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# Convergence of Social Policy, Employment and Labour: The European Equation

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## Introduction

Labour and employment regulation is a complex and ever changing area of the law fed by social and economic policy, politics, external and internal pressures, and cultural influences. In isolation, labour regulation is particular to the country in which it is found. However, in a world growing smaller due to globalisation,<sup>1</sup> the differences in labour regulation between jurisdictions can become an issue in cross-border business transactions and may even affect a multi-national company's choice of investment. The flexibility of labour regulation can affect the attractiveness of a jurisdiction, as evidenced by the outsourcing of labour intensive sectors of many corporations to developing countries which lack the expense of protective labour regulation and benefit from a cheaper labour force.<sup>2</sup>

Legal systems within the EU have been on a process of slow convergence since the 1950s. However, in examining legal systems with a view to determining their core similarities, some exhibit areas of convergence while other aspects remain quite different.<sup>3</sup> Even when comparing those systems that are similar, there remain distinctive characteristics distinguishing one from another. There are differences that seem irreconcilable even within legal groups such as those jurisdictions adhering to the common law or civil law systems. While certain rules and solutions may seem alike, legal cultures and traditions can differ significantly,<sup>4</sup> leading to fundamental differences in approach to regulation and policy initiatives. These differences in approach are influenced by aspects of culture and history which cannot easily be separated from the legislative process. Convergence therefore becomes more difficult with culture bound areas of the law, such as labour and employment.<sup>5</sup>

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<sup>1</sup> S Milner, "Globalisation and Employment in France: between Flexibility and Protection?" (2001) *Modern and Contemporary France* 327.

<sup>2</sup> J McMullen, "International Outsourcing and Transnational Transfers of Undertakings – a UK Perspective" (2005) 26(10) *Comp Law* 296.

<sup>3</sup> A Zimmer and S R Smith, "Social Service Provision in the US and Germany: Convergence or Path Dependency?" (2014) 23(1-2) *German Politics* 1.

<sup>4</sup> E Örüçü, "Looking at Convergence through the Eyes of a Comparative Lawyer" (2005) Volume 9.2 *European Journal of Comparative Law* 4-7.

<sup>5</sup> R Zimmermann, "Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science" (1996) 112(Oct) *LQR* 576.

EU social policy has aimed to harmonise standards based on a minimum floor of rights<sup>6</sup> to a level which is more reflective of what is present in the more socially progressive countries, such as France. However, lack of concrete EU wide definitions have made coordination in social policy difficult. Though similar terms to describe elements of procedure may be used, the ideologies and policies informing the objectives of those procedures create a barrier to mutual understanding and an obstacle to coordinated action. The question remains then as to how it may be possible to find a means of coordinating the law in order to create a more balanced environment for cross border business. In discovering the influences on the aims of socially oriented regulation, it may be possible to identify areas where coordination and perhaps convergence may be realistically attempted and to work around those areas in which the different social aims make such convergence impossible or at least improbable in the near future.

In order to attempt an alignment of labour systems in the EU, which of itself is a potentially unrealistic suggestion, at least in the current political climate and particularly following the United Kingdom's referendum outcome and pending exit from the EU, an understanding of the fundamental values which have influenced a country's approach to employment law and social policy is vital. Any EU level coordination would require diplomacy and compromise, a full knowledge and understanding of the elements of the systems being the most important tool to guide any such process. Though the current political crisis of 2016 gives little hope toward this end, an understanding of the underlying factors that influence jurisdictional approaches to social policy and employment law may be a useful exercise in the event that the crisis is resolved and harmonisation, or at least a managed convergence, again becomes an aim of EU social policy.<sup>7</sup> To this end, an analysis of the historical context of labour regulation and the working classes will reveal much about the fundamental values upon which labour systems and employment regulation are based, and the differences between them. A typically top-down technical analysis would only expose a positivist view of the law,<sup>8</sup> isolated from its constituent parts without which it would not exist in its current form. The comparative perspective presented is not only useful for the development of solutions, but also for the discovery of other alternatives.<sup>9</sup> This unique methodology could then be relied upon as a means finding a path to greater coordination by attempting to align systemic values in the future, should the EU survive the political turmoil that has engulfed 2016.

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<sup>6</sup> B Hepple, "New Approaches to International Labour Regulation" (1997) 26 ILJ 353.

<sup>7</sup> M Daly, "EU Social Policy after Lisbon" (2006) 44(3) JCMS 461.

<sup>8</sup> H L A Hart, "Positivism and the Separation of Law and Morals" (1958) 71(4) HLR 593.

<sup>9</sup> Lord Wedderburn of Charlton, "The Social Charter in Britain: Labour Law and Labour Courts?" (1991) 54(1) MLR 35.

### **Path Dependency and Understanding Obstacles to Convergence**

Historically, societal divergence can be simply explained. Pockets of tribal groups, isolated from other groups, confronted different problems with dissimilar access to resources, individual skill-sets and human capabilities, and in different climates. The result of these differing circumstances can be seen in the different solutions to the shared problem of survival, which came to include different languages, customs, traditions, and taboos. There is no reason to believe that such differences would not eventually come to converge over time as these pockets became less isolated. However, such convergence has not occurred, as is abundantly clear if one observes the conflicts still inherent in the world today. Civilisation, despite an immense decline in the cost of information and despite the implication of trade and economic theories that suggest convergence should occur in the modern context, there remains a significant contrast between the social, economic, and political institutions of modern and developing states alike.<sup>10</sup> Such continued divergence can be explained by reference to the path dependency of the institutions involved.

Often used as an alternative to conventional economic theory, which tends to avoid the consideration of increasing returns, path dependency embraces the concept of positive feedback<sup>11</sup> as a means of explaining the difficulty that tends to face institutional changes. In economics, history provides a tool for understanding what rationality and efficiency cannot explain about human behaviour, where traditional economic theory fails.<sup>12</sup> Path dependency makes it possible to explain slow, incremental changes that are difficult to see unless viewed through a lens of history because some changes, particularly those at the margins, tend to be glacial in character, contrasting with the perceived rapidity of institutional change occurring in the modern world.<sup>13</sup> Current entrenched legal positions, such as those relating to social policy in European jurisdictions, are difficult to change and harmonise because of the long road upon which those policies journeyed to arrive at their current status. This can also explain in part why the EU did not make harmonisation of social policy a central aim of its founding.

Path dependency was developed as a theory to explain the rules, or institutions, which govern society and how those institutions change over time, shaping the way in which societies evolve.<sup>14</sup> Institutions that can be explained by reference to their historical context include conventions, codes of conduct, norms of behaviour, statute law, the common law, contracts between individuals, and many others.<sup>15</sup> Together, these institutions provide the rules for the game of life. They define the constraints devised by the human condition that shape human interaction.<sup>16</sup> Thus law as an

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<sup>10</sup> D G North, *Institutions, Institutional Change, and Economic Performance* (CUP 1990) 92.

<sup>11</sup> W B Arthur, "Positive Feedback in the Economy" (1990) 262(February) *Scientific American* 92.

<sup>12</sup> S J Leibowitz and S E Margolis, "Path Dependence, Lock-in, and History" (1995) 11(1) *JLEO* 205.

<sup>13</sup> North, n11, 6.

<sup>14</sup> *Ibid.*, 3.

<sup>15</sup> *Ibid.*, 6.

<sup>16</sup> D G North, "A Transaction Cost Theory of Politics" (1990) 2(4) *Journal of Theoretical Politics* 355.

institution is also a product of its historical context in the same way that current economic trends are. Over time, certain institutional characteristics become historically “locked in,”<sup>17</sup> which can explain why certain inefficient institutions remain in place if over time they have led to increasing returns in society.<sup>18</sup> The path of institutional, or legal change in this instance, that determines its long term evolution is a product of the constraints derived from the past and the often unanticipated consequences of the many incremental choices made within a legal system that slowly modify those constraints.<sup>19</sup>

The use of path dependency as a theory to explain legal institutions also affords an opportunity to examine and appreciate the history of legal systems. Certain aspects of history become important because a sequence of events can determine current values, thus the history relied upon is selective as well. Where a sequence of events does not tend to affect the end result, there is no place for history in the path dependent analysis. Rather, it is a mere carrier or deliverer of the inevitable.<sup>20</sup> Thus, as a methodology, it requires an enormous and in-depth exploration of the history leading up to the current legal position of a particular characteristic of a legal system. Only after a broad reading can the precise historical sequence be identified that explains the current position.

Path dependence has been used in relation to economics,<sup>21</sup> politics,<sup>22</sup> and sociology<sup>23</sup> and has been both broadly and strictly defined depending on its usage. It has been described as meaning “that what happened at an earlier point in time will affect the possible outcomes of a sequence of events occurring at a later point in time.”<sup>24</sup> Essentially, history matters. This broad conception of path dependence does not offer that useful an analytical tool, however. A narrower definition was given by Margaret Levi:

“Path dependence has to mean, if it is to mean anything, that once a country or region has started down a track, the costs of reversal are very high. There will be other choice points, but the entrenchments of certain institutional arrangements obstruct an easy reversal of the initial choice.”<sup>25</sup>

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<sup>17</sup> W B Arthur, “Competing Technologies, Increasing Returns and Lock-In by Historical Events” (1989) 99 *Economic Journal* 116.

<sup>18</sup> Leibowitz and Margolis, n13.

<sup>19</sup> North, n17.

<sup>20</sup> Leibowitz and Margolis, n17.

<sup>21</sup> P Krugman, “History and Industry Location: The Case of the Manufacturing Belt” (1991) 81(May) *American Economic Review* 80 and B A Arthur, *Increasing Returns and Path Dependence in the Economy* (University of Michigan Press 1994).

<sup>22</sup> See for example, D North, n11 and n17.

<sup>23</sup> W H Sewell, “Three Temporalities: Toward an Eventful Sociology” in TJ McDonald (ed) *The Historic Turn in the Human Sciences* (University of Michigan Press 1996).

<sup>24</sup> *Ibid.*

<sup>25</sup> M Levi, “A Model, A Method, and a Map: Rational Choice in Comparative and Historical Analysis” in M I Lichbach and A S Zuckerman (eds), *Comparative Politics: Rationality, Culture, and Structure* (CUP 1997) 19-41.

Path dependence for the purpose of this article will be used to refer to social processes that exhibit positive feedback and generate branching patterns of historical development.<sup>26</sup>

The theory of path dependency has only recently has been applied to law<sup>27</sup> as compared to its longer history in other social sciences. Given the political, economic, and social context within which legal systems are situated, it is only logical that path dependency should also be applicable. According to Richard Posner, law is 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 its history.<sup>28</sup> The characteristic gerontocracy of the profession relies upon ingrained attitudes that are obstacles to any attempt to reorient the law to a more pragmatic, coordinated, and efficient direction.<sup>29</sup> The fundamental dependence of the law on its history is evident in how precedent functions in common law systems, exemplified by the UK and US in this treatise.<sup>30</sup> 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.

A comparative legal historical analysis such as the methodology espouses will benefit in the application of path dependency theory as it will not only explain how things differ, but in effect, why they differ as well. This is an important value to add to such an analysis as it may offer a means of projecting how reforms might be received and, indeed, effected in the future of a jurisdiction, which in the event it again becomes desirable, may lead to a more successful push toward convergence or harmonisation in the EU.

### **EU Social Policy and Harmonisation**

Social policy refers to the provision of services, income and protection for those citizens unable to or who are in a weaker bargaining position to support or protect themselves. The basis for social policies stem from human rights protected by the EU and national court systems and the social ills they are aimed to resolve. Though the background to social policy is universal, the level and form of investment in these matters vary from country to country.<sup>31</sup> Until the turn of the millennium, social

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<sup>26</sup>P Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton University Press 2004) 20.

<sup>27</sup>OA Hathaway, "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System" (2000) 86 *Iowa Law Review* 601 and J Bell, "Path Dependence and Legal Development" (2012) 87 *Tulane Law Review* 787.

<sup>28</sup>RA Posner, "Past-Dependency, Pragmatism and Critique of History in Adjudication and Legal Scholarship" (2000) 67(3) *The University of Chicago Law Review* 573-606, 573.

<sup>29</sup>*Ibid.*

<sup>30</sup>OA Hathaway, "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System" (2000) 86 *Iowa Law Review* 601-665, 601.

<sup>31</sup>P Kettunen and C Wolff, "Europeanisation through the Back Door: EU Social Policy and the Member States" (2010) 47(5) *Politicka misao* 146.

policy was viewed as a poor relation in the process of European integration. The Treaty of Rome merely exhorted the Member States to improve working conditions and standard of living for workers without actually conferring any rights on the workers themselves.<sup>32</sup> The initial view was that economic integration itself would ensure an optimum social system through the removal of obstacles to free movement.<sup>33</sup> The Spaak report drawn up prior to the Treaty of Rome rejected the idea of trying to harmonize social policy within the Community because it was thought that as higher costs tended to accompany higher productivity, the differences between countries were not as great as they appeared.<sup>34</sup> In the early days of the EU, the absence of a clearly identifiable Community social policy can be explained by the fact that social policy and labour law lay at the heart of the sovereignty of Member States and were viewed as a means of preserving their integrity and political stability.<sup>35</sup>

By the 1970s the social dimension of the EU had begun to grow in importance, recognising that a philosophy of economic growth based on neoliberal ideology was not capable of addressing the social problems consequential to economic integration.<sup>36</sup> 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.”<sup>37</sup> The Social Action Programme<sup>38</sup> of 1972 introduced a number of measures, creating the perception that a comprehensive market-correcting social policy at Community level had arrived.<sup>39</sup> The SAP proposed mandates in the areas of health and safety, minimum wages, working hours, employee participation and contract labour.<sup>40</sup> The resulting legislative activity culminated in the adoption of a number of Directives in the fields of sexual equality, health and safety, the transfer of undertakings and insolvent employers.<sup>41</sup> Social policy became a dichotomy, combining market led employment regulation with some recognition of its market-correcting function.<sup>42</sup> While it could be that these market-correcting elements were unintended consequences of legislation aimed at eliminating distortions in competition, their

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<sup>32</sup> “The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, *an increase in stability and accelerated raising of the standard of living*, and closer relations between the States belonging to it.” Article 2 The Treaty of Rome of 25 March 1957 (emphasis added).

<sup>33</sup> Brussels Report on the General COMMON MARKET, Information Service High Authority of the European Community for Coal and Steel Luxembourg, June 1856 (the Spaak Report).

<sup>34</sup> C Brewster and P Teague, *European Community Social Policy and its Impact on the UK* (Institute of Personnel Management 1989) 52.

<sup>35</sup> W Streeck, “Neo-Voluntarism: a new European social policy regime?” (1995) 1 ELJ 31.

<sup>36</sup> C Barnard, *EC Employment Law* (3<sup>rd</sup> edn, OUP 2006) 8-21.

<sup>37</sup> EC Bulliten 10/1972 para 6.

<sup>38</sup> Hereafter referred to as the “SAP”.

<sup>39</sup> Streeck, m36, 42.

<sup>40</sup> J T 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 PR 01-09 3.

<sup>41</sup> Barnard, n37, 9.

<sup>42</sup> *Ibid*, 53-54.

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social relevance is evident. However, the Commission's successes in these areas were overshadowed by its failures; its proposals simply strayed too far from national practices in many member states<sup>43</sup> to expect effective implementation.

In the 1980s, the UK government objected to the interference with its sovereignty which European social policy represented. The ruling UK Conservative party was in favour of labour market deregulation to ensure maximum labour market flexibility and maintained a minimalist 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. 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, 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.<sup>44</sup> 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.<sup>45</sup>

While the European Commission recognised the need for a flexible workforce, it refused to compromise on its commitment to safeguard the rights of employees. The UK was able to impede the will of the Commission as social policy measures required unanimity at that time. This was to change with the introduction of the Single European Act in 1989 when the UK ceded ground on the requirement for unanimity, accepting that qualified majority voting could be used in relation to health and safety and the gradual implementation of minimum standards.<sup>46</sup> The concession of the UK gave the Commission a means of circumventing the UK veto by passing a number of social policy initiatives under the umbrella of health and safety, despite British hostility toward EU social policy objectives.<sup>47</sup> 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 individualistic ends. Social policy might then become further fragmented with different laws applying to different jurisdictions with the resulting differences in law between Member States.<sup>48</sup> Essentially, the UK opt-out emasculated the EC competence and legitimacy to produce laws in this area.

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<sup>43</sup> Addison, n41, 4.

<sup>44</sup> B Hepple, "Social Rights in the European Economic Community: a British Perspective" (1989) 11 *Comp Lab LJ* 425, 435-437

<sup>45</sup> J Bell, "Path Dependence and Legal Development" (2012) 87 *Tul L Rev* 787.

<sup>46</sup> OJ L 169 of 29 June 1987 Single European Act (SEA).

<sup>47</sup> Barnard, n37, 12.

<sup>48</sup> *Ibid.*

Social policy was once again relegated to an ineffectual compromise.<sup>49</sup>

In 1991 the Commission sought to extend the qualified majority voting further into the field of social policy.<sup>50</sup> However, the UK's staunch objections to the social chapter required a political compromise in order to save the treaty as a whole. The social chapter was therefore left out of the main body of the Maastricht Treaty, placing it instead in a separate Social Policy Agreement and Social Policy Protocol, making it possible for the UK to opt out of its effects.<sup>51</sup> The existence of this "two track social Europe" was 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.<sup>52</sup>

The Treaty of Amsterdam then incorporated the provisions of the Social Chapter directly in 1997. It also created a new employment chapter which set a high level of employment as a central objective of the Community. In 1999 employment policy moved to the forefront of the agenda in the EU,<sup>53</sup> 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 would remain a domestic concern. However, once the EU had created the Common Market with a common currency, social policy in one country becomes relevant to other states as it can affect the integrity of the currency and the competitiveness of the larger trans-national market.<sup>54</sup>

The Treaty of Nice which came into effect in 2003 also provided for a fundamental development of social policy in the EU. In it the Community Charter of Fundamental Rights was adopted which provided a counterweight to the neo-liberal orientation of the treaties toward social policy and provides the Court with the jurisdiction to reconcile social and economic rights, at least to the extent that the scope of EU law will allow. It was hoped that this would also avoid States removing social rights as a means of improving their competitiveness within the market in what has been termed a "race to the bottom".<sup>55</sup> However, EU social policy remains within the domain of member states to determine, requiring unanimous decision making in areas falling under its definition.<sup>56</sup>

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<sup>49</sup> C A 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.

<sup>50</sup> OJ C 191 of 29 July 1992 Treaty on European Union.

<sup>51</sup> J Fairhurst, *Law of the European Union* (Pearson Education Limited 2010) 15.

<sup>52</sup> *Ibid*, 16.

<sup>53</sup> Addison, n41, 8-10.

<sup>54</sup> 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.

<sup>55</sup> Barnard, n37, 28-32.

<sup>56</sup> N Esenturk, "EU Social Policy: Progressive Development in Legal and Governance Aspects" (2010) UK Social Policy Association, <http://www.social-policy.org.uk/lincoln/Esenturk.pdf> accessed 17 November 2012, 2-3.

While true that the EU Treaties have so far left the competence to regulate social policy to the Member States,<sup>57</sup> since the Lisbon strategy of 2000 there has been a push to modernise the European social model by investing in human resources and combating social exclusion. However, these exhortations were lost in the financial crisis and member state adherence to their sovereignty over social policy has thus far triumphed.<sup>58</sup> Social institutions are also deeply embedded in each country's larger societal framework and history therefore cannot be easily amalgamated.<sup>59</sup> While the EU treaties have included an aim to harmonise and approximate labour laws among the member states, there are underlying structural constraints which limit the realistic and practical possibility of creating a uniform labour market within the common market. As labour laws are products of the social structures of particular countries, the obstacles to a harmonised labour market are endemic within each political system and thus difficult to overcome.<sup>60</sup> Diverse social policy regulation among the member states thus remains an obstacle to regulatory harmonisation or coordination in the EU. It will continue to be difficult to coordinate in socially oriented areas unless certain unique extra-legal historical, social, economic and regulatory jurisdictional factors are taken into account when approaching coordination.

#### **Different Attitudes Borne of Different Historical Experiences**

Changes in society during the middle ages present an initial suggestion of convergence in societies of the Western World. The decline in population owed to the Black Death in the fourteenth century altered the bargaining power of peasants relative to feudal lords, which led to incremental alterations over time, eventually becoming implicit in the contracts between them. While feudalism evolved over time to define the roles of lord and serf, a model that was difficult to completely dislodge and is still a shadowy presence in the modern employment relationship, incremental changes saw the reduction of that social inequality that may now only be intelligible in terms of the historical relationship. Competitive political forces and slowly changing mental constructs defining status combined to produce more efficient outcomes in terms of wealth and well-being, leading to the rise of Western Civilisation.<sup>61</sup> It is the relationship borne of the feudal system that evolved into the norms that now underpin modern employment and labour law.

Employment and labour law is an autonomous institutional phenomenon which influenced by public policy which is then translated into formal legislation.<sup>62</sup> Different jurisdictional policies lead to different forms of legislation or other

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<sup>57</sup> K-J Bieback, "Harmonisation of Social Policy in the European Community" (1991) 32(4) *Les Cahiers de Droit* 916.

<sup>58</sup> G Ross, "The Revenge of Neglected Issues: EU Founders and Social Policy" (2011) 29(2) *French Politics, Culture and Society* 95.

<sup>59</sup> Kettunen and Wolff, n32.

<sup>60</sup> B Hepple and P O'Higgins (eds), *The Making of Labour Law in Europe – A Comparative Study of Nine Countries* (1986) (Hart Publishing 2010) 5-6.

<sup>61</sup> North, n11, 96.

<sup>62</sup> S Deakin and W Njoya, "The Legal Framework of Employment Relations" (2007) Centre for Business Research, University of Cambridge, Working Paper no. 349, 3.

regulatory institutions. Public policies are in turn influenced by a number of historical, social, economic and political factors, affecting the approach taken to regulation. It is these diverse extra-legal factors and the idiosyncrasies of legal systems which can prevent the convergence. The progress and timing of industrialisation and the evolution of the industrial proletariat, the nature and evolution of the employment relationship, the characteristics of collectivism and trade unionism, and the fundamental aims of labour regulation all play a part in the character of labour and employment policy in different jurisdictions. A comparative examination of these areas will demonstrate how similarity of function will often hide differences in aim and approach, which in turn will affect the possibility of convergence due to the variance of values placed on social policy.

#### *Industrialisation and the Working Classes*

The countries of the European Union all underwent capitalist industrialisation at different times and under different political conditions during the eighteenth and nineteenth centuries. While there are many differences in the historical characteristics of the UK and France, some of the most significant and relevant differences emerged at the time of industrialisation in both systems.<sup>63</sup> 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. Liberal economics insisted on the free exchange of all factors of production, including labour, which can be seen as a commoditisation of the human being. This was eventually tempered to a certain degree by the introduction of the welfare state<sup>64</sup> as wage labour had become the means of subsistence for a large majority of the population.<sup>65</sup> The experience of industrialisation is an important turning point in French and British attitudes toward the working classes, collectivism and labour regulation. An understanding of the environment within which labour regulation evolved will be useful in order to determine the foundation upon which labour and employment laws have been built. Britain moved somewhat organically into an economically liberal mode by the early eighteenth century, while France struggled with revolution and autocracy until the end of the nineteenth century. 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 pressures. 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. France's process of industrialisation was less revolutionary, resembling a slow evolution of systems, processes and ideas. As late as the 1880s,

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<sup>63</sup> Hepple and O'Higgins, n61, 5-6.

<sup>64</sup> A system whereby the state undertakes to protect the health and well-being of its citizens, especially those in financial or social need, by means of grants, pensions and other benefits. The foundations for the welfare state in the UK were laid by the Beveridge report in 1942 which set out proposals such as the National Health Services, National Insurance Scheme, implemented by the Labour government in 1948.

<sup>65</sup> S Deakin and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford University Press 2005) 18-19.

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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 still relying on home craft work and the dispersion of industry in the rural areas. There was never massive and rapid transfer of manpower from agriculture in the countryside to industrial centres in the cities, which occurred in Britain a few decades after industrialisation had begun.<sup>66</sup>

Britain's early industrialisation allowed the modern business enterprise to emerge before the legal system could move beyond late medieval and early modern forms of legal regulation. In France, private law codes had been introduced decades before large scale industrialisation occurred during a period of slow growth when only small industrial enterprises were emerging. These differences had profound implications for both legal and economic development. In Britain, institutions had to hurry to catch up with the pace of industrialisation and evolved in order to suit its requirements while in France, institutions such as the employment contract and companies limited by share capital were created prior to the full thrust of industrialisation and were then able to support the emergence of large scale industrial enterprises.<sup>67</sup>

The proletariat which evolved in France was also 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 came from a diversified industrial proletariat issued from different socio-economic 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 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.<sup>68</sup>

*The Employment Relationship*

The late appearance of a more equitable concept of the employment relationship in the UK had the effect of institutionalising the conception of the enterprise as the employer's unencumbered property. The new economic relationship of employer and employee was based upon a concept of private property (capital) provided by the employer for the employee to be used in order to perform the services for which he is 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

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<sup>66</sup> M Despax, J Rojot and J-P Laborde, *Labour law in France* (Kluwer Law International 2011) 209-210.

<sup>67</sup> S Deakin, P Lele and M Siems, "The Evolution of Labour Law: Calibrating and Comparing Regulatory Regimes" (2007) 146(3-4) *Int'l Lab Rev* 133.

<sup>68</sup> Despax, Rojot and Laborde, n67, 210.

as for the tools and place of his trade.<sup>69</sup> Continental concepts of work relations imposed a juridical equality between worker and employer which was embodied in the legal codes. In France, the employer's control over employees was tempered by the development of mandatory social legislation.<sup>70</sup>

The British employment relationship was based on a master and servant model 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, who later became the working classes. The master and servant form of employment relationship relied upon a command relation with an open ended duty of obedience imposed on the worker, reserving far reaching disciplinary powers to the employer.<sup>71</sup> Even once the employment relationship had been given the status of contractual relationship imposing certain civil obligations, the hierarchical characteristic of the traditional master and servant model were carried over into the contractual employment relationship.<sup>72</sup> Legal terminology and the old assumptions of unmediated control continued to be applied by the courts as they developed the common law of employment. The advent of the welfare state and the extension of collective bargaining caused employment law to change direction, but the traditional hierarchy of employer and employee remained difficult to dislodge from the legal psyche.<sup>73</sup> While this has been tempered since the 1940s and given legal status following the introduction of the Employment Rights Act of 1996 as well as other more progressive employment oriented legislation, the master and servant approach is still evident in Britain's regulatory approach to employment law.<sup>74</sup>

The French employment relationship began with a similar approach to that of the UK. Labour contracts were initially grouped among other types of contracts thus also based on exchanges within the market, effectively commoditising labour by linking it with price through the institution of contract. In these early codes, the concept of the subordination of the worker was absent, though this concept would come to define the French employment relationship. The practical reality was that an employer had the power to give orders, issue binding rules, and even retain the worker in employment until the employer considered that the work was complete. The *contrat du travail* entered into general usage in the 1880s due to an argument by larger enterprises that a general duty of obedience should be read into all industrial recruitment. Eventually, the *contrat du travail* would be promoted and systematised by those charged with developing the conceptual framework for collective bargaining and worker protection. The *contrat du travail* would become

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<sup>69</sup> Hepple and O'Higgins, n61, 12-13.

<sup>70</sup> Deakin, Lele and Siems, n68.

<sup>71</sup> Deakin and Njoya, n63, 7.

<sup>72</sup> Lord Wedderburn of Charlton, "The Social Charter in Britain: Labour Law and Labour Courts?" (1991) 54(1) MLR 35, 6.

<sup>73</sup> Deakin and Njoya, n63, 7.

<sup>74</sup> Wedderburn, n73, 6.

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the core of the French employment relationship, the centre of which was a notion of subordination in which the employee's duty of obedience was exchanged for the acceptance and absorption by the enterprise of a range of social risks.<sup>75</sup>

*Freedom of Contract*

The British employment relationship is characterised to a greater degree by freedom of contract.<sup>76</sup> Britain places a value this which goes beyond a mere legal concept, taking it into the realm of a fundamental constitutional value which is to be interfered with only if absolutely necessary. The same fundamental anti-interventionist respect is not as heavily present in the French system.

Contractual terms such as good faith are implied in consumer and employment contracts in the UK; however, from a French civil law perspective, specific rules of law give expression to good faith and related notions. It is normal for French judges to intervene to control unfair or abusive contractual terms, which under the common law would constitute a formal constraint on the contractual autonomy of the parties. UK law allows contracting parties to agree to whatever terms they see fit outside of the employment relationship; it is only when an agreement qualifies as an employment contract and in some cases consumer agreements that special rules will apply. However, the French legal system will look at the circumstances within which relevant labour services are carried out in order to determine the existence of an employment relationship and ignore any labels or manifest intention of the contracting parties not to enter into an employment relationship, except in borderline cases.<sup>77</sup>

Once a relationship is defined as having the nature of employment, additional protections are indicated in both common law and civil law jurisdictions, although in the UK some legal provisions regulating the employment relationship may be avoided through the use of certain standard contractual terms.<sup>78</sup> The potency of Britain's freedom of contract is further evident in the fact that it even restricts Parliament from banning the facility of contracting out of statutory protection due to the primacy attached to the intention of contracting parties.<sup>79</sup> Contracting out is possible to a far lesser extent in France as the employment relationship is subject to stricter rules.<sup>80</sup> An employment contract cannot be breached unilaterally by an employer unless he gives notice, respects procedure, gives a serious reason for breaching the contract, and pays compensation. An employee, however, can breach his employment contract at any time without fear of repercussion.<sup>81</sup> While under UK law there can be repercussions for breaching contracts, the criteria is generally

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<sup>75</sup> Deakin and Njoya, n63, 9.

<sup>76</sup> Wedderburn, n73, 2-3.

<sup>77</sup> Deakin, Lele and Siems, n68, 137-138

<sup>78</sup> Deakin, Lele and Siems, n68, 139.

<sup>79</sup> Wedderburn, n73, 13.

<sup>80</sup> Deakin, Lele and Siems, n68, 139.

<sup>81</sup> Despax, Rojot and Laborde, n67, 36-37.

applied after such a rupture, rather than restricting how contracts are dealt with while in progress. An employer or employee is able to deal with the terms of the employment contract in whatever manner they choose, though they may have to deal with certain consequences should a breach then be brought before a court or tribunal. The differences in treatment of the employment relationship reveals the existence of deeply ingrained assumptions about the role of law in regulating economic relationships in France and other civil law countries. These assumptions have helped to shape substantive rules of law.<sup>82</sup>

### *The Definition of Employee*

The definition of an employee also differs between the French and British legal systems. In France, an employee is simply an individual who has been placed in a subordinate position to an employer who pays remuneration in wages or salary.<sup>83</sup> The subordinate character of the contract of employment and the character of the employee can be traced back to the hierarchical reciprocal duties left over from the *ancien régime*. In the determination of whether an individual is an employee in France the courts will first look at the contracting party who may have the characteristics of an employer rather than at the potential employee, placing a degree of responsibility upon an employer reminiscent perhaps of the duties of lords to their peasants under the *ancien régime*. Even the reciprocal obligation of workers can be seen in the purpose for which the *contrat du travail* was initially instituted. If a contracting party behaves as an employer by taking that title, determining the framework of work and its execution, supplies the means of work, and fixes the place or hours of work, a French court will determine that a contracting party has the quality of an employer and that therefore the other party has a subordinate role and is an employee.<sup>84</sup> The criterion applied to determine an employment relationship in the UK is reversed.

In the British system, the characteristics of an employee are based on whether an individual works under a contract *of* services or a contract *for* services. The former has the nature of an employment contract, the definition of which is based on the seminal case: *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*.<sup>85</sup> A contract of service would exist if (1) the “servant” agrees that in consideration for a wage he will provide his own work and skill in the performance of some service for his master, (2) that the “servant” agrees that he will be subject to the employer’s control in sufficient degree to make him a “master”, and (3) that the other contractual provisions are consistent with it being a contract of service. This approach not only differs in the lack of emphasis given to the quality of subordination of the employee to the employer, but also in that the employment relationship is based on the characteristics of an employee rather than of an

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<sup>82</sup> Deakin, Lele and Siems, n68, 139.

<sup>83</sup> See the case of *Bardou* Cass civ (6 July 1931) D P 1931.1.121.

<sup>84</sup> Despax, Rojot and Laborde, n67, 93-95.

<sup>85</sup> [1968] 2 QB 497.

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employer. British law asks whether an individual is in business on his own account, rather than looking at the economic dependency of that individual, which would more closely characterise the French concept of subordination.<sup>86</sup> Thus in Britain, if an individual were sufficiently autonomous in his working patterns but nonetheless financially dependent upon the other contracting party, that individual would still not be an employee under the standard criteria. Given the same set of circumstances, the result between the French versus British systems would often be the opposite. It is much easier to be considered an employer under French law and to escape such a designation under British.

*Character of Labour Markets*

The nature the labour market also differs between Britain and France, functioning on two quite different models. The French labour market exhibits the characteristics of an internal labour market in that employers regularly fill vacancies by upgrading or transferring existing staff, restricting external recruitment to a limited number of entry points. The UK labour market might be considered an occupational labour market where qualifications and training define the positions an individual might fill. An occupational labour market features transferable skills needed by a variety of firms while in an internal labour market, the skills developed are much less transferable as access to jobs from outside a firm is generally closed by institutional ground rules. Labour moves more readily across local labour markets in an occupational market, while labour generally moves vertically within the same firm through levels of seniority in those with internal characteristics.<sup>87</sup> The different qualities of labour markets also affect job access and union organisation.

In occupational markets, employees will usually focus on the defence of their particular skill set and its transferability within an inter-firm labour market while limiting the possibility of substitution. Internal labour markets place greater emphasis on defending employment within the enterprise while rewarding seniority with advancement. In terms of collective activity, those markets with an internal quality tend to form enterprise based groups while occupational markets tend to organise along skill group lines. In addition, internal unions will seek to define issues broadly in order to benefit and attract the support of the widest possible group of workers in an enterprise. Occupational unions tend to argue for specific working issues.<sup>88</sup> These characteristics are evident in the approach of France and England to trade union organisation as France tends to have pluralistic collective labour organisations while in the UK, specific unions generally draw together individuals in common trades.

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<sup>86</sup> G Cavalier and R Upex, "The Concept of Employment Contract in European Union Private Law" (2006) 55(3) Int'l Comp L Q 590-594.

<sup>87</sup> F Eyraud, D Marsden and J-J Silvestre, "Occupational and internal labour markets in Britain and France" (1990) Volume 129 Number 4 International Labour Review 501-502.

<sup>88</sup> Ibid, 502-503.

*Collectivism and the Labour Movements*

Early during the period of the Industrial Revolution, association for the purposes of exerting pressure on employers to improve the position of employees was prohibited in the UK and France; it was eventually freed in both countries. In Britain, a principle of collective *laissez faire* was espoused which allowed employee organisations to bargain freely within the labour market with minimal government or regulatory interference. Thus, any mechanisms or procedures created before the middle of the twentieth century were implemented through trade unions and 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.<sup>89</sup> For example, in the early twentieth century Britain viewed the duty to regulate or otherwise control working hours as belonging solely to the remit of collective bargaining and was therefore unwilling to ratify the International Labour Organisations Convention on the forty eight hour work week.<sup>90</sup> Direct regulation of the employment relationship was not a matter for law, but for the social institutions of industrial relations.<sup>91</sup>

The collective *laissez faire* preferred in Britain allowed the free play of the collective forces of society and limited the interventions of the law to those marginal areas where there was a disparity between the forces of organised labour and organised management which impeded the successful operation of the negotiating machinery.<sup>92</sup> Even where such disparity existed, labour regulation was light. The collective bargaining system evolved independently of the law and little was done to regulate or even recognise the legal standing of trade unions and their bargains. Collective bargaining was also an important mechanism through which employment relations were managed in France, however, the legal systems recognised trade unions and also legally instituted enterprise level works councils. These generally involved the compulsory establishment of works councils and the election of representatives, placing a legal obligation upon the employer to give information to works councils and consult with it over matters of concern to employees. Continental works councils have the legal standing to compel the employer to treat his employees on a collective basis. While in Britain, the organisation of the workplace was based on the voluntary organisation of trade unions and their negotiations with employers, continental workplaces tended to be organised according to legal principles.<sup>93</sup>

The growth of the union culture and collective bargaining in Britain in the early twentieth century was characterised by a lack of demand for changes to the law. Rather than using the law as a means of securing better conditions, higher wages and other employment benefits, British unions had discovered a better, more flexible

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<sup>89</sup> P Davies and M Freedland, *Labour Legislation and Public Policy* (Oxford University Press 1993) 8-10.

<sup>90</sup> Wedderburn, n73, 4-5.

<sup>91</sup> Davies and Freedland, n90, 8-10.

<sup>92</sup> O Kahn-Freund, "Labour law" in *Selected Writings of O Kahn-Freund* (Stevens Publishing 1978) 8.

<sup>93</sup> Davies and Freedland, n90, 16-17

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means of looking after their members.<sup>94</sup> The a-political nature of unions during the early days of collectivism in Britain is one of the major differences between the evolution of unionism in the UK versus in France. French unionism developed simultaneously with a mass political labour movement and its political parties. In Britain, the trade union organisation came first and the political movement later. The lack of political association of the early British labour movements led to agitation for a protected space within which trade unions could collectively bargain and negotiate without the interference of politics or even the law.<sup>95</sup>

While the function of trade union rights in the UK is similar to those of other continental democracies; the form that they take has traditionally been radically 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,<sup>96</sup> such as conspiracy. While strike action is “immune” from prosecution, striking employees will usually be taking action in breach of their employment contract, for which they could be sued by their employers.<sup>97</sup> While such action by employers is rare, the fact that it is possible again emphasises the importance British courts and law makers place on the sanctity of contract.

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. 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.<sup>98</sup> 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.

In France, the development of large scale industry and mechanisation in the framework of the capitalist system brought formerly isolated workshop labourers physically together within factories. Although a legal prohibition on collective organisation persisted into the middle of the nineteenth century, this 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

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<sup>94</sup> W McCarthy (ed), *Legal Intervention in Industrial Relations: Gains and Losses* (Basil Blackwell Limited 1992) 4-5.

<sup>95</sup> Wedderburn, n73, 7.

<sup>96</sup> Ibid, 3.

<sup>97</sup> Ibid, 8.

<sup>98</sup> R Lowe, “Hours of Labour: Negotiating Industrial Legislation in Britain, 1919-39” (1982) 35(2) *The Economic History Review* 270.

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.<sup>99</sup>

While the Second Republic acknowledged the right to work, limited the working day to ten hours and created the forerunner to a ministry of labour, it remained suspicious of labour organisation. However, in 1864 the felony of conspiracy which had often been used against collections of striking workers was eliminated, opening the way towards lawful strikes. The act of 1884 then repealed the existing texts contrary to trade union freedom, insured their independence from the state, and granted freedom to organise as well as to not belong to a union. The right to strike was later positively protected in the Constitution of the Fifth Republic in 1946. It was also under this Constitution that works councils were introduced into the structure of private enterprises and a place was given to the representatives of employees<sup>100</sup>

The evolution stemming from the so-called “long nineteenth century” beginning with the French Revolution and ending with the commencement of World War I left a deep mark which is still visible in the present labour regime. Early in the labour movement, there was no strict division of labour organisations between political and union activity. Social reformers, economists and political ideologues were all involved in the labour movement, rendering it fundamentally political in form.<sup>101</sup> The labour movement took on a pluralistic character rather than as a unified labour movement which characterised the British process. Trade unions in France were divided along ideological lines. Thus workers at a particular establishment could be members of different unions based on their political or philosophical affinity, such as Communist, Progressive, Socialist, or Christian or some other political or dogmatic confederation. However, trade union membership itself attracts only a relatively small percentage of the workforce. This is in part due to the existence of enterprise level representation in work councils and employee representatives.<sup>102</sup> The individualistic nature of France is also contrary to the inherent collectiveness in unionism, which may also contribute to the low membership. This does not stop the persistence of wildcat strike action and other forms of collective resistance or activism which is protected under the human rights enshrined in the French Constitution and sacredly respected by the people.

Labour policy has since become a tool of political power in 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

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<sup>99</sup> Despax, Rojot and Laborde, n67, 49-50 & 194-195.

<sup>100</sup> Ibid.

<sup>101</sup> Despax, Rojot and Laborde, n67, 209.

<sup>102</sup> M Forde, “Trade Union Pluralism and Labour Law in France” (1984) Volume 33 Number 1 The International Comparative Law Quarterly 134-136.

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legal culture itself. The British common law system is infinitely malleable in comparison to the French codified system<sup>103</sup> and can thus be easily affected by political shifts. British Conservatism in the 1980s emphasised the need to free labour markets in order to compete in the global market which led to a substantial weakening of the power of labour interests in favour of its 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, so too did labour reforms become increasingly protective, though not with the same alacrity as in Britain. In both jurisdictions, political changes are typically accompanied by changes to the protectiveness of labour law, though this is more easily and more readily accomplished in the UK.<sup>104</sup>

*Labour regulation*

In both jurisdictions, labour regulation evolved along with industrialisation. In the case of Britain, it occurred long after the beginning of the revolution. It could be surmised that the implementation of labour law is not, therefore, constitutive of the factors of production but actually reflects the economic and social structures of a jurisdiction.<sup>105</sup> 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. France has also traditionally manifested a reserve about the market economy and capitalism and has instead pursued a more interventionist policy in the area of labour law and other social affairs.<sup>106</sup> British labour regulation; however, was instituted only after the power of labour interests had grown to the point that they were able to wield real and damaging political power. Thus labour regulation was introduced first with broadly economic impulses aimed at limiting 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.

In the French system, the power of the state to regulate conditions of work was instituted within the legal system through the concept of *ordre public social*, a set of minimum binding conditions applied as a matter of general law to the employment relationship. This concept recognised that as there should be a formal contractual equality between the parties of an employment relationship. Ensuring that this equality existed in practice meant that the state had to assume a responsibility for establishing a form of protection for individual workers who, by accepting

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<sup>103</sup> Wedderburn, n73, 12.

<sup>104</sup> Deakin, Lele and Siems, n68, 145-146

<sup>105</sup> Hepple and O'Higgins, n61, 14-15.

<sup>106</sup> Despax, Rojot and Laborde, n67, 33-34.

employment, were placed in a position of subordination to employers.<sup>107</sup> Thus, the state assumed a role of calibration in the natural imbalance in the power between employer and employee. Labour law differs from French civil law in that it takes the inequality of the contracting parties as the point of departure, while civil law assumes bargaining equality. Labour law also integrates a dimension for collective relations while civil law governs individual relationships based on the assumption that where an individual employee cannot bargain on an equal footing with an employer, then trade unions or other collective organisations can do so. The French labour law is therefore a special law operating alongside civil law which is then referred to in those instances where labour law does not cover certain circumstances.<sup>108</sup>

Since the end of the 19<sup>th</sup> century, 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, particularly those of the working classes. Further, France did not distrust the state or government intervention, unlike its neighbour across the channel who preferred to retain their regulatory free area within the sphere of trade unionism.<sup>109</sup> Rather, France has chosen the route of direct government regulation of the terms and conditions of employment for all employees, whether unionised or not. French labour organisations are 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 even those companies who did not agree to its terms.<sup>110</sup>

France also introduced works councils following the end of World War II with the aim of associating the workers more closely with the functioning of the enterprise. Works councils are mandatory in enterprise employing at least 50 people, while smaller employers may choose to establish one voluntarily. Employers owe a number of duties to works councils to inform and consult with them on matters concerning the organisation, management and general running of the firm and in particular on any measures likely to affect the volume or structure of the work force, duration of work, employment, work and vocational training conditions.<sup>111</sup> There is no similar organisation in the UK system, although information and consultation exercises are required from time to time, but these will generally be with a representative group of employees comprised in order to meet the requirements of the exercise. In France, these work councils are a fundamental part of the labour law

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<sup>107</sup> Deakin and Njoya, n63, 9.

<sup>108</sup> Despax, Rojot and Laborde, n67, 36-37.

<sup>109</sup> Despax, Rojot and Laborde, n67, 56.

<sup>110</sup> M A Glendon, "French Labor Law Reform 1982-1983: The Struggle for Collective Bargaining" (1984) 32(3) *American Journal of Comparative Law* 470-471.

<sup>111</sup> Despax, Rojot and Laborde, n67, 255-258.

system.

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 today. France has manifested a certain reserve about the market economy and capitalism through its political and economic policies.<sup>112</sup> Clearly, the French system has taken a view on the importance of social protections and this view is imposed upon any legislative act which may affect society. Britain, however, has continued to resist interference in the labour market where possible, despite the influence of EU social legislation.

### **Convergence, Coordination and Obstacles**

#### *Seeking Convergence*

While there are a number of arguments that individual states have made against harmonisation of labour and employment laws within the European Union, there are also many arguments that support such action. Globalisation has made it possible for capital to relocate to jurisdictions which provide the most beneficial legal regimes in order to maximise profitable opportunities. A consequence of the mobility of capital is the need for individual nations to tailor their economies in order to attract and retain capital investment. The question then arises as to why any kind of protective labour laws are necessary if the otherwise free play of market forces allow capital investment to side step protective efforts to invest elsewhere. In such a case, it could be argued that it makes more sense to craft labour laws to serve the needs of business so that national companies can compete on a global stage. However, this argument ignores the fact that labour is not just a commoditised factor of production, at least not in every jurisdiction. In addition, the presence of EU social policy requires a certain level of investment in social protection, which makes competitive labour regulation impossible within the current framework.<sup>113</sup> The answer then may be to entrench labour rights and protections within the EU through the creation of transnational instruments aimed at creating a level playing field for competition between labour markets. Otherwise, the dilemma of globalisation and the relocation of capital will continue to encourage a race to the bottom of employment rights within the EU.<sup>114</sup>

Competition continues to be a fuel which feeds investment choices and employment regulation plays an important role as a competitive force. Employers in one state gain advantages if labour and social laws permit them to engage in employment

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<sup>112</sup> Despax, Rojot and Laborde, n67, 33-34

<sup>113</sup> R Dukes, "Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law" (2008) Volume 35 Number 3 Journal of Law and Society 341-342.

<sup>114</sup> B Hepple, "New Approaches to International Labour Regulation" (1997) Volume 26 Number 4 Industrial Law Journal 355.

practices below the essential standards required in others. The EU approach to labour regulation in terms of requiring minimum standards of social protection fails to equalise the playing field. In order to equilibrate the competitive landscape within the EU, a broad equivalence in labour standards would be required. This would require finding a balance of protection which might raise the level of protection in the UK while potentially lowering some elements of protection in France.<sup>115</sup> The problem with this approach is that each system begins from a different perception with different aims and methods of providing social and employment protection both on a national level and under EU social policy legislation.

The question remains, then, as to whether harmonisation would provide adequate benefits to justify the upheaval it would cause to labour systems. While the typical economic argument remains that any labour protective regulation is merely an exogenous and illegitimate interference with market relations, it has now been widely accepted as a necessary one. An additional argument against harmonisation is that it would restrict the benefits which could flow from economic integration in the form of opening up and extending the market. Convergence of standards between national systems at different stages of economic development would remove an individual comparative advantage to those states with lower social costs. Thus harmonisation potentially becomes a form of protectionism imposed by more developed economic systems for their own benefit.<sup>116</sup> The problem with this argument within the EU is that under the treaties themselves it was agreed that harmonisation should be made possible by the convergence of working conditions within the single free EU market. Free movement of people and improved working conditions should favour harmonisation as should the approximation of provisions laid down by EU law in regulatory or administrative form.<sup>117</sup> As such, the idea that it may be unfair to force the lowering or raising of labour standards to meet some common level among Member States is moot. EU membership itself precludes individual Member State pursuit of competitive advantages which cause imbalances in the Common Market. In addition, the aims of the social chapter would also seem to exclude anti-social ambitions toward interstate competition.

#### *Obstacles to Convergence*

There are a number of reasons why labour systems among the member states have not yet converged to a more balanced level. These reasons are fed by factors relating to history, economy, society, culture and the idiosyncratic manner in which labour systems evolved in different jurisdictions. The manner of industrialisation is evidence of two very different approaches as well as different values placed upon tradition and culture over profitable gains. As Britain adopted a neo-liberal economic

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<sup>115</sup> Wedderburn, n73, 16.

<sup>116</sup> S Deakin and F Wilkinson, "Rights vs Efficiency? The Economic Case for Transnational Labour Standards" (1994) Volume 23 Number 4 Industrial Law Journal 289.

<sup>117</sup> "Treaties of Rome" Eurofound accessed 6 April 2014 from:

<http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/treatiesofrome.htm>

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approach, allowing industry to develop unrestricted with the associated impact on the working classes and poor, France took a steady approach with greater care and consideration for the traditional industries already in place. This can be explained by reference to the more risk averse nature that characterises the French national personality, as well as the veneration of tradition that is reminiscent of *ancien regime* prior to the French Revolution. The industrial proletariat was also differently composed, due in part to the enclosure of the English countryside which forced English peasants into industrial centres, an experience that did not occur in France. As such, the French proletariat was diverse leading to diverse approaches to the problems occasioned during industrialisation.

The character of the employment relationship is also demonstrative of the historical factors affecting the evolution of this area of law. French feudalism, the absolute monarchy, and then the catastrophic fall of the *ancien regime* have affected the way in which the employment relationship is viewed in France, taking from the pre-revolutionary context the subordinate nature of employees and the obligations of employers and the compassion and recognition of the need to balance this relationship from the ideals of the Revolution itself. Britain, however, retains its master and servant style contractual approach, placing the duty on the both to comply with the contractual terms governing the relationship, but allowing each freedom to negotiate and to breach agreements without the intervention of regulatory provisions. Freedom of contract thus retains an important position within the British labour system, while in France intervention is not uncommon to protect employees, which also suggests that the Revolutionary emphasis on the protection of human dignity remains a guiding principle in the treatment of the working classes.

The character of collectivism in the UK and France are fundamentally different. While France places an ultimate value on the freedom to associate and positively protects those rights, the UK has kept as much distance as possible while considering the effects of the power of collective labour interests on the economy in negative immunities. Though the balance of labour interests to labour regulation has changed today, the attitude of *laissez faire* is still present in the system. Further, France has legally integrated collective rights through the presence of works councils and employee representatives, a quality that arises in the UK only when certain events trigger the requirement for information and consultation. In addition, the nature of the working classes differs due to the historical experiences of each. The French proletariat tends to exhibit an individualism that can be traced back to the ideologies of the French Revolution which is evident in the pluralist nature of French trade unionism. The communitarian nature of the English working classes is, however, constitutive of a village community culture which was retained to some extent by the homogenous proletariat of the industrial revolution, making collective action more natural.

Finally, at least in the context of the employment, the labour markets themselves also seem to be structured on very different ideologies. The French seem to take an internal view of labour that encourages long term working within a single enterprise

where typical advancement occurs along with seniority. Again, the long persistence of feudalism in France and the highly hierarchical *ancien regime* and absolute monarchy is reflected in the structure of the French labour market. The British, however, apply an occupational model based on transferable skills allowing for lateral moves between firms rather than within single enterprise hierarchies on the vertical path of seniority. This reflects the more individualistic nature of the British people and the entrepreneurial spirit that fed colonial exploration, financial revolution, and early industrialisation, which in turn continued to encourage risk-taking for financial and personal gain for individuals rather than the collective.

With differences as fundamental as these, it must be queried how it might be possible to overcome these obstacles in order to draw labour systems into closer alignment toward a point of convergence that would effectively level the competitive landscape within the EU. In addition, the conflicting political climate of 2016 following the UK referendum leading to an eventual “Brexit”<sup>118</sup> has led to a distancing from the concept of harmonisation in those areas that would always have proven difficult, such as social policy. The different characteristics of labour and employment between Britain and France demonstrate different values that should be considered in any attempts at further coordination in the field of social policy. If the aims of the EU are to promote eventual harmonisation, then the consideration of significant fundamental differences affecting the aims and approaches to social policy regulation in the systems which are to be coordinated can only assist in finding a means of promoting more effective coordination. In the case of the UK and France, it will be necessary to cater to considerably opposed foundational principles underpinning social policy in both jurisdictions. However, with knowledge of the context of these differences, a solution may be possible that will lead eventually to an effectively harmonised employment and labour law framework, levelling the competition throughout the EU.

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<sup>118</sup> At the time of writing, the negotiation of the UK’s departure from the EU is still under discussion in Parliament and article 50 has still not been initiated.