Convergence of Labor Law in the Anglo-American Countries

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Abstract

Historically, three distinct industrial relations models existed across the Anglo-American countries: the Wagner Act framework in the United States and Canada, a voluntarist model in Britain and Ireland, and a centralized Award-based arbitration system in Australia and New Zealand. During the past thirty years there has been considerable convergence towards an Anglo-American model as the voluntarist and award systems have transformed. This common framework is premised on a private ordering of labor rights designed to enhance managerial flexibility. At the same time, this model is underpinned by 'minimum standard' employment rights. Nevertheless, important variation continues, with the United States and Ireland remaining outliers, if for different reasons.

Introduction

It is commonly viewed that there has long been an "Anglo-American" model of industrial and employment relations characterized by a liberal market ordering of the economy (Hall and Soskice 2001). Historically, however, this was not the case and there was considerable variation in the industrial relations systems among English-speaking countries. Indeed, there were three distinct models: a voluntarist system (with implicit state support) shared between Britain and Ireland; a unique award system founded on conciliation and arbitration, which prevailed in Australia and New Zealand; and the legally regulated Wagner Act framework, which was shared between the United States and Canada. While these models shared some underpinnings, such as their common law foundations, it was their distinctiveness that was most notable.

Over the past twenty-five years, however, there has been substantial con-

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vergence in the legal foundations of the industrial relations systems in these six countries as the voluntarist and award models have broken down and been replaced by new legal frameworks. A common "Anglo-American" model has now emerged, premised on a private ordering of industrial and employment relations practices rather than the public ordering that was an important dimension of the voluntarist and award models. The shared mode of regulation is designed to assist managerial flexibility and facilitate a divergence in employment practices between firms. There are similar practices with respect to collective representation in such dimensions as union recognition, non-union forms of representation, and strikes and lockouts. The collective model is underpinned by a common structure of "fairness standard" individual protections on such issues as dismissal and minimum terms and conditions. Yet while there has been convergence, divergence remains. This is so in Ireland, where national partnership agreements play a significant role, and in the United States, where the interests of employers are paramount and neither collective nor individual protections are as robust as elsewhere.

Dynamics of Collective Representation Systems

Since the early 1980s there has been much turbulence and change in comparative systems of labor regulation and representation. This is most commonly associated with Thatcher and Reagan in Britain and the United States, respectively, though it has been at least as profound in Australia and New Zealand. In contrast to other countries, the framework of labor law in the United States and Canada has exhibited remarkable stability. In both countries the system of industrial relations was firmly built around a private ordering of affairs, with representation and economic negotiations centered around the firm.

In the United States the National Labor Relations Act (NLRA) remains the statute enacted in the federal Wagner Act of 1935 (as subsequently amended by the Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959). While there has been some reinterpretation of the NLRA by the Reagan-, Clinton-, and Bush-appointed National Labor Relations Boards (NLRB), arguably more important have been the uses made of existing provisions of the law in recent decades and the change in the perceived social contract that occurred during the Reagan administration. The change in practice is particularly noteworthy in the case of the permanent replacement of strikers, which was first facilitated by the 1939 U.S. Supreme Court case of *NLRB v. MacKay Radio.* This decision had limited impact on industrial relations practice until the 1981 PATCO dispute and, significantly, the 1982 Phelps-Dodge mine strike, where the employer was able to use permanent replacement workers to eliminate union representation at the mine. This became a model for aggressive employer strategies in the 1980s and 1990s. While unionization has been declining in

the United States for decades, new employer attitudes have contributed to a decline from 22 percent in 1980 to just 12 percent in 2006 (Katz, Kochan, and Colvin 2007).

The industrial relations system in Canada also has been stable and, as in the United States, is based on the Wagner Act. Although labor relations is an issue of provincial jurisdiction under the Canadian constitution, the Wagner Act provided the model for the initial federal law governing labor relations in the 1940s and subsequent provincial legislation in this area. The Canadian legislation incorporated key features of the Wagner Act, including exclusive representation of bargaining units; majority union support required for certification; duties to bargain on employment related matters; and the availability of strike and lockout weapons to support bargaining.

At the same time, however, Canadian labor law has developed some distinct doctrines causing it to diverge from its neighbor, including lack of a bar on employer-dominated representation plans; use of card check or snap elections to determine majority representation status; self-enforceability of labor relations board orders; use of interest arbitration as an alternative to strikes for first contracts; and greater limitations on the use of permanent replacement workers in strikes or lockouts. In general, these differences represent a more pro-labor slant to Canadian labor law compared to the United States. Although there have been a series of amendments to existing labor laws passed in the various Canadian provinces since the 1980s, these represent periodic shifts in power associated with changing provincial governments. However, these have occurred within a common general structure of regulation of labor relations and do not entail a broader transformation.

In contrast to this pattern of stability in North America, in Britain unions faced a concerted attack from 1979 to 1997 under the Thatcher and Major governments. From the turn of the twentieth century the industrial relations system had been premised on a doctrine of collective laissez faire. At the same time, however, governments consistently provided implicit support for unions and recognized their place in the economic order. The result was a distinctive regulatory approach to relying on voluntary collective bargaining to achieve a particular normative outcome (Davies and Freedland 1993). The thrust of the Thatcher reforms was to transform the role of unions and collective bargaining within the economy and society. This was achieved through a rebalancing of power, with legislation on such issues as prohibiting secondary picketing, compulsory ballots before strikes, and the abolition of the custom or requirement to recognize unions. The redefined place of unions was not only to be on the margins of the economy but also one of private ordering.

The Labour Party under Blair did not seek a reversal of this underlying philosophy, and, therefore, labor law has continued to be used to confine

collective action to the private sphere of ownership as an end in itself and to achieve economic goals, with associated implications of flexible outcomes. However, a softening of the extremes of Thatcherite legislation was introduced with the 1999 Employment Relations Act, which provided unions with recognition rights. The 2004 Employment Relations Act also provided some protection against employers offering inducements to individual employees not to belong to a trade union, responding to the *Wilson and Palmer* judgments (2002). Individual employment protections were introduced with the minimum wage (1998) and limited extension of rights in areas such as unfair dismissal, working time, statutory holiday entitlement, parental leave, part-time rights, and age discrimination. These actions, sometimes prompted by European Union directives, have been restricted in their scope.

Ireland has trodden a different path, despite its common industrial relations heritage with Britain. While the constitution gives a right to join a trade union, it does not impose a corresponding obligation on employers to recognize or bargain with them. Nevertheless, the role of unions within the public sphere was long accepted, with the 1946 Industrial Relations Act (and amendments in 1969 and 1976) having the promotion of harmonious industrial relations as a key objective (Kerr 1991). The voluntarist foundation of Irish industrial relations without collective bargaining rights has been retained and labor law has been comparatively stable. The 1990 Industrial Relations Act, for example, ultimately avoided introducing a positive right to strike but retained the "immunities" approach dating from 1906, though with the addition of prestrike ballots. The 2001 Industrial Relations Act also avoided giving unions a right to recognition, even though it gave some rights to refer disputes on terms and conditions in non-union firms to the Labour Court.

What has been unique in Ireland has been the great expansion of the role of unions in the public ordering through successive national-level "partnership" agreements beginning in 1987. These have established pay guidelines, addressed issues of public policy (such as taxation), and progressively expanded to broader social issues involving community and voluntary organizations. For unions, this has been regarded as a protection against Thatcherite neo-liberalism and providing union legitimacy. This public ordering has significantly facilitated Ireland's remarkable economic success (Baccaro and Simoni 2007). At the same time, however, the "truncated partnership" (Roche 2007) has seen tacit governmental support facilitating greater private ordering of employment practices at the firm level as a key route to attracting multinational companies. There is no longer any pressure on firms to recognize unions, density has fallen to 34 percent overall and 20 percent in the private sector, and firms have substantial flexibility to construct their own affairs. There have been, however, fourteen separate labor laws supporting individual rights, including

a national minimum wage, protection of part-time employees, working time regulations, and expanded maternity rights.

The arbitration and award systems that developed in the early twentieth century in Australia and New Zealand were premised on an understanding of the legitimate public ordering of industrial relations extending into encouraging union membership (through union preference clauses), dispute resolution, and the settlement of terms and conditions of employment such that they were "fair and reasonable." In the 1907 *Harvester* case, Justice Higgins came to define this as meaning "the normal needs of the average employee regarded as living in a civilised community." Relating this to the humblest worker living in a household of five, this social dimension was evident. Progressively, the regulatory system expanded to include establishing norms on issues such as working hours, holidays, physical working conditions, periods of notice, and the like. All such employment practices were deemed to be central to the public ordering of industrial relations. In both countries the system was supported by high trade tariffs.

A radical attack on the system occurred in New Zealand in 1991 with the Employment Contracts Act transforming the system into one of private ordering, leading to a collapse of union membership and density and the determination of conditions at the firm level. The 2000 Employment Relations Act represented a rebalancing of power, facilitating union recognition in particular, though very much operating within the a regime of private ordering.

In Australia the transformation was more gradual, occurring with the 1993 Industrial Relations Reform Act and 1996 Workplace Relations Act progressively decentralizing industrial relations to enterprises and allowing individual contracts, though both occurred within a framework of protections established by the award system. Strikes and lockouts were legalized. In 2005, however, Australian legislation shifted dramatically to an extremely private ordering of employment relations with the Work Choices Act. While phasing out award provisions, it also provided unions no right to recognition or access to the workplace, removed the right for workers in companies with fewer than one hundred employees to seek redress for unfair dismissal, and, remarkably, explicitly prohibited the use of pattern bargaining. As an extreme imposition of a private ordering model, bargaining has to reflect the circumstances of the individual enterprise and unions are obliged to respond to the specific proposals of any employer. Furthermore, bargaining over a range of issues is prohibited, in contrast to the distinction between mandatory and permissive subjects in the United States. These include union involvement in the workplace, additional unfair dismissal protections, and the hiring of agency or contract workers. While minimum wage legislation has replaced the award system, the legislation imposes significant constraints on the ability of unions to

strike while allowing offensive lockouts. This extreme legislation is, however, likely to change following the defeat of the Howard government in the 2007 elections, when repeal of key provisions of the Work Choices legislation was a central election issue.

Collective Labor Rights and Individual Rights

The pattern of labor law changes has led to a decline in the public ordering of industrial relations and a convergence in the realms of collective labor rights and individual employment rights. There do remain, however, differences across the countries examined. Union recognition is now the norm, though there are operational differences. While Canada has the potential for card check and snap elections, the slow process and campaigning in the United States inhibits the ability of the unions to gain bargaining rights. The British system represents a hybrid, while in New Zealand rights have been restored. Ireland and Australia stand apart in not having recognition rights. The preservation of the voluntarist model in Ireland has occurred in spite of continuing declines in union membership and the national partnership agreements. The dramatic push to curtail recognition or good faith bargaining rights in Australia is extreme, though unlikely to be sustained following the change in government. While the United States prohibits non-union collective representation through 8(a)2 of the NLRA, this is generally allowed. In Canada it is possible, though the right to recognition remains and this pattern dominates elsewhere.

While Britain and Ireland have retained a basic structure of "immunities" as opposed to a right to strike, the introduction of that system in Australia and New Zealand (which was contrary to the arbitration and award system in theory, if not in practice) has meant a formal convergence. In Britain, Ireland, Australia, and New Zealand, authorization for strikes requires ballots of differing degrees of complexity, though such requirements are absent in the United States and Canada. However, in the former permanent replacement of strikers is permitted while this is true in Canada only for temporary replacements; beginning in 2004 in Britain, workers receive protection from dismissal for twelve weeks.

Minimum wage protection has now become the norm. In the United States the Fair Labor Standards Act of 1938 established the minimum wage and the right to overtime pay, and Canadian provinces enacted similar provisions soon afterwards. In Canada, however, there has been some expansion to include additional minimum terms of employment such as holiday entitlement. Historically, neither Britain nor Ireland had provisions for minimum wages, though wages councils served at the industry level to set conditions. While these were eroded in Britain by Thatcher, in 1998 the National Minimum Wage Act was

introduced, and this has subsequently served as the model for similar acts in Ireland, New Zealand, and Australia. In the latter two cases, this represents a lessening of the historic protections workers enjoyed given the expansive role played by the award systems on a range of terms and conditions. This resulted in a very high level of minimum wages in both countries; in 2004 the minimum wages were 58 percent of median wages in Australia and 47 percent in New Zealand, compared with just 31 percent in the United States and between 39 and 44 percent in Ireland, Britain, and Canada (OECD 2006).

Most Anglo-American countries also provide basic entitlement to parental leave: while in New Zealand workers are entitled to fourteen weeks of paid leave and thirty-eight weeks of unpaid leave, Canada, Britain, and Ireland all have more paid leave. Australia allows one year, though unpaid, while the United States stands out as having the most limited benefit, with only twelve weeks unpaid leave being provided under the Family and Medical Leave Act, which is further limited to larger employers and as a result only covers about 40 percent of the workforce. A similar pattern holds for holiday entitlement, which is four weeks or more in Britain, Ireland, New Zealand, and Australia. In Canada there is variation by province, though two weeks initially is common, rising to three weeks after five years of service. The United States is again the exception with no minimum entitlement.

Most countries also have protections against unfair dismissal, with protections (after a period of employment, typically one year) in Britain, Ireland, New Zealand, and Canada. Similar legislation exists in Australia, except that the Work Choices Act of 2005 removed the ability to seek remedy in firms of fewer than one hundred employees (though this was a key election issue for the incoming Labour government). The United States is the outlier; the employment-at-will doctrine allows an employer to dismiss workers without notice or severance pay. In each country, discrimination protection exists, though the scale of damages in the United States mitigates firms' willingness to act in an unconstrained manner on dismissals (Colvin 2006).

Conclusions

The three distinct models of industrial relations that historically existed within the six countries discussed in this paper contradict the idea that there has been a longstanding Anglo-American model of liberal market economic ordering. However, the employment relations systems have been converging in two major areas: labor rights and individual employment protections. The convergence in the realm of labor rights has been away from public ordering and toward a private ordering of employment relations. The private ordering entails the idea that work and employment terms and conditions are primarily determined at the level of the individual organization, whether through collec-

tive bargaining, individual negotiations, or unilateral employer establishment of terms and conditions. The shift away from public ordering has been most dramatic in the cases of Australia and New Zealand, given the role played by the award system. There has been much less change in North America, reflecting the historic situation whereby the Wagner Act model was founded on the idea of private ordering from the outset, with the individual organization having been regarded as the appropriate level for the determination of work and employment conditions. The breakdown of multi-employer and pattern bargaining, however, has represented a deterioration of a superstructure of partial public ordering built on top of the Wagner Act model during the 1950s through the 1970s.

With regard employment rights, the convergence is toward a model in which the role of employment law is to establish a basket of minimum standards. Again, the dramatic shift has been in the cases of Australia and New Zealand, where the award system provided extensive and broad-ranging protections. In Britain and Ireland, by contrast, the shift has been toward great formalization of minimum standards in contrast to the earlier system of voluntarism supplemented by industry protections.

The strongest degree of similarity in adoption of the private ordering in labor rights and employment rights is in Canada, Britain, and New Zealand. Labor law in these countries favors organizational-level economic ordering but with reasonably substantial protections of trade union organizing and bargaining rights and a set of minimum employment standards. Australia had moved in a similar direction until the 2005 Work Choices legislation moved it in a significantly more pro-employer direction. This is likely to change under the new Rudd-led Labour Party government. Ireland, however, is an outlier in that it combines a high level of public ordering at the national level through partnership agreements. However, this has not been strongly institutionalized, and there is a significant dichotomy between the national and local levels. The United States is also an outlier. Structurally it is similar in the private ordering of labor law and the role of employment law in establishing a minimum basket of standards. However, it diverges from the other countries by generally favoring the interests of employers over those of employees and organized labor in the implementation of the model. This is evident in weak enforcement of the right to organize, the ability to hire permanent replacement workers, the employment-at-will doctrine, and the lack of basic standards on sick leave or holiday entitlement.

References

Baccaro, Lucio, and Marco Simoni, 2007. "Centralized Wage Bargaining and the 'Celtic Tiger' Phenomenon." *Industrial Relations,* Vol. 46, no. 3 (July), pp. 426–455.

Colvin, Alexander. 2006. "Flexibility and Fairness in Liberal Market Economies: The Comparative Impact of the Legal Environment and High Performance Work Systems." *British Journal of Industrial Relations,* Vol. 44, no. 1, pp. 73–97.

Davies, Paul, and Mark Freedland. 1993. *Labour Legislation and Public Policy.* Oxford: Oxford University Press.

Hall, Peter, and David Soskice, eds. 2001. *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage.* Oxford: Oxford University Press.

Katz, Harry, Thomas Kochan, and Alexander Colvin. 2007. *An Introduction to Collective Bargaining and Industrial Relations.* New York: McGraw-Hill.

Kerr, Tony. 1991. "Irish Industrial Relations Legislation: Consensus not Compulsion." *Industrial Law Journal,* Vol. 20, no. 4 (December), pp. 240–257.

OECD 2006. *Employment Outlook: Boosting Jobs and Incomes.* Paris: OECD.

Roche, William. 2007. "Social Partnership and Workplace Regimes in Ireland." *Industrial Relations Journal,* Vol. 38, no. 3, pp. 188–209.