VARIETIES OF TRIBUNALS

Employment disputes resolution, legal origins and national business systems

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Institutions for resolving individual employment rights disputes are located at one of the most contested interfaces between employers and employees. The effective enforcement of decent work standards, in particular on termination of employment, depends on access to and the efficient operation of public agencies, quasi-judicial bodies and courts for redress. The perceived legitimacy of these bodies also arguably rests both on their composition and the forms in which expert knowledge of the world of work is used to ensure that decisions with a profound impact on employees meet the requirements of procedural justice. The role of such institutions has become significantly more important with the shift to more individualised and juridified employment relationships, observable in many countries since the 1980s (Heery, 2010). This paper explores the scope for establishing links between such bodies and wider business systems and legal orders, drawing on contributions to the institutionalist and comparative law literature as well as work-in-progress by the authors. In particular, we focus on whether adjudicative institutions include non-legally qualified members drawn from employers and employees or whether they are composed solely of professional judges.

Previous approaches

Despite the significance of adjudicative institutions in employment regulation, there has been little research that has attempted to link the structure and operation of institutions for determining employment rights disputes with theories and models that might help explain the origins and persistence or change of these institutions. Institutional analysis has tended to focus on welfare systems, vocational training, and industrial relations (Thelen, 2010: 45). In the field of comparative law from an institutional perspective, there has been work on corporate governance (see Vitols, 2001) and the employment relationship (Rubery, 2010). Teague (2009) used the concept of 'path dependency' for a comparative study of conflict resolution in Ireland and Sweden, which links to the theories of national business and IR systems considered below.

One reason for the lack of attention to labour law enforcement might be that it represents a 'second order' institution that reflects broader social structures but for which systemic links might be hard to establish.[1] In contrast, we argue, firstly, that adjudicative institutions merit attention as a 'weather vane' of wider social forces, in that they register and are the site of ongoing conflict (mediated through individual claims), and as such are particularly sensitive to change, if only through mopping up the consequences of first-order conflicts (over the nature of employment relationship, employer prerogatives etc.). And secondly, we contend that such institutions distil significant aspects of national administrative and legal cultures and ideologies, and as such offer insights into broader processes of change and stability (see Kagan, 2007: 53f.).

The literature contains a number of fruitful approaches that can be drawn on to explore labour courts and other dispute resolution mechanisms. We use three here: the 'legal origins hypothesis'; national business systems, in particular 'varieties of capitalism'; and comparative industrial relations systems. The paper begins by outlining these three approaches. Next, we

[1] This is a provisional notion that draws on theories of multi-level governance, in which second-order or secondary institutions facilitate or are dominated by the resolution of 'first-order' problems (or conflicts).

integrate them into a comparative matrix of adjudicative mechanisms (labour courts, civil courts, other procedures)[2] in nine countries, drawing on the initial phase of our international research, and set out some of the major differences between these countries. We then consider whether the composition of adjudicative mechanisms fits or deviates from what the principal explanatory models suggest. Our discussion explores these anomalies and offers some thoughts on whether the models serve as a useful starting point for, firstly, categorising and, secondly, explaining national differences in labour law enforcement.

Legal origins hypothesis

There are a number of strands of the 'legal origins hypothesis' (LOH), and we can note only some of the central aspects here. LOH argues that national regulatory approaches are significantly influenced by whether a country belongs to one of the 'principal legal families' (Deakin et al., 2007: 133; Zweigert and Kötz, 1977): the civil law tradition (with French, German and Nordic variants) and the English common law tradition (including the large number of countries that acquired their systems 'involuntarily' through transplantation and colonialism).[3] Initially applied to corporate governance and finance, the LOH was applied to labour law by Botero et al. (2004), who set out to look at labour laws, but not enforcement and redress mechanisms, in 85 countries using three theories of institutional choice: efficient adaptation of institutions to change, political power theories (in this context the political power of labour), and the impact of legal tradition. Employment laws were coded and scored for (formal) protective impact for employees, and then regressed against proxy variables for the three theories: the strongest determinant was found to be legal origin.

Deakin et al. (2007) and Deakin and Sarkar (2009) highlight a number of problems with the LOH of relevance for the present study which we note only briefly here. One issue is that LOH is based on a 'stylized' distinction between the two traditions that obscures a more nuanced view of differences and areas of overlap; we return to this below. In addition, there are significant differences within the two legal families: Mahoney (2001: 513) and Zweigert and Kötz (1997) note the distinctive German and Nordic civil law traditions compared with France.

Within LOH, there have been efforts to link legal families and economic efficiency, measured in terms of growth and unemployment. As well as the intrinsic problems of this approach, such as the choice of time-frames for measurement, this quantitative approach can overlook questions of legitimacy, which are a key concern in looking at labour courts and may be related to social values with an economic impact, such as trust. Deakin et al. (2007) also emphasised the role of 'contingency', and in particular those institutions that happened to be in place at the point of industrial 'take off' that were subsequently preserved through path dependency.

Varieties of capitalism

The theory of national business systems, and in particular the VoC variant[4] contends that firm strategies are shaped by the range of institutional opportunities and constraints for resolving coordination problems, leading to distinctive paths of development and reinforcement of these

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[2] We do not deal here with other aspects of enforcement, such as labour inspection and the use of public law.

[3] As Roe (2007) notes, the 'export' of English law often entailed a curtailment of rights viewed as central to common law, including the jury system. Botero et al. (2004: 1345) discuss the efficiency gains for countries that extend their adopted legal traditions to new areas, such as employment regulation, reinforcing path dependence.

[4] The classic exposition is the Introduction (Hall and Soskice, 2001), with contributions compiled in Hancké (2009); for critiques and refinements see Hancké et al. (2007). Albert (1993) and Thurow (1992) are precursors.

institutions through 'complementarities' between industrial relations arrangements, vocational training, corporate governance, and employer and employee associations. Positive feedbacks between firms' strategic choices and institutions create two broad economic models: coordinated market economies (CME), in which coordination problems are resolved by non-market methods, with integrated supply chains; and liberal market economies (LME), in which these problems are resolved through competitive and contract-based inter-firm relations. External shocks – including globalisation – reinforce these distinctive clusters.

We do not propose to engage in a critique of the VoC approach here; both the authors of the theory as well as its critics have been occupied in a long period of refinement and revision (see Hall and Gingerich, 2009) as well as developing alternative accounts (see Crouch, 1993 and 2005). However, two aspects of criticism relevant for this study are, firstly, the dichotomous nature of the theory and, secondly, the timing of the characterisations. On the dichotomy, VoC authors have allowed for hybrids and we make use of the 'Mediterranean' type in our typology below.[5] The issue of timing is also important. Although VoC theory is inherently a 'longue durée' model, there has been a debate about whether two of the countries in our selection that are classed as LMEs, Great Britain and New Zealand, have always been unambiguously in that camp. We return to this issue below as institutions of employment regulation have been at the heart of some significant changes in both countries.

The nine countries chosen for the matrix are intended to reflect a range of business systems and IR types in developed countries, including one Eastern European transition economy. In terms of categorising economies, we draw primarily on the VoC poles of LME and CME, with France and Spain assigned to a 'Mediterranean' category.[6] The categories are:

- Liberal market economy (LME): Great Britain,[7] USA, New Zealand.
- Coordinated market economy (CME): Germany, Netherlands, Sweden.
- 'Hybrid' ('Mediterranean'): France, Spain.
- Transition economy: Estonia

We do not propose to deal with each of the nine in detail in this paper, but will refer to organising aspects and significant differences where appropriate for emphasis.

Comparative IR models

We also draw on the typology of European national industrial relations models suggested by Ebbinghaus and Visser (1997: 336ff.), which is directly applicable to some of the cases considered. Whereas the LOH approach is an explanation by historical genesis, and the VoC theory is rooted in assumptions about how rational firms interact with social institutions, and relies on a theory of feedback mechanisms, the comparative IR model is essentially a

[5] It might that other more complex typologies could be also be fruitful, and these will be considered in future work. Hancké (2007) offers a deductively-derived typology, for example. See also footnote 10.

[6] This is an initial heuristic. There is not scope here to deal with the limitations of this duality. However, in contrast to Casey (2006), we feel that a spectrum from CME to LME 'with others scattered in between', implying intermediate rather than alternative states, does not account for some non-LME/CME models. There is a trade-off between an approach that multiplies the types of national business system and the 'analytical leverage' (Hopkin and Blyth, 2004) gained by a simpler model: we have tilted towards 'leverage' at this stage of our research.

[7] Great Britain *currently* includes England, Scotland and Wales; Northern Ireland has different arrangements. Scottish law is distinctive in many ways, but labour courts operate on the same principles as in England and Wales.

categorisation in which models exhibit 'persistence' based more general theories of social cleavage (ibid. 338). Ebbinghaus and Visser distinguish a number of 'basic types':[8]

- 'Nordic corporatist', based on collective self-regulation, strong and cohesive labour market actors, a 'mixed economy', branch level collective bargaining (but see Howells and Givan, 2011), and in which the state acts as a mediator between capital and labour.
- 'Continental European Social Partnership', based (classically) on free collective bargaining, with extensive statutory employment and representative rights.
- 'Anglo-Saxon pluralism' (perhaps better 'Anglophone'), based on extensive deregulation, weak labour market actors, workplace level industrial relations, and common law contractual principles.
- 'Latin polarised', with a strong state-led sector, adversarial and politicised industrial relations, and extensive statutory regulation.

For Eastern Europe, we draw on the schema proposed by Kohl and Platzer (2004). This argues that Central and Eastern European (CEE) countries can be assigned to a 'CEE transition' IR model, characterised by: continued dominant influence of the state ('statism') and weak independent collective institutions but with tripartism to help resolve regulatory deficits; extensive 'union-free' zones in the private sector (especially greenfield Foreign Direct Investment); generally weak institutions for labour jurisdiction. Kohl and Platzer identify a 'northern variant' (Poland, Czech Republic, Baltic states) and a 'southern variant' (Hungary, Slovakia, Slovenia), with the 'northern track' exhibiting a greater density of these 'transitional' features and fewer autonomous labour market actors.

Labour law enforcement: a comparative matrix

We initially draw on the LOH and VoC approaches to ascertain whether it is possible to establish associations between bodies for resolving disputes and wider aspects of national institutional orders. For the sake of economy, we refer to such bodies as 'labour courts' in situations where there is a distinct strand of labour jurisdiction.[9] Otherwise, they are referred to as civil or administrative courts where rights disputes are adjudicated within the civil law system. Where quasi-judicial or non-judicial bodies may make determinations on such issues, with varying legal impacts, this is indicated. Decision-making members of labour courts who are not required to be legally-qualified are termed 'non-legal members' (NLMs).[10]

The main headings used provide an overview of the key features of labour courts (and other judicial and administrative bodies) in terms of their relationships to wider industrial relations considerations, and in particular:

- whether they include NLMs,
- procedures for selecting NLMs,
- the decision-making powers of NLMs,

[8] Ebbinghaus and Visser draw on and extend the typology suggested by Crouch (1993). Hall and Gingerich (2009: 144) also offer a quantitative index of 'coordination in labour relations' by country.

[9] For a fuller analysis see Burgess, Corby and Latreille (2011a) and Burgess and Corby (forthcoming).

[10] In practice, many 'NLMs' possess a legal qualification or have related expertise: however, this is not a formal requirement in most instances, although it can have an impact on the operation and dynamics of labour courts.

- the scope for judges to decide issues without the presence of NLMs,
- the 'national legal order' and the national business system and IR type,
- the 'direction of travel' of employment relations and labour regulation.

Although this latter element is brief in the extreme, and possibly contentious, we have included it in order to add a 'time element' to what otherwise can be an asynchronous (cross-sectional) account typical of 'coding' approaches to comparative law. As Deakin et al. (2007: 142) have noted in their critique of the legal origins hypothesis, without some element of time it is impossible to make any observations about the speed and nature of legal change. Accordingly, we introduce a time element to explore the associations between change and stability in labour courts and wider changes in business systems. As we also note below, a time element is crucial to explain some of the apparent anomalies that arise when attempting to establish associations between types of system and adjudicative institutions.

However, we do not deal here with mediation or conciliation procedures, which in some countries are closely integrated with labour court proceedings.[11] Nor do we engage in this paper with issues of the legitimacy of adjudicative bodies.

[11] At this stage, we also do not deal with issues of employee 'voice' (Dundon et al., 2004; Hyman, 2004: 418ff.) or employee/employer 'exit', although it is reasonable to suppose that CMEs have higher voice and exit options, and that 'Mediterranean' models have higher employer exit barriers. This will be explored in forthcoming work, given that 'voice' institutions also serve as filters for dispute resolution, and may be integrated into the judicial process inasmuch as the course adopted by workplace representatives can influence subsequent legal proceedings (as in Germany).

Individual employment rights resolution. Selected developed economies.

Country	Labour jurisdiction*	Labour market actor involvement	Tribunal composition		Decision-making procedures	'National legal order'	National business (1) and IR system (2)*	'Direction of travel' of labour regulation**
			First-instance	Appellate				
Germany	Separate at all levels Covers all contractual disputes	Labour courts include equal numbers of employer and employee NLMs nominated by labour market organisations	Tripartite	Tripartite	Majority at all levels No dissent Judge decides alone on limited and largely procedural matters	Civil law Some federalism	1. CME 2. Continental European Social Partnership	More individual rights via EU anti-discrimination law. Reaffirmed collectivism in manufacturing: increasing fragmentation in service sector. Steps to regulate minimum pay.
N. Zealand	Quasi-judicial investigative first-instance procedure: separate labour court for appeals	No formal involvement	Expert investigator appointed by public authorities	Judges alone	N.A.	Common law	1. LME 2. Not classified	From collectivism to pluralism
Estonia	No separate labour jurisdiction. Option of tripartite extra-judicial procedure (Labour Dispute Committees)	Employer and trade union nominees sit on Labour Disputes Committees	Labour Disputes Committees have a chair and equal numbers of employee/employer nominees.		Majority voting. Judge may decide alone if accepted by the parties	Civil law	'Northern track' transition IR (Kohl and Platzer, 2004)	Transition economy
N'rlands	None, but civil courts have special procedures for employment. Optional admin. procedure for employer termination	Bipartite arrangements within special redundancy procedure where employer opts not to use courts to effect termination	N.A.		N.A.	Civil law	1. CME 2. Continental European Social Partnership	General retention of collectivism with controlled deregulation of employment law and welfare reform, in particular to promote female participation.

Sweden	Separate at first-instance and appellate plus civil courts for some cases	Formalised employer-employee involvement in Labour Court based on pre-given institutional rights	Quadripartite at both levels (judge, employer and union nominees, independent labour market experts)	Majority Yes Limited procedural	Civil law	1. CME 2. Nordic Corporatism	Decentralization disguised as coordination but within retained strong collective framework
France	Separate labour court at first instance: civil courts for appeals	Employee-employer members of first-instance labour courts are elected by workers and employers, with separate sections by economic sector	Bipartite Judge alone	Bipartite: resort to legally-qualified judge in event of stalemate Judge alone	Civil law	1. Mediterranean 2. Latin polarised	Formal retention of industry-level collectivism, with weak TUs partly offset by formal state-based tri- and bipartism. Active state intervention to shape new forms of firm-level representation
Great Britain	Employment tribunals cover most statutory and contractual disputes. Civil courts adjudicate contractual issues.	Self-nomination by individuals, but subsequent assignment to employee/employer side within labour court. No sectoral correlation with cases	Tripartite Tripartite – but default position judge-alone	Majority decisions with scope for dissent. Trend towards more scope for judge-alone decisions on substantive matters.	Common law	1. LME 2. 'Anglo-Saxon pluralism'	From weakly-institutionalised collectivism to pluralism, with increased 'individualised juridification' and weak institutions leading to upsurge in employment claims
United States	State and Federal civil courts hear employment-related cases NLRB deals with unfair labour practices	None	N.A.	Judge alone NLRB consists of independent members appointed by state.	Federalism Common law –	1. LME 2. Not classified	Falling union density, low statutory employee protection, growing practice of workplace arbitration to exclude claims in civil courts, individuals using discrimination law to combat arbitrary dismissal.
Spain	Single judicial system with 'Social Courts' for labour disputes at first-instance and social chambers at appellate levels	None	Professional judge(s) alone – number depending on first-instance or appellate. No particular career path for labour court judges.	Judge alone	Civil law	1. 'Mediterranean' 2. Latin polarised	High levels of temporary and fixed-term employment have been seen as reflecting strong employment protection rules for open-ended contracts. National tripartite accords on pay have come under pressure in the economic crisis, with bargaining reforms in the pipeline.

* 1) = Hall and Soskice (2001:19-20); 2) Ebbinghaus and Visser (1997:333ff.). For Eastern Europe, see Kohl and Platzer (2004: 360-62).

** These characterisations draw on a range of literature, including Howell and Givan (2011); Deakin et al. (2007); Deakin and Sarkar (2009).

Principal features

The three basic lines of cleavage in our selection are between:

- systems in which NLMs have a decision-making role in adjudicating disputes (Great Britain, Germany, France, Sweden),
- those in which workplace knowledge is injected into dispute resolution procedures in the form of mediators, often with investigative powers (New Zealand) or in quasi-judicial panels on which NLMs sit with judges (Estonia),
- systems in which individual employment rights claims are heard by the normal courts (USA), in some cases in special chambers (Netherlands, Spain).

In terms of the countries dealt with in this paper, The Netherlands represents an interesting hybrid, with employers having the option either of obtaining a dissolution of the employment relationship through a civil court (operating under a special procedure) or through an official process in which applications are considered by representatives of employers and trade unions before being determined formally by an official.

Another major difference refers to the autonomy of labour law. In Germany, labour law constitutes a separate judicial pillar with its own appellate system that extends to all but cases referred on constitutional grounds. In contrast, Great Britain has a hybrid system with specialist labour courts adjudicating at first instance and at the first appellate level, but with the Court of Appeal and Supreme Court hearing all cases, whether or not they are employment disputes, on points of law only. In France, an analogous process (albeit different in specifics) operates, with employment cases switching from specialised labour courts after the first instance, first to a specialist chamber of the civil courts and then into the general civil court system at higher appellate levels.

The extent of social partner involvement also varies considerably. Germany has social partner involvement and a tripartite structure from first instance to the highest appeal court. France has social partner involvement through a bipartite structure at first instance. Only if union and employer members do not agree is the employment matter referred for determination by a judge. In Great Britain social partner involvement has been attenuated: nomination rights have been removed from social partner organisations and replaced by self-nomination to the worker or employer panels, with persons being selected and appointed through the official procedure for all public appointments.

Finally, the decision-making powers of judges (and by extension of NLMs) also vary. In all the cases considered here, NLMs sitting in a full hearing with a mixed composition enjoy the same decision-making powers as judges in those hearings. In theory, this can allow NLMs to outvote judges, although this appears to be a rarity in practice. However, judges have varying scope to make judgments when sitting alone, without NLMs. Here the main dividing line is between Great Britain and the other systems considered here. In Great Britain, judges sitting alone may decide on a range of substantive matters, with a steady expansion of the scope for this in the recent past and plans to widen the range of options in the future. In many instances, the decision as to whether a full hearing should be convened lies with the judge, paralleling changes in other British administrative tribunals (Burgess, Corby and Latreille, 2011b). By contrast, *in practice*, judges in the other cases dealt with here decide alone virtually only on procedural matters or when a default judgment is issued in the absence of one of the parties. In Germany, for example, there is a formal option for a judge to decide on a substantive matter alone: however, this is rarely used both on practical grounds and because of issues of legitimacy (see Burgess, Corby, Latreille, 2011a).

Initial associations

We now look at whether it is possible to associate any of the main features of adjudicative institutions with the features of wider legal and economic systems, drawing on the approaches reviewed above. In particular we focus on the presence and powers of NLMs as a central indicator of the role assigned to employers and employees in these institutions.

Specifically,

- whether there is an association between the presence of NLMs and the characterisation of a system as 'civil law' or 'common law' ('legal origins' hypothesis),
- whether there is an association between the presence of NLMs and the national business system (using the 'varieties of capitalism' schema),
- whether there is an association between the presence of NLMs and the industrial relations system, using the scheme proposed by Ebbinghaus and Visser, 1997),
- and finally, the scope for judges to decide on either procedural or substantive matters, and any association between this and any of the other characterisations used above.

In each case we outline the expected or conceivable 'fit' and note any anomalies. We subsequently explore whether it is possible to offer an explanation for the anomalies.

Legal origins

There is no direct association in the LOH between legal families and the role of NLMs. Although common law systems are often held to be characterised by the presence of juries (essentially for criminal cases) unlike civil law systems in the labour sphere, this initially offers no direct read through. Roe (ibid.) also argues that 'legal origins institutions are trumped, and perhaps trumped easily, by modern political forces' (ibid.: 296). In fact, looking at the cases of Germany, Sweden and France, the presence of NLMs in labour courts would lean more towards the 'political power' explanation of institutions, some support for which was found in the research by Botero et al. (2004). As Deakin et al. (2007) argue, the dichotomy between these two legal families can also be overdrawn. Much of employment law in Germany, for example, has been shaped by judicial developments of constitutional principles, and this applies to virtually all the law governing industrial action, and large areas of collective bargaining. Although under civil law traditions, the employment relationship is held to be constituted by statute, leading to formalised statutory types of employment contract, there is typically extensive scope for judicial interpretation over what is 'equitable' and 'proportionate' in the field of termination.

Roe (2000) has argued that civil law systems are essentially a proxy for 'social democracy' – that is 'nations committed to private property but whose governments play a large role in the economy… and favour employees over capital-owners when the two conflict' (Roe, 2000: 543). If this description is accepted, then it would be possible to collapse the two legal families in broad terms back into VoC categories of coordinated and liberal market economies, with the expectation that a stronger state might be associated with forms of (neo-)corporatism and tripartism. This would also fit with a 'Hayekian' interpretation of legal origins (see Mahoney, 2001: 504), under which civil law systems foster state intervention and common law systems are associated with fewer state limits on private property.

'LEGAL ORIGINS'									
	CIVIL LAW						COMMON LAW		
	Germany	Estonia	Sweden	France	Spain	NL	G. Britain	USA	NZ
NLMs	Yes	Yes	Yes	Yes	No	[Yes]*	Yes	No	No

Anomalies: Civil law – Spain, NL*
Common law – Great Britain

* No labour courts but administrative procedure that includes employer and trade union members.

National business systems

From the standpoint of a VoC approach, at its simplest and ignoring many localised features, it would be reasonable to expect CMEs (or at least the Western European version) to possess strong institutions to help solve collective action problems, and that, in turn, these might have the legitimacy and political power to acquire and retain a role in labour courts: parity of strength between employers and employees would (ultimately) be reflected in parity of decision-making. On this assumption, the presence of employee and employer NLMs in adjudication bodies (or equivalent) is as follows:

NATIONAL BUSINESS SYSTEMS									
	Coordinated market economy			'Mediterranean'		'Transitional'	Liberal market economy		
	Germany	Sweden	NL	France	Spain	Estonia	G. Britain	USA	NZ
NLMs	Yes	Yes	[Yes]*	Yes	No	Yes	Yes	No	No

Anomalies: CME – NL (see above)
LME – Great Britain
'Mediterranean' – no firm expected outcome
'Transitional' (Northern track) – only one case considered here.

Industrial relations systems

From the standpoint of Ebbinghaus and Visser's IR system typology approach, the presence of employee and employer NLMs in adjudication bodies (or equivalent) might be broadly expected to correspond with the LME/CME model.

INDUSTRIAL RELATIONS SYSTEM									
	Continental European Social Partnership		Nordic corporatism	Latin polarised		'Transitional'	Anglo-Saxon pluralism	Not classified	
	Germany	NL	Sweden	France	Spain	Estonia	G. Britain	USA	NZ
NLMs	Yes	[Yes]*	Yes	Yes	No	Yes	Yes	No	No

Anomalies: Social partnership – NL (see above)
Nordic corporatism – one example only: consistent with thesis.
Latin polarised – thesis might suggest civil court system only: hence France
'Transitional' (Northern track) – only one case considered here.
Anglo-Saxon pluralism – Great Britain

Powers of judges

Finally, we look at the powers that labour court judges have to make decisions when sitting alone: in particular, we distinguish here between situations in which judges may decide on essentially procedural matters only or whether they may also make substantive decisions in *contested* cases. As we discuss further below, this represents a potentially significant differentiator in terms of the power of the judiciary in relation to NLMs.

'JUDGE ALONE' – First-instance							
Procedure			**Substantive**				
Sweden	Estonia	Germany*	Spain	NL	G. Britain	USA	NZ

Anomalies: France – first-instance is bipartite without professional judges.
Great Britain –judges decide substantively where there are NLMs.
Netherlands – no labour courts: anomalous as a CME.
*Germany – in practice judges decide alone overwhelmingly on procedural matters.

Based on this, admittedly small selection, there would appear to be an association between the comparative models and typologies and much of the fine grain of institutional arrangements for adjudicating and determining individual employment rights (such as the roles and powers of judges and NLMS), provided it is also possible to arrive at plausible narratives to deal with the anomalies.

Discussion: Explaining the anomalies

Amongst the identified anomalies, Great Britain features the most frequently, possibly with France the runner-up and with some explaining to do for The Netherlands and New Zealand. We review some of the findings from above and the anomalies under four main headings: functional equivalence, the impact of the time element, and convergence and diversity.

'Functional equivalence'

The concept of 'functional equivalence' is used frequently in comparative research, often without explicit consideration of its implications. In essence, it refers to a process under which different institutions in different societies take on roles and activities that act in equivalent ways to fulfil the same function. The strength and weakness of the concept is that it implies that a set of needs can be identified that must be met within different societies, and as such rests on functionalist types of explanation and is vulnerable to the weaknesses of that approach. This is too large a topic to explore in depth here: rather we focus on how functional equivalence has been dealt with in the context of institutional analyses of the law.

Dealing with the issue of functional equivalence and the 'complementarity' of institutions has been a major concern of VoC theories and there are two broad positions. Teubner (2001: 419) argues that 'functional equivalence' eventually leads back to a convergence theory position, in which countries move towards a common model, possibly driven by technical imperatives: he rejects it on the grounds that different societies do *not* have to solve the same problems through functionally adapting existing institutions, but that in line with the VoC approach societies face *different* problems. By contrast, Deakin et al. (2007: 137-8, drawing on Zweigert and Kötz ,1998), support the use of the notion of 'functional equivalence' as a means of explaining 'how formal diversity of legal rules masks a deeper functional continuity': 'functional equivalence' is 'an indispensable tool of comparative legal analysis, and arguably of comparative analysis more generally' (Deakin et al., 2007: 138). Does our analysis of labour courts throw any further light on this?

Firstly, the VoC position would predict a clustering of institutions in terms of function *within* the main country groupings, but not between *all* countries. That is, although institutions might change within these country groupings (as a result of political conflict, external influence etc.), 'actors will seek institutional and functional equivalents' (Hancké et al., 2007: 11) in order to reaffirm or re-establish forms of coordination, reinforcing institutional patterns that facilitate this (collective in the case of CME, pluralist in the case of LME). Since collective institutions tend to support the presence of employer/employee NLMs on adjudicative bodies, and often nominate and train them, NLMs also tend to 'cluster' in courts in CMEs. That is to say, if 'functional equivalence' is discarded completely, then it is hard to make the case for the existence of institutional complementarities within the VoC perspective. Some VoC theorists have accepted that political power can act to change institutions, but that 'actors still face incentives to preserve the existing system of coordination' (ibid.: 12). It is, therefore, possible to argue for a 'functional equivalence' position without needing to argue for a set of 'universal' social needs, but only if the equivalences are confined to the main country groupings within the VoC approach. This would, however, still leave the difficulty of dealing with the hybrid systems.

Secondly, we look at the argument that NLMs should sit on adjudicative bodies because 'labour is special', a position cited or implied in many national studies of adjudication mechanisms[12] as one reason why labour courts should include members with direct experience of working life as opposed, or in addition to, taking evidence from expert witnesses. If proponents of this view were located solely in countries in which labour courts included NLMs, then this would simply beg the question in the absence of further evidence of NLMs' contribution. However, the reality is more complex. Firstly, there are countries in which there are no labour courts, such as the Netherlands, but in which a mechanism exists to draw on workplace expertise in some situations. And secondly, in New Zealand there are labour courts without NLMs, but also with means to incorporate workplace knowledge into pre-judicial procedures. This suggests that there might be a specific type of functional equivalence related to the need to draw on workplace and bargaining expertise to resolve employment disputes and obtain decisions that are regarded as 'well-founded' in some way.

If the case for including NLMs could be justified in terms of an operationalisation of 'well-founded', then this would strengthen the argument for 'functional equivalence' in the more specific legal context, lending some weight to Deakin et al. This is a difficult task as there is no satisfactory benchmark for comparing the *quality* of judgments. Potentially 'objective' yardsticks, such as the volume of appeals from first-instance bodies, are virtually impossible to compare because of the vastly differing procedures and criteria for allowing appeals. On the other hand, in the absence of any such evidence, the claim that 'labour is special' in terms of enforcement might simply mirror the preconceptions of those located in such systems, and would not be suggestive of 'authentic' functional equivalence.[13]

The national experiences of three of our anomalies – The Netherlands, New Zealand and Great Britain – offer some relevant material in this respect. The Netherlands does not have a separate system of labour courts, and employment rights disputes are heard by the civil courts, albeit through dedicated procedures. However, there is a restriction on employer exit from employment relationships through the need for all terminations to be either sanctioned by a court, through

[12] See the bibliographies in Burgess, Corby and Latreille (2011a).

[13] For Hepple (1988) the difference between labour and other courts lies not in their procedures but in their composition and specialisation, based on a desire to secure 'expertise' through a variety of institutional forms.

dissolution of the contract, or for the contract to be terminated by an official procedure.[14] Termination remains the core business of labour courts in most countries. Although this procedure is managed by public officials, who make the final decision, they take advice from a panel consisting of employer and trade union nominated members. As a consequence, although The Netherlands can be classified as a country without labour courts, in practice dismissal can include an element of workplace expertise through direct involvement.[15]

These are only initial thoughts, and any deeper discussion of the notion of 'well-founded' would also need to consider the issue of legitimacy, which we have not dealt with here as its raises further methodological challenges. However, we would tentatively suggest that the Dutch example indicates that the higher the degree of 'contingency' found in a model (that is, the extent to which its institutions are anomalous when compared with other countries in the same broad country grouping), the greater might be the degree of functional equivalence in these institutions: that is, its institutions take on roles that reflect or contribute to the institutional complementarities of the wider system, possibly through the creation of subsidiary bodies to fulfil these wider functions.

Time element

Both New Zealand and Great Britain crop up as anomalies, and both also figure as anomalies or exceptions in both the VoC literature and that of its critics (see for example, Kesting and Nielsen, 2008: 37ff on New Zealand).

The key factor is the change in both of these systems since the 1980s. In the case of Great Britain, the trajectory was from a period (or better episode) of strong trade union influence (measured in terms of union density and the union role in economic policy) but generally weak collective institutions, and a state sector that was not used in a *dirigiste* sense. This peaked in 1979 and was followed by rapid movement to a highly deregulated model by the mid-1990s, subject to some modest reregulation as a result of EU legislation and the Labour government (1997-2010). This earlier phase left a trace of tripartite institutions that swiftly declined in number and influence, but left the state employment arbitration and conciliation service (ACAS) and employment tribunals initially fairly untouched. This 'echo' of a tripartist past largely accounts for the anomalous character of the presence of NLMs. Furthermore, the subsequent step-by-step changes (for example, the attenuation of their decision-making powers and the empowering of judges) reflects the UK's trajectory towards a liberal market economy.

New Zealand has followed a comparable course, but in this case formal tripartism in the labour courts was addressed, and removed, at a much earlier stage, suddenly and with the complete removal of social partner involvement from the labour court (and appellate levels), and the installation of pre-judicial investigative and mediation procedures, building on earlier traditions (see Burgess, Corby and Latreille, 2011a).

Convergence and diversity

The evidence of national diversity between institutions for rights adjudication, combined with a number of anomalies and the existence of associations between these institutions and broader VoC features, suggests a complex interplay between contingency and 'fit'. In particular, institutions that

[14] High exit barriers also correspond with CMEs.

[15] Hepple (1988) refers to this procedure 'as the functional equivalent of the conciliation role of ACAS', but this would seem to omit the role of nominated social partner representatives in advising public officials.

are now seen in functional terms (such as the benefits of a workplace-based perspective) were not established to complement other aspects of economic organisation, and were often opposed to them. The establishment of labour courts in Germany and France, for example, represented a victory for labour against either an authoritarian judiciary (in Germany in the 1920s) or employer-only courts in France (in the nineteenth century). On the other hand, current debates about reforms often elicit functional arguments adducible to current institutional interests. Again, in the case of Germany, while the national employers' organisation has supported rationalising the civil court system, including the possibility of removing elements of a distinctive labour jurisdiction, it has also continued to advocate retaining tripartite first-instance courts on grounds of fairness and efficiency.

This leaves us with a need to develop a narrative that can account for France, whose first-instance labour courts remain unique in terms of their bipartite make-up (with a professional judge only invoked as a 'tie-breaker', which occurs surprisingly rarely). A number of options are available, but it should borne in mind that as a 'hybrid' in VoC terms, France might be expected to exhibit more exceptionalism. One key consideration is that the social struggle in France between employers and workers' organisations focused much more on who would control labour courts rather than the British option of avoiding them as much as possible. Finkin (2008) also argues that first-instance adjudication in France is more akin to arbitration, with a high level of appeals where judges decide alone without NLMs. In effect, this argument holds that French exceptionalism is muted, as *conseils de prud'hommes* cannot be properly compared with German or British labour courts.

Final thoughts

On balance, the legal origins hypothesis, on its own, does not appear to offer a convincing approach to the key differentiating factors of employment rights adjudication. Given the overlap between civil law societies and what Roe terms 'social democratic' societies, it might be that the political power hypothesis offers a more fruitful avenue of explanation. Roe (2007) also notes that a theory of origins is insufficient to account for present-day institutions without additional arguments, such as path dependency or 'institutional channel' (Deakin et al. 2007 to sustain them.

We have looked at VoC theories as a deterministic model. However, the degree of determinism required by the theory remains open to question. Some social institutions might be compartmentalised from others, for example. As such, VoC does not require all social institutions to complement each other: such a claim would fly in the face of the contingency and conflict seen in national histories, and possibly eliminate the scope for new institutions to emerge (Hodgson, 2001: 53-4). This allow the development of legal institutions to have a degree of autonomy, especially in terms of their origins, while being linked to wider social structures through acquiring new functions and roles ('conversion' in VoC parlance).

Based on our matching of different features of labour courts to the country typologies, the VoC approach appears to offer a closer association between its proposed society models and types of labour court than the legal origins theory, provided that Great Britain, in particular, is looked at with a broader historical sweep. Whether this is because of the political power that CMEs open up to trade unions, or whether there are deeper functional links is an issue that remains to be explored.

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