (*). Le maintien des contrats de travail est écarté si la procédure ouverte est une procédure de redressement judiciaire ou de liquidation judiciaire : le transfert des contrats de travail est ici subordonné au choix du tribunal de commerce entre les offres de reprise.

L'article L 1224-1 du code du travail ne s'applique pas ; il est écarté au profit des règles propres du code de commerce sauf certaines règles de consultation du comité d'entreprise et de l'administration (C com., art L 642-5).

La question des emplois est prise en compte comme un élément du choix du tribunal parmi d'autres éléments : le montant du prix offert pour les actifs cédés, le maintien d'une activité sur le site, le caractère total ou partiel de la reprise, le transfert des contrats de fourniture (contrats de location, leasings, contrats de prêts, contrats d'abonnement...), le nombre de contrats de travail conservés (pour les offres, voir C com., art L 642-2).

Cela conduit à une évaluation globale des offres (pour les critères du choix du tribunal, voir C com., art L 642-5).

Les contrats de travail sont donc transférés dans la limite des offres. Ils s'imposent alors au nouvel employeur, y compris pour les avantages acquis (en cas de licenciement ultérieur, les indemnités sont calculées en fonction de l'ancienneté).

Les autres salariés (non compris dans le plan de cession) sont licenciés par l'administrateur judiciaire (dans une procédure de redressement judiciaire) ou par le liquidateur (dans une procédure de liquidation judiciaire) (sur les licenciements, voir C com., art L 642-5 al 4).

Q5: Sont-ils des argumentations parmi des praticiens contre l'application des droits maintenus des travailleurs aux transferts d'entreprise qui sont faits pendant les procédures de sauvetage, en plus des dérogations concernant l'insolvabilité qui sont déjà existant sous les codes légaux domestique ?

R1: Les argumentations contre le droit positif sont inutiles. La procédure applique les textes en vigueur.

R3: Aujourd'hui, le praticien doit toujours se poser la question suivante: la cession d'actifs doit-elle s'opérer dans le cadre d'une cession d'actifs de gré à gré autorisée par ordonnance du juge commissaire conformément aux dispositions des articles L 642-18 et L 642-19 du code de commerce ou dans le cadre d'une cession d'entreprise en application des dispositions de l'article L 642-1 dudit code ? Dans l'hypothèse d'une cession d'entreprise, quelles sont les incidences de ce jugement de cession à intervenir sur la procédure de licenciement initiée et sur le sort des contrats de travail des salariés qui seraient repris par le cessionnaire. 1- Rappel des dispositions légales et jurisprudentielles sur la cession d'entreprise intervenant dans le cadre d'une liquidation judiciaire et la remise en cause des licenciements opérés antérieurement à la cession La problématique des cessions d'unités de production dument autorisées par le juge commissaire a donné lieu à une jurisprudence abondante et ancienne de la Chambre sociale de la Cour de cassation qui estime les licenciements pour motif économique notifiés par le liquidateur antérieurement à la cession, dépourvus d'effet car notifiés en violation des dispositions d'ordre public de l'article L 1224-1 du Code du travail. Le fondement juridique de ces décisions est le suivant : une telle cession autorisée par le juge commissaire emporte transfert de plein droit d'une entité économique autonome dont l'activité est poursuivie ou reprise et en conséquence, la poursuite chez le cessionnaire de l'ensemble des contrats de travail attachés à l'entité cédée, rendant sans effet les licenciements notifiés antérieurement. Le salarié dont le licenciement est dépourvu d'effet peut au choix, demander la poursuite de son contrat de travail chez le cessionnaire ou au contraire, demander réparation au liquidateur pour le préjudice né d'un licenciement dépourvu d'effet (Arrêt Maldonado du 20 mars 2002). L'arrêt Voisin a restreint l'option du salarié sous certaines conditions : la poursuite du contrat de travail s'impose à lui si « le cessionnaire l'informe, avant l'expiration du préavis, de son intention de poursuivre, sans modification, le contrat de travail » (Cass. Soc. 11 mars 2003 bull civ, 2003, V, n°86). L'arrêt de la chambre sociale de la cour de cassation en date du 19 novembre 2008 emploie une formule plus large « avant la fin du contrat rompu par le licenciement ». Cette jurisprudence a été confirmée depuis lors notamment au terme d'un arrêt en date du 4 mai 2011 (Cass. Soc. 4 mai 2011, Droit Social, p 997) qui n'exige pas que cette information soit réalisée exclusivement par le cessionnaire, le liquidateur pouvant tout aussi bien informer le salarié de la poursuite de son contrat de travail chez le cessionnaire. Les cessions d'actifs autorisés par le juge commissaire ne permettent pas de sécuriser la procédure, cédant et cessionnaire dans la mesure où il n'existe aucune dérogation permettant de déroger aux dispositions de l'article L 1224-1 du code du travail et le juge commissaire n'ayant pas qualité pour autoriser le licenciement du personnel non concerné par la reprise (Cass. Soc. 11 octobre 2006, n°04-45212 rappelant que le juge commissaire n'a pas ce pouvoir). Les dispositions de la loi de sauvegarde ont partiellement résolu cette problématique en permettant, dans le cadre d'une liquidation judiciaire avec poursuite d'activité autorisée, la mise en œuvre d'une cession d'entreprise homologuée par le Tribunal, dont le jugement, conformément aux dispositions de l'article L642-5 et R 642-3 du Code de commerce, autorise le licenciement du personnel non repris, permettant ainsi de déroger aux dispositions de l'article L 1224-1 du Code du travail. En pratique, le plan de cession n'est pas toujours

possible, car la poursuite d'activité est parfois impossible. Dans cette hypothèse les dispositions de l'article L 1224-1 du code de travail sont un véritable obstacle à la reprise du fonds de commerce et poussent le liquidateur ou le repreneur à renoncer au projet.

R4: non je suis favorable au maintien des droits acquis mais à avoir une procédure de restructuration qui soit plus en phase avec les besoins économiques et non avec les statuts protégé individuel

Q6: Y at-il des arguments spécifiques de juridiction en supportant ou contre l'application des droits maintenus des travailleurs dans les cas de sauvetage des entreprises ?

R5: la difficulté est la double contrainte : non seulement le maintien des droits acquis mais surtout l'impossibilité de parvenir à une liste qui soit compatible avec le besoin (pbe des champs d'application des restructurations et des critères.) pour le maintien: gage de sécurité et d'adhésion pour les travailleurs.

R6: Le maintien des droits des salariés est lié à l'ordre public social et économique. La garantie des droits des salariés limite les pertes d'emplois et maintient le pouvoir d'achat des salariés concernés.

Le transfert des entreprises qui serait ordonné sans un transfert des contrats de travail serait un facteur de fraude; la nouvelle société peut être une société créée pour poursuivre l'activité par les dirigeants de l'ancienne société. A l'inverse, le caractère obligatoire (d'ordre public) du maintien des contrats de travail limite la possibilité d'offres concurrentes sérieuses.

Dans les faits, le transfert obligatoire des contrats de travail entraîne une diminution du montant des offres de prix par les candidats à la reprise.

Enfin le transfert obligatoire des contrats de travail constitue parfois un facteur d'insécurité juridique pour le cessionnaire : les coûts réels (des licenciements nécessaires) sont révélés tardivement, ce qui peut constituer un aléa économique plus élevé.

Q7: Avez-vous aucune chose à ajouter concernant le système Français et son approche aux droits maintenus des travailleurs qui est distinct par rapport aux autres juridictions?

R1: Le système français est protecteurs des droits des salariés. Il peut être détourné comme une arme par certains d'entre eux. Il peut être utilisé comme un instrument de motivation dans la reprise par d'autres. L'approche dépend de la prise en compte du facteur humain dans le redressement de l'entreprise, en fonction de son activité.

R5: trop de lourdeur pour la mise en place des procédures de restructuration (notamment applications des critères, contraintes géographiques, cout des pse, pouvoir de blocage des institutions du personnel (trop nombreuses).)

R6: Le niveau élevé de garantie des salaires impayés en cas de licenciement est un facteur favorable au sauvetage.

La différence entre la procédure de sauvegarde (avant cessation des paiements) et les procédures de redressement et de liquidation judiciaire (en cas de cessation des paiements) est justifiée : elle a pour but d'éviter que la procédure de sauvegarde soit utilisée comme un moyen d'écarter l'application des règles de protection.

Par contre, l'obligation de chercher une solution de reclassement des salariés, qui s'impose à l'administrateur judiciaire et au liquidateur, est négative.

Les formalités sont également trop importantes.

Le rôle de l'administration peut aussi constituer un facteur de frein pour le transfert de l'entreprise. La consultation de l'administration est une formalité obligatoire. Son autorisation est, de plus, imposée pour le licenciement des salariés bénéficiant d'un statut protégé (représentants du personnel et délégués syndicaux).

Comme complément aux questions précédentes, l'impact négatif des droits des salariés est variable selon la procédure ouverte.

Si la procédure ouverte offre une solution de continuité (if the company is rescued as a going concern), les droits des salariés imposent de limiter les licenciements économiques de rechercher une solution de reclassement dans l'entreprise, dans le groupe ou à l'extérieur du groupe et d'indemniser les salariés licenciés.

Si la procédure prévoit la cession de l'entreprise insolvable, les inconvénients sont moins importants : l'entreprise est cédée à un candidat qui fait une offre contenant les contrats de travail qu'il pense possible de conserver en fonction du développement de son activité. Les autres salariés sont licenciés et indemnisés. Le précédent employeur étant insolvable, le coût n'est pas pour l'entreprise mais pour le fonds de garantie (AGS).

Enfin, lorsque l'entreprise est importante (150 salariés ou 20 millions € de chiffre d'affaires, C com., art L 626-29 et R 626-52), des comités de créanciers sont constitués : ils sont consultés sur les offres.

Pour réduire l'impact négatif du transfert des contrats travaille plusieurs solutions sont possibles dans les limites du droit positif que de commerce et code du travail : limiter les obligations de reclassement aux véritables possibilités existant jurisprudence consultées les créanciers autorisent le tribunal a dérogé au caractère obligatoire des transferts.