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The Business School

Labour courts in Great Britain and Sweden:

a self-service model v collective regulation

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Working Paper

No: WERU 4

Year: 2013

Abstract – *The institutions for adjudicating employment rights in Great Britain and Sweden are superficially similar – in both countries there are labour courts with lay judges and both countries are covered by European Union employment legislation. Beneath this surface, however, there are important differences. In Sweden there is collective regulation as the social partners (that is trade unions and employers organisations) continue to play a significant part in the labour court process. In contrast the social partners no longer play a role in the adjudication of employment rights in Great Britain, which provides an individualistic, self-service model. This article traces these changes in Great Britain, and the lack of them in Sweden, before offering theoretical explanations for the differences.*

Keywords: labour court, individualism, adjudication

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**Labour Courts in Great Britain and Sweden:
a self-service model v. collective regulation**

In the last 40 years in Europe, protection at work has come to rest increasingly on individual legal rights, partly because of national policy and part because of the European Union's social dimension. As a result, the institutions for adjudicating these individual legal employment rights have become increasingly salient. This paper looks at these adjudicatory institutions in two countries: Great Britain and Sweden and draws cross-national comparisons and explanations for divergence. It argues that although there are superficial similarities, for instance in both countries there are labour courts i.e. specialised institutions which adjudicate disputes between the individual worker and his/her employer, the differences are significant. In Sweden the social partners, that is trade unions and employer organisations, continue to play an important part in the adjudication process, including the nomination of lay judges and controlling access to the Labour Court. In Great Britain in contrast, the social partners now play virtually no part as a result of a series of changes. It is for individuals to put themselves forward as lay judges and to bring claims to the labour court and to mount appeals.

For convenience this paper mainly uses the generic terms 'labour court', and 'lay judges', although sometimes we use the local name. This paper also focuses on Great Britain, not the UK, as Northern Ireland's arrangements differ slightly from those elsewhere in the UK, i.e. England, Wales and Scotland.

The structure of the paper is as follows: first some relevant theoretical frameworks and the methodology are outlined, as well as the origins of the labour courts in Great Britain and Sweden. Then this paper considers the differences between the two countries today in the

way lay judges are selected, in the gateways before use can be made of the labour court, hearings at the labour court and appeals. Next the paper discusses which system is more effective, adopting a number of criteria as effectiveness is a contested term and raises the question, for whom it is effective. Finally we offer a theoretical explanation of the differences based on path dependency theory.

Theoretical frameworks

As noted briefly above and as will be demonstrated in detail below, there are significant differences in the employment adjudicatory systems in Great Britain and Sweden and there are a number of typologies which could provide a theoretical explanation. One explanation is the legal origin hypothesis. This hypothesis argues that national regulatory approaches are significantly influenced by whether a country belongs to one of the ‘principal legal families’ (Deakin et al., 2007: 133): civil law as in Sweden, or common law as in Great Britain.

Initially the legal origin hypothesis was applied to corporate governance and finance, but it was then applied to labour law by Botero et al., (2004), who looked at labour laws in 85 countries using three theories of institutional choice: efficient adaptation of institutions to change, political power theories (in this context the political power of labour), and legal origin. The strongest determinant was found to be legal origin. The author, however, is not aware of any research applying the legal origins hypothesis to labour law *adjudication*.

Nevertheless, legal origin provides a possible explanation of the differences in Swedish and British labour courts.

Another explanation is the varieties of capitalism thesis. This contends that firm strategies are shaped by the range of institutional opportunities and constraints for resolving coordination problems, leading to ‘complementarities’ between industrial relations arrangements, vocational training, corporate governance, and employer and employee associations. This

results in two broad economic models: coordinated market economies such as Sweden, where coordination problems are resolved by non-market methods; and liberal market economies such as Great Britain, where these problems are resolved through competitive and contract-based inter-firm relations. See Hall and Soskice (2001); Hancke (2009). Again the varieties of capitalism thesis provides a possible explanation of the differences between Swedish and British labour courts.

These explanations, however, are essentially static, unlike path dependency. To crudely summarise path dependency theory, what has happened in the past determines what happens in the future and initial differences persist. This is because ‘in any given institutional system, previous steps in a particular direction induce further movements in the same direction’ (Erhel and Zajdela, 2004). There can be deviation from a path, however, in the face of an exogenous shock. Expanding on this Mahoney (2000) outlines mechanisms for change: functional – a response to an exogenous shock, power – a response to the weakening of elites, and legitimation – a response to a change in values. Streek and Thelen (2005), however, argue that exogenous shocks, such as war and revolution, have not been a feature of the past 50 years in western Europe and institutions evolve. ‘[W]e are struck, simultaneously by how little *and* how much they have changed over time’ (Thelen, 2003:11). In a similar vein, Teague (2009) distinguishes between hard path dependency as a result of an exogenous shock and soft path dependency. The hard version of path dependency is too rigid to explain gradual change, unlike soft path dependency, which he argues may occur because of endogenous factors such as a decline in trade union power.

This seems to reify change and as Crouch and Farrell (2004), agency should be taken into account. Accordingly, they maintain that ‘actors may adapt institutions in a given environment’ but only where alternatives exist somewhere within agents’ repertoire, for

instance an adjacent field (Crouch and Farrell, 2004:15, 20). This paper will revisit these theories.

Methodology

The two countries studied have been chosen because on the face of it they have many similarities: both are in Western Europe and both are unitary, not federalist states; both are members of the European Union and are thus subject to European Union employment legislation which is extensive covering, for instance, hours, holidays, maternity leave, health and safety, consultation with worker representatives and discrimination with the protected characteristics being gender, ethnicity, disability, sexual orientation, age and religion or belief. In addition in both countries there is additional domestic legislation including legislation on unfair dismissal.

Moreover, in both countries, claims based on employment law do not go to the ordinary courts, as they do in Italy, Portugal and Spain for instance. They go to specialised institutions: labour courts. Moreover, not only do both countries have labour courts, they also have both professional judges and two panels of lay judges, one panel representing employers and one panel representing employees.

This paper is primarily based on desk research drawing on official materials, statutes, handbooks, and legal commentaries. In addition, face-to-face interviews were held with 10 stakeholders in Sweden (professional and lay judges, lawyers and public officials). In Great Britain, this paper builds on survey data and nine exploratory interviews as part of a previous research study¹. Interviews lasted on average an hour¹ and were recorded and transcribed. Additionally the author has extensive experience as both a participant (lay judge) and

¹ Economic and Social Research Council, RES-000-22-4154.

observer of Great Britain's first instance and second instance labour courts. The interview material was mainly used to elucidate and clarify institutional practice in order to allow for institutional comparison, which is the main focus in this paper. Further research is needed on the practice of key actors.

Origins and background

Until the 1970s the law in Great Britain was used only in exceptional circumstances in the employment sphere and the rights and interests of British workers were protected by trade unions and the collective agreements which they had concluded with employers (Kahn-Freund, 1977). In the last four decades, however, there has been a significant decrease in trade union density and coverage of the workforce by collective agreements has waned. For instance average trade union density was 47 per cent in the 1970s, but in 2011 it was 25 per cent with collective bargaining coverage standing at 31 per cent in 2011 (Brownlie, 2012).

Concomitant with this decline there has been a growth in individual statutory rights in Britain mainly, but by no means wholly, emanating from the European Union. As a result, British employment relations, which half a century ago were voluntarist and collective, are now subject to legal adjudication mainly, but not exclusively, by labour courts known as employment tribunals, (ETs).

ETs were set up under the Industrial Training Act 1964, essentially as administrative tribunals dealing with individual disputes in the employment sphere between a party versus the state, for instance to adjudicate on appeals by employers in respect of the imposition of training levies. Nevertheless, although they were never the creatures of collectivism, unlike Sweden – see below, they were established in the heyday of corporatism, so they were constituted on a tripartite basis. Each court was composed of a legally qualified judge and two lay people, one representing employers and one representing employees (Dickens et al,

1985; Meeran, 2006). In 1971 a new individual employment right was enacted, unfair dismissal. Accordingly the government used existing institutions, ETs, to expand their remit to party versus party disputes. Then after this, when new employment legislation was adopted, ETs were the bodies charged with further party v. party adjudication.

The Swedish Labour Court (*Arbetsdomstolen*) is much older than Britain's employment tribunals. It was created in 1929 and its primary task was to deal with disputes on the interpretation and application of collective agreements covering manual workers and disputes relating to the no-strike requirements of the 1928 Collective Agreements Act. Accordingly it was a creature of collectivism. In 1947 collective agreements covering salaried private sector employees were brought within the Labour Court's scope and from 1966 public sector employees, like their private sector counterparts, came within the scope of the Labour Court.

When in 1974 the Swedish government began to introduce individual employment rights legislation, like its British counterpart it decided to adapt an existing institution. Accordingly, the remit of the Labour Court was widened in 1974 to cover virtually all aspects of employment law relating to individual rights. When new employment legislation was adopted, the Labour Court was charged with further party v party adjudication (*Arbetsdomstolen*, n.d.).

Nevertheless, several matters which are regulated by statute in Great Britain remain regulated by collective agreement in Sweden, not law, such as redundancy payments and a minimum wage (Woolfson et al, 2010). Moreover, despite the increasing amount of individual employment rights legislation, trade union density in Sweden has remained high compared to Great Britain, and any decline has been slight. In the 1970s average trade union density in Sweden was 73 per cent and in 2011 it had only slightly dropped to 68 per cent. Furthermore,

85 per cent of companies are members of employers' organisations; collective bargaining coverage equates to 90 per cent of employees (European Commission, 2011; Scheuer, 2011); there are some 60 unions and 50 employers' associations and they negotiate some 600 collective agreements (Diskrimineringsombudsmannen, 2009).

Despite these industrial relations and institutional differences, which we depict more fully below, both countries have much in common. Both are subject to European Union law. Both are subject to the *zeitgeist* of neo-liberalism and, although both countries are outside the euro, they are not immune to the financial upheavals affecting the euro and the US dollar since 2009.

Lay judges

As noted above, in both countries there are lay judges in the labour courts. Their role is to provide workplace/employment relations experience to supplement the legal knowledge of the professional judges. The lay judges are separated into two panels, reflecting the two sides of industry, but there the similarity ends. In Sweden, statute sets out how many lay judges can be put forward by each trade union confederation and employers' organisation as follows:

Table 1: Lay judges and nominating bodies

Number of lay judges	Organisation
4	Confederation of Swedish Enterprises
1	Association of Local Authorities
1	Federation of County Councils
4	Swedish Trade Union Confederation
2	Confederation of Professional Employees

1	Confederation of Professional Associations
1	Appointed by Ministry as representative of State as employer

In theory each nominating body ‘recommends’ its nominees to the Ministry, which then has to approve the nominations and only appoints after approval. In practice, the Ministry never challenges these recommendations. Moreover, in addition each nominating organisation also recommends three stand-ins for each substantive lay judge and again the Ministry never challenges these. As a result, the labour market actors are in control.

In marked contrast to Sweden, Britain’s social partners have not played a part in the selection of lay judges to Great Britain’s labour courts for over a decade. In 1999, the British government decided that lay judges should be selected and appointed in accordance with the procedures that had been introduced for public appointments generally, which are based on the principles of transparency and appointment on the basis of merit that had been adumbrated by Nolan (1995). Accordingly there are advertisements for British lay judges who self-nominate, fill in an application form and are then assessed by formal selection processes which draw on a conventional human resources repertoire (competency frameworks, job requirements, person specification, formal tests) overseen by the Judicial Appointments Commission but outsourced to human resources consultants who are assisted by professional judges (Department of Trade, 2003). (This is not to say that self-nomination does not take place in Sweden, but it is typically behind an institutional veil, through internal search or self-promotion, and individuals do not submit applications directly to appointing authorities.)

Somewhat paradoxically, however, although in Great Britain (unlike Sweden) worker and employer organisations do not play a part in the nomination and selection of lay judges, tripartism has not been totally obliterated. There are still two panels: employer and employee to which individuals self-nominate. This has occasionally led to individuals who are union members but whose job is as a manager nominating themselves to the employee panel (Department of Trade, 2003). Furthermore, at the final stage of the lay judge appointment process the Minister is required by law to consult with organisations representative of employers and employees, although in practice this is a formality.² There is no such consultation, however, when British lay judges are reappointed after their three year term, a reappointment that is virtually automatic until the age of 70.

Composition

The Swedish Labour Court is generally composed of seven people. There are three neutrals: two professional judges and a labour market expert. The professional judges are career judges, who begin their careers as so-called secretaries (apprentice judges) before becoming judges. There are four lay judges: two from the employer side and two from the employee side.

In discrimination cases, this composition can (not must) be changed: the same three neutrals, but only one employer judge and one employee judge. The rationale is that the employer side and the employee side members have a mutual interest in defending their agreements and thus preserving the status quo at the workplace to the detriment of those from a minority group and thus the neutral members in discrimination cases should be able to outvote the employer/employee members. This provision was brought in from 1.1.2009 after the then

² Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, reg. 8.

gender equality ombudsman lost many cases on wage discrimination to the consternation of female Members of the Swedish Parliament.

In Great Britain today most cases are adjudicated by a single professional judge, who has formerly been a lawyer (solicitor or barrister of at least seven years' standing). This is because since 1993 the Government step-by step has been eroding the jurisdictions where the two lay judges (one from each side) sit with the single professional judge, with the latest change (April 2012) allowing the professional judge to sit alone in unfair dismissal cases which comprised a quarter of all claims in 2011-12 (Ministry of Justice, 2012a). Now essentially in every jurisdiction except discrimination (which comprise about a third of all cases (Ministry of Justice, 2012a)), the default position is that the professional judge sits alone; for instance the professional judge can sit alone in unfair dismissal/hours/holidays/minimum wage/redundancy cases. The professional judge, however, can exercise discretion and depart from the default position and sit with lay judges (one from each side) after having regard to certain matters, for instance the views of the parties, whether there is a likelihood that there will be a dispute on the facts which makes it desirable for the proceedings to heard by a full tribunal. In summary then, essentially apart from discrimination, it is for the professional judge to decide the labour court's composition against the background of the default position.

Even where lay judges sit in Great Britain, their status is less than that of their counterparts in Sweden. Although British lay judges are required to swear the judicial oath they are not officially called lay judges. Instead they are called lay members or wing members (implying that their position is not central) or non-legal members, the latter term defining them according to what they do not possess, rather than what they do possess. Such equivalent terminology is not used in Sweden. Second, while in Sweden lay judges are required to sign

the judgment, in Great Britain only the professional judge signs the judgment and British lay judges are merely required to give tacit approval. Indeed the professional judge often also writes a lay member's dissent in the very rare cases (less than five per cent) where there is dissent (Selwyn, 2008).

Gateways

In Sweden, before a claim even gets to the Labour Court there is much involvement by the social partners. When a labour dispute arises and if the worker is a member of the union and covered by a collective agreement (and as noted above most Swedish workers are) there are initially formal local negotiations between the most senior workplace manager and the local union representative. These negotiations may involve several meetings and most issues are settled locally, providing a significant filter. Similarly, there are local negotiations if the employer is a member of an employer's association and/or is covered by a collective agreement.

If there is no resolution, the next stage is central negotiations between the trade union official and the employers' association official. These negotiations are more formal, often with the parties' lawyers providing advice according to interviewees, and most cases which reach this stage are settled, so providing a further filter. Only if there is a failure to settle at this stage does the case go to the Labour Court.

Discrimination cases can be different as a worker can complain to the Discrimination Ombudsman³ (DO), and there were 700 complaints in 2011 to the DO that were related to employment. If it is an employment matter, the DO advises the worker to approach his/her union. If the worker is not a union member, however, or if the union does not wish to take the

³The Discrimination Ombudsman (*Diskrimineringsombudsmannen*) is the title of both a person and the organisation headed by that person.

complaint further, the DO will investigate. After investigation, it takes no further action in the vast majority of cases. For instance in 2011 it settled 23 cases and brought seven to the Labour Court, less than 2 per cent of all cases lodged.⁴

In Great Britain, there is no provision for the involvement of the social partners at any stage. Only after an individual worker has lodged a claim with the labour court and the employer has responded, does a government funded body, the Advisory, Conciliation and Arbitration Service (Acas) step in and offer to conciliate. It was successful in a third of cases in 2011-12 (Ministry of Justice, 2012a).

This post-claim conciliation by Acas, which dates back to 1975, is to be supplemented by 'early conciliation' in 2014. Claimants will be required to submit the details of their claim to Acas in the first instance and will then be offered the option of conciliation. If they, or the respondents, do not wish to attempt conciliation or if conciliation is unsuccessful after normally a one month period, the individual can then lodge a claim with the labour court (BIS/HM Courts & Tribunals Service, 2011).

Up to now claimants in Great Britain and Sweden have to pay no fee to access the labour court but this has recently changed in Great Britain in 2013. The fee structure is complex, but for most cases the so-called issue fee is £250 (approximately €292) (Ministry of Justice, 2012b). A system of remission in respect of these fees has been devised, essentially providing that no fees will be payable if the claimant's annual income is below a certain level or if certain state benefits are received, but this system is not generous. See the Statutory Instrument for more details.⁵

Hearings

⁴ Interview with DO

⁵ See www.legislation.gov.uk/ukdsi/2013/9780111538654 UK Statutory Instrument: The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 No. 1893.

In Great Britain any worker (not employer) can lodge a claim with the labour court. To have a hearing, however, claimants in 2013 will have to pay a further fee of either £230 (approximately €269) or £950 (approximately €1,111), depending on the type of complaint, in addition to the issue fee noted above (Ministry of Justice, 2012b).

There is no legal aid. In the 1960s the unions wanted claimants to rely on their union and at that time union density was almost double what it is today; government did not want to place a burden on the public purse; and it was not in the interests of employers that there should be financial assistance for workers. As a *quid pro quo* however, first there are no restrictions on representation. Both claimant and respondent can be represented by, for instance, a friend, a spouse, a union official or a human resources consultant, as well as self-representation or representation by a lawyer. A survey in 2008 found that almost two thirds of both claimants and respondents had legal representation at a hearing (Peters, et al, 2010). Second, costs do not follow the event. In only a very few cases (less than 0.1 per cent) does the ET require the losing party to pay the winning party's costs, for instance because a party has acted abusively or if the bringing or conduct of the proceedings were 'misconceived' (Ministry of Justice, 2012a).

Hearings at the Swedish Labour Court are very different. The most important difference is that the worker cannot initiate claims and a worker does not decide whether or not to make a claim. A claim has to be made on a worker's behalf by a trade union or the Discrimination Ombudsman. A trade union can (not must) bring a claim on behalf of a worker if the worker is a member of the trade union and covered by a relevant collective agreement. The Discrimination Ombudsman (DO) can bring a case to the Labour Court on behalf of a worker

if the case concerns an employment matter, whether or not the worker is a trade union member and/or covered by a collective agreement, but again the choice is not the worker's.⁶

As to employers and their associations, an employers' association may bring a claim in its own right or on behalf of an employer who is a member of that association either in relation to a sectoral agreement or in relation to a single-employer agreement: this could deal with a collective matter, such as the timing of industrial action, or an individual issue such as recovery of a worker's wages because of inadvertent overpayment. Similarly an employer who has a collective agreement can also bring a claim to the Labour Court.

In short, control of access to the Labour Court is very much in the hands of the social partners. Where the worker is not represented by a union, or where an employer does not have a collective agreement/ is not a member of an employers' association, claims have to be made to the ordinary civil (district) court.

No statistics on the number of employment cases handled by the civil courts have been uncovered but anecdotal evidence suggests that the number is low as fees, and the fact that costs are normally awarded to the winner, serve to discourage putative claimants. In contrast, at the Labour Court there are no fees and the organisation bringing the case is normally legally represented.

Appeals

There is no appeal from a decision of the Swedish Labour Court, so social partner control is not undermined at a later stage. In addition if an employment case has originated in the civil courts, appeal is to the Labour Court and can be made on fact or law. The decision as to

⁶ The DO has to bring cases concerning goods and services and other non-employment matters to the District Court.

whether to allow an appeal in full or in part is taken by three professional Labour Court judges who have perused the papers, the appellant's submissions, the District Court's judgment and, as the District Court's hearing has been videoed from start to finish, they sometimes watch at least part of that video. Permission is granted in about a third of all cases with no reason given either for acceptance or rejection of an appeal.

At such an appeal the Labour Court watches the video and thus rehears the case in the District Court completely, as well as hearing submissions from the parties' representatives. As the Labour Court is normally composed of seven members (two professional judges plus the labour market expert and two employer side and two employee side members), the social partners are involved in having the final word.

It almost goes without saying that Great Britain's appellate system is very different. Appeals, which can only be made on a point of law, are taken first to the Employment Appeal Tribunal (EAT). Until 2013 the EAT was tripartite, if the first instance hearing had been tripartite, (that is a professional judge and two lay judges, one representing employers and one representing employees). The EAT lay judges self-nominate filling in an application form in response to an advertisement like their counterparts below, and the process of selection mirrors that for the ETs, so here too the social partners today play virtually no part.

In 2013, however, lay judges were removed entirely from the EAT. As below, however, the professional judge can (and will continue to be able to) exercise discretion and depart from the default position and sit with lay judges, one from each side (BIS/HM Courts & Tribunals Service, 2011).

Appeals on points of law in employment matters, however, do not stop at the EAT. If leave to appeal is granted, further appeals can be made to the Court of Appeal (Court of Session in

Scotland) and the Supreme Court. In these courts they professional judges do not specialise in employment; they are generalists and there are no lay judges at all.

Relative merits

Any consideration of the relative merits of these employment rights institutions is fraught with difficulty because such comparisons are taken out of context. Moreover, what is more effective is a contested term and what is deemed more effective than something else depends on the criterion adopted and the party for whom it is more effective.

The Royal Commission chaired by Lord Donovan (1968) were of the view that employment tribunals would be easily accessible, speedy, inexpensive and informal compared to Britain's civil courts. These criteria will be adopted for comparing labour courts in Great Britain and Sweden, taking first the criterion of accessibility. The more accessible is a labour court, essentially the more effective it is for the person who seeks to enforce their employment rights and that person is typically a worker. Accessibility, however, has many aspects. One aspect is who can bring a claim. In Great Britain a worker can lodge a claim, if he/she so wishes. In Sweden, as we have seen, workers cannot do so. Whether or not a worker's claim is lodged is the decision of the trade union or the Discrimination Ombudsman. A second aspect of accessibility is location. In Great Britain employment tribunals can be found in 26 centres. In Sweden there is only one Labour Court in Stockholm, the Swedish capital.

As to speed, and it is in the interests of both claimants and respondents, that is workers and employers, that disputes are adjudicated promptly. British labour courts are speedier than their Swedish counterpart. In the year from 1 April 2011, the average time taken from a claim being lodged at an Employment tribunal to a final decision was 32 weeks (Ministry of Justice, 2012a), compared to some 56 weeks in Sweden (Arbetsdomstolen, n.d.). However, if

one then considers the appellate process as well, the British system is much slower. It can take years for a worker in Britain to take the case upwards through all the appellate courts and finally obtain a decision from the Supreme Court, whereas the Swedish Labour Court's decision is final.

Another criterion revolves around the question of expense. British labour courts now charge a substantial fee to lodge a claim, like their Swedish counterpart. In Great Britain, however, that fee is paid by the claimant who is normally the worker. In Sweden it is paid on behalf of the claimant by the trade union, DO, or employers' association.

As to informality, it is probably in the interests of both parties, but not the lawyers', to have informal, non-legalistic proceedings. In Great Britain lawyers have crept in. The number of British workers having legal representation has grown. In 1983 20 per cent of claimants and 37 per cent of employers had legal representation (Dickens et al, 1985). In 2008, 62 per cent of claimants and employers had legal representation (Peters et al, 2010). Lawyers are both a reflection of formality and add to it. (For other symptoms of the growth of formality see Corby and Latreille, 2012). Sweden's Labour Court has never scored highly on informality and the organisations that act on behalf of the individuals are virtually always legally represented.

Another criterion that could be adopted is whether there is procedural justice and the judgments are seen as legitimate by the parties. A survey in Britain found that three-fifths of claimants (59 per cent) said they were satisfied with the outcome of their case, but there was a significant difference between those who had won and those who had lost their case (76 per cent compared to 29 per cent), suggesting that it is hard to disentangle satisfaction with the

outcome from satisfaction with the process. The same survey also found that satisfaction among British employers was related to a successful outcome. (Peters et al. 2010).

There is some evidence that a decision is seen as more legitimate where it is made by more than one person enabling differing perspectives to be brought to bear. As noted above, a case is heard in Sweden's Labour Court by at least five judges and normally seven; not only professional judges, but also lay judges with knowledge of the world of work and a labour market expert. In Britain a case is more often than not now heard by a single professional judge. A 2011 survey found that the majority of British professional judges (55 per cent) and lay judges (98 per cent) broadly agreed with the statement that 'a three person tribunal is likely to have greater legitimacy for parties than a judge sitting alone' (Corby and Latreille, 2011).

A further criterion is the litigation rate: the number of claims divided by the working population. In Great Britain, the litigation rate is 0.7 per cent, compared to Sweden's 0.01 per cent. This chimes with a study by Knight and Latreille (2000). They found that there were less dismissals in unionised British workplaces than in non-union British workplaces, which suggests that differences in litigation rates between Britain and Sweden can be explained by trade union density and collective bargaining coverage where, as noted above, Sweden scores significantly higher than Great Britain.

Discussion and conclusions

Comparing labour courts in Great Britain and Sweden, the former is self-service by individuals. It is up to individual workers whether to help themselves and put in a claim. Similarly individuals help themselves and decide whether or not they want to put themselves forward as a lay judge, although often a professional judge alone adjudicates without lay

judges. In contrast in Sweden, the labour courts are underpinned by collectivism as trade unions and employers play a significant part in the adjudicatory system in various ways. They seek to resolve disputes by negotiation, before access to the Labour Court. Workers cannot take cases themselves, only trade unions can on their behalf (or the DO). As to employers, again only employers covered by a collective agreement and/or members of an employer's organisation have access to the Labour Court. Furthermore, employer organisations and trade unions provide lay judges; there is no way individuals can directly self-nominate in Sweden and Sweden's lay judges play a part in every adjudication, unlike their British counterparts.

This paper then sought to evaluate which country had the more effective adjudicatory system and found that it depended on the criterion adopted and from whose point of view one was judging effectiveness.

Finally, how do we explain these cross-national differences? As noted above, legal origin theory and varieties of capitalism theory capture differences between Great Britain and Sweden and provide possible explanations. This rejected here, however, because they are static and do not help us to understand developments over time. Path dependency provides a much more plausible explanation (Thelen, 2003; Teague, 2009). It explains the differences between the collectivist approach in Sweden's labour court and the self-service individualistic model in Great Britain's labour courts. Moreover, in its soft version it avoids economic determinism and neo-institutional determinism and caters for incremental change, which we have seen particularly in Great Britain's labour courts.

There is a danger in using path dependency theory to reify institutions and to ignore agency and labour courts are creatures of the state. In Sweden, the Social Democratic government used an existing institution, its Labour Court, and extended its remit from collective dispute resolution to individual dispute resolution. Moreover, despite a change of governing party in

2006 from the Social Democrats to an Alliance of centre-right parties and the advancing tide of neo-liberalism across Europe, there has been virtually no change in the constitution and operation of the Swedish labour court, which remains collectivist, as does the country which continues to have relatively high trade union density. Indeed, a recent government inquiry into the Swedish courts attested to the high level of confidence in the Labour Court by stakeholders and concluded that labour disputes should continue to be heard by the Labour Court and not be transferred to the civil courts (Mål och medel, 2010).

In Great Britain, the government also used an existing institution, an administrative tribunal adjudicating individual disputes between a party versus the state, to a body adjudicating party versus party employment rights disputes. Since the 1990s governments of different political hues have made changes incrementally to the labour court to make them yet more individualistic, for instance, by excluding the social partners, curtailing lay judges and imposing fees to mimic the individualistic civil court system. Accordingly, this paper provides an empirical example of soft path dependency theory, albeit modified by the thesis of Crouch and Farrell (2004), who highlight the role agency and the significance of mimicry. As we have shown, governments make changes and when they do so, they do not start from scratch; they copy models that are to hand.

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