

The role of law in regimes of labour relations: A critique and corrective of comparative political economy

Andrew James Bernard Morton.

**The University of Leeds – School of Politics and International Studies
(POLIS)**

**Submitted in accordance with the requirements for the degree of PhD
with the name of the relevant degree added in full afterwards**

November, 2018.

The candidate confirms that the work submitted is his own and that appropriate credit has been given where reference has been made to the work of others.

The right of Andrew Morton to be identified as Author of this work has been asserted by Andrew Morton in accordance with the Copyright, Designs and Patents Act 1988.

Acknowledgements

I firstly must thank my two supervisors – Charles Dannreuther and Christine Harlen. Their patience with persistent writers block on my part was met with reassurance and kindness, without which this thesis would not have been completed. I also offer sincerest thanks to my mother and father, my uncle John and my elder sister, Cari. I owe a debt of gratitude for the support of Dr. David Cabrelli at the School of Law at the University of Edinburgh, my MSc. Dissertation Tutor Dr. Daniel Clegg at the University of Edinburgh and Professor Ian Greer at Cornell University. I also owe thanks to a number of fellow PhD students at the University of Leeds, especially Greg Barnes and Ahmed Tannira, and the School Manager at POLIS, Caroline Wise. Additionally, I owe thanks for the invaluable support of friends Marisa Elsaßer, James Byng, Hasan Daoud and Guy Haynes.

Abstract

This thesis concerns the influential field of comparative political economy (CPE) and its leading approaches to labour relations 'institutions' and regimes in Europe. More specifically, this study offers both a critique and corrective of Varieties of Capitalism, Welfare State and Regulation approaches of CPE that have neglected the role of law, legal rules and legal systems in European labour relations. This thesis offers an alternative theoretical framework, a socio-legal political economy approach, developed principally out of existing CPE theory and contributions from legal studies. The thesis is organised according to a qualitative case study research design that sees two national examples of labour relations systems, Britain and Germany, compared using two areas of European Union law, acquired rights and posted workers, to develop this socio-legal political economy approach and draw conclusions. The four cases produce important findings in regards to specific aspects of labour relations concerning these two countries, collective bargaining and labour law. One broader theoretical argument stems from this comparative approach however. To theorise and compare evolving labour relations systems in Europe, the influence of law cannot be separated from emergence of neo-liberalism, its reforms, politics, practices and, crucially, its critically important legal characteristics. The result for CPE, is neither holistic and self-referential national models nor a singular neo-liberal 'European' model, but something much more complex and contested.

Table of Contents

Tables and Figures

Glossary of Key Terms

Section I

1.1. Introduction to Comparative Political Economy, European labour relations and the role of law

1.1.1.	Introduction	page 19
1.1.1.i.	<i>CPE, labour relations and the role of law</i>	page 20
1.1.1.ii	<i>Neo-liberalism & law-driven change in European labour relations</i>	page 24
1.1.2.	An alternative framework: an outline of a <i>socio-legal political economy approach</i>	page 30
1.1.3.	Key Arguments	page 37
1.1.4.	Research process and methods	page 40
1.1.5.	Concluding comment and thesis organisation	page 43

1.2 Comparative Political Economy, Labour Relations 'institutions' and the role of law: a critique of three CPE schools

1.2.2.	Introduction	page 45
1.2.3.	Varieties of Capitalism	page 48
1.2.3.i.	<i>The original VoC approach</i>	page 48
1.2.3.ii	<i>Varieties of Capitalism and the law</i>	page 55
1.2.3.iii.	<i>VoC and Labour relations</i>	page 57
1.2.3.iv.	<i>Varieties of Capitalism: Concluding comment</i>	page 66
1.2.4.	Regulation Theory	page 68
1.2.4.i.	<i>Regulation, Fordism and its successors</i>	page 70
1.2.4.ii.	<i>National SSIP and complementarity</i>	page 73
1.2.4.iii.	<i>RT, labour relations and the 'wage-labour nexus'</i>	page 77
1.2.4.iv	<i>Regulation Theory: Concluding comment</i>	page 84

1.2.5. Comparative Welfare Capitalism	page 86
1.2.5.i. <i>Welfare, economy and politics: Modelling welfare</i>	page 87
1.2.5.ii. <i>Power resources, de-commodification and Recommodification</i>	page 91
1.2.5.iii. <i>Labour relations as welfare provision for workers</i>	page 94
1.2.5.iv. <i>Conclusions</i>	page 100

1.3 Taking Stock: lessons from three reviews of CPE approaches and developing key arguments

1.3.1. Three CPE schools	page 103
1.3.2. Developing key arguments	page 108
1.3.2.i. <i>Neo-liberalism</i>	page 109
1.3.2.ii. <i>The State</i>	page 110
1.3.2.iii. <i>Complexity not complementarity, and CPE's national 'models'</i>	page 114
1.3.2.iv. <i>Application to Germany and Britain</i>	page 115
1.3.3. Conclusions	page 116

1.4. Research Process and Methodology

1.4.1. An alternative framework and its methodological implications	page 118
1.4.2. Comparative case study analysis and case study selections	page 120
1.4.2.i. <i>Qualitative comparative analysis</i>	page 121
1.4.2.ii. <i>The national cases: Germany and Britain</i>	page 124
1.4.2.iii. <i>The European cases</i>	page 126
1.4.3. Data sources	page 128
1.4.3.i. <i>Legal texts</i>	page 128
1.4.3.ii. <i>Documentary sources and secondary data</i>	page 132
1.4.3.iii. <i>Interview data</i>	page 134
1.4.4. Concluding comment	page 135

Section II

2.1. Two national level case studies: An introduction to German and British Labour Relations

2.1.1. Introduction	page 141
2.1.2. Germany	page 143
2.1.2.i <i>The 19th and 20th Century: From the Imperial state to the Weimar Republic</i>	page 145
2.1.2.ii <i>Post-1945 to 1970s: the rise of Tarifaautonomie</i>	page 152
2.1.2.iii <i>Post-1980: the rise of neo-liberal industrial politics & the slow demise of Tarifaautonomie</i>	page 156
2.1.3. Britain	page 159
2.1.3.i <i>The late 19th Century: from industrial strife to reconciliation</i>	page 160
2.1.3.ii <i>The turn of the 20th Century: a concerted turn toward industrial peace</i>	page 163
2.1.3.iii <i>1979-to the present: renewed English liberalism as Neo-liberalism</i>	page 169
2.1.4. Concluding comparisons	page 172

2.2. Two European level case studies: European Union posted workers law and acquired rights law

2.2.1. Introduction	page 176
2.2.2. European Acquired Rights Law	page 177
2.2.2.i <i>Definition and scope of the ARD</i>	page 178
2.2.2.ii <i>The ARD and collective bargaining</i>	page 182
2.2.3. European Posted Workers Law	page 186
2.2.3.i <i>The 1996 directive and key issues</i>	page 187
2.2.3.ii <i>CJEU case law: from Rush Portuguesa to Laval</i>	page 189
2.2.4. Conclusion	page 194

Section II Case Study Chapters

2.3. German Labour Relations and European Posted Workers law

2.3.1 Introduction	page 197
2.3.2. Empirical section: From the <i>Rüffert</i> case to the <i>RegioPost</i> case	page 199
2.3.2.i <i>The legislative background to the 2008 Rüffert case</i>	page 199
2.3.2.ii <i>The Rüffert judgement and the CJEU's new posted workers case law</i>	page 201
2.3.2.iii. <i>The response to Rüffert</i>	page 207
2.3.2.iv <i>The 2015 RegioPost case</i>	page 210
2.3.2.v. <i>Concluding comment to empirical section</i>	page 214
2.3.3. Theoretical section	page 215
2.3.4. Conclusion	page 221

2.4. British Labour Relations and European Posted Workers law

2.4.1. Introduction	page 224
2.4.2. Empirical section	page 227
2.4.2.i <i>Context: the 2009 Lindsey dispute</i>	page 227
2.4.2.ii <i>The Settlement: collective bargaining and collective action in the shadow law</i>	page 230
2.4.2.iii <i>De facto versus de Jure state of legal rights</i>	page 237
2.4.3. Theoretical section	page 239
2.4.3.i <i>Collective action, collective bargaining and comparative lessons for British labour relations</i>	page 240
2.4.3.ii <i>Conflict of rules, negotiation and contestation</i>	page 245
2.4.3.iii <i>CPE, Britain and labour relations</i>	page 247
2.4.4. Conclusion	page 249

2.5. German Labour Relations and European Acquired Workers law

2.5.1. Introduction	page 251
2.5.2. Empirical section	page 254
2.5.2.i <i>the ARD's scope</i>	page 254
2.5.2.ii <i>the ARD and Collective Bargaining</i>	page 261
2.5.2.iii <i>Concluding comment for empirical section</i>	page 271

2.5.3. Theoretical findings: the political content of law	page 271
2.5.3.i <i>Tarifautonomie, its decline and emerging legal influence</i>	page 272
2.5.3.ii <i>Neo-liberalism and increasingly complex German capitalism</i>	page 275
2.5.3.iii <i>Conflict of rules: Neo-liberal politics and reordering of conflicting rights</i>	page 278
2.5.4 Concluding comment	page 280

2.6. British Labour relations and European Acquired Workers law

2.6.1. Introduction	page 283
2.6.2 Empirical Section	page 286
2.6.2.i <i>The ARD's scope</i>	page 286
2.6.2.ii <i>Collective Agreements and the ARD</i>	page 294
2.6.3 Theoretical Section	page 301
2.6.3.i <i>Law and collective bargaining inextricably entangled</i>	page 301
2.6.3.ii <i>A clash of legal systems and complex problems of direct and indirect legal influences</i>	page 304
2.6.3.iii <i>Conflict of rules, laws, complexity and incoherence</i>	page 306
2.6.4 Conclusion	page 309

Section III

3.1. The application of four case studies: Lessons of an alternative framework and core arguments

3.1.1. Introduction	page 314
3.1.2. Preliminary comparisons	page 314
3.1.3. Five Observations	page 322
3.1.4. Examining the <i>socio-legal political economy</i> approach	page 340

3.2. European Labour Relations, the role of law and neo-liberal legal change

3.2.1. Neo-liberalism, the state & juridification	page 351
3.2.1.i <i>The state and juridification</i>	page 351
3.2.1.ii <i>Judicialisation</i>	page 357
3.2.2. European labour relations under Neo-liberalism	page 360

3.2.3. Complexity, incoherence and national models	page 365
3.2.3.i. Complexity, neo-liberalism and national models	page 365
3.2.3.ii CPE and institutionalism: new directions	page 369

3.3. Conclusion	page 374
3.3.1. Reflections: improvements and lessons	page 375
3.3.2. Future research agendas and publications	page 376

References	page 382
-------------------	----------

Appendix	page 405
-----------------	----------

<i>i. List of legislation and cases</i>	page 406
<i>ii. Documentary sources</i>	page 412
<i>iii. Interview text</i>	page 414

Tables and Figures

Tables

- Table 2.2.i –key CJEU cases on the scope and definition of a ‘transfer of undertakings
- Table 2.2.ii Core cases – ARD’s scope
- Table 2.2.iii- Status of Collective Agreements post-transfer
- Table 2.2.iv: Posted Workers cases of the Court of Justice]
- Table 2.3.b Conflicting rules: social rights and economic rights
- Table 2.6.b UK and EU cases on the ‘static-dynamic’ interpretations
- Table 3.1.a. Four cases

Figures

- Figure 1.1.a. Positioning of an alternative approach
- Figure 2.3.a contracting supply chains
- Figure 2.4.a contracting supply chains
- Figure 2.5.a chain of transfers in Werhof (2006)
- Figure 2.5.b The chain of transfers in Asklepios
- Figure 2.6.a UK Court hierarchy
- Figure 2.6.b The transfers of the Alemo-Herron case
- Figure 3.2. Overlapping political, industrial and legal drivers of neo-liberalism

Glossary of Key terms

Terms and abbreviations

European Union related

1. EU – European Union
2. EEC – European Economic Area
3. CJEU – European Court of Justice
4. ARD – Acquired Rights Directive
5. PWD – Posted Workers Directive
6. ICED – Information and Consultation Directive
7. TFEU - Treaty for Reform of the European Union (Lisbon Treaty)
8. SEA – Single European Act
9. TEU – Treaty Establishing the European Union (Maastricht Treaty)
10. TSCG – *Treaty on Stability Competitiveness and Growth*
11. SGP – *Stability and Growth Pact*
12. ECB – *European Central Bank*
13. EWCs – *European Works Councils*
14. SMEs – *Small and Medium-Sized Enterprises*

Academic

CPE – *comparative political economy*

VoC – *Varieties of Capitalism'*

CWC – *Comparative Welfare Capitalism'*

RT – *Regulation Theory'*

SSIP – *'Social Systems of Innovation and Production'*

LME – *Liberal Market Economy*

CME – *Coordinated Market Economy*

Britain specific

1. SPC – *Service Provision Change*
2. NJC - *National Joint Council*
3. NJCECI - *National Joint Council for the Electrical and Construction Industry*
4. NAECI – *National Agreement for the Electrical and Construction Industry*
5. TUPE – *Transfer of Undertaking (Protection of Employment)*

Germany specific

1. *Tarif* - Collective Bargaining Agreement
2. *Tarifklausel* – Collective Bargaining (Obligation) clause
3. *Tariftreuegesetze* – Collective Bargaining Obligation Statute
4. *Betriebsrätsgesetz* - Works Councils Act
5. *Mitbestimmung* – Co-determination
6. *Gewerkschaft* – trade union
7. *Arbeiter* - worker
8. *Betriebsrat* - Works Councils
9. *Betriebsvereinbarung* - Works Agreement
10. *Aufsichtsräte* – Supervisory board
11. *Öffnungsklauseln* – Opening Clauses
12. *Mitbestimmungsrecht* – Co-determination rights
13. *Arbeitsgericht* - Labour Court
14. *Arbeitsrecht* – Workers’ rights
15. *Mindestlohn* - Minimum Wage
16. **DBG** - *Deutscher Gewerkschaftsbund* - German national trade union federation
17. **BMAS** - *Bundesministerium für Arbeit und Soziales* - Federal Ministry for Labour and Social Affairs
18. **IG Metall** – *‘Industriegewerkschaft Metall’* – Industrial Union of Metalworkers

19. **IG BAU** - *'Industriegewerkschaft Bauen-Agrar-Umwelt'* – Industrial Union of Construction Workers
20. **Ver.di** - *'Vereinte Dienstleistungsgewerkschaft'*- German United Services Trade Union
21. **BAG** - *Bundesarbeitsgericht* Federal Labour Court
22. **LAG** - *Landesarbeitsgericht* – State Labour Court (*Land* level)
23. **OLG** - *Oberlandesgericht* - Higher Regional Court
24. **BGB** - *Bürgerliches Gesetzbuch* - Civil Code
25. **HGB** - *Handelsgesetzbuch* – German Commercial Code
26. **GmbH** - *Gesellschaften mit beschränkter Haftung* – Limited Liability Company
27. **AG** - *Aktiengesellschaft* – Publicly listed company (equivalent in UK company law parlance).
28. **TVG** - *Tarifvertrag für den öffentlichen Dienst*

Section I

Chapter 1.1.

Introduction to Comparative Political Economy, European labour relations and the role of law

1.1.1. Introduction

This thesis concerns an important theoretical problem within comparative political economy (thereafter 'CPE'). More specifically, the problem exists within the approaches of CPE's leading schools toward the subject of labour relations¹ and the comparison of different national models of labour relations in Europe. These leading schools of CPE, represented in this thesis by the *Varieties of Capitalism* (VoC), *Comparative Welfare Capitalism* (CWC) and *Regulation Theory* (RT) approaches, have each placed national labour relations 'models' in a central and defining position in their respective theories and comparative typologies. The way in which CPE theories have approached labour relations regimes however have been undermined by a failure to address adequately, either empirically or theoretically, *questions of law, legal regulation and legal influences* within national labour relations systems in Europe. It is this problem of CPE that motivates this thesis and the development of an alternative approach and framework that seeks to provide a substantive role for empirical realities of law, such as legal rules, legal actors (such as courts) and legal systems (national and transnational), as well as theoretical innovations from legal studies.

This alternative approach, thought of and referred to as the *socio-legal political economy approach*, is developed in this thesis through a qualitative and comparative case study research design where the various intricate

¹ Labour relations' concerns the relationship between workers and employers and is defined here as interchangeable with commonly used terms *industrial relations* or *employment relations*

relationships between law and non-law are compared and theorised. These relationships however serve to highlight the interdisciplinarity of labour relations, CPE more broadly and the role of law itself, rather than relegating any of the hugely important political, economic and social factors that frame how law is given life and exercised in contemporary capitalist societies.

This introductory chapter will proceed by detailing the different parts of CPE's problem, but will also outline the field and present CPE's strengths. The alternative approach above will also be outlined and accompanied by some key arguments that are drawn from its application. This is then followed by an outline of the research approach, methods and organisation of this thesis.

1.1.1.i. CPE, labour relations and the role of law

CPE concerns the comparative analysis of usually, but not exclusively, nationally-defined capitalist societies and the political, economic and social conditions of these different regimes of capitalist governance. CPE is a broad, open and inherently interdisciplinary research field that brings together researchers from politics, economics, sociology and, importantly in regards to labour relations, business school-orientated industrial relations studies. Other sub-fields have been particularly influential upon CPE, including new economic sociology, institutional economics (old and new²), business school-centred industrial relations, with important contributions from the fields of labour law and comparative law.

These latter two introductions from legal studies present a crucial first step to addressing CPE shortcomings in this area. CPE's 'legal problem' has

² Old institutional economics is associated with the work of Veblen and Commons, whilst new institutional economics is identified by Coase, Williamson and North.

been also raised by others from within CPE-aligned studies, namely Morgan and Quack (2010, p.281) in the 2010 edited volume *Comparative Institutional Analysis* (Morgan et al., 2010). These sorts of critiques are not however specifically directed toward labour relations as a subject and are more forgiving of some of CPE's failings, particularly those of the *Varieties of Capitalism* approach. The first, and hugely influential, *Varieties of Capitalism* volume (Hall and Soskice, 2001) did in fact include chapters on capitalism's relationship with law and legal systems, namely from prominent legal theorist Gunther Teubner (2001, p.417-441) and Steven Casper (2001, p.387-416). These also however did not address concerns of labour relations, work and employment. Additionally, these contributions either tended to operate, as in Teubner's case, at some distance from the 'core' VoC approach crafted by Hall and Soskice or, in Casper's case, exhibited some of the those same problems of the canonical VoC view of political economy (explained in detail in chapter 1.2).

Beyond this, there is a small number of studies within CPE that address *some* aspects of legal analysis in the specific context of labour relations (as in intended by this thesis). These include promising contributions from lawyers Deakin et al., (2008). Deakin and Sarkar (2008) and Ahlering and Deakin (2007) and Deakin Pele and Siems 2007. These authors offer a reformed VoC-like institutionalist approach. In similarity with Teubner's 2001 contribution, these operate at some distance from the canonical and original VoC framework with their stronger aspects in fact calling into question core aspects of the VoC approach. Contributions from the Regulation Theory (RT) (Heino, 2015) and Comparative Welfare Capitalism (CWC) (Bonoli, 2003) corners of CPE and offer more promising contributions. Although these two studies of Heino and Bonoli provide important contributions to this thesis, as do Deakin and Ahlering, they have

limitations either in how law is conceived or in the extent to which the subject of law is integrated into approaches to trade unions, employers, collective bargaining and labour market policy that dominate CPE.

A detailed critique and review of CPE's three schools (VoC, CWC, RT) is provided in the following review chapter (1.2). To address the overarching problems of CPE here however, the problems of CPE's approach to labour relations is evident in two key areas. First, most CPE studies direct their analytical focus overwhelmingly toward the institutions and social actors of collective bargaining, thus paying very little regard to either direct forms of legal influence, principally represented by labour law, or those *indirect* legal influences found in various bodies of economic law (e.g. company and contract law). This fundamental neglect of law's multi-faceted role also produces an analytical neglect of national legal and constitutional systems from CPE typologies. This is despite CPE approaches making efforts to map and weave together different welfare state, political and economic systems together in their approaches. Nearly all of the notable CPE typological schemes identify national regimes of labour relations and welfare states within them, making the absence of national legal systems in these CPE approaches particularly problematic. An attempt to theorise the complex mix and interaction between different sets of legal rules found in labour law, company law and aspects of national constitutional systems is entirely necessary. This theorisation also demands the incorporation of an analysis of the *judicial* state as well as its interaction with the *governmental* state (that is well covered in CPE work) in organising the relationship between the statute law and common law. This attempt also requires a theorising of those relationships between these facets of legal-constitutional systems on the hand and those of *non-law* found in politics, economic organisation and social-setting and social relations on the other. Without these, an appropriate

understanding of the relationship between law and collective institutions like wage bargaining, trade unions, political and policy influences is not possible.

The second shortcoming is represented in those CPE studies that do offer *some* treatment of law. These however only do so in a fleeting and superficial manner that usually manifest themselves in brief, blunt and limited references to legislative reforms of labour markets and labour relations. An understanding of law's role must be much more substantive and comprehensive. These studies often present a very limited and formalistic understanding of law's influence that, by implication, sees law as a given, as rigid and a mere external influence upon the actors, practices and institutions of labour relations. Law is not rigid, and has much of its character informed by politics, industrial practice and social relations. Law is simultaneously a flexible, malleable and mediating influence used to settle disputes and organise economic and social relationships as well as something that *is itself sometimes mediated* by the same social relations in seeks to regulate. This process of mediation often presents itself in the form of social and political conflict as imposed changes on legal rights of action provoke responses from social actors that have competing interests and claims on these rights. In other instances, these mediated responses will take a more subtle and negotiated form, shaping how legal changes take shape in existing practice.

These abstractions are present at different points in labour relations, but the presence or threat of the first has particular relevance to a capitalist labour relations context where social interests of labour and capital are inherently in competition (Traxler et al., 2001, p.11; Offe 1985). The social complexity of law's 'impact' becomes more important the more that law is forcibly imposed upon the social relationships to reorder rights of either capital or labour. In labour relations terms, this means that legal attempts to

influence labour relations will themselves be framed by the political and social interests this attempt affects. A key part of theorising law's place in contemporary European labour relations is accepting the role neo-liberalism has played in renewed efforts to reorder labour and capitalist relations. This argument of law's neglect in CPE is therefore inextricably tied to the emergence of neo-liberal politics, ideas and policy agendas; a subject well covered in CPE but without neo-liberalism's *legal character* being addressed.

1.1.1.ii Neo-liberalism & law-driven change in European labour relations

From approximately 1980 onwards, the intellectual, policy and political shifts associated with neo-liberalism presented serious demands for change from institutions of labour relations in Europe.

These 'changes' often presented modest changes in labour relations regimes, and in other cases produced far more sweeping and destructive results. Changes driven by legislative reforms and associated shifts in business practice were clearly more significant in countries like Britain than in countries like Sweden and Denmark. In either sets of cases, whether substantive decline was witnessed or not, almost all national regimes of wage bargaining have seen the role of law become much more commonplace and prominent. Moreover, the imposition of neo-liberal reforms coming from the European level were felt very differently across Europe. This point presents a fertile line of comparative enquiry.

The implications for neo-liberalism's potent role require a recasting of CPE approaches to labour relations that have relied heavily upon collective bargaining and its actors, in different ways, as the core unit of analysis when defining, comparing and examining European labour relations systems. This reform needed to include the substantive introduction of legal theory and

legal analysis to understand both the *legal characteristics* of labour relations' and the emergence of neo-liberalism which framed many new interventions from the realm of law. This entails CPE stepping beyond the overtly political and economic aspects of neo-liberalism that are of overwhelming focus in CPE accounts of the subject. This proposed theoretical reform of CPE's approach to *European labour relations*, addresses the labour market effects of the post-1970s 'neo-liberal revolution' (S. Hall 2011) to illustrate this problem of CPE.

The role of neo-liberal ideas and practices is identified as the central driver in legal change and associated reform agendas. These usually sought to promote the liberalisation of wage-setting practices and broader employment systems so that employers can reorganise production systems (Traxler 2002, 2003a). In different countries, the main institutional pillars of collective bargaining systems include strong membership organisations, trade unions and usually industry-based employer membership organisations, and the bargaining apparatus itself that places unions and employers on the opposite side of the wage bargain. In some countries, the power of trade unions was targeted by neo-liberal reforms in order to weaken unions' ability to impose wage and job security demands upon employers. These were made more effective by the economic decline in those sectors where union membership was strongest. In other examples, the collective bargaining process was itself the target of 'reform' as well as (or rather than) the relative power of key actors such as trade unions. The goals were to allow employers to adjust wage levels and work systems if economic conditions demanded. Such reforms in some European countries included the creation of 'opening clauses' designed to enable employers to prise open and renegotiate collective agreements (Visser 2005, Eichhorst and Marx 2011). In some cases reforms also introduced heightened roles for court and quasi-

judicial actors as part of more juridified and formal rule-based settings for labour relations.

This final point above highlights to two specific and paradoxical developments of neo-liberalism. The first is broader and sees a contrast between the *rhetoric* and intention of neo-liberalism to de-regulate on the one hand, and the reality where legal rules in fact became commonplace. The modes of regulation and governance found in European labour relations are increasingly mixed. Trade union and wage bargaining forms decline, but do not disappear, the space for legal rules and frameworks and employer prerogative (HRM³) has correspondingly increased. This increase in legal influences, this has produced a shift from *collective* rights, providing trade union action and collective bargaining, to a greater emphasis on *individual* rights for individual workers. This is important, given the inherent imbalance of power between workers and employers attempts to *de-collectivise* worker power, force individual-level model of workplace negotiation with employers, increasing the power of employers. This was a central goal of different neo-liberal forms of labour market reform.

In terms of wages specifically, the above has manifested itself notably in the creation of nationally-encompassing minimum wage laws for *individual* workers in many European countries. Placing laws guaranteeing a minimum salary in a content of neo-liberal legal change may sound odd, but three things should be considered. First, the existence of the legal minimum wage does not itself tell us about the *level* and purchasing power of this minimum wage. Secondly, its existence does not tell us how it is enforced. Thirdly, and more importantly, the level of the minimum wage is always lower than the minimum rate agreed in any collective agreement. If collective

³ 'Human Resource Management' is both a theory and an agenda of corporate practice highlighting employer prerogative over its work force, hence 'management' rather than labour 'relations'

bargaining is weakened or removed, the legal minimum wage is only partial compensation to the worker in material/wage terms. This places the creation of legal minimum wages into a labour market context of weakening collective bargaining as part of a regime of neo-liberal change, even if compensatory in nature.

In Britain, a legal minimum wage was introduced in 1998 long after collectively-bargained minimum wage rates had become scarce given collective bargaining's rapid post-1980s decline. In Germany, a similar legal and nationally encompassing minimum wage was created in 2015 as the declining coverage of collective bargaining left large portions of the German economy beset by serious low pay problems. Countries like Austria and those in Scandinavia still have very high collective bargaining coverage (80-99%), so have not needed to produce legal minimum wages as collective bargaining provides these minimum wage rates as part of broader wage scales. Again, the development of these individual legal rights to a minimum rate of pay can therefore be seen as part of the neo-liberal labour market and a vision of 'neo-liberal legal change'. The reforms of individual and collective labour law⁴ have worked in tandem to craft such outcomes, but are still crucially mediated by the social, political and industrial factors acting in different ways in different industrial and national settings.

Together, these legal interventions take the form of explicit attempts to reorder the legal rights that frame the balance of power between capital and labour and therefore define labour relations and the wage bargain labour relations contains. More explicitly, this sees the subordination of *social* rights beneath *economic* rights. Ostensibly this may appear to offer individual

⁴ Labour lawyer Alan Bogg defines 'Collectivist' labour law as "that which encompasses a concern for collective or *group* rights, rather than rights for *individuals*; it affirms collective values; and the metric of legitimacy of a legal regime of freedom of association is the extent to which it supports collective bargaining through independent trade unions." (Bogg 2017).

economic rights to workers as well, but again if workers lose legal rights for *collective* action, employers' power resources are enhanced. The formation of new legal frameworks and rights systems is central to a neo-liberal *re-regulatory* pattern and sits in contradiction to the central theoretical and rhetorical tenets of neo-liberalism that highlight the importance of *de-regulation*. This assertion forms a key part of other prominent theories associated with neo-liberalism, and in particular 'new public management' (NPM), and the 'regulatory state' (Majone 1994, Moran 2003) when theorising the state under neo-liberalism. These theories map and often promote the development of neo-liberal frameworks that advance efficiency, flexibilisation, rationalisation and the prising open public sector services for private interests. Identifying this theoretically interesting paradox between the *de-regulatory* intentions and the *re-regulatory* reality of neo-liberalism is only of secondary importance to this core point: the role of legal regulation and legal intervention in European labour relations has in fact *increased*.

The neo-liberal vision of legal change in labour markets has come through these public policy reform attempts and through employer strategies. By segmenting workforces and undermining trade union power (by fragmenting cohesive bodies of trade union-organised workers (Schnabel 2013)) business have been able to reform production to cater to market and profit needs. Neo-liberal reform therefore does not merely manifest itself through changes in *labour law*, but also *company law*, contract law and other forms of economic law that enhance employer freedom to re-organise their businesses and workforces. Regulatory changes of this sort were accompanied by two shifts in the area of the judiciary. The first saw courts introduced to enforce legal rules concerning economic rights, the second saw the creation of new quasi-judicial regulatory bodies so that politics could be kept out of technical processes of 'economic regulation'. These two

developments together were an important part of a process of de-politicisation, so central to neo-liberal 'regulatory state' goals (Majone 1994).

In the comparative European context however, these different sorts of reforms were evident in some national cases more than others, given their different legal systems and traditional roles for courts. In Britain, where courts were traditionally hostile to the impositions trade unions brought to employers, a prominent court role was re-introduced after 1979. Even in those countries where this form of legal change was not forthcoming to the same extent, the role of European law and the reach of its legal institutions into national economies, like the European Commission and Court of Justice, have had an increasingly potent effect on national labour markets.

CPE has produced a number of important contributions to the comparative analysis of capitalist systems and to comparative social science more generally. It is for this reason that CPE's shortcomings concerning the role of law in European labour relations must be understood and set within a reformed approach to neo-liberalism as well. As outlined above, one cannot be done without the other. CPE has placed labour relations and its core actors in centrally important positions in their respective theories, so its problems are unlikely to be limited to labour relations. In crafting a small-*n* case study research design, two national cases – *Germany and Britain* – are selected alongside two areas of EU law, *acquired rights and posted workers law*, to provide a comparative empirical basis from which to examine this alternative approach. The methodological details of this are outlined in the third section of this first chapter, following the second section immediately below that outlines this alternative framework.

1.1.2 An alternative framework: an outline of a *socio-legal political economy* approach

This thesis follows a simple structure. It starts with the identification of a *problem*, CPE's treatment of labour relations, which is used to prompt the creation of an *alternative corrective framework*. This is then applied to four case studies so that qualitative comparisons demonstrate and develop this new framework in the shadow of existing CPE theories.

An important principle sits at the heart of this alternative framework: it is not sufficient to argue merely that *law matters*, but more importantly *how* law matters. A crucial part of grasping the different ways *that law matters* comes through the acceptance of the interdisciplinary nature of law and the different interdisciplinary contexts (social, industrial, political) within which law 'happens'. Political, economic and social contexts provide different sorts of venues and actors for mediation and contestation that shape law's creation, delivery and adoption into practice. With this in mind, this framework is developed from interdisciplinary mix of academic influences, including from labour law, economic sociology, institutional economics and both the critical and orthodox branches of CPE. The term 'socio-legal' is meant so as to situate law in its social context, therefore placing this alternative approach between existing CPE approaches to labour relations on the one hand and traditional/doctrinal law school approaches, often described as 'black letter' legal analysis, on the other.



Figure 1.1.a Positioning of an alternative approach

“A theory is only a tool for investigating practice, like a spade for digging up facts and converting them into an understandable system”

John R. Commons in (1924, p.722)

The purposes and objectives of theory can be directed towards either prediction or the framing and informing how a research process is conducted or both. Looking to Commons’ statement above, the framework provided below is set around tools used for generating material organising it in a particular way, but in doing so will also point to alternative conclusions from those of existing CPE approaches.

This *socio-legal political economy framework* is presented in this section and is then followed by some key arguments as to what this framework will produce in the case studies selected for this thesis. This alternative approach consists of five parts: including: 1) *a core operational definition*, 2) *the relationship between law and collective bargaining*, 3) *a holistic approach to legal systems*, 4) *conflict of rules*, and 5) *two conjoined methodological innovations*.

1. A *core operational definition* of 'labour relations' builds upon Marginson and Sisson (2002) who define labour relations as that concerning 'the regulation and governance of the employment relationship', but it offers here an equally prominent place for legal sources of 'regulation and governance'. This sees labour relations, whether defined as that at the national or sub-national (industrial) level, *as defined by two principal forms of regulation and governance: legal sources and collective institutional sources*, the second provided by collective bargaining, its core actors and other similar institutions, such as co-determination⁵ bodies.

This concept of 'regulation and governance' however should be considered more broadly beyond these two core labour law and collective forms found in labour relations systems. Labour law and collective bargaining are not the only forms of regulation and governance that affect labour relations. Labour relations are inserted into broader economic, political and legal systems through other rules, laws and governance systems. These include aspects of contract law, company law, and competition law as well as those non-legal and more informal sets of rules and governance regimes that impose themselves upon labour relations. Law however is essential to integrating labour relations into a broader economic and political system. The way this takes place however can produce any number of regulatory and governance problems, particularly when attempts at legal change are pursued by legislators, courts or social actors. This notion of *regulatory and governance problems* provides a useful analytical foil from which to examine case studies, such as the four cases offered in this thesis.

2. A *dynamic relationship between legal and collective institutional means of regulation and governance*. Recognising the co-existence of these

⁵ These are commonplace in European countries and are described in chapter 2.1 where German labour relations' historical development is outlined.

two *legal and collective institutional means of regulation and governance in defining 'labour relations'* leads naturally to the second part of this alternative approach. These two halves of labour relations systems must be understood in *dynamic, interactive and relational* terms. Employers and unions must interpret their legal environment and the legal rules that come with it. Legal interventions are not static and given and must be interpreted, mediated, contested and enacted. This is achieved with varying degrees of obedience by social partners as their interactive adjustments when applying law will often differ from that intended by the creators of a given legal rule. Clearly, as described in the first section, where unions are weak and collective bargaining is weak or not present, employers have a freer hand in interpreting legal rules and their own legal rights. Legal rules demanding rights for workers will be interpreted as narrowly as possible by employers. Indeed, most law demanding workers' rights, whether collective (such as union recognition) or individual (such as working time and minimum wage), requires union shop stewards to police the enforcement of these.

In a neo-liberal era of dense and complex interventions from different sorts of legal rules, the interpretive and activation role of labour actors (employers, unions) is analytically much more important. In broader terms, this demands a *socio-legal* approach to labour relations and its different legal and non-legal means of 'regulation and governance' and the social actors that operate within them.

3. The heightened role and presence of legal rules, legal actors and legal frameworks in labour matters requires *a holistic understanding of legal systems*, the different legal characteristics these possess and, for labour relations or any aspect of a capitalist system, the *direct and indirect* forms of influence that are found in national legal systems.

This not only prompts an examination of those more direct aspects of legal rule found in labour law, but also requires this be placed in a broader legal context inclusive of bodies of constitutional law, economic law and other areas of law that may be relevant to labour matters in different contexts (e.g. human rights law). A provision found in labour law may, when read in black letter terms, point to particular desired outcomes, but may be subordinated or submerged beneath other legal rules and bodies of law. For example, at different periods of British industrial history the *law of contract*, which holds a very important constitutional place in the legal systems of all capitalist countries (MacNeil 1977; Williamson 1985), has had considerable influence over both the *individual* employment contracts and the in-effect *collective* 'contract' forged between management and trade unions in the form of collective agreements. This nation state-centred view of various labour law and non-labour law influences has become considerably more complicated in the European context due to two interrelated factors: the first is the emergence of neo-liberalism induced legal change of labour relations, the second is the emergence of European legal integration. As an operational concept, posing questions as to the direct and indirect influences of law allows for labour law to be contextualised against other law and non-law and engage in a mapping process to separate out different relevant legal rules.

4. A *conflict of rules* concept is adapted from a *conflict of laws* concept found in legal theory (Everson and Joerges 2012; O'Hara and Ribstein 2009; Wilson 2007, p.88; Kramer 1991) and a *working rules* concept drawn from labour relations scholar J.R. Commons (1924⁶).

In a period in capitalist history that exhibits a rich variety of legal interventions into labour matters, the contested interactions of different kinds of rules needs to be central to the comparative study of labour matters.

⁶ In Commons' *The Legal Foundations of Capitalism* (1924)

This *conflict of rules* concept provides a simple mechanism to observe both formal *legal* rules and less formal *non-legal* rules of a given regime of regulation or governance and to assess how these come together to either come into conflict or seamlessly converge and everything else in between. In labour relations terms, the role of labour and other law presents a number of possible points of interaction with the non-legal rules found in collective bargaining and other forms of employment rules and workplace norms (codes of practice, corporate culture etc.).

In legal studies, the conflict of *laws* dominates international private law study and concerns a common legal problem where agents operate outside their own jurisdiction and a conundrum emerges where two sets of laws can be applied but not simultaneously. This would force social actors and regulators to make a 'choice of laws' decision. This is not however an exclusively legalistic concept. Lawyers Everson and Joerges (2012) demonstrate the prominence of the *socio-legal* considerations given that legal and jurisprudential forms of remedy (provided by courts or other regulators) are not the only modes of mediation available. This more sociological approach to conflict of laws, that Everson and Joerges draw from Dahrendorf (2008), identifies a paradox in law's role: in seeking to regulate and mediate conflict, particularly 'class conflict' in labour relations terms, this role can find itself contributing to the conditions of conflict it is trying to settle. This means that the mediation role may itself provoke responses from social actors who themselves massage legal rules and legal influences into existing practice.

In labour relations, the contractual venues of interaction between employers and labour, namely the employment contract and the collective agreement, can be left to regulate these disputes but can also be subject to external interference, placing the venue for rule interaction in the realms of

legislatures or courts. In truth, different combinations of these two realities operate at different times and with different sorts of labour dispute or issue (e.g. collective disputes like strikes, individual dismissal rights enforcement), complicating how labour relations is governed and regulated. In an era of expansive neo-liberal reforms of labour markets, legal interventions have forged increasingly conflicts of between different sets of rules, a complexity that requires a deeper theoretical understanding.

5. The positioning and conceptual aspects of this alternative approach lead to *two important methodological contributions* of this framework. This framework cannot be employed without the *substantive introduction of judicial actors into the CPE analysis of labour relations*, a requirement that also necessitates the examination of the relationship between court actors and other actors. Importantly, in terms of methods and data, the introduction of court case law is necessary and offers a rich source of data not seen in most in CPE studies. Court case law not only opens a window onto the activities of increasingly important judicial actors and how they interpret formal law, but its case law offers a wealth of qualitative empirical material into the realities of labour relations issues, practice and labour disputes and the conditions that created these. Case law data has played a part in political science-based European integration studies (Alter 1998, 2009; Martinsen 2015), but not in non-labour law studies of labour relations within CPE. With one eye on point four of this framework above, such analysis of court decisions, alongside other legal texts like statutes, also provides an opportunity to assess different instances of the *conflict of laws* and *conflict of rules* scenarios. This is expanded upon in the following methodology based section.

The second innovation sees this *legal analysis part applied to approaches drawn from the qualitative corner of CPE research* (Hall 2006; Mahoney 2007;

Kogut 2010). This is described in more detail in the next methodology focused section below. These studies argue for the strengths of in-depth analysis of a small number of case studies for the purposes of theory development. Theory-orientated research, argues Hall (2006), may be able to employ quantitative techniques of comparison to map broad patterns and has particular use for macro level and multivariate studies of phenomena such as employment.

Applying this methodological form of comparison from CPE to legal questions and legal material (i.e. court case law text, legislative text) represents part of this theses' surplus value, and is described in more detail in chapter 1.4.

1.1.3. Key Arguments

The above framework needs to produce and point to alternative arguments to those provided by existing CPE theories. A broad hypothesised argument is offered here in outline form and is applied to the four case studies of this thesis to produce four sets of comparable material to be used for theory development in Section III of this thesis.

Given the earlier coverage of those shifts associated with the emergence of neo-liberalism, a key overarching claim is presented: *the increased and multi-faceted influence of law in European labour relations (post-1980) is inextricably linked to the emergence and dominance of neo-liberalism, its intellectual order and the policy agendas and patterns of corporate practice and reorganisation this brought. The forms this takes across different national regimes of labour relations and capitalist systems however produce different results that underline the importance of legal systems, labour law systems and political and economic characteristics of different countries. The comparable results however point*

to various national forms of contested dissolution and decline, rather than functionally forming and parsimonious 'models of capitalism' defined by institutional coherence.

This linking of processes of legal change to neo-liberalism demands not just a reformed understanding of law and its different manifestations (courts, statutes, etc.), but also the *legal character of neo-liberalism itself*. CPE has given the subject of neo-liberalism plenty of coverage in examining patterns of institutional change (Hall and Soskice 2001, Thelen 2001, Scharpf 2011, Pierson 1996), but these have focused upon the political, welfare and industrial characteristics of neo-liberalism's advance; the roles of law, legal systems, legal actors and forms of resolution on conflicts between economic and social *legal* rights however are conspicuously absent. Some exceptions to this broad statement (Bonoli 2003, Heino 2015) are examined in the review chapter that follows. When purposeful examinations of law and legal influence are properly integrated into the comparative analysis of capitalist systems, new themes such as national legal and constitutional systems, labour law systems, contractual law systems and broader doctrines of economic law become important.

Labour relations systems' sensitivity to neo-liberalism's advance presents a number of comparative analytical issues. National labour relations systems may be subject to various change pressures. Different national regimes, even if possessing strong similarities, may develop in different ways and speeds. With this, some regimes adopt to reforms quicker and more seamlessly than others. Moreover, in the European context these comparative concerns also inevitably introduce a variety of very important legal (as well as market) influences stemming from Germany's and Britain's⁷ membership of the European Union. This *Europeanisation* element further complicates the

⁷ Britain remained a member of the European Union up until the submission of this thesis.

cross-national comparison of countries in Europe, but law's advance also introduces important factors into these countries' increasing insertion into a broader European legal order.

In directing attention toward the four cases selected for this thesis, including two countries and two areas of EU law, four different examples of EU institutions seeking to influence or change labour relations are offered. These case studies are examples of varying degrees of disruption and response to disruption. The findings of this two-country comparison produce two further claims that seriously challenge two existing totems of contemporary CPE: existing *typological labelling* and the concept of *institutional complementarity*. These case studies provide a mix of empirical evidence for why specific CPE approaches to these two countries' labour relations as well as more abstract theoretical representations of broader problems and phenomena. For example, The decline of the *Tarifautonomie* model that defined German labour relations in the 20th Century is clearly displayed in these cases. In regards to Britain, such sweeping empirical demonstrations are not so important, but the abstract demonstrations of theoretically useful events such as strike action by trade unions as a response to neo-liberal legal change.

With neo-liberalism's comparatively varied corrosive influence in 'national models', Europe instead is seeing *varieties of dissolution* due to neo-liberalisation. This sees comparative models being developed based on *different forms of dissolution* rather than how *they form and maintain themselves*; in effect reversing the established logic of typology construction. This has clear implications for the concept of institutional complementarity that is central to VoC theories and some RT accounts of comparative capitalism.

1.1.4. Research approach and research methods

Three main areas of the research approach are outlined: a comparative qualitative case study research design, and introduction to the selected cases, and data sources.

As point five from the alternative framework outlined above indicates, a key part of this thesis' added value comes from combining *comparative qualitative analysis*, that already has an established place in CPE and the social sciences, and approaches and methods from legal studies. Using a small number of cases allows for the in-depth analysis of them which has particular benefits for examining complex causal links and explanatory relationships between variables in a manner that more statistical-based quantitative methods are not well suited. The complications created by various legal factors (e.g. legal rules, interventions by legislators and courts) point to those approaches and methods appropriate for identifying and then separating out complex and different variables. The research design is given more detail in chapter 1.4. One key point is highlighted here however. In-depth analysis of small numbers of case studies do not just provide empirical material to learn about a specific case, but importantly must provide findings to speak to broader phenomena, also known as generalizations or theoretical extensions (Hall 2006). Case selection must be done with care and be guided by theory, but must be done for these cases to be useful. In particular, the four cases selected for this thesis provide meaningful findings about British and German labour relations more broadly and the relationships with European legal order and the legal character of European neo-liberalism.

Cases: Two national level cases – *Germany and Britain* – are selected and compared through an analysis of their adaptive responses to two selected areas of EU law – *posted workers law and acquired rights law*. Detailed reasoning for the selection of these cases is provided in chapter 1.4 and both

of these national level and European level case selections are the focus of two chapters at the start of section two of this thesis (2.1, 2.2).

Data sources: Such comparisons traditionally rely on the methods found in social science such as interviews, surveys and other forms of contextual analysis. For this study, additional emphasis is placed upon legal texts produced by courts as well as legislators as well as supporting documentation as to how these affect non-legal actors like businesses and workers. The conjoined legal analysis of statute and court-made law is a key methodological part in this thesis' four cases. Court case law in particular has been important in all four and some description as to their strengths is provided here. The decisions of courts clearly provide the doctrinal view of a court in regards to its application of formal law (in view of legislation or a constitution) to disputes. The texts of such decisions also however provide rich empirical data on these disputes and how *law is applied* to these disputes in search of legal remedy. Of course, the decisions of a court in one decision often only concerns the case itself and the parties involved, particularly when made by courts at the lower end of a hierarchical court system. When decisions are made by higher courts however, their implications stretch much further and can alter the legislative status quo or other dominant practice or practices in society or industry. It is the role of legal analysis to map both the body of a court's case law *and* the legislative arrangements that are relevant to this area. In such scenarios, competing pieces of formal law found in different statutory texts or court decisions may come into conflict.

The above invariably will also clash with dominant interpretations of a given area of law. The role of legal analysis, when directed to labour relations, ultimately sees law being applied to social reality. Methodological concerns of labour relations therefore must reflect this. This thesis complements the use of the analysis of legal texts with a number of

qualitative techniques including interviews, documentary analysis and secondary sources and data. The use of these methods varies across these cases. In some chapters, such as the *Britain-Posted Workers* case, no court decision is *directly* at issue, but certainly is *indirectly*. Here, qualitative data such as interviews and key documentary text have to be used to develop answers. The *Germany-Acquired Rights* case also requires the use of both interviews and documentary analysis and secondary data. In this German case study, industry-based examples drawn from existing literature were used to develop a picture of the Acquired Rights Directive's lack of regulatory impact in Germany.

This sort of analysis is again aided by the comparative qualitative analysis literature raised earlier in this section. Creating causal inferences is often challenging when different and incomplete data are being used. Therefore the researcher must recognise the inductive nature of this process and the limits of the data when examining causal mechanisms. The *Germany-Acquired Rights* chapter was the most challenging in this regard, but theoretically very useful since it demonstrates how the complex mix of direct and indirect legal influences and conflict of laws problems mattered in determining outcomes. The remaining *Germany-Posted Workers* and *Britain-Acquired Rights* chapters relied more however on legal analysis, but also used qualitative methods such as interviews and documentary data to provide an important aspect to how these were analysed. Importantly, these four chapters together, with the different mix of legal and social science forms of data sources, present a contrasting and comparative spread of methodological as well as theoretical lessons. The methodological discussion is provided in chapter 1.4.

1.1.5. Concluding comment and thesis organisation

This introductory chapter sought to outline three main things: *a problem* identified with CPE studies of labour relations concerning its incorporation of questions of law, legal regulation and legal influence; *an alternative approach* to correct this, and *the research and methodological approach* to demonstrating this. The objectives are theoretical and intend to provide a reformed CPE approach to contemporary labour relations research.

This thesis is organised into three broad sections. Following this introductory chapter, the first section produces a detailed critique of the three CPE schools raised above (Chapter 1.2). This is then followed by a fuller presentation of the methodological concerns of this thesis in Chapter 1.3. Section Two includes the four case study chapters but is preceded by two chapters dedicated to describing the national and European level aspects of the four selected cases. These two chapters include some description of these countries' labour relations histories as well as the broader political, economic and *legal* systems these are set within (Chapter 2.1). These provide historical context to these cases as well as a preliminary demonstration of an approach inclusive of analytical concerns of law. The second of these two chapters describes and analyses European acquired rights law and posted workers law. This includes some contextual description of the EU legal system itself and how legislation and court-made law create and contribute to EU employment regulation like these two areas selected. The third section brings together the empirical and theoretical findings from the four case studies for the central purpose of theory development that motivates this thesis.

Chapter 1.2.

An introduction to Comparative Political Economy, Labour Relations 'institutions' and the role of law: a critique of three CPE schools

1.2.2. Introduction

The previous chapter outlined the two main aspects that organise this thesis: first, the identification of a central problem with comparative political economy (CPE) concerning its treatment of law within the study of labour relations systems, and second, an alternative framework to correct it. This chapter addresses the former and reviews three schools, the *Varieties of Capitalism* (VoC), *Regulation Theory* (RT) and *Comparative Welfare Capitalism* (CWC) approaches. This introduction first maps these three approaches and then outlines the manner in which they will be critiqued and compared.

These three schools (VoC, CWC and RT) have engaged in some fruitful collaboration as well as heated disagreements, but do not always target the same subjects or, when they do, do so in the same manner. The CWC and VoC schools for example make good use of various and rather weighty theoretical concepts, but then direct these to different empirical subjects; VoC scholars concentrate on business interests, and CWC scholars on the state and trade unions. RT however, due in part to its Marxist traditions, reverses this and focuses upon quite weighty theoretical concepts *first* and integrates empirical questions afterwards. In regards to labour relations matters, this tendency is demonstrated clearly by 'regulationists' viewing labour matters through a conceptual guise of the 'wage-labour nexus', a concept with strong Marxist traditions. More importantly, these three schools start with different foci based partly upon their disciplinary

characteristics. The economist-dominated VoC and RT tend to favour a methodological industrialism and the role of business actors within this, whereas the welfarists within CWC favour sociological and political approaches and explanations and focus upon social dynamics and political actors. RT sits neatly between the welfarist CWC and industrialist VoC schools in displaying a similar 'economic sociology' pedigree to CWC but being still dominated by economists.

Each school focuses on the *production*, *protection* (welfare) and *political* regime aspects of capitalist systems in different ways. The Industrialist VoC school quite naturally focuses on *production* regimes first, and the firm as central to this, and comes to questions of protection and political factors afterwards. CWC scholar focus upon the provision of social protection provided by the state and by other means. Each of these three schools has importantly sought to encompass all three of these three *production*, *protection* (welfare) and *political* regime aspects of capitalist systems. These attempts have given rise to ambitious theoretical agendas to identify and test institutional linkages between these aspects and sub-realms within them such as skills regimes, pension systems, corporate governance and collective bargaining. The role of *institutional complementarity* for example has played a dominant role in VoC research and some RT and CWC research. CWC however has developed its own attempt at theorising system-wide institutional linkages courtesy of *elective affinities* and ideas of *functional equivalents* to the formal welfare state. This latter example is important in appreciating how formal state-provision of social welfare interacts with collective bargaining arrangements, which are not directly provided by the state, in achieving welfare goals. Fundamentally, to return to the leading argument of this thesis, these political, production and protection systems need to be combined with a permanent and integrated analytical

appreciation of *legal systems*, as the interactions and linkages under examination are inevitably affected by legal rules in a number of ways.

There are, it is noted, a number of discrete areas of literature that have made an attempt at this sort of correction. One of these comes from the labour relations field, often placed in either business schools or sociology departments, and a second comes from 'new economic sociology'. Work from the latter (Sutton et al. 1994) has argued that the increasing 'legalisation' and 'juridification' of workplace relations has brought about two sets of developments: extensive interventions from courts, the state and quasi-state bodies in the employment relationship, as well as the development of formalised processes of work management at the company level, pursued to satisfy the demands of new and dense sets of statutory rules.

Safford and Piore (2006) note a similar development in regards to American labour relations. Declaring 'dead' the collective bargaining system built as part of Franklin Roosevelt's New Deal, these authors cite a double shift where the decline of collective bargaining has been met by a concomitant rise of extensive legal rules, mandates and interventions, particularly in the form of individual legal rights (both labour law and human rights law). This shift away from wage bargaining as the primary means of governing labour relations to alternative modes of workplace regulation has clear, but varied, relevance in Europe. Safford and Piore importantly do not identify political neo-liberalism and associated reforms as the *primary* reason for this shift, but instead see a "shift in the axes of social mobilization" from mobilization set around "economic identities (class, industry, occupation) to [...] those rooted outside the workplace (sex, race, ethnicity, age, disability)" (Safford and Piore 2006). This recognition of social context *alongside that of politics* is hugely important and points to a very simple understanding concerning the multi-faceted set of political, social,

economic *and* legal causal factors how they interact in different labour market contexts.

The following reviews begin with the *Varieties of Capitalism* (VoC) approach, followed by *Regulation Theory* (RT) and is completed by the *Comparative Welfare Capitalism* (CWC) school.

1.2.3. Varieties of Capitalism

The *Varieties of Capitalism* (VoC) approach represents the principal production system-focused contribution to CPE, but in truth has held such a dominant position in CPE studies since the early 2000s that most CPE has been forced to address its central claims. The original VoC volume, Soskice and Hall's edited 2001 book, inspired an enormous amount of research as well as a huge amount of criticism (Korpi 2006; Boyer 2005; Jessop 2011; Ebenau et al., 2013; Pontusson 2005). The phrase 'varieties of capitalism' has been employed with varying degrees of commitment to the original 'VoC' approach devised by Hall and Soskice (2001) due to either explicit attempts at modification or simple lazy labelling. This VoC-focused section will begin with a mapping of its core themes and contribution. This is followed by a narrowing of focus to, firstly, how the role of law is addressed by VoC studies and, second, the labour relations-centred studies found in VoC work.

1.2.3.i. The original VoC approach

Economist David Soskice and political scientist Peter Hall, edited the 2001 'VoC' volume which brought together key theoretical themes from previous CPE works (Soskice 1990, Iversen et al. 2000). These themes formed a two-pronged comparative taxonomy of 'varieties of capitalism' that were,

according to VoC scholars, left after the fall of the Berlin Wall and the demise of non-capitalist regimes associated with the USSR. The VoC approach broke decidedly with the neo-corporatist analysis that dominated post-War CPE which placed the state and trade unions in an analytically important position *alongside* that of organised business interests, seeing labour relations as various forms of a shared and tripartite governance system. The VoC approach instead placed its analytical emphasis upon business actors and interests as central to theories of capitalist change and the comparison of capitalist systems. Soskice and Hall were keen to not neglect the role of the state and trade unions and described their approach to both as part of a 'relational' approach vis-à-vis business actors. Unavoidably, this original VoC approach still relegated the analytical position of the state and trade unions beneath that of business actors.

It is from this business actor-centred starting point that VoC scholars adopt the concept of *institutional complementarity*. Complementarity can come in several different forms with recent literature coalescing around three definitions of the term (Crouch 2010): complementarity as *similarity*, complementarity as *compensation*, and, in the economic sense, complementarity as a process of positive or negative causal relationships governed by supply and demand. In the business actor-centred complementarity approach of Hall and Soskice however, this meant that broader events and changes within a capitalist system stemmed from the interests of firms. For example, other institutional domains (welfare states, collective bargaining, skills systems) would be bound by a shared complementarity logic as a result of business interests.

The institutional domains that Hall and Soskice identify as the most important include labour market regulation, corporate governance and education and training (Hall and Soskice 2001; p.4). VoC research however

is limited to the analysis of these domains. The way in which institutions are linked relies on the notion of 'institutional logics' which, according to VoC scholars, are defined by business interests and actions. From this micro-analytic base represented by the individual firm, causal claims can be made as to how capitalism's organisational institutions are created, are sustained and function. If individual firms rely on highly skilled labour to produce high quality products and services, capitalism will produce institutions of skills and wage formation, and welfare protection required to sustain it. Conversely, firms requiring only low skilled labour are in a position to access this labour easily, are less likely to invest in elaborate institutional arrangements of skills formation and wage-setting. Conversely, firms requiring high skill labour will need to invest in skills systems *and* the higher salaries for such labour. This will have knock-on effects for other institutional domains such as welfare states and collective bargaining.

Additionally, these labour relations, educational and welfare arrangements forged from these two opposing scenarios themselves have causal relationships with partisan politics as well as macroeconomic policy-making. As such enables this same micro-analytic base presents a starting point for extrapolating broader macroeconomic outcomes, including a macro-national form, or 'variety', of capitalism. These holistic pictures of *national varieties of capitalism* come in two typological forms: *coordinated market economies* (CME) and *liberal market economies* (LME).

This original VoC approach produces a number of claims, some of which sit in clear contrast to other established CPE theories. In highlighting the role of business, rather than the state or unions, and the different institutional settings firms operate within, VoC scholars claim that business interests are *not* necessarily driven by opposition to welfare states, social policy, trade unions and collective bargaining as assumed by the 'neo-liberal

convergence' thesis. VoC scholars claim that firm interests are instead contextualised within an institutional environment governed by different kinds of complementarities, sometimes pushing firms to support such non-market means of economic and social governance, and sometimes not. In *Coordinated Market Economies* (CME), firms set within high quality product-based markets and industries are more likely to invest in such institutional arrangements, or at least if they already exist will demand that other employers obey the rules of these as well, so as to not lose any competitive advantage. In contrast, *liberal market economies* (LMEs) will see firms seeking to extend the liberalisation (if not dismantling) of welfare and wage-setting systems in the absence of coordination mechanisms enjoyed in *coordinated market economies* (CMEs). This sees a part-rejection of the 'neo-liberal conversion thesis'⁸: LMEs will pursue the intellectual and policy implications of neo-liberalism as this (broadly) accords to the *liberal* market-based patterns of economic development found in LMEs, whilst CMEs will resist the pressures of neo-liberal demands for change or at least adapt to these in a manner that does not disrupt the non-market forms of coordination that define these 'varieties of capitalism'.

The commitment to this VoC typology varies considerably across VoC-aligned studies. Several explicit attempts to modify or augment the typology have also been offered. Hancké et al. (2007) present a third, and rather vague, 'mixed market economy' (MME) type which seeks to encapsulate those national VoCs that do not conform to either the CME or LME types. The problem this produces is that most of southern Europe and France ends up being placed under this MME label. The central criticism stemming from the introduction of this MME 'variety' is that the state is poorly theorised in the original VoC theory of Hall and Soskice. Vivien

⁸ That claims all 'varieties of capitalism' are converging upon a neo-liberal model

Schmidt is more specific and demands that a third 'state-influenced' variety must be included into the European experience of comparative capitalism (Schmidt 2007, 2008) to pay due heed to the case of France, the archetype of a state-influenced if not state-dominated capitalism. This French case is particularly illustrative of the problems the VoC has with the role of the state in regards to labour relations. The state is not just a venue where government of various partisan complexions is subject to social pressures to maintain or reform particular aspects of the regime of economic governance. The state in France uses law in labour market management in ways traditionally far more extensive than the British and German cases. This needs to be understood and is not going to be if the state is theorised poorly. Another labour relations focused VoC advocate, Georg Menz, goes one step further and tacitly debunks the VoC typology altogether in favour of those well established in corporatist labour relations and, crucially, one that carves out space for a French archetypal 'étatist' model (Menz 2005, p.8-12).

The typology question is only one of three main areas of critique. These three areas are also interconnected. The other two are the firm/business actor-centrism of the VoC approach and the use of institutional complementarity to base the VoC's causal claims when developing national varieties of capitalism. An excellent critique of VoC-like firm-centrism is offered by Walter Korpi and is raised in the *comparative welfare capitalism* review section that follows. The approach however bears a similar neglect of VoC studies on this question concerning law and legal institutions. By assuming that causal and complementary dynamics originate from the interests of business, VoC approaches automatically undermine the role of other actors whose interests or resources are different. In this case, firms can lobby and influence the *governmental* state, but their interactions and influence with courts is clearly very different. Courts will often buck the

policy desires of business, the government of the day and other actors if doctrine-framed interpretations of particular facts demand it. It is here where the role of courts and the dominant doctrines found in legal systems undermine both this firm centrism and the notion of complementarity as conceived in the VoC approach.

The problematic theme of complementarity features in CWC, RT and VoC approaches in some form. The VoC approach however is the most problematic due, in part, to the fact that complementarity is such a central feature of the VoC approach. There are some RT and CWC scholars who engage with the concept, but most in both schools do not. There are broad critiques aimed at complementarity based upon its inherent functionalism and, through this, implications for the success of particular forms of capitalist organisation. Those of a Marxist or radical persuasion naturally reject such functionalist theorising as ignorant of capitalism's inherent contradictions and conditions of crisis. Other non-Marxist scholars of note, such as Crouch (2005, p.99), underline the importance of other dynamic processes at play such as complexity, incoherence and conflict.

"We can therefore observe innovations of this kind only if our models of real-world institutions have allowed us to find elements of complexity and incoherence. This will not happen if a false interpretation of the law of parsimony requires us to simplify the cases we study so that they seem to be the embodiments of ideal types"

(Crouch 2005, p.99)

This is not to deny that complementarity processes and outcomes might indeed exist in certain cases and setting. What the VoC approach does however is base its approach squarely upon complementarity and argue that

this take *priority* over non-functionalist processes found in conflict or various persistent examples of institutional incoherence. This thesis supports the arguments made RT scholars Boyer and Heino and CWC scholar Korpi that complexity, incoherence and conflict are inherent in capitalist systems and indeed *more important* in developing cross-national comparisons of them. This complexity inevitably presents a problem: it is much it harder to produce theories of clean, parsimonious and holistic national 'systems' if one claims that these are neither clean nor parsimonious nor defined by nationally encompassing functionalist logics. If we cannot identify simple conceptual logic that bring together different disparate aspects of a spatial phenomena, then how does CPE as a comparative enterprise exist as an academic endeavour?

This is no doubt a challenge, but part of the task of comparing regimes of labour relations, and the systemic forms of capitalist organisation within which they reside, does not have to be dominated by formulating comparative nation state 'ideal types'. As is indicated in both the assessments of Kathleen Thelen's 2014 work and that found in RT, it is now more helpful within an era of dominant neo-liberal politics to ask how national systems have been *changed and disrupted* rather than *how they are built and maintained*. In reversing the logic in terms of how we think of and use 'national types' and compared units, scholars do not have to be concerned with how national systems are formed and sustained, but can be more open to competing concepts of complexity and incoherence that precipitates their *dissolution*, partial or otherwise. In labour relations terms, this point is demonstrated by the complex array of legal rules that impose themselves upon labour relations whilst collective bargaining, that used to define 'national systems' of labour relations, has declined unevenly across Europe.

As indicated previously in comments on the state, the degree to which the central concerns of law, legal influence and legal systems are introduced into the VoC approach is very limited. The next sub-section surveys those limited attempts to introduce law into the VoC approach. From here focus is narrowed onto specific assessments of labour relations found within VoC scholarship.

1.2.3.ii Varieties of Capitalism and the law

Hall and Soskice's edited 2001 VoC volume did in fact offer two dedicated chapters on the subjects of law and legal systems. These however were not well integrated into the broader VoC approach, into the field of research the volume inspired nor into labour relations-focused VoC studies.

These separate 2001 chapters, authored by legal theorist Gunther Teubner and Steven Casper, offer different prospects to remedy the VoC's problem in this area. Casper conforms much more to the standard VoC approach given its commitment to a dual game-theoretic and business actor centred approach. Casper's contribution places his analysis of business-court interactions within the 'law and economics' approach, developed from the new institutional economics (NIE) (Williamson 1985; North 1990), explicitly elevated by Hall and Soskice in the introduction of their 2001 edited VoC volume. This is also the only substantive attempt to link NIE and VoC work on questions of law and legal analysis. This sort of NIE approach also has strong ties with game theory based institutionalist approaches, the sort introduced into the VoC programme. Casper's chapter, again, is very much set within this tradition.

Teubner's chapter however is different and underlines an important role for an understanding of *legal culture* when viewing *legal systems*, an

orientation that has more in common with the socio-legal *comparative law* approach of Zweigert and Kötz (1998) and Simon Deakin (below) than the rational choice/game theoretic approach above. 'Legal cultures' are important so that the non-formal, codified and procedural aspects are not the only aspects of 'the law' that are examined, but the manner in which law is made, delivered and administered, applied and obeyed is placed in social context. Social context is critical to framing how law is made and enacted. The social backgrounds and education of judges, of civil servants and policy-makers, not to mention citizens as 'rule-takers', are all important cultural prerequisites to how legal systems develop and evolve. In comparative terms this is important, as two separate legal systems may ostensibly be similar, but produce different legal or social outcomes because these different social priors forge different approaches to how the law is obeyed and enforced.

Teubner views this in a way relevant to the case studies of this thesis: by asking how certain aspects of EU law are transposed⁹ into national law and in how these affect national *varieties of capitalism*. More specifically, Teubner uses the example of European contract law and its apparent disruption to the British system of contract law. Instead of identifying European demands to alter UK contract law as a 'legal irritant' coming from Europe, Teubner sees British legal culture adapting to the imposition and transforming its meaning for the British experience. It is important to note however that this process of adaptation depends on the nature of the initial imposition, meaning whether law is being imposed by a court or by a legislator. In this thesis, four cases are offered giving different examples of the adaptive processes that offer some credence to Teubner's and similar

⁹ Transposed is the official legal term used in EU law parlance for EU law that is applied to/absorbed into national law.

legal cultures explanations but not to functionalist explanations of complementarity.

Teubner sets himself apart from Casper and the VoC approach proper by not featuring the theoretical tenets of the VoC approach (institutional complementarity business actor-centred). Teubner does however conform to the core VoC argument, namely that national VoC can and do adapt to these external pressures coming in the instance from the EU. However, this argument cannot be generalised beyond the example Teubner uses. In labour relations terms, the four cases of this thesis present contrasting examples of how well national legal systems, and non-legal institutional arrangements, adjust to interventions from EU law. These interventions themselves come in different forms and are not just defined by their legislative or judicial nature.

The four cases of this thesis show that competing sets of law and policy found in economic law (the single market) and social law (labour law) have to be navigated and mediated by both legal and non-legal actors at both the European and national levels.

Neither Casper's nor Teubner's insights have been carried forward and developed in the vast research agendas the 2001 VoC volume inspired. Their legal system-focused contributions are not directed to labour relations, unlike the VoC contributions of Thelen, Hancké and Soskice. These contributions are turned to below and are joined by the work of labour lawyer Simon Deakin.

1.2.3.iii. VoC and Labour relations

The principal charge against the VoC approach to labour relations, which also holds in regards to CWC and RT, is the overwhelming focus on collective bargaining institutions and its actors. This may indicate a disciplinary bias in

favour of social factors, actors and institutions by the various social scientists (political scientists, economists, sociologists) that dominate VoC studies. A slightly superficial but simple numerical illustration makes this point: the terms 'labo[u]r law', 'employment law' or 'legal rights' only appear in the 2001 *Varieties of Capitalism* volume on a total of ten occasions. The terms 'collective bargaining' or 'wage bargaining' in contrast appear no fewer of 63 times. More substantive demonstrations of this problem are made in this section courtesy of the contributions of Kathleen Thelen and labour lawyer Simon Deakin. Thelen is placed firmly within the ambit of the 'core' VoC approach and indeed features in the original VoC volume. Deakin however is somewhat removed from that scholarship that has dominated VoC research and does not feature in any VoC text of note.

There is a large number of important VoC studies directed toward the subject of labour relations. David Soskice and Bob Hancké, two central figures in developing the VoC approach. Both scholars address issues of wage-setting within the context of macroeconomic policy and those shifts in this area that has seen central banks emerge as an important actor in political economy since the 1970s. This is an important stream of CPE research and demonstrates a disciplinary flexibility to expand CPE to incorporate new theories (in this case, macroeconomics) and new actors (central banks). A similar innovation is however needed to incorporate the influences of legal rules, legal systems and courts. Deakin and colleagues offers much more on this front than existing VoC work, and attempts to place this in VoC framework. Thelen, despite exhibiting shortcomings that are typical VoC approach, has offered very important contributions nonetheless.

Thelen occupies a different area of labour relations-centred CPE given her political science background and one that favours qualitative case study analysis rather than quantitative analysis employed the macroeconomists

Soskice, Iversen and Hancké. Thelen has produced three iterations of her approach to comparative 'labour politics'. As the author of the second chapter in the 2001 VoC volume, Thelen's approach to comparing labour relations within compared political economies was placed firmly within the standard VoC approach¹⁰. Subsequently, Thelen stepped away from this 'standard' approach to modify it in important ways (with Wijnbergen 2003, with Streeck 2005). In 2014 however, Thelen was to return to something much closer to the standard VoC approach she had aligned with in 2001. These are addressed in turn.

This 'standard VoC approach' is reiterated here in the context of how it relates to neo-liberalism. It forcefully claimed that globalizing markets would not force all capitalist systems to converge along neo-liberal lines. Firms in *liberal* (LME) countries would converge, but those *coordinated* (CME) countries would not. Thelen in 2000 in fact, in *Unions, Employers and Central Banks* (Iversen et al. 2000), sought to explain 'why German employers cannot bring themselves to dismantle the German model'. The 2001 VoC volume underlines this same emphasis and argument. It also focuses on the interests of business as maintaining one of two sets of institutional outcomes: strong complementarities providing very *coordinated* political economies, or weaker institutional arrangements where firms will rely on low cost strategies (*liberal*).

The spectre of the neo-liberal threat to the celebrated CME models in Europe, which include Germany, Austria, the Netherlands and Nordic countries, runs through most VoC studies. As early as 2003 (with Wijnbergen), Thelen plotted a different course to challenge the basis of this VoC typology and the regimes of complementarity that forges it. Thelen and

¹⁰ As was her article in 2000 in *Unions, Employers and Central Banks* (Iversen 2000), where Thelen explains 'why German employers cannot bring themselves to dismantle the German model'

Wijnbergen (2003) criticised the VoC's functionalist tendency "to see all feedback as operating to sustain and reproduce the existing system", but did so without stepping away from Thelen's long-standing commitment to path dependency explanations of 'institutional change'.

Thelen and Wijnbergen's 2003 article joins Thelen's co-authored introduction to *Beyond Continuity* (2005) (with Streeck), saw Thelen further modify her own application of the VoC approach to labour relations. This modification, that focuses upon the destructive processes of liberalisation, came close to an in-effect rejection of the VoC approach as it seriously questioned its CME-LME typological framework and the resilience of CME's 'coordinating' institutions. As Schelkle notes, Thelen's approach (with Wijnbergen 2003, and Streeck 2005) represents a clear departure as it would no longer assume the existence and recombinant maintenance of LMEs and CME regime types, but rather "their possible dissolution" (Schelkle 2008).

The implications for the VoC approach, modified or not, are serious. The approach relies on identifiable complementarities operating within and propping up national capitalist systems. Recognising the disruptive and often destructive role of liberalization undermines this complementarity-based approach that predicates CME and LME typological depictions of national capitalism. In short: Thelen sees events in labour relations systems as evidence of the destruction of 'varieties of capitalism'.

This is particularly relevant to this thesis for three reasons: the labour relations focus of Thelen (although again very collective bargaining focused), the focus upon Germany as a CME 'variety of capitalism', and the focus upon (neo-)liberalisation.

Thelen later draws focus upon the theme of *liberalization* as the principal force that undermines CMEs. Thelen then authored a book on *Varieties of Liberalization* in 2014. In Thelen's 2014 *Varieties of Liberalization*

study however, Thelen appears to revert back to a more 'classical' (2001 form of) VoC approach but does so by theorising the destructive forces of liberalisation upon the coordination practices in Germany. Thelen also sees liberalisation taking different forms, with a process 'dualization' being a key feature of contemporary German labour markets and job creation and the weakening of German *Tarifautonomie* that defined its post-War labour relations system. Dualization sees, on the one hand, its core sectors that traditionally defined its 'coordinated' character successfully resist liberalization pressures whilst, on the other, other industrial sectors conform more to the liberal practice of low skill, low cost market activity rather than conform to the economic characteristics of CMEs.

The two German case studies produced in this thesis go further than Thelen and demonstrate that these traditional industries that, to VoC advocates, define the German CME are also being subjected to the destructive forces of liberalisation. Put another way, the CME model, and the principle of *Tarifautonomie* that represents this in terms of labour relations is being dismantled. This not only critically undermines the VoC approach to the German CME in broader terms, but also exposes its failures in accounting for the role of law and legal influences as key drivers of neo-liberalism-induced change. More importantly, Thelen offers no more analysis of law's various influences upon labour relations than that found elsewhere in VoC work. Labour relations is essentially seen as interchangeable with the term 'collective bargaining'. Even in this German case, where collective bargaining has been traditionally strong, this approach presents an entirely incomplete, limited and unsatisfactory understanding of labour relations' different regulatory and governance characteristics. The contribution of Thelen is important as her post-2001 contributions offer a far more realistic appraisal of labour relations change vis-à-vis the influence of liberalisation. It still fails

however to move the VoC approach to a place where the role of law is introduced into understanding and comparing labour relations regimes.

The work of lawyer Simon Deakin and various colleagues is not introduced. The contributions of Deakin (2009; with Sarkar 2008; Ahlering 2009). has not featured in VoC debates. Deakin, Ahlering and Sarkar are academic lawyers, a broader academic profession that has rarely featured in VoC studies (except for Teubner and Casper). They offer the only substantive inclusion of those aspects of legal rules, systems and legal cultures to labour relations within a form of VoC framework. Their work is very promising in that that they offer the best hope to redeem the VoC approach that, it is claimed in this chapter, needs it the most out of the three CPE schools selected in this thesis. Despite their contribution however, Deakin and colleagues' VoC-like affinity for the functionalist *institutional complementarity* concept still bars any prospect for the salvation of the VoC approach. Three studies however from this collection of lawyers, Ahlering and Deakin (2007); Deakin et al. (2007); Deakin and Sarkar (2008); Deakin et al., (2015) are examined to demonstrate this claim.

There are two broad aspects of these studies: 1) first, they explicitly introduce labour law systems and national legal systems into the comparative analysis of both labour relations and capitalist organisation. 2), secondly, and similarly to Teubner above, Deakin and colleagues approach the *nature of law* as a social and *endogenous* process as supposed to one favoured in the VoC approach where law is approached in very formal terms and external in its influence and imposition upon labour relations. This is an important theoretical advance on the very limited VoC approach. Deakin and colleagues however place this within a VoC-like complementarity view of 'institutions' that is not accepted in this thesis given its functionalism.

Starting with the first of these points, Deakin et al. (2008) and Ahlring and Deakin's (2007) treatment of labour law and national legal systems provides direct and explicit engagement with the study of comparative law. Ahlring and Deakin direct their institutionalist critique toward the well-known 'legal origins theory', associated with 'the Botero index' (Botero et al. 2004), concerning the effect of labour law upon economic performance. This theory contends that common law systems found in Britain and the United States are superior to civil law systems found in continental Europe given the presence of "stringent labour regulations" in the latter that constrains the processes of financial development and productivity that fuel better economic performance. Deakin et al. (2008) and Ahlring and Deakin (2007) take issue with the methodological basis and assumptions made with this line of argument. Botero et al., (2007) use a rigid set of indexed variables for employment protection legislation (EPL) and compare these across countries to draw their conclusions. Although they do not dismiss quantitative methods, Deakin and colleagues note the problems that arise when drawing conclusions across different variables as some of these will share important linkages or complementarities that are not captured when variables are separated out in the such rigid indices. With this, Deakin et al. see complementarity in distinctly qualitative terms where relationships between different areas of law and non-law exist and need to be understood. The qualitative nature of these relationships is not going to be well represented in statistical form.

As Deakin and Sarkar make clear "legal rules do not operate in a straightforward instrumental way", meaning that no two sets of laws *within* countries will be brought to life in the same way, thus having implications for how these affect each other's outcomes. Additionally, comparing these same two sets of laws *across* countries cannot be done cleanly when these are

exposed to different aspects of the social context that provide these functional linkages. These contributors are careful not to dismiss the importance of national legal systems and to make sure these are placed within a proper context where social factors are not ignored and national systems are not treated rigidly as singular blocs determined by singular logics. As underlined throughout the thesis' first section, the overlapping and complex layering of legal *and* non-legal rules and governance makes such neat national holism unrealistic for such causal claims, like Botero's, to hold water.

This points to important functional relationships between labour law and areas of *non*-labour law such as company law and contract law. Deakin, like Teubner above, argues that systems of contract law are centrally important when relating legal systems with national 'varieties of capitalism'. This focus upon contract law provides a particularly interesting link with the work of institutional economists Williamson and MacNeil (1977). Williamson and MacNeil built upon the work of Coase (1960, 1996, 1998), in forging the *law and economics* stream of institutional economics that Ahlring and Deakin explicitly embrace. It is interesting to note that Hall and Soskice however do not integrate an explicit approach to contracting in the NIE tradition. The work of Deakin and colleagues does integrate this into a VoC-type complementarity-based framework in a way that also relates contract law to both labour law and the two contractual venues that are central to the employment relationship: the employment contract and collective agreements. Deakin and Sarkar identify the employment contract and the collective agreement as centrally important contracting "institutions" in advanced economies (Deakin and Sarkar 2008). The employment contract and collective agreements have important functional relationships with economic law, particularly contract law, as well as social security law and through the welfare state. This point is developed here briefly to define the

employment contract as an important nexus between *individual* labour law, termed as EPL by Botero and Deakin et al., and *collective labour law*, given that EPL will demand certain things of employment contracts as will collective agreements (where present).

Deakin and Sarkar see the development of “long-term contractual cooperation” as an important part of capitalist systems. This gives rise to the combined use of four institutionalist concepts in VoC-type research. These authors importantly identify labour law as a distinct institutional phenomenon that, despite having its own path dependent developmental characteristics, ‘co-evolves’ with those of collective bargaining. More specifically, this co-evolution of legal and non-legal contractual institutions like employment contracts and collective agreements is placed in a ‘layered’ form of path dependency.

Deakin and Sarkar’s treatment of *the social nature of law* joins the contributions made above, concerning the layered role of labour law and collective bargaining institutions, as the most promising contribution to VoC and CPE more broadly. Firstly, Deakin and Sarkar correctly assert that the economic effects of labour law are *a priori* indeterminate (2008). This operates as another critique, as intended by these authors, of the Botero index. It is extended here to underline the point above that labour law’s effect is indeed ‘indeterminate’ in that it cannot necessarily be, from the outset, complementary given the clear scope for non-complementary outcomes (i.e. incoherence).

The complexity of the social settings law exists within mandates a more nuanced theoretical understanding than the functionalist complementarity concept can provide. With this, Deakin and colleagues argued for an *endogenous* interpretation of law’s place in capitalist societies, a view that plainly contradicts the VoC approach of law’s limited role as

exogenous. Law is not constructed far away from the social actors and activity to which it is applied. In labour relations terms, employers and trade unions influence the content of law in different ways, either both in terms of legislation or making litigations to courts who then must respond to these legal claims and interpretations of competing social rights. This makes law's content inherently political and contested, particularly those laws that manage the relationship between capital and labour. These authors acknowledge this characteristic of law and the manner in which it is brought to life through mediation. Social actors must interpret law and do so in the labour relations context within employment contracts, collective bargaining, corporate codes of conduct, strikes, lobbying and court cases. All this clearly serves an argument pointing to law's complexity and its scope for conflict and incoherence.

1.2.3.iv. Varieties of Capitalism: Concluding comment

This sub-section is concluded here by pulling together the key findings from this review of the *varieties of capitalism* literature. Two main theoretical subjects, complementarity and liberalisation, are the subject of the main critique. As an overriding concern however, to repeat a point earlier, is much simpler than these conceptual problems: namely that the VoC school approaches *labour relations* as a subject that is defined purely by collective bargaining activities. In an era where legal rules and influences have become too prominent ignore, and where collective bargaining's role is being challenged, this view of labour relations is not just limited, but substantively inadequate.

The VoC approach suffers from its commitment to theoretical concepts that cannot and do not theorise comparative patterns of capitalist development nor labour relations' complex legal and wage bargaining parts.

More directly, and compared to the other two RT and CWC approaches to CPE, the VoC approach is inherently ill-equipped to remedy its problems. The details of this critique are directed to concepts of complementarity, the path dependency concept drawn from historical institutionalism favoured by both Deakin et al. and Thelen and the firm-centric approach to the actors of political economy.

The contributions of Ahlring and Deakin (2007), Deakin et al. (2008), Deakin et al. (2015) and Deakin and Sarkar (2008) offer some partial opportunities for the VoC approach to be reformed, particularly if combined with Thelen's work theorising 'varieties of liberalisation' in the context of labour relations. Thelen's typology of liberalization, as noted by Schelkle (2008), is an important innovation that reverts to usual logic in how typologies are used. This sees an approach whereby typological systems are viewed not by *how they are formed* but by *how they are threatened with collapse*. Liberalisation has indeed been identified throughout CPE literature as a threat to non-liberal forms of capitalism, welfare states and labour relations. Its threat to the CME model created in the two-pronged VOC schema, is particularly acute. Thelen provides important observations of this in regards to Germany and the splintering of its patterns of industrial development and the effect this has on labour market institutions. It is unfortunate however that Thelen, whose own post-2001 work began to move away from the 'classic' 2001 VoC approach, reverted to a more rigid path dependency VoC of institutional change by 2014 (when she authors her *Varieties of Liberalization* study).

A full and realistic understanding of liberalisation processes is hard to square with a VoC approach that cannot theorise how destructive neo-liberal reform agendas are to regimes of collective bargaining and is virtually impossible if the role of legal change is not adequately theorised within it.

Moreover, firms' interests in liberalisation reforms do inevitably and critically undermine the fabled institutions of CMEs. Thelen in fact provides plenty of evidence of this in her post 2001 work (2003 with Wijnbergen, 2005 with Streeck, 2014), but still tries to place this in a VoC framework that has rejected such arguments. Understanding 'the neo-liberal revolution' properly will of course see different national manifestations of liberalisation and firm responses to it. But firm interests will only vary in *how much* and *how* they favour liberalisation, not whether business favours liberalisation reforms at all.

1.2.4. Régulation Theory

Régulation Theory (RT) holds an important place in CPE as it provides the most prominent contribution from of Marxism to CPE. RT, sometimes called the 'French' or 'Parisian Regulation school', is distinguished from traditional Marxism as it focuses upon a *modes of social regulation* concept drawn from traditional Marxism. *Modes of social regulation* reinforce and recreate the *regime of accumulation*, a concept that as is central to all Marxist thought, that defines capitalist organisation and *crisis*. RT places and defines 'modes of social regulation' in temporal-historical context where these take different forms across different phases of capitalism's development and inevitable collapse.

The principal phasic/temporal form of regulation is *Fordism*: a capitalist mode of production based upon mechanisation and Taylorism and a 'work-wage bargain' that sustains capital-labour relations and governs labour's insertion into the capitalist mode of production. This bargain frames a particular system of employment and labour relations that regulationists call the *wage-labour nexus*. This system was sustained as long as capitalists

extracted productivity gains from labour and labour received corresponding rise in its wage share. In line with its Marxist origins, RT does not see this regime as sustainable and in fact contains the conditions for its own collapse as capital inevitably seeks to extract more productive capacity from labour. RT in fact emerged in the 1970s by identifying the sources and processes of Fordism's collapse, thus developing into theories of Fordism's replacement (post-Fordism) (Boyer 2005, p.13, Dannreuther and Petit 2006, Lipietz 2013, Reynauld 2005).

There is however considerable diversity within contemporary RT. Two broad camps are identified. One includes a traditional or 'vintage' *régulation* that engages far more with classical Marxist and neo-Gramscian thought (Aglietta 2000; Lipietz 1993; Jessop 1995, 2011, 2012). The second, and newer, variant interacts more with institutionalist CPE found in VoC and CWC approaches (May and Nölke 2015, p.83; Amable 2000, 2004; Boyer 2005; Basle 2005; p.21). Prominent contemporary regulationists, namely Boyer (2005), Amable (2003) have engaged substantively with neo-institutionalists found in CPE. This is particularly notable given the history of angry disagreement between Marxist and institutionalist scholars¹¹ and lack of mutual engagement. In this section on RT, positive contributions are found from both camps.

This chapter is organised according to the same broad structure of the other two review sections (VoC, CWC). It starts by examining the broader theoretical contributions of RT including *Fordism* and *post-Fordism*, RT's principal contribution to comparative study of capitalism, nationally-defined concept of *social systems of innovation and production* (SSIP), as well as RT's treatment of *institutional complementarity*. This broad focus is then narrowed

¹¹ Marxist Richard Hyman for example took direct aim at the institutionalist approach of internal labour markets of Michael Piore, and institutionalist economist Oliver Williamson gave a serious rebuke to Braverman's Marxist 'labour process' theory approach.

toward the specific concerns of labour relations that motivate this thesis and examines the regulationist concept of the *wage-labour nexus*.

RT exhibits similar shortcomings of the VoC approach in regards to questions of law. It is also distinctly industrialist and economic, despite the sociological pedigree of Marxist approaches from which RT stems. The contribution of Heino (2015) is the one notable exception as he addresses law in the context of labour relations. Moreover, Heino's contribution is elevated as it situates the subject of changes to labour law within the conceptual context of a *liberal productivist* form of post-Fordist capitalist system. This places and relates the development of labour law and labour market change within the advance of post-1970s neo-liberalism.

1.2.4.i. Regulation, Fordism and its successors

Central to RT's *raison d'être* is a critique of neo-classical theories of economic development and the methodological individualism that came with it (Boyer 2005; p.13). It also sought to step away from the structuralism of traditional Marxist analysis (Boyer and Saillard 2005, p.36). RT also decisively steps away from traditional Marxism in one key respect: by accepting that capitalist development takes distinct *national forms* rather than taking a singular, globally holistic form. This presents an opportunity for RT scholars to offer their own approach to comparing nationally-defined political economies. The leading attempts, supported by Amable (2000, 2003) and Boyer (2005), sees a four-pronged typology of 'social systems of innovation and production' ('SSIP').

The central role afforded to this typological offer and to historically-sensitive theoretical concepts such as Fordism and post-Fordism, the *regulationist* school provides a dual comparative basis to approach the comparative study of capitalist systems. Both of these are examined in this

chapter. Firstly, basic definitions of 'regulation' are offered. From leading RT studies, *regulation* is defined according the following themes:

"Regulation theory describes the social and economic patterns that enable accumulation to occur in the long term between two structural crises."

(Boyer and Saillard 2005, p.38)

This purpose of *regulation* therefore is to act as a system of supports for a *regime of accumulation*. Modes of regulation dynamically sustain a regime of accumulation by managing the transitions and shifts that occur within it. It achieves this through adaptations and institutional fixes but not without absolving the regime's inherent contradictions and conditions of its own collapse. RT therefore provides a middle way by recognising the ability of capitalist regulation to sustain itself, even if this is not permanent and still prone to inevitable collapse.

"[Regulation theory concerns] the analysis of the way in which transformations of social relations create new economic and non-economic forms, organised in structures that reproduce a determining structure, the mode of production"

(Aglietta 1979, cited in Boyer et al. 2005; p.1)

The key operational term here is 'transformations'. RT explicitly concerns itself with on-going processes of evolution and adaption of regimes of accumulation. RT is often critiqued as being functionalist, a critique also similarly directed at neo-institutionalist studies of comparative capitalism

such as the VoC approach. It is important however to reiterate one characteristic of RT that separates it from neo-institutionalism: RT does not make claims about capitalism's *success of permanence*, only the *resilience* of its institutional 'modes of regulation' and its ability to adapt and reproduce itself. This is underlined by RT's central claim that Fordism is prone to collapse as are the precarious capitalist forms that replace it.

The transformation from *Fordism* to *post-Fordism*, in different countries and regions, is the central mission of RT. From this conceptual base, RT arguments concerning Fordism's successor ('post-Fordism') have only partially coalesced around a concept called *liberal productivism*. Liberal productivism provides a form of *regulation* and *wage-labour nexus* where the capitalist no longer seeks a wage-work bargain with labour where it can successfully balance its drive for surplus value with productivity-backed rises in wages. This 'bargain' no longer exists as extraction from labour is driven more by control, a poorer material position for workers and the ingredients for conflict that results.

In the 1970s, the exposure to rising and unstable oil prices meant a new mode of production had to emerge to replace the Fordist regime. Liberal productivism relies much more on high-quality production, high skill and specialised divisions of labour and financial service products rather than mechanistic mass produced (Fordist model) goods (Lipietz 2013). Technological advances gave this further reinforcement and allowed oil-based manufacturing to move east and away from North America and Europe (ibid). Liberal productivist modes of wage-labour nexus suffers from even greater instability and contradiction than its Fordist predecessor however. The wage-labour nexus of the Fordist era could not provide the capitalist with its surplus value and means of 'accumulation' without extracting more from the (wage) share of workers. This meant either poverty

for the latter or, as is what occurred in post-1970s Europe and North America in different ways, allowing for workers' easy (and unsustainable) access to credit and debt. This broader context is useful for the examination of actors such as trade unions and they behave in labour relations contexts such as bargaining for wages, to lobby for policy change, and to organise workers spread across diversified forms of work.

Capitalists therefore must engage in a mode of production where labour cannot guarantee its own share of production through rises in its productivity, thus breaking down this wage-labour bargain that defined Fordism. This produces several new realities contested by different theoretical positions. Does labour meekly acquiesce to the capitalist who has greater control over the means of production? Or does labour challenge capitalist interests in regaining a desired share of production? The new grounds for conflict clearly compromise the sustainability of the new capitalist system, but will do so in different ways in different national and industrial settings. Those that did not adopt the Fordist model well in the first instance (like Britain) adopted the liberal productivist replacement more effectively than those where Fordism did take root (like Germany).

1.2.4.ii. National SSIP and complementarity

This final point above leads us to those comparative concerns raised by different capitalist forms exhibited in different countries. Fordism and its post-Fordist replacement take different (and historically contingent) national forms and types.

"Vintage régulation of the late 1970s left little room for possible diversity among developed economies, being more concerned with finding a generic pattern that would fit all advanced capitalist countries for a given historical period."

(Amable 2000.p.665)

As with both the VoC and CWC approaches, the success of typological labels is not the important aspect of the typologies. How these are arrived at and developed is of interest however. The conceptualisation of 'national capitalisms' found in some RT work is presented in the form of four types of *social systems of innovation and production* (SSIP) (Amable 2000, 2003; Boyer 2005). These come in the form of a *market-based* SSIP, a *statist* SSIP, a *meso-corporatist* SSIP and *social democratic* SSIP. The SSIP typology, like the VoC attempt, provides cross-national categorisation based upon on the institutional features that define their modes of regulation and accumulation.

There is not, however, a consensus as to how these institutional features are defined and how the linkages that bind them are theorised. Boyer defines these four SSIP according to institutional arrangements based around *regimes of competition, money and finance, the state, the wage-labour nexus and insertion into an international regime* (Boyer 2005). Amable on the other hand identifies five 'fundamental institutional areas' including *corporate governance, product market competition, the 'financial intermediation sector', the wage-labour nexus and labour market institutions* (2000, 2004; p.17). Amable's separation of the latter two is problematic and poses questions for what constitutes the 'wage-labour nexus' in Amable's 'institutional' terms if 'labour market institutions' are not included in this definition. The wage-labour nexus concept is understood differently by Boyer (2002) and is set broader so as to incorporate labour relations and other labour matters within the wage-labour nexus concept. In much of Amable's work on labour issues, this problem is side-stepped in that he addresses labour market institutions directly as 'industrial relations' and not through the 'wage-labour nexus' concept.

RT's SSIP typological scheme does offer an interesting attempt, similarly to the CWC school that follows, that encompasses upon both national *production* as well as *protection* regimes. With this, the four SSIP models broadly follow the demarcation drawn between Nordic regimes and Germanic ones¹² drawn in Esping-Andersen's 1990 *Three Worlds of Welfare Capitalism* typology (next section). This separation is not echoed in the two-pronged VoC typology that places both Nordic and other former Mark-bloc centred economies (e.g. Benelux) under the same broad CME label. The distinction of these Nordic and Germanic models may follow, at least on welfare state grounds, but the separation of Germany and France on this welfare front diverges from Esping-Andersen's *conservative* type which places these two together in a 'Bismarckian' welfare regime.

Boyer and Amable, in producing typologies of this sort, operate much closer to neo-institutionalist approaches found CPE. Others like Jessop and Heino operate more closely to traditional Marxist and neo-Gramscian debates and are more committed to the theoretical concepts and language of traditional regulationism and Marxism. This SSIP and institutional complementarity concepts are rarely addressed by the latter traditional category of regulationist but prioritised by Amable and Boyer. There is a critical difference between how Boyer and Amable apply institutional complementarity. Boyer provides an approach that is more meaningfully distinct from the VoC form of complementarity than that of Amable. The difference is found in the how far complementarity's functionalist intentions are taken. Boyer argues that capitalism successfully reproduces institutional forms and institutional fixes in a manner that demonstrates, as noted previously, the system's *resilience* but not its *permanence*. Boyer still contends

¹² The Three Worlds and RT typologies attached the same 'social democratic' to describe national regimes in Nordic countries.

that capitalism's inherent contradictions mean the ability of capitalist systems to reproduce forms of regulation and accumulation is finite and limited temporally, and these systemic contradictions will eventually result in systemic collapse.

It is important therefore, following Boyer's lesson, for RT to see the capitalist condition as one beset by *institutional dis-equilibrium*, versus the Amable and VoC accounts that favours, particularly in its game-theoretic rational choice guises (Aoki 2001), more *equilibrium*-based explanations. Amable et al. (2005) for example uses complementarity in a more functionalist manner to relate developments in the financial sector to outcomes in labour relations. This is done by relating differences between cooperative and conflictual labour relations with the various forms of business and finance sector interests favouring long-term investment (patient capital) or a more immediate return on investment (short-termist, 'fast money'). This produces a binary CME-LME type outcome found in the VoC approach, meaning Amable et al., (2005) do not diverge in any substantive way from the VoC account of complementarity. The prospect of theoretical slippage into the sort functionalism is very real if this distinction between resilience and permanence is not maintained.

Both Boyer and Amable have a similar problem however that is not answered in regards to labour relations, problems to prompt important questions: how does *complementarity* sit alongside explanations of *incoherence, complexity and conflict*? A key aspect of the argument outlined in the first chapter is that the interventions and influences coming from law deepen the problems of complexity and incoherence rather than sustaining complementarity relationships. There will of course be some limited examples where complementarity between law and non-law (e.g. collective labour law rules and collective bargaining), but if RT contends to focus on

the long-run and the macroeconomic level outcomes, complementarity cannot justifiably describe the processes and events of the neo-liberal (liberal productivist) era.

1.2.4.iii. RT, labour relations and the 'wage-labour nexus'

The final comment above points to the contribution of Heino in this labour relations-focused sub-section. This introduces a detailed assessment of a *wage-labour nexus* concept that sits at the heart of RT's contribution to CPE and labour relations. The centrality of the wage-labour nexus that forms within a different regime of accumulation and mode of social regulation, stems from the central importance of social relations between capital and labour in all Marxist and neo-Marxist political economy. The breakdown of the Fordist wage-labour nexus brought about the breakdown of Fordism itself, giving rise to a new form of accumulation and extraction. The work of Boyer (2005), Bertrand (2005), Reynauld (2005)¹³ and Heino (2015) are given focus in this labour relations-focused section to map the RT attempts to explain how the Fordist wage-labour nexus collapsed and what the consequences are for CPE and labour relations.

"A form of wage-labour nexus is defined by the set of legal and institutional conditions that govern the use of wage-earning labour as the workers' mode of existence. The wage-earning class has developed dramatically because the wage-labour nexus has constantly adapted itself to social conflicts and to the constraints imposed by accumulation."

¹³ Each of Boyer's, Bertrand's and Reynauld's contributions are contained within the 2005 edited volume - Regulation Theory – the State of the Art (2005)

“[The wage–labour nexus consists of the] complementarity of the institutions framing the employment contract and their compatibility with the current mode of regulation”

Boyer, R. (2005; p.74)

The “legal and institutional conditions that govern the use of wage-earning labour” is an clear and explicit recognition of law’s relevance, but the degree to which this is incorporated into RT is limited and open to a similar critique direct toward the VoC and CWC schools. The second passage more pointedly identified the employment contract as a venue where legal and institutional forces meet to regulate workers and work, an important point concurred with by Deakin in the VoC chapter and an important recognition of the role labour law can have in this area.

The first quote also identifies the wage-labour nexus’ capacity to adapt to changing economic and social conditions in between crises. This does mean however that it must eventually collapse. In the *Regulation Theory-State of the Art* volume (Boyer 2005), Bertrand identifies labour relations as being an essential aspect of any wage-labour nexus and the importance of understanding the comparative differences across time and how different national expressions of the Fordist and post-Fordist wage-labour nexus take shape (Bertrand 2005, p.82). Bertrand identifies some crucial differences, for example, between the British and German expressions of the Fordist wage-labour nexus (*ibid.*). The British variant does not, according to Bertrand, conform to a Fordist wage-labour nexus type due to the nature of its militant trade unionism that prevented the sort of wage-labour bargain taking shape (where workers’ productivity gains are rewarded through wage rises). Germany however is identified by Bertrand as an archetype of a classic Fordist wage-labour nexus given that this grand ‘social compromise’ did in fact take shape.

In the 1970s, both countries endured the effects of two oil price crises in different ways given the differences in the way production was organised (and exposure to global price shocks) in different countries after WWII. Thusly, the way in which Germany and Britain emerged out of the Fordist era also presented important differences, differences that are fertile ground for RT and broader debates within CPE.

Many in RT have defined this post-Fordist era as *liberal productivist* (Lipietz 2013, Heino 2015), whilst other regulationists see the post-Fordism state as something merely modified, partially collapsed and partially retained version of 'old Fordism' (Reynauld 2005; p.91). In regards to the wage-labour nexus and labour relations, the role of neo-liberal policy reforms and ideas must be understood one way or another; either as part of a new historical form of accumulation and regulation (liberal productivism) or as something that falls in between; something incoherent, mixed and mongrel-like comprising of half of the remnants of the old regime with underdeveloped aspects of a new one. Such a development is clearly too messy for the parsimonious, clean and functionalist depictions of much institutionalist CPE, and some RT scholars seem more comfortable with this reality than others.

Heino identifies the same intellectual shift associated with neo-liberalism that other regulationists do and argues that its effect had "armed capital with the resources to shape a new model of development" (Heino 2015). For Heino, this did not only predicate a shift from a Fordist to a liberal productivist form of wage-labour nexus, but a key aspect of this was a shift in labour market policy agendas toward aiding flexibility for employers to re-organise work and production patterns so they could extract more from both of these sets of processes. Citing Lipietz (2013), the end-game of this shift brought "a more intensive accumulation regime that dissociates real

wages and productivity". This link between real wages and productivity defined the Fordist wage-labour nexus. Reynauld, despite not using the *liberal productivist* label to approach a post-Fordist *wage-labour nexus*, does however describe similar policy shifts, including policies to abolish indexing that linked wages to living standards that exist in some European wage-setting regimes (i.e. Belgium) (2005; p.91). With the collapse of the Fordist wage-labour nexus, something else had to emerge in terms of businesses extraction goals and the labour process required to achieve it. Heino develops an important RT observation whereby neo-liberal policy agendas forged a different work-wage bargain where employers could now extract from this without meeting wage demands that rose with worker productivity. Heino's development is important as it introduces the subject of law and legal change into this discussion of post-Fordist neo-liberalism and its intellectual and policy agenda.

"What is needed for a rigorous account of labour law development, and legal change more broadly, is a Marxist analysis that reconciles both the abstract and concrete functions and structures of law within the capitalist mode of production"

Heino, B. (2015)

In defining a comparable 'antipodean Fordism' Heino also creates an opportunity to place "labour law systems and legal change" within a context where law becomes important to the dismantling of Fordism and engineering a transition to its liberal productivist successor. Connecting the intellectual shift associated with neo-liberalism to the policy use of labour law to generate new processes of capitalist regulation is hugely important. There are however aspects of Heino's study that demand further questions. It is argued here that Heino's paper is still based within the heavily abstracted

and macro-theoretical language of 'vintage' RT and does not address many of the complexities and contradictions found across different areas of law that that interact to define this neo-liberal shift (individual and collective labour law, economic law rights to contract etc.). Despite this, Heino's paper present an important contribution that places labour law and legal change within a context of neo-liberal capitalist change.

Heino's approach to post-Fordist regulation is first examined. Heino identifies labour law as central tool in the "commodification of labour-power". This conflicts with the normative purpose of the term 'labour law' (at least in the Anglo-phone world) that is defined as based around workers rights and empowerment (Bogg et al., 2015, p.3); something that *de*-commodifies labour through substantive and facilitative rights that would support collective institutions such as wage bargaining. Heino is however correct in identifying the role labour (and other) law in performing the opposite *re*-commodifying purpose under liberal productivism: to undermine workers' rights and the power of collective institutions to restrict employer prerogative.

Although not described explicitly in the way intended in this thesis, Heino does offer important insights into the way the relationship between law and collective bargaining is altered by neo-liberalism. He stops short of recognising the paradoxical existence of both *de*-commodifying and *re*-commodifying tendencies found in different and competing aspects of law and non-legal regulation that mark labour relations systems. It is felt however, unlike the VoC approach, that this version of RT can incorporate this, even if other problems with the various versions of the RT approach remain.

Heino's description of Australian Fordism provides a wage-labour nexus inclusive of the following elements: "compulsory arbitration, the encouragement of moderate unionism, the unification of wage and social objectives, and the growth of administrative fixes to worker power". The collapse of this regime of Fordism and transition to liberal productivism saw the relationship between productivity and real wage growth dismantled. Heino places this assertion correctly in a social context where these changes to a labour law regime can be understood at the level of the actors whose interests and resources such changes are designed to alter. Notably, the decline of working class power greatly influences the content of labour law as delivered through new legislative reforms, reforms that have become much more sensitive to the wishes and political interests of business. If collective worker power is strong, the state is "compelled to resort to [administrative] fixes in order to continue the reproduction of wage labour".

In line with the crucial time-line component of RT's core thesis (i.e. still historical, systemic pattern of crisis and collapse) such institutional fixes will only "achieve a provisional and temporary measure of success" before symptoms of contradiction and crisis reemerge. Such fixes are very evident in the paradoxical use of labour law reform described in chapter one. On the one hand, law is used to prise open new rights and space in for employers, but on the other new legal rights are extended to workers to *partially* compensate for the loss of resources and rights previously provided by collective bargaining and trade union membership. Heino uses the Australian experience to describe something different: a state that has retreated from using such fixes as labour power has declined, but importantly identifies a court actor and a 'juridification' process that sees the labour-capital relationship as one conducted by two co-equal employer and employee partners "engaged in mutually beneficial exchange". The

channelling of dispute management through judicial and tribunal avenues, and away from collective bargaining and state-led reconciliation, is a hugely important aspect of the Australian system that has traditionally marked it out from other advanced economies.

This sort of tribunal system has become a key feature in national regimes such as Britain since the 1960s. Such systems are usually used in the area of *individual* labour law to police complaints made by individual employees against employers. Unions, being *collective* actors, have a role as long as the employee is a member of the union and can be represented. These tribunals are joined by conciliation bodies acting under the auspices of the state. This alone presents complicated linkages between different *judicial* (tribunal) and state actors as well as between employers and employees. With these different actors intervening to impose and police the assignment of legal rules, it is clear that labour relations in some systems is increasingly sensitive to labour law-based regulation.

*Liberal-productivism's attack upon the precocious antipodean Fordist wage-labour nexus has fundamentally crippled the ability of this nexus to deliver wide-ranging policy goals. In its place, there has arisen a more functionally differentiated welfare system and a wage relationship that is **increasingly sensitive to legal regulation outside of labour law narrowly construed.***

(Heino, B. 2015. *Emphasis in original*)

Heino's quote makes the important point that it is not just these very *direct* legal influences found in labour law that labour relations is increasingly sensitive to. It is clearly very sensitive to non-labour law sources of law as well. These areas of law, such as contract law, have been touched upon in the VoC chapter and feature in the case study chapters also. These present

another area of complex interaction and overlap between different areas of law.

When placed in a social setting these complexities deepen when you factor in the different forms of resistance coming from labour and *some* business interests. The organic relationships forged between the labour law regime and social, economic and political contexts is important to understanding Fordism's decline and the arrival of its very unstable liberal productivism replacement. The paradoxical rise of *individual* labour law sees statutory protections for workers being met with a retreat of statutory supports for collective labour law is a key feature found across Europe and has become a central (and developing) feature in European Union law. Using Heino's terms, these often competing forms of "institutional fixes" exist under a shroud of prevailing neo-liberalism, generating considerable uncertainty and complexity.

These regulatory paradoxes of neo-liberalism do not lend themselves to stories of functionalist complementarity. It therefore makes sense that Heino does not engage with such concepts. Nonetheless, the contention of "a wage relationship that is increasingly sensitive to legal regulation outside of labour law narrowly construed" also importantly introduces concerns of law that have become increasingly important to how wage-setting takes place. This point is relevant to most of the European experience, regardless as to whether concepts of institutional complementarity or SSIP are adopted in the process.

1.2.4.iv Regulation Theory: Concluding comment

Heino does not engage with the SSIP typological approach developed by Boyer and Amable as his work is more of the traditional or vintage regulationist type. To underline a point made previously, it is not of primary

concern to this thesis whether or not typological labels are 'right or wrong' or even used, but it is more the process used to arrive at these and their purpose that is important. In this regard, RT in fact shares some common theoretical ground with Thelen's 2014 *Varieties of Liberalization* appraised in the preceding VoC review section: to develop typologies based more on their *dissolution and collapse* rather than their successful formation and resilience. Heino, again, integrates concerns of labour law far more substantively than Thelen and any other VoC scholar and does so without the baggage of complementarity concepts that cannot address the complexity and incoherence that defines neo-liberalism and neo-liberalisation. Heino does not however introduce any innovations from the realm of labour law and legal studies that are required, relying purely upon RT concepts and themes.

The stipulations above concerning the paradoxical role of *individual* and *collective* labour law were in fact added into Heino's analysis. They were however added quite neatly given the appropriateness of Heino's framework. What Heino does successfully is appreciate substantively the role of neo-liberal legal change on *both* labour law and collective bargaining. His work does leave the following questions unanswered: How are courts theorised? Are they thought of as class actors in the same way the 'capitalist state', within which judiciaries are contained, is? How are cultural and normative differences in how law operates in different capitalist societies understood, particularly those that give rise to consensus or conflict based labour relations?

These comparisons are continued in the final chapter of this first section to prompt a further development of the theoretical arguments outlined in chapter 1.1. This chapter is followed by a similar assessment of *comparative welfare capitalism* that has its own shared aspects of approach with regulation theory.

1.2.5. Comparative Welfare Capitalism

Comparative Welfare Capitalism ('CWC') represents the welfare state-focused corner of CPE where different national systems of social policy and social protection are compared. This 'CWC' label, in contrast with the VoC and RT schools addressed earlier, has been constructed specifically for the purposes of this thesis as CWC does not constitute a singular approach or body of research like the VoC or RT approaches. This is due in part to welfare state studies being much older and in many ways broader. Therefore, the *Comparative Welfare Capitalism* label is used to draw together more recent and relevant welfarist literature.

There are four areas of CWC examined in this review of welfarist CPE studies. Two are broad and elevate the *Comparing Welfare Capitalism* volume (Ebbinghaus and Manow eds. 2004) and the renowned *Three Worlds of Welfare Capitalism* volume of Esping-Andersen (1990) that dominate welfare state studies since its publication in 1990. Prominent in both of these, raising the third area of CWC, is the *power resources approach* (PRA) associated with Walter Korpi (1983, 2006). Korpi was particularly influential on Esping-Andersen's *Three Worlds* study, but is given some specific treatment in this section. The fourth is the one notable CWC contribution in regards to those questions of law in the labour relations context (Bonoli 2003) that motivate this thesis.

CWC provides a rich variety of conceptual innovations that sets it apart from other CPE approaches. Those concepts that are of interest in this section centre upon the themes of *de-commodification*, *social rights*, *power resources*, *stratification*, and *functional equivalence*. It is argued that within these there is greater potential scope for CWC to correct its approach to labour relations, in comparison to the VoC approach, so as to account for both labour

relations' legal and collective bargaining aspects that contribute to broader state systems of 'worker welfare' (Bonoli 2003). There are still shortcomings to this that are highlighted. First, a broader mapping of CWC and its approach to comparisons of 'welfare capitalisms' is provided. This is followed by the assessment of the four contributions of CWC outlined above.

1.2.5.i. Welfare, economy and politics: Modelling welfare

There exists some creative tension between the CWC contributions selected here. Importantly, each affords employment systems and labour relations a central role in the development of European welfare states therefore seeing these as central to their comparison. Welfarists do place a greater emphasis on socio-economic conflict as the basis of actor interests than VoC scholars who favour more functionalist explanations based on economic interests (industrialism). VoC and CWC however do share an affinity for institutionalist logics, with some CWC scholars embracing the institutional complementarity concept that is central to the VoC approach.

This division between the more sociologically-minded welfarists and industrialist VoC scholars however should not be overstated. The focus they both have upon labour markets and labour actors provides a promising bridge between concerns of welfare and *social protection*, of focus in CWC, and those questions of *economic production* that dominate VoC and RT literatures. Ebbinghaus and Manow in particular sought explicit interaction with VoC work, and in fact employ the term *Varieties of Welfare Capitalism* in their edited 2004 volume. The tension that emerges is not necessarily a productive one however, particularly if the power resources approach of Korpi is still to be retained. Korpi angrily rejects the firm-centric industrialism of the VoC approach in favour of traditional social/political conflict explanations of welfare state development. Institutional

complementarity also presents a problem for theories like Korpi's that emphasise conflict and contest rather than institutional functionalism. This is a challenge that speaks to the inherently interdisciplinary subject of labour relations where economic, social and political factors are hard to separate.

Korpi and Esping-Andersen provide important conceptual advances to CWC and CPE and are addressed in the next sub-section. Their broader contribution to CWC is outlined here first.

Esping-Andersen contribution to CWC come in a period where the theme of 'welfare state retrenchment' was occupying a great deal of space in welfare state studies in this post-1980 neo-liberal period (Clayton and Pontusson 1998, Pierson 1995). Welfare state retrenchment was being defined and measured in CWC in terms of state expenditure on social policy and welfare systems with cross-national differences in retrenchment (or lack thereof) being the focus of CWC work. A focus on social expenditure-based comparison had its limitations as it lent itself to narrow statistical time-series comparisons that do not yield much about the more complex social structures and histories that forge different welfare states and their different responses to neo-liberal policy intentions of policy-makers. Scholars Esping-Andersen and Korpi were hugely important to CWC attempts to remedy this and introduced the concepts of *stratification* and *social rights* that needed a historically contextualised form of comparative analysis.

Looking beyond mere state expenditure meant also looking beyond welfare provision that was only provided by the state itself. Esping-Andersen also offers a celebrated typology of welfare states, identifying an Anglo-phone *liberal* model, a Germanic-Rhenish *conservative-corporatist* model and a Nordic-focused *social democratic* model. Similarly to the VoC typological offering raised earlier, this three-way typological model has often been amended, usually with a southern or Mediterranean form of welfare

state raised as a 'fourth world' of welfare capitalism (Kleinman 2002; p.32, Abrahamson 1999, Leibfried 1993). Given the central place afforded to employment systems, labour-capital contests in both the political and wage bargaining realms, it is important to note the tensions between these typologies and the realities of both collective bargaining systems and legal systems in different countries. Similarly to the LME-CME classifications of the VoC approach, France and Germany are lumped together in the *Three Worlds* typology, despite very different roles for labour law in these two countries.

The 2004 volume of Ebbinghaus and Manow does not offer any modified alternative typology or classification system. It does however reassert the role of politics from CWC studies in a new welfarist research agenda that sought to engage substantively with the VoC work published three years earlier. The was concluded by its editors with adjusted label – *Varieties of Welfare Capitalism* to underline this point, and had a number of contributions who were either active in VoC debates or in fact contributed to Hall and Soskice's original book (Hassel, Estevez-Abe, Mares, Vitols). *Comparing Welfare Capitalism* took on one central objective of welfarist research inspired by the *Three Worlds* volume: theorising the linkages between *protection* systems and *production* systems. Several authors highlighted the centrally important role of employment systems and labour relations (Ebbinghaus and Manow 2004, p.7-13; Hassel 2004, p.146-155; Crouch 2004, p.105-124). The intent to form a bridge to VoC work was evident in Ebbinghaus and Manow's *Varieties of Welfare Capitalism* work, specifically through the institutional complementarity critiqued in the previous VoC section.

To reiterate, the purpose of institutional complementarity is to causally relate events in one institutional domain of the economy to another.

However, CWC already possessed the conceptual means to this courtesy of the concept *elective affinities*. As the name suggests, *elective affinities* is based on a political interest logic rather than on a functionalist and economic one that the VoC *complementarity* concept is. The task of Ebbinghaus and Manow's volume was therefore to reconcile the two. Despite commissioning renowned welfarist Michael Shalev for this task, this was not achieved as Shalev simply resorted a politics-centric version of *elective affinities* that sits closer to Korpi's approach than that of the complementarity based-VoC. This politics-centred *elective affinities* brought the same emphasis on socio-economic conflict emphasised by Korpi, and applies this (elevating Anke Hassel's chapter from this same Ebbinghaus and Manow book) to a post-1970s period where political parties on the left have seen their traditional labour union allies decline in strength (power resources).

It is stated that this power resources, and aligned *elective affinities* account of labour politics and labour relations, has much more value than the industrialist complementarity account of the VoC account. This becomes very clear in the German example developed in this thesis, despite this same German example being raised by VoC scholars such as Thelen who still contend that German employers are invested in welfare state and collective bargaining systems. Prior to the targeted case study chapters in section two, both the British and German cases are surveyed in broader terms inclusive of the historical development of their legal and labour relations systems. Albeit in different ways, it is clear the socio-economic conflict and unrest are critically influential in forcing employers and the state to acquiescing to the welfare demands of labour. These first two chapters of section two have their arguments then reinforced by the case study chapters in mapping the decline of these welfare institutions found in collective bargaining after the 1970s.

This identified a processes of *re-commodification* where power resources began to shift in capital's favour.

1.2.5.ii. Power resources, de-commodification and recommodification

Esping-Andersen and Korpi were responsible for a renewed welfarist focus upon concepts of *social rights, power resources* and *de-commodification*. The exercise of social rights and power resources by labour would prompt the *de-commodification* of their labour. It is this *de-commodification* process that would forge those concessions from the state to and state-provided or state-sanctioned welfare for workers. This sees process of wage-formation (collective bargaining through unions) and welfare-guarantees (welfare state, labour law) tied together as part of the same *de-commodification* process. Formal and direct welfare state provision is found in some healthcare systems in Europe and some pension systems. Collective bargaining however is different in that this usually led by social partners (unions, employers) but is sanctioned by the state. Labour law plays an important role in this process of sanctioning collective bargaining and the trade unions role in this, but is not a central feature in CWC research. Bonoli is the one exception to this and is explored further on.

In political terms, the *power resources* concept highlights the aggregation of power between workers and business and their partisan representations in government and legislatures at key points in time. This kind of claim itself promoted the role of path dependency explanations where key bargains were struck at key moments in time that prompted the formation of new welfare state institutions.

This concept of *power resources* is now directed to a comparison with other CPE work. This positioned labour actors as demanding social policy to

de-commodify work and workers and employers as opposed to these attempts. This contrasts with VoC work, including notably that of Thelen, who see employer interests in certain countries (CMEs) as not necessarily opposed to the creation of welfare states and social policy. The notable VoC contribution is to highlight the state's role in providing or facilitating the provision of workplace skills to aid employers' productivity goals. This alters a bargaining dynamic where firms now will engage more with wage and welfare concerns of workers in exchange for skilled labour. Esping-Andersen and Korpi dispute this claim that employers would never choose to accept the regulatory and financial imposition of welfare policies as a matter *of first preference*. Korpi in 2006, in a firm rebuke of VoC style theorizing, developed this discussion of transitions from first to second order preferences of actors by placing power resource-based class struggles in a central analytical position. Korpi developed this PRA account to include variations of actor interests (whether political party, employer, or trade union). These variations are put in three camps: protagonists, consenters and antagonists (Korpi 2006). Different actors at different points will see their preferences reflect their institutional environment, and in this case that provided by the welfare state, labour relations and skills systems labour and capital must operate within in.

Over time, says Korpi, a firm's preferences will change and potentially become more deferential to a stable welfare state and collective bargaining environment that embeds itself around them. Put another way, firms may indeed choose the status quo forged many years or decades prior in struggles with trade unions demanding de-commodification of labour through welfare and wage-bargaining. These actors would be *consenters*. But why are they consenting? For the VoC scholars, it is because these institutional environment satisfies their needs. To Korpi and PRA proponents, it is

because of either the state's partisan colouration or union strength propping up the status quo in place. Moreover, some employers could also seek to keep in line other employers who may seek, opportunistically, to upset a given welfare settlement due to a weak union presence in their workplace. This latter set of employers are called *dissenters*, irrelevant as to whether they are successful or disrupting welfare state provision. In forging a middle way between the VoC and PRA accounts, Afonso (2011) sees cause to focus on this sort of power resource interaction between employers rather than between employers and unions.

The power resources of actors flows logically into another theoretical innovation of CWC, the concept of 'elective affinities'. This presented fruitful comparisons across countries of the *political* and *partisan* interests of actors the industrial and social prerequisites to these interests. Similarly to those business interests placed at the centre of the VoC approach, this sees politics and political interests of *both* union and business interests being used as the theoretical means to explain why welfare states are forged and how these protection systems interlock with systems of economic production. Following Korpi from above, this does place both sides of industry (firms, unions) in an equally important position. This makes sense in comparative terms, as different settings (national, industry-level, local) firms or unions will have the upper hand given a particular balance of power defined by their *relative power resources* exercised by social rights and economic rights given by law or by other means (usually organisational).

These CWC concepts are placed together and placed into the historical context of neo-liberalism. The inversion of the *de-commodification* concept into a *re-commodification* is a particularly useful way of appreciating how *social* rights afforded to labour have been either reversed, weakened or subordinated to the *economic rights* of capital. Neo-liberal ideas are at the root

of labour market liberalisation agendas where these regimes of rights and power resources (derived from both law and non-law) have been altered. This same intellectual agenda has also promoted the prising open of the welfare state itself to ready it for the extraction and profiteering by and for private interest. This sees *re-commodification* process of labour power. This combination of social rights, *re-* and *de-*commodification and power resources is a very promising aspect of CWC to correct its problems concerning labour relations and the role of law.

For Esping-Andersen, de-commodification was defined by the quality of the social rights citizens possessed and “the degree to which they permit people to make their living standards independent of pure market forces”. The concept of social rights, elevated by Esping-Andersen and Korpi, is not directed or expanded into a discussion about the legal character of these *social rights*. There is scope here to develop a power resource-type approach to understand how law imbues power in citizens, collective organisations like employers and unions as well as states. This does however also require an understanding of how the judicial arm of the state acts to police the allocations of social rights. This has some very clear comparative differences between countries but also, in the European context, demands the same attention be given to European level courts given their increasingly prominent role in regulating various individual rights, both economic and social. This is discussed later in this chapter and throughout the rest of this thesis.

1.2.5.iii. Labour relations as welfare provision for workers

Labour and business are placed at the centre of welfare state studies, particularly that sort that seeks to relate social *protection* regimes (welfare states) to economic *production* regimes. These actors are also central to the

study of labour relations which act as a key bridge between both a country's protection and production systems. This sees collective bargaining play a role as a key welfare institution, but one not directly provided by the state but one facilitated in two key ways by the state: through law or directly imposing bargaining of unions and employers ('corporatism').

This is the subject of Bonoli's study that attempts to theorize the linkages between the *formal* welfare state and these "functional equivalents" found in the labour market, namely collective bargaining and the legal means used to facilitate particular welfare outcomes. Collective bargaining is forged and maintained by the two union and employer parties of the employment relationship, and only sees the state directly become involved in bargaining in corporatist regimes that were more common in parts of Nordic and Rhenish Europe in the decades after WWII. If the state does not take this more active role found in corporatist regimes, as is more typical in contemporary Europe, the state reverts to a sanctioning role provided in the main by providing legal rules and frameworks in which bargaining can operate. These rights afforded by the state provide the right to recognition to bargaining parties, the right to bargain and to strike (unions) as well as various judicial and quasi judicial means of dispute settlement (tribunals, conciliation bodies etc.).

What Bonoli goes further than other CPE scholars (minus Heino) in the way he incorporates this labour law component of labour market based welfare arrangements. It is not just collective bargaining that takes on an important welfare role, but does this in conjunction with labour law. Bonoli, using the notion of 'functional equivalents' from CWC, focuses upon those "labour market-based means of providing worker welfare" that operate outside the boundaries of the formal welfare state. Bonoli then compares the different forms these take across Germany, Britain and France. Bonoli

conforms to the four-pronged “families of nations” typology of Castles (1993) rather than the three-fold typology of Esping-Andersen that separates France from Germany (both usually lumped together) and instead puts France into a southern European group of ‘families’. This is appropriate, given the substantive role has legal intervention traditionally seen in France than in Germany. France has a generous legal minimum wage as well as extensive *erga omnes* extension rules that extend collective agreements beyond their initial signatories to cover entire sectors. These do not exist in Britain and only in very limited form in Germany. This subject is a feature in the first case study chapter (2.3.) in the thesis’ second section.

In this three way comparison, Bonoli appropriately emphasises different traditions of *state-society relationships* in these three countries, differences that are, again, reinforced by how labour law and collective bargaining institutions have been created. He suffers from a superficial and often incorrect appraisal of their developments however, particularly in regards to the 19th Century. Bonoli identifies France as more authoritarian in this period than Germany which given the emergence of imperial Germany in the latter half of the 19th Century is hard to argue. The German Imperial state was slow to acquiesce to organised labour demanding better welfare and working conditions and initially used police and even military actions to pacify militant worker revolts. As described in chapter 2.1, some German employers were however keen to build consensual relations with increasingly strong trade unions and built autonomous (non-state mandated) pension and co-determination bodies in their workplaces (McGaughey 2015). This eventually pushed the German Imperial state towards accepting these forms of workplace democracy and then extending, often at the behest of employer interests.

These struggles and shifts in 19th Century Germany were very influential in providing the building blocks for the *Tarifautonomie* model that was to emerge on both sides of WWII. This account also might seem to aid Bonoli's historical comparison of Germany and France where, again, he sees the French state in this period as being more authoritarian than the German state and the causal factor behind the different form legal and collective bargaining pillars of labour relations that took shape hence.

This points directly to Bonoli's use of a *state-society relationships* concept, despite some historical inaccuracies. Firstly, he has focused more upon the state side of the *state-society relationship*, where elevating the role of *societal* interests that presents actors of capital and labour is just as important. In Germany, unlike in France, collective institutions of co-determination and pensions, and eventually wage setting, began to forge autonomously as employers acquiesced to rising worker power. The state *then acquiesced to both employer and labour demands* to extend these across Germany. It is for this reason why Germany is characterised as having more consensual labour relations traditions, whilst France and Britain are not (Feldmann 2006, Crouch 1993). In France's case, similar to Britain, trade union militancy and authoritarian attitudes on the part of *employers'*, rather than the state, were responsible in forging different responses (Parsons 2007; p.114). In most of 20th Century France, the state was in fact authoritarian as Bonoli suggests but in fact direct by political goals of reconciling industrial peace, social rights and economic success. This historical appraisal of France also echoes much of the British labour relations experience for much of the 20th Century up to 1979. In this way, the introduction of France is a useful third compared case so as to identify cultural conditions that provided either consensual or more conflict based labour relations.

Under this broader concept of state-society relationships, Bonoli employs CWC concepts of power resources, elective affinities and path dependency to compare the development of labour market-based welfare arrangements in these three countries. As appraised in the previous VoC section, the prospects of path dependency's use have serious shortcomings. Deakin's use of path dependency, outlined in the previous section, is done so in a very legal analytic fashion to examine aspects of court behaviour and doctrinal traditions such as the 'doctrine of precedent'. Bonoli, again, does not go this far in to law school based theories and uses path dependency in manner typical of CPE and CWC work.

This form of path dependency sees Bonoli identify 'key moments in time' that are important in the formation of welfare states and functionally equivalent welfare institutions in the labour market. The role of courts here would seriously complicate this neat, functionalist picture of path dependency that Bonoli paints, but as he does not include an analysis of court actors, even for an analysis of labour law, then this functionalist path dependent view of labour market regimes in Germany, Britain and France remains undisturbed. The case studies in this thesis demonstrate this point. Court interventions occur in different ways in different national legal systems with some courts entitled to be more activist in some cases (Britain) than others (Germany). The spectre of European law however is another aspect of this 'role of law discussion' not addressed by Bonoli or other CPE scholars and needs to be. Interventions from European institutions like the Court of Justice and Commission are regular parts of the regulatory and governance arrangements of labour relations in European countries, meaning they must form a permanent part of theories understanding their effects. These 'effects' here present distinctly non-functionalist and

disruptive examples of institutional change, rather than neat reversions to path dependent practice.

Important aspects of *individual* labour law are also raised in Bonoli's contribution, but is limited to questions of legal minimum wages and going no further into other areas of individual labour law rights (working time, dismissal etc.). Despite this, the role of legal minimum wages in 'neo-liberal labour markets' is an important subject. A legal minimum wage had only existed in Britain since 1998, five years prior to the publication of this article. Germany only introduced its own federal minimum wage in 2015, leaving France as the only country out of these three with a long-standing and developed legal minimum wage. France also stands out in terms of the generosity of its minimum wage rate ('le SMIC') vis-à-vis these other two countries and indeed most of Europe (Salverda and Mayhew 2009). A key claim is made in the first chapter concerning the role of legal minimum wages, namely that these have been introduced in some countries as compensatory reforms in light of receding collective bargaining coverage (leaving workers unprotected by *any* minimum wage) that came about as a result of neo-liberal reforms. To reiterate in brief: legal minimum wages are in essence part of the neo-liberal vision of the labour market, albeit as a compensatory means of providing worker welfare, even if inferior to collectively bargained minimum wages.

The subject of neo-liberalism is not addressed by Bonoli, which again would disturb the pretty picture of path dependent forms of functionally equivalent labour market based welfare arrangements. Bonoli does not go into detail with either individual and collective labour law.

This approach still however lacks: 1) a sufficient and indeed *systemic* understanding of legal systems inclusive of judicial actors and an understanding of labour law systems beyond the isolated examples of

minimum wages and some collective labour law 2) an approach to the *nature of law* and how doctrine and social context intersect in the manner that Deakin above, for example, has attempted. This means power resources, and indeed the 'social rights' concept found in CWC, can be adapted to understand how legal rights are deployed, shaped and indeed made by different actors based on their resources and power.]3) the role of European integration and the European legal and market system has had enormous influence of these countries' regimes of 'labour market based social policy'. This must be factored in to any CPE appraisal of European labour relations and with this and understanding of how European legislation and court-made law affects the legal systems of European countries labour markets and labour relations.

1.2.5.iv. Conclusions

The contribution of CWC echoes that of RT in the previous section. CWC provides one notable contribution, like RT, to those specific questions concerning law and labour relations. It also offers some fruitful conceptual offerings that aid a necessary approach to a neo-liberal context under which European labour relations now finds itself. These include the concepts of *re-commodification* and *de-commodification*, power resources, social rights and state-society relationships. A combined use of Esping-Andersen's and Walter Korpi's *power resources* and *social rights* has particular promise in theorising how collective and individual labour law can alter the relational power dynamics between labour and capital. It does not however provide any insight concerning judicial actors and these impose themselves on various welfare and labour market matters. Given the state-centric nature of welfare *state* studies, it would also be important for CWC to note the difference between the *governmental state* and the *judicial state* in formulating national

types. This poses questions for how CWC understanding the political interests (elective affinities) of key actors, as courts cannot be understood as political actors in the same way as trade unions, firms and policy-makers. In some cases, courts will be shielded from political influences, in others the role of tribunals and court discretion takes politics out of decisions concerning competing legal rights in the labour market. CWC does not have answers to these points.

Bonoli, the one single contribution from CWC to introduce questions of labour law, does not however address these issues of courts and legal systems either. He does however use the *functional equivalents* concept to understand both labour law and collective bargaining as non-welfare state forms of labour market based welfare provision. This can be built on further to introduce collective and individual labour law rules to appreciate how state-society relationships forge labour relations systems over time. Within this, many concerns of labour *law* rather than *policy* can be subsumed, but not all given the role of courts that sees labour market rules very much become 'law' rather than 'policy' created and driven by the *governmental* state. A central part of the argument of this thesis is that a historically contextualised appraisal of neo-liberalism must include this legal analytic part. In this, CWC joins the VOC approach in lacking what RT provides.

Chapter 1.3.

Taking Stock: lessons from three reviews of CPE approaches and developing key arguments

The previous chapter offered a critical review of the *Varieties of Capitalism* (VoC), *Comparative Welfare Capitalism* (CWC) and *Regulation Theory* (RT) approaches. Besides pointed critiques of their treatment of questions of law and other aspects of capitalist system comparison, these reviews did also raise a number positive contributions from these three schools. With this in mind, this chapter provides two functions. It will first outline and compare those core critiques from these three schools. This will then be built upon through an attempt to refine those leading arguments that were outlined with the alternative framework in chapter 1.1.

1.3.1. Three CPE schools

The prominent points of critique are surveyed in this section. Firstly, one broad overarching conclusion of the three schools is presented: There is clear problem in how these schools approach the subject of *labour relations* and how they define it. Each of these three schools, in different ways, overwhelmingly commit their focus toward the institutions and actors of collective bargaining, neglecting important questions of labour law, the influence of economic law and broader legal systems. This problem is only mitigated by the occasional reference to aspects of *legislative-statutory law*-based legal aspects, with judicial sources of legal rules and influence dealt with only fleetingly. In a post-1970s period where legal change is a fundamental part of agendas to restructure labour market activity and reorder labour market relationships, it is necessary to have an approach to legal systems, legal

influences and legal change integrated into CPE theories of labour relations and comparative capitalism. Merely introducing these themes only infrequently and treating them as external and formal influences and is wholly inadequate.

There are without doubt however, some noted exceptions to this broad critique found within the three schools. These do come however in two broad categories: an exception which is not well integrated within a core approach, and those which are incomplete but could potentially be developed. It is stated up front, that the VoC school comes off the worst, with some fertile areas of development from within RT and CWC approaches. Deakin (with Sarkar 2008, with Ahlering 2007, and with Pele and Siems 2007) provided a broad approach that acts as a possible exception to this claim concerning VoC's shortcomings. The word 'possible' is used as these contributions diverge in important ways from the core and original VoC approach of Hall and Soskice (2001); a divergence that likely places their contributions outside of the scope of the VoC approach and, perhaps, within a broader 'law and economics' field with which it is aligned. Deakin and colleagues do employ an institutional complementarity concept that is central to the VoC framework and combines this with a 'co-evolution' concept used to describe the dual and interlinked development of legal and non-legal institutions of contracting. At a descriptive level this is useful conceptualisation of legal and non-legal institutional dynamics, but the inherent functionalism that results from this use of complementarity weighs it down with similar problems to VoC scholarship.

The functionalism found in complementarity concepts and the typologies of national capitalism these provide cannot be reconciled with the 'paths' that labour relations in Europe have taken. These 'paths', not meant in a path dependency sense, have produced increased complexity where

regimes of collective bargaining that used to dominate labour relations systems have been subject to competing dynamics of change and continuity, where complementary and non-complementarity processes have had to co-exist dynamically and in competition. Complexity, rather than uniformity, is the result.

This subject of complementarity, and the clear rebuke of it in this thesis, also directs a challenge to *Regulation Theory*. Unlike the VoC approach however, complementarity is a) only a feature in some RT work and b), in those RT studies where it features (Boyer 2005, Amable 2000, 2003), complementarity's innate functionalism does not produce *permanence*, but only temporary resilience. Examples of institutional functionalism will still eventually fail and fall under the collapse of a capitalist system such complementarities once preserved. In this way, RT's approach to complementarity is more realistic as it describes only a *part* of a capitalist system's process of development. This is very important to this thesis as it forms part of a regulationist offer to properly address the subject of neo-liberalism, and more specifically the threat it poses to different sorts of capitalist regime and the institutional formations that define them.

The above sees the emergence of a two-pronged critique concerning the entangled link between questions of law and legal change on the one hand and those of neo-liberalism. Here, CWC contributions are introduced and sat next to those of RT as these provided much more promising conceptual propositions and lessons.

Both CWC and RT addressed this question of neo-liberalism's role and the role of law in labour relations. One offering from RT, that of Brett Heino, is the only one that did both simultaneously. RT scholars have produced, as is typical for this approach, a distinct and macro-level concept called 'liberal productivism'. CWC has not reverted from using the term 'neo-liberalism'

when examining, for example, debates surrounding neo-liberalism's relationship with 'welfare state retrenchment' (Clayton and Pontusson 1998, Pierson 1995). In comparing the work of regulationist Heino and CWC's Bonoli therefore, both of whom explicitly address labour law questions, it is Heino who explicitly links an analysis of labour market regimes with the emergence of an intellectual neo-liberal order.

Crucially, Heino pursues this line of analysis so as to theorise neo-liberalism's *legal character*, and as possessing the machinery to drive *legal change*, as well as the political-ideological character and its manifestations in industrial practice and restructuring. An important criticism of this is that this does not move far beyond very broad and abstract theorizing, something that characterises an RT school more generally that commits itself to heavy conceptual devices such as a 'wage-labour nexus' and 'regimes of accumulation'. There is some debate within RT whether the 'wage-labour nexus' concept, for example, can and should be applied beneath the macroeconomic level for which it was designed (see. du Tertre 2005; p. 204-213). This 'criticism' is raised more as an issue of crossed-purposes rather than a problem, but it is not typical in RT for the sort of multi-level analyses of labour relations, and especially of collective bargaining structures, that is evident in VoC work (Johnston and Hancké 2009) and other business school industrial relations studies (Marginson and Sisson 2002 & 2004, Katz and Darbishire 2000). It is argued that this sort of flexibility is important when examining collective bargaining systems *within* countries, and all the more so when examining the relationship different kinds of industry-level bargaining systems have with legal rules and the national legal systems they are encased within. The principal use of the wage-labour nexus concept however is its placement within a comparative historical context where it takes on a particular temporal form. The breakdown of the Fordist wage-

labour nexus was critical to the collapse of Fordism itself and the ushering in of a neo-liberal order that, as Heino correctly asserts, to *re*-commodify wage labour and to dismantle those institutions of worker voice and wage management of a Fordist wage-labour nexus that was intended to do the opposite (*de*-commodify) as long as capitalist production goals were reached.

Importantly, the lessons taken from this corner of RT from which Heino operates, that does not engage with a complementarity concept, sees its approach to neo-liberalism accepted for this thesis but without the adoption of all the conceptual burdens of RT. As with much of Marxist and neo-Marxist theorising, and as underlined by such scholars, a student cannot cherry pick these concepts without applying all of them as part of a holistic Marxian theory. The historical placement and understanding of Fordism and liberal productivism are however useful for contextualising the differences between the pre-1980s and post-1970s periods. With this, greater historical context is provided to those shifts in the interests and policy preferences of capital, labour and state actors and the consequences this presents for labour relations systems. The consequences have been profound and corrosive and far more so than the VoC accounts acknowledge, extending policy and legal changes into policy systems and institutional regimes and reversing their initial *de*-commodification purposes.

A key component of this *de*-commodification and *re*-commodification dualism presents a shared lesson drawn from CWC and RT. Further collaboration here sees themes of power resources and competing social rights from CWC further aid a *re*-commodification account of neo-liberalism's advance that has had serious implications for welfare states and collective bargaining. Important social rights are enshrined in law, but will not necessarily be challenged by their removal by the state, but could find

themselves subordinated beneath *economic* rights that are usually directed toward *individual* notions of economic empowerment in market activity rather than *collective* rights to welfare. Such economic rights also see the rights of profit-interests prioritised over those seeking social rights to welfare. There are numerous examples of these social and economic rights competing and conflicting. Choices at this point must be made as to how to reconcile or police such conflicts. An adequate and complete understanding of neo-liberalism's legal character sees such conflict of laws organised according to capital's interests, not labour (welfare seekers).

This leaves a hugely important question about the role of the state. How does the state approach these demands for re-commodification from capital versus competing demands from labour to maintain social rights to have their labour *de*-commodified? What role does the state play in attempts to re-order social rights and power resources of competing interests? Traditional Marxist approaches that favour the 'state as hand-maiden to capital', favoured in some corners of RT, is inadequate to understand the role of judicial actors, even if one excepts this Marxist description of the *political-governmental* state's role in capitalist societies. These leave considerable space to reinterpret the role of the state in CPE as well as that of neo-liberalism and labour relations. This is attempted in the following section.

1.3.2. Developing key arguments

The preceding reviews of leading CPE approaches, to reiterate, were pursued to both demonstrate its existing shortcomings, but also draw out the positive contributions from across the three schools. This second section of this chapter focuses upon the second and pursued through four key themes: *neo-liberalism; the state, concepts of complexity and incoherence* versus those of

complementarity, and the analytical place of *national typologies of capitalism* with CPE studies.

1.3.2.i. Neo-liberalism

Neo-liberalism is understood as a distinct phase of capitalism demarcated from the 'Fordist' pattern of development which dominated in Europe for most of the 20th Century. This has emerged in different ways in different European countries, and has been directed and filtered in complex ways by the processes of European integration, making the comparative analysis found in CPE highly relevant. This distinct phase of capitalism is an 'ideologically expansionist' intellectual order (Grewal and Purdy 2014, Heino 2015) that has greater resilience and deeper roots than those temporary fads in policy preferences of policy-making elites and is directed toward the re-commodification of labour with the serious consequences for welfare state and collective bargaining institutions this produces. Neo-liberalism does not merely concern its *political* ideational features and the *industrial* practices and reforms these prompt, but it includes a fundamentally *legal character*; a character that provides for distinct forms of legal change and reform, legal rights, legal frameworks and contractual relationships.

The creation of legal rights sees a two-pronged pattern of social rights being subordinated beneath economic rights, and the rights of employers prioritised over workers. It also provides for the creation of legal frameworks and modes of legal enforcement required to adjudicate any conflicting claims upon such legal social and economic rights and to do so in a manner that aids neo-liberal objectives. For the organisation of labour relations specifically, this does however also present the creation of *individual* rights for workers as

part-compensation for the loss of collective rights and institutions of worker power that neo-liberal reforms seek to weaken or destroy.

1.3.2.ii. The State

The implications for role of the state from this above are profound and require its reconceptualization. This is done here in two ways. The first sees those shifts in both the political and judicial functions of the state to pursue the requirements of the neo-liberal order. The second demands a simple but important identification of both the state's *legal-judicial* as well as *political-governmental* organs which CPE focuses upon.

The first is dealt with as it follows immediately from the points above and is assisted by those contributions from CWC (Korpi 1983, Esping-Andersen 1990) and Heino (2015) as well as from fellow RT proponents Peck and Tickell (2007, in Leitner et al. 2007). A useful contribution from lawyers Grewal and Purdy (2014), whom refer to Peck and Tickell in crafting their legalistic approach to neo-liberalism, are also leant upon. The 'paradox' identified in chapter 1.1. between the rhetoric and reality of neo-liberalism is developed here. Noting neo-liberalism's legal character immediately begins to undermine its *stated* goal of *de-regulation*. As Peck and Tickell recognise, "only rhetorically does neo-liberalism mean 'less state'" and in reality is marked by paradoxical *de-regulatory* and *re-regulatory* moments, both of which come with a "thoroughgoing reorganisation of governmental systems and state-economy relations" (Peck and Tickell 2007; p.33). The reordering of its functions presented by privatisations, strict new rules and codes about the processes of market activity and the creation of new state bodies or regulatory enforcement, manifests itself in "significant extensions" of state power (*ibid.*) As new spaces are prised open for market and profit-making

activity, legal rights to the proceeds of this activity must be re-ordered also, and then enforced. This has occurred within welfare states, as parts are marketized or outright sold to private for-profit interests, and within labour markets as relationships between state and citizen and capital and labour are *re-commodified*.

Lawyers Grewal and Purdy identify a similar *de facto* truth of the neo-liberal state: neo-liberalism, which “has the consistent purpose of promoting capitalist imperatives” (Grewal and Purdy 2014), can never simply “win” because a the reified ‘pure market’ of the neo-liberal cannot never be absent of legal content. The functional and operational realities of markets need various forms of property rights and contract rights and their enforcement to be perpetually present. Any state, as Grewal and Purdy continue, that aspires to “any form of responsive governance faces perennial demands to depart from market discipline” (*ibid.* p7.). These contributions from Peck and Tickell and Grewal and Purdy tie in nicely with abstraction descriptions of the ‘regulatory state’, although without Majone’s (1993) own celebratory embrace of it. As citizens and workers see social rights that are tied to their ‘social citizenship’ dismantled or weakened, these demands only increase. This presents a contest between the remaining *welfare* state functions and the *regulatory* state functions advanced by neo-liberalism in a constant not-so-creative tension, where attempts to re-distribute gains to capital are challenged by attempts to re-distribute *away* from capital.

Noting these attempts to forge the ‘neo-liberal regulatory state’ are marked by other critical tensions, with the main one presented by the role of *judicial actors*. The more abstract discussion above about the contemporary state under neo-liberalism is contrasted by more basic recognitions of the state’s judicial arm. This is built upon however to place *judicialisation* within this multi-faceted approach to the state.

Not only do judicial actors play hugely important roles in European labour relations systems, albeit more in some than others, but these have become much more prominent in the neo-liberal period for two reasons: the first sees courts asked to intervene more as contests over competing social and economic rights become more commonplace (as a result of orchestrated attempts to reorder these rights in favour of capital). The second sees courts used to actively *advance* economic rights of profit-seekers and employers. The second sees neo-liberal legal change take a partly 'juridified form', but in a preliminary note of the issues of complexity addressed further on this section, courts *cannot be necessarily relied upon* to advance the objectives and causes of 'doctrinaire neo-liberalism' as their commitments to other doctrines and practices of law may diverge from this. Even in countries like Britain, often labelled a liberal and market-orientated economy with legal principles of 'freedom to contract' that aid employer prerogatives, expectations that these will conform to the outcomes demanded by neo-liberal goals are often unrealistic. Even when a court interprets the law in a way to satisfy such goals, these might have unexpected consequences in regards to how other courts, legislators and social actors might deal with these; legislation may be passed to nullify court decisions, courts may overturn another court's decision etc.) The two UK-based case studies firmly demonstrate this point. With incorporating courts and judicial factors of legal systems into a reformed CPE theory of labour relations, it is important to recognise that this cannot be done neatly.

This points, again, to perhaps unsatisfactory theoretical conclusions pointing to *complexity over complementarity*, but should be seen as part of the result of 'expansionist' and pervasive European neo-liberalism that demands the adherence of judicial actors but does not necessarily get it. In labour relations terms, courts have more to do as they must interpret not just greater

amounts of *individual* labour law rights as well as those found in weakened *collective* labour law, but the conflicts these have with enlarged bodies of economic legal rights must be policed. These 'conflict of laws' are often explicit and direct, as one piece of legislation or previous court case may contradict another. Sometimes these are indirect and the result of unforeseen consequences as bodies of legislation are made without regard or reference to another, only to find out these contradict also over time. Courts must decide how to award rights in these cases. In this European context this becomes even more complex when a powerful set of European institutions also produce large amounts of legislative text and court decisions, often without much regard for their compatibility with particular national arrangements.

A conflict of *rules* concept is developed from this to capture another aspect. When dominant political agendas, that include part legal content and part non-legal (i.e. political, ideational) content, provide such a powerful context that black letter law is harder to apply. This underlines the importance of social-setting in which law is applied. This is particularly important in the Germany-Acquired Rights chapter and the Britain-Posted Workers chapter where different legislative and judicial legal interventions found themselves nullified by social actors' ability to massage them into a desired context and alternative result than that required *by law*. In one case study, Britain-Posted Workers, this occurred to nullify the demands of a European court to impose rules that echoed neo-liberal goals. In Germany, the opposite was the case as European legislation demanding social protection was massaged into a context where neo-liberal objectives won the day.

The role of courts have, therefore, been friend and foe to the ambitions of neo-liberal reformers and the interests that come with these. Attempts to

place their role neatly and cleanly in a CPE schema of labour relations is futile, as courts' approach to the political arm of the state, social actors, and to social actors who make claims to them are framed by constitutional orders and aspects and legal practice that may at times conform to the desired outcomes of neo-liberalism, but at other times not.

1.3.2.iii Complexity not complementarity, and CPE's national 'models'

Each of the four thematic parts of these arguments are connected, but the concepts of complexity and national models are addressed together here. This is due in the main to the rejection of complementarity made in the previous chapter and the role it plays in formulating theories of holistic national types, varieties or models of capitalism and labour relations.

This should not be understood as ruling out *any* existence of complementary dynamics and institutional formations, only that it cannot be used in such sweeping fashion so as to structure theories of national holism and completeness. Complementary institutional features may indeed be present in different systems, have increasingly had to co-exist in conflict and tension with non-complementary dynamics; especially those posed by neo-liberal demands for 'institutional change'. VoC scholars do say, to be fair, that these complementarities only exist with 'ideal' LME and CME types like Britain and Germany, and not for more 'mixed' types that sit in between these polar opposite national 'varieties'. This thesis, by using these German and British case study examples in section II, clearly demonstrate that these national examples do not conform to these neat ideal types either. Instead, something more contested, disorderly and *complex* has emerged as uneven patterns of *corrosion* are evident in different ways in different national

regimes of labour relations. This has produced national 'models' that are far too mixed or mongrelised; stuck between 'form' and the singular neo-liberal global 'one-type' that a deterministic neo-liberal view of the politico-economic world order desires.

The effects upon collective bargaining, and the complementary arrangements found in labour law and welfare state provision, have been severe in some countries but not in others. In some countries, legal rules have had to 'step in' to correct, modify or supplement the role of bargaining that have begun to weaken. This can take the form of legal minimum wages filling in holes in the labour market where collective bargaining has receded, or extension laws pushing the scope of collective agreements out to cover similar gaps in the labour market where there is no wage floor. The complexity here places this emerging mix of legal and non-legal modes of labour relations 'regulation and governance' in a broader neo-liberal context; a context with powerful bodies of economic law designed to prise open market or profit-spaces in the public sector, or to enhance the power of employers in the private sector by giving them rights to reorganise production and workplaces.

Each of the four case studies of this thesis present different versions of this interaction between law and non-law in labour relations.

1.3.2.iv. Application to Germany and Britain

The implications for Germany and Britain offer stiff rebuke to dominant CPE theories of these two countries labour relations systems and models of capitalism. Germany continues to be depicted as collective bargaining-dominant, social partner-led form of labour relations with the labels 'meso-

corporatist' or 'coordinated' attached to it as well as the label 'Tarifautonomie' ('bargaining autonomy'). The first chapter of section two provides a history of both German and British labour relations that discuss the development of such labels and depictions. The two Germany-based case study chapters in section two however make clear not only that German *Tarifautonomie* has been declining at a pace courtesy of on-going neo-liberal pressures, but that the influence has become a paradoxical element of this. On the hand, it has been a key driver of this decline alongside those aspects of politics and corporate practice associated with rising neo-liberalism. On the other, legal rules have provided some compensatory influence, such as minimum wages and laws extending collective agreements to non-signatories, as part of this same context, presenting the sort of multi-faceted and complex legal influence argued above. The 'neo-liberal revolution', as labelled by British academic Stuart Hall, would ostensibly be a 'good fit' in traditionally 'liberal' Britain. However, as with Germany, both the cases in question contradict the sort of institutionalist predictions as to how Britain would adjust to external pressures to change. In one case, Britain-Acquired Rights, legal logics and legal incoherence dictated how a 'regulatory and governance problem' was resolved, rather than through Britain's inherent liberalism and doctrinal lean toward employer rights and business freedoms. In the other, adjustments to various legal rules, national and European, hostile to trade union action made sure these liberal, pro-market outcomes to which these legal rules pointed were nullified and not enacted.

1.3.3 Conclusions

The final and following chapter deals with matters of research process and methodological concerns. The five-point framework, that points to the arguments above, has a number important methodological implications and

offers an important bridge between this first section and the second section of this thesis.

Chapter 1.4.

Research Process and Methods

The purpose of this chapter is to present in detail the research and methodological process that will guide this thesis. First, the methodological aspects of the five-point *socio-legal political economy* framework is discussed. Second, a section titled *comparative case study analysis and case study selections* will follow this and describe the purposes of the comparative approach selected. Section 1.4.3. then outlined the *data sources* used.

1.4.1 An alternative framework and its methodological implications

The first chapter (1.1) outlined the five points of the *socio-legal political economy* framework crafted as the corrective to CPE approaches to labour relations and consisted of the following.

1. *Labour relations is defined by two principal forms of regulation and governance: legal sources and collective institutional sources*
2. *A dynamic relationship between legal and collective institutional means of regulation and governance*
3. *A conflict of rules approach to understand the complex interaction between legal and non-legal sources of rules*
4. *A holistic understanding of legal systems inclusive of both direct and indirect legal influences*
5. *A combination of two methodological innovations found in qualitative comparative political economy and legal studies*

Also in chapter 1.1, this new framework above was joined and contextualised by a quote of John R. Commons that defined theory as a set of tools designed

to 'dig up' empirical material so it can be used for theory building, or as Commons puts it to be used to organise "a generalizable and understandable system". A theoretical framework therefore is directed to how a research process is conducted and, through this, provides hypothesised claims and arguments.

Chapter 1.3 developed some the core arguments that this *socio-legal political economy* framework will produce. This section will briefly present the methodological characteristics of the alternative framework above. Point five of the framework is explicitly methodological as it points to the combined use of qualitative comparative analysis and legal analysis with particular reference to legal texts produced by courts as well as legislation. This is examined in detail below in sub-section 1.4.2.i. There are however methodological characteristics to the four preceding points of the framework. The first, for example, highlights the dual concept of 'regulation and governance' and is designed to push the researcher towards examination of the regulatory and governance aspects found *in law* as well as collective bargaining, trade unions and business. This does not only require the researcher to identify and examine the different regulatory and governance aspects of the case in front of them, but also requires the detection of 'regulatory and governance *problems*' in a given case. The process of identifying such problems prompts examinations as to how such problems arise and how they are resolved. This important analytical process, in the context of labour relations, directs analysis of labour actors (business, unions), legislators and courts. What is the initial *regulatory and governance problem*? For whom is this a problem for (unions, employers, the state)? what steps are taken by key actors to resolve these problems? What interests, power resources and conflicts of rules guide resolutions to these problems? The four cases selected for this thesis each have complex regulatory and

governance 'problems' with different legal and non-legal regulatory sources and solutions to these. This includes, but is not limited to, changing relationships between labour law and collective bargaining that represent the *direct* forms of 'regulation of governance' in labour relations. These problems will also include regulatory and governance aspects found outside of these, including contract law and company law.

The complexity of such different legal and non-legal forms of regulation and governance are where these *problems* are found, but depend upon the competing interpretations of these of business or union actors. Such scenarios, also create the sort of *conflict of rules* issues raised in point three of the framework. Such conflicts create a contest between competing claims to particular social or economic rights that are either provided in law or non-legal rules. Placing these problems in a conflict of rules context is appropriate for a labour relationship defined by an inherent conflict of *interests* between labour and capital.

This framework is applied to the four case studies in section two and produces four sets of findings that are then taken forward to the third section of this thesis. The process details of this section two are provided below.

1.4.2 Comparative case study analysis and case study selections

This section comes in four parts. This first provides some background and review of existing approaches in qualitative comparative analysis (1.4.2.i). The second and third detail the national level (Germany and Britain) and European level (EU acquired rights law and posted workers law) case studies that dominate the second section of this thesis the follows immediately after this chapter. The fourth provides some detail to the organisation aspects of these individual case study chapters.

1.4.2.i Qualitative comparative analysis

The goals of this thesis are theoretical and conceptual rather than empirical. The approach employed however has an empirical basis, presented by the use of four empirical case studies and their comparison to produce empirical material that is then compared and examined for the purpose of theory development. New empirical insights are not the motivating factor behind this thesis. Nonetheless, some are produced as a by-product and some of these could be later directed toward publishable ends outside this thesis. An in-depth engagement with the empirical detail of these cases however is necessary, but the commitment of this thesis is to their theoretical value.

The alternatives to a qualitative case study approach includes a more abstract theoretical approach based on abstract and broader analysis of particular conceptual themes, presented by conceptually based thematic chapters, and a quantitative approach. The latter is deemed is inappropriate, given the lack of available data to address the questions of the sort that define this thesis and the innately qualitative nature of these. The former has some merit and is pursued in the third and final section of this thesis, but an empirically-set comparative case study is far more appropriate as it provides the means to develop theory using empirical examples but this also more common in CPE, enabling debate with existing CPE. It is indeed the intention to address existing CPE theories in each of the four case studies of this study and provide an opportunity for those existing theories from CPE approaches to offer their own answers.

Some detail is now provided of existing literature concerning qualitative comparative analysis (QCA). QCA has held a prominent place in CPE and broader social science (Mahoney 2007; Mahoney and Rueschmeyer 2003; Hall 2006), but has not been developed using legal methods and legal theory in the manner proposed in this thesis. The way in which this is

developed in this thesis is outlined in this section, in line with the proposed alternative framework provided, but includes a detailed mapping and presentation of the cases selected, its organisation and rationale for their selection. These organisational and structural matters are then followed by details of data sources and data analysis in the following section.

Qualitative case studies highlight in-depth, context-specific and historically-specific analysis of causal relationships and important contextual features of the cases that provide them (Hall 2006, Ragin 1987; p.35). It also demands in-depth knowledge of cases and the development of causal inferences from incomplete data. These methods are appropriate for developing theory and have a long established place in CPE, 'comparative institutional analysis (CIA)' and broader comparative social sciences (Ragin 1987, p.34-52; Kogut 2010, p.139-182; Hall 2006; King et al., 1994, p.43-46, Mahoney 2007). The 2006 work of Peter Hall¹⁴ particular useful arguments in favour of theory-centred small-*n* qualitative case study research. This sort is the appropriate methodological approach to examine the *complex relationships and causal connections* between legal and non-legal aspects of labour relations in the framework presented in the preceding section.

The in-depth analysis of the complex causal mechanics within cases is what sets qualitative comparative analysis apart from quantitative analysis that, using a large number of case studies, can produce and present broader patterns and *suggest* causal links through correlation, but not empirically prove them *causally*. In-depth analyses of small numbers cases can also uncover causal relationships that are neither numerical nor quantifiable in nature, and therefore present them appropriately (without presentation with number). Moreover, as Hall again points out, not only do attempts to

¹⁴ Who happens to be the same renowned co-author of the *Varieties of Capitalism* volume critiqued in chapter 1.2 (Hall and Soskice 2001)

quantify certain things often produce over simplification, but some compared cases will also present certain causal processes of relevant developments in some cases but not in others (Hall 2006). Even if quantitative analysis of these relationships was, in the abstract, feasible, no data exists to perform this task. If it did, by implication this 'problem' identified in CPE probably would not exist. Comparing qualitative case studies enables the examination of innately qualitative causal processes. It enables an emphasis to be placed upon those inherently qualitative linkages and relationships between law and non-law and their different manifestations in different compared contexts.

Hall argues that theory development in case study analysis, to be of any use, must see the selected cases cannot be merely 'cases of themselves' and must have a generalizable quality so as to provide lessons to broader phenomena. This process of *theoretical extension and generalization* must clearly be undertaken with caution, but must be pursued otherwise the research is simply engaging in a process of describing the contents of those cases in front of them (Hall 2006). This relies on a high degree of contextualised knowledge of these cases and the applicability to broader phenomena. In this thesis, the examination of the European acquired rights and posted workers law gives rise to specific processes, events and outcomes and particular economic sectors and policy areas. These examinations however clearly provide lessons for German and British labour relations more broadly, and do so to challenge dominant CPE approaches and understanding of these national labour relations regimes and European labour relations more generally.

The strengths of selecting these two countries as exemplar cases are addressed in the next sub-section. Importantly however a key point is underlined: The two case studies of these two countries' experiences of two

discreet areas of EU law *must* be able to tell us something fundamental about both of these national cases and about European labour relations more broadly. It is asserted that they both do so and will be demonstrated throughout this thesis.

1.4.2.ii The national cases: Germany and Britain

This kind qualitative and comparative analysis occupies an important place within CPE research and broader comparative social science, but has not been directed to specific sets of law-orientated questions. This is modified for the theoretical and operational purposes of this thesis with innovations introduced, both methodological and conceptual, from legal studies as described in the previous section. As outlined earlier in this chapter, the identification of *regulatory and governance problems* are useful tools in each of the four case study chapters offered. The nature of these problems is described in each chapter and in brief below.

These four cases include the selection of *two areas of European Union law* that concern labour relations (*EU posted workers* and *acquired rights law*¹⁵) and two national case studies: *Germany and Britain*. The two national cases are selected for two main reasons based on their comparative pedigree. The first is that both countries occupy a role as opposing archetypes in CPE theories. In each of the CPE schools identified here, British capitalism is characterised as a *liberal market economy* (LME) (VoC), or, similarly, as *market-orientated* (RT), or a *liberal* model of welfare capitalism (CWC). Likewise, Germany's corporatist traditions have been given provided it with the label's *meso-corporatist* (RT), *conservative-corporatist* (CWC) and *coordinated* market economy (VoC). In Germany, the development of advanced and consensual

¹⁵ Also known under the label 'transfer of undertakings'

collective bargaining institutions in the 20th Century (*Tarifautonomie*) has been placed at the centre of Germany's typological positioning in CPE theories. In Britain, the principle of an employer's 'right to manage' has been a strong guiding principle to how labour relations has been organised, although much more so in the post-1979 British experience and 19th Century Britain and less in between these periods. This is discussed more in the following chapter (2.1).

The contrast between these two countries is also found in the comparisons of their legal systems and systems of labour law. Britain is mostly characterised as a *common law* legal system with a stronger role for judicial independence and a doctrine of precedent that comes with it. Germany is typically considered as a form of *civic law* system inclusive of Roman law traditions that provides for a stronger role for formal codes of public law and constraints on judicial power. There is however further typological distinctions within these broader types and are addressed in comparative legal studies (Zweigert and Kötz 1998) that separates the *Germanic* legal tradition and a *Romanistic* one found by French-Napoleonic systems (1998, p.73) despite sharing some roman law traditions. France is much more centralised and uses public law more expansively than the more decentralised, federal Germany.

This broad distinction between common law and civic law systems masks a rather simple reality where *all* national legal systems comprise both civic statutory codes defined by legislative forms of law and judicial elements where legislation and constitutional rules are interpreted; the critical question is the balance between these which differs in important ways between common law and civic law systems. These are important however when asking how the German and British legal systems are inserted into a European legal order (pre-March 2019). As the four case studies illustrate,

how different countries deal with the impositions of EU law, whether in legal terms or in terms of everyday practice, differs according to legal, political and cultural factors. Courts are more interventionist in some countries than others, and legislation is more likely to be reached for to affirm social rights than in countries with strong non-legal arrangements such as collective bargaining, trade unions, employer associations or others. Britain represents a strong example of judicial independence whilst Germany of judicial acquiescence to established legal or cultural norms.

1.4.2.iii The European cases

These two national cases are brought together and compared courtesy of the selection of two areas of EU policy and law: European *posted workers* and *acquired rights* law as defined by the directive texts (directive 96/71, directive 2001/23 respectively) that introduced these into EU law. Both of these however, importantly, bring with them the interpretations enforcement by national governments, who must transpose these into national law, and European and national courts. Both of these selected areas of EU law also sit at a theoretically interesting regulatory nexus, and conflict, between *social rights* and the *economic rights* that are at the centre of the single market. With this normative clash between the economic and the social goals, the four case studies present opportunities to test explanations of *complementarity* or *conflict of rules* that might result. In some of the cases, examples of *de jure* complementarity emerge in the abstract but can then be contradicted by the *de facto* reality presented by the events and facts of the case. One pertinent example of this is raised in the Britain-Posted Workers chapter (2.4), where shifts in EU law appeared to match with existing labour law arrangements in Britain in terms of furnishing employers, not workers, with empowering legal rights. The events on the ground, chiefly by striking on-site workers,

however produced a radically different outcome.

It is worth addressing this question: why pick areas of *law* as part of these case study selections, and in this case European law, as these would clearly demonstrate law's perhaps rather obvious role. Two important points are made in addressing this concern. Firstly, the arguments of this thesis are directed more toward demonstrating *the nature of law's influence and the multi-faceted (comparable) nature of it*, rather than whether its influence is *ex ante* important at all. CPE theories of course do not dispute its importance, but take law's presence as a given and do not examine *how and when* it is important in comparative context. Secondly, CPE approaches, particularly of the neo-institutionalist sort, would contend that these external pressures coming from EU law would be massaged into dominant national practice and would not fundamentally disrupt existing complementarities. This is rebutted to differing extents across the four cases. Thirdly, and stemming from this second point, in offering four sets of contrasting findings, these four cases do provide some scope and opportunity for CPE theories to be applied and offer counter arguments to those of this thesis in each case. For example, the Germany-Acquired Rights case (chapter 2.5) offers some important scope for institutional-type CPE approaches to rebut the claims made in this thesis. On both the appraisals of change in Germany labour relations and on the role of law and neo-liberalism, these fail and will be demonstrated in this chapter.

The research process undertaken will be as follows: Each of these four chapters in section two of this thesis will be each divided into two main parts: an empirical section where the subject matter of the cases will be examined and, following this, an attempt to apply the five-pronged framework outlined in chapter 1.1 and above.

1.4.3 Data sources

There are four principal sources of data used, in different ways, across the four chapters: *legal texts*, *documentary sources*, *interview data* and *secondary data sourced from existing academic work*. The original intention was to use a balanced mix of these. As the research was carried out, the use of interviews took on a more secondary and supplementary role, although important in two chapters (*Britain-posted workers*, *Germany-Acquired rights*). As is usual, some interview data was difficult to source, but in most instances it became clear that appropriately knowledgeable interviewees simply did not exist and that piecing together data had to be done another way. This produced a greater reliance on legal texts, documentary sources as well as secondary source data from academic literature that addressed parts of a given case study (i.e. industrial case studies of outsourcing in Germany for the Germany-Acquired Rights chapter).

These four sources listed here do, in some ways, overlap. Their use however is described below in separate sections with their areas of overlap touched upon where appropriate.

1.4.3.i Legal texts

The role of legal texts is an important methodological aspect of added value to this thesis. Legal texts refer to several sources, with the main two consisting of *legislative texts* and *judicial decisions*. CPE and comparative politics is already very familiar with the first of these and usually identify these under the label of 'public policy' and expressions of *political will*, and the end result of aggregated and competing political interests, rather than as 'legal' texts.

Court case law has formed a key part of important non-legal studies literatures that have had some necessary interaction with CPE. These include European integration studies (Martinsen 2008, 2015; Burley and Mattli 1993; Scharpf 2002, 2010) new economic sociology (Stryker 2003; Edelman and Suchman 1997) and new institutional economics (Hadfield 2005, p.175-204) Rubin 2005, p.205-228, Arruñada and Andonova 2005; p.229-250). Despite CPE's occasional interactions with these fields of study, substantive interaction has been rare, minus those exceptions raised in chapter 1.2. It is important that the role of courts are introduced in a manner that enables a contextualised understanding of legislative texts *as well as* and how social actors interpret and apply such legislation, both with and without judicial intervention. To be more explicit on this last point, as is demonstrated across the four case studies, actors often have considerable leeway (for various reasons) to interpret theirs' and others' legal rights, so often require policing by legislators, courts and other state regulators.

Legislation is nearly always shaped by courts as the latter must often police disputes concerning legislative changes and how particular legal rights are organised or reorganised among social actors. This space where new law is made and enforced however is not merely decided by legal actors like legislators and courts, as social actors often contest shifts in legal rights. The interactions this creates between social actors and legal actors is often present in legislation and associated documents (e.g. consultation documents), but also in court decisions presenting in judgement texts. This judgements present the facts of a case as well as doctrinal approaches, and therefore represent a very fertile source of empirical information about the dispute itself and the contextual factors around it.

The role of court made law is represented primarily in the four cases by the decisions of the European Court of Justice (CJEU), but national courts

also feature very prominently. This is more so the case in the two British cases as the national courts in these examples were more expansive in seeking to police such conflicts themselves rather, as in the German case, of referring cases straight to the European Court without examining the case itself. This relatively passive role for German court *vis-à-vis* UK courts, is still analytically very important. A total of exactly 50 cases have been sourced in this thesis comprising both national and European court decisions, and, using a simple core-periphery logic, much greater emphasis placed on smaller numbers of cases within specific cases. For example, the two *Laval* and *Rüffert* cases are especially prominent in both the posted workers chapters, whereby the *Süzen* case features much more than most in the British-Acquired Rights chapter.

A key part of this kind of analysis however is to read these *core* judgements alongside those decisions and relevant legislation that preceded them. These provide important contextual value to a core landmark case and offers a guide to future developments in law and in the social practice it inspires. For example, the *Laval* case raised above requires an understanding of EU free movement law within posted workers law is framed and guided by. This means that landmark decisions of the Court of Justice of EU free movement law, such as *Van gend en Loos*, *Gebhard* and *Dassonville* (see *List of Legislation and Cases* in the Appendix) also need to be grasped. This also requires the researcher to engage with the legal scholarship in this area that includes 'case notes' shorter judicial decision-focused notes found in legal studies journals.

These raw numbers concerning the numbers of court cases cited however mask the fact that particular court cases are more prominent than others. A key skill in any legal analysis of court case law is to identify cases and parts of cases of central interest and those decisions, or legislation, that

are of peripheral or secondary relevance or importance to these core cases. This core-periphery mapping exercise is pursued in each chapter. Two of the case study chapters rely much more upon case law (2.2.3, *Germany-Posted Workers*, 2.2.6, *Britain-Acquired Rights*) as a source of data than the other sources listed in below. As a point of methodological comparison, this comparatively different reliance upon judicial decisions in the different case study chapters is indicative of the role that courts hold in each case. The *German-Acquired Rights* (2.2.5) chapter for example, the use of secondary sources found in existing literature, and in particular of in-case industry-set case study examples, is used alongside the analysis of some court cases and legislation, but less than the British- Acquired Rights case and the *German-Posted Workers* case. The Britain-Posted Workers chapter however sees court case law take a very secondary and indeed distant explanatory role in the events of this case study. Here, documentary evidence found in a collective agreement and other documentary sources are very prominent. These other sources of data are outlined below.

Important similar points are now made about the *legislation* element of this data plan. The European legislation selected starts with those directives that provide European posted workers and acquired rights law, but are not limited to these as they have relationships with other areas of European legislation. The posted workers directive (PWD) for example has unavoidable overlap with European public procurement directives and the directive for public works contracts in particular¹⁶. The acquired rights directive (ARD) in fact has very explicit relationships with other EU employment legislation including the Information and Consultation directive (2002/14) and the Collective Redundancies Directive (98/59).

¹⁶ Directive 2004/18 concerning procurement contracts for public works was what was in force during the events that are of focus in the two posted workers chapters. This was replaced by directive 2014/24 in 2016 across the EU however.

Moreover, the PWD and ARD also interact with various aspects of national legislation. The ARD, given its focus on business transfers and its clear relevance to questions of corporate governance, bumps into questions of company law. For the reason, this is an interesting example of where labour law and company law, or social rights and economic rights, can come into contact. It presents the sort of potential conflict of rules scenario that can either produce complementary and functional outcomes or conflict and complexity.

1.4.3.ii Documentary sources and secondary data

'Documentary' sources of data can be primary, secondary or tertiary in nature (Burnham et al 2004; p.187, Lichtman and French 1978, Burnham 2008), although for the purposes of this thesis come in the form of reports, consultation documents and explanatory reports and memoranda that accompany legislation and judicial decisions. Such documentary evidence include governmental sources, like national governments and the European Union's institutions, reports and consultation responses provided by labour actors and aligned representative organisations.

These sorts of documentary materials are useful sources as they provide greater light upon the policy-making intentions behind legislative change and how consultations on those changes have influenced how such legislative change has been presented. The consultation processes mentioned here also provides an opportunity to identify the interests of employers and workers to proposed legislative change when these actors submit responses to consultations. This becomes a factor in the Britain-Acquired Rights chapter where court-induced disruption to established legal frameworks required the government to carefully factor in the interests of business and unions to craft a new settlement that provided legal certainty. Proposed legislative

changes are also often provoked by the decisions of courts interpreting or striking down a piece or portion of an existing statute. This is also addressed in both government reports and consultations and is factor in each of the four case study chapters.

Another useful source of documentary material includes the text of collective agreements put together and enforced by employers and unions. Details of relevant collective agreement texts and of disputes related to them could be found across a variety of sources as well as from the collective agreement text itself. Effort was made to find these agreements themselves but this was not always necessary or possible. In the Britain-Posted Workers chapter (2.4), a collective agreement for one specific sector was centrally important in solving a *regulatory and governance problem*, so was sourced and analysed. In the Germany-Posted Workers case however an attempt to the regulatory problem in question was made outside of a collective bargaining process by legislators and courts (the CJEU), with key sections of a collective agreement sourced from within CJEU decisions (the *Rüffert* and *RegioPost* cases). In the Germany-Acquired Rights chapter (2.5), in contrast to the two posted workers chapters that raised one key sector, a broad lens was cast over a number of industrial sectors making targeted examinations of individual collective agreements less necessary. Secondary literature was also available making lots of observations and assessments of a broader collective bargaining context possible.

This chapter (2.5) in fact used secondary literature to build a set of in-case sectoral/industrial case studies of changes to the collective bargaining pillar of German labour relations. More specifically, this included a study of the German hospital sector (Greer et al. 2013), the manufacturing sector (Schulten 1998) and the privatised telecommunications sector (Jackson and Sako 2006). Judicial decisions were also useful in this *Germany-Acquired*

Rights chapter in providing the necessary details of those aspects of collective agreements that were affected. As elaborated upon below, these alternative sources of data had to be found for this chapter as interview data became either inappropriate or difficult to source. In the case of this Germany-Acquired Rights chapter however, a broad and useful mapping of different industry-set examples provided an excellent source of information from which to make causal inferences and conclusions.

1.4.3.iii Interview data

Similarly with the case of collective agreement text mentioned above, the intention was originally to use much more interview data. Two sets of issues presented themselves: the question as to how appropriate or useful interviews would be for a given case, and the typical challenge of finding willing interviewees.

Interview data was not necessary for the British Acquired Rights and Germany-Posted Workers chapters, although was sourced for the latter anyway, but were potentially of much more promising for use in the British-Posted Workers and Germany-Acquired Rights chapters. The British-Posted Workers chapter benefited from two especially useful interviews from the side of labour and one from an important intermediary body charged with managing the collective agreement process. These were illuminating to both how a central event in 2009 at the centre of this case and how this event prompted changes to a centrally important collective agreement. The hope to obtain an interview from employer interests in this case was disappointing but not at all unexpected as the particularly controversial aspects of this case, namely the Lindsey dispute in 2009, meant it was highly unlikely these would be forthcoming.

The Germany-Acquired Rights chapter however had a different set of concerns attached to its process of research. Like the British-Posted Workers chapter, it needed to piece together different data sources as none of these on their own provided all the necessary answers. It was thought from outset that the Germany-Acquired Rights chapter could have benefited from targeted interviews of unions and employers that sought to ascertain why the European acquired rights directive had such little affect in Germany despite, in the abstract, the presence of collective bargaining and co-determination institutions that would aid the directive's goals. However, there were very few respondents from labour, business or government actors that either seemed informed on the broader subject or, again, willing to provide a substantive interview. Court case law and legislative texts, at both the national and European levels, could only provide so much information. It was at this point that the use of secondary data described above found in academic studies were used to piece together a set of findings. This did not diminish the use of the chapter to the broader arguments of this thesis. On the contrary, the empirical puzzle of the Germany-Acquired Rights demonstrated some enormously important points concerning how law is enacted and actioned in complex labour relations contexts. This and the Britain-Posted Workers chapter were both excellent demonstrations of important theoretical arguments of this thesis concerning the contested nature of law driven of competing interests and conflicting areas of legal and non-legal rules.

1.4.4. Concluding comments

The purpose of this final chapter of this first section was to detail and map the methodological and research process of this thesis. Looking forward to the following chapters in section two, it is important that the purpose of the

four compared case study chapters is clearly made. The purpose of comparative analysis of a small number of cases allows for the in-depth analysis of these cases and complex causal mechanics and processes that exist within them. Despite a small number of compared cases, the findings from these can still be used, and in fact must be, directed towards careful generalisations and observations of broader phenomena. In this thesis, the findings developed present different forms of relationship between law and non-law in defining European labour relations, and make pointed generalizations about the relationship between European labour relations systems and European neo-liberalism, inclusive of the latter's own, rarely theorised, legal character.

Before these four case study chapters however, further detail and context is given to the four case studies as stand-alone areas, beginning with a historical mapping of both German and British labour relations followed by a similar historical mapping of the two areas of EU law selected.

Section II

Chapter 2.1.

Two national level case studies: An introduction to German and British Labour Relations

2.1.1. Introduction

The principal goal of this chapter is to provide a substantive introduction to the national level case studies of this thesis. This will include three things: firstly, a rationale for the selection of the two countries chosen; to provide a preliminary demonstration of the importance of integrating legal analysis into a CPE account of labour relations, and to provide important descriptive context of these two countries' political, legal and economic systems.

Both Germany and Britain have received ample coverage in CPE studies. This presents the justifiable question: why select these two countries once again for another comparative study? The leading answer is simple. A demonstration of the importance of legal analysis in CPE accounts of labour relations will be more credibly made if compared to existing studies. With there being so many available of Britain and Germany, such illustrative comparisons can be made. This is a key purpose of this chapter.

As illustrated at the start of chapter 1.2, the basis for the existing CPE work on these countries is spread across a number of factors. This includes economic organisation (regimes of *production*), comparing for example the prevalence of particular industries (services vs. manufacturing), the form and size of welfare states (regimes of *protection*), and the nature of political systems (consensus systems v. majoritarian ones) (regimes of *politics*). Germany and Britain have been given key positions as 'ideal types' in each of the three VoC, CWC, and RT schools appraised in Chapter 1.2. In the VoC

offering, Britain is depicted as Europe's most prominent Liberal Market Economy (LME) 'variety', whilst Germany represents a similar archetype example of a Coordinated Market Economy (CME) model. In Esping-Andersen's three-pronged welfare capitalism taxonomy, Britain's welfare model is again identified as *liberal*, whilst Germany as *conservative-corporatist*. In RT, and the SSIP taxonomic model developed by Boyer (2005) and Amable (2000), Britain is again identified as 'market-orientated' whilst Germany is identified as 'meso-corporatist'. The themes running through each of the three schools are similar, inclusive of identified sets of 'institutions' defined by their functional relationships.

As Chapter 1.2 made clear, the role of legal systems, labour law and other legal influences have not been integrated adequately. These points above are developed briefly here by connected discussions in CPE to comparative legal studies. Firstly, both countries' labour relations regimes are often characterised, in different ways, as 'law-light', where law's involvement in the regulation and governance of labour relations is minimal. Germany has traditionally been defined by a social partner-led model with the state adopting an arms-length approach to labour relations. The German model has been depicted in German as *Tarifautonomie*, meaning 'autonomous collective bargaining'. Britain however has been defined by a more unstable and conflictual model defined by a 'right to manage' approach to legal rights that favour employers meaning these actors can rely on recourse in the courts as they see fit. For this reason, 'voluntarist' traditions in Britain have seen trade unions keen to keep their relations with employers outside the reach of law as much as possible.

Both countries have their origins in the respective designations in comparative law. Germany represents an example of a *civic law* legal system and Britain as a *common law system*, but formal distinctions of this sort need

to be placed in a social and historical context where the differences in legal traditions or 'legal styles' are introduced (Zweigert and Kötz 1998). The distinction between civic and common law regimes also should not be overstated, as court-made law and statute made law are indelibly key features in European legal system and differences in how courts and legislators act have differences that are not based on these distinctions.

In regards to Germany, a brief comparison is made with France. These two countries responded differently to the invasion of Roman law that is seen as definitive to European 'civil law' legal systems, so much so that in comparative law circles, namely Zweigert and Kötz (1998), these two countries are separated into different 'Romanistic' (France) and 'Germanic' types (1998, p. 74 & p.132). French constitutional and governmental tradition has produced a very centralised system of politico-legal authority (*Ibid*, p.133), a feature that bears closer resemblance to Britain. This translates into a labour law regime which is not just centralised by provides for a very prominent role for the state. This manifests itself in regards to collective bargaining and wages, where the French state routinely extends collective agreements to employers who are not signatories to these agreements; a feature that is prominent in case study chapters 2.3, 2.4, and 2.6. Germany was, pre-unification, divided between different city and regional states, meaning its different geo-political parts applied Roman law differently in response to different social and political conditions (Bavaria was majority catholic, Prussia was much larger, Imperialist etc.). The results in Germany are a mixture of hierarchy and decentralisation and provides an important political and constitutional role for the regional state (*Land*) in German politics (the *Länder*). This framed the model of German federalism that emerged in the 20th Century, particularly after 1945, and the regionally fragmented labour law and collective bargaining systems created after

WWII. Britain on the other hand has an uncodified constitution with a prominent role for common law doctrine and parliamentary sovereignty. This centralised model however is challenged by a number of factors, including that of devolved, quasi-federal entities. This however does not apply to questions of labour law, which are centralised UK-wide.

Such characterisations of these countries' law-light character, compared to France for example, can encourage the sort of analytical neglect of legal factors that provides for the failings in CPE detailed in chapter 1.2. This last point is important for a nearly 40-year period where both legal rules and judicial interventions have become much more prominent in the regulation and governance of labour market affairs. Given the different legal and non-legal traditions and histories of both these countries, how they respond to the different forms of legal influence and legal intervention will present important differences and theoretical findings.

2.1.2. Germany

This section on Germany focuses primarily on the principle of *Tarifautonomie* that has been the principal focus for CPE and other studies directed at German labour relations.

As described earlier, the *Tarifautonomie* model is one based upon an autonomous social partner-led means of governing the employment relationship, 'social partners' being trade unions and employers, rather than one that provides a leading role for the state. The model is built on the twin pillars of sectoral collective bargaining and co-determination institutions (Lehndorff 2010) and it is upon these two sets of arrangements that this section will focus.

Firstly, and abstractly, *co-determination* comes in two forms: co-determination from *above*, ‘supervisory councils’¹⁷(*Aufsichtsrat*), and co-determination *from below*, called ‘works councils’ (*Betriebsrat*), with works councils being the more commonly used and the rules governing these being tied to German company law designations for different sorts of company¹⁸. Both collective bargaining and co-determination institutions however have received ample treatment in CPE studies, albeit with those limitations described in Chapter 1.2. Secondly, raising a time-line problem, CPE for the most part focuses overwhelmingly upon German labour relations and broader capitalist development in a post-World War II period. Linking these two together, this section on German labour relations finds that much of German collective bargaining and co-determination traditions have important legacies dating back before both World War II and World War I.

As with the British section that follows, there are three main chronologically organised segments. The first extends from 19th Century, that saw the emergence of the unified and Imperial German state, to the first half the 20th Century. The second focuses upon the post-1945 era and a third mapping a post-1970s era where *Tarifautonomie* began to face serious challenges associated with neo-liberalism and economic change.

2.1.2.i The 19th and 20th Century: From the Imperial state to the Weimar Republic

To repeat a point made above, the roots of *sectoral collective bargaining and co-determination institutions* in fact reach as far back as the 19th Century period in

¹⁷ Of which companies with 500 employees or more must create, with a third of its composition being (non-management) workers (Kirchner et al. 2010)

¹⁸ E.g. limited liability company, publicly listed company etc.

Germany. The early stages of their development were also very much interconnected.

Their emergence came despite numerous countervailing forces from the state, fledgling expressions of trade union collectivism and worker voice and competing visions of corporate governance (Owen-Smith 1994; p.273). Germany is often depicted as a country with more consensual labour relations rather than conflict-based (Feldmann 2006, Jacobi *et al.* 1998, p.191-193). In comparison to Britain, whose labour relations traditions are characterised as being more conflictual than consensual, the mid-19th Century period in Germany was marked by a great deal of industrial unrest; unrest that would have considerable formative impact upon the labour law and collective institutions that would define German labour relations in the coming century.

In 1848, as McGaughey describes (2015), the revolution in France inspired and stirred unrest and revolutionary sentiment in Germany (and elsewhere in Europe). The response of most pre-Imperial/pre-unification German states was very authoritarian, wary of the potential revolutionary threat such strikes might pose to the established order. Employer interests in Germany were more divided however, with some seeking more conciliatory responses to rising union activism and unrest. In one city state, Frankfurt, one newly elected parliamentarian and textile owner, Carl Degenkolb, had already become famous for forging his own institutions of worker welfare and worker voice in his business, and sought these arrangements to be replicated elsewhere to engender broader industrial peace (McGaughey 2015). Degenkolb's proposal sought to create a form of works council where employers would hold a two-thirds controlling stake in the councils' representation. This was not sanctioned by fellow parliamentarians, the aristocracy nor by the state, and it would still be 60-years until the first co-

determination legislation was passed (*ibid.*). In some places, such as Frankfurt, the results to strife were different and saw political rights of association created, whilst in other areas of Germany the authorities continued to be heavy handed. Frankfurt's Degenkolb was the only industrialist to create and extend working rights within their enterprises, even as the state sought to crush demands for industrial democracy (McGaughey 2015). These two seemingly contradictory trends of employer acquiescence and state authoritarianism would later come to a head.

With the creation of the German state in 1871, the now Imperial German state would not allow any space for trade union activity in economic life. This was despite some attempts made to enhance the conditions of the worker in some places like Frankfurt. Despite these rare examples, workers were not afforded any role in this process and trade unions' criminalisation status was to continue.

This was to change gradually. Von Bismarck's health reforms (*Krankenversicherungsgesetz*) of 1883 created rules stating that managers of companies' health coverage programmes must be elected by workers. As McGaughey explains, these rules were formed on the back of knowledge that many companies had already provided these sorts of participatory (worker voice) arrangements. Otto Kahn-Freund, German-turned-British citizen and forefather of British labour law studies, called this system the most advanced social insurance regime in the world as it covered workplace accidents, disability, old-age pensions as well as health (Kahn-Freund 1981; p.20-21).

Once the age of Bismarck ended in 1888, Kaiser Wilhelm II became Emperor. Only a year later, Kaiser Wilhelm had to manage a strike in the coal industry. The Kaiser did however shift from a zero-tolerance disciplinarian position to allow some concessions to unions demanding further democratic rights in the workplace. This came despite the Kaiser's own dim view of

industrial action. This shift of the Kaiser was seen in other areas of labour policy. In 1890, the Kaiser produced new legislation to provide Germany's first works councils systems. The bill was passed as the *Arbeiterschutzgesetz* (Worker Protection Act) of 1891 and demanded that employers create a works council so workers could participate in workplace decision-making. This long-term process saw a shift from antipathy to pragmatism on the part of the state toward workers' rights and interests. This shift to a pragmatic approach was important however in order to quell persistent and worsening industrial unrest and militant trade unionism. This was reinforced by some employers' own willingness to negotiate with unions and create new welfare arrangements in their own businesses (McGaughey 2015).

As Germany edged nearer to WWI, two key political developments emerged that were to embed this delicate but emerging industrial consensus. The first was the merging of the SPD and the trade union movement both ideologically and organisationally (Kahn-Freund 1981; p.21-23). The second saw the General Commission German Trade Unions' (ADGB¹⁹) decision to give its full support to the war effort in 1914. During WW1, trade unions obtained further gains on recognition and pay bargaining, yet "unofficial bodies and organisations" were increasingly employed in a clandestine fashion at workplaces to suppress workers' rights and organising (Kahn-Freund 1981; p.24).

As the political situation became worse and more unsettled (that led to the revolution in 1918), trade union leaders met with leading industrialists to plan for a peacetime economy (*ibid.*) This was important. Once the Kaiser had abdicated in November 1918, the main trade unions and employer associations concluded an agreement for a post-War 'workplace community' (*Arbeitsgemeinschaft*) and, as McGaughey calls it, "the most important

¹⁹ *Allgemeine Deutsche Gewerkschaftsbund*

collective agreement in history” – the Stinnes-Legien Agreement (*Stinnes-Legien Abkommen*) (McGaughey 2015; Kahn-Freund 1981; p.25). This hugely important advance for German collective bargaining was followed shortly after by the first Works Councils Act (*Betriebsrätsgesetz*) of 1920. The trade union movement was now firmly placed (with alongside employers) within a national apparatus of labour market policy-making (Owen-Smith 2012; p.274).

This union position was aided, from 1913 to 1919, by an explosion in trade union membership, more than doubling from three to 6.5 million in this six-year period (*ibid.*). In a nine-year period, from 1913 to 1922, the number of workers covered by collective agreements jumped from around two million to 14 million (Kahn-Freund 1981; p.27). This period also saw productivity rises that empowered unions to demand wage gains. A pattern that is repeated in the post-WWII era later. Before economic turmoil hit in 1929, the German Imperial labour courts, ‘*Reichsarbeitsgericht*’, were still not willing to cede any ground to this new emerging labour relations status quo, and interpreted the new laws on co-determination (*Betriebsgesetze*) so restrictively so as to render their legal rights qualities (for workers) useless (McGaughey 2015). In 1929, the year of the Wall Street Crash, the approach of the *Reichsarbeitsgericht* became even more hostile and demanded that any laws be interpreted as to put ‘business first’ (*ibid.*). This judicial factor was however to change after WWII, a shift that was to be important in the post-WWII settlement.

The back half of the Weimar era saw both the Great Crash and the rise of the Nazi party. The economic problems that emerged from the Great Crash brought further industrial unrest as the trade union movement could not control unruly elements as Germany turned into 1930s. Here, the impressive rise of the trade union movement, witnessed before and after 1920, was

however blemished by serious and stubborn ideological and organisational division (Owen-Smith 2012; p.273). Unemployment led to the system of social insurance built by Bismarck to collapse, and wage bargaining and workplace democracy became less relevant as unemployment rose. Hitler's rise to power saw the trade union movement banned, despite his successful appeals to the angry sentiments among millions of Germany's workers.

To follow into the following post-1945 segment, some discussion is pursued concerning the implications of these important contributions from Kahn-Freund and McGaughey. The relationship between socio-economic, political and legal factors is important. The role of law is often treated as an afterthought or even too distant in regards the development of collective bargaining and co-determination in Germany. The stance of the governmental state was hostile to trade unions and the institutions unions wanted created, although through a mix of pragmatism and fear of further social unrest the state eventually relented to the wishes of unions and employers. Once the political character of Weimar state changed after the fall of the Kaiser, this pragmatism toward industrial and workplace democracy began to look more like full throated support. The judicial arm of state however retained its conservative employer-interest doctrinal approach.

Labour lawyer McGaughey is relied upon for much of the above addressing 19th Century Germany. His historical account comes with a critical purpose: to critique the assertions of 'law and economics' scholars who claim that these institutions of co-determination, because they engender economic inefficiency, would not exist without them being legally imposed upon employers by the state. This is explored with an eye cast to some of those debates mapped in chapter 1.2. McGaughey's argument can be viewed with competing VoC and CWC type arguments found in *power resources* (PRA) and *state-society relationships* and in particular a debate concerning

employer preferences for the creation of co-determination and collective bargaining institutions.

PRA scholars would contend that the formation of employer preferences was not based on employers' first order preferences, but due to rising worker militancy that needed pragmatic response. VoC scholars however would claim that the creation of such institutions would be engender skilled workforce and increased production. It is clear from McGaughey's account that employers did not bow to union demands *en masse*, but those that did only did so in large part to stave off further disruption brought by strike action. This points to a PRA account to the form of institutional formation at issue here (co-determination and collective bargaining). It should be noted, as stated earlier, that VoC accounts have not covered this period in German history and the nature of employer interests that sits at the centre of the approach (versus those of trade unions or the state) would be very different now. As chapter 1.2 makes clear, these co-determination and collective bargaining institutions feature heavily in VoC work and an accurate appraisal of how they were formed is important. Employer preferences may have been important in persuading the state to accept these institutional arrangements, but these employer preferences were responsible for these in the first instance.

This is an important theoretical discussion given a socio-legal approach to political economy developed in this thesis. It is important however that the discussion of 'actors' and their interests also includes that of courts. During the period examined in this section, German courts were not willing to accept the new labour market arrangements, even though the *governmental* state had done. An important shift in German judicial approach came later after WWII and features in the following section below.

2.1.2.ii Post-1945 to 1970s: the rise of Tarifautonomie

The settlements forged at the end of WWI, and leading up to 1914, possessed remarkable yet not always acknowledged durability given that they were partially destroyed during the Great Crash and WWII. These reemerged after WWII and were given powerful legal reinforcement through legislation and the approach of the reformed German judiciary.

Within the considerable CPE coverage of Germany's capitalist development, and of its celebrated post-WWII model of labour relations, this legal scaffolding has received little coverage. This post-1945 segment will look at some CPE work to demonstrate this point. Much of CPE coverage of *Tarifautonomie* and change to German labour relations (Streeck 2009; p.93, Mares 2003, Thelen 2001; p.71, Hassel 2006) has also been confined to a post-World War Two time-line. The previous sub-section underlined the importance of pre-1939 and pre-WWI legacies to post-WWII *Tarifautonomie*. This advanced system of sectoral collective bargaining that emerged after WWII was built upon institutionalised roles of employer membership organisations and those of trade unions.

The functional purpose of these membership organisations was to create intra-class enforcement mechanisms so that members who honoured wage agreements were not undercut by any opportunistic fellow members who did not. For this to work employer membership organisations, and the Confederation of German Employers (BDA) formed in 1950, needed to be strong and cohesive. The strength of these employer organisations that emerged after WWII was identified in CPE as a key determinant of *Tarifautonomie's* success as well as its later demise as the cohesion of these organisations started to wither in the 1990s and 2000s (Mares 2003).

Despite the growth of German trade unions and the ADGB in the 1920s, they were not able to match the organisational strength of employers'

organisations (Owen-Smith 2012; p.274), a reality was to persist well into the 20th Century. After WWII however, trade union interests were aided by legislation underpinning *Tarifautonomie* as well as the creation of the *Deutscher Gewerkschaftsbund* (DGB), a national umbrella union-interest organisation with similarities to the Trades Union Congress (TUC) in Britain, the country whose occupation over the north western sector of the country was influential on the creation of the DGB (*ibid.*, Mares 2003; p.129). This unifying union body (*Einheitsgewerkschaft*) consisted of 16 industrial unions inclusive of IG Metall, the biggest union in Germany, and both the Christian democratic and socialist unions whose division created the problematic disunity of the 1920s (Owen-Smith 2012; p.274). The DGB also had to reconcile divisions between manual workers and white collar workers (*Beamte*).

These two actors, with some justification, have received a lot of coverage within CPE and associated literatures as well as specific industrial sectors. This sector based collective bargaining did not emerge evenly across Germany's post-War industries, but instead developed to encompass the country's economy from one core, key sector – the metal industry. This core sector sat at the centre of a 'pattern-bargaining' wage bargaining system (Traxler et al. 2008) where social partners (unions, employers) in adjacent sectors and sub-sectors would orientate their wage-setting to this core collective agreement, even if they are not contractually or legally obliged to in the first instance.

Although the new post-1945 constitution did not affirm co-determination or collective bargaining rights, unlike under the Weimar constitution, the legislation produced was very important. This legislation regulating collective agreements (*Tarifvertragsgesetze*, 'TVG') and the 1949

'Works Constitution Act' (*Betriebsverfassungsgesetz*, 'BetrVG')²⁰ mandating the formation of workplace co-determination institutions, did however provide powerful *public law* (if not *constitutional law*) means of forging the *Tarifautonomie* model and to advance those arrangements that existed before 1933. The role of trade unions was also given a number of institutional supports and responsibilities with new strike rules stating that industrial action will not be illegal unless supported by the recognised trade union. Collective agreements were given legal force and direct effect (Kirchner et al. 2010; p.192) whilst the Works Constitution Act provided rules for works councils (*Betriebsrat*) to be formed at the workplace level and supervisory boards (*Aufsichtsräte*) at the management level in different sorts of company (limited, publicly listed etc.). This two-level structure was designed to provide co-determination rights from below and from above.

How this new statutory regime was to operate depended on two sets of relationships, those concerning unions and business and the other concerning the state and these actors. The latter has seen plenty of attention given to the governmental state, in its federal form, but not to courts. The refusal of the Imperial courts to defer to the labour relations regime in the 1920s was an important hindrance to its development. The shift in the courts' stance after WWII was therefore important for the new regime to become established after 1945. The nature of this shift needs to be understood. Although affirming the principle of *Tarifautonomie* in law, courts did intervene in the crucial area of industrial action (Jacobi *et al.* 1998, p.191-193).

The threat of strikes was still present as Germany moved into the 1950s, often demanding a response from courts. As economic growth started to accelerate through the 1950s, bringing with it wage and job growth, the

²⁰ Substantially reformed through amendments in 1972 and 2001 (Fetzer 2011)

threat of industrial unrest was minimal. Once the 1968 recession hit, the spectre of strikes remerged and the Federal Labour Court (*Bundesarbeitsgericht*) had to again intervene and demanded that any strike must be preceded by a conciliation process (Owen-Smith 2012; p.295). Both sides of industry, the BDA and DGB, would broker a conciliation agreement. From this, no-strike clauses and 'peace clauses' were also to become key features in German collective bargaining and received the support of the courts (Kirchner and Mittelhamm 2010, p.201, 207; Jacobi *et al.* 1998, p.199). German courts therefore provided reinforcement for *Tarifautonomie* with some key decisions regarding strikes, pushing unions toward the conciliatory approach to labour relations with which German capitalism became closely associated (also, Nordic labour relations). Most strike clauses included as agreed provisions in collective agreements, partly as a result of judicial nudging (*ibid.*).

As the economic turbulence of the late 1960s grew worse in the 1970s, bringing heightened inflationary pressures, the German Bundesbank established a powerful role in macro-level (nationwide) wage-setting that was designed to preclude any union attempts to make excessive or inflationary wage demands (Jacobi *et al.* 1998, p.193). This is an important development in the story of post-WWII German labour relations and was an early major sign of the rise of neo-liberal ideas on economic policy that was to rub hard against the grain of German *Tarifautonomie*. This should not undermine the realities of a 1970s decade that was marred, by German standards, by considerable industrial unrest, as was evident elsewhere in Europe.

The emergence of neo-liberal politics was delivered in a number of ways, including in macroeconomic policy theory associated with monetarism. This role of the central bank is analytically pertinent in this

regard, as CPE work has provided plenty of useful research of independent central banks, and the macroeconomic management apparatus that came with it. The Bundesbank's central place in the European neo-liberal and monetarist order saw it described as 'the fourth branch of government' in Germany for good reason (Kennedy 1991; p.3 cited in Dyson and Marcussen 2009; p.131). This rise of the Bundesbank, of neo-liberal policy ideas (such as monetarism and flexible labour markets) and the decline of collective bargaining are all related. The role of legal factors, again, is only addressed in the context of statutory reforms that were deemed necessary to push liberalisation further.

A role for courts and the broader legal-constitutional system however has been offered far less treatment, despite the important roles they have played. A simple comparison is made between central banks and courts as these both represent two important actors in German, and European, political economy since 1970.

2.1.2.iii Post-1980: the rise of neo-liberal industrial politics & the slow demise of Tarifautonomie

The re-emergence of liberal economic ideas imposed itself not only upon emerging macroeconomic policy agendas, driven principally by the arch-monetarist Bundesbank, but also in shifts in labour market policy advanced by German governments after 1980.

The 1980s saw the rise of Christian Democrat Helmut Kohl and the passing of the EU's Single European Act in 1985, the EC Treaty that demanded economic liberalisation in order to give new life to the EU's single market programme. The economic reorganisation pursued throughout continental Europe was not as dramatic as that seen in Britain. A process of reform however gathered pace after 1990. In retrospect, this rise 'neo-liberal

revolution' in Europe can clearly be linked to the steady but clear decline in the coverage of collective bargaining from 1980 to 2015 (from 79% to 54%) as well as trade union membership rates (35% down to 17%) (ICTWSS 2016). As illustrated in the German-Acquired Rights chapter (2.5), the privatisation of (formerly public sector) industries altered both the works council and collective bargaining structures that existed before these reforms. This has been shaped by agendas coming from both Berlin and Brussels and pitted the social protection ethos of collective bargaining, co-determination rights and the Acquired Rights Directive (ARD) against this neo-liberal drive for 'reform'. This reform agenda had significant change-effect on the (non-privatised) private sector too. Such changes, in both the private and public sectors, created changes in the company law designation of many companies. This is very important in Germany where company law has very formal and explicit connection with the type of co-determination and collective bargaining obligations that operates in different types of company.

Restructuring in core German industries was increasingly encouraged by policy-makers in Germany and at the European level. Plus, the development of new private service industries where collective bargaining, works councils and trade unions were not present nor strong, fostered rapid changes to Germany's economic landscape. This meant these institutions were being eroded in two interconnected ways: one, the express alteration of collective bargaining through policy and legal change, and the second seeing the economic base for existing bargaining being subject to change. The focus of these changes included both the weakening of individual collective agreements (in employers' favour), and their shift downward from the sectoral level (where wage bargaining traditionally took place under *Tarifautonomie*) to the company level (Hyman and Gumbrell-McCormick 2013; Bispinck and Schulten 2011, Bispinck *et al.* 2010, Thelen 2001).

There is a mix however of *partisan* as well as *industrial* politics that contributed to these developments. Firstly, in terms of industrial politics, unions had agreed, in exchange for new rules on working time, to agreeing and organising the specific of these changes at the *company* level instead of the traditional sector/industrial level. As Hyman and Gumbrell-McCormick described (2013, p.109), this “set in train a sustained process of devolution”. As Germany moved into the 1990s, neo-liberal reform agendas were becoming more popular, even with German trade unions’ traditional partisan allies, the SPD. In 2003, the Hartz IV reforms of the social democratic Schröder government, although ostensibly motivated by job creation goals, conformed to neo-liberal reform prescriptions to liberalise collective bargaining (Menz 2005b). This also crucially brought reforms of German collective bargaining through the use of ‘opening clauses’ (*‘Öffnungsklauseln’*) to enable collective agreements to be renegotiated if given economic conditions demand (Visser 2005, Eichhorst and Marx 2011, Eichhorst 2014, Addison et al. 2007). More importantly, the introduction of these ‘opening clauses’ cannot be laid at the feet of the centre-left SPD. These were not only unveiled for the first time in the early 1990s, but unions in fact agreed to their introduction under the threat of more serious *legal* reforms to collective bargaining. The 2004 Pforzheim Accord represented the primary example after 2000 (Hyman and Gumbrell-McCormick 2013; Bispinck and Schulten 2011). These shifts, and threatened changes, ran contrary to the abstention role of the state under *Tarifautonomie*, with the role of law, both actual and threatened, playing a key role in forging new incentives and power resources for employers and labour.

For many, these reforms were seen as successful in reducing German unemployment by creating space for low wage industries to prosper, particularly in the services industry rather than the manufacturing industry

that drove German economic growth after WWII. In combination with receding collective bargaining coverage, where companies exited employer associations central to sectoral collective bargaining or outsourced their operations, this period did see some very serious low pay problem develop in Germany (Bosch and Weinkopf 2008, Salverda and Mayhew 2009). This prompted yet a further new intervention by the state into wage-setting: the creation for the first time of a German minimum wage. The fact that Germany had to introduce this has powerful symbolic meaning as it confirms that the decline of collective bargaining is unlikely to be reversed quickly as trade unions likely accept. Even IG Metall, the metal sector union that for a long time were opposed to the idea of a federal minimum wage, reluctantly accepted the creation of federal minimum wage in 2015.

The roles of greater legal influence and neo-liberalism in labour relations in Germany therefore have not merely acted to slowly erode the German *Tarifautonomie* model, but with it has made the 'model' less 'German' as defined by the distinct German institutions that CPE had long fixated. The two Germany-based case study chapters in this second section demonstrate how German labour relations has been defined by competing tendencies of neo-liberal practice and legal change as well as the vestiges of a declining 'old regime' of *Tarifautonomie*.

2.1.3. Britain

The experience of British labour relations shares some similar historical features and themes with that of Germany. It is the differences however that stand out. The role of industrial conflict has a far more prominent and permanent role in Britain than it does in Germany, even if the Germans experienced plenty of industrial unrest and strife themselves as part of those social conditions that forged the settlements creating collective bargaining,

co-determination, welfare state institutions in the 19th Century. The role of liberal principles are also more prominent in the political and legal traditions in Britain. Even when Germany appeared to engage with liberal, market-orientated ideals in the post-1970s period, these have still manifested themselves differently in regards to changes in labour law and collective bargaining outcomes.

Attempts at creating conciliatory collective institutions were notable in Britain in between the Wars, as they were in the period just after it (1945-70). Again, however, these were the exception to a broadly liberal rule in Britain that has existed since the industrial revolution and did not take root like they did in Germany.

This section is organised in a similar manner to the previous German sub-section above inclusive of three chronologically ordered sections. It starts in the 19th Century where serious social conflict was quickly met with a conciliatory state response as Britain entered the 20th Century.

2.1.3.i The late 19th Century: from industrial strife to reconciliation

Britain's rapid industrialisation in the mid-19th Century was of enormous formative importance for both the British legal system at large and the shape and form of labour relations that was to emerge. The legacies of this 19th Century period and the bearing it had on labour relations in Britain cannot be underestimated. In this sense, Britain stands apart from other European countries whose experience with various revolutions provided opportunities for cathartic and sweeping reform. In Britain, *evolution*, rather than *revolution*, is the appropriate thematic depiction of its legal and politico-economic development. With this, Britain's socio-economic elites, minus a few key concessions and moments of serious conflict, have not been subject to a violent revolutionary overthrow. Social conflict and violent unrest, despite

not producing the sort of revolution seen in France for example, have still been a notable presence in British industrial and social history. More specifically, key moments of strife in the 1860s, 70s and 80s had a strong formative influence upon the forms of industrial capitalism and labour relations that Britain took into the 20th Century.

These influences had important bearing on the development of a distinctive British model of economic constitution, particularly upon its contract law system. The doctrine of *Laissez faire* capitalism relied particularly upon the 'master-servant model' that framed labour relations and a allocation of rights in these relations (Deakin and Morris 2009,p.19-21; Hyman and Gumbrell-McCormick 2013, p.25). Although no longer in place, the 'master-servant model' included the 'freedom of contract' principle that still laces modern British contract law and the concept of the employment 'contract' to this day. A central irony exists at the centre of this apparent 'freedom to contract': the freedom is distinctly unequal in the way it affords rights of action upon employers on the one hand and employees on the other. This principle is blind to the de facto reality of labour relations that gives employers an inherently stronger position in the employment relationship as owners of the means of production (Hyman and Gumbrell-McCormick 2013, p.25). The principle is based on the premise that the freedom is an *individual* one, creating a doctrinal bias against *collective* means of organising labour matters as these could act to restrict the *individual* freedom to contract. The embedding of this principle into Britain's common law, meaning it has been reinforced as a matter of doctrine repeatedly by Britain's courts, has meant that statutory remedy has been needed to compensate for its harsh effects *vis-à-vis* the interests of workers. This *common law-statute law interaction* itself became a central dynamic feature of the organisation of British labour law well into the 20th Century. It is also a centrally important historical feature of

a complex and contested relationship between legal and collective means of regulation and governance.

These doctrines, developed by British courts during this crucial period of the 19th Century have, again, been influential on a labour law system that has persisted, in different forms, up to the current day. The hostility of courts toward state (labour law) or non-state collective means (collective bargaining or collective action) of labour relations of regulation and governance has manifested itself, over time, in the two main ways: the *criminalisation* of unions and union activity, and the use of non-criminal civil sanctions through *economic torts*, making unions financially liable for any economic loss suffered by the employer in the event of a strike (Deakin and Morris 2009, p. 7-11; Dickens and Hall 2010, p.298-299). Even in instances in the late 19th Century where *criminal* sanctions were removed, the civic law sanctions (of tort) remained, as did the 'freedom of contract' and its adjunct the 'right to manage' principle that furnished employers with greater rights *vis-à-vis* labour.

The details of these abstract descriptions are provided here. The Master and Servants Acts of 1823 and 1867 still enshrined principles criminalisation, although this was more limited in the latter 1867 statute. 1867 was in fact an important year in the history of British labour law, one that saw the beginning of the retreat of a 'master-servant' model and legal rights that gave employers considerable control over their workforce (Deakin and Morris 2009; p.7-8).

Courts, a key part in this system, still displayed considerable creativity and intent in challenging trade union activity, and used *criminal* law sanction rather than just *civil* law sanction to do so. In the 1867 *Hornby vs. Close* case, a court decided that trade unions were inherently unlawful organisations whose ability to set wages above market rates constituted an unreasonable

restriction on trade (Deakin and Morris 2009; p.7-9). This decision, in essence, cast union activity as not only liable in terms of *economic tort* (civil liability), but also *criminal*. This saw competing tensions emerge where the governmental state was beginning to soften its approach to trade unionism, whilst the judicial state that was not. That same year, the state buckled under pressure from a sharp rise in industrial unrest and created the 1867 Royal Commission (*ibid.*). The Commission, led by Sir William Erle, produced a number of remedies that effectively annulled the *Hornby vs. Close* decision and paved the way for the decriminalisation of trade union activity. This was an important step in a process that produced important further reforms in 1871 and 1906 (Deakin and Morris 2009; p.7-9.).

There are two observations of the 1867 Royal Commission's conclusions that have remained key features of British labour law. The first is the use of statute law to provide statutory immunities to unions and workers from the harsh effects of court-made law (as noted earlier). The second is the use of statutory arrangements *to engineer greater distance* between courts and an emergent form of *consensual* labour relations where collective regulation of labour relations was to be encouraged (Kahn-Freund 1969; p.84). The Campbell Bannerman government of 1906 continued and built upon much of what the 1867 Commission proposed and its approach formed part of the basis for a model of voluntaristic "collective laissez faire" that came to define British labour relations in the first half of the 20th Century (Deakin and Morris 2009, p.5; Hyman and Gumbrell-McCormick 2013, p.25).

2.1.3.ii The turn of the 20th Century: a concerted turn toward industrial peace

The approach adopted by the Bannerman government to granting immunities and *negative* rights (as supposed to *positive* rights giving *explicit*

rights for collective action) was important, as it served to push the threat of judicial intervention away from collective regulation of labour relations (*ibid.* Deakin and Morris 2009; p.9).

The model 'collective laissez faire' was coined as such by Otto Kahn-Freund (Deakin and Morris 2012; p. 12). The 1906 'settlement' that embodied collective laissez faire was defined by the state taking arms-length approach to labour relations yet still quietly promoting bargaining of the governmental state. This engineered this desired distance between collective labour relations and the courts alongside something much more explicit on the right to strike. This did not go so far as to push employers into bargaining against their will, but rights to industrial action for workers and unions did end the state-sanctioned sanction against unions for forcing employers to bargain through striking either through civil or criminal law means.

Later, government reforms sought to more actively promote collective bargaining, although this did not include proposals to give legal underpinning and enforcement to collectively bargained agreements (as is typical in most of Europe). This last point is important as it formed part of that broader strategy to keep law and the courts out of labour relations. This did not however go as far as to give collective agreements that ability to be legally enforced as other forms of contracts governing economic transactions would. Legal underpinning is an important part of making collective agreements enforceable in the absence of strong unions and has existed in most of Europe throughout the 20th Century. Without it, the onus on unions and employer organisations to give collective agreements a binding quality upon all intended parties is increased. The Whitley Committee Reports, that predicated a 1918 Act of Parliament, came very close to recommending the legal underpinning of wage agreements, but instead conferred the right of

trade boards to set minimum rates of pay and terms and conditions within their trades (industries) (Deakin and Morris 2009; p.16).

As we find out further on in this British section, the Thatcher government sought to destroy most of these institutions of collective governance, and the principles that formed them, established on both sides of WWII. Some of these arrangements, and key features of them, however persisted (however reformed, incomplete or altered), providing important legal and institutional legacies from these different periods examined here. One of those remaining features comes in the form of National Joint Councils (NJC), the other was the tribunal system.

The Trade Boards Act of 1918 created 'Joint Industrial Councils' (JICs). These JICs, now called national joint councils (NJC) where they still exist, are intermediary bodies that govern collective bargaining processes in individual industries. The lofty ambitions the Trade Boards Act looked to create a form of labour relations that would promote industrial peace. This was met however with little follow-through in later years and decades. A lack of enforcement and incentives for multi-employer bargaining, that jarred against employers' wishes, meant this fledgling regime did not lay down deep enough roots. This sits in contrast to countries like Germany with corporatist traditions that developed very strong industry-set multi-employer organisations that scaffolded its model of *Tarifautonomie*. Such employer organisations successfully reinforced *coordinated* industrial wage-setting systems in Germany alongside those trade union means of providing this same function (to discipline members to adhere to collective bargaining).

Britain had to wait until after the next World War before new impetus from the state could be provided to such a system. Wage councils, created through legislation in 1945, extended the presence of trade boards into new sectors and a revival of those JICs that had become dormant in the decades

prior to WWII (Deakin and Morris 2009; p.17). The rise of active JICs rose from 56 in 1946 to 200 in 1960 (*ibid.*) As both of the UK case chapters show, the place of NJCs differs between the public sector and private sector, but they are still very much operational in many sectors but are absent in others. In the public sector, the 'employers' are in essence an emanation of the state. This complicates the relationship between the state and the collective bargaining activities in these areas. In the private sector, as we will see in the chapter concerning the UK and posted workers, the role of the state is minimal and operated at some distance from disputes and their causes. The role of ACAS, the state body that in different guises has intervened in industrial disputes since 1896, is perhaps the most relevant arm of the state when it comes to industrial action outside of the Tribunal and judicial system.

The 1960 to 1970 period that followed saw renewed state activism in wage-setting as a result of increased numbers of strikes in the 1960s and deepening macroeconomic problems concerning inflation, productivity and unemployment in the 1970s. The 1960s was in fact a hugely important decade in creating the conditions for that which occurred in the three decades, and beyond, after. The mid-to-late 1960s in particular is perhaps as important a five-year period in understanding British labour relations history as that in the late 1860s. Strikes were on the rise and after the 1964 *Rookes v. Barnard* House of Lords case, political pressure for labour relations reform reached a critical point (Turner 1969; Dickens and Hall 2010, p.299). The *Rookes v. Barnard* case rudely inserted judicial opinion into industrial concerns in a way that the 1906 and 1945 settlements specifically did not want. In 1965 the *Royal Commission on Trade Unions and Employers Associations* (aka' the Donovan Report') was published. The Donovan Report sat astride two proposals for reform that defined the politics of labour relations of the 1960s

and 70s. The two other proposals came in 1968 from the Labour government of the day, a white paper called *In Place of Strife* (1968), and the Conservative proposals called *A Fair Deal at Work* (1968). It is with a comparison of these three proposals that the tensions and incongruences of British labour relations can be understood. There are two sets of tensions: the first concerns the relationship between law and legal sanction in labour relations matters and the second concerns the 'settlements' of 1906 and 1945 versus the economic and labour relations reality of the time (1960s).

The Donovan report, led by academic Hugh Clegg²¹, did not seek a return to collective *laissez faire* endorsed in the 1906 and 1945 reforms, but did not want the sweeping introduction of legal interventions either, but rather reforms of the a collective bargaining-led system (Turner 1969). It sought modest but appropriate forms of state intervention, but essentially thought that the problems in wage-setting between 'factory level' and the macro/national level needed to be corrected *within* the framework of the current system (Turner 1969, Tyler 2006). It also sought to create 'labour tribunals', to reduce strikes, and were in fact later adopted in the Conservatives 1971 Industrial Relations Act. These Tribunals remain in place (in different form) today as Employment Tribunals (ETs) (and Appeals Tribunals (EATs)) (Deakin and Morris, 2009, p. 25), and feature in the Britain-Acquired Rights chapter (chapter 2.6).

An important part of Donovan Report's context was Hugh Clegg's rejection of American style legal sanction of trade union strike activity. This contrasted with the Conservative's own proposals, in a *A Fair Deal at Work*, that sought to introduce precisely this kind of punitive legal intervention²².

²¹ Hugh Clegg was a pioneering labour law and labour relations scholar alongside Otto Kahn-Fruend who led the research for the Donovan Report.

²² And was a key pillar of the Conservative's 1971 Industrial Relations Act after they returned to power in 1970 (Dickens and Hall 2010, p.299)

The Labour government's response, led by Minister of State Barbara Castle, came in the report called *In Place of Strife*. Castle had to address a difficult balancing act in order to deal with the political pressures of the time (strikes, the Conservative proposals, the Labour party's trade union allies) as well as the recommendations of the Donovan Report that they could not easily ignore (Turner 1969, Tyler 2006). The tensions Castle faced again speak directly to the tensions between legal and collective means of regulation and governance and those incongruences and pressures that could not make this relationship work. In plotting a middle way, *In Place of Strife* afforded considerable powers to the secretary of state to involve the government in industrial disputes, *instead* of formal legal rules demanding particular rights and remedies (Turner 1969). This included, in contrast to the Donovan Report, a proposal to make collective agreements legally binding. It also sought to create 'peace clauses' that would legally prevent strike action before all mediation options had been exhausted (*ibid.*, Deakin and Morris 2009, p.25).

The proposals failed, partly as a result of Britain's trade unions rejecting it in favour of the voluntarist collective laissez faire status quo (Turner 1969, Tyler 2006). The perceived failure of these arrangements of the 60s and 70s were to be used as a pretext for the Conservative governments after 1970 (although short-lived) and post-1979, the latter of which to completely recast Britain's labour relations and the role of legal and collective means of regulation and governance. However, key aspects did remain beyond the destructive period of neo-liberal Thatcherism.

2.1.3.iii 1979-to the present: renewed English liberalism as Neo-liberalism

The various attempts from the late 19th Century to create consensus-based labour relations did not embed themselves in the visions and practices of labour relations in the way these equivalent forms did in Germany and other European countries. For this reason, collective laissez faire lacked the permanence necessary to weather political and economic upheavals in Britain.

Margaret Thatcher's 1979-1990 government, and those governments which succeeded it, took an ambitious and multi-pronged approach to radically reforming labour relations, and specifically liberalising it. This comprised of dramatic changes to the legal rules as well as the economic and industrial structures within which labour relations took place. Trade unions were targeted directly by restrictive new legal rules on balloting and recognition, and collective bargaining was to be critically undermined by both legal restrictions and the destruction of the industries where it, and trade unions, were strongest. The 'right to manage' principle of the mid-19th Century was to see a forceful re-emergence, formally connecting the 'Master-Servants act' era with labour law with the modern present. All these changes formed a pincer movement against trade unions and included the reintroduction of Britain's courts into labour matters, still directed by a doctrinal bias against trade union action. Some of the changes made post-1906 however were still in place (in some form) such as the role of Joint Industrial Councils (JICs, now NJCs), Employment Tribunals and individual legal employment protection rights (Deakin and Morris 2009, p.22), although wage councils were abolished²³ (Dickens *et al.* 1993).

²³ Over time from 1980 to 1993.

The effect of these reforms over time was destructive and widespread. Collective bargaining coverage in Britain was reduced by more than half between 1980 and 2013 (69% to 25%) while union density (membership) followed a similar trend in this period (52% to 25% of the UK work force) (source: ICTWSS, Visser 2016). This did however forcefully confirm the end of any governmental support for collective *laissez faire*, even if some parts of the old regime remained in place.

Britain's courts were able to re-establish a prominent role in labour relations and were still armed with a doctrinal commitment to a firm's 'right to manage'. The nature of this judicial actor however had however changed, not least of as now they had to respond to their place within a broader, and developing, European legal order and a system of tribunals and individual legal rights that did not exist before either World War. Statutory immunities for unions in the area of economic torts were repealed and new administrative burdens on union recognition and industrial action imposed (Edwards *et al.* 1997, p.12-15; Dickens and Hall 2010, p.300-301; Deakin and Morris 2009, p.29). The 1982 Employment Act removed the protection for unions' from economic tort litigation, and a raft of further collective labour law reforms targeted trade unions internal organisation by imposing ballots and new rules on union finances (Deakin and Morris 2009; p.29). The first of these was directed at increasing the costs of industrial action for unions and therefore increasing firms' room to manoeuvre to discourage or break strikes (Deakin and Morris 2009; p.35). De-recognition was also part of this attempt to empower the position of business in the 1980s, but it was not until the following decade where sweeping withdrawals of union collective bargaining rights started to take place.

With unions seriously weakened, they had no choice but to bargain with employers from a position of serious weakness, if at all, knowing that

both common law *and* statute law was far from helpful to them. This, in a sense, encouraged a new form of voluntarism where incentives meant actors wanted law kept out of labour matters.

There were some important differences between this Conservative era of labour market policy and the policies pursued by New Labour after 1997, notably a legal and nationally encompassing minimum wage and the creation of the Central Arbitration Committee (CAC) that provided unions a new route to statutory recognition. These features notwithstanding however, the labour market model inherited from the Thatcher era was largely retained (McKay and Moore 2015, p.107; Dickens and Hall 2010, p. 309; Heyes and Nolan 2010, p.111).

Again, and despite the destruction of the unsettled collective *laissez faire* regime that existed prior to 1979, some of its institutional aspects remained, creating a complex set of arrangements that was neither a pure liberal model of the labour market desired by Britain's conservatives nor one devoid of collective institutions and state-sanctioned means of providing these.

Two features are raised here. The first is the role of European law and the EU's Court of Justice; a factor addressed throughout this second section of this thesis. The second includes the employment tribunal system used to settle employment law disputes. Industrial Tribunals, renamed Employment Tribunals (ETs)²⁴ in 1998, were established initially in 1964 to settle employment disputes and to minimise the caseload of higher courts (Deakin and Morris 2009, p.67). This latter point is one key reason why these were retained in the 1980s when other aspects of the 'old' pre-1979 labour relations

²⁴ Now ETs are formed of a panel of three including an established official from employer interests and one from trade unions and chaired by a legal professional (judge, senior employment lawyer like a QC)

regime were being dismantled. ETs comprise of a panel of three officials with one drawn from employer interests, one from trade unions and a legal professional (judge or senior employment lawyer like a QC) acts as chair. These tribunals are not technically 'courts' in the strictest sense, despite forming part of the British legal system and do not form binding precedent for later decisions (meaning the decision of an ET only applies to the parties and facts of the case before them) (Deakin and Morris 2009, p.69). ET and Appeals Tribunals (EAT) have become an important feature in British labour relations and, as intended by the Donovan Commission that first proposed them, are meant to be inexpensive and inaccessible form of dispute resolution (*ibid.*). ETs and EATs play a key role the British Acquired Rights chapter (2.6).

The history of British labour relations sees an often very prominent role for legal intervention coming from both the governmental state as well as the judicial state. Importantly, both critically important aspects of law and non-legal institutional factors were important in the shifts from a 19th Century Master-Servant model, to a collective laissez faire model, to the post-1979 neo-liberal regime and saw aspects of each of these eras in some way retained, whether by choice or simply as a result of their path dependent qualities.

2.1.4. Concluding comparisons

Even if the exceptionalism of German and British ideal type regimes was not already well highlighted in contemporary CPE, conceptualising the role of legal institutions and the relationships they share with non-legal phenomena still tells us important things about where these regimes have come from and how they respond to various and multi-faceted pressures to change (e.g. neo-liberalism, European integration, economic). This latter is addressed more in

the next chapter and throughout this thesis, although it is important that the analysis of these two 'national models' be understood in complex and shifting spatial context of European market and legal *de-nationalising* influences.

Three themes stand out however in comparing the histories of these two countries, themes that offer an alternative to understanding these two countries' histories. The role of courts, the role of the state and the place of legal rules, especially collective labour law as an expression of the governmental state's approach to organising labour relations.

Despite being regarded as different archetypes of labour relations and 'models of capitalism', these German and British labour relations histories share some similarities in regards to the themes above. First a broader observation is made about the different regimes that existed at different points across the time lines under observation. The different types of relationship between these three factors produced different sorts of labour relation regime. Importantly however there were no neat demarcations between these eras and the legacies of each had an imprint on those that followed.

Germany saw two revolutionary type events after both World Wars, but the *Tarifautonomie* system that made the German model of capitalism famous (with its two core sectoral wage bargaining and co-determination parts) had its origins established slowly in the 19th and early 20th Centuries. Similarly the British case, German courts held long-standing doctrinal bias against trade unions. This was to change however after WWII however as German courts found their mandate heavily framed by statute law rules reinforcing *Tarifautonomie*. From this moment in 1945, the role of courts is rarely discussed in CPE coverage of German capitalism, but Otto Kahn Freund's observation of the German courts' rejection of fledgling co-

determination rights in the 1920s raised an important point: the tacit, arms-length form of acceptance of *Tarifautonomie* by courts (and the governmental state) is an important but often ignored feature of *Tarifautonomie's* successful establishment.

In Britain, courts were more aggressively opposed as a matter of doctrine to labour rights and collective means of regulation and governance. Unlike in Germany however, this was not to substantively change. The purposeful removal of the judiciary from labour matters after 1900 served to firmly settle the kind of relationship law and collective bargaining were to share, something that would not be possible (it was felt) if courts still had a potent tole.

A broad comparison is made here of the regime of British collective laissez faire and *Tarifautonomie*. These regimes share similarities in terms of objectives: give social partners a key shared role in organising labour relations in order to achieve industrial and social peace. After WWII both countries attempted to develop these further. Britain, as it failed to do in the 1920s, did not provide firm enough foundations. The Conservative governments that dominated the 1950s did not build on these and the economic problems of the 1960s and 70s provided the context for the regime's eventual destruction (however partial). In Germany, the economic problems of the 1960s were not present or at least not so pronounced, and the success of the 1950s appeared to merely affirm *Tarifautonomie's* place within a narrative of the 'German miracle'.

The 1970s provided the basis of a new neo-liberal compact that effected these two countries in very different ways. The European part of this neo-liberal shift would also present itself differently across these two countries as the four case study chapters of this second section illustrate.

Both the Germany-focused case studies see the core relationships between law and collective institutions that defined *Tarifautonomie* fundamentally change *and* engage with a European regulatory and market system as an on-going process. This on-going process is unlikely to be reversed with the new governance regime for EMU providing further intervention of European rules and institutions like the ECB.

This chapter not only represented an opportunity to offer some descriptive mapping for these two selected case study countries, but also offered an analytical attempt to understand these countries' labour relations in the manner outlined in the first chapter. Both countries exhibit different sorts of relationships between legal and collective institutions as determined by different political, social and economic conditions. The specificities of this claim become clearer across the four case study chapters that follow in this second section. Before this however, a chapter similar to this one maps out the other two case study selections from EU law.

Chapter 2.2.

Two European level case studies: European posted workers law and acquired rights law

2.2.1. Introduction

Following on from the previous chapter covering the national level case studies, this chapter does two things. The first comes with the intention to provide a reasoned basis for the selection of these two areas of EU law. The second intention is to provide preliminary context and detail to these two cases to avoid repetition when relying on the same material in the four empirical chapters that follow this chapter.

There are several intertwined reasons for selecting these cases and for selecting areas of European law. Selecting *areas of law* itself may seem inappropriate given the claim concerning law's role in labour relations. To repeat again a key point, it is the *nature* of law's role, rather than its mere existence, that is important (*how* law matters, not *if* law matters). Moreover, these two areas of law addressed in detail in this chapter also share important connections and interactions with other law as well as broader political and economic factors (i.e. non-law). With this, these cases produce a spread of different features including legislative and judicial elements as well as different roles for trade unions, strike action, employers and different kinds of responses to law. Moreover, these different case studies offer different kinds of opportunities for existing CPE to offer some counter-claims made in this thesis: despite these, it is argued, still falling short.

Each section addressing posted workers and acquired rights law begins with some discussion about the main regulatory and normative concerns within these. This is done first by defining these 'two areas of law'

by the directive text that created them. From here, further discussion is provided mapping the role of the Court of Justice (CJEU), a key feature in the four empirical case studies that follow this chapter.

2.2.2. European Acquired Rights Law

European Acquired Rights law is presented courtesy of a European directive – currently Directive 2001/23 (ARD)²⁵ and is also known in English as a ‘transfer of undertakings’. The ARD was originally devised in the 1970s to ensure that the ‘acquired rights’ of workers (terms and conditions) were carried over when their employer was taken over by new employers (a ‘transfer of undertaking’). With this, and save any valid ‘economic or technical reason’ (ETO) for a transfer, the directive intended to protect from being dismissed as a result of a ‘transfer of undertaking’ or to suffer any detriment to their pay and conditions under their new employer. In this way, a ‘transfer’ *cannot be the sole reason* for any dismissals or effects against the existing workforce.

The ARD also demanded that workers be consulted prior to any transfer. In regards to dismissal and consultation rights, the ARD also has very explicit and formal relationships with other European legislation, notably the Information and Consultation Directive (ICED) and the Collective Redundancies Directive (CRD) (98/59/EC 1998).

What the original ARD did not explicitly provide however, as well as not applying to ‘share issue’ based takeovers²⁶, was a firm definition of a ‘transfer’ or an exhaustive list of those *sorts of transfer* that were covered by

²⁵ This 2001 directive codified the previous Directive ([77/187/EEC](#)) which was amended by a third ([98/50/EC](#)).

²⁶ That occurred through the buying out of shares rather than a formal takeover of another company.

the ARD and were not. Is outsourcing covered? Is second generation outsourcing? insourcing²⁷ The use of subsidiaries and down or upstream mergers within the same corporate group? Were public sector reorganisation programmes, that were commonplace in the 1990s in Europe, included? These questions were all left to the interpretation of the Court of Justice and national regulators. These issues of *definition and scope* are central to the ARD and the controversy that surrounded the directive over its 40-year life-span. It is the first of two areas of the ARD pinpointed for the two ARD chapters. The second concerns the *role of collective agreements* and how individual terms of employment drawn from collective agreements are transferred and for how long these must be imposed.

2.2.2.i. Definition and scope of the ARD

There has been a key shift in both of these areas however in both how European institutions, especially the CJEU, and national stakeholders have applied and responded to the ARD. These shifts are of focus in the two British and German ARD chapters. These two areas are given some description here. In the previous paragraph, five questions were posed as to the potential forms of transfer that could or could not constitute a 'transfer of undertaking'. The CJEU answered in the affirmative to each of these in the 1980s, the directive's first decade. Expanding the *scope and definition* of the ARD was part of a social policy-labour law approach to acquired rights of the Court that sought to enhance the social protection characteristics of the directive. The table below identifies some key cases and their implications in this area.

²⁷ This comes in two main forms. Firstly, a previously outsourced undertaking brought back 'in-house' and the internal shifting of operations to a subsidiary within the same corporate group.

Table 2.2.i –key CJEU cases on the scope and definition of a ‘transfer of undertakings

Case and No.	Brief description of facts	Key aspect of decision
<i>Allen and others v Amalgamated Construction Co Ltd</i> case (1999) c-234/98	A British case concerning the contracting ‘out’ of mining works to another company within the same corporate group (subsidiary).	<i>The ARD applies to internal contracting out involving two subsidiaries of the same group even if these legally distinct companies share the same management and work from the same premises.</i>
<i>Vidal</i> (1999) joined cases c-127/96, c-229/96 and c-74/97	A Spanish company originally contracted out cleaning services sought to bring these back in house prompting a complaint of altered working conditions.	<i>Contracting-in is caught by the ARD, but the economic entity test must still be satisfied.</i>
<i>Sanchez-Hidalgo and Horst Ziemann</i> (1998) - joined cases c-173/96 and c-247/96	A British case concerning the contracting out of cleaning services from the public sector to the private sector.	<i>Outsourcing, as caught under the ARD, of cleaning services applies to the public sector as well as the private sector. Like Suzen, concerned third party transfers.</i>
<i>Oy Liikenne</i> (2001) c-172/99	A Finnish case where a bus company took control of another, employing two drivers but refusing to employ them on their original working terms and conditions.	<i>Transfers pursued using intermediary bodies or subsidiaries for a phased transfer are also caught by the ARD. This also includes those done through a procurement process.</i>
<i>Watson and Rask</i> (1993) c-209/91	Danish case where contracting out of catering between companies Phillips and ISS.	<i>The transfer of ancillary (not just core) services of an undertaking also captured by the ARD</i>
<i>Dr. Sophie Redmond</i> (1992) c-29/91	A Dutch case concerning the withdrawal of contract to the claimant, then offered to a new party, resulting in the termination of employment of the original awardee.	<i>This fell under the scope of the ARD, but only based on key facts. Issues of third parties in transfer depend on facts of the case.</i>
<i>Daddy’s Dance Hall</i> (1988) c-324/86	Danish case concerning leasing arrangements of a music venue where A leased to B, terminated this and leased to C. All such ‘transfers’ caught by the ARD.	<i>The transfer of ownership between a legal or natural of an undertaking and their capture under the ARD.</i>

The table above (2.2.i) is supplemented by a table below (2.2.ii) that details three *core* cases which are of particular significance. At the centre of

both sets of cases is a determination made by the CJEU whether a ‘transfer of undertaking’ in fact took place in a meaningful way so as to be caught by the directive. This was subject to abrupt change by the Court in the 1990s. The table below provides three key cases where the CJEU applied different interpretive logics. These shifts in the CJEU’s stance are important in both the German and British ARD chapters.

Table 2.2.ii Core cases – ARD’s scope

Case and No.	Brief description of facts	Key aspect of decision
<i>Ayşe Süzen</i> (1997) c-13/95	A German case: Mrs. Süzen was employed as cleaner at a school by a contractor. The school’s contract with the contractor ended, Mrs Süzen was dismissed.	<i>The ARD does not apply to a situation where a contract ends, ending someone’s employment, unless significant tangible and intangible assets have been transferred as a result (a single dismissal does not meet this standard).</i>
<i>Schmidt</i> (1994) c-392/92	A German case: Mrs Schmidt brought an action challenging her dismissal, in which she was unsuccessful in the first instance by the German Higher Labour Court (<i>Landesarbeitsgericht</i>) who did not regard cleaning services as a part of the identity of the economic entity. The CJEU disagreed.	<i>The ARD does indeed apply to labour intensive undertakings, meaning such undertakings are caught by the directive.</i>
<i>Spijkers</i> (1986) c-24/85	A Dutch case surrounding a disagreement over a company ceasing operation and the employment of employees under a new company without substantive changes to nature of the company and the work (an abattoir)	<i>Six-pointed definition of a transfer that be viewed flexibly by national courts based on the facts of the case in question. Flexible and expansive approach to defining a ‘transfer’.</i>

The test has usually hinged on the more social protection-weighted *entreprise-activité* approach (pro-worker) or the more commercially-orientated *entreprise-organisation* (pro-employer) interpretation (Barnard 2006; p.637). In *Spijkers* (1986), the CJEU held it necessary that a business *retain its identity* in order to be caught by the directive. The CJEU stated that six factors could be weighed by national courts when looking at particular cases. Although offering some flexibility, this case did not shed much light as to whether *labour intensive* undertakings were caught by the ARD or if some form of asset transfer must take place first. In *Schmidt* (1994), the CJEU decided that undertakings dominated by labour intensive, human-capital means of economic activity, rather than tangible assets, *were also caught* by the ARD. This expanded the social protection-inclined interpretation of the ARD (*ibid.*).

This developing but settled approach, to which national authorities had adjusted to or were in process of adjusting, was to receive a sharp jolt in the 1997 *Süzen* case. Here, the CJEU reversed its approach toward the commercial rights inclined *entreprise-organisation* interpretation. The Court stated that *a substantive transfer of assets had to take place (ibid.)*, relegating the role of labour intensive work as the basis of determining the character of the business in question. As McMullen describes, the 'harsh effects' of *Süzen* essentially allowed new employers (transferees) *to choose whether to take on existing workers*, meaning they could in effect dismiss these workers in order to pursue a transfer. This logic was perverse given that the directive was expressly created to prevent companies from using a transfer process with the *sole purpose* of dismissing individual or groups of workers.

This was a German case that posed serious challenges for all EU member states that had to absorb this abrupt, messy change to EU acquired rights law. Curiously, despite being a case concerning German labour actors,

this case was much more controversial in Britain than in Germany. In Britain however, it was for more challenging and provoked some responses from legal and political actors not foreseen by CPE theories or explanations.

2.2.2.ii. The ARD and collective bargaining

The issue concerning the regulation and governance of collective agreements under the ARD is more complex and concerns two main issues:

- 1) Whether a collective agreement *in place at the time of a transfer should be transferred or not to the new post-transfer employer.*
- 2) *should a new employer, to whom the business has been 'transferred' to, also have to abide by those collective agreements that succeed the one in place at transfer (once it expires)?*

The original social policy purpose of the ARD and the social policy/worker protection function of collective agreements should point to a complementary relationship between the ARD and collective bargaining institutions, with collective agreements providing a good source of 'acquired rights' for workers.

In abstract terms, an individual employment contract must have its contents 'transferred' when a transfer of undertaking takes place as demanded by article 3(1) of the ARD itself. These individual employment contracts might however have a large degree of their content drawn from a collective agreement, making this employment contract stronger from the perspective of the employee and imposing greater labour costs on the part of the employer. Therefore, one can see an employer seeking to 're-organise' its functions through an outsourcing or merger so as to absolve themselves from the burdens of a collective agreement. German and UK labour law provide

for a type of linking or 'bridging' term to formally connect a collective agreement with an individual employment contract. On occasion however, employment contracts are populated with terms drawn from a collective agreement informally and without such explicit terms of linkage.

The ARD, again, makes it clear that terms of a collective agreement *in place at the time of a transfer must be transferred*, but the question as to whether a 'transferee', the new employer an undertaking is transferred to, should adhere to later, successor collective agreements to the one transferred, is not addressed in the directive. This is important, as collective agreements at any given point in time will mandate certain wage levels and pay scales, but will also often agree the rate which these will increase over time. This second issue with collective agreements creates a serious regulatory concern of timeline, as employers could be fine accepting a collective agreement *at the time of transfer*, as demanded by the ARD, knowing that this will one day expire and thus would not have to abide by this permanently. If an employer must abide by later collective agreements that succeed the transferred at the time of transfer, even if they have not signed this or a party to it, this implies that the *collective bargaining process and apparatus* itself is being transferred also. The question can be posed: how long is it reasonable for them to adhere to said bargaining process?

To explain this further, an important aspect of the collective agreement process is described. Collective bargaining for a group of employees occurs over a multi-year cycle, but sometimes forming annual collective agreements rather than multi-annual agreements. The prevalence of such arrangements varies across countries, industries and companies. If a transfer happens within an industrial sector where *all its employers* are covered by a collective agreement (multi-employer sectoral collective bargaining), the point is null as a transfer to another company would see

these transferred workers covered by the same collective agreement. A problem arises when a new employer is *not* a member of a collective bargaining process (and attached employers' association) which previously provided the employment terms for the new employer's employees. This issue is pertinent in both the UK and German ARD cases.

Unlike with questions concerning the ARD's scope and definition, the CJEU case law is non-existent up until the turn of the Millennium. With this, there are two different approaches to post-transfer collective agreements: The *dynamic* approach and *static* approach (McMullen 2006, Wynn-Davies 2013).

Table 2.2.iii- Status of Collective Agreements post-transfer

	Facts and decision	Approach
Werhof (2006)	Mr Werhof worked for company A which was eventually bought by Siemens (company B) and retained as a subsidiary until transferring part of this business to company C. Mr Werhof claimed the previous terms and conditions applied under the ARD as stated in Collino.	<i>Qualified Static interpretation, as the CJEU merely pointed to Germany's transposition of the optional article 3(2) of the ARD that imposed a one-year limit upon collective agreements' post-transfer life. If 3(2) was not part of German law, the outcome may have been different.</i>
Scattalon (2010)	Ivana Scattalon was transferred to work for the Italian Ministry and Education, Universities and Research from the municipality of Scorze. Article 2112 of Italian law that ratified the ARD did not incorporate the optional article 3(2).	<i>Qualified dynamic interpretation. Where remuneration, determined by collective agreement is linked to length of service. ARD must protect against substantial loss of salary relative to current employees of transferee (new employer).</i>
Alemo-Herron (2013)	A London borough (A) contracted out leisure services to a private sector firm (B). B then sold this to C. Local government collective agreements applied to A and B but not C. C refused to accept the strictures of this collective agreement (not being a local or public body).	<i>Static interpretation. Once a collective agreement had expired, transferees are not to be bound to negotiate a new agreement for transferred employees. 'hard static interpretation'.</i>

Asklepios-Kliniken (2017)	A case concerning German hospitals and two generations of transfers. In an initial transfer of two hospital employees from local government control to the private sector saw the municipal sector collective agreement transferred. A dynamic clause was contained in the transfer agreement demanding the retention of the terms of the municipal collective agreement. A later transfer to another private company prompted changes to the employment terms of the employees.	<i>Static interpretation. Even with the presence of an agreed 'dynamic clause' in the collective agreement giving it force in later years, the CJEU struck this down stipulating that the rights of new employers also had to be protected under the ARD, not just workers.</i>
----------------------------------	--	---

The *dynamic* approach states that where collective agreements are central to the transferred employment relationship then the bargaining processes that formed these agreements must be transferred also. The *static* approach demands the opposite, interpreting it as unjust for employers to be bound to collective bargaining processes they never agreed to or were otherwise bound to (through an associational membership for example). Complaints of the latter sort usually are based upon a claim that a fundamental breach of the 'freedom to contract' principle has occurred and invoke the EU's Charter of Fundamental Rights.

Out of the four cases above, the *Scattolon* case is an exception. The *static interpretation* outlined in the German *Werhof* and *Asklepios* cases and the British case *Alemo-Herron* cases have now made this clear. In both Germany and Britain however, very different contexts and actors produced very different outcomes. In Germany, the ARD was oddly uncontroversial, despite the presence of a large number of 'transfer of undertakings' occurring across a lot of the country's economy producing substantial job and wage cuts; two things the ARD was intended to prevent. In Britain, the ARD was much more controversial but on the issues of the ARD's scope. The issues concerning collective agreements however did cause multiple litigations

where UK courts found themselves caught between different interpretations and doctrines of UK and European law. The results when comparing these two countries were surprising and present a challenge to CPE depictions of these two countries as 'models of capitalism'.

2.2.3. European Posted Workers Law

The issue of posted workers has become very controversial in European politics in the 10-15 years. It also sits at the same troubled nexus between the European project's social and economic dimensions. On the one hand, EU institutions want to expand and develop the single market in *services*, one of the four freedoms, that had been developed the least (prior to circa 1990)²⁸. On the other, if this involves workers being transported by a service provider to a location in another member state. This leaves an important question: can this employer pay these workers according to the state they have gone to pursue work (*host state rules*) or their *home* state where they are established? National authorities are allowed to impose their labour standards on these foreign service providers, whether through labour law or collective agreements, then this might remove the economic incentive for firm seeking to go to another country to provide services. However, if the service providers *are allowed* to adhere to their own country's regulations rather than those of the country *they are operating in*, this could undercut those social rules and institutions (in the country of operation) like collective bargaining and labour law if this practice proliferates and becomes widespread. Domestic firms might then engage in preferential hiring of foreign firms and workers because they are cheaper or business might rebase itself in other jurisdictions

²⁸ Services markets largely have a mobility problem in that the provider and buyer of said service usually need to be in the same location, unlike goods that are usually boxed up and sent across borders with greater freedom.

to take advantage of laxer rules. These different dynamics have been given several labels: 'regime shopping', 'regime competition', 'wage dumping', 'social dumping' and 'a race to the bottom' (Scharpf 2002, Scharpf 2010, Streeck 1995, Höpner and Schäfer 2010).

These issues have set the scene conjoined normative and regulatory problems in European Union politics. Similarly to the ARD earlier, EU institutions have altered their approach to these questions over time to one that is far more liberal in nature and favours economic rights over social rights, market-making over social models.

This section will outline the law of the Posted Workers Directive (PWD) and the key case law of the CJEU in this areas of EU law. Within this, these issues will be well demonstrated. In our British and German chapters, we have a few particularly key cases of interest; including one Germany-specific case.

2.2.3.i The 1996 directive and key issues

The PWD was first passed into law in 1996 (EC 96/71) to regulate the working terms and conditions of contracted foreign labour ("posted workers"). With various forms of labour law and collective bargaining systems in operation throughout the EU in the 1990s, the directive sought to provide a list of those rules and mechanisms in which member states could use to impose employment standards on foreign companies who brought their foreign labour with them to pursue (sub)contracts. The normative thrust of the directive was to balance this with the right of these companies to pursue their freedom to provide services in line with CJEU case law.

The posted workers directive (PWD) provides member states a 'hard nucleus' of rules companies must adhere to when employing 'posted workers' (article 3(1)). This could be done through labour law (such as a

minimum wage or extension laws), or through collective agreements or arbitration awards (article 3(8)). The PWD in fact has a necessary functional overlap with EU public procurement law. European public procurement law is delivered through a number of directive texts regulating services and public works, utilities and (post-2016) concessions and forms an enormously important part of the single market agenda. For the purposes of posted workers issues, it is the directive regulating public contracting awards in *services*²⁹ that is relevant given the role of this directive in a procurement heavy construction sector where the majority of postings take place. Posted workers are always employed through the award of sub-contracts that form part of often dense contracting supply chains for large building projects. Although much more common in the construction sector, the use of posted workers has become more prominent in other sectors like tourism, various delivery based services and manufacturing. The *RegioPost* case of 2015 provides an important demonstration of this. First, controversial cases prior to this are outlined.

There are two sets of issues that are central to discussions concerning posted workers: one, the *economic* circumstances behind posting; and the other the *legal* issues presented the posted workers directive (PWD) and Court of Justice decisions in this area (below sub-section). The economic circumstances themselves are placed into two ‘models of posting’ by Voss et al. (2016): those postings triggered by labour cost differences between member states with lower wages and those with higher wages. The second sees skills shortages and the need to acquire specialised labour as the rationale for posting workers. The first model is associated with ‘social dumping’ or ‘wage dumping’ practices. This is what has placed posted

²⁹ Directives 2004/18 up was applied and then replaced by the update version of the same directive (2014/24) in 2016.

workers issues at the heart of a renewed 'social vs. liberal Europe' divide in European politics.

These issues first reared their head during the tumultuous negotiations over the 2004 draft of the Services Directive, and in particular the directive's controversial 'country-of-origin-principle' (CoOP). The CoOP in essence provided legal reinforcement of wage-dumping practices of mobile firms in a position to pursue off-shoring and noted a shift in EU free movement law from a 'host-state rules' logic to a 'home-state' rules logic. This offending provision was removed when the directive was finally agreed in 2006, but the debate concerning this regulatory conflict between economic free movement rights and national social policy institutions did not end there. The Court of Justice acted quickly to simply reinsert the country-of-origin-principle into EU free movement law and posted workers law.

2.2.3.ii. CJEU case law: from Rush Portuguesa to Laval

Before this interpretive turn of the Court, it was the Court's own earlier case law – *Rush Portuguesa* (1990), *Van der Elst* (1994) and *Evi v. Seco* (1994) – that provided the basis for a PWD balanced between social policy and free movement considerations. Provision 3(8) of the PWD was in fact based on the Court's statement in *Rush Portuguesa* case.

“Community law does not preclude member states from extending their Legislation, or collective labour agreements entered into by both sides of industry, to any person who was employed, even temporarily, within their territory, no matter in which country the employers established; nor does Community law prohibit member states from enforcing those rules by appropriate means”

CJEU in *Rush Portuguesa* (1990), paragraph 18.

The key regulatory point being that formal labour law is not the only place where wage and employment rules can be sourced by hosting authorities seeking to apply wage rules to foreign firms. Many such rules come from within collective agreements as well with considerable variation in how legal and non-legal sources of employment rules interact across different industries and member states. This subject of collective agreements and the labour standards they produce were also central in the later *Laval*, *Luxembourg* and *Rüffert* cases post-2007. In these cases, the CJEU decided to impose a severely restrictive interpretation of the PWD and the means it made available for member states to apply the various types of employment standards that might exist in their countries. Table 2.2.iv below illustrates the two generations of the CJEU's posted workers case law.

Table 2.2.iv: Posted Workers cases of the Court of Justice

Pre-2007 case law

Case	Description
<i>Rush Portuguesa (1990)</i>	CJEU declares that member states <i>can impose</i> their labour law or other non-legal labour standards to foreign companies employing posted workers on their territory.
<i>Evi v. Seco (1994)</i>	Reaffirms <i>Rush Portuguesa</i> .
<i>Van der Elst (1994)</i>	Reaffirms <i>Rush Portuguesa</i> .
<i>Arblade (1999)</i>	Pay rules drawn from a <i>collective agreement can be imposed</i> upon foreign companies and their posted workers per article 3(1) and 3(8) of the PWD.
<i>Mazzoleni (2001)</i>	A national statute demanding adherence to <i>collective agreements</i> stipulating minimum pay rates <i>can be imposed</i> by a member states as it sees fit.
<i>Portugaia Construções (2002)</i>	Domestic authorities <i>cannot demand</i> that foreign companies abide by a collective agreement if domestic firms are not bound by such rules.
<i>Wolff v. Müller (2004)</i>	<i>State regulation of liability systems</i> across supply chains to ensure adherence to minimum wage rules <i>is permitted</i> under EU free movement law.

Post-2007 case law

Case	Description
<i>Laval (2007)</i>	Member states <i>cannot impose wage rules derived from a collective agreement</i> as these go beyond the ‘mandatory rules’ provided in article 3(1) PWD. Also, collective action designed to impose such rules are also in breach of EU free movement law.
<i>Rüffert (2008)</i>	Following <i>Laval</i> , wages drawn from a collective agreement cannot be imposed upon foreign companies <i>and</i> legislation demanding the adherence to such pay rules are also in breach in EU free movement law if these are not declared ‘universally applicable’.
<i>Luxembourg (2008)</i>	Following the <i>Laval</i> and <i>Rüffert</i> cases, posted workers must be subject to the ‘mandatory rules’ provided in article 3(1) of the PWD and nothing more, <i>and</i> provisions in article 3(10) providing for public policy objectives also cannot be relied upon to reinforce non-mandatory wage standards.
<i>RegioPost (2015)</i>	A minimum wage provided by statutory provision (not a collective agreement) can be applied to posted workers under public procurement directives.

Collective agreements were the principal target in these *Laval* and *Rüffert* cases. This new line of case law essentially imposed a *host state* rules logic

rather than a *home state* logic onto posted workers questions, the latter came to be known as the ‘country of origin’ principle’ raised earlier. Article 3(1) was made in essence into an exhaustive list of those rules that can be applied, meaning anything not in this list could not be applied to posted workers. Ironically, rules derived from collective agreements *is in fact* included in this list in article 3(1), but the CJEU in this new line of case law demanded that these rules be made ‘universally applicable’. This sets a very high bar for collectively agreed rules to be applied. The logic of article 3(7), stipulating that member states can go beyond these rules and provide stronger protections for posted workers, was reversed. This meant that article 3(1) became a *ceiling*, from which no higher/better rules can be applied, rather than a *floor* from which standards could be then defined (ACL Davies 2008).

The *Laval*³⁰ case is given some description here given its importance to both of the posted workers chapters to avoid repetition (although indulged to a point in chapter 2.4).

The case involved the subsidiary (Baltic) of Latvian company (Laval) being awarded a subcontract to build a school in the town of Laxholm, Sweden. A collective agreement in the Swedish construction sector set the rates of pay and pay scales for all workers in the sector, including a minimum wage rate (there is no *legal* minimum wage in Sweden as collective bargaining coverage has always encompassed the vast majority of Swedish workplaces). A dispute arose when the Latvian company was accused of only paying 40% of the minimum wage contained in this collective agreement. The trade union on site demanded a negotiated pay settlement for these posted workers, Baltic refused. The trade union then pursued not only a strike but

³⁰ The *Viking* case is often placed in this same discussion as it was decided jointly with the *Laval* case in December 2007 (ACL Davies 2008, Malmberg and Sigeman 2008). *Viking* also addresses a conflict between free movement rights and the right of collective action (strikes) as well as collective bargaining. The *Viking* case was not a posted workers case however, and is not addressed any further here.

also a blockade of the site. Baltic were not able to finish the contract and went into liquidation.

There were two issues at hand in *Laval*: one, the right of host member states to *impose collective agreed pay minima* onto foreign contractors and their posted workers; the other *the use of industrial action and a blockade* of a worksite. The Court of Justice decided *Laval* alongside a *Viking* case that only had one of these issues at hand (industrial action). The Court first broke with its *Rush Portuguesa* line of case law by overturning the principle that national authorities had the right to impose their laws and rules onto foreign contractors, even if these were sourced from a collective agreement. In striking down the right of Sweden to impose pay minima drawn from a collective agreement, stating that if such pay rules were not made 'universally applicable' in law (much like a legal minimum would be) these would not be deemed acceptable, the Court effectively annulled section 3(8) of the PWD. Once the Court delivered this view of collectively agreed pay it was bound to find the strike and blockade enforcing them to obey this agreement to also be an unjustifiable breach of free movement law.

The 2008 German *Rüffert* case did not concern any industrial action, but did entail the imposition of collectively agreed pay (like *Laval*) and a regional (*land* level) law demanding such adherence to these pay rules. More specifically, the *Rüffert* case concerned the imposition of labour standards by national authorities upon a foreign subcontractor who was not bound by the collective agreement that covered the construction sector in that region (Niedersachsen, north west Germany). The details are covered more in the Germany-Posted Workers chapter that follows this chapter. In brief, the implications of *Rüffert* for German collective bargaining in the construction sector, where posted workers are most commonly used, were serious in two important ways. Firstly, the role of regional labour law and a regional

collective agreement were critically undermined in the name of protecting the free movement rights of profit-seeking firms. Second, it undermined the legal integrity of the EU's own public procurement regime by voiding a part of a publicly procured contract. In effect, primary contractors were able to accept 'binding' contractual terms (in this case labour standards) in the first instance knowing that such terms would not be enforceable, thus subcontractors could simply ignore them.

These cases concerned the imposition of minimum pay derived from *collective agreements*, not a legal minimum rate. It did however, unlike *Laval*, concern a legal rule that sought reinforce collective agreement. Either way, the CJEU drew a line: collectively agreed pay cannot be imposed on posted workers under free movement law (even if extended through law), but legal minimum wages, being 'universally applicable', can. These issues are returned to in the *RegioPost* case in the following chapter.

2.2.4. Concluding comment

These two case areas of law are applied to British and German labour relations in the following four chapters. The variations in the roles of different actors and regulatory arrangements provides great complexity and different sorts of outcomes. Some commonalities are noted: the role of neo-liberalism remains, although in differentiated form across the European and national levels and how it is felt in different labour relations and industrial contexts. The embeddedness of law within collective institutions such as collective bargaining, works councils and trade union activities is analytically important; the complex multi-level dynamics that do not constitute a holistic 'system', but a part designed formal system and part not as 'conflict of laws' and conflicts between law and non-law create a host of complex, incongruent, incoherent dynamics that undermine national level

labour relations, but do not result in a 'European model' of labour relations result either.

Both cases also present important interconnections between collective bargaining and formal legal sources of rules. The acquired rights, collective bargaining issues are joined by issues specific ARD concerns of the scope and definition of a 'transfer of undertakings'. In the posted workers chapters, collective bargaining issues come into complex and often conflicting contact with labour law and an important form of economic law: public procurement. The connections presented here between these legal and non-legal sources of 'labour market regulation and governance' are of central theoretical interest in this study and reveal important features and dynamics of European labour relations' relationship with neo-liberalism and European integration.

From these two chapters outlining the two national and European case studies, the four case studies are presented starting with *Germany-Posted Workers*, followed by the British half of this posted workers case, followed by the *Germany-Acquired Rights* and then *Britain-Acquired Rights*.

Chapter 2.3.

German Labour Relations and European Posted Workers law

2.3.1. Introduction

This chapter presents a case study of a particularly direct and disruptive intervention from the realm of law, namely from a court. The judicial intervention in question, represented initially by the 2008 *Rüffert* decision of the European Court of Justice (CJEU), itself forms only part of the relevant aspects of this case study. This judgement also inspired adaptive responses by key actors in Germany, the country at the centre of the *Rüffert* decision, that sought to minimise the effects of the CJEU decision and preserve existing labour relations practices within this CJEU-inspired change in EU law. More specifically this case study demonstrates a distinct form of adaptive response, a *political and legislative* form, and will be compared with the other forms presented in the later three case study chapters. This case study chapter comes first out of the four as it provides useful context to the case study chapters that follow, particularly the posted workers case study concerning Britain that follows this (2.4).

The response by German policy-makers to the *Rüffert* decision was pursued at the *Länder* (state) and not federal level and was later to be scrutinised by the CJEU again in 2015 in the *RegioPost* case. The eight-year-long timeline of these two *Rüffert* and *RegioPost* cases of, and the process of adjustment that took place in between, provide the empirical material of this case study. The examination of this prompts findings concerning the ongoing decline of the once-celebrated German *Tarifautonomie* model of German labour relations and the emergence of increasing legal influences

upon this regime. These conclusions point a law-based re-ordering of rights and power resources of employers and unions (favouring the former) but with a greater reliance on legal minimum wages rather than collectively bargained minimum wages (which have receded in scope and strength).

These empirical observations are directed to three leading theoretical arguments that go towards aiding the theoretical goals of this thesis. First, this case study highlights a form of court-imposed legal change that sees its desired outcome mediated by political interests in the form of legislation. This does not successfully reverse the effect of this intervention, but does modify it up to a point. Again, this mediated form of response to a *regulatory and governance problem* sees social partners take a back seat rather than the traditionally leading role they occupied in German *Tarifautonomie*.

Second, CPE theories that highlight the strength of coordinating institutions like collective bargaining have been made to look, at best, outdated, as developments like those presented by the *Rüffert* case (and the responses to it) have not only undermined the pillars of 'coordination' that defined *Tarifautonomie*, but have exposed how much these had weakened and withered even *before* the *Rüffert* case was brought to court.

Third, the *conflict of rules* concept is especially useful in this case as it allows for a mapping of: 1) a conflict of *laws* between EU posted workers law and German laws demanding adherence to minimum wages, 2) a conflicts of *laws* between European posted workers law and European public procurement law (in *RegioPost*), 3) a conflict of *rules* between law and non-law represented by a conflict between *collectively bargained* minimum wages and *legal* minimum wages.

The details of these arguments are developed in the second (theoretical) section of this thesis and throughout the (empirically-focused) first section.

2.3.2. Empirical section: From *Rüffert* to *RegioPost*

This first section is dedicated to the examination of the legal interventions and the political and economic interests that determine how law is adjusted to, mediated and framed. Two judicial decisions, *Rüffert* and *RegioPost*, of the CJEU are examined but an important and complex legislative context is mapped first.

2.3.2.i *The legislative background to the 2008 Rüffert case*

This mapping exercise is important as it covers not only European posted workers law at the centre of this case study, but also unavoidably includes European public procurement law and German labour law at both the federal and state levels in Germany.

This mix of legislative rules is complex, but must start with an appraisal of EU legislative texts. European posted workers law has an unavoidable overlap with European public procurement law as posted workers are usually sourced and employed through sub-contracts caught within large contracting projects themselves regulated by public procurement law. This presents clear grounds for conflict of *laws* problems (not *rules*, as this just refers the *legal* rules here) and with this potential *regulatory and governance problems*. Once the CJEU began to change its approach to posted workers law in 2007 and 2008, this conflict of laws problem was to become important.

There are directive texts regulating public procurement at the European level as well as posted workers law and these are both given life in (federal) German legislation. This overlap between posted workers law and public procurement was, at the time³¹, only explicitly recognised however in

³¹ The 2014 Enforcement Directive provides guidance on regulating liability chain issues that links posted workers and public procurement law explicitly for the first time in EU law.

German legislation and not in European public procurement legislation. The Posted Workers Directive (PWD) was enacted into German law courtesy of the *Arbeitnehmer-Entsendegesetz* (AEntG) statute. Before 2016³², the overarching regime regulating public procurement in the European Union was found in two 2004 directives (utilities: 2004/17 and public works 2004/18) that consolidated a large number of previous directive texts. Directive 2004/18 regulating public works, often called the ‘public sector directive’, is the relevant legislative text here the role of public works contracts used to organise the construction sector that sees the regular use of ‘posted workers’. The place of public procurement in European law provides important regulatory as well as normative functions: *regulatory* in the sense that it provides many detailed rules as to how public contracting should take place, including advertising and award procedures for different types of contract (e.g. monetary value and size) and *normative* in that EU public procurement law is hugely important to the goals of the European single market and the single market in *services* in particular.

Germany also has a long history of regulating public contracting and placing detailed rules within (or next to) these statutes that reconcile collective bargaining and pay issues with the goals of competitive contracting. The core statute in Germany is the *Gesetz gegen Wettbewerbsbeschränkungen* (GWB) or ‘Act against Restraints on Competition’ (Schulden 2014, Sack 2012). Rules governing wages in this framework traditionally took two forms: clauses in public contracts demanding adherence to a collective agreement (*Tariftreueklausel*³³) or more comprehensive statutes, *Tariftreuegesetze*³⁴, that sat next to the GWB (Schulden

³² From 2016, the 2014 regime of public procurement directives comes into force, providing new versions of the 2004/17 (2014/25) and 2004/18 (2014/24) directive plus a new third directive on concessions contracts (2014/23)

³³ Loosely translated as ‘collective agreement fidelity clause’

³⁴ Loosely translated as ‘collective agreement fidelity law (statute)’

2014, Sack 2012). In Germany's federal system, different states would use different sorts of rules for different kinds of public contracts (construction, post, transport etc.), a theme returned to later on in this section. The GWB is placed under the EU's public procurement regime³⁵, but conflicts between EU law and German law on the issue of wages and that accompanied the GWB were not a problem until the CJEU engaged upon its 'interpretive turn' in the 2008 *Rüffert*.

2.3.2. ii *The Rüffert judgement and the CJEU's new posted workers case law*

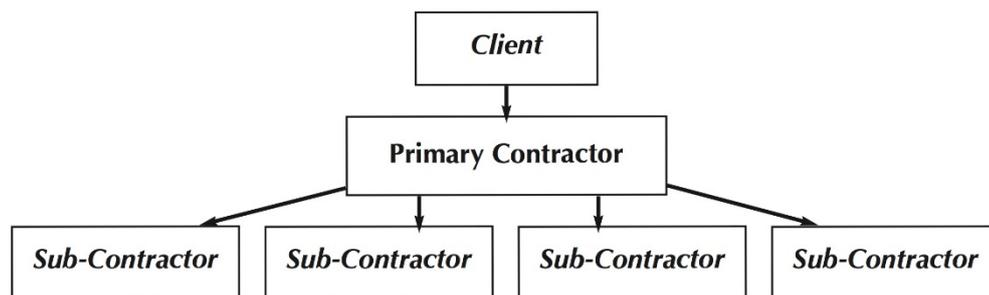
The 2008 *Rüffert* case is first placed in a context of an "interpretive turn" pursued by the CJEU on posted workers matters. The *Rüffert* decision came a little over three months after the CJEU delivered its conjoined *Laval* and *Viking* decisions, the first of which is a posted workers case and the second not, despite having a very similar fact pattern (mobile ('posted') workers, and a mobile company, strike action and a collective agreement).

A distinction is made between the implications of the *Laval* case and the German *Rüffert* case. *Laval* raised the twinned issues of collectively agreed wages being extended to posted workers *and* industrial action (including a trade union-led blockade). The fact pattern in *Rüffert* was slightly different as there was no strike action at issue in this case, but, as in *Laval*, it did concern collectively-bargained minimum wages. It did however possess an additional factor not present in the *Laval* case: *a statutory provision extending the pay rates in the collective agreement to cover posted workers.*

³⁵ There are four main areas of federal law ratifying EU public procurement law: Award Rules for Public Contracts (Verordnung über die Vergabe öffentlicher. Aufträge, VgV), Building Work Award and Contract Code (Vergabe- und Vertragsordnungen für Bauleistungen, VOB/A), Award and Contract Code for Supplies and Services (Vergabe- und Vertragsordnungen für Leistungen, VOL/A), Award Rules for Professional Services (Vergabe- und Vertragsordnungen für freiberufliche Leistungen, VOF) (Schulten 2014).

Before continuing to outline with the details of these statutory provisions it is important to understand the characteristics of the ‘employer’ in this construction sector context. In short, in large public contracts that contain lots of sub-contracts within them, employer interests are split between a *primary contractor* and a series of *sub-contractors*; the latter of whom agree to the terms of the sub-contract which include terms of employment and wages. Additionally, although not pertinent in this case study, a ‘client’ contracted the primary contractor in the first instance, so sits atop a procurement contract ‘supply chain’.

Figure 2.3.a contracting supply chains



Facts of the case: The *Rüffert* case concerned the north-western state of Lower Saxony (Niedersachsen) and a litigation brought by Dirk Rüffert, the liquidator of the assets of the company Objekt und Bauregie GmbH & Co. KG. who acted as the primary contractor and signatory of a publicly procured works contract. Legislation in Lower Saxony concerning labour standards in public contracts (*Landesvergabegesetz*) mandated that all signatories of such a public contract must abide by the wage rules of a regional collective agreement (a form of *Tariftreueklausel*³⁶) for the

³⁶ A clause demanding adherence to a collective agreement

construction sector. Paragraph 3(1) of the *Landesvergabegesetz* is provided below:

'Contracts for building services shall be awarded only to undertakings which, when lodging a tender, undertake in writing to pay their employees, when performing those services, at least the remuneration prescribed by the collective agreement at the place where those services are performed and at the time prescribed by the collective agreement.'

This provision constitutes the central means to impose collective bargaining rules and norms across this sector. The other important aspect of the case concerns legal rules demanding that this provision be enforced *by primary contractors onto any selected sub-contractors*. This raises the subject of liability in contracting supply chains that itself presents several different regulatory options to enforce such rules concerning wages and employment (Heinen et al. 2017). Paragraph 4.1. Below sees *primary contractors* given the primary responsibility to ensure that legal regulations are not just included in the terms of contract but that these are also *enforced* at the expense of a monetary fine.

Paragraph 4(1):

*'The contractor may assign to sub-contractors services for which his establishment is set up [...] In so far as services are assigned to subcontractors, **the contractor must also undertake to impose on the subcontractors the obligations laid down in Paragraphs 3, 4 and 7(2) applicable to contractors and to monitor compliance with these obligations by the subcontractors.**'*

As a regulatory enforcement issue, the above means that primary contractors must perform part of the state's enforcement job instead of the state itself.

This form of liability regulation is understood as ‘joint several liability’ as supposed the ‘chain liability’ where risks and responsibility are shared more across sub-contractors (*ibid.*).

The failure of primary contractors to apply and enforce minimum rates of pay throughout their procurement supply chains would incur a fine of 10% of the contract’s value. In *Rüffert*, Objekt und Bauregie sub-contracted some works to a Polish contractor who were later found to be paying 53 workers only 46.5% of a minimum wage rate of the regional collective agreement. After an investigation, the state authorities revoked the contract from the primary contractor, Objekt und Bauregie, and levied the fine on the Polish sub-contractor. Objekt und Bauregie went into liquidation. The liquidator, Mr. Rüffert, took the case to the Higher regional court (*Oberlandesgericht*), only to be referred to the European Court.

At this point prior to the dispute getting to the *Oberlandesgericht*, it is important to note that the only regulatory and governance problem is one of enforcement. A company has already at this point *agreed to contractual terms that demand adherence to established labour relations practice*, and another company *is also bound by this contractual commitment* courtesy of the primary contractor’s signing a contract demanding this. Mr Rüffert tried to impose economic law rules found in European free movement rights over these state-level laws in Lower Saxony, and the contractual terms demanding such adherence, despite the company having already agreed to it. For the CJEU to find in his favour would create two serious *conflict of rules* problems: one, where the place of collective bargaining, and laws reinforcing it, become seriously undermined. This problem would leave workers in a potentially worse position in material terms as there would no longer be *any* mandated minimum wages in place. Two, a regime of contract law would also be

seriously undermined if signatories can simply walk away from contractual terms they had already agreed to.

The *Rüffert* decision, similar to the *Laval* decision in Sweden, was destructive in its effect on existing law and practice, but in one sense went further than the 2007 *Laval* decision. In *Laval*, no area of law existed that could extend, attach nor demand adherence to collectively-bargaining wage rates to non-signatories as this process of extension was achieved autonomously by well-organised trade unions and employer organisations in Sweden. In *Rüffert* a legal rule demanding adherence was present in Germany. The Court struck this down, declaring it illegal under EU free movement law, and preventing German authorities from relying on these to legally underpin pay clauses in public contracts.

This is true in regards to four of the PWD's provisions – article 3(7), 3(8) and 3(10). First, the CJEU deemed such laws to be in breach of article 3(7) of the PWD³⁷, turning this feature of the PWD into a regulatory *ceiling* from which national regulators could operate from, rather than the *floor* that the original PWD intended it to be (A.C.L. Davies 2008, Novitz and Syrpis 2008, Kilpatrick 2009c). The normative thrust of the PWD, that originally sought to balance social and economic rights, was therefore reversed so as to place economic rights of free movement law above and superior to social rights of workers demanded by the original directive. The CJEU not only closed off article 3(7) to national authorities seeking to impose local wage rules, but it also closed off article 3(8) and 3(10) of the PWD. Article 3(10) of the PWD was meant to allow national authorities to impose local/national wage under justifiable 'public policy' considerations, including policy goals designed to avoid 'wage dumping' practices. This avenue for national authorities

³⁷ That states that national authorities must not be prevented from applying higher standards those detailed in articles 3(1) to 3(6)

however was curtailed in the *Luxembourg* case delivered shortly after the *Rüffert* case.

With article 3(8), the Court stated that if minimum wages were not made 'generally applicable' in law, then these would not satisfy EU free movement rules. This is a hugely important aspect of the judgement that appeared to make legal minimum wages *compatible* with EU law but collectively agreed minimum wages *incompatible*. In deciding this, the court rendered pay clauses drawn from collective agreements as an unacceptable hindrance to the free movement rights of business. This illustrates the ambitions of a court actor clearly seeking to use law to close off space for collective bargaining to be imposed on mobile business.

None of the text of the PWD has been altered since its creation in 1996. How this text has been interpreted and enforced has been subject to radical shifts courtesy of the CJEU's own shift in approach³⁸. The presence of three sets of rules provided by a piece of legislation, a public procurement contract and a collective agreement may appear complex, but the arrangement was not producing significant problems until the CJEU delivered its *Laval* and *Rüffert* decision. The CJEU created a very clear *conflict of rules* problem that undermined not only a German labour relations regime already in decline, but also the integrity of the EU's own public procurement regime of the EU's own making.

In the sub-section below, the different attempts made at the state (*Land*) level to adjust to *Rüffert* are examined. The success of these attempts, and one in particular, will later find itself in front of the CJEU.

³⁸ Described earlier in this chapter and in chapter 2.2.

2.3.2. iii. *The response to Rüffert*

The reaction to the 2008 *Rüffert* case from German trade unions and their political allies in the SPD was ferocious. The CJEU's decision was deemed to be a serious affront to the principles of German labour relations and those associated with the European social model. Wage standards, German unions claimed, could only be maintained if foreign employers are subject to these same standards when they employed their (posted) workers on German soil. This country of *operation* principle ('*host state rules*') however clearly contradicted the country of *origin* principle ('*home state rules*') that was now being favoured by the Court in its posted workers case law and other jurisprudence described in chapter 2.2.

Despite the anger this generated, the response did not take the form of a militant strike seen in *Laval* and in Britain in the next chapter, but instead saw an adjustment based in *legislative change*. Such reforms did partly correct the problem noted earlier where an industrial sector would be left without any form of minimum wage rate. These attempts at adjustment, again, took place at the state (*Land*) level after an attempt in 2002 to create a federal-wide *Tariftreuegesetz* had failed. This section draws on existing literature (Sack et al. 2015, Schulten 2014) to examine the responses of German states to *Rüffert* and map these responses to defending *Tariftreuegesetz* and *Tariftreueklausel*. Detlev Sack maps the German states by the presence and kind of *Tariftreuegesetz* or *Tariftreueklausel* that were in place before and after the *Rüffert* decision. At this point, the reader is referred to Sack's 2012 paper for the finer details, and illustrative graphs, as these are not particularly relevant here. What is relevant are those states that did produce these legislative responses to *Rüffert* and why they did so. What is very clear from Sack's work is the role of political-ideological interests of partisan coalitions at the state level in shaping these responses.

The economically conservative CDU and FDP parties, where they held positions in state-level coalitions, were usually influential in removing *Tariftreuegesetze* or *Tariftreueklausel* or in these not being present even before the *Rüffert* decision in 2008 (making the point moot in these *Länder*). In total, eleven of Germany's sixteen federal states produced amendments to existing legislation or produced entirely new statutes. Bavaria, Hessen and Saxony, quickly took the opportunity to remove legislation demanding adherence to collectively bargained wages. Other states, where social democrats were in control however (usually in a coalition), made these efforts to find a legal remedy to *Rüffert* so as to defend pay clauses in public procurement.

The solutions developed by the latter set of states centred around European public procurement directives, per the advice of specialists and lawyers (Sack 2012, Interview GPWD1). As already described, the role of public procurement law is *de facto* already present in posted workers matters given its role in organising contracting-based construction industry where posted workers are mostly used. What some German states did however was to look beyond the *economic law* element of the directives, that try to foster competition and market access, so as to find some space to provide for social considerations such as those concerning wages. Article 26 of the directive 2004/18 provides for the imposition of non-economic 'special conditions' upon bidders and winners of public contracts.

*Contracting authorities may lay down **special conditions** (emphasis added) relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. **The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.***³⁹

³⁹ In the new public procurement directives article 26 on special conditions is included under article 70.

To attach ‘special conditions’ to public contracts, drafters needed to make sure these conditions, if guided by *social considerations*, were connected to the *economic* objectives of the contract. Of more encouragement to those German policy-makers was the existence of a specific ‘special conditions’ provision in recital 34 of the same directive:

(34) “Directive [96/71] lays down the minimum conditions which must be observed by the host country in respect of such posted workers. If national law contains provisions to this effect, non-compliance with those obligations may be considered to be grave misconduct or an offence concerning the professional conduct of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract”.

(part of) Recital 34, Directive 2004/18.

The government of Rhineland-Palatinate (*Rhineland Pfalz*) was one state to employ the above provisions to try and adapt rules concerning pay clauses for the purposes of posted workers being employed in their state. The logic of this adjustment is a simple one: the CJEU dismantled the posted workers directive and closed it off as a meaningful avenue to apply national labour rules. Therefore national authorities would try and circumvent it and look for alternative options to do the same thing *within EU law*. The logic therefore is, in one sense, a gamble: will the CJEU blow holes in the EU’s own public procurement directives *as well as* its directive on the posting of workers? It was a risk, but in the absence of better options this legislative approach was an innovative to create a remedy.

These questions were only partly answered by the *RegioPost* decision below, but are still important theoretically. For the purposes of this thesis's theoretical goals, this *RegioPost* case represents the culmination of an eight-year process where legal intervention is met by an adjustment response that is eventually tested in law *and* by the same CJEU that caused this regulatory and governance problem in the first instance (in *Rüffert*). Importantly, it sees German labour relations, instead of being led by the 'social partners' of collective bargaining, relying on public policy support and associated partisan allies in the face of a judicial actor intent on imposing *economic* law on regimes designed by rules demanding *social* protection. The role of law and the adjustment to it found in law and non-law became a central feature of a labour relations regime not traditionally defined by such features.

2.3.2.iv The 2015 RegioPost case

The use of these provisions in EU public procurement directives by state legislators of Rhineland-Palatinate was based on two goals: First, to continue imposing collectively bargained pay clauses, and two, a legal minimum wage rate if a collective agreement was absent. This response to the *Rüffert* case was put before the CJEU in the *RegioPost* case.

The case facts are outlined here. The municipality of Landau issued a European Union-wide call for tender under an open procedure regulated by the EU public procurement law. The services in question were for various postal services (collection, parcels, letters, etc.). Attached to the advertised contract was the requirement to honour the provisions of the *Tarifreuegesetz* in Rhineland-Palatinate that would ensure compliance with the regional collective agreement and minimum wages in public contract

awards (thereafter the 'LTTG'⁴⁰). The case was brought by the primary contractor - RegioPost GmbH - against the city of Landau over a dispute concerning the imposition of pay rules in a procurement contract that RegioPost had already been awarded. The *sub*-contractors had performed their administrative due diligence demonstrating their intention to comply, but RegioPost, the primary contractor, curiously had not done so, refusing to claim that their free movement rights were being infringed.

The Higher Regional Court (*Oberlandesgericht*) of Rhineland-Palatinate referred the case to the Court of Justice with questions addressing the PWD, the Public Procurement Directive for public works (2004/18), the GWB⁴¹ and the LTTG. As described in the CJEU's judgment, "under point 4 of section III 2.2 of the contract notice, under the heading 'Economic and financial standing', 'the successful tenderer shall comply with the provisions of the LTTG". The key passage in the LTTG is represented by its fourth paragraph entitled 'Obligation to comply with collective agreements':

'(1) Public contracts [...] may be awarded only to undertakings which undertake in writing, at the time of submitting their tender, to pay their staff, for performing the service, a remuneration which, in its amount and form, corresponds at least to the provisions of the collective agreement by which the undertaking is bound under [that Law].

Paragraph 4, the 'LTTG'.

This provision demands the undertakings can only be awarded contracts if they agree to pay their workers, posted or not, according to the collective agreement in place. This above provision raises a potential 'Rüffert

⁴⁰ A version of a 'Tariftreuegesetze' Landesgesetz zur Gewährleistung von Tariftreue und Mindestentgelt bei öffentlichen Auftragsvergaben – thereafter 'LTTG'.

⁴¹ Gesetz gegen Wettbewerbsbeschränkungen - federal legislation against restrictions to competition

problem'. Does the CJEU allow, this time, collectively agreed pay to be imposed on posted workers *through the use of EU public procurement law*?

From this came a further demand providing for the joint several liability regulation raised earlier, meaning that the *primary contractor* must ensure that *sub-contractors* complied to these wage rules, thus becoming the primary enforcer of a statute demanding adherence to a collective agreement.

'Where contractual services are to be performed by subcontractors, the undertaking shall ensure that those subcontractors comply with the obligations referred to in Paragraphs 3 and 4 and shall provide the contracting authority with the subcontractors' declarations regarding the minimum wage and compliance with collective agreements. ...'

Paragraph 5(2) of the LTTG.

RegioPost and its subcontractors had to provide written confirmation that would commit them to either the regional minimum wage laid down in paragraph 3(1) or the mandated rate. RegioPost refused to provide these commitments (although oddly, the subcontractors that RegioPost commissioned did), claiming that these demands to observe such minimum wages was in breach of their free movement rights guaranteed by EU law⁴².

This prompts a question from *Rüffert*: did the company RegioPost agree to terms of the contract *knowing that they would ignore any rules on wage standards later*? It is possible, and if true would represent a clear attempt by a company to ignore its contractual obligations by exercising *legal rights*

⁴² One might question the wisdom of the company RegioPost for objecting to a contractual term demanded in the originally advertised public contract that they had already agreed to.

(provided by a court) to do so. The *Rüffert* case very likely acted as a signal of sorts to this sort of opportunism.

This prompted the legislative innovation outlined above concerning the use of hitherto unused provisions in EU public procurement law. The state government of Rhineland-Palatinate therefore successfully pushed the CJEU's attention toward these provisions in EU public procurement law as the venue for managing conflicts between domestic labour regulation and free movement rights, rather than the PWD that was now full of holes courtesy of *Laval*, *Rüffert* and other cases of CJEU. Theoretically, the opportunistic interpretations of corporate actors to their legal rights and the interpretive adaptations of policy-makers pulled the direction of this area of EU law, that had clear normative intent behind it provided by the CJEU, into different directions. This underlines the malleable and mediated nature of law and legal rules.

Article 26 of Directive 2004/18/EC [...] must be interpreted as not precluding legislation of a regional entity of a Member State, such as that at issue in the main proceedings, which requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation.

CJEU in RegioPost article 89(2)

The Court's judgement affirmed the use of this provision in EU public procurement law to defend wage standards but with important caveat. Despite the excitement in some quarters about this decision, its effect was limited in two ways. First, it only applied to the *legal* minimum wages defined by statute and not the rule demanding adherence to a collective agreement as there was none in place in this case. This does not aid a straight

RegioPost-Rüffert comparison given that the latter did have concerned this collective agreement present. Second, as the court was also silent on this issue concerning collectively bargained wages (using public procurement law as a prop), this problem is left unaddressed and we will likely have to wait until a new case is put before the court before knowing if the Court will EU public procurement law can be used to shield *collective bargained minimum wage rates*.

2.3.2. *v. Concluding comment to empirical section*

These empirical observations do produce a sort of anti-climax: a still incomplete set of outcomes where the role of collectively bargained minimum wages are left in a similar, but not quite the same, precarious position they were after the *Laval* and *Rüffert* cases. In theoretical terms however, the *RegioPost* case, despite its inability to settle the regulatory and governance problem of *Rüffert*, does produce a lot of interesting findings; namely those details of a legislative manoeuvre to nullify or mitigate the disruptive intervention of the CJEU in *Rüffert*. German collective bargaining institutions, the core defining part of German *Tarifautonomie*, were however already decline, as described in chapter 2.1 and demonstrated in chapter 2.5 (Germany-Acquired Rights). This case presented an abrupt legal change that targeted an important legal support for collective bargaining. It also produced however the proliferation of new forms of ‘minimum wage only’ collective agreements⁴³ that only adds another layer to a complicated set of wage-setting arrangements in modern Germany already weighed down by the fragmentation, decentralisation and erosion of collective bargaining in Germany as well as a post-2015 federal legal minimum wage.

⁴³ Interview GPWD1.

2.3.3. Theoretical findings

The leading and broad *empirical* finding from this case study chapter centres around the claim that German *Tarifautonomie* has declined and has been displaced by the emergence of a complex entanglement between law and non-law. The institutions of *Tarifautonomie* however have not completely disappeared, leaving an inchoate and incomplete set of arrangements marked by competing yet co-existing tendencies. This case study saw regulatory and governance arrangements found in collective bargaining and labour law be joined forcefully by another body of law: public procurement law. This additional law-based feature will not be a factor in many other industries in Germany⁴⁴, but the weakening of collective bargaining and trade unions does point to broader patterns of decline and deep complexity in German labour relations and law's complicated, contradictory role within this. This chapter sees greater legal rule-making, neo-liberalism, and Europeanisation all come together to create this highly incomplete and complex emerging regime of German labour relations.

This finding presents serious implications for CPE in regards to both its approach to German labour relations, which has featured so prominently and frequently in CPE studies, and European labour relations more broadly. The narrow collective bargaining-focused view of 'labour relations' that has dominated CPE is clearly inadequate. Not only did this case study represent a *regulatory and governance problem* created by a distinctly judicial actor (the CJEU), but more importantly this inspired a heavily politically contextualised law-based response rather than an adjustment led by the social partner actors of collective institutions that defined post-War *Tarifautonomie*. *Tarifautonomie* was based on the principles of minimal state

⁴⁴ The one useful interview pursued for this (GPWD1) did indicate that these issues were a feature in the meat-packing industry to go along side those of construction and post found in the *Rüffert* and *RegioPost* cases.

intervention, with German courts taking a purposively passive role thereby tacitly affirming place of the *Tarifautonomie* model but expressly reaffirming it when called upon. This approach of German courts, as detailed in chapter 2.1, was in-effect a key doctrinal support for *Tarifautonomie*. German courts however, in this case and the following German case (2.5.), have had to adjust more and more over time to the demands of EU law and the European Court. This is demonstrated by German courts' swift acquiescence to the European legal order by referring cases like *Rüffert* and *RegioPost* immediately to the CJEU.

The importance of this process of referral is underlined with a comparison with the final chapter of this second section (2.6) where British courts do not simply refer cases up the European court, but pass their own judgement *first*, and then litigants can appeal the decision to the CJEU if they wish. In this German context, besides the greater role for legal rules and one judicial actor, the CJEU, German courts acquiescence to the EU legal order has in effect ended their previous doctrinal commitment to the legal principles of *Tarifautonomie*. This is a key, and law-based, shift in the ongoing and slow process of German *Tarifautonomie's* deconstruction.

The terms mediation and contestation are used to understand how social actors, besides the legal actors like courts and the legislative state above, adapt and frame the legal demands placed before them. With the decline of *Tarifautonomie* has come the decline of German trade unions, whose weakened power resources and ability to enforce a desired regulatory and governance wage-setting regime is a key factor in the events in this case. A trade union's role however can occur in a political or industrial context. In a political context, trade unions still had enough power to influence some state governments in adjusting to the *Rüffert* decision.

In a particular industrial setting however, again exhibited in the *Rüffert* case, companies felt they had the right and the opportunity to aggressively shape their own regulatory and governance environment assuming little push-back would come from unions on site (e.g. through a strike). In both *Rüffert* and *RegioPost*, companies agreed to conform to a local collective agreement only to later decide they would disregard it. To put it another way, in both cases the companies' opportunism was particularly egregious as both refused to conform to a contract *they had already signed*. The difference being that in *RegioPost* the contract had not yet started and the company perceived it had the legal right to ignore the wage portions of the contract given the CJEU decisions in *Rüffert* and *Laval*.

The critical theoretical point is the nature of those rights and obligations provided in law and collective agreements are determined by the nature of their interpretation and their enforcement by key actors. In this case, companies pushed the envelope in regards to their perceived rights as they had the power resources to do so. These companies would not have ignored the obligations nailed down in a given contract, collective agreement or law if they thought these would be substantively challenged by either legal enforcement or by trade union action. This produces a clear comparison with those lessons drawn from the next chapter where it is *trade unions* who impose considerable power resources to expand their *de facto* rights of action in clear breach of their (and employer's) *de jure* legal rights.

The role of power resources was central to how the considerable *conflict of rules* problems in this chapter were addressed. These two modes of *rights* are organised into the table below before their interactions (and conflicts) in this case is mapped.

Table 2.3.b Conflicting rules: social rights and economic rights

Social rights	Economic rights
<i>Collective Agreements</i>	<i>European free movement law</i>
<i>Laws extending collective bargained wages</i>	<i>Public Procurement law</i>
<i>Legal minimum wages</i>	<i>Posted Workers law</i>

The CJEU, in its *Laval*, *Rüffert* and *Luxembourg* decisions, essentially sought to reorder a complex regime of social and economic rights found from European and German law and institutions. Contextualising this ordering process sees EU free movement law placed at the top of a *hierarchy* that sees the economic rights of free movement law *placed above and imposed upon those social rights* provided by collective bargaining and those national laws used to support these. The one exception to this hierarchy, according to the CJEU, is that *legal-statutory minimum wages are allowed to be imposed* upon foreign companies and their posted workers and is therefore compatible with EU law.

At the root of these *conflict of rules* is a basic conflict of *normative* principles. These can be managed and reconciled in different ways, usually involving a balancing process gauging trade-offs by legislators or courts. The German statute that governs public procurement, the GWB, sought to provide this sort of balance and not contradict state-level statutes reinforcing collective bargaining and the minimum wages contained within this (*Tarifklausel, Tariftreuegesetze*). This is also true, to an extent, of the EU's public procurement directives that the GWB was created to enforce in Germany. Again, as reiterated above, the CJEU rejected this 'balancing' approach, where rights are seen as equal and reconciled, in favour of placing these competing rights into the hierarchy described above.

This theme of balancing rights may have been debunked in the *Rüffert* case (and *Laval*), but was to remerge when public procurement law was substantively introduced. Public procurement law provides a *framework* for economic rights to be exercised so as to increase competition for public contract awards, but both the German and European versions of public procurement law however did provide space for ‘social considerations’ to be exercised as well, as evidenced by the *RegioPost* case, thus seeking to assert this balancing act once more. This was a key part of the reasoning behind legislative adjustment strategy of some German states like Rhineland-Palatinate that reached for public procurement as a remedy.

This raised the prospect of a conflict between two areas of European law: public procurement, that allows ‘social considerations’ to form part of those rules and those governing posted workers, and the PWD (post-*Laval* and *Rüffert*) that did not. This conflict between European public procurement law and the CJEU’s posted workers case law, was at issue in the 2015 *RegioPost* case. European public procurement law and posted workers law had considerable *de facto* overlap⁴⁵, even if it had little *de jure* overlap in that very few specific and explicit provisions existed that connected them⁴⁶. In *Rüffert* and *Laval*, the CJEU did not address this overlap. This became unavoidable however when German states starting reaching for European public procurement law to reframe the legal rules regulated posted workers and their pay. Theoretically this is important as it again sees the *response*, not the *initial intervention*, as just as important in formulating both legal frameworks, legal rights, and how these also interlock with non-legal

⁴⁵ To repeat an earlier point, posted workers are nearly always employed as part of publicly procured works contracts regulated (in when of a certain monetary size) by European public procurement law.

⁴⁶ Minus recital 34 of public procurement directive 2004/18

arrangements like collective bargaining. Shifts to the regulatory and governance regime is, again, heavily contested and mediated in this case.

The attempt of the CJEU to reject a balanced approach and to settle this conflict of rules *by subordinating one (social rights) to the other (economic) in a hierarchy*, purposively favoured the normative principles of economic rights of profit-seekers, competition and market-making. As a conflict of laws concept helps organise different rights into shifting and unstable hierarchies, this unveils important legal characteristics of *European* neo-liberalism.

Germany's further insertion into a European legal order is simultaneously seeing its on-going insertion into an increasingly neo-liberalism-framed single European market. Although German legislative responses to the 2008 *Rüffert* case sought to mitigate or minimise the disruptive impact of this CJEU decision, instead they, in-effect, simultaneously furthered a process of German labour relations' Europeanisation and juridification. This is a very important theoretical point for the broader goals of this thesis, as it sees a national regime of labour relations, and a German model that has long been seen as an archetype, increasingly having its borders blurred as its core components are weakened and become part of a broader European legal and market system. 'European' labour relations will never be purely transnational, but the national level aspects of EU members' labour relations 'models' will cease to be purely 'national'.

This German experience will clearly not be mirrored in other European countries, as some will retain more of their labour relations regimes more than others. This case study, and the British cases that follow it, will however confirm that CPE theories of European labour relations are lacking a serious and credible account of legal factors and their connections to both European legal integration and neo-liberalism's advance. The path dependencies that

defined German labour relations, and collective bargaining in particular, were already eroding and failing. The interests of employers were not as wedded to the preservation of collective bargaining and other coordination institutions as much as VoC scholars thought. More realistic appraisals of employers' interests in an era of European neo-liberalism are more likely to be found in CWC and RT approaches.

2.3.4. Conclusion

“This case presented an abrupt legal change that targeted an important legal support for collective bargaining. It also produced however the proliferation of new forms of ‘minimum wage only’ collective agreements⁴⁷ that only adds another layer to a complicated set of wage-setting arrangements in modern Germany already weighed down by the fragmentation, decentralisation and erosion of collective bargaining in Germany as well as a post-2015 federal legal minimum wage.”

This passage above was taken from the concluding paragraph of the empirical section of this chapter as it captures the complex set of problems this case study demonstrates from German labour relations at large.

This case study, and the others that follow it, demonstrated that law is not a top-down, command-and-control drive process but one that is mediated and contested with interests defined by power resources and politics. Even in a case exhibiting a court-ordered change to legal rules.

A doctrinaire and ‘black letter’ account no more useful to understand law’s role than the completely law-less accounts of most CPE. Law is often designed to mediate, but sometimes must have its attempts at mediation *mediated* itself. This case offered such an example: a court adjudicates in a

⁴⁷ Interview GPWD1.

case, but does so in such a disruptive and politically controversial manner that it provokes a new mediating response from social actors that have their claims, and resources to make claims, to different legal and non-legal rights. In this chapter, this response was itself distinctly legal (and legislative) in nature. In the following chapter, it is not.

In the following posted workers chapter concerning Britain, the role of these same CJEU decisions is again at issue, but instead acts at a distance as no CJEU decision of this sort saw Britain's labour relations practice put before the European Court. This sets up one neat comparison between two posted workers-based-case studies, where some aspects of industrial context and legal context are the same, but some aspects of law (namely the role of the CJEU) and *the response* by labour to pressures to change are very different. In this case study concerning Germany, a creative legislative route was used to mollify and respond to the CJEU's decisions, with the ultimate outcome still uncertain. In Britain, the response was militant industrial action to a perceived threat of posted workers to a form of labour relations the workers wanted retained.

Chapter 2.4.

British labour relations and European Posted Workers law

2.4.1. Introduction

This case study chapter, like the previous chapter, concerns the subject of European posted workers law. Two main differences however stand out: the first is that, unlike in the German case, no CJEU decision was directed toward Britain and the way it regulated posted workers issues, nor has there been any legislative implementation of the PWD at the national level in Britain (1996 to present day)⁴⁸. Second, and despite the controversy surrounding posted workers issues in Britain in the 2000s, the response to these was very different from that in the German case. In the German case study, a *legislative response* was pursued to try to preserve as much of German wage-setting practice as possible. In Britain, the response was delivered through *trade union-led strike action*. This response was not pursued by the political state in this case and kept it within the industrial context where the dispute arose, and successfully forced employers to negotiate a settlement through a new collective agreement. Theoretically, this creates pertinent comparisons with the other three case study chapters as it essentially sees the form of labour relations in this case successfully pulled away and separated from the reaches of law and the legal intervention that sought to change it manifested through employers attempts to activate legal rights *in situ* rather than in a court or through lobbying for legislation.

⁴⁸ It is usual and expected for EU member states to 'transpose' European directives into national law through statute. On some occasions when new directives are passed by the EU it will not be necessary for a member state to do this if national law already broadly conforms to EU law that area.

With a CJEU decision being specifically directed at Germany in the previous chapter, that case study chapter revolved around that case (*Rüffert*) and everything that stemmed from it. In this British case, again, no CJEU posted workers judgement had been directed toward the UK, so the central unit of analysis of this British case study comes through hugely controversial set of events that occurred in 2009.

These events began with and were led by one central dispute at an energy plant in Lincolnshire, eastern England. This is outlined briefly here but described in detail in the first section later. An Italian company employed posted workers on a subcontract it was awarded to perform at an energy depot in Lindsey, in Lincolnshire. The company was then to be accused of not applying the collective agreement of the British construction sector, sparking an unofficial (i.e. illegal⁴⁹) strike at this Lincolnshire site. From this, a wave of disruptive solidarity⁵⁰ actions spread across the British construction sector as well as adjacent (other construction) sectors. The disputes were given further political prominence by a context provided by Prime Minister Gordon Brown, whose quote from the Labour party conference in the previous year, 'British Jobs for British Workers', was adopted as ironic slogans by strikers on their strike placards. The strikes became serious enough to prompt a meeting of 'Cobra', the UK government's cross-departmental emergency committee usually convened in the event of serious incidents such as terrorist attacks (Randall 2009).

The dispute was ended by a settlement with the strikers, their trade unions and the contractors and sub-contractors involved. This was despite the striking workers and their unions being offered little in EU and UK law

⁴⁹ 'Illegal' here means that the strikers can be subject to sanction under *civil law* for breach of contract and tortious liability (economic damages of the employer) and not *criminal law* sanction. (TULRCA section 220, 241. Deakin and Morris 2009, p. 897-915)

⁵⁰ Also known as 'secondary actions'

that supported either their industrial action or the new collective agreement the strike helped forge. In fact, the state of the law (both European and British law) provided employers with a strong set of rights to bring the strikes to an end. Therefore, the empirical subjects of this case study prompt a clear question: if the legal rights at issue so clearly favour employers and not workers, how did the latter manage to forge a regulatory and governance outcome that clearly contradicted it? The answer is found in a contradiction between *de jure* rights of action *de facto* rights brought to bear by the power resources of unions; powers not evident in the other three case study chapters.

These events of 2009, placed under the broad label the 'BJBW dispute', therefore provide the empirical basis of this case study. A further analytical line of enquiry is pursued using the arguments of labour lawyer Claire Kilpatrick as an operational hypothesis. Kilpatrick's argument is as follows: the CJEU *Laval* and *Rüffert* decisions "contributed to the widespread social unrest in the UK" and [...] created a 'regulatory conundrum' for member states as they were now unsure how to impose their own wage norms upon posted workers on their territory (Kilpatrick 2009b, 2009c). It is difficult to empirically validate Kilpatrick's claim, *ex ante*, that CJEU decisions were responsible for provoking the dispute in the first instance. In examining this case, it is argued however that it is highly likely to have been the case in one key respect: employers identified and sought to exploit new legal rights found in the CJEU's *Laval* and *Rüffert* line of case law. Moreover, it is argued in this chapter that these CJEU decisions were influential *in the aftermath of the dispute*, and framed a negotiated settlement that ended the dispute.

Crucially and theoretically, this settlement acted to pull the regime of labour relations in question *away from the reaches of legal encroachment*. The text of the collective agreement that defines this 'negotiated settlement', other

documentary and interview data are used alongside the kind of analysis of legal texts seen in the previous chapter.

This chapter, as with the other three case study chapters, is organised into two broad sections, an empirical section and a theoretical section. The first section (2.4.2) begins with a more detailed description and mapping of the BJBW dispute (2.4.2.i). This is then followed by a legal analysis section of this dispute and places it within a comparative context with the *Laval* and *Rüffert* cases (2.4.2.ii) which is important given the absence of any similar case concerning Britain. The section is completed by a dedicated section examining the new collective agreement forged as the settlement to the dispute (2.4.2.iii).

2.4.2. Empirical section

2.4.2.i Context: the 2009 Lindsey dispute

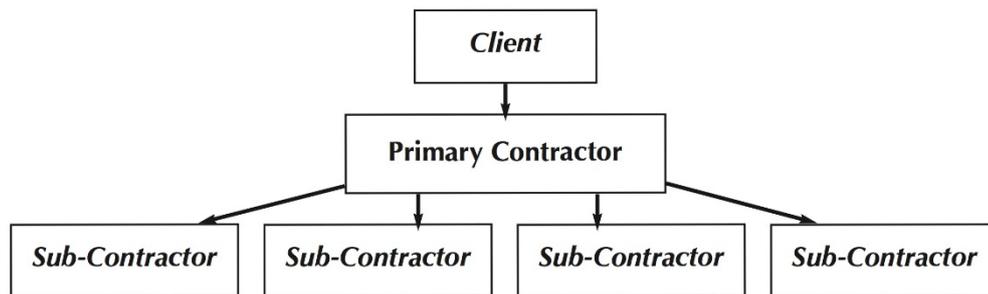
This section provides a contextual mapping of the original BJBW dispute. Some aspects of industrial context are outlined first. These disputes occurred within the energy and power segment of the construction sector, but was covered by a collective agreement mentioned above for the engineering and construction sector (the NAECI). As witnessed in the other Britain-focused (acquired rights) chapter, collective bargaining institutions included a 'national joint council' (NJC), a body that acts as an intermediary actor that governs the collective bargaining process for that sector. In this case concerning Britain constructions sector it was termed 'NJCECI'⁵¹. The employers' association was called the EICA⁵² but identifying 'the employers' and 'employer interests' in this sector is more complex as this actor is not

⁵¹ NJC's are the organisations set up by both sides of the pay bargaining relationship to manage collective agreement issues, as noted in the other UK focused chapter.

⁵² Engineering and Construction Industry Association.

singular, but represented by a primary contractor and a series of subcontractors that are awarded contracts by this primary contractor. The figure from the previous chapter is used again to illustrate the multi-faceted and multi-level reality of 'employer interests'.

Figure 2.4.a contracting supply chains



To make things more complex, the primary contractor is often awarded the overarching contract by a 'client'. In short, a major part of the 'regulatory and governance problem' sees unions and the NJC not merely trying to get *one employer actor* to adhere to the collective agreement (the NAECI), but make sure it is adhered to *throughout* the primary contract's sub-contracted parts.

The BJBW dispute arose because of the use of foreign 'posted' workers by a foreign subcontractor and had two connected issues at the centre of the dispute: one, the sensitive migration politics resulting from *the use of posted workers over native workers*; and two, *the wages of the posted workers and how these compared to 'native' workers*. The dispute centred around the building of a hydro de-sulphurisation facility at the Total oil refinery in Lindsey, Lincolnshire. An Italian sub-contractor, called IREM⁵³, won an emergency tender to fill in a previously dropped subcontract as part of the project.

⁵³ Company website: <https://www.irem.it/en/company/>

Crucially, IREM brought in 200 Italian and Portuguese ‘posted workers’ to perform the subcontract. As IREM carried out the contract, complaints from native British workers began to emerge around the two points earlier: the hiring of foreign workers in question and their pay. On January 28th, workers embarked on a walkout and then blockade of the site involving 3000 workers (Ince et al., 2015, Booth 2009⁵⁴). As the dispute at Lindsey became more serious, other solidarity or ‘sympathy’ actions arose at a large number of refineries and depots throughout the UK⁵⁵.

In the June of 2009, another unofficial strike was pursued by an initial 180 workers that grew to over a thousand at Lindsey and solidarity strikes totalling 8000 workers across the UK (*ibid.*). In truth, the conditions of this dispute, with the use of foreign posted workers at their heart, were present in the years prior to the BJBW dispute at Lindsey. This sees the dispute of 2009 act as the culminating event of on-going changes within a British construction industry that was becoming more transnational in terms of the companies bidding for contracts and the workers that were sourced to work on them⁵⁶; these same developments were also evident in the *Laval* and *Rüffert* cases raised in the previous two chapters.

The legal and political context in Britain at the time made this dispute, and its outcome, peculiar. The strikes in Lindsey and beyond were ‘unofficial’ as no formal balloting process took place so were organic in nature and not the result of formal, top-down union organising that would have culminated in a strike ballot. Reforms in Britain after the 1980s had heavily restricted the right to strike and had completely banned secondary/solidarity actions. The organic nature of the strike, that elevated

⁵⁴ Booth, R. The Guardian (2009) ‘Mediators called in as wildcat strikes spread across the UK’. The Guardian 31/01/2009

⁵⁵ BBC News online (30/1/2009) ‘Refinery strikes spread across UK’ [accessed: April 2014] available from: <http://news.bbc.co.uk/1/hi/uk/7859968.stm>

⁵⁶ Interview with NJC official (BPWD1)

rank-and-file union members rather than senior union officials, put the leadership of the trade unions in a difficult position.

Despite being caught on the back foot, the trade union *officials* (not *lay members* who initiated the strike on site) were central to ending the dispute through a negotiated settlement involving the primary contractors and IREM and a reformed collective agreement (NAECI). The settlement with IREM brought 102 new jobs on the same offending subcontract, with most of these going to local workers (Gall 2012). IREM still did not reveal however, interestingly, what rate they were paying the posted workers⁵⁷ in the original dispute. The new collective agreement is examined below.

2.4.2.ii The Settlement: collective bargaining and collective action in the shadow law

The 'settlement', as labelled above, comes in four parts: the resolution reached with IREM that saw new job offers for local/native workers; the rescinding of dismissals ordered for striking workers, and the reformed NAECI and a new pay audit⁵⁸ regime where contractors must disclose their rates of pay. The focus of this sub-section is on the new collective agreement and the pay audits. This is pursued in data terms with the use of the text from this new NAECI, some accompanying documentary evidence in the form of these pay audits and interview data from the trade union side and from the NJC⁵⁹.

⁵⁷ A year earlier, the Alstom dispute in Staythorpe, Nottinghamshire produced a similar set of facts concerning hiring preference and the rates of pay that undercut the NAECI.

⁵⁸ Documentary sources BPWDdocC1, BPWDdocC2, BPWDdocC3 (in Appendix) were provided important contextual information by interview BPWD2

⁵⁹ I was also allowed to attend a cross-union meeting of officials from Unite and the GMB unions which was extremely useful to provide practical context to the post-2009 NAECI's application, seven years after the dispute.

There are two interconnected reasons why this new collective agreement is important: First, the contents of the new post-Lindsey NAECI came directly as a result of the 2009 BJBW dispute⁶⁰. Second, with an eye on the contextualised legal analysis noted above, this new collective agreement and attached reforms were designed with full knowledge of the CJEU decisions in *Laval*. Third, despite the knowledge on the part of the authors of the current state of EU law, the new collective agreement at several points contravenes current EU law, including these CJEU decisions in *Rüffert*, *Viking* and in particular *Laval*. Fourth, and looking forward to the theoretical section of this chapter, as this new collective agreement provided an *on-going* ‘settlement’, it constituted a reinforcement of the labour relations regime, at least for that in this sector. In doing so, it resolves a ‘conflict of rules’ problem between this collectively bargained settlement (the NAECI and pay audits) and set of legal rules found in UK and EU law. It does however create a new conflict of rules problem given that this new agreement contravenes EU law as defined by the CJEU’s *Laval* and *Rüffert* decisions concerning collectively agreed pay. This conflict of rules however *has been allowed to remain*, at least up until Britain’s exit from the EU⁶¹.

The new post-2009 NAECI⁶² was demonstrably different from that in place before 2009 because of the inclusion of a new provision called ‘Appendix G’. The BJBW dispute was in fact the reason behind Appendix G’s inclusion in the NAECI and was confirmed in interviews with union (BPWD2) and industry officials (BPWD1). Appendix G specifically sought to regulate “non-UK contractors and non-UK labour”. The third paragraph

⁶⁰ Interviews confirmed this, but copies of three post-Lindsey NAECI’s were sourced (Appendix: BPWDdocA1, : BPWDdocA2, : BPWDdocA3)

⁶¹ With this said, and by the time this thesis submitted, it is not clear if EU public procurement law, or other single market law, would apply to the UK as part of any EU exit or transition arrangement. No speculation is offered here on this point.

⁶² For the period 2010-2012 period, and all the successor NAECI’s signed since.

(third bullet point) of provision G.2 states that ‘managing contractors’ must “ensure that the non-UK contractor is aware that the project requires all “in-scope⁶³ labour” to be directly employed under the terms of [the] NAECI”. This underlines a demand that all terms of the NAECI, including the pay scales, must be adhered to by non-UK contractors. The demands for foreign contractors to apply to the NAECI rates of pay to their posted workers, again, contravenes the CJEU decisions in *Laval* and *Rüffert*.

Two important pieces of evidence from interviews were produced on this point concerning the NAECI rates of pay and EU law. The union official indicated that the CJEU decisions in this area were a concern and indicated that a number of lines of legal liability in UK and European law did weigh down this new post-2009 NAECI⁶⁴. The interviewee from the NJC, well placed to speak to both the interests of unions *and* contractors (employers), also spoke to some of these issues, the important ones being why employers agreed to the NAECI. There was considerable tension in the points this interviewee made. On the one hand he indicated that Appendix G was merely “advisory” and “guidance based” and that EU public procurement law demanding EU-wide advertising of contracts could not be ignored⁶⁵. On the other hand he clearly stated that that foreign contractors who enquired about bidding were told in no uncertain terms that they had to adhere to the NAECI collective agreement as they would be “in serious trouble” if they did not. In describing why this needed to be laid out to prospective foreign contractors, the NJC official said that the threat of union unrest hung heavy over these issues of work and pay and that any disruption would be profoundly serious *from the client’s perspective*⁶⁶. He described in detail the

⁶³ In the scope of the NAECI

⁶⁴ Interview BPWD2

⁶⁵ Interview BPWD1

⁶⁶ *Ibid.*

highly time-sensitive nature of construction sector contracts in that if work was completed late or was faulty, the client would claim 'liquidated damages' per terms agreed for such damages in the (sub-contract).

This is an important point theoretically and speaks to this tension in the regulatory and governance regime crafted after 2009 and how it is applied in the shadow of law, particularly the demands of public procurement law. Clearly, both the union and employer side were highly conscious of the legal straitjacket raised by issues in UK and EU law, but employers were aware of union strength and of the costs of contracts not being performed or done on time. Thus, a meeting of interests, directed powerfully by workers' power resources, acted to create a wage settlement that could operate in the shadow of law.

The interviewee from the NJC however did note that contractors were not 100% obedient to the regime, stating that they were often "quite cute" in how they observed the terms of the NAECI⁶⁷. This statement leads neatly to an ancillary but important development concerning wages that arose from the BJBW dispute: the creation of pay audits used to probe a contractor's finances to check if they were paying full NAECI rates of pay (NAECI 2010-2012, pages 68-82).

Importantly, the use of pay audits also saw the machinery of the NJC used to demand access to contractors' finances to check that NAECI pay rates were being. These have been used as a powerful tool since 2009⁶⁸, yet there was still evidence of foreign employers (and in fact UK employers circumventing the NAECI pay rates⁶⁹, with the result of enforcement drives still leaving open questions regarding how easily and quickly this was rectified. One unverified point was made by the union official that some

⁶⁷ Interview BPWD1

⁶⁸ Interview BPWD2

⁶⁹ *Ibid.*

foreign contractors paid back their posted workers the wages they were owed, after the former failed the pay audit, only to have it taken off them again back home⁷⁰. The account of one union official however noted the satisfaction with the pay audit operation as a means of enforcement (*ibid.*).

The legality of these pay audits under the CJEU's new interpretation of EU law is highly questionable, given CJEU decisions concerning 'unnecessary administrative burden' in the *Mazzoleni*⁷¹ case. Again, this has not been tested in court and, unlike the pay demands in provision G.1, is less clear how the CJEU would decide. It is thought highly however likely that these 'administrative burdens' would be struck down as they concern pay and are attached to a collective agreement that would most certainly be struck down by the CJEU given the *Laval* and *Rüffert* decisions.

The second issue, away from wages, concerned preferential hiring of native or non-UK labour and also raises this 'administrative burdens' problem of this *Mazzoleni* case. Here, EU law has been clear for a long time: free movement rights are fundamental and discriminatory hiring practices are illegal.

The second paragraph of G.1. in Appendix G stipulates that employers (contractors) have the right to recruit workers from any part of the European Union as required by the project in question. This couches the Appendix G in language that conforms, broadly, with basic European free movement law. Provisions G.3 ('Advance Notice') and G.4 ('Equality Opportunity for UK Workers') exhibits a similar linguistic attempt to respect EU law yet simultaneously raising serious questions as to their legality in EU law. Clause G4 builds on this and skirts the edges of legality in EU law. G4 states that a "contractor should explore and consider the NAECI trades that are available

⁷⁰ Interview BPWD2

⁷¹ Case C-165/98 (2001)

locally” and “should enter discussions with local job centres” to this end. The use of such equivocal language (‘should’, ‘consider’) suggests an awareness of EU law, but does again produce a two-pronged breach of EU law as it brings in the *Mazzoleni* problem in regards to administrative burdens *and* a breach of EU free movement of *persons* law with these measures that would discriminate against foreign labour.

The CJEU’s 2001 *Mazzoleni* case is again relevant. In this case, the CJEU took a restrictive view on the ‘administrative burdens’ that could be imposed upon the use of posted workers. G.3 states clearly that managing contractors “must not allow a situation to occur whereby non-UK labour has already been mobilised to site before the trades unions have been formally advised in a reasonable timescale”. This is notable as it not only demands that efforts be made at local hiring, which has free movement and administrative burden based problems, but it also inserts trade unions into a position to regulate the use of UK labour over foreign contracted labour. This acts as an administrative hurdle for a foreign contractor looking to employ labour. These would almost certainly be deemed illegal by the CJEU if these issues were ever brought before it in a court case. It is not clear that the administrative issues raised in *Mazzoleni* were noted by union or NJC officials, but the free movement issues were.

This ‘settlement’ did therefore bring an end to a serious dispute and provided a reformed labour relation regimes to this sector. The difficulty for unions to do this with a fragmented and multi-national employer interests to police presents an on-going struggle for its enforcement.

Kilpatrick’s claim outlined in the introduction to this chapter is returned to. It is not possible to empirically verify whether the *Laval* and *Rüffert* line of case law contributed to or triggered the conditions and events in Britain in 2009 *ex ante*. The reasons for this are, firstly, the Italian company

or any employer interests could not be sourced for an interview to explore this point. Secondly, it is not likely that any testimony they give will be either reliable or useful. What was evident is that the reformed NAECI agreement was done with an awareness of EU law and these *Laval* and *Rüffert* cases above.

It should however be noted that the rapidly increased internationalisation of the market for construction project contracts was clearly a key part of the conditions for the disputes in Germany (*Rüffert*), Sweden (*Laval*) and in this case concerning Britain. This market dynamic is clearly reinforced by the introduction of European public procurement law that frames how contracts of particular size are advertised and awarded in this transnational market place. The effect of EU posted workers law in Britain however is, again, clearly only *indirect*, as there was no transposing legislation in Britain of the 1996 PWD and no CJEU posted workers case concerning Britain. These CJEU cases however did have an *indirect* effect *after* the disputes of 2009 as it impacted how collectively bargained wage rules were reformed. This is not to dismiss Kilpatrick's argument out of hand that the CJEU *Laval*-line of cases *ex ante* created the conditions for the BJBW dispute. It is highly probably that this was an important incentive factor within this broader internationalisation of the industry.

The empirical niceties of this line of enquiry act as a foil to produce theoretically useful material for this thesis' core purpose. The relationship between a range of legal rules (both national and European) and non-legal rules found in collective agreements and those concerning trade union action is theoretically significant.

2.4.2.iii De facto versus de Jure state of legal rights

Some key aspects of the above are remapped before moving onto the theoretical second section of this chapter. The BJBW dispute concerned two main issues: wage rates of native and (foreign) posted workers and access to work of local workers and these same foreign posted workers. There is however another important legal question concerning *industrial (strike) action*. Given the similarities of the BJBW dispute to the *Laval* case, there is little doubt the CJEU would decide this strike action (both initial and secondary strikes) would be illegal obstructions of a company's free movement rights under EU law. There is little doubt the British courts would find both the initial and secondary action to be illegal under *UK labour law* as the initial strikes were not called by a legally required ballot and the secondary actions are entirely illegal (ballot or not). With this context, unions and employers on site knew that the latter had a powerful set of legal rights available to them actionable in either European and UK courts.

So why did the mix of employer interests (client, primary contractor, subcontractor (IREM)) negotiate with unions? The industrial context is important in this case. The requirement and pressure to finish these contracts on time was such that employers were desperate for this disruptive dispute to end and not be repeated. The loss of profits due to non-completion and fines provided a powerful incentive. This was confirmed by interviews with NJC official⁷² and contextually by employers rescinding the ordered dismissals of striking workers. Theoretically this is very important as, again, social partners acted to craft a new regulatory and governance arrangement for a labour relations regime so as to pull it far away from the reach of courts and legal sanction. At the time of writing (2018), some nine years after the dispute, this new arrangement has held, and with Britain's expected exit

⁷² Interview BPWD1

from the European Union will not live under threat of sanction by a European Court.

An interesting hypothetical point is raised through this question what would occur if CJEU was asked to pass judgment on this dispute. In short, if the CJEU did produce a decision similar to *Laval* (as it would be expected) and strike down this new NAECI and the strike action. *What would have then occurred* if these illegal strikes continued regardless or had even escalated? the implications for the rule of law as an abstract ideal is serious. The implications for the rule of *European* law, and the supremacy doctrine, even more so.

Britain has seen violent industrial unrest before, where trade unions engaged in illegal revolt against employers and the state (notably in the 19th Century as well as after WWII). The British government, courts and police may well be used to break a strike, however messy this might be. Would the British government and courts however sanction such a response at the order of the *European* Court to enforce *economic* rights of free movement? This would effectively see *economic* law being the legal prompt to the use of legal criminal sanction exercised by national police forces as the EU does not possess such policing powers. It would also see a politically unpopular use of the British police to break a strike in the name of EU law. The effective criminalisation of labour relations to impose economic rights for employers, and the EU ordering British police actions against a strike, would be very controversial. In Sweden however, the unions obeyed the decision and strikes were ended. It is an interesting consideration for the rest of Europe and labour relations regimes given that some member states have the sort of conflictual labour relations seen in Britain.

The main reason why this is important, besides any interest in European integration and European political economy, is theoretical. With

an eye on the next theory-focused section of this chapter, this case underlines the importance of the social setting in question in which law is applied and responded to. This social setting in this case was marked by conflict, as internationalisation of the market for these contracts brought new competition for wages and jobs. The extent that law is applied as intended by its creators varies between different contexts. In *Laval*, the CJEU got its way. In this rather similar *Laval*-Like British case, the new rule established in the *Laval* and other cases was effectively annulled by the settlement and new NAECI. These points about social setting therefore underlines just how far 'the rule of law' can be reframed or even have its desired effect nullified. A similar variety of this is raised in the next chapter.

2.4.3. Theoretical Section

This case study represented a different form of dynamic relationship between labour relations' legal and collective bargaining components, and in essence saw the latter retain its dominant role in the regime of labour relations that existed in this industry. Moreover, this case study produced a prominent role for collective *action* in defending and reinforcing collective *bargaining*. Unlike the previous German posted workers case study, this did not involve a *direct* legal intervention by a court. The role of legal rights, found in the CJEU's case law and UK legislation, was however still very prominent as these provided potent reinforcement for the power resources of employers. These legal rights however were delivered only in an limited and abortive attempt one segment of the employer 'interests' in this case (Italian contractor IREM) and were eventually nullified and made irrelevant to the labour relations and work-wage bargain that workers actively sought to preserve.

The nature of these attempted regulatory and governance changes in this model of labour relations are addressed first, followed by the important *conflict of rules* scenarios presented at both the beginning and the end of this case study's time-line. Given the prominent role of industrial action in this case, important theoretical findings concerning the overlapping roles for mediation, negotiation and conflict are also examined. These points are then directed toward to some pointed observations in regards to CPE.

2.4.3.i Collective action, collective bargaining and comparative lessons for British labour relations

Three interlinked and simple theoretical themes are identified and addressed in this sub-section. The first and leading category is the regulation and governance *problem*. The second is the *response* to this and the third is the *outcome*. In this case study, and unlike in the previous chapter (Germany-Posted Workers) where the 'outcome' was decidedly incomplete⁷³, a clear and discernible outcome was produced by a process marked by considerable conflict. Comparisons with the previous German posted workers case are joined by those from the Swedish posted workers example found in the *Laval* case to explore features concerning collective *action* and its relationship with collective *bargaining*.

The principal 'problem' from the perspective of trade unions was a threat presented by business seeking to invoke new legal rights in EU law that would undermine a settled labour relations system and work-wage bargain. As Gregor Gall (2012) notes, the model of work organisation that defined this 'work-wage bargain' in the construction industry was temporary and project-based, but despite this was accepted by workers given the

⁷³ As defined by the *RegioPost* case.

expectations that once one project ends new work would become available (Gall 2012). The use of (foreign) posted workers, as was claimed, threatened native workers' future access to work as well as their pay rates and a wage-setting system being subject to downward pressure by posted workers being paid below wage norms set by this system.

This provoked an organised and aggressive *response* by unionised workers on-site, rather than the union hierarchies promoting strike action through a formal ballot as required in UK law. This response grew to be national in scope and then prompted policy-makers to intervene by promoting conciliation (rather than legislation, as seen in Germany). This response was led however by social rather than political actors, unlike in the German-Posted Workers case. It was also clearly effective and successful as defined by the *outcome* defined by a labour relations regime, already defined in large part by collective bargaining institutions, being pulled further away from the reaches of unfriendly law. Theoretically speaking, this settlement did not as such *recast* the form of already collective bargaining-dominated labour relations, but saw this collective bargaining mode of regulation and governance *take on an even greater role than it had previously*. This is a very pertinent finding, as, in essence, the relationship between law and bargaining here became an even more distant one despite the intentions of employers to invoke new legal rights in EU law and to enhance the role of law and legal rights of business. More broadly, this is significant for contemporary efforts to understand European labour relations as it elevates the role of industrial action in forging alternative labour relations solutions and settlements. This also occurs in conflict with neo-liberal forces of change pursued by policy-makers, courts and business actors.

This point concerning the relationship between collective bargaining, industrial action and legal rules is addressed in more detail, with a three way comparison of the *Rüffert-Laval* and BJBW examples.

Unions in the *Laval* and BJBW examples possessed strong power resources and therefore could use a strike to force a concession from employers. It did not work in the *Laval* example as the dispute ended up in court and the strike action was struck down. The judicial outcome did not materialise in Britain as the offending company (IREM) did not seek litigation but negotiation, due in part the company in this British case was still solvent and able to operate the contract whereas the company in the *Laval* and German *Rüffert* examples went bust. In Germany, the unions were not the reason the company (Objekt, whose assets Mr Rüffert was liquidating) ceased trading, but the enforcement actions of the German state.

Sweden, in the *Laval* case that bore considerable similarity with this British case, had not seen strike action such as that in this *Laval* case given that native employers had long accepted this 'social partnership' with trade unions in setting wages thus reducing the prospects of conflict and strikes. This emphasis on 'social partnership' defined Sweden's 'autonomous collective bargaining model' (Malmberg and Sigeman 2008). Swedish unions in *Laval* were however forced to strike, similarly to the British case, as a result of the threat posed by a foreign company seeking to circumvent this long-standing and accepted model of Swedish labour relations. This relationship between industrial action and collective bargaining is important as the former prompts the latter if employers refuse to bargain with workers voluntarily. Sweden and Germany are identified in CPE as two countries that, after initial formative moments of industrial unrest in the 19th and early 20th centuries, settled upon an autonomous collective bargaining model that needed (and was) accepted by employers (Sweden: Malmberg and Sigeman

2008, Germany: the *Tarifautonomie* model described previously). In Britain, this has not been the case since the heyday of *collective laissez faire*, but the construction industry has performed the role of outlier in a post-1980 era in regards to as it has retained an industry-wide collective agreement, organised unions and an NJC.

This three-way comparison of Sweden's 'autonomous collective bargaining model', German *Tarifautonomie* and British *collective laissez faire* is engaged further to examine this relationship between collective *action* and collective *bargaining*. To reiterate, autonomous collective bargaining (where unions and employers lead a process of wage-setting with little interference by the state) has been far more successful in Sweden and Germany than it had in Britain where the governmental state has had to take a more active role (prior to 1980) to make such a system work. There were moments however in Britain's past where *collective laissez faire* did take root with little interference from the state and this case study had clear echoes of these. There are also similarities however with earlier periods in Germany industrial history where collective *action* did force negotiations with the interests of capital and the state. It is not claimed from this that British labour relations in general will conform to this sort of process and outcome. The industrial specificities for one are too different from those other sectors that dominate Britain's modern economy.

What this case study does provide however is more of a theoretical abstract of the collective *action*-collective *bargaining* relationship and the relationship of this dual dynamic with law and legal interventions and particularly those aligned with ideals of neo-liberal legal change. The economic specificities are combined with sociological factors of power resources in this case study to produce a very simple collective *action*-collective *bargaining* relationship, but one defined by contestation and

conflict and *eventual* cooperation. Strong demonstrations of *collective action*, borne of strong power resources from labour, will not and have not always produced the employer climb-down evidenced here. This scenario was a feature of British labour relations in the 1960s and 70s, as discussed in chapter 2.1.

The reasons why some countries produce more *cooperative* labour relations (like the Swedish and German historical cases) whilst some produce more *conflictual* labour relations (like Britain and France), are met with answers drawn from sociology or economics (Feldmann 2006). Sociological explanations point to cultural factors that exist within practices and characteristics of business, trade union actors, and broader societal contexts (e.g. religion) as well as power structures. Economic explanations point to factors that centre upon various concerns of economic production. For example, if labour productivity is not high enough (historically a problem in Britain) employers will be less inclined to agree to wage increases demanded by workers without increases in productivity. This productivity bargain defined the Fordist 'wage-labour nexus' discussed in chapter 1.2. To raise another example, if employers know that the skilled labour they need for production requires offering higher wages to attract such labour, they will then be more likely to offer these.

This case study forcefully demonstrates the combined importance both these sociological and economic explanations. Economic factors defined by the industrial specificities of the construction sector (contract-based, temporary project-based form of work organisation) were centrally important as workers could exploit the time-sensitive nature of this industry's economic form of production to maximise the effect of their strike, thus introducing this sociological aspect of power and power resources with these economic factors.

Again, there is one main difference between the *Rüffert*, *Laval* and British Examples. In the Swedish and German examples, litigation was prompted in large part by companies going out of business (as there was no other recourse or position to negotiate from). Each case study told us something pertinent but slightly different about how labour relations systems change based not only on the nature of those market and legal drivers to change them, but also by the responses to these pressures.

2.4.3.ii Conflict of rules, negotiation and contestation

The thematic features of *negotiation and contestation* are inextricably connected to the *conflict of rules* concept. Two principal conflict of rules scenarios are present at both ends of the time-line that define this BJBW dispute. The first, at the front end where the dispute began, saw new legal rights found in the CJEU's interpretation of the PWD being invoked by an employer actor (the Italian contractor, IREM) coming into conflict with the established collective bargaining-dominated regimes of labour relations in the British construction sector. This conflict of rules presents a neat 'law versus collective bargaining' contest as the first sought to undermine the latter by allowing employers the legal right to ignore the pay rules of the collective agreement they had signed.

A conflict of rules of a similar, but importantly different sort, existed at the end of the time-line marked by the negotiated settlement. These new legal rights in EU free movement law, ostensibly, still existed 'in law', but because of the strike action and the settlement it produced were made irrelevant. This 'settlement' created new rules which were clearly in breach of the CJEU's ruling in *Laval* and *Rüffert* concerning pay rules in collective agreements being imposed on posted workers. As illustrated in this and the previous posted workers chapter, 'employer interests' in the construction sector context are multi-faceted in nature. It is important to separate

domestically based employers, that make up most of the client and primary contractors, and many of the sub-contractors and *foreign* contractors whose presence in the sector is less permanent. This makes domestic contractors, and those with a more permanent presence, more invested in the pre-existing modes of regulation and governance and the relationships with labour this entails.

This meant therefore that employers had greater incentive to negotiate this settlement besides the strike action (that coerced them to negotiate), despite the new rights available in EU law, and these would have to outweigh those of foreign contractors who were less invested in pre-existing relationships in Britain. IREM, the offending subcontractor from Italy, could not (predictably) be sourced for an interview or other data, but it would make sense that their interest in negotiating rather than litigating did not just come from pressure from their primary contractors (who gave them the subcontract), but also with the expectation of later contract awards or perhaps to protect their reputation (which was damaged with this dispute). This cannot be proven, but given the powerful legal rights available to IREM in UK and EU law it is likely the company were pushed towards the same negotiation strategy as main employer interests at Lindsey (the ECIA, the client).

This is important, as it does not merely highlight the role of trade union actors and their militant strike action but also the strategic actions of employers to either concede or to contest this strike action. This highlights socio-economic relations the crucial aspect of social context where law is mediated, shaped and directed towards outcomes it may not have been made for. *How* law matters, and *when*, again is part of social reality as much as a doctrinal one. This appears far truer in this case study compared to the

preceding one concerning Germany, where the response by social actors was framed far more heavily by a judicial decision and legislative actors.

2.4.3.iii CPE, Britain and labour relations

Leading CPE theories are presented with some serious problems as a result of this case study like the German case that came before it. In regards to the VoC approach, Britain's apparent liberal, market orientation, on its face, is contradicted by the findings of this case study, particularly the aspects of employer freedom to pursue flexible production strategies and use of a weak labour actor in the process. Employer prerogative was not the guiding principles here. Again, the purpose of this case study was not to demonstrate that aggressive strike action successfully forcing concession from business was that which defined *British labour relations*. More an abstract theoretical demonstration of how aggressive interventions of neo-liberalism inclined legal change are responded to. Even in 'liberal' Britain, the interventions of neo-liberal legal change to do not produce *outcomes* that align with this features that afford Britain this 'liberal' label.

To repeat the point, an abstraction of a classical *collective action-collective bargaining* relationship, that challenges attempts at neo-liberal re-ordering of a labour relations regime, is the principal lesson drawn from this chapter. There is however some relevance to a broader British idea of labour relations particularly given Britain's history with labour unrest and traditions of 'collective laissez faire'. CWC and the power resources branch of CWC therefore has particular purchase when industrial action and labour conflict is central to the case. The different forms that legal intervention take however challenge how these power resources can be used. A direct judicial intervention (alla *Laval* and *Rüffert*) may well have ended this dispute in

employers' favour, although it is, again, felt highly unlikely that striking workers would have ended their already illegal strike this way.

VoC scholars may, based on that in the previous sub-section, highlight the role of employers in accepting a negotiated settlement, identifying their profit interests in reaching a settlement. Power resources scholars from within CWC would, correctly, highlight the pre-eminent role of organised labour in pushing employers to this position as employers' 'first order' preferences were not to negotiate but to resist and punish striking workers⁷⁴. For similar reasons concerning questions of power resources, Marxist-rooted RT has an interesting position with such a case study. As argued in the review chapter 1.2, Heino and other regulationists emphasise the destructive, incoherent and non-functionalist effects of social conflict that result from neo-liberal reordering of the wage-work bargain that defines the 'wage-labour nexus' of this sector⁷⁵. Placing this in terms of thesis' conceptual framework, a conflict between new imposed legal rights and the labour relations regime in place produced an incoherent and problematic regime of regulation and governance, one that required a response that reaffirmed this regime despite it not confirming with the 'law of the land' (EU law, in this case). In this, legal rules were governed by one logic and the non-legal rules found in the established collective agreement and mode of job access provided another; legal rights in EU law and the rules contained in the post-2009 NAECI sit in conflict. At the time writing, and nine years hence, this 'settlement' has not changed nor has been further threatened with Britain's expected departure from the European Union in 2019 will therefore remain in place.

⁷⁴ Companies initially dismissed striking workers, only to rescind these later

⁷⁵ Marxist Gregor Gall, sourced in this chapter, describes this destruction of the wage-labour nexus in this way, although there is some debate in RT whether the concept can be applied below the macroeconomic level for which it was designed.

2.4.4. Conclusion

This chapter presents some important points of comparison with the previous chapter. It also has an important place in a broader four-way comparison when sat next to each of the other case study chapters in this second section.

Firstly, it demonstrated the power that workers and their unions have in shaping the regulatory and governance features of their relationship with employers in particular circumstances, even when their legal environment is not helpful to them. Theoretically speaking, this chapter represents a powerful example of how interventions from the realm of law, however distant, can provoke a response from the actors concerned that can result in a very different (if not opposing) outcome and in law being pushed away and minimised.

This chapter is unique in regards to the other three case studies given this strong role of collective institutions. It is in fact the only pertinent example of industrial action out of the four case studies. It does however, bear greater similarity with the following case study concerning Germany and the acquired rights directive (ARD) given the complexity of the legal and labour market issues at hand. The German-ARD case also sees an attempt at legal intervention, from the legislation on acquired rights (the 'ARD'), being completely nullified by the collective institutions in place as seen in this chapter. The difference however comes with the fact that is now workplace works councils in Germany that perform this responding role, and require ample assistance from policy-makers like in Germany PWD, and sees collective bargaining weakened; all this despite the ARD's ostensible (and original) goals to enhance workers' rights.

This again is what gives this chapter its comparative value: demonstrating the role that collective *bargaining* and collective *action* can play

in adjusting to shifts in the legal aspects of labour relations' regulation and governance if the right conditions are in place.

Chapter 2.5.

German Labour Relations and European Acquired Rights law

2.5.1. Introduction

Unlike the previous chapters, where aspects of law either were (or threatened to be) a disruptive influence, this chapter sees the principal area of law under examination – the Acquired Rights Directive (ARD) – effectively annulled as its provisions were massaged into a pre-existing, yet still developing and changing, German labour relations context.

This context was one defined by neo-liberal reform and restructuring agendas and their destructive influence upon collective bargaining and co-determination institutions. The empirical subject matter of this case study represent something of puzzle. German collective bargaining and co-determination institutions, that represent the twin pillars of German *Tarifautonomie*, should together provide mutually reinforcement for those provisions of ARD that are directed at shielded workers' 'acquired rights' in the event of a 'transfer of undertaking'. Collective agreements can act as a powerful source of 'acquired rights', and co-determination institutions provide a hugely useful venue for workers to impose their interests upon any workplace reorganisations defined as a 'transfer of undertaking'. Instead, the ARD did not provide the worker protection function it was meant to. Increasingly dominant neo-liberal reform ideas, bringing new industrial practices and specific forms of legal change, instead triumphed seeing employers' rights enhanced and substantive changes to labour relations pursued accordingly. The *regulatory and governance problem* therefore is one felt more by workers and their unions. The problem however is also one

exhibited by an increasingly complex form of labour relations where the influence of neo-liberal politics and neo-liberalism-framed legal rules become more prominent and operate alongside vestiges of the 'old' *Tarifautonomie* regime.

This chapter bears some similarity to the previous chapter (Britain-Posted Workers), in that labour relations actors and institutions took a leading role in adapting and responding to attempted changes to a labour relations regime. This chapter however presents far greater complexity as to how this adjustment process took place, and the implications and outcomes for workers and unions were distinctly worse in this case study. Additionally, when sat next to the first case study chapter, also concerning Germany (2.3), this case study produces some important findings for both German labour relations and for CPE more broadly. The decline of institutions of German collective bargaining are again evident, even with the existence of legal rules found in an ARD that could have reinforced these. In contrast to the previous case study chapters, this case study does however present some opportunities for existing CPE approaches to offer alternative explanations to those at the centre of this thesis. The prominent role of neo-liberal politics in this case study however acts to undermine pre-existing CPE accounts, and again points to an emerging German labour relations reality that challenges leading CPE approaches to German capitalism more broadly.

The theoretical contribution of this chapter elevates the role of *conflict of rules* problems. The relationship between the ARD and neo-liberal agendas represented a clear *conflict of rules*, as the ARD represented an attempt to impose *social rights for workers* onto processes of restructuring that were usually pursued to further the *economic rights for, and interests of, employers*. A 'choice of rules' needed to take place and did so with the ARD and collective agreements, and the 'acquired rights' these contained, being subordinated

below those rights of employers. This occurred even if it meant undercutting workers' rights and wages in the way the ARD explicitly intended to outlaw. This process of subordination was a distinctly political one, defined by neo-liberal *political* objectives, but had also some important reinforcement from courts and (supportive) *legal approach* to neo-liberal restructuring goals.

The role of courts in this process of ordering legal rights is still very important and comes in two main forms: German courts' willingness to refer cases to the European Court without passing judgement on them first themselves, and the European Court of Justice's own approach to assigning legal rights and policing these conflict of laws problems. This was particularly important in the aspects of this ARD discussion concerning collective agreements. Here, German legislative reforms and the approach of the CJEU acted to complement each other as they adhered to a broadly similar neo-liberal approach to policing conflict of laws problems presented when social protection regulations conflicted with agendas to further employer rights and corporate restructuring agendas.

This chapter is organised according to the same two-part structure of the other case study chapters. The substantive empirical material of the case study comes in section 2.5.2. As indicated in chapter 2.2, two features of the ARD are focused on: *the scope of the directive* and the definition of a 'transfer of undertaking', and the *ARD's relationship with collective bargaining*. The theoretical lessons drawn from this are provided in section 2.5.3.

As indicated above, this chapter relies on both legal analysis and qualitative analysis to develop the case study and findings. This deductive two-pronged approach could not rely on legal analysis alone. The qualitative and deductive analysis employed means some reliance is placed upon industry-level case studies drawn from existing studies as stakeholder interviews could not, as originally hoped, speak directly to the subjects of the

ARD. Legal analysis, provided mostly by judicial decisions, has again however been useful in building a body of evidence when pieced together and contextualised with these secondary-sourced industrial case studies and interview data.

New empirical revelations are not leading the purpose of this thesis, but the complex empirical issues uncovered do produce some pertinent empirical as well as theoretical findings; particularly in regards to how politics and law interact in driving change in labour relations systems.

2.5.2. Empirical section

2.5.2.i the ARD's scope

Industrial restructuring in Germany was politically controversial. Yet despite the ARD's clear relevance to the various forms of restructuring to issues of workplace organisation and wages, the ARD *itself* was distinctly uncontroversial. In fact, most attempts to source interviews for this case study found little interest or knowledge in the ARD. More specifically in regards to the ARD's scope and definition, it is stated clearly that much of restructuring that Germany had witnessed from roughly 1990 onwards was most certainly caught by the directive. It is therefore pertinent to ask why the ARD has been so ineffective in German restructuring. This sub-section will address this leading question resting upon one key judgement of the CJEU, *Süzen* (1997), and three industry-focused case studies. The rights available to workers in the ARD were not activated nor reached for. This was due to a mixture of reasons including union weakness and acquiescence within those negotiated settlements that took place at the industrial level within co-determination institutions (works councils).

An introduction to German transposition of the ARD is outlined before moving onto to the 1997 *Süzen* case. From here, the three sector-based examples, from the hospital, telecommunications and manufacturing industries, are introduced.

Both the 1977 and 2003 versions of the ARD were transposed under section 613.a of the German civil code (the 'BGB'⁷⁶). The German transposition sought to achieve three things. First, business transfers should not alter the continued existence of the employment relationships of individual employees and must serve as an additional system of protection against wrongful dismissal. Second, it sought to ensure the continued existence of works councils. Third, the acquiring party and potential new owner (the 'transferee') assumes all rights and duties of the seller (transferor) arising from the employment relationship existing at the time of the business transfer (Kirchener and Magotsch 2006; p. 253). The scope of 613.a. is to apply to all employees whether they are full or part-time and is applied to those on temporary or permanent contracts. The above appears to mirror the social protection principles of the original intentions and language of the ARD text, rather than re-interpretation of these in the direction of greater commercial or employer rights.

Again however, this black letter reading of the German law adopting the ARD did not translate into a reality where the 'continued existence of the employment relationships' was to be guaranteed; indeed, the opposite outcome was what transpired.

This social protection vs. commercial rights conflict was also at the centre of the 1997 *Süzen* case. A number of different types of transfer had taken place across the German public and private sectors prior to 1997, so this decision had the potential to upset the process of neo-liberal reforms by

⁷⁶ *Bürgerliches Gesetzbuch*

imposing and embedding existing labour relations arrangements that business wanted to reform. The *Süzen*⁷⁷ case of the CJEU appeared to *restrict the ARD's scope* thus favouring employers wanting to pursue business transfers in order to cut labour costs. *Süzen*, despite originating in Germany, was in fact much more disruptive in other EU member states that had already developed settled law on transfer of undertakings regulation prior to 1997. In Germany, the decision was not particularly controversial.

The use of the *Süzen* case in this chapter in fact acts to highlight the *lack of significance and effect the directive had*. It also demonstrated that restructuring was being pursued confidently by employers. Trade unions did not bring the case to court, but instead was brought by an individual litigant. This is also true in the *Werhof* case presented in the next sub-section on *collective bargaining and the ARD*. This is significant as it shows that unions were not interested in forcing the issue with the ARD to access the rights for workers it contained. Given that neo-liberal restructuring was already in motion in many sectors, and union refusal or inability to resist it, the *Süzen* case acted to *affirm and reinforce* already in-train restructuring programmes, despite the impact it had upon labour standards and institutions.

Similarly to the example of EU posted workers law however, this *Süzen* decision represented a reversal of the CJEU's own previous approach that supported a social protection-based interpretation to these conflict of laws problems. In *Redmond Stichting*⁷⁸ and *Schmidt*⁷⁹ for example, the Court argued that disputes involving more than one transfer, thus three or more sets of parties involved over time, were indeed covered by the directive.

⁷⁷ The *Süzen* case was outlined in chapter 2.2, the outline of the case is briefly repeated: Mrs. Süzen was employed as cleaner at a school by a contractor. The school's contract with the contractor ended, Mrs Süzen was dismissed from her job. The CJEU found in the employer's favour, not Mrs Süzen.

⁷⁸ C-29/91 (1997)

⁷⁹ C-392/92 (1994)

These *Redmond Stichting*, *Schmidt* and *Süzen* cases, like so many ARD cases, concerned the work of cleaners and their work being transferred from one contractor to another and then, later, another. In *Süzen*, the CJEU decided that a mere change of contractor was *not* enough for the ARD to apply, moving away from the *Redmond Stichting* and *Schmidt* interpretations, thus attempting to shrink the scope of the ARD. This case presented two problems. First, the implications meant that workers could be laid off as a result of terminating one contractor and picking up a new one, thus *incentivising the practice of pursuing a transfer in order to dismiss workers and decrease labour costs*; a result completely at odds with the intentions of the ARD.

Second, this pulling back of the ARD's scope by the CJEU was not achieved at all cleanly or neatly, and in fact left a great deal of uncertainty about where exactly the new boundaries of the ARD lay. Importantly for this chapter, neither the pre- nor post- *Süzen* period (before or after 1997), saw the ARD being reached for by unions to try demand workers' 'acquired rights' be maintained post-transfer. This discussion of regulatory uncertainty is curtailed here as it is less relevant to this German case, as uncertainty and controversy, again, were not at issue (although it is in the British-ARD chapter that follows). What is significant from the *Süzen* case to this German case study is, firstly, the apparent *insignificance* of the ARD to restructuring processes and trade union strategies even prior to *Süzen*.

This case study from the hospital sector in Germany is provided by Greer et al. (2013). The hospital sector in the 1990s and 2000s had gone through dramatic organisational changes that saw many municipal hospitals transferred out to the private sector through multi-stage transfers. At the earlier stages these hospitals would have been transferred to 'autonomous subsidiaries' which were later subject to mergers and from here then

privatised (*ibid.*). The entities created and then transferred were often subject to changes at each stage of a transfer (*subsidiary > merger > privatised/sold*) with some parts chopped up and sold on with their workers attached and other parts not (Greer *et al.* 2013). As complex as these over-time, multi-stage restructurings were, the ARD was designed to account for these different manifestations of transfer, particularly with CJEU *Redmond Stichting* and *Schmidt* decisions in the 1980s and early 1990s, and to protect those workers from a) being dismissed and b) having 'acquired rights' found in employment contracts shielded from any alteration that might result from any transfer. In *Süzen*, these workers were effectively dismissed *as a result of the transfer* in question. In chapter 2.2, labour lawyer John McMullen was cited describing the 'harsh effects' of *Süzen*. This description is true in regards in both a *regulatory* sense (do practitioners know what the law is?) and in a *worker protection* sense, as workers could, again, be dismissed simply because the company they work for is being transferred to a new employer (in clear contradiction to the ARD).

An example of privatisation as a form of transfer is raised to explore some of these question. In each of these industry-level examples three cases (hospitals, telecommunications, manufacturing) works councils were the important venues for unions to influence these transfer processes, albeit in a very limited way that could not prevent significant pay and job cuts. This is the strategy the unions, for the most part, pursued to effect restructuring. Only in rare circumstances were more muscular and aggressive strategies adopted.

The example from telecommunications presents an example of a wholesale privatisation (not done as multi-stage transfers but all at once) of publicly-owned Deutsche Telekom (DT) (Sako and Jackson 2006). This brought with it a fragmentation of the company's functions into divisions.

This restructuring also brought with it the new works council configurations and company-level collective agreements in each of these new divisions as the legal designation of DT changed⁸⁰. Privatisations almost always fall under the scope of the ARD and the example of DT would be no different (before and after *Süzen*). The role of the state however was particularly important as it concerned a public sector company being opened up to private interests meaning the state could take a central role in organising this. As Sako and Jackson describe, part of the offer made to workers and unions was the prospect for *job growth* rather than cuts (seen elsewhere) as a result of privatisation. Additionally, with the fragmentation of DT, a divide and conquer strategy is employed by employers and the state resulting in better deals being offered to some workers (through works councils) in comparison to others (Sako and Jackson 2006). Also, as Sako and Jackson describe, the new collective agreements formed in some of the new privatised divisions of DT were again better than in others. Employers played the two big trade union players, IG Metall and (what later became) Ver.di, against each other. An important note however has to be made regarding time-line: the deals offered *at the time of restructuring* may not still be in place in later years. This strategy of employers in this example used more carrot than in other restructured industries, but the *long-term* effect would still see pay and working conditions weakened in some or all parts of this undertaking. This is a hugely important temporal aspect of the ARD discussion.

Works councils were again the central venue for unions to shape, rather than stop, a process of reform and is primarily where the employer offer to workers was made. The ARD demanded 'information and consultation' for workers which works councils were tailor made for, but

⁸⁰ As described in chapter 2.1 (section 2.1.2 on Germany), German company law rules designating labels such as 'limited liability' or 'publicly listed' company changes the type of works council rules that apply to each of these types of company.

beyond providing such information and consultation the negotiated process that took place within them gave unions little power to seriously challenge employers from pursuing restructuring. In this complex context of competing legal rights for workers and unions found in co-determination law, collective bargaining, the ARD on the one hand and an ascendant political neo-liberalism on the other, it is important to ask why unions did not seek more aggressive or combative responses to defend the legal and institutional aspects of German labour relations. The answers are only partly based on their weak organisation and membership and the isolated attempts, as in the DT example above, to buy them off.

In the German hospital sector, Greer et al. (2013) describe some isolated examples of more aggressive union action opposing restructuring. In Hamburg in 2001, the hospital firm Asklepios became the recipient of what these authors call the largest hospital privatisation in German history (Greer et al. 2013). Ver.di, a newly created super union for the services sector in Germany, decided to pursue civil society-based campaigns against privatisation, often placed under the label 'social movement unionism' (Greer 2008, Holgate 2015). This campaign produced a referendum in Hamburg that, despite winning the vote, did not stop privatisation from taking place (*Ibid.*). An 18-month long campaign was seemingly ended by a new agreement between Asklepios and workers that meant the linking of pay to the public sector pay framework (the TVD⁸¹). This would appear to be a victory of sorts for unions, but as addressed in the following sub-section on collective agreements, Asklepios used another transfer process for a hospital near Frankfurt to circumvent this same public sector agreement. This led to a dispute that reached the CJEU in 2017, with the Court finding in Asklepios' favour (continued in the next sub-section).

⁸¹ TVD - 'Tarifvertrag für den öffentlichen Dienst'

In the case of the ARD's scope and definition, the directive was of little relevance to how transfers were regulated and governed in regards to labour matters and unions did not reach for it. When interviews were sourced for this chapter, it became clear that the ARD was not a factor in how these processes were pursued and regulated. A context providing strong power resources on the part of employers and bi-partisan political support for restructuring meant that the idea of using the ARD to challenge transfers was not considered. Even when more aggressive attempts to challenge these were taken (e.g. Ver.di in Hamburg), these involved political campaigns and strikes. After 1997, given the implications of the *Süzen* case, it perhaps made more sense to pursue both political campaigning and strikes to curtail restructuring plans as the law, the ARD or anything else, would not assist unions and their workers. The general rule for union strategies however was not agitation, but negotiation and using works councils to limit the pain of restructuring.

This example from the German hospital sector acts as a bridge to the following section that focuses on collective agreements and their relationship with the ARD. This bridge is built along two planks, a CJEU case concerning the company above, Asklepios, and the role of collective bargaining in transferred undertakings.

2.5.2.ii the ARD and Collective Bargaining

In the previous section, works councils, one of the two core pillars of German *Tarifautonomie*, were important in framing the effects of transfer processes. In this sub-section, collective bargaining becomes the subject of focus and that which is being altered. These transfers however did, again, have considerable effects upon collective bargaining structures in sectors where bargaining was once strong. Examples of these are introduced with important legislative and

judicial interventions in this sub-section, both of which were important in weakening the role collectively bargained 'acquired rights' that could be imposed upon the actors involved in transfers of undertakings. Many material rights that workers receive, such as wages, are provided in collective agreements and the employment contracts framed by these agreements. Work councils then flesh out some of the details such planned wage increases and holiday allowances and working time⁸². This makes concerns of collective bargaining unavoidably central to how workers' 'acquired rights' are preserved in processes of economic restructuring when established workplaces transferred. In regards to the ARD, two important technical concerns (outlined in chapter 2.2) are identified in the application of collective bargaining at particular points in time as well as *over* time.

- 1) *The content of a collective agreement, as attached to individual employment contracts, **that exists at the time of transfer**, but no rules exist as for later agreements on transferred undertakings (number 2).*
- 2) *Whether successor agreements to the collective agreement that existed at the time of transfer are to be adhered to as well by new employers. This implies that the **overarching collective bargaining apparatus**, that created the original collective agreement, may be transferred as well thus binding employers to that apparatus and the later agreements it produces.*

There are important normative questions concerning these. Taking a workers' rights (social protection) approach over an employer rights (commercial) approach, one can see employers accepting the employment terms and conditions of the current workforce, as laid down in a collective agreements, if these employers can simply change employment terms and conditions *later* after the collective agreement in place expires. This therefore

⁸² Interview GARD1

presents a challenge to either unions or employers if the law demands one approach over the other, with workers wanting to have both the original collective agreement (at transfer) and *successor* collective agreements applied, if these are indeed stronger than the alternative arrangements favoured by the new post-transfer employer (and employers want only the first or neither).

The ARD is clear in regards to the first point, but not so in regards to the second. The first is addressed explicitly in Article 3 of the ARD: a collective agreement *in place at the time of transfer must be transferred* also as this is a key formative part of employees' 'acquired' employment rights. The second is not given any treatment in the 2001 version of the ARD so was therefore left as an open question. The onus has therefore been placed on national actors and the CJEU to interpret.

The German *Werhof* and *Asklepios* cases are examined alongside the same use of industrial case studies provided earlier in regards the ARD's scope. These two cases in fact are especially relevant in regards to hospital restructuring (*Asklepios*) and manufacturing (*Werhof*). The *Werhof* case in fact connects the two regulatory and governance concerns with transfers and collective agreements outlined above. For this reason, point one and its specific treatment in German legislation, is addressed first.

In-line with policy preferences seeking to enhance employers freedom, German policy-makers adopted an optional passage of the ARD's Article 3 (Art. 3 paragraph 2) of the ARD that states that collective agreements in place at the time of transfer *can only continue for either one year after the transfer, or once that agreement expires*. The translated text from German law, 613a of German public code) is as follows.

*“Where those rights and obligations are governed by the provisions of a collective agreement or works agreement, they shall be incorporated into the employment relationship between the new owner and the employee and **may not be amended to the employee’s disadvantage for at least one year following the date of the transfer.**”*

*Translated from both the Werhof and Asklepios cases of
the CJEU 613.a (1) of BGB⁸³*

Article 3(2), as transposed into German law above, gives employers considerable incentive to pursue transfers to reduce labour costs *over the longer term*, or even after one year (as they cannot do it immediately after acquiring a company via transfer). This is despite the adopted provision clearly contravening the social protection purpose of the ARD, given the ability of collective agreements to enhance the social protection afforded to workers. Altering the incentives for employers and unions in this way could have had considerable bearing on strategic decisions made by these actors.

There is a fruitful line of analytical enquiry. What efforts were made by employers or unions to get or change the version of Article 3(2) was transposed? There was little indication, again, that the ARD featured in the strategies or thinking of either employer or union interests. Two union-aligned specialists were interviewed and both indicated a preference for a lengthening of the time period which collective agreements could apply after the date of a transfer (or to be removed completely⁸⁴). It is notable that this was even raised, as most prospective subjects approached for interviews had little knowledge of the ARD, a fact that underlines just how uncontroversial the ARD was in Germany. These interviews did not yield much more on the

⁸³ BGB - ‘Bürgerliches Gesetzbuch’ (German civil code).

⁸⁴ Interviews: GARD1, GARD2.

ARD itself, but did point to the significant influence of those neo-liberal policy agendas that dominated German industrial politics and the assistance employers had in reorganising their businesses⁸⁵.

Germany's adoption of ARD 3(2) featured in both the court cases raised here – *Werhof* (2006) and *Asklepios Kliniken* (2017). German courts did not address the issue themselves but instead referred decisions to the CJEU for judgement. Again, both cases present *individual* workers seeking legal redress rather than their trade unions bringing litigation for them. Prior to the 2006 *Werhof* case, the CJEU had not been asked to provide guidance on the second concern raised by collective agreements. In 2000 *Collino & Chiappero*, the Court affirmed that the ARD must be interpreted so that collective agreements must be transferred in the cases of multiple stage transfers (second and third generation transfers), but did not address whether successor collective agreements must be adhered to by employers not party to the overarching bargaining process that produced in collective agreements. The normative issues here, as outlined in chapter 2.2, are placed within the the *dynamic-static* debate: should successor collective agreements be imposed on new employers in the years after a transfer has taken place, even if this new employer is not a signatory to them (the *dynamic* view), or is this an unfair infringement on an employers' 'right to contract' (the *static* view)? This choice of laws goes directly to the normative conflict between social protection or commercial rights principles at the heart of this debate.

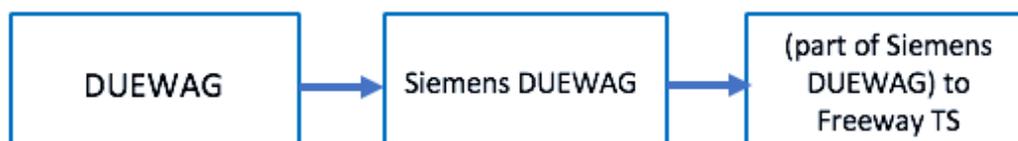
The *Werhof* case is the first notable case of this *dynamic-static* debate and sees a challenge to Germany's adoption of the optional article 3(2) above. As *Werhof* is also a German case, the details of the case also illuminate how such transfer of undertakings practices had altered labour relations in Germany.

⁸⁵ *Ibid.*

This is placed next to the recent *Asklepios* case and some useful examples from across German industry. The core details of the *Werhof* case are outlined first.

The case concerned the employment contracts of employees of a bus company (Mr Werhof being one), their relationship to sectoral collective agreements and the continuance of this relationship after the transfer of part of an undertaking. The claimant (Mr. Werhof) was hired in the 1985 by a publicly listed company (AG) called DUEWAG. The terms of employment were decided by a sectoral collective agreement for the metal industry, agreed by the Employers Federation for the Metal industry in Niedersachsen (AGV) and IG Metall, the trade union that has traditionally represented workers in the metal industry. In April 1999, the company DUEWAG AG was converted into Siemens DUEWAG GmbH. In the October of that year, Siemens DUEWAG transferred part of its business to Freeway Traffic Systems (the defendant) and took Mr. Werhof with it. Freeway was not party to the collective agreement covering the metal industry in Niedersachsen (nor any other).

Image 2.5.a chain of transfers in Werhof (2006)



In August 2001, the works council agreed to a pay grade system in a works agreement for Freeway employees that was based on the same collective agreement that covered Siemens, even though Freeway itself was not a member of the employers association in question (AGV). Freeway and

the works council also agreed a one-off payment *in exchange for waiving future claims to this collective agreement* made by employees. This detail is significant as it acts as, in essence, a 'static clause' preventing future collective agreements from having any future (dynamic) affect. It also sees works councils sign away workers' 'acquired rights' that would come in *later* collective agreements. IG Metall and AGV then concluded a new collective agreement for the sector in Niedersachsen in May 2002. Mr Werhof opened litigation claiming for the difference between the pay scale agreed between the works council and Freeway on the one hand and the original pay terms under his employment for the pre-transferred DUEWAG on the other (the pay differential would have occurred after 2002 when the new sectoral agreement was signed).

Mr. *Werhof* based his argument on *Collino & Chiappero* (2000). The Labour Court in Niedersachsen disagreed with this argument, pointing to the works council agreement that waived future union claims to impose previously agreed collective agreements. Mr Werhof conflated the two issues concerning collective bargaining outlined above: 1) the question whether a collective agreement transferred *at the time of the transfer be adhered to by new employers*; and 2) whether the broader collective bargaining process that created these be transferred as well. The first is explicitly required in the ARD and was confirmed to apply in multi-stage transfer cases in *Collino & Chiappero*. This is limited in Germany however due to the 12-month limit on this rule provided in the optional article 3(2) of the ARD that Germany chose to adopt. Mr Werhof was effectively demanding that Germany's adoption of this provision be struck down as well as the contents of a works agreement that waived any future claims to the collective agreement Mr Werhof's pay would be based upon. On appeal, the Federal Labour Court (*Bundesarbeitsgericht*) stated that section 613.a of the BGB could not be

interpreted in this way, but referred the decision to the CJEU with two questions attached. The German government at the time also agreed with the German Labour Courts' view⁸⁶. The CJEU agreed and rejected Mr. Werhof's claim.

In legal scholarship on this subject this case is held up as the first indication that the CJEU preferred the *static* interpretation of collective agreements' post-transfer life more favourably than the *dynamic* view. There are two factors that complicate this broad conclusion. The first is the presence in German legislation of the ARD's optional provision, article 3(2). The second is the presence of the works agreement that itself imposed a static interpretation, on the part of the works council, onto the collective agreement at issue. It remained to be seen if the CJEU would uphold this static view in the absence of these conditions.

The British *Alemo-Herron* case in 2013 then later confirmed this in the affirmative. The 2017 *Asklepios* case however is another German case that also affirms the static approach of the CJEU evident in *Werhof*. Namely, and notably, the presence of an explicit 'dynamic clause' in the collective agreement at issue that would force employers after two rounds of transfers to adhere to a collective agreement. In the *Asklepios* case, the CJEU rejected this. Therefore, not only did the CJEU decide that the dynamic clause will not be applied as a general rule, but even if the dynamic clause is contained within a collective agreement in the case in question the Court will strike this down as well.

Similarly to the *Werhof* case, *Asklepios Kliniken*⁸⁷ contained private litigation (from two claimants), rather than seeing trade unions litigating on behalf of workers. It also saw a referral from a German Labour Court and

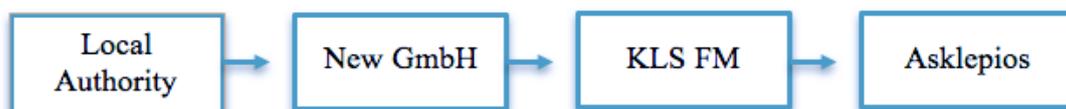
⁸⁶ The *Werhof* case, paragraph 19.

⁸⁷ full name: 'Asklepios Kliniken Langen-Seligenstadt GmbH'

concerned, in part, an interrogation of the optional provision included in German law, article 3(2), of the ARD. It did however present one further transfer than in *Werhof* (transfer from A, to B, then to C) and included a fourth party ('D').

The two workers and claimants were cleaners originally employed at a hospital controlled by a local authority. In 1995, their work was transferred to a newly formed limited liability company (a 'GmbH' in German company law) which was subsequently transferred, in 1997, to a company called 'KLS Facility Management'. In 2008, the work of these two workers was then transferred to private company Asklepios (Paragraph 7, *Asklepios*).

Figure 2.5.b the chain of transfers in Asklepios



The litigation concerned the application of a particular collective agreement, and the processes that formed it, and the use of a 'dynamic clause' that would have retained the terms and conditions of it in later transfers. The pay terms of the collective agreement that the claimants wanted enforced was the collective agreement in place in the local government sector in the 1990s. This collective agreement was replaced by a new collective agreement for the broader public sector (the 'TVD'⁸⁸). It was in this collective agreement that a dynamic clause referred to the old collective agreement that the claimants wanted retained. Another important agreement accompanied the TVD called the 'agreement on the transition of staff employed by municipal employers

⁸⁸ 'Tarifvertrag für den öffentlichen Dienst'

to the TVD and the regulation of the transitional law' (Paragraph 10, *Asklepios*) which explicitly provided the link between an old collective agreement and the new one (TVD). *Asklepios*, as well as previous employer KLS FM, were not a party to any employers' association that were party to these collective agreements. The normative question again concerns applying either a social protection based *dynamic clause* or a commercial (employer) based inclined *static clause*.

To reiterate, the dynamic clause of the collective agreement in question sought to impose 'acquired rights' onto a company who had not agreed to them. This sits in contrast to that in the *Werhof* case where an agreed waiver to any claims to acquired rights contained to such successor collective agreements amounts, in effect, to a 'static clause'. The company, *Asklepios*, argued that the demand to obey the 'dynamic clause' in the agreement was illegal and unjust in light of a) the ARD and the German transposition of article 3(2) of the directive, and b) it would undermine the company's freedom of association and freedom to contract under article 16 of the EU's Charter of Fundamental Human Rights. The latter claim echoes that made in the earlier *Alemo-Herron* case, that features in the British-ARD chapter, as this would effectively force a company into an association created by a collective agreement.

The CJEU found in favour of *Asklepios* and confirmed its *Werhof* and *Alemo-Herron* line of case law but built on it in one important respect by striking down a clause of a collective agreement, the 'dynamic clause', as it imposed constraints upon employers beyond which the Court thought was just. To be clear, it did not simply point to the legislative provisions in Germany enacting article 3(2) as it did in *Werhof*. The decision also came with an overarching normative argument, as in *Alemo-Herron*, in paragraphs 17, 18 and 22 that the ARD had to be interpreted "to balance" the social rights of

the ARD with economic rights found in the European law regulating the single market. In truth however, it favoured the latter.

This effectively closed off the ARD from being used to retain collective bargaining regimes over time from employer to employer. Meaning, and in line with the *Süzen* decision of the CJEU, that transfers that happen over longer periods of time and include several employer actors (A>B>C>D), collective bargaining regimes cannot be taken with them, and can in fact be undermined deliberately by these transfers of corporate organisation and workplaces.

2.5.2.iii Concluding comment for empirical section

This empirical section consisted of two main parts: questions of the scope and definition of a 'transfer of undertaking' in the ARD, and the questions of collective bargaining and its relationship with the ARD. The stylised depiction of German labour relations, based on *Tarifautonomie*, would have pointed to the suggestion that the ARD would form a complementary relationship with its core wage bargaining and co-determination institutions. This did not in take place. Instead, the political goals of neo-liberalism were given life by specific forms of economic reorganisation and legal re-engineering of economic contexts and rights.

2.5.3. Theoretical findings: the political content of law

This theoretical section comes in three parts. The first deals with the theoretical findings that concern German labour relations directly. The second addresses the role of neo-liberalism and neo-liberal legal change, and the third addresses the potent conflict of rules problems that defined the regulatory and governance problems of this case study chapter.

2.5.3.i Tarifautonomie, its decline and emerging legal influence

The relationship between the collective and legal institutions of German labour relations was becoming increasingly complex even without the ARD. In this sub-section the decline of German *Tarifautonomie* is addressed through four subjects that define its de-development: collective bargaining, works councils, courts and legal rules with some points raised here being developed in the following sub-sections.

Collective bargaining and works councils are addressed together. The ARD could have provided meaningful law-based remedy to alter, or at least minimise, the decline of sectoral collective bargaining in Germany's changing economy. Instead however, the legislative fix that was (quite deliberately) pursued did the very opposite, resulting in the ARD's nullification on this question of collective agreements and its ability to provide 'acquired rights' for transferred workers.

German co-determination institutions have not been subject to the same pressures in this case study, although have been subject to a similar sort of decline in coverage in Germany (Eurofound, Feb. 2015). In this case study, works councils were in fact centrally important venues organising and negotiating these restructuring reforms that weakened collective bargaining further. With these two once important sets of institutions of German labour relations now co-existing in an state of imbalance and on-going decline, German labour relations is defined by a regulatory and governance uncertainty. This complex regulatory and governance arrangement is defined by competing and incoherent yet co-existing forces found neo-liberal politics, practices, law on the one hand *and* the vestiges of *Tarifautonomie* on the other.

The subject of neo-liberalism's role is addressed in the next sub-section. The process that saw works councils retain a prominent role in this

case study needs some discussion in regards to questions of legal rights and power resources. Legislative adjustments (through Germany's transposition of the ARD), court cases (*Asklepios*, *Werhof*) and labour market institutions (works councils) each acted as the important venues that escorted the ARD toward its eventual irrelevance. The ARD did however, demand information and consultation rights⁸⁹ for workers prior to any transfer of undertaking, something works councils were expressly designed for in Germany. How these legal rights are enacted however depended on the power resources dynamics between employers and unions.

This case study illustrated a weak trade union actor that was unable to challenge restructuring and legal changes that threatened their interests. It was only through works councils where they could influence neo-liberal restructuring, and again this 'influence' was minimal. Theoretically this is important as the *legal rights* to 'information and consultation' are not the same as *substantive rights* that can alter the material position of (in this case) workers. What is the purpose of a right to information and consultation if employers can impose their intentions upon workers anyway and still results in workers being materially worse off? The answer lies in the difference between *de jure* rights and *de facto* rights and the power resources provided to workers and employers that give life to these rights. *De facto* rights for workers are provided, typically, by their unions and by the institutions of collective bargaining and (where they exist) co-determination. These can offer powerful reinforcement to *de jure* legal rights and conversely can be undermined by legal rights favouring employers.

In the previous chapter (Britain-Posted Workers), workers developed formidable power resources through strike action. Here, unions did not pursue this option and instead relied on a damage limitation strategy

⁸⁹ In conjuncture with the information and consultation directive (ICED)

through works councils. A black letter reading of 'the law' in regards to works councils and the ARD pointed towards strong legal rights for workers to affect these sorts of restructuring processes in their favour. The relationship between these *de jure* and *de facto* sets of rights however depends on how they are actioned by workers and employers and the relative power resources they share.

The first Germany-focused case study chapter presented some of these features found in this case study such as weak union role and resulting collective bargaining weakness. This second case study goes further than the case study in chapter 2.3 as it produces several industry-based examples of a similar but more complex process. This process, as well as seeing collective bargaining undermined by restructuring, also sees a strong role for works councils to minimise the effects of neo-liberal legal change.

Besides these shifts in regimes of legal rights, 'neo-liberal legal change' also brought with it small but important legislative tweaks to narrowly-defined legal frameworks. The example of this from this case study is found in the optional provision of the ARD that limited the post-transfer life of collective agreements. These were complemented by judicial interpretations of both these *rights* and *framework* concerns made in the *Asklepios* and *Werhof* cases. Law is however also responsible for the legal framework providing for works councils and works agreements. This provides for very complex relationship between declining collective bargaining and numerous legal rules and frameworks made at the national and European level, but with some of the legal *rights* within them deliberately submerged and nullified in favour of others.

Centrally important questions of law are now addressed, specifically those of both European and German courts. This chapter demonstrates that the governmental state increasingly intervened in wage bargaining matters

from the 1990s to further neo-liberal agendas that undermine these collective bargaining regimes. German courts have also seen their role change in an important way so as to undermine *Tarifautonomie*. *Tarifautonomie*'s literal meaning is based on the idea of 'autonomous' collective bargaining, where the state (both judicial and governmental) would purposefully sit at arms-length from wage bargaining. This traditional position of deference toward the *Tarifautonomie* principle did not see German courts themselves intervene into collective bargaining, but instead adopt a new position of deference towards a court (the CJEU) that would intervene. German courts' practice of referring decisions (with attached questions) to the CJEU rather than pass a judgement themselves itself constitutes a new doctrinal institution that, again, has contributed to a direct legal threat *Tarifautonomie* and to trade unions' role within it.

It should be noted that German Constitutional Law (article 23) demands adherence to the EU legal order and the CJEU's decisions. This needs further explanation however. In reality, there has been considerable conflict between German courts and the European Court over the extent of EU law's primacy over national law (Saurugger and Terpan 2016; p.108-109). Additionally, we are given several examples in the following British acquired rights chapter (2.6) of national courts adjudicating cases themselves rather than simply referring the case upwards to the CJEU judgement (*ibid.*). It is not demanded of courts to refer questions to the European court, especially if the appeals process will take a case to the highest court in many cases anyway.

2.5.3.ii Neo-liberalism and increasingly complex German capitalism

Neo-liberalism as *industrial practice*, rather than that represented in political and policy-based 'reform agendas', is given important illustration in this

chapter courtesy of the variety of restructuring programmes used in Germany. What this has produced is industrial fragmentation defined by outsourcing, divisionalisation and privatisation. Importantly, this has fragmented collective bargaining structures that used to operate in these industries. Regulating both the process of shifting *to this* fragmented arrangement and *what happens after* it has taken place have been pressing regulatory concerns for trade unions, works councillors and some policy-makers. This has involved shifts in legal and non-legal rights systems and claims to retain or change these systems of rights. The ARD was meant to be a key part of this, as has collective bargaining and works councils. In the restructuring and reordering process however, only works councils appear to have been spared, acting as a venue for employers to manage restructuring with workers but in their favour. This raises questions concerning both *conflict of laws* and the different modes of mediation to address them. These are raised later in this section.

Before this however, some critique is directed toward CPE approaches. It was noted at the start of this chapter that CPE approaches, and particularly the VoC approach, have greater potential contribution to this chapter than the others. Kathleen Thelen, to name one VoC scholar, has focused much of her work on the subject of German labour relations and neo-liberal restructuring (as critiqued in chapter 1.2). This case study does, in a broad sense, offer an example of national institutions adjusting self-referentially to an external threat to a national variety of capitalism. This kind of ‘institutional resilience’ argument is central to VoC and institutional CPE accounts. The problem with this sort of path dependency-based argument is that the threat and destructive change-effect of neo-liberal reforms upon these institutions is not at all grasped. The industrial practices and policies and legal change advanced by neo-liberalism are central to the wholesale

degradation of collective bargaining institutions that are of definitive importance to German capitalism. Works councils, as already described, also hold a similarly important and symbolic role in German labour relations and capitalism. These co-determination institutions were not undermined directly in this case study and, again, were important venues for workers to impose *some* (very limited) influence upon business transfers. Dominant neo-liberal policy agendas however turned works councils into venues where *Tarifautonomie* was negotiated. Neo-liberal goals also framed the incentives of a) policy-makers at the European level to put in the optional provisions in the ARD to weaken its social protection principles, b) of German policy-makers to use this provision, and c) the CJEU to impose an economic rights/liberal interpretation of the ARD so as to favour the rights of employers.

The lack of institutional resilience is not the only problem that institutionalist CPE (VoC, some CWC) have with this case study. CPE theories that rely on institutional resilience accounts also tend to be functionalist in nature and also favour institutional *complementarity* arguments as these concepts of resilience and complementarity are tied together. This case study instead presents evidence of a more distinctly non-functionalist and complex set of outcomes defined by institutional incoherence. Neo-liberal reforms certainly undermined institutions such as collective bargaining, but it has not had the same effect on works councils (in this case study) nor the coordinated *employer* membership organisations⁹⁰. With the decline of fundamentally important sectoral wage bargaining coupled with the insertion of different and often competing legal rules, the result is a mongrel form of part neo-liberal market and part-coordination that belongs to none of the main typological camps of CPE (coordinated, liberal,

⁹⁰ Also identified as a key institution of coordinated German capitalism in VoC and similar work

meso-corporatist, *etatist*). Moreover, the insertion of European market and legal influences makes such this complex set of incoherent (and still-partly developing) regimes of regulation and governance far less 'German' and nationally contained. This raises pertinent questions for CPE and other comparative social science when trying to compare ostensibly national regime types in Europe. This subject is addressed in more detail in chapter 3.2.

The CPE accounts that have more conceptual use in this case study come from CWC (of the Walter Korpi-power resources kind) and non-complementarity based RT. Imbalances in power resources clearly had an important bearing in employers pursuing restructuring and was felt in policy debates and in the industrial contexts (in direct interactions with unions). The context that enabled this (the neo-liberal policy and restructuring agenda) was more political than legal in terms of its initial impetus. For example, the legislative tweak to the ARD, concerning collective agreements' role and life-span after a transfer, was an important legal mechanism that altered how German law regulating transfers of undertakings affected employers' ability to pursue restructuring. Such legal fixes have important bearing on how the balance of power resources is organised.

2.5.3.iii Conflict of rules: Neo-liberal politics and reordering of conflicting rights

The conflict of rules problems of this case study are represented more correctly as conflicts of *rights*.

'Legal rights' when understood as a social phenomenon are as a contested space where a conflict between two or more sets of laws are remedied (in part, or in whole) by an ordering process that elevates certain rules and relegates others. In the previous Germany-based chapter, a court,

in very formal terms, ordered the (social) rights of workers (to strike, to collective bargain) to be set below those (economic) free movement rights of business. Here, this process of ordering was much less formal, unclear and complex as the negotiation process that took place occurred partly in the legislative arena, in large part in works councils (the industrial arena), and in part in the courts.

There is, again, potential to combine the conflict of rules concept with the power resources concept of CWC and in (some) RT. The fact that unions did not, or could not, resort to strike action is notable. Was this merely because they were too weak in terms of membership numbers? Or because of traditions and sentiment of members that favoured industrial peace? Or perhaps part of both. Nonetheless, if employers do not view strike action as likely, this provides space and opportunity to pursue a strategy that they might otherwise not. This point compares neatly with the lessons of the previous chapter (2.4). When coupled with the pro-business sentiment of successive governments, these power resources of business produced a resolution to a conflict between the ARD and existing labour relations arrangements on the one hand and the neo-liberal reforms business wanted on the other (in favour of the latter).

To reiterate, the ARD was designed to impose the social rights of workers onto an economic restructuring process that usually requires the economic rights of employers to be exercised without restriction. The social rights of the ARD therefore sat in conflict with the neo-liberal reforms agendas that intended to give employers greater *commercial* freedoms to reorganise their companies and labour forces, and became increasingly prominent and potent in Europe from the 1980s. This ordering process to settle this conflict was complex, but was clearly governed by a neo-liberal ordering based relative power resources of labour, business and the state.

Legislative agendas were very clear in regards to collective bargaining and in promoting industrial restructuring. The normative thrust of German neo-liberal reforms, both in terms of legal change and emerging industrial practice, therefore sat in direct conflict with the demands of the ARD. The interests of partisan and corporate actors ensured that this conflict was partly reconciled in favour of their favoured restructuring reforms. Court actors could have challenged this in a meaningful way, but the CJEU was not brought in to intervene in the 1980s in the manner it was in Britain (next chapter). By the time the CJEU was brought into this ordering process, on questions of the ARD's scope (*Süzen* in 1997) or collective agreements (*Werhof* 2006), German reforms were already well advanced. This does not mean that German or European courts could not have delivered a decision to badly disrupt this, but again, German courts chose to defer to European courts, and European courts relied on liberal, commercial rights orientated doctrines to resolve conflict of laws problems.

2.5.4 Conclusion

This chapter shares a broad common feature with the previous chapter: the effect of the legal intervention under primary examination, the ARD was effectively nullified. There are two key differences however. First, in the previous chapter, the 'legal intervention' in question was more indirect, as no court case of the *Laval* or *Rüffert* sort was aimed at Britain's labour relations regime. Here the legal interventions were very much direct and multi-faceted, coming through a piece of legislation as well as judicial decisions. This chapter also, perhaps more than the other case study chapters, highlights the very *legal character* of neo-liberalism in both *legislative* as well as *judicial* forms, as well as the implications of the industrial restructuring reforms it demands. Unlike the previous two case study

chapters, that focused on one key industrial sector, this case study offered examples from a number of sectors.

This chapter reaffirmed the theoretical position that law exists as a contested social space, not merely as a formal and fixed sanctioning mechanism by a legal authority. This sees conflict of laws scenarios exist between two or more sets of laws or rules which then require an ordering process to take place to elevate certain rules and to relegate others. This contested process, in a labour relations context, is one marked by material-economic interests and politics. The ARD had very clear formal 'rules' set out and its normative purpose was clear (workers should have their acquired rights protected). Yet this clearly did not materialise in this case as jobs were lost and pay was cut as collective agreements were replaced by weaker agreements. This took place because the ARD was conveniently pushed out of the way, with the tacit acceptance by European institutions who were becoming more committed themselves to neo-liberal agendas and concurrent legal interpretations.

There are some important implications for CPE in this chapter, a chapter that offered more space for existing CPE approaches to offer some alternative arguments to those offered here. The challenges to CPE depictions of Germany as a coordinated or meso-corporatist economy from this case study are clear, but the complete destruction of coordinated institutions is not the outcome either. Instead, an on-going process of mongrelized complexity emerges from the traditionally coordinated model that also sees legal and market rules begin to dominate.

Chapter 2.6.

British Labour Relations and European Acquired Rights law

2.6.1. Introduction

This case study presents a clear contrast to the previous chapter in regards to the controversies inspired by the ARD in Germany. In Germany, the merging and massaging of the ARD into a pre-existing but developing practice effectively nullified the directive, and did so in a negotiated political process supplemented by important legislative and judicial interventions. In stark contrast, the experience of ARD in Britain has been very controversial over a 40-year period, both politically and in terms of its successful regulatory application.

The 'controversy' inspired in Britain however came in two different forms at both ends of this long 40-year-plus time-line. At the front end of this 40 years, not long after the ARD's creation in 1977, the ARD and its worker protection thrust directly contravened the neo-liberal reform intentions of Britain's Conservative government. The British government, in the 1990s, did reluctantly however accept European demands to conform to the social protection interpretation of the ARD. These same European institutions soon began to reverse their approach to the ARD (as they did in other areas of EU law like posted workers law) and started to impose a more liberal, market-rights, neo-liberal reform orientated view.

This elaborate 40-year 'roundabout' process that describes Britain's experience with the ARD should, according to assumptions found in most CPE, point to Britain being able to revert seamlessly back to organising labour relations in these matters according to the 'liberal' or 'market-orientated' model with which Britain is associated. This outcome however is

not what transpired as CPE scholars might assume. The role and embeddedness of *previous adjustments* and *adjustments to legal uncertainty* were instead the driving forces behind the outcomes in this case as industrial actors (employers, unions) and the governmental and judicial state coalesced around solutions to minimise legal uncertainty rather than satisfy politico-economic goals associated with either social protection or employer rights. This broad description manifests different in the two areas of the ARD under examination, its scope and collective bargaining questions. This case study therefore sees considerable complexity and incoherence define it but with a prominent role for law-based logics centred upon principles of legal certainty and preservation of a *status quo* rather than politico-economic logics that point to neo-liberal or social protection principles.

This chapter gives a very prominent role for two important law-based aspects. Firstly, *national courts* feature prominently as well as the European Court of Justice (CJEU). This prominent role for courts also produces key explanatory factors found in legal systems and aspects of *legal culture* in determining and shaping labour relations outcomes (Zweigert and Kötz 1998, Deakin 2009). In substantive terms this means that factors of *legal reasoning* pursued by courts ('jurisprudence') provide a different logic from those defined by *political goals* or *economic rights* found in social protection or market rights principles that are prioritised in explanations found in political science and political economy. For example, the British judicial and doctrinal positions have traditionally been based around deference to an 'employer's right to manage' and the 'freedom to contract', two principles that conform quite neatly to classical liberal and neo-liberal political goals. This case however, to repeat, sees other doctrinal commitments become prominent, particularly the approach of British courts to practical concerns of *legal certainty*, the remedies which do not necessarily conform to political goals

associated with neo-liberalism nor workers' rights.

Therefore, for this chapter, the *regulatory and governance problem* comes in two forms of *legal uncertainty* coming in both questions of, one, the ARD's scope and, two, collective bargaining. Pronounced legal uncertainty was created on questions of the ARD's scope when the CJEU attempted, aggressively, to *pull back* the scope of the ARD thus reversing its previous position in a single case (*Süzen*) from a firmly social protection approach to one more employer rights-centred. Here, legislative initiative was used in Britain to minimise the uncertainty this decision caused. The second stems from the lack of European level guidance (in the directive or by CJEU) on how some collective bargaining issues are regulated under the directive. Here, the CJEU did eventually settle matters but only after UK courts interpreted EU law in very conflicting ways for several years prior, with some courts applying a social protection ethic of the ARD to these questions and yet others a more employer rights approach. This created a jumbled jurisprudence and unsettled law.

This poses more problems for existing CPE theories that attach some variation of the label 'liberal' to the British type of capitalism. Again, Britain's common law, contract law and labour law traditions might, in the abstract, support the typological characterisation of Britain as a market-orientated or 'liberal market economy'. The responses of the domestic courts in this case however do not support such typological conclusions, nor do the responses of legislators. In both cases, on both the questions of scope and collective agreements, the emphasis was placed on *providing legal certainty in the face of disruption delivered from Europe*. This points to distinctly legal-jurisprudential logics determining outcomes, found in legal cultures that form part of legal systems, than purely politico-economic logics highlighted in CPE.

This chapter follows a similar structure to the previous ARD chapter.

The empirical section is divided into the two aspects of the ARD selected in chapter 2.2: questions of *the ARD's scope and definition* and *collective bargaining* concerns. This chapter relies much more than the previous chapters on legal texts as a result of this prominent role for national courts.

2.6.2 Empirical Section

The disruptive effect of the ARD is felt differently with questions of the directive's defined scope versus those concerning collective bargaining's relationship with the ARD. This bizarre 'roundabout' process mentioned above can very clearly be identified with those questions of the ARD's scope. As outlined in the introduction to this chapter, there were two discernible periods of the EU's approach to definition and scope of a 'transfer of undertaking' across the ARD's 40-year-plus life-span; a social protection approach in the first half of the ARD's life, and a more commercial rights-orientated approach in the latter half. With collective bargaining however, a discernible approach within the ARD to these questions is only made clear after 2000, whilst ambiguity and uncertainty existed in the earlier period of the ARD.

As in the previous chapter, we begin with those issues of the ARD's scope and definition of a transfer.

2.6.2.i The ARD's scope

Questions concerning the ARD's scope and definition of 'a transfer' are the centrally important regulatory and governance challenge presented by the directive. This is especially true in the post-1970s era where such transfers became a key feature of industrial reorganisation, as made clear in the preceding German ARD case study, and were central to the 2006 and 2014

variants of Britain's 'TUPE' regulations that transposed the ARD into UK law.

Britain is a particularly interesting case in this regard as the restructuring agendas that were seen across Europe from the 1990s were rolled out much earlier (in the 1980s in Britain) and went much further in terms of industries affected. The attempts by the Conservative governments of the 1980s in Britain to liberalise its public sector included various privatisations, 'Compulsory Competitive Tendering (CCT)' policies and other 'market testing' frameworks (Adnett and Hardy 1999). The 1977 ARD, with its demands that workers' rights be retained when 'transfers of undertakings' took place, would seriously hamper this public sector reform agenda, so in its first attempt at transposing the ARD in 1981 (the first 'TUPE'⁹¹ regulations) the British government limited the scope of the ARD to only covering 'commercial' activities.

This was deemed an unacceptable attempt by the European Commission to circumvent the social protection goals of the ARD. In 1994, in the *Commission vs. the UK*⁹² case, the CJEU decided in favour of the Commission's complaints and demanded the UK fall into line. The UK government in fact pre-empted the CJEU, seeing the writing on the wall, and modified the 1993 Trade Union Reform and Employment Rights Act (TURERA) accordingly to extend its application of the ARD to public sector enterprises as well. This pre-emption was delivered as the CJEU had already made clear its position in preceding cases such as *Dr. Sophie Redmond*, *Rask* and *Daddy's Dance Hall* (see chapter 2.2) and a UK case (*Dines*⁹³) where the CJEU's interpretation of the ARD was applied over the wishes of the British

⁹¹ Transfer of Undertakings and Protection of Employment (TUPE) regulations

⁹² CJEU c-382-92

⁹³ *Dines and others v. Initial Health care services Ltd and Pall Mall services group Ltd.* [IRLR 336, CA]

government. In view of this Commission-CJEU pincer, the UK government relented. Furthermore, In 1995 the UK government passed the 1995 Collective Redundancies and Transfer of Undertakings regulations that merged the ARD with the Collective Redundancies directive (98/59) and made sure that Britain's TUPE regulations conformed to EU law. A classic conflict of laws between the European and the national level was 'resolved' with EU actors enforcing the supremacy of the European legal order in very formal terms.

As in the other chapters, disruptions from a legal source (usually the CJEU) are identifiable by singular events like a single court case. The disruption felt here in Britain however in the 1980s and 1990s was on-going, firstly due to the UK not interpreting the ARD in the manner European institutions wanted them to, and then with a spectacular reversal which itself was very disruptive.

It was ironic and, from a British perspective, highly frustrating that only two years after the 1995 Collective Redundancies and Transfer of Undertakings regulations brought UK law into line with EU law, the European Court was to reverse this approach of EU law towards that which Britain had been ordered to remove. The 1997 *Süzen* case was addressed in the previous chapter, but, and despite coming from a German litigation, was far more disruptive in Britain so is addressed differently in this chapter. *Süzen* did two unhelpful things from a regulatory standpoint. First, it reduced the scope of ARD narrowing the scope of transfer scenarios to which it could be applied. Second, it did so in a manner that was so unclear that practitioners and regulators do not know precisely where the outer edges of this new definition are (what is a 'transfer' and what is not) (McMullen 2014).

From the standpoint of social protection principles, under which the ARD were designed, this pulling back of the ARD's scope also reduced the

social protection quality of the ARD. This did so in a serious material way: by allowing a new employer to choose whether or not to take on existing staff if the undertaking being transferred was a labour intensive one (McMullen 2014). Employers being able to choose whether to dismiss the entire workforce represents a plain contravention of both the social protection principles of the ARD and the EU's own Collective Redundancies Directive. UK courts were very unimpressed due to the serious *legal uncertainty* the decision caused (*ibid.*). On the one hand, the reversal itself created uncertainty and disruption. On the other hand, the 'harsh effects' of *Süzen*, as described by McMullen, were so severe in their implications (described above) that some British tribunals were reluctant to enforce it (McMullen 2014).

Some chose to ignore the *Süzen* decision, as what happened in *ECM (Vehicle Delivery Systems) Ltd v Cox*⁹⁴ and the *RCO Support Services v UNISON*⁹⁵ cases (McMullen 2014). As McMullen notes however, this did not achieve any greater degree of legal certainty and did not offer a remedy to the dispute. Some courts developed new tests such as the 'multi-factorial' and 'motive' tests offered in the *RCO Support Services v UNISON* case and were adopted by the Court of Appeal in *ADI (UK) Ltd v Firm Security Group Ltd*⁹⁶. There were however court decisions that ignored these tests and attempted to honour the commercial logic of *Süzen*⁹⁷. The uncertainty only deepened as different courts addressed the uncertainty of *Süzen* in different ways. In an Employment Appeals Tribunal (EAT) case, *Complete Clean Ltd v Savage*⁹⁸, the deciding judge stated that "...the law in the UK is in a state of critical uncertainty. It is almost impossible to give advice to [parties] involved in possible transfers with any degree of certainty".

⁹⁴ 1999, CoA

⁹⁵ 2002, CoA

⁹⁶ 2002, CoA, Civil Division 971

⁹⁷ 2004, *Astle v (1) Cheshire County Council (2) Ominisure Property Management Ltd*. EAT

⁹⁸ 2002, EAT

The conflicts of *laws* presented above here are organised according to their direct and indirect effects. *Süzen* was in fact one single direct and disruptive legal intervention that also had indirect and unintended consequences, namely causing such uncertainty where national courts had no idea what the state of EU law in this area was.

This conflict of laws had to be settled by a *choice of laws* engineered by legislators. Recasts of the ARD in 1998 and 2001 did not provide this. So what occurred was that UK legislators had to provide it themselves. The attempt, in the 2006 TUPE regulations, was innovative and expansive as it defined the regulations to cover any ‘Service Provision Changes (SPC)’, a broad standard that went beyond the fuzzy but reduced boundaries of the *Süzen* standard. This did three things: provided legal certainty for practitioners, extended the social protection reach of TUPE and the ARD, and did so with the support, in the main, of practitioners on both sides of industry (unions, employers). A government consultation document spelt this out:

‘A more comprehensive coverage of ‘service provision changes’ (ie contracting-out and similar exercises involving business services) in order to achieve greater certainty in practice for all parties concerned, reducing unnecessary disputes and litigation and lowering transaction costs⁹⁹.

Section 3 (1) of the TUPE regulations is provided below with sub-section (b) detailing the SPC (highlighted).

3.—(1) These Regulations apply to—

(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to

⁹⁹ Department of Trade and Industry (DTI) Draft: Revised Transfer Regulations: Public Consultation (2005) (URN 05/926)

another person where there is a transfer of an economic entity which retains its identity;

(b) a service provision change, that is a situation in which—

(i) activities cease to be carried out by a person (“a client”) on his own behalf and are carried out instead by another person on the client’s behalf (“a contractor”);

(ii) activities cease to be carried out by a contractor on a client’s behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person (“a subsequent contractor”) on the client’s behalf; or

(iii) activities cease to be carried out by a contractor or a subsequent contractor on a client’s behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf.

and in which the conditions set out in paragraph (3) are satisfied.

The above is designed to capture a number of ownership change scenarios, including that found in the *Süzen* case in three ways. Covering all transfers where the public sector ‘contracts out’ to the private sector (a), where the public sector ‘re-contracts out’ by giving a contract to a new private contractor from an old one (b), and taking a contract back into to the public sector from the private sector (c). This presented three clear service-defined scenarios where transfers applied rather than complicated definitions based on whether an entity was ‘labour intensive’ or not.

The responses of stakeholders to a 2013 consultation on reforming TUPE indicated, when asked whether or not to repeal the SPC, that it should be retained. This indicating that the SPC did, up to a point, provide some legal certainty. In fact, 67% of respondents, many of whom would have been trade unions, did not want it repealed and identified the legal certainty

problem as the reason why (BIS consultation 2013).

In the process, there is also little doubt that a social protection approach to transfer of undertakings law in Britain had triumphed over the employer rights orientated commercial approach favoured by the CJEU.

“Oddly, given the UK’s reputation for being a relatively unregulated market system, from an initial position of providing employees with scarcely any protections in the event of the sale of a business or outsourcing, the current law probably provides, at least on paper, the most intensive safeguards in Europe”

Collins, H. (1992; p.202)

“The Transfer of Undertakings (Protection of Employment) Regulations 2006 constitutes a major limitation to the freedom to contract and power of employers to arrange their commercial and corporate in such a way as minimise or fragment their employment law liabilities”

Deakin and Morris (2012; p.196)

The two quotes from legal scholars above point to the social protection thrust of the SPC that resulted from these entirely law-based concerns for regulatory certainty. There are however two *conflict of rules* problems that emerge. The first is the normative conflict between these social protection and commercial rights principles displayed by the *Süzen* and SPC logics. The second is the conflict of *laws* between EU law (defined by *Süzen*) and the national response to it (defined by the SPC) that sought to render the ‘harsh effects’ of *Süzen* moot. The SPC acts as a clear example of an indirect and unintended effect of *Süzen*.

Süzen, contrary to the commercial rights logic through which the case was decided, therefore ended up enhancing, not hindering, the social

protection thrust of the ARD in liberal Britain. This sees a law-based logic emerge as the leading explanation as to how conflicts of law are resolved. This renders political or politico-economic forms of explanation of the processes and outcomes of this case study of secondary importance. More specifically, neither the institutionalist explanations (institutional *resilience*) nor the neo-liberal determinist (institutional *erosion*) type arguments are able to address the creation of the SPC. As the Collins quote above indicates, depictions of Britain's liberal or market-orientated capitalist traditions were not on display in the way ARD was brought into EU law. Even when Britain returned a more committed Conservative government in 2010, the UK did not revert to its liberal traditions in this case of the ARD to repeal the SPC.

This sub-section is concluded by reasserting why these problems concerning the ARD's scope are important. In the introduction to this chapter, the process of British adherence to EU law in this area was described as a 'roundabout'. More specifically, this tortuous journey British regulators were taken on was about a *messy process of legal change and later (also messy) reversal*. This process itself prompted extensive and ambitious legislative adjustments that critically altered the intentions of the initial intervention. This bears some similarity to the previous UK-based chapter, although the response to (a more direct) disruptive intervention here was based *in law*, not through *strike action*. This is similar to the example found in the first chapter (2.3) where legislative readjustment was undertaken.

The CJEU's unhelpful and messy reversal of EU law may appear as a rare or unlikely event, but these kinds of regulatory and governance problems are remarkably common, prompting various kinds of adjustments and responses. A broader point is noted here: disruptive examples of neo-liberal legal change will provoke responses that often will refer to dominant institutional logic, but not always. This chapter is the third such example

where the typological depictions and labels of these national ‘varieties of capitalism’ have not been borne in the identified outcomes. Below is the subsection dealing with collective bargaining and the ARD. Here, the outcome was much more in-line with the liberal traditions associated with Britain’s capitalist regime. How it got to these outcomes however, was again messy and did not support the claims of CPE theories.

2.6.2.ii. Collective Agreements and the ARD

The regulatory and governance problems presented by questions of the ARD’s scope were specifically identified as problems of legal uncertainty. Similar problems are also evident with those issues raised by collective bargaining and the role of collectively bargained ‘acquired rights’ of transferred workers. There is an important difference however in the nature of the uncertainty in the case of collective agreements under the ARD. With the ARD’s scope, there was a long list of CJEU cases outlining the position of EU law on the subject, with the legal uncertainty created when this position was reversed by new case law of the Court. With collective agreements however, the CJEU had not generated any significant case law. As outlined in the Germany-ARD case, the (2000) *Collino & Chiappero* case is the earliest significant case on the subject identified.

At this point the two principal concerns of collective bargaining in the context of transfers of undertakings, already outlined in chapters 2.2 and 2.5, are once again outlined.

1. *The content of a collective agreement, as attached to individual employment contracts, **that exists at the time of transfer**, but no rules exist as for later agreements on transferred undertakings (number 2).*

2. *Whether successor agreements to the collective agreement that existed at the time of transfer are to be adhered to as well by new employers. This implies that the overarching collective bargaining apparatus, that created the original collective agreement, may be transferred as well thus binding employers to that apparatus and the later agreements it produces.*

The directive clearly answers number one above in the affirmative (article 3(1)) and also states that this transferred collective agreement must be honoured up until the time of its expiry or replacement. This was also confirmed by the CJEU in *Collino & Chiappero* and also confirmed its application to multi-stage transfers. This latter point leads to the second regulatory concern of collective agreements: should a new employer, to whom the business has been 'transferred', also *have to abide by those collective agreements that succeed the one in place at transfer (once it expires)*?

As raised in the previous chapter, this is an important question for any labour relations regime in a context of economic change and restructuring and for the following reason: employers can plan for long-term wage cost reductions if they know that when a (current) collective agreement expires, they do not need to abide by its replacement; thus providing a strong incentive to pursue some kind of transfer of undertaking. This debate is identified as the *dynamic vs. static* debate, with the dynamic interpretation stating that future/successor agreements must be adhered to as well, even if the employer is not a party or signatory to the agreement, and the static interpretation saying they do not (as described in chapter 2.2).

The CJEU partially resolved this uncertainty from 2006 with the German *Werhof* and the later *Asklepios* cases (2017). The *Werhof* case did however also inspire significant consternation within the UK court system. Unlike in Germany however, where domestic labour courts passively referred cases up the judicial hierarchy to the European court, British courts

sought to establish their own judgements on this question, some imposing the *dynamic* interpretation and others the *static* interpretation. Unlike with the matters concerning of the ARD's scope however, the legal uncertainty on this question that existed prior to *Werhof* was not resolved by any legislative manoeuvre like the SPC provision in TUPE. British courts had to address this uncertainty themselves and in doing so, but served to create even more legal uncertainty. The lack of a legislative fix, of the SPC kind, at the UK level is notable. The conflict of laws scenario created was eventually settled by the CJEU in the 2013 British case, *Alemo-Herron*¹⁰⁰ and in favour of a 'freedom to contract' principle where employer rights superseded those social rights of workers.

Placing complicated issues of collective bargaining within the ARD context demands that a key aspect of the relationship between law and collective bargaining is returned to. This key aspect also provides an important comparative difference between Britain and most other EU member states' labour relations. This aspect concerns the lack of legal character that UK law affords collective agreements, meaning they are not enforceable as regular contracts are in the courts. This creates a problem when the ARD demands that collective agreements in place at the time of a transfer must, *by law*, be transferred as well. This does not overturn the general principle of collective agreements' non-legal character, but does mean that in the event of a 'transfer of undertaking' that they *do become so*, courtesy of article 3(1) of the directive.

As examined in the previous chapter concerning Germany's experience with the ARD, the second question outlined at the top of this subsection as to what happens once this collective agreement transferred at the

¹⁰⁰¹⁰⁰ Case C-426/11 Mark Alemo-Herron and others v Parkwood Leisure Ltd

time of transfer expires is not addressed. This question, again, sits within the *dynamic* or *static* debate raised in chapters 2.2 and 2.5 (Germany-Acquired Rights). In this British-Acquired Rights chapter, national courts were very involved in a debate that saw *both* the dynamic and static interpretations imposed at different points in different cases, creating the consternation described above. The CJEU again intervened here.

Some contextual points raised from UK law are first outlined. British contract law, a central doctrinal part of the British constitution, has been defined by the liberal principles of a ‘freedom to contract’ right assigned to all individuals (Deakin and Morris 2009; p.110-114). Labour lawyers however have usually criticised this doctrinal position from a normative basis as they approach the employment relationship as one set around a balance of power that is nearly always skewed in the employer’s favour (by the innate circumstances of any employment relationship), thus rendering this ‘freedom’ as entirely unbalanced in the employer’s favour. Doctrinal impositions coming from the European level are muddled by traditions of both a ‘labour law’ view, emphasising social rights of workers, and a ‘freedom to contract’ view which, by implication, favours employers. In this chapter, EU institutions have notably shifted from one (social protection) to the other (commercial), but how this shift was dealt with by UK courts produced more problems, requiring the CJEU to create its own settlement.

UK courts, again, had applied both dynamic and static interpretations in different cases, creating a conflict of *laws* problem. Three main cases are addressed here develop this and include the *Glendale Managed Services v Graham* (2003)¹⁰¹ and *Whent* (1997)¹⁰² cases, the *Alemo-Herron* decision that actually reached the CJEU. This third case in fact settled the uncertainty

¹⁰¹ *Glendale Managed Services v Graham* IRLR 465, Court of Appeal [2003]

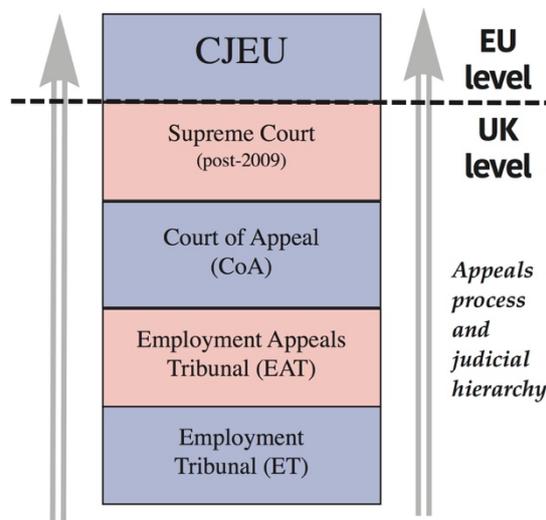
¹⁰² *Whent v T Cartledge Ltd* [1997] IRLR 153 (EAT).

around the *dynamic-static* debate in favour of the employer-friendly *static* approach. The German *Werhof* case, examined in the previous chapter, also features in this section as it was an influence on some of these UK cases.

Two aspects of context are present in both the *Glendale* and *Whent* cases. First, these cases concerned outsourcing in the public sector and, second, a role for a National Joint Council (NJC), of the sort seen in the Britain-Posted Workers chapter, that governs the collective agreement for local government in Britain. Both the *Glendale* and *Whent* cases were decided in accordance with the dynamic interpretation, stating that it was logical from a legal standpoint that an established collective agreement for the sector be enforced in a situation where transfers and multi-stage transfers were common. This has echoes of the 'business case' argument made with the SPC in the previous sub-section, but unavoidably also conforms to social rights interpretation of this question rather than an employers' 'right to contract' principle. With this, it also has echoes with the 'pattern bargaining' logic seen in countries like Germany and Austria with stronger corporatist traditions rather than Britain. This does underline a key point of this chapter however: in order to achieve legal certainty, legal actors like courts or the governmental state will often look for practical solutions rather commit themselves to broad abstract principles found in doctrine or ideology (liberalism, freedom to contract, industrial peace etc.).

The graphic above displays the hierarchy of courts, or appeals chain, in Britain. Employment Tribunals (ET) (and Appeals Tribunals (EAT)) could not establish a common approach, with EATs overturning previous decisions in *Whent* and *Alemo-Herron*. British courts, caught between different approaches, were not sure how to adjudicate these disputes.

Figure 2.6.a: UK Court hierarchy



More space is provided to outline and analyse the 2013 *Alemo-Herron* case as this, again, settled this conflict of rules between the dynamic and static interpretations. This was a British case that finally reached the CJEU after an exhaustive appeals process and different levels of courts had been gone through, some applying the *dynamic* interpretation and others applying the *static*.

Table 2.6.b UK and EU cases on the 'static-dynamic' interpretations

<i>Static interpretation</i>	<i>Dynamic Interpretation</i>
<i>Werhof (2006) CJEU</i>	<i>Glendale (2003), CoA</i>
<i>Alemo-Herron (2013) (EU & UK)</i>	<i>Whent (1997), UK EAT</i>
<i>Asklepios-Kliniken (2017) CJEU</i>	<i>Scattalon (2010) CJEU</i>

The *Alemo-Herron* concerned a claim by employees to a collective

agreement agreed by the National Joint Council (NJC) *and changes made* to the collective agreement made at the NJC. The new owners of the undertaking in question (the transferee) were not signatories to this collective agreement.

An initial transfer of undertaking from a local authority (Lewisham, South London) to a private sector firm, CCL Ltd, incorporated the terms of the collective agreement run by the NJC for the local government sector. These entailed the agreed pay increases for the transferred employees. When a further transfer occurred, to Parkwood Leisure Ltd. (the defendant), a dispute arose over Parkwood's refusal to adhere to this collective agreement and the continued application of the pay increases this brought.

Figure 2.6.b The transfers of the Alemo-Herron case



The Employment Tribunal (ET) originally imposed the *static* interpretation arguing that the transferee company should not expect to have terms to a collective agreement imposed upon them that were created *after the date of the transfer*. The ARD might be meant to impose employment conditions *at the point of transfer*, but not all those subsequent changes that might occur later. On appeal, the EAT disagreed with the ET and imposed the dynamic interpretation. The Court of Appeal then disagreed with the EAT and agreed with the ET's original decision, and re-imposed the static interpretation and did so by interpreting EU law through the CJEU's 2006 *Werhof* case.

This decision came with a caveat (of sorts) from the Court of Appeal,

stating that the dynamic interpretation, if it were not for *Werhof*, would constitute the “conventional application of ordinary principles of contract law to the statutory consequences [of the ARD]” (Justice Rimer at paragraph 46, sourced by Wynn-Evans 2010). This statement itself is interesting as it demonstrates just how far British courts had adjusted UK law over thirty years-plus of the ARD to a position where these courts would *prioritise social protection principles* rather than the employer’s ‘right to manage’ and ‘right to contract’ than sits more comfortably in British judicial and doctrinal traditions. When this case got to Luxembourg, the CJEU, again, concurred with the Court of Appeals decision and firmed up its jurisprudence providing the *static* interpretation.

In this important sub-section, UK courts and social partners were caught with a serious regulatory and governance problem and in fact a conflict among three options: a) adherence to traditional British approach to contract law as it relates to collective bargaining and employment contracts, b) the extended social policy approach of the *old* ARD, c) the *new* approach of the CJEU. This sets up a number of theoretical claims raised below.

2.6.3. Theoretical findings

2.6.3.i. Law and collective bargaining inextricably entangled

Unlike in the German-Acquired Rights chapter, there are no works councils or similar institutions of workplace ‘worker voice’ in place in Britain. This means that the ‘collective institutional’ half of the labour relations regime in Britain’s case is represented solely by collective bargaining¹⁰³. Similarly to the

¹⁰³ To repeat some context on the difference between works councils and collective bargaining, the latter sets wages and pay scales (and can do so at a national, industrial or company level) whilst works councils in most guises where they exist in Europe do not set wages but deal with other ‘local’ aspects of the employment relationship like holiday pay, grievance procedures and *the details* of pay-setting.

German case, British collective bargaining finds itself in a passive and defensive position when dealing with legal pressures to their institutions.

There are however important differences in Britain concerning the relationship between law and bargaining. The important aspects of this law-collective bargaining relationship in this case concerns the legal character and legal force of collective bargaining. As already noted in the previous subsection, in most of Europe collective agreements are legally enforceable in the same or similar way other contracts are. In Britain (and Ireland) these are not, but individual employment contracts, whose content are often provided by collective agreements, are legally enforceable meaning they can be enforced *in law*. Moreover, employment contracts are often endowed with a 'bridging clause' that formally recognises a collective agreement and its framing of the terms and conditions of that contract.

As illustrated in the concluding section of chapter 2.1, the presence of legal character is hugely important as it indirectly provides rights of action for both unions or employers to have provisions enforced. Employers in Germany for example may seek to impose an agreed 'peace clause' contained in a collective agreement they feel unions are breaching by going on strike. In the British case, as illustrated in the previous UK-focused chapter and in 2.1, trade unions have traditionally sought to keep collective bargaining away from the reach of the state given the historic hostility of courts and the UK common law towards union action and collective bargaining. As the neo-liberal policy agendas of the 1980s and 1990s began to challenge trade union and workers' rights, European courts became a new litigation avenue to enforce workers' rights and interests. This is evident in the case of the ARD which provided an on-going source of case law for both UK and European courts.

This sees the relationship between bargaining and law in Britain as a

rather distant one and therefore led by workers and employers, although with employers being much more dominant in a post-1980s period with unions being weaker or even non-existent. In this ARD case, EU law forces them together; initially giving collective agreements legal character (in the case of transfer of undertakings *only*) where they did not have this before. Then the European Court sought to reorder the rights of action and rights of association, in *Alemo-Herron*, later on in favour of employers.

The first of these produced a clear breach of the doctrinal position of UK labour law by making collective agreements *legally binding* (again, only for the purposes of transfers of undertakings only). This applied only to the question as to whether collective agreements applied to a transfer *at the point of transfer*, but successor agreements will not be binding unless the new employer agrees to it. The phrase 'doctrinal position' is used purposefully as there is a meaningful question as to whether this point of law actually results in practical effects. It is argued here that it does, up to a point. If unions cannot ensure that employers will enforce a collective agreement (either honestly, on time, or only partially, or at all) then, in the abstract, they have a number of options: strike and or blockade, lobby for governmental assistance, or litigate in the courts. If union membership or organisational power is weak and assistance from government is thought unlikely, litigation is the only option remaining if this is deemed viable. If unions know that in those instances covered by the ARD they can ask for collective agreements to be enforced by the courts, they are more likely to use this option. This introduces an important feature of *juridification* into collective bargaining concerns where before this would not exist.

As it stands in Britain, the legal enforcement of collective agreements only applies to 'transfer of undertakings' cases and not elsewhere in British labour relations. Given that the expansive and common use of such transfers

however, as caught by the directive, the relevance of this point to British labour relations is not limited, but relevant to plenty of British labour relations. The relationship between law and collective bargaining therefore is much closer and intimate, even if complex as a result of European demands for legal change, but was complicated by *renewed* interventions coming from Europe that came later.

Section III offers some important comparisons on this last point above but is outlined briefly here. In the case of German unions, that also had legally enforceable collective agreements both within and outside of ‘transfer of undertakings’ cases, litigation was not reached for. The answer points to the role of neo-liberal reform agendas in Germany, consensual labour relations traditions (as supposed to more conflictual relations in Britain), and the role of works councils in Germany as a critical venue for unions to exert influence. Both of these comparisons sit next to the other British chapter (on posted workers) where unions used strike action to impose new collectively agreed rules, exploiting power resources unique to the circumstances of this corner of the construction sector rather than of high union membership. This is continued and developed further in Section III.

2.6.3.ii. A clash of legal systems and complex problems of direct and indirect legal influences

As with the German-Posted Workers case study, this chapter presents a very prominent role for a direct law-based disruption, but does so with both a court-inspired disruption and a disruptive *legislative* intervention. In this case however, two different examples present themselves. In the *Süzen* case, the CJEU had the intent to produce a decision that aligned with neo-liberal goals, market-making goals. The terms ‘neo-liberal’ or even ‘liberal’ are not used in the decision, but do not have to identify (an albeit messy) coming together of

judicialisation and *neo-liberalisation* trends. The coming together of these in this case study served to create legal uncertainty that inspired a legislative response represented by the SPC. This produced an outcome almost completely contrary to the liberal implications of the *Süzen* case. This is a legislative example of the kind of *unintended consequences* that can result from disruptive legal intervention that take outcomes away from their intended normative destinations. This points to an interesting comparison with those *unintended consequences* in the British-Posted Workers chapter (2.4) where collective action and collective bargaining were the principal drivers of those outcomes nullifying the intentions of EU law.

Unlike the previous UK-based case study, courts were every much central here, as employers did often feel the need to action their perceived legal rights in the courts. Here, British courts were caught between a) adherence to a traditional doctrinal approach to labour law questions, b) the social policy approach of the *old* ARD (pre-*Süzen*), c) the *new* but underdeveloped and unsettled *Süzen* approach of the CJEU. The CJEU settled this dispute in the 2013 *Alemo-Herron* case. The process that culminated in the final judgement in this case (of the CJEU) however was complicated and disorderly, and says much about the conflict of rules problems that can arise when hyper-liberal interpretations of competing social and economic rights are used to generate legal change. Despite the finality of the Court's *Alemo-Herron* decision, this process underlines the prominence of conflict, complexity and uncertainty rather than complementarity or functionalism in explaining this example, in institutionalist CPE parlance, of 'institutional change'.

For this chapter, and as indicated immediately above, the complex layering of different existing legal rules presents the sorts of conflict of *laws* problems addressed below. We are in essence talking about *two* legal systems

trying to co-exist. But under the hierarchical system of EU law, national law must conform to EU law (in the abstract). This has been made remarkably difficult for Britain in this case given the contrary normative logics operating in European legal rules *vis-à-vis* UK law, and then the disruptive form of change to these legal rules pursued at the European level.

2.6.3.iii. Conflict of rules, laws, complexity and incoherence

The concept of *conflict of rules*, and in particular conflict of *laws*, have been especially useful for organising the complex and competing sets of legal rules found in this chapter. There are two sets of *conflict of rules* problems in this case study. One sees two *temporal* and one *normative* conflict of rules issues, the other is found in the three conflicts raised at the end of the last (empirical) section concerning collective bargaining.

The first set of *temporal* and *normative* conflict of rules is examined here. The *normative* comes in two parts: the first sees a conflict of rules between legal rights providing social protection for workers and those legal rights for employers to reorganise their businesses and workforces and their 'right to contract'. The second sees a UK position, represented in legislation and public policy preferences, being set in opposition to the intentions of the ARD as provided by European institutions. The ARD, as initially written, was very clearly directed toward social protection logic and was enforced by European institutions (the Commission, the Court).

The *temporal* conflict, following from the above, sees this initial social protection interpretation reversed in favour of the antithetical employer rights-centred approach. This reversal itself, concerning the ARD's scope, created a conflict between an interpretation that UK courts and legislators had grown obedient too, albeit only recently before the 1997 *Süzen* shift, and the new employer rights-centric approach delivered by this same 1997 case.

The *choice of laws decision* was ultimately made by legislators through the SPC clause in the 2006 TUPE regulations; a 'choice' that in fact extended the social protection force of the directive and in fact reversed the logic of the CJEU's *Süzen* decision. This was not done to assuage the then Labour government's trade union allies, although a consideration, but was done to provide legal certainty to this area law. This *conflict of laws* problem and resulting *choice of laws* solution was based on a principle of legal certainty for employers, workers as well as for courts who had also been complaining about the CJEU's *Süzen* decision.

The conflict of rules scenario presented by the collective bargaining problems is in fact murkier, but only because the CJEU did not have much case law on this subject compared to those questions of the ARD's scope.

Given UK courts' acceptance of the European interpretation in the 1980s and 90s, some judicial actors chose, in the absence of explicit guidance in the directive or by the CJEU, to interpret and enforce the social protection principles of the directive and impose successive collective agreements onto post-transfer employers, despite them not being party to these agreements. Other UK courts disagreed with this interpretation and instead of being deferential to EU law in this case (as interpreted in the 80s and 90s) were instead deferential to the traditions of the 'law of contract' found in Britain that were more friendly to employers. The CJEU eventually settled this conflict of laws problem by enforcing the *static* rather than *dynamic* approach, thus enabling employers the ability to use multi-stage transfer processes to subvert the demands of collective bargaining and unions.

Where courts were caught between a) an adherence to traditional doctrinal approach, b) the extended social policy approach of the *old* ARD, c) the *new* approach, it is important to note the CJEU settled this dispute in the 2013 *Alemo-Herron* case. The process that culminated in the final judgement

in this case (of the CJEU) however was complicated and disorderly, and says much about the conflict of rules problems that can arise when hyper-liberal approaches to competing social and economic rights are used to generate legal change (by prioritising the latter). Despite the finality of the Court's *Alemo-Herron* decision, this process underlines the prominence of conflict, complexity and uncertainty rather than complementarity or functionalism in explaining this example, in institutionalist CPE parlance, of 'institutional change' mentioned earlier in this chapter and developed more in chapter 3.2.

The legal uncertainty present on this occasion, created by an absence of European level guidance rather than a reversal of some kind, was instead met by domestic courts, although without any coherence or commitment to a common doctrinal cause. In this chapter, competing *legal logic* based on judicial interpretation are more likely to explain these outcomes than those arguments that align with neo-liberal determinism or institutional complementarity found in CPE. This point underlines an important realisation about pursuing CPE research in a still-dominant era of neo-liberalism. Courts may behave in any number of ways to conform and reinforce the imperatives of neo-liberalism, but they could also act in contradiction in favour of other principles of doctrine, justice or jurisprudential respect for the facts of the case. The *governmental state* is easier to wrap into theories of the neo-liberal state given its ability to be seized by powerful political ideas and circumstances. Courts, at the very least, cannot be looked upon theoretically in the same way. In the German ARD case, courts were not committed to *doctrinaire neo-liberalism* either, but their consistent and passive referrals of cases to a European Court that was merely served the use of legal principles that aided neo-liberal goals to employers weaken institutions of German *Tarifautonomie*. In Britain, courts were more active, but were still more committed to legal principles such as legal

certainty (for courts and practitioners) and deference to EU law, only their deference was manifested in an attempt to apply EU law rather than simply refer the case to Europe.

In short, courts are an increasingly prominent actor in events marked by processes of economic reorganisation, processes that see employers given greater rights to operate either by circumstance or in law. This does create counter claims by workers to frame or halt these processes. This creates a classic class-based conflict of laws scenario on which the rule of the neo-liberal order is clear in the ordering of rights, only courts are not. The CJEU's position, and across all four cases of this thesis, is very clear. Neo-liberalism as *legal* as well as *market* and *political* imperative is part of a European constitutional order that national legal and labour relations systems have had to reconcile themselves to. The concurrent and often overlapping advance of neo-liberalism and Europeanisation poses serious questions for the comparison of labour relations and possesses serious legal as well as politico-economic parts.

2.6.4 Conclusion

This was a case study of a particular sort of law-based disruption and legal change; its specificities defined, in the main, by the perverse results it created when viewed against the very intentions of the initial disruption. In simpler language, this was a case study in the 'messy reversal', the sort that created the 'roundabout' journey that British legislators and practitioners were subject to. What is theoretically most interesting, looking forward to the third section that follows this chapter, is the *response* to it. The reasons for the selections of *posted workers* and *acquired rights* as areas of law is not simply what these legal rules themselves do, but what they provoke and inspire in

legislators, political interests, trade unions and employers. This response in this case study was very law-based, and came through both legislative and judicial action, unlike the first case study chapter (Germany-PWD) which is offered only a legislation form of response to a judicial intervention. This response, more specifically in regards to CPE, also did not conform to the varieties of 'liberal' label attached to Britain. This is particularly remarkable given that the disruptive legal change, on both the ARD's scope and on collective agreements, pointed to the sort of outcome that would conform to the 'liberal' or market-orientated outcome that characterises Britain. Why did Britain not revert to politico-economic type as CPE theories would suggest? The reason is found in law, and concerns of legal certainty and regulatory stability and how these are addressed by courts and legislators; these factors are not addressed in CPE schools.

Section III

Chapter 3.1.

Comparisons and findings from four case studies

3.1.1. Introduction

The purpose of this first chapter of this final section is to bring together the empirical findings of the four case study chapters for the purposes of analytical comparison. These comparisons, a fundamental part of CPE and all comparative social science, produce a number of important empirical findings and observations. These findings and observations are then used, in chapter 3.2 that follows, to generate claims about broader phenomena including the future of labour relations under European integration, the continuance of the neo-liberal order and, importantly, how CPE can address these.

This chapter has three main sections. The first (3.1.2) provides a brief mapping of the four case studies and some preliminary four-way comparisons. The second section (3.1.3) builds upon this and produces those key empirical observations from the four chapters but does so according to selected themes. The final section of this chapter (3.1.4.) examines the alternative framework put forward in this thesis and offers some modifications to this framework based upon the findings drawn from the four case study chapters.

3.1.2. Preliminary comparisons

As articulated by Peter Hall in his paper *Systematic Process Analysis* (2006), detailing the benefits of small-*n* comparative case study research models, the in-depth analysis of compared cases is particularly beneficial for theory

development. This includes extending theoretical arguments to broader phenomena from these discrete cases. In using the four case studies in this thesis, and the wealth of empirical material these brought, it is important to acknowledge both the *empirical* as well as *theoretical* uses these cases have for this thesis. This means that these cases have provided direct *empirical* findings as well as *purely abstract theoretical* ones.

The two German case studies for example, despite concerning specific and discrete areas of the German economy and labour market, do nonetheless tell us something about the empirical realities of German labour relations *more broadly*, namely the demise of *Tarifautonomie's* centrally important collective bargaining component. In the two British case studies however, the broader conclusions made for broader British labour relations are more limited (although still present), but do present two important *abstract and theoretical* findings that are relevant for *all* labour relations concerns as well as Britain. To identify these briefly, the *Britain-Posted Workers* chapter (2.4) presented an abstract and classic example of a *collective action-prompts-collective bargaining* relationship that, relying on market context and power resources of labour, completely nullified attempted changes in legal rules and legal rights. In the second Britain-focused chapter (2.6, acquired rights), the abstract theoretical picture that was painted concerned a disruptive reversal made through law prompting an adjustment response which again nullified an attempt to alter the legal framework and legal rights of one actor (employers) over another (labour). This again, is an abstract scenario but is one not unusual in a European labour relations context where courts and legislators often pursue disruptive and unwelcome legal change, and has in fact become more commonplace.

From this broader comparison and contextualisation these case studies and what they have been used for, more pointed and specific

comparisons in this section are addressed. There are a number of possible avenues to mapping and then comparing these four case studies. In this section, two comparative schemes are outlined organising the four cases and those central themes used for comparative theory building. A simple comparative scheme is provided below with basic descriptive comparisons of the four cases.

Table 3.1.a. Four cases

<p>Germany – Posted Workers</p> <p><i>An initial and disruptive intervention from a court that targeted both collective bargaining and legal rules that reinforced them. This saw an innovative legislative adjustment strategy on the part of German policy-makers that pushed labour relations matters further into the realm of law and formalising a relationship with public procurement, a form of economic law.</i></p>	<p>Britain – Acquired Rights</p> <p><i>The CJEU sought to impose a narrower, market-orientated, employer-friendly re-interpretation of the ARD’s scope (the Süzen case) and on collective agreements’ post-transfer role. The re-interpretation of the ARD’s scope caused such legal uncertainty that legislators sought to create a legislative fix that served, in effect, to reverse the normative intent of Süzen, also giving the British version of the ARD stronger social policy character than Süzen implied.</i></p>
<p>Germany – Acquired Rights</p> <p><i>Instead of CJEU decisions seeing their liberal, market rights-based intentions negated or nullified, a piece of European legislation providing social rights for workers was instead nullified by a mix of negotiated settlements (in German works councils), a legislative tweak in the German legislation transposing the ARD, and CJEU decisions having to affirm the policy intentions of German and European policy-makers.</i></p>	<p>Britain – Posted Workers</p> <p><i>The Rüffert and Laval cases provoked (alongside UK labour law) a much more radical departure from the intentions of the CJEU to expand the market access rights of employers. Here, the regulatory and governance regime, already dominated by collective bargaining, was pulled away from both EU free movement law and UK labour law that offered powerful rights for employers to a) have collective agreements ignored by foreign contractors, and b) end the strike action used to respond to a shift in legal rights.</i></p>

As a first step, these four case studies are separated by a simple and broad categorisation where 1) *substantive change took place* (C) or 2) *substantive change did not occur* (nC). This simple two-way classification is made given that the primary area of law that defined each case study (*posted workers* or *acquired rights*) either was *nullified and massaged into existing practice* (nC) or, was *successfully generated changes in labour relations practice* (C). The *Germany-Acquired Rights* and *Britain-Posted Workers* provided the two examples of the attempts at legal change being blunted and massaged into existing labour relations norms and practice (nC), with the *Britain-Acquired Rights* and *Germany-Posted Workers* the example of legal change successfully performed its intended purpose (or at least to a large extent) (C).

This simple dichotomy however does not illustrate *the degree of disruption* caused by these attempts at legal change. The *Britain-Posted Workers* chapter for example did see the attempt at legal change (represented by CJEU engineered shifts in posted workers law) in-part inspire very disruptive strike action ('in-part' because changes in market dynamics (more foreign contractors entering the market) also contributed to these strikes). When drawing a neat causal line from *the beginning* of this dispute to its *outcome* however, this shift in the legal rights *does not* produce the changes in Britain that it did in Sweden (as in *Laval*) nor in Germany (as in *Rüffert*). One obvious difference is presented by the presence of a CJEU decision in the *Laval* and *Rüffert* examples, hence the name of these cases, but in Britain did not reach the European (or any other) court. An important point from this chapter (2.4) is repeated however: it is far from guaranteed that a CJEU decision like that in *Rüffert* (*Germany-Posted Workers*) or *Laval* in the British case would have ended the dispute Britain. In fact, given the extent and ferocity of this strike action, and the fact that it was already taking place

illegally, it is highly unlikely that a *Laval* or *Rüffert*-like decision would have ended.

The *Britain-Acquired Rights*, as with the *Germany Acquired Rights* chapter, featured two sets of issues: scope and collective bargaining concerns. With this, the basic C-nC dichotomy would seemingly be split across these two sub-areas. In the *Germany Acquired Rights* chapter no discernible legal change occurred in either the areas of scope nor collective bargaining, even with the existence of several Landmark CJEU cases concerning Germany (*Süzen*, *Werhof*, *Asklepios*). In Britain, substantive change was inspired in the area of the ARD's scope at both ends of the ARD's 40-year life-time. At the back end of this time-line however, the legal change inspired by the 1997 *Süzen* case inspired a response that nullified the effects of *Süzen*. This response itself constituted *substantive legal change (LC)*, as did the consternation among Britain's courts in regards to collective bargaining issues that were shrouded in murk at the EU level.

Why these cases produced these particular kinds of outcome however is not only determined by the *nature of the legal intervention* (whether it was legislative or judicial or a mix of the two) but also *the manner* it was delivered (a disruptive court decision for example) and the *nature of legal and labour relations regime it sought to change*. Importantly it is the *responses to this intervention* which were examined. These responses to the *regulatory and governance problems* themselves reveal much about the state of labour relations systems, whether defined in national or industrial level terms, the nature of the legal systems in these cases *and*, importantly, informal aspects such as labour actors' approach to legal rules. From these empirical examples, and the simple C-nC scheme, three abstracted categories of *response to attempted legal change* are identified and drawn from the four case studies. These are *Collective Institutional*, *Political-legislative* and *Juridified*.

Table 3.1.b. Three forms of response

<p>Germany – Posted Workers</p> <p>An initial and disruptive intervention from a court that targeted both collective bargaining and legal rules that reinforced them. This saw an innovative legislative-political form of response that pushed labour relations matters further into the realm of law and juridified form of regulation, formalising labour relations’ relationship with other forms of economic law (public procurement).</p>	<p>Germany – Acquired Rights</p> <p>Negotiated settlements in works councils mitigated the impact of restructuring, some legislative tweaks and judicial decisions contribute to nullifying the ARD, making it entirely non-disruptive. A Collective institutional form of response, supplemented by legislative-political and judicial reinforcement).</p>
<p>Britain – Acquired Rights</p> <p>Disruption from judicial and legislative interventions at different ends of a 40-year time-line. Domestic legislative and judicial responses to this disruption were, in their own way, expansive. Courts were left in a muddle before a final judicial decision settled matters (on collective agreements). Legislation was retained and corrected some of the damage caused. Legislative-Political, judicial influences in the response.</p>	<p>Britain – Posted Workers</p> <p>Law’s influence more indirect, but present in shifting legal rights in a transnational market. Collective action and collective bargaining combined to pull labour relations away from the threat of unfriendly, and multi-faceted, legal interventions. A far purer form of Collective Institutional form of response that reasserted the pre-existed role of collective bargaining.</p>

These abstracted *Collective Institutional, Political-legislative* and a *Juridified* types of response each take more complex forms across the four chapters. These three categories denote the type of dynamic relationship between law and collective institutions and include roles for labour, employers and the governmental and judicial state. In the thematic terms provided by each point of the *socio-legal political economy framework* of this thesis, these different forms of response are predicated by the manner in which *conflict of rules* problems are addressed and settled, and are themselves determined by the relative power resources of key actors.

In both the Germany-based case studies, the power resources of labour were too weak to impose themselves and their interests upon employers in the very direct manner found in the *Britain-Posted Workers* chapter. In fact, in the *Germany-Posted Workers* case, trade unions did have some influence on a legislation-based response although this did only produce an incomplete and very limited outcome in attempting to defend an existing labour relations regime. A key finding when viewing the two Germany-based case studies together also produces a paradox. These demonstrated both collective bargaining's *on-going reliance upon law-based supports* as well as its *heightened sensitivity to law-based threats* as collective bargaining and its trade union actors weaken.

Each of these case studies exhibit some distinctive and unique characteristics in terms of the outcomes they produced. The *Germany-Posted Workers* chapter above for examples stands out from the other three as it produces a wholly incomplete 'outcome' (at the time of writing) where the legislative response has not yet had its validity, using EU public procurement 'special conditions' provisions to defend collectively agreed and legislation-provided minimum wages, confirmed by the CJEU. This may happen in time, but had not ten years after the initial *Rüffert* case. Five main observations are identified in the following section, but this emergence of public procurement presents a more specific but important observation of the sorts of juridified contractual forms that the regulation and governance of labour relations are increasingly being placed within.

The *British Posted Workers* chapter stands out given that the prominent role for strike action in this chapter does not appear in any significant form in the other three case study chapters. This feature places this case study an important comparative position in this third section when understanding how power resources operate against different legal rules and economic

contexts. It also points to those prospects and requirements for unions to use more aggressive means of challenging neo-liberal legal change. As indicated at the top of this section, the abstracted collective *action-collective bargaining* relationship is an undeniably relevant feature of labour relations in capitalist systems whether it occurs as a regular event or *the threat of it* this sort of interaction informs the employment relationship that takes place to avoid it.

The *British-Acquired Rights* chapter also presented a form of ‘final outcome’ in regards to both the ARD’s scope (an outcome provided by legislation) and the collective bargaining issues in the ARD (provided by the CJEU in its 2013 *Alemo-Herron* decision). The finality provided in of both these thematic parts of the ARD discussion in Britain is belied by the presence of very messy regulatory problems created by the uncertainty surrounding European acquired rights law. Legal uncertainty was present in *some* form in all of the other chapters, but was masked up to a point by particular actors taking advantage of the uncertainty by imposing their own interpretation of shifts in legal rights and attempting to exercise them, thus removing (up to a point) any uncertainty. This ordering process can sometimes occur relatively seamlessly, even if over time (e.g. *Germany-Acquired Rights*), and in other scenarios not. The *British-Acquired Rights* chapter therefore stands out versus the other three case studies as an extreme example of legal uncertainty and the perverse outcomes it can produce. In this case, these perverse responses are defined by those of British legislative and judicial actors that broke quite radically from approaches that would conform to a British ‘liberal’ politico-economic model anticipated by most CPE scholars.

The *Germany-Acquired Rights* chapter marked itself out from the other two as it produced a *collective institutional*-led response, courtesy of the rules of works councils, as well as the paradoxical presence of collective institutional *decline* in the form of collective bargaining’s on-going erosion.

3.1.3. Five observations

This chapter could have been organised by a rigid process of going through the five points of the alternative *socio-legal political economy* framework, outlined in chapter 1.1, one-by-one. Instead, it was thought more useful to create two sections following the section above: one with those *observations and findings* drawn from the four case studies (examined on their own merits and not organised and structured according to any framework), and to then direct these observations and findings toward another section where these findings and observations are used to modify the alternative framework. This section therefore provides the function of presenting core observations from the four case study chapters using direct comparisons of the four cases. There are five main, and interconnected and overlapping, observations drawn from the previous section and the four case studies.

- 1) *The relationships between legal and collective institutions of labour relations are becoming unsettled due to influence of neo-liberal ideas.*
- 2) *The role of labour law is being heavily framed and determined by areas of law and legal change, principally found in economic law*
- 3) *The responses to increased legal interventions into labour relations takes several forms, to which relative power resources of key actors are central to defining.*
- 4) *Differences between legislative and judicial expressions of these 'legal interventions' are important, but the interaction between these are unsettled, disrupting how legal systems and labour relations interact.*
- 5) *The roles for different forms of mediation and conflict are important in defining these responses to legal interventions and for settling conflict of rules problems.*

1. *The relationships between legal and collective institutions of labour relations are becoming unsettled due to disruptive influence of neo-liberalism*

As stated in chapter 1.1, the rise of neo-liberalism and the emergence of new forms of legal interventions and influence in collective bargaining are inextricably related. This directs us to developing a renewed understanding of neo-liberalism, that appreciates its *legal character* as well its *political* and *economic* facets. Tying the emergence of neo-liberalism on the one hand together with those new legal influences and characteristics of labour relations on the other, is the central theoretical insight of this thesis (derived from the *socio-legal political economy* approach). It is however addressed in more detail in the following chapter (3.2) alongside other theoretical findings as it is a broad-based observation. Here, the concrete empirical findings from the four case study chapters are raised to demonstrate the claim.

The connection between the law and neo-liberalism's emergence in the last 40 years of labour relations in Europe leads to another important claim: *That this dual emergence has also made labour relations more unsettled, simply because the nexus between law and collective institutions has become disrupted by 1) attempts at reorganising existing collective institutions of labour relations and 2) the responses these provoke among key stakeholder actors.* Put another way, collective bargaining regimes and neo-liberalism have been engaged in a form of contest; a contest that is on-going and has not as yet produced 'a winner', as the intrusions of *neo-liberal legal change* produce responses, some of which muddy and misdirect the initial intentions behind that intrusion.

Theories found in Comparative Political Economy (CPE) have addressed some of the political and economic aspects of these *responses* to

neo-liberalism's challenge (naturally, given the term 'political economy' in CPE). These have not however grasped a) the legal character of neo-liberalism, nor the legal characteristics of the responses to neo-liberalism. With *political* and *economic* factors being addressed without acknowledging the *role of law*, both the standalone subject of law itself and its interaction with these *political* and *economic* factors are neglected. These *legal factors* are *formal* as well as *informal*, or in other terms, *doctrinal* as well *cultural*. Together these are both important aspects of legal systems and how legal systems interact with labour relations, and, crucially, these how the actors involved in labour relations respond to those interventions a given national, industrial or local labour relations regime.

Each of the four case studies in the preceding section provided meaningful examples of both and are addressed here thematically. These three themes include how *strike action*, *litigation*, *negotiation* and *legislation* are used and the conditions that determine what mixture of these define the response.

The role of *negotiation* is addressed more further on in this chapter, but is the centrally defining feature of all collective bargaining (even if conflict and the threat of it revolves around bargaining). In Germany, the traditions of *Tarifautonomie* highlight the role of *negotiation* over state-led mediation or intervention, given that 'autonomous' collective bargaining can not exist unless parties successfully negotiate rather than engage in conflict. What is notable in the Germany-based chapters is the emerging roles for *legislation* in intervening in labour relations and, crucially, to *undermine* those collective bargaining institutions that defined *Tarifautonomie*.

This *Germany-Acquired Rights* chapter demonstrated courtesy of Germany's adoption of the ARD provision 3(2) that would severely curtail (in terms of time-line) the use of collective agreements as a source of workers'

acquired rights. Something similar was also present in the *Germany-Posted Workers* chapter, but in an importantly different way as the (*Land*-based, not federal) legislation in question was initially to *support and reinforce* collective bargaining. The legislative response in this case study also attempted to prop up collective bargaining after the CJEU's *Rüffert* decision undermining it. This presents a complex and incoherent set of legal rules, some demanding changes in the image of neo-liberalism, whilst others do the opposite. This is partly a result of Germany's federal structure where states can diverge from federal policy, but still produces a complex set of regulatory and governance arrangements which partly comes from attempts at *neo-liberal* change and partly from the responses to these. This presents an interesting finding about German labour relations that produces a 'old regime versus new regime' contest where neo-liberal order seeks to remove or weaken collective bargaining institutions but does not completely succeed. Instead, an uneasy and incongruent and conflictual form of co-existence is the result.

Traditions of negotiation found in German *Tarifautonomie* also produced norms of interaction between social partners that were meant to preclude both *strike action* and *litigation* as means of exercising power or rights. These sorts of traditions are evident in the examples of litigation in the *Germany-Acquired Rights* case for example as these pursued by *individual workers*, not trade unions who had already reached negotiated settlements with employers as was at hand in the 2006 *Werhof* case. This aversion to both litigation and to strike action are both important cultural aspects of German *Tarifautonomie* and appear to still exist to a degree, even if the rest of the regime slowly erodes. More comment is made below in the fourth 'observation' of this sub-section concerning courts and the heightened role of judicial action in German labour relations.

In Britain, approaches to both litigation and strike action are traditionally more prominent than in Germany. The examples raised by the two UK case studies should not be extrapolated as 'proof' of these traditions, as the use of the UK case studies is to produce more abstract demonstrations rather than concrete empirical examples of British labour relations as a whole. These two cases do illustrate these traditions in British labour relations however. In regards to litigation, it is usually employers who are more willing to exercise legal rights through the courts, although the employment tribunal system in Britain has become an important venue for workers and trade unions to exercise their legal rights as well in particular instances. As an aside, the creation of the UK Supreme Court has also, in its short life, provided remedies to disputes on the side of workers¹⁰⁴. Strike action was the important causal factor in the *British-Posted Workers* case study and was the result of those power resources that unions possessed as a result of strong union organisation and specific aspects of the industry they operated within. Again, this is the one chapter out of the four where the activation of new rights by employers, provided by highly liberal interpretations of European free movement law by the CJEU (*Laval, Rüffert*), was challenged and reversed. This therefore resulted in an outcome that ran completely counter to the intention and thrust of decisions by the CJEU. This only has a partial similarity with the *Germany-Posted Workers* case, where an expansive response (through legislation) was produced, but did not substantively correct the damage of a judicial decision.

¹⁰⁴ The UK Supreme Court was created in 2009, so has not developed an extensive jurisprudence on many areas of law. Decisions such as *Autoclenz v. Belcher* however were more pro-worker in approach than that considered traditional in Britain's higher courts.

Across the four case study chapters, the effects of neo-liberalism's *legal, political and industrial*¹⁰⁵ drivers appear to have successfully weakened collective bargaining and its attached trade union actor in all four but one of the cases. The *British-Posted Workers* chapter is the one exception. This one case is again therefore notable as the lessons for the labour relations and trade unions in Europe are significant. If litigation does not provide the remedies required, and the legislative route is cut off or ineffective, increased collective action by unions may be the result of ever-increasing legal re-ordering of legal and non-legal rights in favour of employers.

Collective bargaining's relationship with the neo-liberal European order is addressed more in the following chapter, but the claim about *the relationships between law and collective institutions* is hugely important as a theoretical concern. Legal interventions may disrupt institutions like collective bargaining, but these relationships are most certainly two-way in causal terms as the responses to defend collective institutions can direct these to places not originally intended.

2) *The role of labour law is being heavily framed and determined by areas of law and legal change, principally found in economic law*

This observation concerning labour law flows logically from that above concerning collective bargaining, particularly given the traditional role of labour law to act to materially aid the interests of workers. This observation produces the claim that *labour law's role has increasingly been couched within the context of neo-liberal reform agendas as the neo-liberal vision of legal change has promoted individual economic rights over collective social rights*. This has meant that when these economic and social (labour) rights have come into conflict,

¹⁰⁵ Again, what is meant by this concerned corporate practices such as outsourcing, restructuring, and 'HRM' policies that sees employers manage labour matters ('Human Resources') rather than engage in parity negotiations. This is addressed in the next chapter (3.2).

it is the former that has been promoted over the latter. This highlights to use of a *conflict of rules* concept that conceptualises this conflict between social and economic legal rights as a reordering process that is often done in legal terms (by courts, legislation) and often pursued between labour actors (workers, employers) at the industrial/workplace level.

Labour law's relationship with collective bargaining is critical to defining labour relations systems. If this nexus is altered or disrupted, the character of the labour relations regime itself is undermined. The four case studies in section two produce some analytically important findings with implications for broader phenomena. The two posted chapters, when compared together in a two-way comparison, offer important lessons for these 'broader phenomena', namely European labour relations more generally.

A key claim outlined in the first chapter of this thesis (1.1), argued that despite the apparent social protection character of legal minimum wages, they are in fact a demonstration, or symptom, of the *neo-liberal vision of legal change*. This does not mean legal minimum wages lose their right to be labelled as 'labour law', only that the creation of legal and nationally-encompassing minimum wages is *a mere compensatory measure for weakening or removing minimum wages created by collective bargaining*. Materially, from the standpoint of labour, this is important for the simple reason that legal minimum wages are usually much lower than those minimum wages created within collective agreements.

This sees legal change re-order wage-setting so that employers have more power of the process of setting wages above this *legal* pay minimum. The effect of this was particularly clear in the *Germany-Posted Workers* case study (2.3). Here, a court (the CJEU) struck down both the imposition of collectively agreed minimum wages (as it did in *Laval*) and a labour law

provision in a state-level statute *legally* imposing these collectively agreed pay minima. The thrust of the CJEU's decision left only *legal minimum wage rates* as the acceptable form of minimum wage rule that could be imposed on foreign contractors. This was confirmed in its later (and also German) 2015 *RegioPost* decision. Again, this form of legal change aids the position of employers by promoting their *economic rights* found in EU free movement law (the CJEU's recent interpretation of it) over the *social rights* for workers found in the German labour law statutes (*Tarifklausel, Tariftreuegesetze*).

In Germany, as noted in chapter 2.1, a national minimum wage was finally created in Germany after decades of collective bargaining decline. Its creation arose amidst tensions within the German trade union movement, many of whom had traditionally saw such a development of a legal minimum wage as a distraction from efforts to reinforce and rebuild collectively bargained wage-setting. In truth, the creation of the national minimum wage (*Mindestlohn*) does act as a symbol of collective bargaining's decline. In 2018, collective bargaining in Germany stands at 54%, as noted in chapter 2.1¹⁰⁶, may not appear particularly nor comparatively low. The rate of decline however, at this time of writing, is steep and progressive. Plus, this coverage rate does not say anything about the *quality* of those collective agreements that still remain. As described in the both Germany-focused chapters, existing collective bargaining arrangements were not completely destroyed thus leaving a vacuum, but *were replaced or supplemented* by weaker collective agreements. In the posted workers chapter, the creation of new 'minimum wage only' collective agreements have become commonplace. In the acquired rights chapter, it was supplementary or replacement agreements that were the result.

¹⁰⁶ This is sourced from the ICTWSS dataset on labour institutions created by Jelle Visser at the University of Amsterdam

The way labour law interacts with collective bargaining, again, is the centrally defining part of the relationship between the legal and collective institutions of labour relations. The comparison of the *Germany-Posted Workers* case study with the *Britain-Posted Workers* illustrates the significance of these changes as they provide very different forms of *labour law-collective bargaining relationship*. Labour law rules in Britain were relatively weak in regards to a) the legal character of collective bargaining (or lack thereof), b) the rights of workers to strike and c) a legal minimum wage that was made irrelevant by its relatively low level *vis-à-vis* minimum rate of pay in the collective agreement at issue in the *Britain-Posted Workers* case. The distance of the political or judicial state from the process and outcome in the British case bears closer resemblance to German *Tarifautonomie* than the German case, minus the role for collective action (which is an important difference)

This sort of reordering process has seen shifts in *legal rights* in favour of employers, but, as noted immediately above, the *couching of labour law within neo-liberal legal change* also includes the creation of *legal frameworks*, not just *legal rights*, such as regimes of privatisation or compulsory contracting-out, that have fundamentally altered the economic context within which labour relations operates. Examples of this are presented in each of the four of case studies, producing different examples of the industrial contexts altered by engineered changes to the legal frameworks have regulate them. For example, the posted workers chapters are set around a public contracting-based construction sector. Here, the connection between these *legal framework* and *legal rights* aspects is evident as shifts in legal rights (in favour of contractors) threatened a form of work-wage bargain, formed under the public procurement framework, that workers still wanted and defined the industry previously. Despite the specificities of the construction sector's mode of production (temporary project and contract based), the use

of public procurement-style contracting as a legal framework exists in plenty of other sectors. This means that this *complex interaction between labour law and public procurement law* will exist in other sectors, posing questions on the role of trade union and *industrial action* in those sectors given the apparent success of the industrial action (from the trade union's perspective) in the *Britain-Posted Workers* chapter and the lack of success in the *Germany-Posted Workers* chapter (which relied on legislative fixes rather than strike action).

The spread of industrial examples in the two acquired rights chapters was much larger. With this, these presented a number of different forms of structural change to industries that threatened the role of labour law and collective bargaining to operate to aid the position of workers. Privatisations, contracting-out, and various kinds of mergers were all used to alter the industrial basis and context that collective bargaining took place. The ARD was essentially a legislative piece of labour law directed to protect workers' jobs and pay when these sorts of restructurings took place. In the *German-Acquired Rights* case study, we saw this attempt at providing labour law protections for workers blunted in the hospital, manufacturing and privatised public sectors (telecommunications) examples. This blunting effect also saw any prospect for the ARD *to operate alongside and with collective bargaining* to perform and reinforce their worker protection functions. This came as a result of an optional provision with the ARD itself, which German legislators adopted, that weakened this collective bargaining role in transfers if undertakings regulation. This is specific example of the ARD's nullification. More broadly, this piece of legislative labour law, that intended to furnish workers with legal 'acquired rights', was merged into a pre-existing but developing neo-liberal order and context inclusive of new legal rights and frameworks demanding flexible labour markets and an enhancement employer prerogatives. This in effect saw the legal rights for

workers contained in labour law submerged beneath the emergence of new economic rights, in German and European law, for employers. This presents a neat abstract demonstration of the 'neo-liberal reordering process' to which law and a particular vision of 'legal change' is central.

3) *The responses to legal interventions into labour relations take several forms, and are defined by relative power resources of key actors*

Law and legal change can be imposed in very forceful and disruptive ways, as two case studies in the preceding section (*Germany-Posted Workers, Britain-Acquired Rights*) demonstrated. The *responses* to these however are crucially important in determining the outcome of these law-based interventions and influences.

These responses to the 'regulatory and governance problems' caused by legal change have provided the principal analytical venue in each of the case study chapters and present meaningful opportunities for analytical comparisons here. Two main propositions are made: 1) these responses are framed by *relative power resources of key actors* and frame *not only how legal rules are perceived and interpreted, by workers or employers, but also how these are activated*. 2) understanding the role of relative power resources in regards to the activation of different legal and non-legal rights, is achieved when combined with the *conflict of rules* concept.

Conflict of rules scenarios in labour relations often stems from the conflict of *interests* that lace the relations between workers and employers. This conflict of *interests* therefore produces questions of *relative* power resources between labour relations actors. The case studies in this thesis all represented the same kind of *conflict of rules* problem whereby an attempt at *legal change* was pursued by a legislator or a court or an actor exercising legal rights, shifting the *legal* rights in favour of either workers or employers. Some

of these cases for example, placed a legal right at the feet of a particular actor, but this actor may or may not activate this legal right in their favour if their power resources relative to other actors is weak.

In the *Britain-Posted Workers* chapter, employers had considerable *legal* rights enshrined in EU law (to ignore collective agreements) and in UK law (to end illegal strike action) but were stopped from activating these legal rights courtesy of workers exercising their considerable (and autonomously created) power resources. In the *Germany-Acquired Rights* chapter, the balance of power resources was firmly on the side of employers. Employers were able to take advantage of a weakened trade union partner that were not in a position to action the rights contained within the ARD (and then reorganised collective bargaining regimes in their (employers') favour).

A similar balance of power existed in the first Germany-based (Posted Workers) case study (2.3). Here, one subset of employers, meaning either a single subcontractor (*Rüffert*) or a managing contractor (*RegioPost*), had no problem exercising the powerful sets of legal rights afforded to them in EU law (CJEU decisions in *Laval* specifically) that allowed them to ignore wage terms of a collective agreement that had been signed or were otherwise bound to. In the *Britain-Acquired Rights* chapter, these power resources in question were less clear as the highly complicated regulatory context created by disruptive interventions from EU law into UK law did not enable courts to enforce legal rights, except in a culminating CJEU decision (*Alemo-Herron*). Power resources dynamics here did not place either employers nor unions in a such a dominant relative position *vis-à-vis* the other *until* the *Alemo-Herron* decision that settled the issue. The availability of rights for employers was not clear in terms of the conflicting decisions that British courts produced on the ARD's collective agreement issues. The fact that employers kept reaching for the courts to enforce these legal rights, however, does speak to an

important feature of *perceived rights*, which itself has both power resources and cultural implications. This use of courts is a more prominent feature in British labour relations than German, and is likely only going to be pushed away from settling conflict of rules if the power resources of one actor (labour, employers) make this possible.

This explicit connection of *conflict of rules* and *power resources* provides one of the modifications addressed in the following section modifying the *socio-legal political economy* framework. The power resources concept also is the one notable conceptual introduction adopted from existing CPE, in modified form, in this thesis.

4) Differences between legislative and judicial expressions of these 'legal interventions' are important, but the interaction between these are unsettled, disrupting how legal systems and labour relations interact.

The difference between *judicial and legislative legal form and legal change* is that judicial action is not subject to pressures of social interests in the same way as legislators are. If, therefore, the *legal change* pursued by courts conforms to the *political* ambitions of neo-liberalism then these are less likely to be subject to the politically motivated repeal of legal rules as if they were made in legislation.

Connecting this with the third observation above, *the power resources demands placed on labour*, and the other counterforces to neo-liberalism (i.e. left political parties in government), are therefore that much higher. The *Britain-Posted Workers* case illustrates the sorts of power resources labour *must develop for itself* when workers and unions are placed in a context where legal change is attempting to impose upon them weaker material conditions and existing legal rights were not much assistance to begin with. Labour is also able to pressure legislators through lobbying, campaigning and even

(political rather than industrial¹⁰⁷) strike action. Employers can clearly do the same. In the *Germany-Acquired Rights* chapter, employer interests heavily influenced the reform agendas adopted by both parties (at the *federal* level in Germany). In the *Germany-Posted Workers*, unions had influence over *Land-level* (state-level) governments where their SPD allies were in power to pursue legislative fixes to the problems caused by *Rüffert*. They could not however in those *Länder* where the partisan coalitions were centre-right orientated.

CPE addresses these sort of the *political interactions* extensively offering competing accounts over different political alignments created either by the meeting of common economic interests between labour and capital (VoC), or by more conflictual relations as prescribed by power resources-based CWC theories. These sorts of interactions cannot occur with courts. This prompts the following claim:

Whereas governments and broadly-defined political actors may or may not be committed, as a matter of political trends, to a neo-liberal view of legal change, the approach of courts is very different as their commitments are based upon doctrine and constitutional principles. This means that the relationship between political neo-liberalism and neo-liberal legal change is looser and concurrent, rather firmly interlinked.

There is, admittedly, something unsatisfactory about this claim. The ambitions of theory development is to make positive and discernible connections between different phenomena. This does however point to a central problem raised by this meeting of politics and law: in the contested labour relations context it is not defined by complementarity nor functionalism, but by incoherence and complexity. Courts may conform to

¹⁰⁷ 'political strike action' would be, as suggested in this sentence, a strike concerning government policy rather than a specific dispute with the union's employers (industry-based strike).

the decisions of the political realm, but if they do not the legislative realm only has a certain amount of scope to challenge it. Courts will be committed to lofty normative principles on some occasions, but not on others as other competing legal principles may be important as dictated by the given specifics of the case, the court's constitutional mandate and its position in a judicial hierarchy.

The CJEU has become very clearly driven by interpretations based around principles of individual economic rights instead of collective group rights found in various forms of social law and labour law. In Britain, as demonstrated in the acquired rights chapter, courts will often make decisions driven by principles of practicality and to reduce legal uncertainty rather than celebrated constitutional principles found in UK or EU law. This means that judicial decisions may *conform to the goals of political neo-liberalism*, reordering legal rights in favour of employers for example, but this 'conformism' *is not the same as being permanently and formally tied to it*. The relationship between political and legal aspects of the neo-liberal order therefore is dynamic but neither functionalist nor mutually complementary.

If courts are to become more active in labour matters, and they have done, this separation between the legal and political aspects of neo-liberalism requires understanding the relationship of legislative and judicial forms of law-making. This is true both within the context of national legal systems in Europe, but also the place of these within a broader *European legislative and judicial system*.

5) *The roles for different forms of negotiation, mediation and contest are important in defining these responses to legal interventions and for settling conflict of rules problems.*

This observation is addressed more directly in the following section of this chapter that examines and modifies the *socio-legal political economy* framework that guides this thesis. A more limited treatment is provided here.

Tendencies and traditions of *negotiation, mediation and contestation*¹⁰⁸ co-exist in many areas of capitalist societies and often interact in tension or in combination. In labour relations, this is perhaps particularly true given the inherent conflict of interests that exist between capital and labour. Contestation and conflict are represented chiefly by disputes between labour and capital and often result in collective action or the threat of collective action. Negotiation refers to either collective bargaining or a similar forum involving a mediating actor presented by the governmental or judicial state.

When disputes occur, the of power particular actors may lead to either of these three outcomes. As neo-liberal policy agendas have thrown down deeper roots in European economies, new and different forms of dispute settlement have developed through legal and non-legal institutional means. Some look like arms-length governmental agencies and some see court actors becoming more active in labour matters. Some of these *impose* settlements upon actors whilst others, indicating that the differences between these three themes become blurred. Some however attempt to mediate without forcing a settlement, but rely on these actors to reach a settlement. Courts also have an important mediation role in capitalist societies, but again, court-imposed outcomes will not satisfy the interests of all parties, a statement that is particularly true in a labour conflict circumstance. Indeed, judicial mediation may in fact create those conditions for *new or further* conflict if commitment to lop-sided doctrinal principles guides such 'mediating' decisions and acts.

¹⁰⁸ Point of Etymology: the term 'contestation' although not in the Oxford dictionary, has its place in social studies including in some labour relations studies. For example, Colin Crouch's *Industrial Relations and European State traditions* (1993, p.31).

Again, the role of relative power resources is important in determining that which either mediation or negotiation produces. Not all actors will benefit from the results of mediation or negotiation, as demonstrated from several examples in this thesis, leaving the conditions for later conflict to remain.

Chapter 2.1 illustrated the highly contestative relations that existed in Germany and Britain in the 19th Century and the approach made toward mediated conciliation and industrial peace in most of the first half of the 20th century in both countries. The centrally defining feature of the post-1970s period is that new of legal frameworks and regimes of legal rights have been imposed on labour relations forcing new forms of contestation rather than mediation. This has not been a uniform nor clean process, as many of the 'old' forms of mediation found in collective bargaining, works councils (in Germany), National Joint Councils (NJC) (in Britain) still remained, albeit often being in a weaker position.

Forms of mediation and dispute resolution do exist at the company level, but are usually formed by employers *and for* employers where the presence and strength of trade unions at that workplace is weak or non-existent. At the national level, new legal frameworks have also sought to create new forms of mediation. The tribunal system in Britain, although technically is part of the court system, focused upon around mediation. Britain's conciliation agency ACAS is also specifically designed as a mediation body to intervene in disputes and mediate an end to strike actions.

The role of strike action is clearly central to the theme of conflict in labour relations, not least as its role has a direct causal relationship with collective bargaining as bargaining is the desired form of mediation from the standpoint of labour.

In the *Britain-Posted Workers* case study, strike action was central to forcing employers to preserve *and improve* a collective agreement. This case study represents a classic case of what strike action is designed to do from the standpoint of unions. Moreover, it provides the expected response from labour to employer attempts to change existing means of wage-setting and work organisation. It is important to draw the right lessons from this sort of example. It should not be claimed that these sorts of strikes have or will necessarily become more commonplace. The *Britain-Posted Workers* case study presented a clear example of how neo-liberalism inspired shifts in legal rights can forge those conditions of conflict. The conditions will emerge in certain contexts but, and as the German case study examples make clear, strike action will usually always be reached for and depends in large part on the power labour wields over employers based on factors like union membership and organisational strength. It is claimed however that it is not uncontroversial to expect industrial action to become more commonplace, at least as the principal form of contestation in a neo-liberal order where other forms of mediation and negotiation offer labour very little. This can even become true in Germany despite not having strong traditions of industrial action, if relative power resources allow it. It is noted that such examples are not present in the two German case studies of this thesis, minus some instances referred to in the *Germany-Acquired Rights* chapter concerning hospital privatisation (Greer *et al.* 2013).

This therefore constitutes the principal claim concerning negotiation, mediation and conflict. Strike action or other forms of conflict-based response will result if power resources are available for the actors in question.

3.1.4 Examining the *socio-legal political economy* approach

The five points of the *socio-legal political economy* framework are outlined below for reference.

1. *Labour relations is defined by two principal forms of regulation and governance: legal sources and collective institutional sources;*
2. *A dynamic relationship exists between legal and collective institutions of labour relations;*
3. *A conflict of rules approach to understand the complex interaction between legal and non-legal sources of rules;*
4. *A holistic understanding of legal systems An assessment of both the direct and indirect forms these legal and non-legal rules ('degrees of directness'),*
5. *A combination of two methodological innovations found in qualitative comparative political economy and legal studies.*

The alternative framework outlined and developed in chapters 1.1. and 1.4 provided a number of tools and concepts that guided the examination of the four case studies and produced the 'observations' in the previous section. These are not addressed key aspect in developing new theory, particularly within the comparative empirical method, is to test and modify new these approaches once exposed to empirical examination (Hall 2006; King *et al.* 1994, p.20-21; Janoski and Hicks 1994, p.7-9). Moreover, as described by J.R. Commons in chapter 1.1, the use of theory and theoretical concepts should offer an operational quality in order to unearth and then organise empirical material so it can be directed to developing explanations and broader theory. Some of the five parts of this framework were more useful than others in this regard. Some concepts provided more in the way of this operational quality

in the *process* of producing and organising empirical material whilst others did a better job of pointing to broader theoretical conclusions.

This section will not proceed by going through each point of the *socio-legal political economy* framework one-by-one, but instead will address selected themes and concepts as appropriate as well as pinpointing those aspects of the framework, such as *conflict of rules*, that demand particular discussion.

1) *The legal and collective institutions of labour relations and their interaction*

The first two parts of the framework, *concerning the identification of and relating both of the legal and collective institutions of labour relations*, are given some treatment first given their importance, but are addressed more fully in the following chapter and have unavoidably been addressed in this chapter. Three points are raised in regards to this leading and centrally important aspect of the *socio-legal political economy* framework.

The first concerns the prospect of modification. In each of the four chapters however, the themes of *mediation, negotiation and contestation* already addressed above provide important *context* and *content* to the role of collective bargaining. Collective bargaining over wages and employment terms is the leading form of *negotiation* in European labour relations, even after three decades of neo-liberal reforms seeking to weaken or destroy it. It operates in conflict however with employer interests that want more control over labour matters. As neo-liberal reforms advance this same cause, the responses of labour resisting these produce different conditions and forms of negotiation or contestation or mediation and, usually, in a process or time-line mixtures of two or three of these.

In the four chapters of this thesis, these concepts of became a feature as descriptive devices to organise these different and often overlapping dynamics. The *Britain-Posted Workers* case saw contestation and conflict resolved by collective bargaining-based negotiation; a classic example again of what strike action is designed for. In the *Germany-Acquired Rights* chapter, works councils acted as the leading negotiation venue that acted, in essence, to aid employer interests with few concessions to labour. The mediation role is almost always provided by the state, either through its governmental arm or its judicial arm. As evidenced in this thesis, both can 'mediate' in ways that still aid one side of the labour-capital relationship. As descriptive devices, these themes became a useful supplement to the two leading parts of this alternative framework.

The second point of the three raised in this sub-section concerns the success of this core definition (*labour relations consisting of legal and collective institutional parts*). This definition provided a benefit over existing CPE theories as it demanded from the outset that a researcher observe those legal aspects that were either clearly or not so clearly present in a given case. This is importantly tested in the four case studies as these offer opportunities for existing CPE to offer explanations as to outcomes. Only in *Germany-Acquired Rights* was there scope for CPE theories like the VoC approach to offer any meaningful rebuttal. Even in those cases where an *institutional resilience* or *institutional complementarity* argument (from existing CPE) may have provided some explanation (*Germany-Acquired Rights*), the conjoined presence of disruptive legal rules, neo-liberal ideas and power resources completely defeated any prospect of these explanations being useful. There might be some prospect for a reformed institutionalist account to emerge from CWC and RT, but much less so from a very functionalist VoC school.

The third, and most important, point concerns the *dynamic relationship between law and collective institutions* must be understood as a causal two-way relationship where legal influence and legal change will *promote or provoke responses* from non-legal actors such as unions and employers (either individually or collectively). As evidenced in the *Germany-Posted Workers* and *Britain-Acquired Rights* chapters, the *governmental state* will also produce its own responses to legal interventions that it itself did not produce. In a neo-liberal context, these interactions are neither clean nor complementary as a general rule. The role of bargaining is placed under clear threat by neo-liberal reforms and legal change. This is not a controversial nor certainly an original statement. Bargaining is not destined for *complete* destruction and will exist in conflict with neo-liberal pressures, often being undermined, but in many cases not. Again, these themes are continued in the next chapter.

2) *Conflict of rules and power resources*

The *conflict of rules* concept was hugely important across all four case studies, albeit in different ways in each. It also provides the principal influence of legal studies and legal theory given that it includes within it a conflict of *laws* concept. Its use was not just as malleable operational concept that was easy to apply to empirical subjects, but also offered important insights for broader theoretical conclusions.

As the case studies were developed and concepts employed, conflict of rules problems were addressed by governmental and judicial actors and social partners in. The role of competing and relative sets of power resources were centrally important to determining how conflict of rules were resolved. More specifically, the *responses to legal change* were determined by the relative and competing power resources of labour and employers. When used within

the *conflict of rules* concept, it became possible to *separate out legal rules and non-legal rules*, particularly those *non-legal rules* found in collective bargaining.

The concept became all the more useful when combined with other parts of the broader *socio-legal political economy framework*, particularly the ‘degrees of directness’ concept¹⁰⁹ where different sets of legal influences within legal systems were identified, mapped and examined. In the two posted workers chapters, it was important to understand the interactions between rules contained in labour law and collective agreements on the one hand and those legal rules found in EU free movement law and public procurement law on the other. Sometimes conflicts were resolved by the introduction of legal rules not previously central to the mode of regulation and governance at hand (*Germany-Posted Workers*). In the *British-Posted Workers* example however, labour law was not helpful to aiding trade union intentions with regards to collective agreements and in fact joined EU free movement law in the threat posed to unions interests (on regulating strikes).

The proposed modification here therefore sees the concept of *power resources couched within the conflict of rules* concept. This represents the one notable introduction from existing CPE into the framework offered with this thesis. It was noted in chapter 1.2 that the power resources approach has an important place within CWC studies, and to an extent in RT, and had the potential to be developed into a concept that could approach and theorise the contested and social nature of law, especially in a labour relations context.

A straightforward claim offers support for this. Understanding the power resources of key actors, not just labour and employers, enables the researcher to understand how *rights of action* provided in law or other sources

¹⁰⁹ Contained within the fourth point of the framework demanding ‘a holistic understanding of legal systems’

(like collective agreements) can be activated by particular actors. Power resources, in a labour relations context, are unavoidably relative and this context is inherently contestative given the inherent conflict of interest between capital and labour. This means actors with strong relative power resources to other actors will view their own legal rights differently than the legal rights of other actors and will seek to advance these over that of the other actor. This comes with the intention to have their own legal rights of action imposed over that of other actors where they came into conflict.

The conflict of rules problems presented by the imposition of legal change took several forms: Normative conflicts and incongruence, complexity, uncertainty, and radical and disruptive change in relative legal rights. Across the four case studies, these different sorts of conflict of rules existed often in overlapping forms.

In the *German-Acquired Rights* chapter, legal rights provided in the acquired rights directive afforded to workers were blunted by formidable power resources for employers that included critical influence over government labour market reforms. Power resources dynamics favouring employers therefore addressed this conflict of rules problem where the ARD could have interfered with these labour market reforms and industrial restructuring.

The *Britain-Posted Workers* case is again notable as the only example where trade union power resources were sufficient to alter the outcomes of attempted changes to their desired labour relations context. These shifts came as a result in *perceived shifts* legal rights of employers and not *imposed* shifts as demanded *directly* by a court, but were potent enough for unions to exercise power resources effectively given to labour itself by their own actions, rather than by law (which did not afford these rights of collective action).

In every other case study, attempts at neo-liberal legal change was at least partly successful as a court imposed strong legal rights on the side of employers, thus enhancing their power resources relative to labour. In the *Britain-Acquired Rights* and *Germany-Posted Workers* chapters, legislators did act in ways to minimise the damage done to existing labour relations, but for different reasons. In the *Britain-Acquired Rights* chapter, on the issue of the ARD's *scope*, the greater social protection outcome was not, in fact, the result of trade union influence or power resources, but of a desire to provide legal certainty to *both* labour and employers amidst legal uncertainty created by legal change. In this instance, incongruence and uncertainty defined the conflict of rules problem. The attempts to correct it were *not* the result power resource dynamics seeing either labour nor employers 'win'. Such explanations in the *Britain-Acquired Rights* case were at play with the collective bargaining issues of the ARD, where a court decided decisively in employers' favour, in effect rewarding them for exercising their legally supported rights of action to absolve themselves of rules provided in (future) collective agreements.

In the *Germany-Posted Workers* chapter, ambitious legislative adjustments to the CJEU's aggressive altering of legal rights (in favour of employers) was pursued in those German *Länder* where the partisan allies of labour were in power. The power resources of unions here were *a factor*, but some consideration must also be given to the interests of legislators to preserve existing regulatory and governance practices. Having said this, this *Germany-Posted Workers* chapter did use the work of Detlev Sack (2012) to show that the prominence of union-backed SPD was the defining variable between *Länder* that pursued these legislative adjustments and those that did not.

As noted earlier, courts cannot be lobbied like legislators and governments. How judicial decisions are responded to are framed by power resources of labour actors and the fact that decisions reach a court also depends on the perception of rights that actors believe they possess over other actors. Here there is an important *cultural difference* between Germany and Britain as in the latter legal rights for employers are stronger. These were on display far more in the *Britain-Acquired Rights* case as evidenced by this case study's numerous domestic court cases. The ample legal rights afforded to employers in the *Britain-Posted Workers* chapter however were not exercised, again, due to the power resources that labour possessed courtesy of their own actions (rather than through law providing them). This example again speaks directly to the pertinent subject of strike action as a credible mode of resistance to Neo-liberalism and Neo-liberal legal change of labour relations. It's credibility relies, in large part on the power resources of unions, their membership, organisational sources, and political support.

3) *Methodological advances*

There are two principal methodological strengths of the approach employed in this thesis. The first is outlined in the first chapter and eluded to at the beginning of the 3.1.1. section in this chapter, and concerns the use of Peter A. Hall's lessons from his 2006 article, *Systematic Process Analysis*.

Hall's *Systematic Process Analysis* highlights the tracing of causal processes through qualitative examination and the identification of key empirical finding to use for theory development. In the four case study chapters, the *regulatory and governance problems* identified in each chapter operated as the central venue to examine threatened changes and the responses to it. In some chapters, notably the *Germany-Acquired Rights* and *Britain-Posted Workers* chapters, these 'problems' were on-going events or series of events rather

than specific moments of blunt change found in legislative change or court cases. In one chapter in particular, *Britain-Acquired Rights*, a number of events were present and over a long time-period and thus presented a series of 'problems'. These problems were often found from a particular viewpoint based on an actor's interests (i.e. unions), but also problems from a simple incongruence between different rules and law. (conflict of rules). This adaption of Hall's *Systematic Process Analysis*, and its incorporation of data from legal factors such as court cases, is an original innovation for CPE and comparative social science.

The second concerns the 'operational quality', as referred to above, of the individual concepts of the *socio-legal political economy* framework. Some of these have already had their strengths addressed above. It is felt important, again referring to J.R. Commons' instructions for theoretical concepts (to 'dig up' data to organise into an 'organised system'), to underline this important purpose of theory: the way in which data is dug up, and how it is dug up, has implications for how broader theoretical claims are made. This is particularly true of the demands of this framework to understand 'labour relations' as comprising of legal and collective institutional parts, and the conflict of rules that exists between and around labour relations. The combination of Commons' lessons and Halls *Systematic Process Analysis* has operated here as an appropriate two-part inspiration for the approach to this thesis. Institutionalism is a rich varied theoretical subject and has different disciplinary representations that need to be appraised differently. Some aspects of institutionalism still have some very promising uses and is addressed more in the next chapter.

The alternative framework provided important improvements versus existing CPE theory. This is true not only in J.R. Commons' terms, by identifying those variables and phenomena and organising them according

to defined conceptual rules, but also that so that these can be addressed in causal terms, as demanded by Hall's *Systematic Process Analysis* approach (Hall 2006). Again, the irony is noted that is this same Peter A. Hall who co-authored the *Varieties of Capitalism* volume that received the firmest rebuke in chapter 1.2. Examining the causal mechanics of a given case however, as demanded by Hall (2006), requires that all the *relevant* phenomena and material is addressed. A socio-legal approach to the political economy of labour relations introduces those aspects of law and how they relate to non-law. This is the broader improvement this alternative framework provides.

3.1.4.iv. Concluding comment

The four case studies of this thesis were selected for their prospects of producing theoretically useful findings, not to make new empirical revelations. Some important empirical revelations were however made in regards theoretically understanding change in German labour relations, whilst the findings from the British case studies were more abstract in their theoretical use. When these four cases are viewed alongside the first chapter of the second section (2.1) that looked more broadly at Germany and Britain, important findings are produced about these two archetypes of modern CPE and expose considerable problems with how CPE has addressed these. How labour relations is approached as a subject determines how one understands how these change and how they will evolve.

With this, more direct and highly specific observations and findings were the focus of this chapter. The next chapter puts these in a broader context to make such broader theoretical findings for CPE and for labour relations.

Chapter 3.2.

European Labour Relations, the role of law and neo-liberal legal change

This final chapter directs the *socio-legal political economy* framework and the key parts from the previous chapter, towards the broader arguments outlined in section one¹¹⁰. The leading argument developed from this framework is that the heightened influence of law and legal rules within European labour relations is inextricably connected with the rise of neo-liberal politics, policies and practice. As the four cases illustrate, these impositions do not however always produce the outcomes that doctrinaire neo-liberalism intends. These comparative differences pose serious challenges to CPE, challenges made more complex by the spectre of European integration and the role of European law within this. An analysis of *European labour relations under neo-liberalism* is developed but is preceded by the presentation of two sub-themes: *neo-liberalism and the state*, and *complexity and national models*.

3.2.1. Neo-liberalism, the state & juridification

This section addresses the core argument of this thesis re-outlined above. From chapter 1.3, the following passage is highlighted:

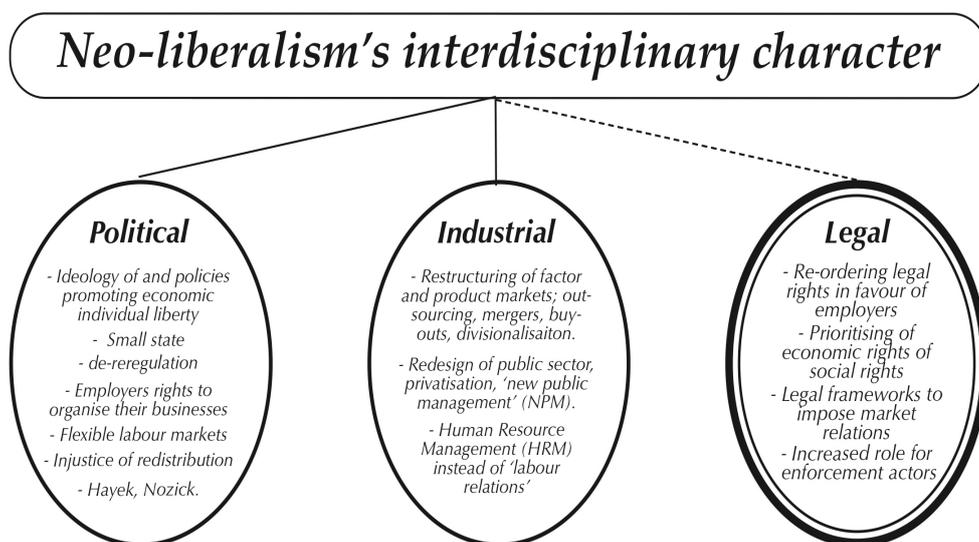
“Neo-liberalism does not merely concern its political ideational features and the industrial practices and reforms these prompt, but it includes a fundamentally legal

¹¹⁰ 1.1.3 of Chapter 1.1 and section 1.3.2 in Chapter 1.3

character; a character that provides for distinct forms of legal change and reform, legal rights, legal frameworks and contractual relationships.”

As a subject, as mapped in chapter 1.2, neo-liberalism has received ample, varied but generally unsatisfactory treatment within CPE studies. RT is elevated as having provided the more realistic and comprehensive approach to neo-liberalism (Heino 2015; Peck and Tickell 2007; Lipietz 2013). There are however important contributions from CWC and VoC work, although of the latter it is only Thelen that has produced a meaningful assessment of the effect of neo-liberalism upon labour relations ‘institutions’(although still problematic). As argued in Chapter 1.2, Heino from RT offers the most promising and comprehensive CPE approach to law, legal rules and legal systems in the context of labour relations. Heino understood the inherently *political content of law* through a simple concept of *neo-liberal legal change* that, in this labour relations context, explicitly and directly seeks to re-order labour relations and labour market functions in favour of capital and employer interests. This view of *neo-liberal legal change*, reinforced by the arguments of lawyers Grewal and Purdy (2014), is therefore theorised in simple terms as consisting of overlapping *political, industrial and legal facets* and drivers of change in capitalist systems and labour relations systems. Importantly, following Heino and ‘critical’ assessments of neo-liberalism, its destructive effects are highlighted and emphasised rather than ‘institutional resilience’ accounts of the VoC and institutionalist VoC kind.

Figure 3.2. Overlapping political, industrial and legal drivers of neo-liberalism



As argued by Peck and Tickell, Grewal and Purdy and Heino, albeit in slightly different ways, neo-liberal change and practice produces the conditions for incoherence and contradiction through its inherent complexity.

Not only are attempts at neo-liberal legal change made in a context that sees other legal and non-legal rules contradict them (conflict of rules), but the responses to neo-liberal legal change will often reverse, challenge or complicate the end result. When comparing the *political* to the *legal* two areas of contradiction stand out. First, the objectives of *de*-regulation are in fact given life by neo-liberal legal change by *re*-regulation: a raft of new overlapping rules which complicate the process of economic activity and economic relations and produces various conflict of laws problems. Re-regulation comes with new and additional bodies of economic law and modes of enforcement designed to create and regulate market frameworks and empower market rights. These must be imposed however, but rather than impose market relations and rights regimes to foster *ex ante* the

conditions for markets and then withdraw to allow these to as genuinely 'free markets', this reregulation is *permanent* as these formal legal frameworks and rights remain. This challenges a central rhetorical tenet (*de*-regulated free markets) of neo-liberal political commitments and rhetoric. In academic terms this blurs the lines between definitions of ostensibly separate theories of *ordo*-liberalism, the 'regulatory state' and the *neo*-liberalism. The first two of these three contend a substantial role for formal regulation as the principal means of market-making and market-perfecting.

The four case studies illustrate these points. In Germany, collective bargaining has not been completely destroyed but has clearly been weakened, so its own capacity to impose rules on wages and wage-setting has been challenged not just by shifts in legal rights in favour of employers, but also complicated by new formal legal rules affecting bargaining (e.g. *Tarifreuegesetze*) and legal minimum wage laws. In the two British examples, the interventions from law that aligned with neo-liberal goals provoked responses then directed the outcomes away from that desired by the legal intervention delivered (but only partially in the *Germany-Posted Workers* case and the collective bargaining segment of the *Britain-Acquired Rights* case).

The specific labour relations part of this discussion is continued later. Firstly, the relationship between neo-liberalism and the modern state is theorised as it forms a hugely important aspect of context for labour relations and broader CPE.

3.2.1.i The state and juridification

A version of *neo-liberal view of legal change* is evident in each case study chapter, albeit delivered and dealt with differently. In each case presented both *juridification* and *judicialisation* characteristics, both of which are

essential to establishing *neo-liberalism's legal character*. The difference between *juridification* and *judicialisation* is identified. The former concerns a *broader system of law and legal change* or, as described by Aasen et al. (2014, p.2), “a diverse set of processes involving shifts towards more detailed legal regulation, regulations of new areas, and conflicts and problems increasingly being framed in legal and rights-oriented terms”. *Judicialisation* however refers specifically *to the role of courts and judicial actors* within this same broad juridification process. Statutory and court-made law have cut across each other in different ways in the four case studies of this thesis, sometimes with legislative codes being modified or nullified by judicial decisions and sometimes the opposite. *Juridification* is addressed first.

The imposition of legal forms of regulation and governance upon legal rules has been driven by two interrelated processes of ‘neo-liberalisation’ (Brenner et al. 2010). In labour relations terms, this has seen the creation of new economic law that constitutes the legal expression of neo-liberalism to empower employers and endow them rights of action to organise their businesses, labour and pay systems. Reorganising a system of legal rights, often termed ‘property rights’ in ‘law and economics’ studies (Coase 1936, Williamson 1985), so as to enhance the rights of employers is one of two defining parts of *neo-liberal legal change*. With the emergence of post-1970s neo-liberalism, the attempts to de-politicise the regulation and governance of various forms of economic activity have seen the role of courts pushed further into these regulatory and governance questions of labour relations and work. The notions of a ‘regulatory state’ (Majone 1993, Moran 2003) offer normative support, based on economic theories that highlight the efficacy of functioning markets, for these processes of de-politicisation. As evidenced in this thesis, de-politicisation has not meant *de-regulation*, but instead has

ushered new forms of law-creation and law enforcement, pointing again to the *de-regulation–re-regulation* paradox of neo-liberalism.

This paradoxical *de-regulation-re-regulation* character of neo-liberalism identified with labour relations is exhibited in those agendas to reform public sectors, welfare states and labour markets in Europe. These shifts here do not simply hinge on creating new legal rights but also upon creating new competition and market-based frameworks (like compulsory tendering, outsourcing and privatisation) that serve to prise open non-market spaces to non-market actors (ACL Davies 2013¹¹¹). This process has been labelled by ACL Davies, in regards to post-2012 British healthcare marketisation, as ‘juridification’, as it has entailed the creation of just *new* forms of rules *but more rules* than existed previously. In the public sector, New Public Management (NPM) reforms more directly seek to replicate market-type relations upon public sector labour matters such work organisation and wage-setting. This, conceptually, is tied to a ‘Human Resource Management’ (HRM) reforms introduced to impose new hierarchies upon labour matters. The emphasis with HRM is on ‘management’ rather than ‘relations’ as the objective is to create or enhance ‘employer prerogative’ and the rationalisation of labour processes to turn such relations into ‘market relations’ (Sisson and Purcell 2010; p.84-85, Barbash 1987).

The diagram above identified *political, industrial* and *political* characteristics of neo-liberalism. The NPM and HRM concepts are themselves key practice features of neo-liberalism’s *industrial* character. These are important non-legal rules-based systems but do conform and cohere to both the political and legal facets of neo-liberalism that seek to reorder the rights and contexts of economic activity in favour of capital.

¹¹¹ ACL Davies, a lawyer who also is referenced earlier for her contribution on EU labour law questions in fact used the term ‘juridification to describe this process of neo-liberal law-making.

Theoretically, the task of understanding and placing the role of courts within a neo-liberal model of legal change is difficult for the reasons raised in the previous chapter. Legislators, typically political figures pushing political agendas through legislation, can clearly be directly tied to the *political* aspects and goals of neo-liberalism. In short, legislators can be lobbied and subject to political pressure. For courts this is, usually, not the case; or at least cannot be subjected to these interests in the same way. This is examined below under the label ‘judicialisation’ as it forms a key part of two entwined developments in European labour relations: the advance of neo-liberalism, and its specific form of legal change, and Europeanisation, with its own growing legal order.

3.2.1.ii Judicialisation

The concept of *judicialisation* is understood here as ‘the insertion of courts into a process of labour relations’. The insertion of court-made law into the regulation and governance of labour relations is contextualised by the presence of legislative and statutory legal influences and those *responses* to court-made law. As demonstrated in the four case study chapters, these responses are just as important given the powerful effect on outcomes these have.

These responses of social (non-legal) actors create the conditions and prospects for considerable diversions in the intent behind legal change and intervention. Such diversions themselves therefore can forge outcomes of incoherence and complexity. The interventions from law *themselves* however can also create the grounds for such incoherence and complexity before actors have the chance to respond to these, as demonstrated in the *Britain-Acquired Rights* case. In this British case study, courts will look for those jurisprudential approaches and logics that will assist them with a case met

with serious legal and practical uncertainty for litigants and the courts themselves (not knowing what law to apply). A central feature of law-based incongruence is represented by the frequently disorderly relationship between European and national law and how legal change happens through this relationship (and what responses are inspired at the national, and indeed sub-national, level). As EU institutions, namely the Commission and the Court of Justice, have shifted from a social protection to market rights approach to various areas of EU law, these issues of incoherence in labour relations have only increased; a point underlined by both the posted workers case studies but far less so in the *Germany-Acquired Rights* case.

The commitments of courts to competing and highly *political* principles are challenged by those *legal* principles found in ‘concerns for justice’ (i.e. legal certainty), judicial hierarchies, a ‘doctrine of precedent’ or literal or purposive approaches to legislation (Slapper 2003; p.173). How courts balance these will vary in different cases. British courts of an ostensibly common law system are traditionally supposed to adhere to a doctrine of precedent, although this does not apply to Employment Tribunals and Appeals Tribunals (raised in *Britain-Acquired Rights* chapter). The CJEU however is often described as a ‘teleological’ or ‘activist’ court (Alter 2009; p.35, Saurugger and Terpan 2017; p.217), meaning it is guided strongly by *overarching normative or political goals* rather the *intricacies of individual cases*. This final point raises a central concern of lawyers regarding the true meaning of ‘jurisprudence’: to give the facts of the case their due and balance these against broader doctrinal concerns.

These competing ‘interests’ of courts are not governed by *doctrinaire* neo-liberalism in the same way a government’s policy agenda might be. Even the contemporary CJEU, whose broader approach has been increasingly aligned with the goals of political neo-liberalism, will not always apply a

‘purist’ liberal interpretation of EU free movement in the cases brought before it, due to the eccentricities. This makes the judicialisation aspect of the *neo-liberal view of legal change* far less neat and orderly because it cannot, again, be tied cleanly and directly to the political agendas associated with neo-liberalism.

In the four case study chapters however, encompassing two national legal systems and a transnational one, three main forms of *judicialisation under neo-liberalism* are evident: *teleological, active facilitation, passive acceptance, and jurisprudential*.

Again, the choice of words is important. ‘judicialisation under neo-liberalism’ is used instead of ‘neo-liberal judicialisation’, due to this point concerning court actors not always adhering and enforcing neo-liberal objectives. This makes *judicial insertion into labour relations’ regulation and governance* a complex and indeed murky one.

Active facilitation is presented by those courts that sought to reach for and apply the CJEU’s rulings (*Werhof*) even though they did not concern British litigants directly. ‘Jurisprudential’ in this British case also could be described as a form of *interpretive disobedience*, given that other courts in the judicial hierarchy chose to ignore CJEU case law¹¹² in reaching conclusions in judging these CJEU decisions as uncertain and not applicable to their case. In regards to collective agreements where this sort of dissension among British courts took place, the CJEU was eventually invited to pass a final judgement (in *Alemo-Herron*). The two German cases saw domestic courts, instead of making an attempt to pass judgement themselves as the British courts did, very quickly referred cases to the CJEU with attached questions. The treaty makes clear that this is allowed, but it is a clear case of *passive acceptance* of

¹¹² Which it could do if the case did not directly concern Britain and was not met by the CJEU being invited to do so.

judicial hierarchies. The German courts in question, usually state level (*Landesarbeitsgericht*) or federal level labour courts (*Bundesarbeitsgericht*), were not formally committed to any doctrinal rule akin to a neo-liberal interpretation of legal rights nor in fact to historically-honoured principles of *Tarifautonomie*. Their actions however, by implication, conformed to a regime of neo-liberal legal change by acquiescing to a European court that *was* committed to doctrines that aligned with neo-liberal 'doctrine'.

The comparison of legislative actors, representing the *political-governmental* arm of the state, and judicial actors is simple but important. Not being in a position to define courts as committed deliverers of the neo-liberal mission complicates an attempt to develop theoretical explanations of labour relations under neo-liberalism inclusive of court actors. With courts' permanent insertion into European labour relations, this problem concerning its relationship with advancing neo-liberal legal change creates its own conditions for complexity and incoherence addressed below. This complexity is made up of part-institutional *erosion* with part-institutional *resilience* with pockets of successful recombination and resilience (as contended by institutionalist CPE), resulting in mongrelised forms of regulatory and governance that increasingly define regimes of capitalism and labour relations.

3.2.2. European labour relations under Neo-liberalism

This section directs the above discussion to the core subject of this thesis: European labour relations and a context where neo-liberal politics and legal change is seeking to reorganise the capitalist system labour relations operates within.

As noted repeatedly, the intention of neo-liberal legal change is to re-order legal rights and legal frameworks of the labour market so as to weaken collective bargaining and trade unions and aid employer prerogative. This forms a simple, stylised and general neo-liberal model of labour relations. This relies on a fundamental truth about the balance of power in any employment relationship: “The power of employers is structurally superior to that of employees” (Traxler et al. 2001, p. ; Offe 1985). Intuitively, employers clearly have an enhanced bargaining position when dealing with their employees on an individual basis than when dealing with them collectively. Therefore, enhancing the status of economic rights over *collective* social rights aids employers and their ability to individualise their relations with their workers, or at least weaken the collective organisation of their workers as much as possible. This is an uncontroversial truth concerning the nature of the capitalist employment relationship. Neo-liberalism is about the advance *and extension* of this more adversarial and extractive (on the part capital) model, and has political, industrial and legal facets. In its ‘pure’ form, a HRM-style form of total employer control over labour matters is the desired model for the interests of capital. With rationalised and hierarchical structures within a company, aided by legal rights of action that favour employers and individual (not collective) employment relationship.

This stylised model of the neo-liberal labour relations however has not materialised in any ‘pure’ form in any European country, with the more comprehensive manifestations of this ‘pure’ model appearing in *isolated industries within countries*. Some aspects of the modern economy, particularly low wage service sectors, are marked by a total absence of unions and even formal employment contracts, meaning *very few labour rights* for employees are present besides in contractual rules and thus only provided in statute law. Even in Britain, the one large European country with which neo-liberal

labour market design is most associated, the role of collective bargaining and unions has remained prominent enough to complicate this 'pure' neo-liberal picture and affect outcomes. Both of the British case study chapters demonstrate this as well as those conditions for complexity created by aggressive attempts at legal change. In the *Britain-Posted Workers* chapter a form of highly organised and disruptive strike action successfully challenged attempts to undercut workers and aid the profit intentions of employers. In the *Britain-Acquired Rights* chapter a judicial decision did eventually impose an outcome that affirmed employer rights and interests in regards one aspect of the ARD (collective agreements), but only occurred after being challenged by workers making successful cases and appeals in British courts before the CJEU settled the issue in *Alemo-Herron* (2013). In regards to the ARD's *scope* however, the second of these two concerns raised by the ARD, in this same case the British government produced a legislative innovation to adjust to aggressive legal change that did not conform to neither the country's 'liberal', 'market rights' labels nor either to the CJEU decision in *Süzen* (1997).

The combined lessons of these two British chapters conforms to a rough kind of Polanyian pattern: workers will still seek to respond to attempts and processes stemming from for-profit actors that seek to extract more from labour or minimise the rights and material resources that come with this labour. This is contingent however upon workers' *power resources to provide for this response* being sufficient. A key point developed below is that neo-liberalism not as defined by 'markets' any more than it is about extraction and control and increasing the rights and resources *of capital and employers*, even if market function and 'perfect competition' is ostensibly represented as the objective. These often overlap, but again must not be conflated. Neo-liberalism has entailed the creation of complex sets of legal rules that often conflict and produce conflicts between key actors that do not

aid market function. In this way, these assertions sit closer to radical/Marxist views of control and class power rather than those of economic rationality, efficiency and market functionalism.

This complicates this abstracted model of neo-liberalism considerably, and there are several avenues through which workers can challenge. Collective action (*Britain-Posted Workers*), collective bargaining where it exists, works councils (*Germany-Acquired Rights*) where it exists (Germany)) lobbying for legislative reform (*Germany-Posted Workers, Britain-Acquired Rights*) and litigation in the courts (*Britain-Acquired Rights*). Increasingly campaigning through a trade union civil society role is becoming increasingly prominent (*Germany-Acquired Rights*), whereas in others traditional strike action has been employed (*Britain-Posted Workers* and in the Swedish *Laval* case).

The *Britain-Acquired Rights* case is compared to the *Britain-Posted Workers* case in regards to this theme of 'worker response'. In some cases like the *Britain-Acquired Rights* case, workers (in individual or collective (union) capacities) will feel required to reach for judicial remedy as a result of neo-liberal regimes of legal change. In those examples like the *Britain-Posted Workers*, the response, however chaotic, made sure the solution to the 'regulation and governance problem' at hand was pulled firmly into collective bargaining mode of regulation and governed and away from a multiple sets of unfriendly legal rules (British, European) that were hostile to their interests.

Attempts to forge a model of neo-liberal labour market, comprised of a dual *law and employer prerogative* form of workplace regulation and governance, also emerged in Germany, despite claims of the VoC that this was not taking place (due to institutional resilience of institutions of 'non-liberal' capitalism). Neo-liberal reforms undermined Germany's long-

standing model of labour relations. In both the Germany-based chapters, the dynamic between law and collective institutions was heavily influenced by legislation-based legal interventions, some aiding a broader neo-liberal agenda and others not. Given Germany's federal structure and the dominance of different political interests at the federal and sub-federal levels, legislative action in labour relations in the posted workers case study was used to prop up collective bargaining systems being progressively weakened by receding union power.

The German labour relations experience of neo-liberalism is different to Britain. The decline of collective bargaining and trade union power has been steadier and slower (less dramatic). The posted workers chapter (2.3) provided evidence of the substantial changes in German wage-setting as collective bargaining has receded across Germany's economy. The advent of a formal legal minimum wage, and the creation of minimum wage only collective agreements¹¹³, only serve to complicate a wage-setting system that used to be dominated by collective bargaining (and works councils). The fragmentation and recession of collective bargaining and the creation of supplementary collective agreements, that undermine core collective agreements, seen in the *Germany-Acquired Rights* all present themselves as symptoms of how neo-liberal changes have slowly crushed German *Tarifautonomie*. This has, again, however, not created a 'pure' neo-liberal form of labour relations, as collective bargaining still exist as do trade unions (however weaker). Importantly much of the statutory law that supported their creation after World War II remains intact, alongside those legislative changes, such as opening clauses, that have undermined bargaining. Plus, it is worth considering the prospects of Germany of emergent use of collective

¹¹³ Meaning that all the other features of traditional collective agreements such as working time, sick pay, grievance procedures, holiday pay etc. are not included and it provides only for minimum rates of pay.

action. This is not a feature in the case studies in this thesis, but is raised as a future reference point. The result is a half-breed, mongrelized form of labour relations that can barely be afforded the label of 'system' given the complexity that now defines it.

3.2.3. Complexity, incoherence and the 'institutions' of national models

This final section builds on those themes raised above and is directed to two specific and related critiques of existing CPE. The difficulty in theorising clean and comparable 'national models' in an era of neo-liberalisation is examined in a first sub-section, whilst some related arguments and recommendations concerning the role and nature of institutionalism are developed in the second sub-section.

3.2.3.i Complexity, neo-liberalism and national models

Most CPE studies, as chapter 1.2 details, has spent a lot of time and effort crafting "national models" of capitalism and has placed labour relations 'models' in a central position with these. Many such theories are based upon conceptions of functionalist complementarity where 'national institutional arrangements' dynamically form and adjust in the face of external pressures to change. It is the argument here that these conceptions are not an accurate comparative basis from which to understand nor compare European labour relations nor the broader forms of capitalism they are based within. Instead, *there is far too much complexity and resulting incoherence for these complementary notions of coherence to hold water. Instead of holistic and functionalist national models, we have different mongrelised institutional forms of labour relations marked*

by paradoxical patterns of institutional dissolution that co-exist alongside those examples of institutional resilience.

At the centre of this argument is a *neo-liberal view of legal change* that has been imposed upon labour relations in different ways and, crucially, has produced different kinds of *response* to these interventions. Aggressive attempts to re-order legal rights in favour of capital and employers has provoked those *collective-institutional, judicial and political legislative responses* outlined in the previous chapter. Importantly, these have often produced outcomes that do not follow *either* the intentions of the original intervention *or* the institutional pattern of a 'Variety of Capitalism' or 'SSIP' in question. Without engaging in another wordy description of the four cases, the *British-Posted Workers* case presented a sharp revolt from workers in a well organised industrial sector. In the *German-Posted Workers* and *Britain-Acquired Rights* cases, legislative responses rather than that of unions, had differing levels of success in nullifying a disruptive intervention from a judicial decision.

The *Germany-Acquired Rights* case certainly saw a more successful joint German and European attempt at imposing a neo-liberal re-ordering of rights. This however did not set a path for a smooth journey toward a neo-liberal order as the role for negotiated settlement (in works councils) was still very prominent even if the decline of collective bargaining continued unabated.

Again, there are two sets of pre-conditions for the complexity and incoherence described: one is the different nature of legal impositions, and complex sets of legal rules existing and the conflict of rules attached, and the other is the responses these inspire. The role of courts, as described earlier, is especially difficult to theorise. Even if one court pursues its jurisprudence in a manner that aligns neatly with neo-liberal goals (i.e. the CJEU), it cannot be claimed to be a committed part of the neo-liberal order. Other doctrinal

considerations will weigh on its decisions in particular cases and, in regards to this particular European court, is capable of reversing or modifying its approach based in different doctrinal principles. For example, despite the CJEU pursuing an approach to posted workers and acquired rights that would ostensibly align with Britain's liberal, pro-market legal and political traditions and preferences, these two British cases do not see the 'neo-liberal vision of legal change' emerge; instead, something more complex is the end result with neo-liberal objectives left unmet.

This provides a neat segue to questions of the two national models contained in this thesis. Germany has not seen its vaunted coordinated institutions of *Tarifautonomie* perform in the way VoC nor (some) RT typologies would predict. In fact, the on-going dissolution of *Tarifautonomie's* collective bargaining component has been on full display in this thesis. What this thesis also presented was the importance of legal factors. One, the intention and, in fact need, of legislators (at the state level) to actively assist in providing legal supports for wage bargaining and provide legal minimum wages; something though unthinkable during *Tarifautonomie's* height. (1945-1980). Two, the role of courts has shifted to these acting as transmission belts for the CJEU to adjudicate on German labour disputes. This means that German courts are now deferring to the European legal order *rather* than to the principle of *Tarifautonomie* as they used to. These constitute new legal institutions that further the insertion of the European legal order and 'regulatory state' into German labour relations and German capitalism.

Perhaps appropriately given Britain's anticipated exit from the European Union, an event that occurred during the production of this thesis, Britain had not been subject to the same degree or form of integration into the European legal order. Indeed, the *Britain-Acquired Rights* case demonstrated considerable diversion from EU legal norms rather than the

easy deference exhibited by German courts. In the *British-Posted Workers* case, this 'diversion' was particularly pronounced, but came from social actors not legal actors.

The implications for Britain's 'model' of labour relations point to incoherence, not a neat, discernible 'liberal' or market-based model. Described throughout the CPE literature as the archetype of a liberal or market-orientated market economy, Britain has still possessed many of the conditions for conflict based labour relations. This certainly appeared in the posted workers case, but not in the other (acquired rights). This sort of militant response seen in this case is contingent upon a high level of power resources and the nature of the industry in question. With much weaker unions in most of the British economy in comparison with this posted workers example in chapter 2.4, it is worth examining the value of this case study. Power resources and industrial context were hugely important to the strike action seen in this case study. Some can be replicated for other sectors, whilst others cannot.

The conditions for resistance were made by a sudden shift in the system of legal rights. This can occur elsewhere and logical process of theoretical extension can take us to a number of sectors with enclosed labour markets based upon temporary work. In fact, Britain has used changes to the law of employment contract to foster precisely this. This missing factor is the power resources element that predicates worker organisation and mobilisation. This is very weak or non-existent in much of the UK economy therefore allowing for something far closer to the 'pure' neo-liberal model to emerge, but as noted above still providing enough of those ingredients to resist and challenge it. As 'national' models are considered however, the diversity across the industry level realities in terms of union power resources forges a very complex and uneven picture, one that does not contradict the

'liberal' label often attached to Britain, but one that does not emphatically reinforce it either.

With incoherence and complexity on the one hand, and the varied insertion of a European legal order into 'national' labour relations on the other, there are questions as to the efficacy of formulating 'national models' and attaching typological labels to them. Comparative political economy must concern itself with the inherently interdisciplinary nature of its subject and incorporate all those approaches and empirical aspects this demands. Here, the role of law has been added crucially to other factors of politics, economy, society. If neat and tidy typological models and labels cannot incorporate all that is important then they lack purpose. A focus on understanding the complex processes of erosion, response and recombination is where CPE should go from these lessons.

3.2.3.ii CPE and institutionalism: new directions

The claim made immediately above in the preceding sub-section poses a serious challenge to CPE. This challenge is more specifically aimed at 'institutionalist CPE' and those areas of CPE that lean more toward the parsimonious and functionalist theorizing found in complementary-like concepts.

Despite the criticisms raised in this chapter, and at length in chapter 1.2, these challenges do also present some opportunities for renewal. This final sub-section outlines those potential areas for renewal. The main argument that leads this final sub-section, following on from the rest of this chapter, is that institutions must be understood as much as venues of erosion, dissolution, conflict and incoherence as well as paradoxical tendencies of functionalism and complementarity. Institutional and neo-institutionalist

approaches are of central definitive importance to the VoC approach as well as playing an important (but more limited role) in CWC and RT (Amable 2003, Boyer 2005). Of the three schools, CWC and RT pursue versions of institutionalism that can more easily conform to this more turbulent, disrupted and contested form of institutional dynamics. Further prospect for their renewal is found in literatures that have already had an influence on CPE or operate not too far from them (e.g. institutional economics, new economic sociology).

The VoC approach made clear reference to the influence of *new* institutional economics (NIE) within its distinctly economic and business actor-centred approach to CPE (North 1990, Williamson 1985). Despite this, NIE offers further untapped potential to modify a VoC approach with which it has already had strong influence. This potential is expressed through a combination between the work of Deakin (2009, with Ahlring 2007, Sarkar 2008) and Oliver Williamson's work upon the concept of contracts and contracting.

Contractual arrangements, both formal and informal, connect institutional formations surrounding things like collective bargaining, firms and employer organisations with the legal realm and bodies of legal rules. This takes place in two formal ways in regards to labour relations: the collectively bargained agreement (or 'contract') and the individual employment contract. Deakin's work again is elevated as important demonstration of the promise this has. Deakin however still favours a complementarity and path dependency-based view of these contractual forms' historical development. Deakin pursues this however without employing the rigid business actor-centrism of the VoC approach. This is important, because if Deakin's approach is to place forms of contracting as the central unit of analysis for institutional formation, which it should, this

must inevitably displace the firm as that micro-analytic base for an institutionalist approach as contracts are inherently *relational* devices that encapsulate (in labour relations terms) labour and the state *as well as* the employer in a relational, interactive setting. This would call into question the very basis of the VoC approach, which again is a key argument made in regards to the VoC approach in chapter 1.2.

Contracts can be conceived as central venues of labour relations both when unions are and are not present to represent workers, as the concept addresses both the *individual* employment contract and the *collective* contract represented by a collective agreement. Contracts are venues for the conditions for conflict and their resolution with codified rules being agreed upon and enforced to remove or reduce conflict of rules problems and their effects. This concept of the contract however provides an analytical venue for both institutional settlements as well as seeds of conflict and institutional collapse can be identified analytically. Both of these are difficult to encompass in the same notion of contract if the a firm's profit-interest is the overriding focus.

*"We should not forget that societal dynamics are usually not explained by way of institutional theories, but with theories of power, conflict, action, stratification, and so on. Contemporary approaches to institutional change, however, attempt to explain social dynamics from **within** institutionalism (emphasis in original) at any cost, which results in overly descriptive and hermetically closed models."*

May and Nölke (2015, p.90)

This passage is taken from chapter within the important edited volume of Ebenau, Bruff and May (2015) that seeks to introduce a renewed critical approach to CPE and acts as an illustration and support for those assertions made in this final sub-section. It firstly elevates the potential for 'critical'

approaches, more broadly found in CWC and the regulationist and (neo-)Marxist approaches as it highlights the role of power, conflict, stratification (and by implication hierarchy) and those more turbulent and destructive institutional tendencies of modern capitalism and particularly *neo-liberal* capitalism. The second part of the quote is also highlighted because it describes the tendencies and problems from within CPE institutionalism. Institutionalism, as May and Nölke note, is useful for building theoretical links *between* broader a social order and empirical realities (2015, p.84). It cannot therefore be overextended in an attempt to pull *all* within it so as to explain *all* things. This is a tendency found in a lot if not most institutionalist scholarship that is more committed to the seductive intricacies of pretty theoretical stories rather than to the empirical realities of the subject they are analysing. This is not a tendency found only with institutionalists of course, but many of those who have become overly fixated upon complementarity type theories are the principal example of this problem found within CPE (and in each of the three schools). In this way, contractual analysis is a good device to understand the social relations of labour relations *with* institutionalism rather than *within* it, as this would produce the same problem.

The *socio-legal political economy* framework of this thesis purposefully did not afford a central role for institutionalist language or concepts as it was not the intention to reform institutionalism, as a theoretical programme, itself. This is not to be interpreted as a rejection of *all* institutionalism, not least given the explicit influences of renowned institutionalists John R. Commons and Peter. A. Hall in constructing the alternative framework of this thesis and the other institutionalist influences (Williamson 1985; North 1990; Thelen 2001, 2014; Deakin 2009, Hodgson 2004, 2014, 2015). The term 'institution' has been used throughout this thesis in looser and mostly formal terms, for

instance referring to collective bargaining 'institutions' on a number of occasions. In order to correct the way 'labour relations' is viewed *before* research is conducted (the literal meaning of the word 'approach') as well as how any examination is conducted, it was necessary to reach for new concepts and theoretical innovations outside of existing theoretical approaches within CPE (and from legal studies, namely). Again, a commitment to the empirical realities of a subject must dictate the theory employed to study it, not the other way around.

3.3. Conclusion

Comparative Political Economy, labour relations and future research agendas

This thesis set out to make a contribution to comparative political economy and its approach to studying and comparing labour relations regimes in Europe. In doing so, some important empirical revelations of labour relations in Europe were made, and introduced some important introductions from the realm of legal studies and prospects for fruitful collaborations.

The theoretical development as the overriding purpose and motivation for this study, but the observations about the concrete empirical subject matter of labour relations in Europe were also important and clearly tied to these theoretical goals. Namely, the German model of labour relations and its core operational parts have been subject to serious erosion and substantive change. This is just one empirical observation that concerns a key national archetype of a labour relations 'model' that poses important implications and questions for labour relations for the rest of Europe. The implications for collective bargaining in Europe are serious, and with different sets of legal rules presenting contradictory sets of influences, the manner of those responses by actors seeking to defend and protect collective wage bargaining is a critically important analytical problem.

The concepts used in this thesis have included those drawn from legal studies as well as from CPE and broader social science. Concepts such as conflict of rules or power resources may not be the only viable conceptual innovations made to correct CPE's problems analysing labour relations. It is claimed again however that the alternative approach of this thesis is the only

substantive offering addressing this, minus perhaps the macro-theoretical work of Brett Heino (addressed in chapter 1.2).

Rather than make a claim that the *socio-legal political economy* approach here is the *only* possible route to correcting CPE's problems identified in chapter 1.2, it is more credible to ask those within CPE and political economy-minded legal studies to produce their modifications or reasoned critique of this or some of its parts. The role of a conflict of rules concept has been especially useful for mapping and understanding complex and interacting sets of legal and non-legal rules. If others from within CPE reject this claim, or how the *conflict of laws* concept has been adapted for this thesis, they will still have to produce their own alternatives to theorising relationships between law and factors of politics, economy and social relations. Existing CPE has made, again, few meaningful attempts to do this.

This concluding chapter consists of two short further sections: a mapping of those research agendas and the possible publication opportunities to arise from this thesis, followed by reflections and suggested possible improvements and lessons.

3.3.1. Reflections: improvements and lessons

A number of reflections and lessons are outlined first in this concluding chapter.

Grappling with different sorts of incomplete and sometimes unsatisfactory data is paradoxically an intellectually stimulating yet also a serious challenge. At times for instance, failing to get desired interview respondents left me thinking about the holes that would be left in a particular chapter and its content. When a process of acceptance directs you to using other data and sources results in pursuing an enjoyable process of piecing

them together, a researcher can take some satisfaction in finding solutions, however imperfect, to these typical academic problems.

Another challenge presented was adapting to new developments that occurred during the course producing this thesis. Two were in fact particularly useful and concerned the delivery of the 2017 *Asklepios* and 2015 *RegioPost* cases of the CJEU. These helped develop the Germany-Acquired Rights and Germany-Posted Workers (respectively) case studies considerably. Many have also asked about the impact of Brexit on this thesis. The honest answer is that it was of little concern, as the time-line of this thesis' case studies did not make any Brexit issues relevant. In fact, some of the issues that arise out of the thesis concerning Britain present some possible publication opportunities in the coming years (as noted above).

More broadly, there were times when personal confidence to produce a written thesis of 100'000 words to the required standard became hard to come by. The issues of writing were probably the biggest on-going concern and challenge. In regards to producing one's own theory however, the *socio-political economy framework* was developed in its form seen here only in the final year of this thesis. Enough confidence in it is manifested by the belief that it will be employed again in later work and probably modified and developed if the collaborations above warrant.

3.3.2. Future research agendas and publications

If an alternative to the *socio-legal political economy* framework of thesis is proposed elsewhere, it will have to form a meaningful collaboration between legal studies and comparative political economy. This sort of collaboration has some history, as noted in section one, with institutional economics, new economic sociology and law and politics being among the best examples of

this. These discrete literatures however have only had an occasional and limited influence on CPE. New economic sociology has had some role in CWC, with both being dominated by neo-institutionalist scholarship, and institutional economics has had an important influence upon VoC studies. Labour lawyer Simon Deakin has produced some important work that sees exactly this kind of legal studies-CPE combination forged in the VoC-type study (Deakin and Sarkar 2008; Deakin 2007; Ahlring and Deakin 2007). This work however has not been meaningfully engaged with by those identified VoC scholars. Maybe this is a result of the decline of VoC scholarship, or simply due to problems of disciplinary bias described in chapter 1.2. Such a bias is not as evident in CWC nor RT. It is not for this reason however that these both represent the more promising options for CPE to reform its approach to labour relations.

There are several other fruitful potential research agendas outside of CPE. The study of labour relations *in Europe* inevitably introduces the subject of European integration and European countries' political and economic 'integration' in to a European legal, market and political order. This thesis demonstrated those issues presented by the lack of European level coordination on wages and collective bargaining, yet an increasing amount of legal rules demanding changes to national wage-setting despite this lack of European-level coordination; more specifically, did so in the context of the single market and four freedoms law. This broad development can be described as one of an imbalance between 'negative' and 'positive' integration, where the destructive effects of legislative and judicial interventions on national law are not compensated by the creation of new rules and coordination at the European level. This is a key feature of European 'regulatory state' that sees the EU produce masses of hard rules demanding changes of things like welfare states and collective bargaining,

but does not have the capacity to replace these features of national social models at the European level. This problem of the European regulatory state is also seen with the emerging economic governance regime of the Eurozone, where another supranational European actor (the European Central Bank) has joined the Commission and the Court of Justice in demanding sweeping changes to labour market institutions but without any form of 'European collective bargaining' framework or coordination existing. This European regulatory state is very much one built in the image of those goals of neo-liberalism, but is also inherently law-based with strong juridification and judicialisation parts. This Eurozone case, and other non EMU-based case studies, represents fertile terrain for further research of European labour relations.

This represents a very pertinent line of future research, particularly to understand how European labour relations, and collective bargaining in particular, can survive in a context of conjoined Europeanisation and neo-liberalisation. It will involve collaborations between European integration studies, CPE and those committed to the study of neo-liberalism.

In regards to potential and specific publication possibilities there are two broad categories outlined: one broader and theoretical, and the other focused and more empirical.

In regards to more empirically-focused journal article-based publications, a number of opportunities are presented by the chapters in this thesis. Cross-national comparative papers can be produced comparing the German and British experiences with both the acquired rights and posted workers subjects. These can be directed to a number of purposes and research streams, with a European Union public policy interest as well as those more focused on labour matters. On the latter, there is an unfortunate and unwelcome disciplinary divide, made largely by the Research Excellence

Framework (REF), between business school-type labour relations studies and a political science-focused 'labour market policy' focus. European integration studies journals are less likely to be so weighed down by these problems of disciplinary division in the REF, so constitute perhaps the more promising publication outlet. Also, political economy-based journals, such as *New Political Economy*, offer a similarly promising possible publication outlets for political economists based in political science schools.

One non-comparative posted workers-focused paper focusing on changes to wage-setting in Europe is already in draft form and will be directed to journals concerned with European integration or political economy journals with a politics ranking in the REF. Another proposed paper sees Britain's experience with the acquired rights directive used as a case study of Britain's tumultuous relationship with European social policy in the context of Britain's requested exit from the European Union. A 1997 paper in the *Journal of European Social Policy* with Nick Adnett and Stephen Hardy represents an interesting model for such a paper in terms of approach and its potential publication. Another paper focusing on Britain's posted workers experience sees the disputes of 2009, that dominated this case study in chapter 2.4, produce an interesting theoretical paper on the rule of law in Europe in light of militant strike action by trade unions when faced with neo-liberal legal change. The ten-year anniversary of the 2009 disputes comes in 2019, offering a potential opportunity for a journal article in a European or political economy focused journal.

Publications in regards theory development in CPE are the most exciting. There is a promising and broad research agenda of the CPE kind on neo-liberalism and its legal character that can include subjects beyond those of labour relations. The prospects of turning this thesis into a book project focused on *European labour relations under European neo-liberalism* however is

serious prospect as the subject remain highly relevant to European integration, European-focused CPE and labour studies. Potential papers along this *comparative political economy of neo-liberalism* also offer opportunities to act as a venue for collaborations between lawyers such as Grewal and Purdy (2014) and critical political economists found in the CWC and neo-Marxist corners of CPE (Ebenau et al. 2015, Dannreuther 2007) and economic geography (Peck and Theodore 2007; Peck and Tickell 2007; Brenner *et al.* 2010). There is also the prospect of key comparative themes from the literature review chapter (1.2) being directed to publications. This includes comparisons of the VoC and CWC approaches, VoC and RT approaches, and a focused paper on the critical political economy approaches found in broader neo-Marxism (i.e. not just RT) and some CWC.

Theory development, the central motivation and theme of this thesis, cannot take place in a vacuum or simply through one single study or thesis. The collaborations outlined above between disciplines such as law, political economy and other social sciences, are exactly new, but in many cases need to be *renewed*. Even if subject to critique, the *socio-legal political economy* framework has done this more than current and contemporary CPE approaches.

References

1. Aasen, H. S., Gloppen, S., Magnussen, A. M., & Nilssen, E. (Eds.). 2014. *Juridification and Social Citizenship in the Welfare State*. Cheltenham, UK: Edward Elgar.
2. Abrahamson, P. 1999. The welfare modelling business. *Social Policy & Administration*. **33**(4), pp. 394-415.
3. Addison, J.T., Schnabel, C. and Wagner, J. 2007. The Parlous State of German Unions. *Journal of Labor Research*. **28**(1), pp.3–18.
4. Adnett, N and Hardy, S. 2005. *The European Social Model – Modernisation or Evolution?* Cheltenham, UK: Edward Elgar.
5. Adnett, N. 1996. *European Labour Markets*. Longman Publishers, London.
6. Aglietta, M. 2000. *A Theory of Capitalist Regulation: The US experience*. London: Verso.
7. Ahlberg, K. Braun, N. and Sigeman, T. 2006. The Vaxholm case from a Swedish and European perspective. *Transfer*, **12**(2), pp.155-166.
8. Ahlering, B. and S. Deakin, S. 2007. Labor Regulation, Corporate Governance, and Legal Origin: A Case of Institutional Complementarity. *Law and Society Review*. **4**(4), pp. 865-908.
9. Alter, K.J. 1998. Who are the “Masters of the Treaty”: European Governments and the European Court of Justice. *International Organization*. **52**(1), pp.121-147.
10. Alter, K.J. 2009. *The European Court’s Political Power – Selected Essays*. Oxford: Oxford University Press.
11. Amable, B. 2000. Institutional complementarity and diversity of social systems of innovation and production. *Review of International Political Economy*. **7**(4), p.645-687.
12. Amable, B. 2003. *The Diversity of Modern Capitalism*. Oxford: Oxford University Press.
13. Amable, B., Ernst, E., & Palombarini, S. 2005. How do financial markets affect industrial relations: an institutional complementarity approach. *Socio-Economic Review*. **3**(2), pp. 311-330.

14. Anderson, T. 1999. The meaning of deregulation. *Journal of Australian Political Economy*. **44**. pp. 5-21.
15. Andreosso, B. and D. Jacobson. 2005. *Industrial Economics and Organization - A European Perspective*, 2nd edition. Maidenhead, UK: McGraw Hill.
16. Armour, J. & Ringe, W. G. 2011. European Company Law 1999–2010: Renaissance and Crisis. *Common Market Law Review*. **(48)**, pp.125-147.
17. Armstrong, K. A. & Bulmer, S. 1998. *The Governance of the Single European Market*. Manchester: Manchester University Press.
18. Arruñada, B., & Andonova, V. 2008. Market institutions and judicial rulemaking' In: Menard. C. Shirley M. 2005. *Handbook of New Institutional Economics*. Dordrecht, The Netherlands: Springer pp.229-250.
19. Arruñada, B., & Andonova, V. 2008. Common law and civil laws as pro-market adaptations. *Washington University Journal of Law & Policy*. **(26)** pp. 81-130.
20. Atkinson, P. & Coffey, A. 1997. Analysing Documentary Realities. In: D. Silverman. ed. *Qualitative Research: Theory, Method and Practice*. London: Sage. p.56-75.
21. Baccaro, L., & Pontusson, J. 2016. Rethinking Comparative Political Economy: the growth model perspective. *Politics & Society*. **44(2)**, pp.175-207.
22. Barbash, J. 1987. Like Nature, Industrial Relations Abhors a Vacuum: The Case of the Union Free Strategy. *Relations Industrielles*. **42**, pp.168-179.
23. Barnard, C. 2008a. Employment rights, free movement under the EC treaty and the Services Directive In: M; Romnar. eds. *National Industrial Relations vs. EU Industrial relations*. London: Kluwer publishers.
24. Barnard, C. 2008b. Unravelling the Services Directive. *Common Market Law Review*. **45**, pp. 323–394.
25. Barnard, C. 2009a. "British jobs for British workers": the Lindsey Oil Refinery dispute and the future of local labour clauses in an integrated EU market'. *Industrial Law Journal*. **38(3)**, pp. 245-277.
26. Barnard, C. 2009b. The UK and Posted Workers: The Effect of Commission v Luxembourg on the Territorial Application of British Labour Law. *Industrial Law Journal*. **38(1)**, 122-132.

27. Barnard, C. 2010. *The Substantive Law of the EU*. Oxford: Oxford University Press.
28. Barnard, C. 2012. *EU Employment Law*. Oxford: Oxford University Press.
29. Barnard, C. & Deakin, S. 2002. Reinventing the European corporation? Corporate governance, social policy and the single market. *Industrial Relations Journal*. **33**(5), pp.484-499.
30. Beach, D. 2005. *The Dynamics of European Integration: Why and When EU Institutions Matter*. Basingstoke, UK: Palgrave MacMillan.
31. Bechter, B, Brandl, B, and Meardi, G. 2012. Sectors or countries? Typologies and levels of analysis in comparative industrial relations. *European Journal of Industrial Relations*. **18**(3), pp.185-202.
32. Becker, J., & Jäger, J. 2012. Integration In Crisis: A Regulationist Perspective on the Interaction of European Varieties of Capitalism. *Competition & Change*. **16**(3), pp. 169-187.
33. Bercusson, B. 2007. The trade union movement and the European Union: Judgement day. *European Law Journal*. **13**(3), pp. 279–308.
34. Bercusson, B. 2009. *European Labour Law*. Cambridge: University Press.
35. Bertrand, H. 2005. The wage-labour nexus and the employment system. In: Boyer, R. & Saillard, Y. eds. 2005. *Régulation Theory. The State of the Art*, London: Routledge. pp. 80-6.
36. Bogg, A. 2016. Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State. *Industrial Law Journal*. **45**(3), pp.299-336.
37. Bogg, A., Costello, C., Davies, A. C., & Prassl, J. eds. 2015. *The Autonomy of Labour Law*. Croydon, UK: Bloomsbury Publishing.
38. Bogg, A. 2017. 'Individualism' and 'Collectivism' in Collective Labour Law. *Industrial Law Journal*, **46**(1). pp.72-108.
39. Bogg, A. Dukes, R. & Novitz, T. 2017. Introduction: Contemporary Issues in Collective Labour Law. *Industrial Law Journal*. **46**(1), 1-5.
40. Bonfeld, W. 2013. Adam Smith and Ordoliberalism: on the political form of market liberty. *Review of International Studies*. **39**(2), pp. 233-250.
41. Bonoli, G. 2003. Social Policy through Labor Markets: Understanding National Differences in the Provision of Economic Security to Wage Earners'. *Comparative Political Studies*. **36**, pp.1007-1030.

42. Bosch, G. Lehdorff, S. and Rubery, J. 2009. *European Employment Models in Flux: A Comparison of Institutional Change in Nine European Countries*. Basingstoke, UK: Palgrave MacMillan.
43. Bosch, G. & Weinkopf, C. 2008. *Low-wage work in Germany*. New York: Russell Sage Foundation.
44. Botero, J-C. Djankov, S. La Porta, R. Lopez-de-Silanes, F. Shleifer, A. 2004. The Regulation of Labor. *The Quarterly Journal of Economics*. **119**(4), pp.1339-1382.
45. Boyer, R. 2005. How and why capitalisms differ, *Economy and Society*. **34**(4), pp.509-557.
46. Boyer, R. & Saillard, Y. eds. 2005. *Regulation theory: the state of the art*. London: Routledge.
47. Brandl, B. & Traxler, F. 2009. Labour conflicts: A cross-national analysis of economic and institutional determinants, 1971–2002. *European Sociological Review*. **26**(5), pp.519-540.
48. Brenner, N., Peck, J., & Theodore, N. 2010. Variegated neoliberalization: geographies, modalities, pathways. *Global networks*. **10**(2). pp.182-222
49. Bruun, N. Jacobs, A. & Schmidt, M. 2010. ILO Convention 94 in the aftermath of the *Rüffert* case. *Transfer*. **16**(4), pp.475-488. ETUI - European Trade Union Institute.
50. Burnham, P. Lutz, G.K. Grant, W. Layton-Henry, Z. 2004. *Research Methods in Politics*. Basingstoke, UK: Palgrave MacMillan.
51. Callaghan, H. 2010. Beyond methodological nationalism: how multilevel governance affects the clash of capitalisms. *Journal of European Public Policy*. **17**(4), pp.564-580.
52. Casper, S. 2001. The legal framework for corporate governance: The influence of contract law on company strategies in Germany and the United States. In: Hall and Soskice (Eds.) 2001. *Varieties of Capitalism: The Institutional Foundations Of Comparative Advantage*. Oxford: Oxford University Press. pp. 387-416.
53. Cichowski, R.A. 1998. Integrating the environment: the European Court and the construction of supranational policy. *Journal of European Public Policy*. **5**(3), pp.387-405.

54. Clayton, R., & Pontusson, J. 1998. Welfare-state retrenchment revisited: entitlement cuts, public sector restructuring, and inegalitarian trends in advanced capitalist societies. *World Politics*. 5(11), pp.67-98.
55. Coase, R. 1998. The New Institutional Economics. *The American Economic Review*. 88(2), pp. 72-74.
56. Colling, T. 2010. Legal institutions and the regulation of workplaces. In: Colling, T. and Terry, M. eds. 2010. *Industrial Relations*. London: Wiley-Blackwell. p. 323-346.
57. Colling, T. and Terry, M. 2010. *Industrial Relations - Theory and Practice*. 3rd eds. London: Wiley-Blackwell.
58. Collins, H. 2010. *Employment Law*. Oxford: Oxford University Press.
59. Compston, H. 2004. Social Partnership, welfare state regimes and working time in Europe. In: Ebbinghaus, B. & Manow, P. eds. 2004. *Comparing Welfare Capitalism*. London: Routledge. p.125-145.
60. Costamagna, F. 2017. Minimum Wage between Public Procurement and Posted Workers: Anything New after the RegioPost case? *European Law Review*. 4(21), pp.101-111.
61. Craig, P. and G. de Burca 2008. *EU Law - Text, Cases and Materials 4th ed.* Oxford: Oxford University Press.
62. Cremers, J., Dølvik, J. E., & Bosch, G. 2007. Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU. *Industrial Relations Journal*. 38(6), pp. 524-541.
63. Crouch, C. 1993. *Industrial Relations and European State Traditions*. Oxford: Oxford University Press.
64. Crouch, C. 2004. Welfare state regimes and industrial relations systems: the questionable role of path dependency theory. in Ebbinghaus, B. & Manow, P. 2004. eds. *Comparing Welfare Capitalism*. London: Routledge.
65. Crouch, C. 2010. Complementarity In: Morgan, G., Campbell, J., Crouch, C., Pedersen, O. K., & Whitley, R. eds. 2010. *The Oxford Handbook Of Comparative Institutional Analysis*. Oxford: Oxford University Press. p. 117-138.
66. Crouch, C., Schröder, M., & Voelzkow, H. 2009. Regional and sectoral varieties of capitalism. *Economy and Society*. 38(4), pp. 654-678

67. Dannreuther, C. 2007. Regulation theory and the EU. *Competition & Change*. **10**(2), pp. 180-199.
68. Dannreuther, C., & Petit, P. 2006. Post-Fordism, beyond national models: the main challenges for Regulation Theory. *Competition & Change*. **10**(2), pp. 100-112.
69. Davies, A.C.L 2013. This time, it's for real: the Health and Social Care Act 2012. *The Modern Law Review*. **76**(3), pp. 564-588.
70. Davies, A.C.L. 2008. One step forward, two steps back? The Viking and Laval cases in the ECJ. *Industrial Law Journal*. **37**(2), pp.126-148.
71. Davies, A.C.L. 2009. *Perspectives on Labour law*. Cambridge: Cambridge University Press.
72. Davies, G. 2010. Understanding market access: exploring the economic rationality of different conceptions of free movement law. *German Law Journal*. **11**. pp. 671-704.
73. de Burca, G. 2009. Rethinking law in neofunctionalist theory. *Journal of European Public Policy*. **12**(1), pp.310-326.
74. de Burca, G. eds. 2005. *EU Law and the Welfare State*. Oxford: Oxford University Press.
75. Deakin, S. 2009. Legal origin, juridical form and industrialization in historical perspective: the case of the employment contract and the joint-stock company. *Socio-Economic Review*. **7**, pp.35-65.
76. Deakin, S. and Morris, G.S. 2009. *Labour Law*. Fifth Edition. London: Hart Publishing.
77. Dickens, L. 2008. Legal regulation, institutions and Industrial relations. *Warwick Papers in Industrial relations*, Number 89. Industrial Relations Research Unit, Warwick Business School, the University of Warwick.
78. Dickens, L. & Hall, M. 2010. The Changing Legal Framework Of Employment Relations. In: Colling, T. and Terry, M. 2010. *Industrial Relations - Theory and Practice*. 3rd eds. London: Wiley-Blackwell pp.298-322.
79. Dickens, R. Gregg, P. Machin, S. Manning, A. & Wadsworth, J. 1993. Wages Councils: Was there a case for abolition?. *British Journal of Industrial Relations*. **31**(4), pp. 515-529.

80. Dølvik, J. E., & Visser, J. 2009. Free movement, equal treatment and workers' rights: can the European Union solve its trilemma of fundamental principles?. *Industrial Relations Journal*. **40**(6), pp.491-509.
81. Dostal, J.M. 2004. Campaigning on expertise: how the OECD framed EU welfare and labour market policies - and why success could trigger failure. *Journal of European Public Policy*. **11**(3), pp. 440-460.
82. Du Tertre, C. 2002. Sector-based Dimensions of Regulation and the Wage-labour Nexus. In: Boyer, R., & Saillard, Y. 2005. *Regulation Theory: The State of the Art*. London: Routledge. p. 204-13.
83. Dyson, K., & Marcussen, M. 2009. *Central Banks In The Age Of The Euro: Europeanization, Convergence, And Power*. Oxford: Oxford University Press.
84. Ebbinghaus, B. & Manow, P. 2004. Varieties of Welfare Capitalism research: an outlook on future directions of research. In: Ebbinghaus, B. & Manow, P. 2004. eds. *Comparing Welfare Capitalism*. London: Routledge. p.304-315.
85. Ebbinghaus, B. & Manow, P. 2004. eds. *Comparing Welfare Capitalism. Social Policy and Political Economy in Europe, the USA and Japan*. London: Routledge.
86. Ebenau, M., Bruff, I., & May, C. eds. 2015. *New Directions in Comparative Capitalisms Research: Critical and Global Perspectives*. Basingstoke, UK: Palgrave MacMillan.
87. Edelman, L. B., & Suchman, M. C. 1997. The legal environments of organizations. *Annual Review Of Sociology*. **23**. pp.479-515.
88. Edelman, L. B. Uggen, C. & Erlanger, H. S. 1999. The endogeneity of legal regulation: Grievance procedures as rational myth. *American Journal of Sociology*. **105**(2), pp.406-54.
89. Edelman, L.B. and Stryker 2005. A sociological approach to law and the economy. In: Smelser and Swedberg 2005. *The Handbook of Economic Sociology*. New Jersey: Princeton University Press. p.527-551.
90. Eichhorst, W., & Marx, P. 2010. Whatever works: Dualisation and the service economy in Bismarckian welfare states. Institute for the Study of Labor (IZA), *Discussion Paper No. 5035*. Bonn.

91. Eichhorst, W., & Marx, P. 2011. Reforming German labour market institutions: A dual path to flexibility. *Journal of European Social Policy*. 21(1), pp.73-87.
92. Elsner, W. and Hanappi, H. 2008. *Varieties of Capitalism and New Institutional Deals: Regulation, Welfare and the New Economy* (Studies in Evolutionary Political Economy Series). Cheltenham, UK: Edward Elgar.
93. Esping-Andersen, G. 1990. *The Three Worlds of Welfare Capitalism*. Cambridge: Polity Press.
94. Everson, M., & Joerges, C. 2012. Reconfiguring the politics–law relationship in the integration project through conflicts–law constitutionalism. *European Law Journal*. 18(5), pp. 644-666.
95. Ewing, K., & Hendy, J. 2017. New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining. *Industrial Law Journal*. 46(1), pp. 23-51.
96. Exadaktylos, T. and Radaelli, C.M. 2009. Research Design in European Studies: The case of Europeanization. *Journal of Common Market Studies*. 47(3), pp.507-530.
97. Feldmann, H. 2006. The quality of industrial relations and labour market performance. *Labour* 20(3), pp.559-579.
98. Ferrera, M. 2005. *The Boundaries of Welfare – European Integration and the New Spatial Politics of Social Protection*. Oxford: Oxford University Press.
99. Ferrera, M. 2009. The JCMS Annual Lecture: National Welfare States and European Integration: In Search of a ‘Virtuous Nesting’. *Journal of Common Market Studies*. 47(2), pp. 219–233.
100. Fioretos, K.O. 2011. *Creative Reconstructions: Multilateralism and European Varieties of Capitalism After 1950*. (Cornell Studies in Political Economy) Ithaca, NY: Cornell University Press.
101. Flyvbjerg, B. 2006. Five misunderstandings about case-study research’. *Qualitative Inquiry*. 12(2), pp. 219-245.
102. Fratini, A. 2017. Minimum Wages in the Award of Public Contracts After RegioPost. In: Crew, M. Pier, P-L, Brennan. T. 2017. *The Changing Postal and Delivery Sector*. Germany: Springer International Publishing. pp.115-126.

103. Freedland, M. 2015. Otto Kahn-Freund, the contract of employment and the autonomy of labour law In: Bogg, A. Costello, C. Davies, A.C. & Prassl, J. Eds. 2015. *The Autonomy Of Labour Law*. p.29-44.
104. Garrett, G. 2000. Public Sector Trade Unions' In: Iversen, T. & Soskice, D and Pontusson, J. 2000. *Employment and Central Banks. Macroeconomic Coordination and Institutional Change In Social Market Economies*, pp. 292-330.
105. Goetschy, J. 1998. The Limits of Reform In: Hyman, R. and Ferner, A. 1998. *Changing Industrial Relations in Europe*. Oxford: Blackwell Publishers.
106. Goldsworthy, J. 2010. *Parliamentary Sovereignty: Contemporary Debates*. Cambridge: Cambridge University Press.
107. Grahl, J. and Teague, P. 1997. Is the European social model fragmenting?' *New Political Economy*. 2(3) pp.405-426.
108. Grahl, J. and Teague, P. 2000.: The Régulation School, the employment relation and financialization, *Economy and Society*. 29(1), pp.160-178
109. Greer, I., Schulten, T., & Böhlke, N. 2013. How does market making affect industrial relations? Evidence from eight German hospitals. *British Journal of Industrial Relations*. 51(2), pp. 215-239.
110. Greer, I. 2008. Social movement unionism and social partnership in Germany: the case of Hamburg's hospitals. *Industrial Relations: A Journal of Economy and Society*. 47(4), pp. 602-624.
111. Grewal, D. S., & Purdy, J. 2014. Introduction: Law and neoliberalism. *Law & Contemporary Problems*. 77(1), pp.1-24.
112. Gumbrell-McCormick, R., & Hyman, R. 2013. *Trade unions in Western Europe: Hard Times, Hard Choices*. Oxford: Oxford University Press.
113. Gunlicks, A. 2003. *The Länder and German Federalism*. Manchester: Manchester University Press.
114. Gurevitch, G. 1973. *Sociology of Law*. New Jersey. Transaction Publishers.
115. Hadfield. G. The Many Legal Institutions that Support Contractual Commitments In: Menard. C. Shirley M. 2005. *Handbook of New Institutional Economics*. Dordrecht, the Netherlands: Springer. pp.281-318.
116. Hall, P. 2006. Strategic Process Analysis: when and how to use it' *European Management Review*. 3, pp. 24–31.

117. Hall, P. A. & Taylor, R. C. 1996. Political Science And The Three New Institutionalisms. *Political Studies*. 44(5), pp.936-957.
118. Hall, P. and Soskice, D. 2001. Eds.. *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage*. Oxford: Oxford University Press.
119. Hammond, S., & Ronfeldt, P. 1998. Legal Methods: Asking New Questions about Law and the World of Work , In: Whitfield, K. and Strauss, G. 1998. *Researching the World of Work*. Cornell, NY: Cornell University Press. pp. 227-238.
120. Hancké, B. Rhodes, M. & Thatcher, M. eds. 2007. *Beyond Varieties of Capitalism. Complementarities and Contradictions in the European Economy*. Oxford: Oxford University Press.
121. Hancké, B. 2002.. *Large Firms and Institutional Change – Industrial Renewal and Economic Restructuring in France*. Oxford: Oxford University Press.
122. Hardy, S. & Adnett, N. 1999. Entrepreneurial Freedom Versus Employee Rights: the Acquired Rights Directive and EU Social Policy Post-Amsterdam. *Journal of European Social Policy*. 9(2), pp. 127-137.
123. Hassel, A. 2004. The governance of the employment–welfare relationship in Britain and Germany in Ebbinghaus, B. and Manow, P. 2004. *Comparing Welfare Capitalism*. London: Routledge. p.146-171.
124. Hassel. A. 2006. *Wage setting, Social Pacts and the Euro – A New role for the State*. Oxford: Oxford University Press.
125. Hatzopolous, V. & Do, T.U. 2006. The Case Law of the ECJ concerning the free provision of services: 2000-2005. *Common Market Law Review*. 43, pp.923-991.
126. Heinen, A., Müller, A., & Kessler, Bernd, K. 2017. *Liability in Subcontracting Chains: National Rules and the Need for a European Framework*. A European Parliament's Committee on Legal Affairs and commissioned report overseen and published by the EU's Policy Department for Citizens' Rights and Constitutional Affairs. Brussels: The European Parliament.
127. Hepple, B., & Veneziani, B. (Eds.) 2009. *The Transformation of Labour Law in Europe: A comparative study of 15 countries 1945-2004*. Croydon, UK: Bloomsbury Publishing.
128. Hertwig, M., Kirsch, J., & Wirth, C. 2018. Defence is the Best Offence: Horizontal Disintegration and Institutional Completion in the German

Coordinated Market Economy. *Work, Employment and Society*. June, pp.1-18.

129. Hollingsworth J.R., and R. Boyer 1997. *Contemporary Capitalism - Beneficial constraints: The Embeddedness of Institutions*. Cambridge: Cambridge University Press.
130. Hollingsworth J.R., Müller, K.H., and Hollingsworth E.J., eds. 2005. *Advancing Socio-Economics: An Institutionalist Perspective*. Maryland, US: Rowman & Littlefield.
131. Holgate 2015. Community organising in the UK: A 'new' approach for trade unions? *Economic and Industrial Democracy*. **36**(3), pp.431-455.
132. Hodgson, G.M. 2004. *The Evolution of Institutional Economics*. London: Routledge.
133. Hodgson, G.M. 2015. *Conceptualizing Capitalism: Institutions, Evolution, Future*. Chicago: University of Chicago Press.
134. Hodgson, G.M. 2014. On fuzzy frontiers and fragmented foundations: some reflections on the original and new institutional economics. *Journal of Institutional Economics*. **10**(4), pp.591-611.
135. Höpner, M 2007. Coordination and Organization: The Two Dimensions of Nonliberal Capitalism. *MPIfG Discussion Paper 07/12*. Max Planck Institute for the Study of Societies, Cologne.
136. Höpner, M. 2005. What connects Industrial relations and corporate governance? Explaining Institutional complementarity. *Socio-Economic Review*. **3**. pp. 331-358.
137. Höpner, M. and Callaghan, H. 2005. European Integration and the Clash of Capitalisms: Political Cleavages over Takeover Liberalization. *Comparative European Politics*. **3**, pp. 307–332.
138. Höpner, M. and Schäfer, A. 2010. A New Phase in European Integration: Organised capitalisms in Post-Ricardian Europe. *West European Politics*. **33**(2).
139. Hyman, R. and Ferner, A. 1998. *Changing Industrial relations in Europe*. Oxford: Blackwell Publishers.
140. Ince, A., Featherstone, D., Cumbers, A., MacKinnon, D., & Strauss, K. 2015. 'British jobs for British workers? Negotiating work, nation, and globalisation through the Lindsey Oil Refinery disputes'. *Antipode*. **47**(1), pp.139-157.

141. Iversen, T. & Soskice, D 2009. Distribution and Redistribution - The Shadow of the Nineteenth Century. *World Politics*. 6(1) July. pp.438-486.
142. Iversen, T. & Soskice, D and Pontusson, J. 1999. *Unions Employers and Central Banks. Macroeconomic coordination in Social Market Economies* (Cambridge Studies in Comparative Politics). Cambridge: University of Cambridge Press.
143. Iversen, T. & Soskice, D. 2006. The New Macroeconomics and Political Science. *Annual Review of Political Science*. 9. pp. 425-53
144. Jackson, G. 2010. Actors and Institutions. In: Morgan, G., Campbell, J., Crouch, C. Pedersen, O. K. & Whitley, R. eds. 2010. *The Oxford Handbook of Comparative Institutional Analysis*. Oxford: Oxford University Press. pp. 63-86.
145. Jacobi, O., B. Keller and W. Muller-Jentsch 1998. Germany: facing new challenges. In: Hyman, R. and Ferner, A. 1998. *Changing Industrial relations in Europe*. Oxford: Blackwell Publishers.
146. Jaehrling, K. and Mehaut, P. 2013. Varieties of institutional avoidance: employers' strategies in low-waged service sector occupations in France and Germany. *Socio-Economic Review*. 4(1) pp. 1-24
147. Janoski, T. and Hicks, A.M. 1994. eds. *Comparative Political Economy of the Welfare State*. Cheltenham, UK: Edward Elgar.
148. Jessop, B. 1995. The regulation approach, governance and post-Fordism: alternative perspectives on economic and political change?' *Economy and Society*. 24(3), pp.307-333.
149. Jessop, B. 2012. The world market, variegated capitalism, and the crisis of European integration. In: Nousios, P., Overbeek, H., & Tsolakakis, A. eds. *Globalisation and European Integration: Critical Approaches to Regional Order and International Relations*. London: Routledge. pp. 91-111.
150. Jessop, B. 2014. Variegated capitalism, das Modell Deutschland, and the Eurozone crisis. *Journal of Contemporary European Studies*. 22(3), pp. 248-260.
151. Joerges, C. and Rödl, F 2008. On the 'Social Deficit' of the European Integration Project and its Perpetuation through the ECJ Judgements in Viking and Laval. *Reconstituting Democracy in Europe - RECON project*.
152. Joerges, C. and Rödl, F. 2009. Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments

- of the ECJ in Viking and Laval. *European Law Journal*. **15**(1) January 2009, pp. 1–19.
153. Johnston, A. and Hancké, B 2009. Wage inflation and labour unions in EMU. *Journal of European Public Policy*. **16**(4). pp.601-622.
 154. Kahn-Freund, S. O., & Clark, J. 1981. *Labour law and politics in the Weimar Republic*. Warwick Studies in Industrial Relations. London: Blackwell.
 155. Katz, H. C., & Darbishire, O.R. 2000. *Converging Divergences: Worldwide Changes In Employment Systems*. **32**. Cornell, NY: Cornell University Press.
 156. Kaufman, B. 2004. *Theoretical Perspectives on Work and the Employment Relationship*. Cornell, NY: Cornell University Press.
 157. Kennedy, E. 1991. *Bundesbank CFR: Germany's Central Bank in the International Monetary System*. London: Bloomsbury USA Academic.
 158. Kerr, C. and Staudohaur, P.D. 1994. *Labour Markets and Industrial Relations - Markets and Institutions*. Cambridge, Mass: Harvard University Press.
 159. Kilpatrick, C. 2009a. The ECJ and labour law: A 2008 retrospective. *Industrial Law Journal*. **38**(2), pp. 180-208.
 160. Kilpatrick, C. 2009b. Laval's regulatory conundrum: collective standard-setting and the Court's new approach to posted workers. *European Law Review*. **34**(6), pp. 844-865.
 161. Kilpatrick, C. 2009c. British Jobs for British Workers? UK Industrial Action and Free Movement of Services in EU Law. *LSE Law, Society and Economy Working Papers 16/2009*. London School of Economics and Political Science.
 162. King, G., Keohane, R. O., & Verba, S. 1994. *Designing Social Inquiry: Scientific Inference In Qualitative Research*. New Jersey: Princeton University Press.
 163. Kirchner, J., Kremp, PR. Magotsch, M. 2010. *Key Aspects of German Employment and Labour Law*. Dordrecht, the Netherlands. Springer.
 164. Kirchner, J. and E. Mittelhamm 2010. Labour conflicts In: *Key Aspects of German Employment and Labour Law*. Dordrecht, the Netherlands. Springer. p.199-208.
 165. Kitschelt, H. 2001. Partisan competition and welfare state retrenchment, In: Pierson 2001. *The New Politics Of The Welfare State*. Oxford: Oxford University Press. p. 265-302.

166. Korpi, W. 1989. Power, politics, and state autonomy in the development of social citizenship: Social rights during sickness in eighteen OECD countries since 1930'. *American Sociological Review*. **54**(3), pp. 309-328
167. Korpi, W. 2006. Power Resources and Employer-centred approaches in explanations of welfare states and Varieties of Capitalism - Protagonists, Consenters and Antagonists, *World Politics*. **58**, pp.167-206
168. Leibfried, S. 2000. National Welfare States, European Integration and Globalization: A Perspective for the next century. *Social Policy and Administration*. **34**(1), pp.44-63.
169. Leibfried, S. 1993. Towards A European Welfare State. Jones, C. ed. 1993. *New perspectives on the welfare state in Europe*. Routledge. pp. 133-156.
170. Leitner, H. Peck, J. Sheppard, E.S. 2007. *Contesting Neoliberalism – Urban Frontiers*. London: The Guildford Press.
171. Lichtman, A.J. and French, V. 2012. *Historians and the Living Past*. New York: John Wiley & Sons.
172. Lipietz, A. 1993. From Althusserianism to Regulation Theory. In: Kaplan, A. 1993. *The Althusserian Legacy*. London: Verso. p. 99-138.
173. Ludlow, A. & Blackham, A. eds. 2015. *New Frontiers in Empirical Labour Law Research*. Croydon, UK: Bloomsbury Publishing.
174. MacNeil, I.R. 1977. Contracts: Adjustment of long-term economic relations under classical, neoclassical, and relational contract law. *Northwestern University Law Review*. **72**(6). pp.854-905.
175. Martin, C.J. and Thelen, K. 2006. Varieties of coordination and trajectories of change: social policy and economic adjustment in coordinated market economies. *Institute for Policy Research, Northwestern University*, May, 8.
176. Mahoney, J. & Rueschemeyer, D. 2003. *Comparative Historical Analysis In The Social Sciences*. Cambridge: Cambridge University Press.
177. Mahoney, J. 2007. Qualitative methodology and comparative politics. *Comparative Political Studies*. **40**(2), pp. 122-144.
178. Majone, G. 1993. The European Community Between Social Policy and Social Regulation. *Journal Common Market Studies*. **31**(2). pp.153-170.
179. Malmberg, J. & Sigeman, T. 2008. Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining model Curtailed by

- the European Court of Justice. *Common Market Law Review*. **45**, pp.1115-1146.
180. Mares, E. 2004. Strategic Bargaining and social policy development: unemployment insurance in France and Germany In: Ebbinghaus, B. & Manow, P. 2004. eds. *Comparing Welfare Capitalism*. London. Routledge.
 181. Marginson, P. and Sisson, K. 2002. European integration and Industrial relations: a case of convergence *and* divergence? *Journal of Common Market Studies*. **40**(4), pp.671-92.
 182. Marginson, P. and Sisson, K. 2004. European integration and Industrial relations - Multi-level Governance in the Making. Basingstoke, UK: Palgrave MacMillan.
 183. Martinsen, D.S. 2008. Welfare Regulation in the European Union: Politics Still Withdrawn. *Paper prepared for the ECPR Standing Group on Regulatory Governance Utrecht*. June 5-7, 2008.
 184. Martinsen, D.S. 2015. Judicial influence on policy outputs? The political constraints of legal integration in the European Union. *Comparative Political Studies*. **48**(12), pp. 1622-1660.
 185. May, C and Nölke, A. 2015. Critical institutionalism in studies of comparative capitalisms: conceptual considerations and research programme. In: Ebenau, M. Bruff, I. May, C. 2015. *New Directions of Comparative Capitalisms Research*. London: Routledge. p.83-110.
 186. McGaughey, E. 2015. The codetermination bargains: the history of German corporate and labour law. *Columbia Journal of European Law*. **23**(1), pp. 135-176.
 187. McMullen, J. 2006. An analysis of the Transfer of Undertakings Protection of Employment. regulations 2006. *Industrial Law Journal*. **35**(2), pp. 113-139.
 188. McMullen, J. 2012. Service Provision Change Under TUPE: Not Quite What We Thought. *Industrial Law Journal*. **41**(4), pp.471-478.
 189. McMullen, J. 2014. TUPE: Ringing the Wrong. Changes. The Collective Redundancies and Transfer of Undertakings Protection of Employment. Amendment. Regulations. *Industrial Law Journal*. **43**(2) pp.149-169.
 190. Menard. C. Shirley M. 2005. *Handbook of New Institutional Economics*. Dordrecht, The Netherlands: Springer.

191. Menz, G. 2005a. Old bottles–new wine: The new dynamics of industrial relations. *German Politics*. **14**(2), pp. 196-207.
192. Menz, G. 2005b. *Varieties of Capitalism and Europeanization: National Response Strategies to the Single European Market*. Oxford: Oxford University Press.
193. Menz, G. 2010. Are you being served? Europeanizing and re-regulating the single market in services. *Journal of European Public Policy*. **17**(7), pp. 971-987.
194. Molina, O. & Rhodes, M. 2002. Corporatism: The past, present, and future of a concept. *Annual Review Of Political Science*. **51**, pp.305-331.
195. Moran, M. 2003. *The British Regulatory State: High Modernism And Hyper-Innovation*. Oxford: Oxford University Press.
196. Morgan, G. & Quack, S. 2010. Law as a Governing Institution In: Morgan, G. Campbell, J. Crouch, C., Pedersen, O.K. & Whitley, R. eds. 2010. *The Oxford Handbook of Comparative Institutional Analysis*. Oxford: Oxford University Press. pp. 275-308
197. Morgan, G. Campbell, J. Crouch, C. Pedersen, O.K. & Whitley, R. eds. 2010. *The Oxford Handbook of Comparative Institutional Analysis*. Oxford: Oxford University Press.
198. Müller-Jentsch, W. 2004. Theoretical approaches to industrial relations. In: *Theoretical Perspectives on Work and the Employment Relationship*. Champaign, Illinois: University of Illinois at Champaign: Industrial Relations Research Association Series. pp. 1-40.
199. North, D. 1990. *Institutions, Institutional Change and Economic performance*. Cambridge: Cambridge University Press.
200. Novitz, T. 2017. Collective bargaining, equality and migration: the journey to and from Brexit. *Industrial Law Journal*. **46**(1), pp. 109-133.
201. O'Hara, O.C. & Ribstein, A. 2009. Conflict of laws and choice of law. *University of Illinois Law & Economics Research Paper* No. LE09-030.
202. Offe, C. 1985. *Disorganized Capitalism: Contemporary Transformations Of Work And Politics*. Cambridge: Polity Press.
203. Owen-Smith, E. 2012. *The German Economy*. London: Routledge.
204. Parsons, N. 2007. *French Industrial Relations In The New World Economy*. London: Routledge.

205. Pecinovsky, P. 2016. Evolutions in the Social Case Law of the Court of Justice: The Follow-up Cases of the Laval Quartet: ESA and Regiopost. *European Labour Law Journal*, 7(2). pp. 294-309.
206. Peck, J., & Theodore, N. 2007. Variegated Capitalism. *Progress in Human Geography*. 31(6) pp. 731–772.
207. Peck, J., & Tickell, A. 2007. Conceptualizing neoliberalism, thinking Thatcherism. In: Leitner, H. Peck, J. Sheppard, E.S. eds. 2007. *Contesting Neoliberalism: Urban Frontiers*. New York: The Guildford Press. p.26-50.
208. Pierson, P. 1995. *Dismantling The Welfare State?: Reagan, Thatcher And The Politics Of Retrenchment*. Cambridge: Cambridge University Press.
209. Pierson, P. 1996. The New Politics Of The Welfare State. *World Politics*. 48(2), pp.143-179.
210. Pierson, P. eds. 2001. *The New Politics Of The Welfare State*. Oxford: Oxford University Press.
211. Piore, M.J. & Safford, S. 2006. Changing regimes of workplace governance, shifting axes of social mobilization, and the challenge to industrial relations theory. *Industrial Relations: A Journal of Economy and Society*. 45(3), pp.299-325.
212. Pollack, M.A. 1996. The New Institutional and EC Governance: The Promise and limits of Institutional analysis. *Governance: An International Journal of Policy and Administration*. 9(4), pp.429-458
213. Pollert, A. 2005. The unorganised worker: the decline in collectivism and new hurdles to individual employment rights. *Industrial Law Journal*. 34(3), pp. 217-238.
214. Pontusson, J. 2000. Labor market institutions and wage distribution. In: Iversen, T. Pontusson, J. Soskice, D. eds. 2000. *Employment and Central Banks. Macroeconomic Coordination and Institutional Change In Social Market Economies*. Cambridge: Cambridge University Press. p.292-330.
215. Pontusson, J. 2005. Varieties and commonalities of capitalism. In: Coates, D. 2005. *Varieties Of Capitalism, Varieties Of Approaches*. Basingstoke: Palgrave MacMillan. p.163-188.
216. Prassl, J. 2013. Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law - Case C-426/11 *Alemo-Herron and others v Parkwood Leisure Ltd*. *Industrial Law Journal*. 42(4), pp. 434-446.

217. Quack, S., & Djelic, M. L. 2005. Reinforcement: The Story of Antitrust and Competition Law in Germany and Europe. In: Streeck, W. & Thelen, K. A. 2005. *Beyond Continuity: Institutional Change in Advanced Political Economies*. Oxford: Oxford University Press. pp. 255-281.
218. Reynauld, B. 2005. Diversity and rules in wage determination. In: Boyer, M. and Saillard, Y. eds. 2005. *Regulation Theory: The State of the Art*. London: Routledge. pp.87-93.
219. Rhodes, M. 2005. 'Varieties of Capitalism' and the Political Economy of European Welfare States. *New Political Economy*. **10**(3). Pp.363-370.
220. Rosamund, B. 2000. *Theories of European Integration*. Basingstoke: Palgrave MacMillan.
221. Rubery, J. 2010. Institutionalizing the employment relationship. In: Morgan, G., Campbell, J., Crouch, C., Pedersen, O. K., & Whitley, R. eds. 2010. *The Oxford Handbook Of Comparative Institutional Analysis*. Oxford: Oxford University Press. p. 497-526.
222. Sack, D. 2012. Europeanization through law, compliance, and party differences—the ECJ's 'Rüffert' judgment C-346/06. and amendments to public procurement laws in German federal states. *Journal of European Integration*. **34**(3), pp. 241-260.
223. Salverda, W. & Mayhew, K. 2009. Capitalist economies and wage inequality. *Oxford Review of Economic Policy*. **25**(1), pp. 126-154.
224. Sarter, E.K. Sack, D. & Fuchs, S. 2014. Public Procurement as Social Policy? An introduction to social criteria in public procurement in Germany. Working Paper No. 1. *Working Paper Series in 'Comparative Governance'*.
225. Saurugger, S. & Terpan, F. 2016. *The Court Of Justice Of The European Union And The Politics Of Law*. Basingstoke: Palgrave MacMillan..
226. Scharpf, F.W. 1988. The Joint Decision Trap: lessons from German federalism and European Integration. *Public Administration*. **66** autumn. pp. 239-78.
227. Scharpf, F.W. 1997. Economic Integration, Democracy and the Welfare States'. *Journal of European Public Policy*. **4**(1), pp.18-36.
228. Scharpf, F.W. 2002. The European Social model: coping with the Challenges of Diversity. *Journal of Common Market Studies*. **40**(4), pp.645-70.

229. Scharpf, F.W. 2012. The Asymmetry of European Integration, or why the EU cannot be a 'social market economy'. *Socio-Economic Review*. **8**, pp.211-250.
230. Scharpf, F.W. 1997. *Games Real Actors Play - Actor-Centered Institutionalism in Policy Research*. Colorado: Westview Press.
231. Scharpf, F.W. 2000. The viability of advanced welfare states in the international economy: vulnerabilities and options'. *Journal of European Public Policy*. **7**(2), pp.190-228.
232. Schelkle, W. 2008. Collapsing Worlds and Varieties of Welfare Capitalism: How to Step Out of Weber's Long Shadow. Oxford Centre For The Study Of Inequality And Democracy (OCSID) Working Paper OCSID_01.
233. Schmidt, V.A 2002. Europeanization and the mechanics of economic policy adjustment. *Journal of European Public Policy*. **9**(6) pp.894–912.
234. Schmidt, V.A 2003. French Capitalism transformed, yet still a third variety of capitalism. *Economy and Society*. **32**(4), pp.526-554.
235. Schmidt, V.A 2007. Bringing the state back into the varieties of capitalism and discourse back into the explanation of change. *Center for European Studies Program for the Study of Germany and Europe Working Paper Series*, Np. 7.
236. Schmidt, V.A. 2008. European Political Economy: Labor Out, State Back In, Firm to the Fore. *West European Politics*. **31**(1-2), pp. 302-320.
237. Schnabel, C. 2013. Union membership and density: Some not so. stylized facts and challenges. *European Journal of Industrial Relations*. **19**(3), pp. 255-272.
238. Scott, J. 1991. *A Matter Of Record: Documentary Sources In Social Research*. Cambridge: Polity Press.
239. Shalev, M. 2004. The politics of elective affinities: a commentary. In: Ebbinghaus, B. & Manow, P. 2004. eds. *Comparing Welfare Capitalism*. London: Routledge.
240. Shapiro, M. 1980. Comparative Law and Comparative Politics. *Southern California Law Review*. **53**, pp. 537–542.
241. Sisson, K. 2007. *Revitalising Industrial relations: making the most of the "institutionalist turn"*. Warwick Papers in Industrial Relations. Number 85.

242. Slapper, G., & Kelly, D. 2009. *The English Legal System*. London: Routledge-Cavendish.
243. Smelser, N.J. and Swedberg, R. 2005. *The Handbook of Economic Sociology*. New Jersey: Princeton University Press.
244. Smith, M.P. 2001. In pursuit of selective liberalization: single market competition and its limits. *Journal of European Public Policy*. 8(4) pp. 519-540.
245. Stone Sweet and W. Sandholtz 1997. European Integration and Supranational Governance. *Journal of Common Market Studies*. 4(3) pp.297-317.
246. Streeck, W. 1995. Neo-voluntarism – A New European Social Policy Regime? *European Law Journal*. 1(1) pp.31-59.
247. Streeck, W. 2009. *Reforming Capitalism – Institutional Change in German Political Economy*. Oxford: Oxford University Press.
248. Streeck, W. 2010. E Pluribus Unum? Varieties and Commonalities of Capitalism'. *MPIfG Discussion Paper 10/12*. Max Planck Institute for the Study of Societies, Cologne.
249. Streeck, W. & Thelen, K. A. 2005. *Beyond Continuity: Institutional Change In Advanced Political Economies*. Oxford: Oxford University Press.
250. Stryker, R. 2003. Mind the gap: law, institutional analysis and socioeconomics. *Socio-Economic Review*. 13, pp.335-367.
251. Sutton, J. R. Dobbin, F. Meyer, J. W. & Scott, W. R. 1994. The legalization of the workplace. *American Journal of Sociology*. 99(4), pp.944-971.
252. Swenson, P. 1993. The end of the Swedish model in light of its beginnings: on the role of engineering employers and their leaders. No. 93. *Wissenschaftszentrum Berlin für Sozialforschung, Forschungsschwerpunkt Arbeitsmarkt und Beschäftigung*.
253. Syrpis, P. 2007. *EU Intervention in Domestic Labour Law*. Oxford: Oxford University Press.
254. Syrpis, P. and Novitz, T. 2008. Economic and social rights in conflict: political and judicial approaches to their reconciliation'. *European Law Review*. 33(3).

255. Teubner, G. 1998. Legal irritants: good faith in British law or how unifying law ends up in new divergences. *The Modern Law Review*. **61**(1), pp. 11-32.
256. Thelen, K. 1999. Historical Institutionalism in Comparative Politics. *Review of Political Science*. **2**, pp.369-404.
257. Thelen, K. 2000. Why German employers cannot bring themselves to dismantle the German model. In: Iversen, T. Pontusson, J. Soskice, D. 2000. *Unions, Employers, And Central Banks: Macroeconomic Coordination And Institutional Change In Social Market Economies*. Cambridge: Cambridge University Press. p. 138-172.
258. Thelen, K. 2001. Varieties in Labor Politics. In: P. Hall and D. Soskice 2001. eds. *Varieties of Capitalism*. Oxford: Oxford University Press. p.71-103.
259. Thelen, K. 2014. *Varieties Of Liberalization And The New Politics Of Social Solidarity*. Cambridge: Cambridge University Press.
260. Thelen, K. 2010. Beyond comparative statics: Historical institutional approaches to stability and change in the political economy of labor. In: Morgan, G. Campbell, J. Crouch, C. Pedersen, O.K. & Whitley, R. eds. 2010. *The Oxford Handbook Of Comparative Institutional Analysis*. Oxford: Oxford University Press. p.41-61.
261. Tickell, A., & Peck, J.A. 1995. Social regulation after Fordism: regulation theory, neo-liberalism and the global-local nexus. *Economy and Society*. **24**(3), pp. 357-386.
262. Traxler, F 1998. Collective bargaining in the OECD: developments, preconditions and effects. *European Journal of Industrial Relations*, **4**, pp. 207-226.
263. Traxler, F. 1999. The state in industrial relations: A cross-national analysis of developments and socioeconomic effects. *European Journal of Political Research*. **36**(1), pp.55-85.
264. Traxler, F. 2002. Wage Regulation between Industrial Democracy and Market Pressures towards a European Model? *European Sociological Review*. **18**(1), pp. 1-16.
265. Traxler, F. 2003a. Bargaining, State Regulation and the Trajectories of Industrial Relations. *European Journal of Industrial Relations*. **9**(2), pp.141–161.

266. Traxler, F. 2003b. Bargaining decentralization, macroeconomic performance and control over the employment relationship. *British Journal of Industrial Relations*. **41**(1), pp. 1-27.
267. Traxler, F. 2004. The metamorphoses of corporatism: From classical to lean patterns. *European Journal of Political Research*. **43**(4), pp. 571-598.
268. Traxler, F., Blaschke, S., & Kittel, B. 2001. *National labour relations in internationalized markets: A comparative study of institutions, change, and performance*. Oxford: Oxford University Press.
269. Traxler, F., Brandl, B., & Glassner, V. 2008. Pattern bargaining: an investigation into its agency, context and evidence. *British Journal of Industrial Relations*, **46**(1), pp. 33-58.
270. Turner, H. A. 1969. The Donovan Report. *The Economic Journal*, pp. 1-10.
271. Tyler, R. 2006. 'Victims of our History'? Barbara Castle and In Place of Strife. *Contemporary British History*. **20**(3), pp.461-476.
272. Visser, J. 2005. New and old modes of governance in European industrial relations. *European Journal of Industrial Relations*. **11**(3), pp. 287–306.
273. Voss, E., Faioli, M., Lhernould, J. P., & Iudicone, F. 2016. Posting of Workers Directive: Current Situation and Challenges. European Parliament DG EMPL report.
274. Vromen, A. 2010. Debating Methods: Rediscovering Qualitative Approaches. in Marsh and Stoker 2010. *Theory and Methods in Political Science*. p.258-266.
275. Wagner, I. 2015. Rule Enactment in a Pan-European Labour Market: Transnational Posted Work in the German Construction Sector. *British Journal of Industrial Relations*. **53**(4), pp. 692-710.
276. Webb, S. and Webb, B. 1932. *Methods of Social Study*. London: Longmans.
277. Weiss, M., & Schmidt, M. 2008. *Labour Law And Industrial Relations In Germany*. The Netherlands: Kluwer Law International.
278. Whalen, C. 2008. *New Directions in the Study of Work and Employment: Revitalizing Industrial Relations as an Academic Enterprise*. Cheltenham, UK: Edward Elgar.
279. Whitfield, K. and Strauss, G. 1998. (Eds.). *Researching the World of Work – Strategies and Methods in Studying Industrial relations*. Ithaca, NY: Cornell University Press.

280. Whittington, K.E. Kelemen, R.D. Caldeira, G.A. eds. 2010. *The Oxford Handbook of Law and Politics*. Oxford: Oxford University Press.
281. Williamson, O. 1985. *The Economic Institutions of Capitalism – Firms, Markets and Relational Contracting*. New York: MacMillan.
282. Wood, S. 2001. Labour market regimes under threat? Sources of continuity in Germany, Britain, and Sweden. In: Pierson, P. 2001. *The New Politics of the Welfare State*. Oxford: Oxford University Press. p.368-409.
283. Wynn-Evans, C. 2010. TUPE, Collective Agreements and the Static-Dynamic Debate *Alemo-Herron and Others v Parkwood Leisure Ltd* [2010] IRLR 298, CA. *Industrial Law Journal*. **39**(3), pp. 275-279.
284. Wynn-Evans, C. 2013. *The Law of TUPE Transfers*. Oxford: Oxford University Press.
285. Wynn-Evans, C. 2014. Case Comment - Transfers of undertakings - principle and pragmatism in the CJEU. *Law Quarterly Review*. 130 (April) pp.202-206.
286. Zweigert, K., & Kötz, H. 1998. *Introduction to Comparative Law*. Oxford: Oxford University Press.

Appendix

- i. List of legislation and cases*
- ii. Documentary sources*
- iii. Transcribed interview text*

Legislation and Case law

European and national level statutes and court cases

Legislation

European and national level statutes listed below in chronological order.

European statutes (directives and regulations)

1. **Posting of Workers** directive (96/71) (1996)
2. **The Acquired Rights** directive (1977)
3. **The Acquired Rights** directive (1998)
4. **The Acquired Rights** directive (2001)
5. **The Collective Redundancies** directive (98/59) (1998)
6. **The Services** directive 2006/123 (2006)
7. **The Enforcement of directive 96/71/EC** concerning the posting of workers (2014/67/EU) (2014)
8. **Public Procurement (Services)** directive (2014/24) (2014)
9. **Public Procurement (Services)** directive (2004/18) (2004)
10. **Public Procurement (utilities)** directive (2004/17) (2004)
11. **Public Procurement (utilities)** directive (2014/22) (2014)
12. **Public Procurement (Concessions)** directive (2014/23/EU) (2014)
13. **Relating to the coordination of procedures for the award of public service contracts** Directive (92/50) (1992)

UK Statutes

Ordered with primary legislation first, followed by secondary legislation and in chronological order.

1. **The Employment Act (1982)** (*primary legislation*)
2. **The Trade Union and Labour Relations (Consolidation) Act (TULRCA) (1992)** (*primary legislation*)
3. **The Trade Union Reform and Employment Rights Act (TURERA) (1993)**
4. **The National Minimum Wage Act (1998)** (*primary legislation*)
5. **The Transfer of Undertakings (Protection of Employment) (TUPE) regulations (1981)** (*secondary legislation*)
6. **The Transfer of Undertakings (Protection of Employment) (TUPE) regulations (2006)** (*secondary legislation*)
7. **The Transfer of Undertakings (Protection of Employment) (TUPE) regulations (2014)** (*secondary legislation*)
8. **The Collective Redundancies and Transfer of Undertakings regulations (1995)** (*secondary legislation*)

German statutes and core legal texts

1. Section 613.a *Bürgerliches Gesetzbuch* (BGB) ‘The Federal Civil Code’
2. *Krankenversicherungsgesetz* (1883) (‘Health Insurance Act’)
3. *Arbeiterschutzgesetz* (1891) (Worker Protection Act)
4. *Betriebsrätsgesetz* (1920) (Works Councils Act)
5. *Betriebsverfassungsgesetz* (BetrVG) (1949) (‘Works Constitution Act’)
6. *Tarifvertragsgesetz* (TöVG) (1949) (‘Collective Bargaining Act’)
7. *‘Tariftreuegesetze’ Landesgesetz zur Gewährleistung von Tariftreue und Mindestentgelt bei öffentlichen Auftragsvergaben’* (LTTG)
8. *Gesetz gegen Wettbewerbsbeschränkungen* (GWB) (‘Act against Restraints on Competition’)
9. *Gesetz zur Regelung eines allgemeinen Mindestlohns* (‘Law regulating a general minimum wage’)
10. *Verordnung über die Vergabe öffentlicher. Aufträge* (VgV), (‘Award Rules for Public Contracts’)

11. *Vergabe-und Vertragsordnungen für Bauleistungen*, ('Building Work Award and Contract Code')
12. *Vergabe-und Vertragsordnungen für Leistungen* ('Award and Contract Code for Supplies and Services')
13. *Vergabe- und Vertragsordnungen für freiberufliche Leistungen*, VOF ('Award Rules for Professional Services')
14. *Aktiengesellschaftsgesetz ('AG')* (Stock Corporation Act)
15. *Arbeitsgerichtsgesetz ('ArbGG')*- Labour Court Act
16. *Tarifvertragsgesetz (TöVG)*- Collective Bargaining Agreement Act
17. *Betriebsverfassungsgesetz (BetrVG)* - Works Constitution Act
18. *Mitbestimmungsgesetz (MitbestG)* - Co-Determination Act
19. *Arbeitnehmer-Entsendegesetz (AEntG)*- Posted Workers Act

Court cases

Abbreviated case name, as used in the text in core chapters, is in bold as is the year of the decision. Cases listed chronologically.

Single Market (Foundational cases)

1. NV Algemene Transport- en Expeditie Onderneming *van Gend & Loos* v Netherlands Inland Revenue Administration (**1962**) c-26-62.
2. Flaminio *Costa v. ENEL*. (**1964**). c-6-64.
3. Procureur du Roi v Benoît and Gustave *Dassonville* - c-8/74 (**1974**)
4. Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (*Cassis de Dijon*). c-120/78 (**1979**)
5. Manfred *Säger* v Dennemeyer & Co. Ltd. c-76/90 (**1991**)
6. Reinhard *Gebhard* v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano. c- 55/93 (**1995**)
7. *Alpine Investments* BV v Minister van Financiën. c- 384/93 (**1995**)

8. *Mary Carpenter v Secretary of State for the Home Department*. c- 60/00 (2001)

European Posted workers law

1. Société anonyme de droit français *Seco* and Société anonyme de droit français Desquenne & Giral v Etablissement d'assurance contre la vieillesse et l'invalidité (*Evi*) **Joined cases 62 and 63/81. *Evi v Seco* (1981)**
2. *Rush Portuguesa Lda* v Office national d'immigration - c-113/89 (1990)
3. Raymond *Vander Elst* v Office des Migrations Internationales - c-43/93 (1994)
4. Criminal proceedings against Jean-Claude Arblade and *Arblade & Fils SARL* (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL - c-369/96 (1999)
5. Criminal proceedings against André *Mazzoleni* and Inter Surveillance Assistance SARL (2001)
6. *Finalarte Sociedade de Construção Civil Lda* (C-49/98) (2001)
7. *Portugaia Construções Lda* (C-70/98) (2001)
8. *Wolff & Muller GmbH & Co KG v Pereira Felix* (C-60/03) (2004)
9. *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet* c-341/05 (2007)
10. Rechtsanwalt Dr Dirk *Ruffert* v Land Niedersachsen (C-346/06) (2008)
11. Commission of the European Communities v Grand Duchy of *Luxembourg* (2008)
12. *RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz* (2015)

Other CJEU cases relevant to Labour relations and free movement

1. *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (C-67/96) (1999) (*competition law*)

2. International Transport Workers' Federation (ITF) and Finnish Seamen's Union (FSU) v *Viking Line* (Viking) (C-438/05) *c-438/05* (2007)
3. *Bundesdruckerei* GmbH v Stadt Dortmund C-549/13 (2014)

Company law and free movement

1. *Centros* Ltd v Erhvervsog Selskabsstyrelsen case **c-212/97** (1999)
2. *Überseering* BV v Nordic Construction Company Baumanagement GmbH (c-208/00 (2002)
3. Kamer van Koophandel en Fabrieken voor Amsterdam v *Inspire Art* Ltd **c- 167/01** (2003)

Acquired Rights (transfer of undertakings)

1. Jozef Maria Antonius *Spijkers* v Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV (1986) *c-24/85*
2. Foreningen af Arbejdsledere i Danmark v *Daddy's Dance Hall* A/S. (1988) *c-324/86*
3. *Dr. Sophie Redmond* Stichting v Hendrikus Bartol and others. (1992) *c-29/91*
4. Anne *Watson Rask* and Kirsten Christensen v Iss Kantineservice A/S (1992) **c-209/91**
5. Christel *Schmidt* v Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen (1994) *c-392/92*
6. *Commission vs. the UK* (1994) *c- 382-92*
7. **Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice** (1997) *c-13/95*
8. *Allen and others v Amalgamated Construction Co Ltd* case (1999) *c-234/98 c-172/99, c-74/97*
9. *Collino and Chiappero v Telecom Italia SpA.* (2000) *c-343/98*
10. *Hans Werhof vs. Freeway Traffic Systems GmbH & Co. KG* (2006) *c.499-04*
11. *Ivana Scattalon v. Ministero dell'istruzione, dell' Università e della Ricerca* (2010) *c-108/10*

12. Kainuun *Liikenne Oy* and Oy Pohjolan Liikenne Ab (1998) C-412/96
13. Francisca *Sánchez Hidalgo* and Others v Asociación de Servicios Aser and Sociedad Cooperativa Minerva (C-173/96), and Horst Ziemann v Ziemann Sicherheit GmbH and Horst Bohn Sicherheitsdienst (C-247/96). (1998)
14. Francisco Hernández *Vidal* SA v Prudencia Gómez Pérez, María Gómez Pérez and Contratas y Limpiezas SL (C-127/96), Friedrich Santner v Hoechst AG (C-229/96), and Mercedes Gómez Montaña v Claro Sol SA and Red Nacional de Ferrocarriles Españoles (Renfe) (C-74/97). (1998)
15. *Alemo-Herron and Others v Parkwood Leisure Ltd.* (2013) (c-426/11)
16. *Asklepios Kliniken* Langen-Seligenstadt GmbH v Ivan Felja and Asklepios Dienstleistungsgesellschaft mbH v Vittoria Graf (2017) Joined Cases C-680/15 and C-681/15

UK cases (that did not reach the CJEU)

1. *Astle v (1) Cheshire County Council (2) Ominisure Property Management Ltd.* [EAT, 2004]
2. *Complete Clean Ltd v Savage* [2002, EAT]
3. *RCO Support Services v UNISON* [2002, CA Civil div 464]
4. *ADI (UK) Ltd v Firm Security Group Ltd* [2001, CA Civil div]
5. *ECM (Vehicle Delivery Systems) Ltd v Cox* [1998, EAT]
6. *Dines and others v. Initial Health care services Ltd and Pall Mall services group Ltd.* [IRLR 336, CA]
7. *Glendale Managed Services v Graham* [IRLR 465, Court of Appeal]
8. *Whent v T Cartledge Ltd* [1997] IRLR 153 (EAT)

* German cases in these case studies have been referred immediately to the CJEU if they were referred to German Labour court or other courts.

** No UK level cases for posted workers cases

Documentary and Media Sources

1. BBC news online (24/9/2007) ' Gordon Brown's speech in full' [accessed on January 2015] available online:
http://news.bbc.co.uk/1/hi/uk_politics/7010664.stm
2. Department for Business, Innovation and Skills (BIS) 2013 consultation document on 2006 Transfer of Undertakings (Protection of Employment) Regulations.
3. Eurofound 1998. New collective agreement for Siemens AG outsourced companies. [online] *European Foundation for the Improvement of Living Working Conditions*. [Accessed January 2013], Available from:
<https://bit.ly/2Oz0q2B>
4. Eurofound 2009. European and international framework agreements: Practical experiences and strategic approaches. [online] *European Foundation for the Improvement of Living Working Conditions*. [Accessed August 13th 2013], available from: <http://bit.ly/2uzONON>.]
5. Eurofound 2015. Germany: Continued decline in collective bargaining and works council coverage'. [online] *European Foundation for the Improvement of Living Working Conditions*. [Accessed May 2015], Available from:
<https://bit.ly/2Or9cP8>
6. Ferrybridge Multifuel Project NAECI Payroll Audit of Duro Dakovic TEP. August 2014. (BPWDdocC1)
7. Ferrybridge Multifuel Project NAECI Payroll Audit of ENWESA June 2014. (BPWDdocC3)
8. Ferrybridge Multifuel Project NAECI Payroll Audit of RR Projects. May 2014. (BPWDdocC2)
9. House of Commons Library briefing (Keter, V. Business and Transport Sector) – Posted Workers. February 2009,=. SNB/BT/301
10. Kington, T. (2009) 'The view from the barge: 'We want to work with the British as brothers' *The Guardian*. [Accessed April 2013] available online:
<https://www.theguardian.com/politics/2009/feb/03/lindsey-refinery-dispute-italian-workers>

11. National Agreement for the Engineering Construction Industry (NAECI) – 2010-2012. Code: BPWDdocA1
12. National Agreement for the Engineering Construction Industry (NAECI) – 2013-2015. Code: BPWDdocA2
13. National Agreement for the Engineering Construction Industry (NAECI) Communique – 2016- 2018. Code: BPWDdocA3
14. National Archives webpage on 'Industrial Unrest' [accessed January 2017] and found at <https://nationalarchives.gov.uk/cabinetpapers/themes/industrial-unrest.htm>
15. Randall, D. (1/2/2009) 'Wildcat wildfire: Frantic bids to stop strikes spreading' in *The Independent*. [accessed on January 2015] available online: <http://www.independent.co.uk/news/uk/home-news/wildcat-wildfire-frantic-bids-to-stop-strikes-spreading-1522533.html>
16. Unite the Union briefing – 'The Crisis in UK Engineering Construction: A Way Forward' February 2nd, 2009. Code: BPWDdocB1
17. Wintour, P. (February 2009) 'Cabinet veterans challenge ministers to address 'social dumping''. *the Guardian* [Accessed Sept 14th, 2017] available online: <https://www.theguardian.com/politics/2009/feb/03/trade-unions-lindsey-strikes>

Transcribed Interview text

The transcribed text of five interviews is below.

GPWD1, BPWD1, BPWD2, GARD1, GARD2

Interview GPWD1

November 16th 2016

Time: 24 minutes, 21 seconds.

This interview took place with a lawyer who had ties to trade unions and had published work for the European Parliament and the European Commission on posted workers. The initials of this official are 'EV'.

The questions of this interview concerned the regulatory options pursued and not pursued by German policy-makers (federal and state) and the preferences of trade unions and other actors.

AM: I have a time-line from the *Rüffert* case (2008) and the *RegioPost* case (2015), the question I have concerns how the German states (and excuse me if I use the English names for these) like Rhineland-Palatinate how the responses of German länder differed...

EV: ...Rhineland-Pflaz

AM: Yes, right.

Now, in the *RegioPost* case it looked like some German states looked to public procurement directives, and what was article 26 that stated that special conditions could be put into contracts. I want to ask you, were there differences in how the German states responded and if so how these came about?

EV: Andrew first of all, I would like to highlight that I'm not a labour lawyer, but I had [to adjust] to as in working with the posting of workers directive and I produced a report for the European Parliament. I'm now doing a complicated study, but a smaller study, for the European Commission on remuneration on rates of pay.

It is very very complicated because the remuneration for posted workers is complicated [sic] and the cases of the European Court of Justice, and you mean mentioned the *Rüffert* and *RegioPost* case, there are different signals out of them. So regarding this balance of social protection and minimum rates of pay on the one hand and on the other the aim of guaranteeing the free movement so not to limit companies going to the UK or to Germany. In that light, the two cases sent...perhaps should be seen as a changing in the views of the ECJ.

Rüffert has been perceived by labour lawyers in Germany was seen very much in the light of the *Laval* and *Viking* cases, about protection based on the provision as in *Ruffert* in public procurement that the basic wages stipulated in collective agreements they should be respected [sic] and in *Laval* and *Viking* the company was asked to join the employer associated and collective agreement and this was of course rejected by the ECJ.

In Germany the logic was quite similar, because the Lower Saxony regulation stipulated that posting companies must pay their workers according to the collective agreement and again the ECJ didn't think this went beyond the minimum demanded by the PWD. The logic being this would hinder the service provision [sic]

Note: I know all this. S/he is just repeating stuff I have read myself in the cases and other literature.

EV: The main reaction that I'm not sure about the practice that all, but maybe all, all western states (in Germany) had a similar practice...of...using...aligning public procurement to guarantee collective agreement arrangements.

And the main reaction, and not just in Lower Saxony but also North-Rhein Westphalia, was that they introduced...or at least began to orient themselves towards minimum wages (legal) at the federal state level.

AM: You mentioned the minimum wages and particularly the state-level minimum wages. For me this is one of the main differences between *RegioPost* and *Rüffert*. In *Rüffert* it was a minimum wage contained in a collective agreement, in *RegioPost* there was not a collective agreement in place for the postal sector, so it concerned a *legal* minimum wage instead.

EV: at the federal state level we have a minimum wage now, there is a term and I can't remember it, but it is a general and specific clause across all sectors. In the *RegioPost* case this was a public authority that aligned with the general practice in other *länder*.

We are reminded that the ECJ confirmed that defining a minimum wage as the base level minimum does fall in line with its own interpretation.

AM: That bit is interesting. Has there been any legislative reaction since *RegioPost* amongst the other *länder*?

EV: I guess, but I have to check. But there are differences in eastern Germany. When the *RegioPost* case came up we were having this debate about low level wages and this talk about a statutory minimum wage was being discussed. I think *all* western states had some kind of minimum wage regulation in public procurement.

Note: the work of Detlev Sack and Thorsten Schulten looks at this.

EV: there were some slight differences in the rate. I think public procurement is based on a minimum wage rate regulation (rather than collective bargaining).

AM: this seems to be the important bit that they're using public procurement directives to *nail down legal minimum wages*, rather than those in a collective agreement.

EV: Yes, that is the important message in these two judgements *RegioPost* and *Rüffert*. In Germany there is certainly a shift to legal minimum wages given the erosion of coverage from collective agreements and at the same time the provisions based on public procurement since 2015 based on the national minimum wage was the response to that.

And our minimum wage was strongly based on the UK experience!

EV: You should bear in mind that in the postal sector and some other sectors like construction and meat processing slaughter houses posted workers is a big topic. The other part of the discussion with these is the (legal) extension mechanism, but there's a big difference between a normal collective agreement and these *minimum wage agreements*.

So you will have in some sectors *two* minimum wages. In some sectors the general one and the collectively agreed minimum and both are significantly lower than the respective wage groups in the 'normal' collective agreement where you have all sorts of provisions like working time and overtime.

Note: this is very pertinent. It is not only that there is a legal minimum wage alongside collective agreements in the wage-setting landscape, but also collective agreements just for minimum wages. Complicating this further.

AM: that is interesting as I hadn't come across this at all.

EV: this is one of the topics I am studying. There are all these other provisions that are not included in the minimum wage agreement in the construction sector. And this is a question for the Commission as to whether these should be allowed [in the reformed posted workers directive].

AM: In Britain it is unlikely that temporary workers will get things like bonus pay or sometimes even sick pay. Is this the case in Germany?

EV: yes definitely. Even the employers in the construction sector... that even with overtime pay...there is often a manipulating or creative practice with calculating working hours. So we have this system of 'social holiday pay

fund' which works in practice with supplements. And employers agree that the directive looks good, but in practice it is different and the labour inspectorate is not able to [AM interjects: 'police it'] EV: yeah.

EV: but Andrew one further comment of the *RegioPost* case. Perhaps you have heard of a judgement of the Court in 2014 on...erm... *Bundesdruckerei*. The federal printing issues.

AM: from Dortmund,, is that right?

EV: Yes.

That also addressed the question whether it is possible to use public service provisions [sic] (public procurement provisions) to set the obligations to respect the minimum wage of €8.70 also for subcontractors. Even if the subcontractors, the subcontractor was based in Poland. There the decision was not allowed [because they were based on Poland). This does raise questions what would be allowed in other constellations (scenarios) where perhaps the contractor is not located in Poland but in Germany.

AM: that would fall in line with Court of Justice's company law case law wouldn't it., there was a case called *Centros* and there was a German case law called *Überseering*, I don't know what the phrase is in German but it is the idea of 'letter boxing'.

EV: Ah OK what is this case you mention?

AM: I can send these to you. An there's another one called *Inspire Art*, and *Cartesio* which is less interesting.

This line of case law pushes what in German I think is called *Sittheorie*, follows the logic of the country of origin principle pushed in posted workers. So if these two appear coherent and do line up together, if the court is changing its mind, and based on what the Court decided in *RegioPost* it's not clear that it's doing that yet, but it might be.

There's one interesting thing about the *Bundesdruckerei* case. Is there not a federal statute that got changed? I think there were provisions where you could prioritise small and medium-sized enterprises (SMEs). Is this something that has been looked at.

EV: I don't know.

End.

Interview BPWD1

Official from the intermediary body that governs the NAECI (NJCECI)

Time: 22 minutes.

AM: I'll be giving some specific sets of questions but most of them will be follow up questions. The key questions that I have are broader and concern how much of these issues were dealt with in the NAECI after the events at Lindsey, and the influence of EU in this.

AM: Were you or the NAECI partners aware of some of the controversial developments in EU law that occurred before 2009, particularly the cases Laval and Rüffert?

JS: we've never discussed them in the NJC but the trade unions were certainly aware of them and the employers would have been aware of them.

AM: so these weren't discussed in the collective agreement negotiations?

JS: No no, but this isn't the place to discuss it is it?!

AM: no, but not having prior knowledge of the these things and reading the NAECI Appendix G and knowing the in NJC's elsewhere like for government services a lot of these issues *were* raised in light of CJEU decisions, obviously a big year to be talking about the CJEU (an aside, a glib point)

JS: In terms of the application of the European statutes, government bodies have a different position to private sector. So they definitely would have discussed them because the public procurement people would have to take notice of that, but the private sector don't in the same way. Because they're an emanation of state.

Note: true, the different public procurement directives do apply to services and works contracts differently, but the latter do apply to the private companies in construction. It's not clear JS recognises that.

AM: the one thing I've come across in regards to UK law is that UK didn't transpose the PWD as they didn't feel the need to as collective agreements are not legally binding in this country. So, even though the CJEU said in the *Rüffert* case which looks like to be the nearest example of what happened at Lindsey...

JS: (interjects) let me just say Andrew, I can see where you're going or maybe I'm misreading it, but these issues in a sense, what we see at the end of it is [sic] is a labour relations issue, so what really causes it is not the PWD and all that stuff, what causes it is the legislation for letting contracts. The procurement legislation where contracts have to be openly tendered to the whole of Europe. So people are able to bid for the work and win the work [sic]. That's what causes all this in the first place.

Note: this is interesting as he unprompted redirects the regulatory issue toward a problem with public procurement and away from posted workers.

JS:...(continues from above) if we weren't in the EU, and I'm not making a political point, we wouldn't have to do that, and companies could decide whether to give the work to a UK contractor or abroad. But they don't have that same freedom and have to advertise in the European gazette [sic] and

anyone can apply and bid for the work and if they win the work we have all these issues.

And by the way that's what happened at Lindsey. The Lindsey thing and what we saw at the end and the furore and all the problems we had that was a subsequent event to a contract being let. And the Italians were able to bid for it.

AM: This is IREM, is that right?!

JS: Yes.

AM: The particular issues as to whether wage rates were adhered to or not...(JS interjects)

JS: yeah well that's another thing...and, well we have problems with bloody UK companies not adhering to rates and stuff like that.

AM: right.

JS: Yes and we've gone through a whole gamut of things in the last year of UK companies being accused of paying the correct holiday pay. And that's nothing to do with the posted workers directive that's (laughs) to do with companies..

AM: that's an enforcement issue. Right. I was going to ask about public procurement specifically as it appears to be the more important item of legislation and another CJEU case decided recently called *RegioPost*, have you come across this?

JS: no.

AM: it actually concerned the postal sector but it concerned the provisions in the old PP directives, although it's in the new ones as well, they are basically called 'special conditions' can be put into contracts. I wanted to ask about this in regards to Appendix G, although maybe I'm not reading it right, but it (Appendix G) does indicate that all contractors are meant to

incorporate or adhere to the NAECI rules. Are these formally put into tenders?

JS: generally what happens with the NAECI is that when work is identified as NAECI work [sic] so if a client is going to build a power station and he decides it's to be done under NAECI then the contractors need to bid using the NAECI rates...

Note: this is hugely important. If the NAECI rates must be used in making bids, we immediately have a Laval-Rüffert problem.

JS: because generally they're higher than other rates [sic] what will happen is that they'll be enforced [sic] to use them and if they bid with a lower rate they'll end up losing money.

AM: right.

JS: so all the contractors, and they're pretty cute note, they know that, although I'm always getting phone calls from abroad from Spain from all over the place from people wanting to bid for work in the UK, and we spell it out to them as we want them to know at the beginning as we don't want them bidding at the wrong amount and then suffering as a consequence. Because when it comes to a NAECI site, they have to pay the NAECI rates.

AM: right.

JS: They have to pay it. So if they bid using something else. They'll be in serious trouble.

AM: So they could lose their contract?

JS: well that's between them and the client?

AM: and the managing contractor?

JS: or the client.

Note: the diagram in both PWD chapters sees a clear hierarchy between managing the client (top) the contractor and subcontractors. Does he mean that subcontractors would have to answer directly to the client? He answers this partially below.

JS: Some clients will let the work in packages themselves. Some will appoint a managing contractor or an EPC contractor.

AM: EPC? sorry tell me what that is.

JS: Right well if we go back a few years in the electrical power sector, CGB (central electricity generating board), what they would do is that they would have a big department down in Barnwood every time someone would build a power station, they would let all the contracts themselves. So they'd let the boiler contract, the turbine contract, and all the rest of it and they would procure a lot of the equipment themselves they'd ask people saw to it and so on. But when the electricity sector got privatised in 1990 all the new electrical companies, so that was PowerGen, national power, Nuclear and Electric, Scottish Nuclear and all the rest of it, they did away with all their engineering and procurement departments.

AM: I see.

JS: and they started using EPC (Engineering Procurement and Construction) contractors. So this manifested itself in the first place in what was known as the 'dash for gas', so during the 90s we built a lot, probably 20-odd, combine-cycle gas power stations. And the way this was done was on what was called 'turn key' contracts. Have you heard them term?

AM: *no answer. The answer would have been no.*

JS: A turn key contract is where the client, in other words the person who owns the site, and wants to build and says to a contractor: "look, you go away, you identify the kit, you get it all together, you get to be delivered, you do the engineering and we'll agree contractually when you hand it over to us..."

Note: this history lesson is still useful for context.

JS: "...so in other words: you're going to start in 1st of May this year and you hand it over to us 30th April two years later." Now that's called a turn key contract. Meaning in two years time you'll turn over the key to the site and it's all working.

JS: but happens is that they have a system of liquidated damages. So the client will have in that [sic] they'll agree in that contract the hand over date, and if the hand over date is missed there'll be damages paid on a daily basis until the plant is handed over.

JS: so most of this was done under EPC, that's 'Engineering Procurement and Construction'. So whoever was going to do it was going to build it for the client, we'll do all the engineering, we'll procure all the kit and we'll construct it. And then we'll hand it over to you on this date.

AM: so it sounds like this turn key is 'you go away and you just deal with it and then come back when its done'

JS: yes that's right

AM: so there sounds like a great deal of autonomy and little in the way of managing contractor enforcement?

JS: Well there in a sense because, whether it's an EPC or managing contractor is that they don't want to miss the date. Because if they miss the handover date they have to pay liquidated damages.

JS: this actually causes a much higher level of enforcement.

AM: OK that is interesting.

Note: this is no longer just a history lesson but now very pertinent to the case study in terms of contextual information about the nature of construction industry mode of production. The interests of contractors and subcontractors to finish a

contract on time is so overwhelming that they do not want to waste time litigating as it would take too much time. This is why contractors in the BJBW case wanted to negotiate with unions rather than litigate against them to end their strike action.

JS: so they can get themselves into serious difficulty. And the other thing is that most of these contracts have a *performance related* liquidated damages (clause) too. So in other words if I say to you, uhh I don't know, I suppose [sic] take Scottish Power and I agree to build a new gas-fired power station for you...now the way these work is so important to the cost of the project, so the difference in the efficiency in the boiler and the turbine [sic], so if I saw to you build this for 300 million pounds, and when it starts running it only has an efficient of 55% now I would then look a see what I can sell the power for, what did it cost me to get it built and the contract would be built on that basis.

Note: the point I took from this was clearer on the recording: if the efficiency of the plant was 55% and the contract demanded higher, performance related damages could be brought against the builder.

JS: if it runs at only 50%, or even 54 or 53 the owner is going to lose money. So what they do they have two forms of damages usually. One is liquated damages at the beginning, so there are damages handed over for every day it goes over late, there is usually performance related damages. So, in other words, the kit doesn't perform to the contractual efficiency agreed before it was started to be construction [sic].

AM: I realise that some of this chimes with Hinckley point C, on of the other things relevant to this, although I'm not too familiar with that other than the EU state aid bit.

It would be interesting to look at the previous NAECI's to see how some of these issues can be plotted [in a timeline of labour relations issues]

JS: now I can go and have a look now and see...when we actually put it in there. Because Appendix G was actually a guidance thing.

AM: well if you like you can just send them to me rather than research it yourself and I can look for it.

JS: OK sure.

AM: so if I'm right with the period, its 2012-14, 2009-2011

JS: what year is Lindsey again?

AM: 2009.

JS: 2009 So it would be the one after that.

AM: it's just getting an picture of when it was...(put in)

JS: well I can certainly get you a date when Appendix G was inserted.

AM: well that would be good.

JS: alright well let me, say this to you: if you read Appendix G you'll see that it's very aspirational, and advisory. So it's not a part of the collective agreement in that its contractual within the agreement.

Note: this is difficult to square with earlier statements about companies not applying the NAECI rates being in 'serious trouble'.

AM: this is one of the reasons I was asking as it indicates that is more guidelines as supposed to rules

JS: well it has to be because it can't cut across companies' right to bid for work.

Note: more of a problem. On the one hand this is right as the procurement directives demand precisely this. But on the hand, and again, he has already said that NAECI rates must be adhered to. The problem is that paragraph one of Appendix G says that 'UK employees must be paid the same rates of pay as foreign

workers'. If this is aspirational, then why would a contractor using foreign labour be in "serious trouble" for not paying NAECI rates?

AM: the question originates back to EU law

JS: well that's what I'm saying to you because you can't look at the labour bit without looking at that. The labour bit is a response to how contracts are let.

JS: what happened at Lindsey did make some changes to our agreement (the NAECI) and people are more sensitive about it, so people who bid from Europe about it seek our advice so they can bid for the work, sometimes it goes wrong, most of the time it works much better. But the UK trade unions still don't accept [...], because they want local people to have the work. So that's just an emotional thing. Although perhaps it's not just emotional as it is their jobs and their livelihoods.

AM: yes their members asking for it.

JS: that's it, yeah.

AM: In EU law there is very little space to allow local hiring (over European workers)

JS: well, I've not read appendix G for some time now, but we've got arrangements now for even if a foreign contractor comes in they have to try and recruit local people and go to the local job centres and all that sort of stuff. So all the advice is there to assist. And most foreign contractors who come in will be sensitive to that and will try and recruit local labour...to head off the posse at the pass!

Note: what he describes is in fact what is asked in Appendix G. He earlier notes that this is advisory and comports with his stipulations that the 'arrangements we have now' are 'advice' based and that foreign companies will be 'sensitive' to it, rather than being forced to do this. This looks like an attempt to keep these sorts of rules very informal so as to keep unions happy but not run foul of the law.

AM: this is really interesting. So the new agreement for 2016, I have a
communique of that, is that available?

JS: that's currently at the printers. In fact the first draft is due back next
week. But there's not changes to Appendix G. Most of the changes are to
the rates.

AM: if I can get hold of the previous versions of the NAECI.

JS: Well let me just see if I have any earlier versions.

AM: Ok thanks very much.

One minute passes.

JS: there was no Appendix G before 2010.

Interview ends.

Interview note B_PWD2

**Interview with Unite the Union official (BM) in Leeds, and Sheffield,
7.30am to 2pm. April 18th 2016. And follow up meeting 10th June 2016.**

Andrew Morton referred to in text as **AM**

*This official (BM) was a senior union organiser for the energy section of the
construction sector and collective agreement negotiator with the NJC. He had first-
hand experience with the disputes in 2009. There were some set questions for the
interview, but the trade union official came well prepared with some hugely
important hard copy material to give me. This material concerned the pay audits used
to check that foreign contractors were paying the rates of the collective agreement.
We ended up pursuing a conversation over several hours in the Unite offices in Leeds
and in a car ride to Sheffield. At the Unite offices in Sheffield, he allowed me to sit in*

on a meeting of trade union organisers from Unite and the GMB trade union for the Energy sector.

The questions I was going to ask are outlined for transparency's sake.

- 1. What effect the events of 2009 have on the collective agreement in the sector (NAECI), the bargaining process and with pay issues concerning posted workers?*
- 2. Have posted workers become more of a feature in subcontracting in the last 10 years or so? Has the use of posted workers increased? Has a notable change in recruitment patterns occurred for native (non-posted workers) employees? (NJC, unions)*
- 3. Have unions tried to organise posted workers?*
- 4. Has unions' ability to enforce terms from the NAECI in and around public works contracts changed as a result of the use of posted workers?*
- 5. Has a greater awareness of EU law and key CJEU decisions been a feature in collective bargaining issues? (NJC)*

Notes of interview

Upon BM giving AM several folders and papers of material he identified the pay audits as of particular interest and described them in the context of the Lindsey dispute (**BPWDdocC1, BPWDdocC2, BPWDdocC3, BPWDdocB1**).

The first question above concerning the effect of the 2009 disputes on the collective agreement and upon the enforcement of wages onto foreign posted workers was therefore pre-empted. The pay audits were presented as at least as important as the changes to the NAECI, 'Appendix G', that specifically concerned posted workers.

BM described how successful these pay audits have been since 2009 in policing contractor pay compliance, but did also provide some examples of conflict and jurisdictional problems in how these foreign contractors treated their posted workers' pay when they returned to the home country. These pay audits were pursued using freedom of information requests if initial requests were denied. This meant that the NJC that governed the NAECI

BM confirmed that the Appendix G was created in light of the 2009 dispute alongside the pay audits. His focus however, again, was on the pay audits rather than Appendix G.

BM stated that the public procurement process itself did not have any union presence involved.

BM confirmed that no hard data existed on the numbers of posted workers coming in the sector. (the government doesn't collect this either).

Organising posted workers was not something unions had success with as their employers not only tried to keep these workers separate but put the fear of god into them so to dissuade them from even talking to native (UK) workers.

In a broader discussion about the history of industrial action in Britain, BM spoke about the role of the state and legal sanctioning for bargaining. He referred, unprompted, to the proposed reforms of Barbara Castle of 1968 (see chapter 2.1) titled *In place of strife* and its proposal to give collective agreements legal character. He expressed an opinion that this, in hindsight, was a missed opportunity for the trade union movement that rejected the proposals. This was interesting in a contextual sense given the broader interests of the thesis of the relationship between law and collective bargaining.

EWAC meeting (Sheffield, April 18th 2016)

- NAECI undermined frequently. The alternative CGIC agreement often favoured which is not as good. Some projects are kept away from NAECI (like Hinkley point C).
- Unions can't get close enough to the **tendering process** and contracts have been awarded long before unions can impose any terms on them.
- IREM said their pay rates were adhering to Italian minimum wage. There wasn't one in Italy!. This is evidence of a) IREM not paying NAECI rates and b) possibly that they thought they had the right to pay Italians rates (although bogus) rather than UK rates. (try and corroborate)

Main Takeaways:

1) **NAECI Appendix G** was, as stated by BPWD1 interview, put into the NAECI after and a result of Lindsey according to BM. This might have been put in anyway because of events that occurred prior to Lindsey, but the events and tumult of Lindsey made sure.

2) **Pay Audits:** This was a major new initiative to occur from the Lindsey dispute. The auditing of foreign contractors to confirm they honoured the NAECI rates. One example was given where a Croatian company had to cough up unpaid wages after the audit, but simply used the courts back in Croatia to get that money back. (one claim, not substantiated). Several documentary examples given where audits did their job (i.e. spotted unpaid pay and demanded payment).

3) **Posted Workers numbers:** no data available.

G-ARD1

Specialist lawyer whom works for trade unions in Germany and has produced reports for EU institutions

Interview conducted on Skype

Date: 6/6/2015

Time: 26 minutes

How have German trade unions challenged restructuring programmes in German industry?

EV: It is difficult to talk about 'challenge' as you say it, as the way things were going with economic policy in Germany in the 1990s it was extremely problematic for trade unions to do very much. Unemployment was a serious problem for a long time and trade unions were weak because of some unions not being strong enough to do anything...umm...how would say...

AM: ...more aggressive?

EV: ...yes right, to attack this agenda.

AM: Were strikes ever considered by unions?

EV: probably but I cannot tell you an example (sic), but union organisation was not going to be strong enough for this to be too effective.

AM: Were litigations in court ever considered?

EV: No not that I remember.

Did works councils not provide unions a way to challenge outsourcing and other restructuring strategies?

EV: I think it is important to differentiate two separate situations: 1) where works councils were strong or present and 2) where they are not strong. Where works councils were involved in restructuring existing practice was often consolidated in part whilst some changes (like new wage agreements for some workers and divisions). But it is important to note the purposes of the works council and how their role changes in different companies. Their role is also not to address wage matters

AM: This role varies depending on, union strength in the sector or the nature of the company, you mean?

EV: Yes correct, it is perhaps attractive to think that the worker representatives in works councils are union members and therefore follow union wishes, but it is not always the case and particularly if the union is not too strong in that company.

AM: If a restructuring took place that entailed a change in the type of works council that would exist, would the works council, before a transfer, not object to this?

EV: They might do, Andrew. But they would not if the works council rule that applies to that type of new company was better than previously.

AM: Even if agreeing to this might incur job losses and new pay conditions that were worse?

EV: Yes, as sometimes this could not be avoided, the employer might have (as was often the case) simply be in too strong a position. So works councils preferred to accept a lot and unions also in many cases.

AM: So, there were consequences for collective bargaining regimes and pay and terms and conditions?

EV: The effects were mainly job cuts and restructuring of collective bargaining systems, yes. Unions had to make a lot of concessions on things like collective bargaining to control the level of job cuts. This was very often the big consideration.

AM: Were collective agreements seriously undermined by the strategic use of outsourcing?

Yes, very often. The use of outsourcing and off-shoring became dominant strategies by companies in the airbus (sic) and automotive industries and what this did is create new collective wage bargaining that were different and separate from the main collective agreement.

AM: Were these usually weaker, or became weaker later in terms of pay?

EV: Yes of course, and often entailed cuts of workers (sic) (job cuts).

AM: I have seen reports about the company Siemens using this sort of strategy and creating precisely this sort of ancillary collective agreement arrangement. Have you come across this?

EV: Yes of course Siemens is a very large powerful company in many sectors and they used these strategies, but given their global power could use off-shoring as a very powerful tool to encourage reforms from unions and from government.

AM: IG Metall is a powerful union in the manufacturing sector. What was their response to Siemens' efforts?

EV: I do not know too much, but I know it was not positive but their.. how do say...hands were tied by a number of factors. Their membership was not as well organised across the company, their was some (inter-) union competition also...

AM: with which unions?

EV: ahh... I cannot name all, but IG BAU and Ver.di probably as well I think.

AM: IG BAU?? the construction sector union?

EV: Yes. I know it may seem strange.

AM: A little, but the inter-union competition point is interesting. Particularly given that we're talking historically about Germany's most powerful union (IG Metall) having their strategic position look rather weak.

EV: Yes, but Andrew it is a problem for all unions and the problems of union

weakness and unemployment and politics ecetera were...a very powerful force.

AM: Yes I see that. Right, I would like to ask you about law and legal remedies. You have mentioned already that court cases were rare. Which key areas of law have been important in how these processes have been regulated? Are there any statutes that are important?

EV: Well in European law the transfer of undertakings directive is of course relevant as is the European Works Councils directive for global companies.

AM: Federal law: Have the Nachwirkung provisions in the Tarifvertragesetz (TvG) assisted the ability of unions/firms to pursue/affect transfer processes?

European law: How have these nachwirkung provisions been interpreted in light of EU law presented by the Acquired Rights Directive (Übergang von Unternehmen)?

Interview G-ARD 2 (AH)

Senior research official at the European Trade Union Institution (ETUI) with expertise in German labour matters and restructuring. Initial AH. Questions concerned broader issues of restructuring in Germany as well as specific questions of the ARD examples such as that of Siemens. The ARD is used as shorthand for phrases like 'the Transfer of Undertakings directive' or 'the directive'. The interview started by my giving the interviewee an example of German restructuring from Siemens: <https://bit.ly/2Oz0q2B>.

AM: most of these questions concern the effect of restructuring on collective agreements, their fragmentation and how these are dealt with by unions. I have some examples such as that of Siemens... (AH interjects)

AH: The question comes with individual companies and why they need to reorganise. Sometimes you will have questions of special benefits, so let's say a premium (on a worker's pay) if you've worked for a company for 15 years or if you get a day off, but you may not get a premium applied to newer employees but it doesn't really matter because they won't work for the company that long anyway. So there are mismatches [between different employees' terms] that are completely OK to carry on [with].

In a way this is what the ARD in effect actually makes possible, that maintain your status quo until there's a reason to renegotiate.

Now in other countries its done differently. In France for example, the ARD is transposed that they can keep collective agreements for a certain amount of time but at the same time trade unions can start to negotiate from day one, or after 12 months or 15 months, and there's weird complicated manoeuvres that they can do. But the essential purpose of the ARD is that you may lose your employers, but you won't lose your rights. And that's why 'acquired rights' is quite a good name for it;

AM: Yes. Interestingly we tend not to use it here.

AH: Ah that's another story. Why the Brits don't use what they have is another story.

(AH indicates she's looking for something relevant to our discussion)

AH: We do have examples from different countries of worker participation in this. I have moved onto company law since all this you see [sic]...

AM: Ah well this is another angle of this chapter I'm doing, and I was talking to a guy at IG Metall (a German trade union) he gave an example of a Danish company where workers had to agree to unpalatable consequences like a new collective agreement otherwise this company would simply outsource this (production) to another firm in another country. And he described this very scenario and is happening quite a lot.

I ask whether this is commonplace in your experience?

AH: I'm going to send this draft report, basically it's a report covering all countries. Are you covering just Germany or Britain as well or is it comparative?

AM: Comparative I'm doing Britain as well.

AH: Ah ok, I can't find it right now so ask your next question.

AM: I have another question about this point on company law and how unions and workers are pressured to accept restructuring with worse conditions. The idea that they have to accept certain deals other companies will take things overseas.

AH: That's true but this is more of a problem under the posting of workers directive. The Commission is trying to reform the directive but they're not sure what they're trying to do. It's a big east-west conflict between newer member states and the countries in the west. I think the right to form of works council, it was there under Belgian law, it's none of the Germans' business if they're forming a works council in Belgium, but if they're working to all these different conditions then this is what they're trying to sort out.

Note: the reference to Belgium here is unclear, although the broader point about works councils is relevant.

AH: I know more about the German situation. In the German case, there is more conservative view, and long-term view, which states that if collective agreements are in place they will remain in place. Some employers might change the rules but others will be like 'if it works don't fix it'. So this is what you'll see.

But with the works councils you have what is probably the key difference. These have a great deal of influence about what shaping what happens at the work place via 'works agreements'. Trade unions have influence over pay overall [meaning at the overarching sectoral level]. Do you know about the different competences of the trade unions versus the works council?

AM: Yes.

AH: the trade union negotiates the overall rates of pay and pay scale, the works council works out who goes into what place on the scale. The trade union negotiates the working week, how many working hours are worked per week. The works council calculates the allocation of working time per week. How overtime works, weekend work, the works council does that not the trade union.

In the event that there's a transfer of undertaking, this means that the collective agreement stays the same anyway provided that the new employer is a member of the same sector (membership agreement). In some countries [that have both works council and trade unions] these roles are quite mixed, but in Germany this differentiation is important to the 'who does what around here' [sic].

Now, I don't know what happened in the Siemens example I don't know what collective agreement they applied because normally there would be one collective agreement that would be valid. They may have applied one from another trade union. So in this example, what was that these transferred workers do, what did they do?

AM: The jobs were much more core task jobs, but the one source I have for this that I've shown you doesn't specify. But Siemens did produce this auxiliary collective agreement, which the union agreed to, that sort of bled off the core agreement. It was however a new separate agreement that wasn't there before.

AH: Are you sure it wasn't a *works agreement* (agreed by works councils) not a *collective agreement*?

AM: here (<https://bit.ly/2Oz0q2B>) it translates into a collective agreement.

AH: That might be your solution. As far I'm aware that Siemens is subject to the main agreement for the metal sector.

Note: this is now interesting, but the interviewee doesn't seem to know more than the traditional state of play for the German metal sector and doesn't know about these changes being described in the source <https://bit.ly/2Oz0q2B> regarding Siemens.

AH: if the employer had changed there would have been reason to create a new works agreement.

AM: Yes this bit I understand, I have been trying to get hold of this guy Thorsten Schulten who wrote it.

The reason I ask this as this is only one example of privatisation and restructuring in Germany. I have others also written by Schulten with Ian Greer, whom I know, and in each case erosion of workers' pay and rights have been changed, despite the ARD, so it's strange how Germany has these institutions that would aid the ARD in protecting workers rights but this is not what is happening.

AH: It is curious to be sure. I'd like to see more of these examples and I'll send you some things about works councils and restructuring. Because one thing is that if the works council agrees to the shift in production then this will weaken the union's ability to stop it.

AM: yes this is what appears to be happening in this Siemens and other cases in Germany.

Note. Although this interviewee couldn't speak to the details of the examples provided, some of the contextual information was very useful and the general picture of how restructuring is dealt with in Germany.

End.