Britain and Brexit: A Forecast of the Future of Employment Protection during Corporate Insolvency

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1 Introduction

The pending spectre of Brexit and its impact on Europe and the United Kingdom (UK) along with the political uncertainty of a major world power in continuing turmoil and division (the United States), calls into question the path that many social and economic policies may take in the future in the Western World. The balance of social policy and economic efficiency is nowhere more evident than in the treatment of employees during bankruptcy/insolvency procedures, which may provide a barometer of changes yet to come.

As a member of the European Union (EU), the UK continues to be subject to Regulations and Directives that implement EU social policy objectives and influence the functioning of the rescue culture throughout the Member States, at least until 31 January 2020 as the state of play currently stands and following the most recent extension. The EU has had a significant influence on the direction the UK has taken in matters of social policy since its accession in 1973. Arguably, this has forced the UK into a socially liberal and protective framework that it might not otherwise have adopted to such a degree. EU policy has also had an influence on the UK's adoption of the rescue culture, which is now the foundation for insolvency systems throughout the EU and in many modern world economies. However, it is possible that the UK was already on a natural path toward the development of a rescue culture within the British insolvency system.

Following the invocation of Article 50 of the Treaty of Lisbon, the UK is making its way toward a deal or no deal Brexit scenario. If and when Brexit becomes a reality, and Britain begins to untangle itself from the influence of the EU, how will the rescue culture and the social protections present within it under the current legal regime be changed? In what direction is the UK likely to go? While difficult to predict, the direction that the UK may take in the event that the European Communities Act of 1972 is eventually repealed and the UK is once again left to its own legislative devices, current conversations in Parliament give a certain flavour of potential futures. In addition, a consideration of different jurisdictions, such as America, Canada and Australia, each having a similar English common law origin and historical links to the UK, can be instructive in relation to which direction the UK may have taken had it never joined the EU. An analysis of this counterfactual position may then also provide a clue as to the direction that the UK may take.

The UK has ever been the "odd man out" in the EU, springing as it does from a significantly different legal origin than the Franco/German model at the heart of the EU. By examining the developmental path of the United States, Australia, Canada, and the UK in this area of law prior to EU accession, the behaviour and reactions of the UK during EU membership, and

comparing this to similar developments in the comparator countries, it may be possible to forecast the eventual direction that the law of post-Brexit Britain may take in relation to the available social protections during insolvency procedures in the future.

2 Methodology: Comparative Legal History in the Context of Path Dependence

This paper utilises a comparative historical research methodology predicated on the theory of path dependency, which can be described as meaning

> "that what happened at an earlier point in time will affect the possible outcomes of a sequence of events occurring at a later point in time."[1]

Path dependency helps to explain how the institutions governing society change over time and shape societies.[2] Once a country or region has begun down a certain path, the costs of adjusting that path become high, increasingly so the longer a jurisdiction adheres to the same path.[3] Preceding steps in a particular direction induce further movement in the same direction and the longer a jurisdiction follows in that direction, the harder it becomes to change direction.[4] Given the political, economic, and social context within which legal systems are situated, it is only logical that path dependency should also be applicable.[5]

While the historical dependence of law is self-evident, its context in the wider history of a jurisdiction also plays an important role in how law develops. Certain aspects of history become important because a sequence of events can determine current values, thus the history relied upon is selective as well. It is necessary to assess why certain actions have been taken by looking for "mechanisms that link cause and effect" in particular jurisdictions.[6] A methodology of this nature will not only explain how things differ, but in effect, why they differ as well. This is an important value to add to such an analysis as it may offer a means of projecting what reforms may be introduced once Parliament can turn its attention to the raft of EU law that will be converted into UK law as a result of Brexit. What is particularly interesting is that while the jurisdictions being compared to the UK have remained closely aligned in a number of policy areas, their legal systems have diverged in relation to the underpinning aims of both insolvency and social policy, which, unlike other legal areas,

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[1] W Sewell, 'Three Temporalities: Toward an Eventful Sociology' in A T MacDonald (ed) *The Historic Turn in the Human Sciences* (University of Michigan Press 1996) 248-280.

[2] DG North, *Institutions, Institutional Change, and Economic Performance* (CUP 1990) 3.

[3] M Levi, 'A Model, a Method, and a Map: Rational Choice in Comparative Historical Analysis' in MI Lichbach and AS Zuckerman (eds), *Comparative Politics: Rationality, Culture, and Structure* (CUP 1997) 28; S J Leibowitz and S E Margolis, 'Path Dependence, Lock-in, and History' (1995) 11(1) JLEO 205.

[4] P Pierson, 'Increasing Returns, Path Dependence, and the Study of Politics' 94(2) *The American Political Science Review* 251, 252.

[5] See OA Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2000) 86 *Iowa Law Review* 601 and J Bell, 'Path Dependence and Legal Development' (2012) 87 *Tulane Law Review* 787; Richard A Posner, 'Past-Dependency, Pragmatism and Critique of History in Adjudication and Legal Scholarship' (2000) 67(3) *The University of Chicago Law Review* 573-606, 573.

[6] James Mahoney, 'Comparative-Historical Methodology' (2004) 30 Annual Review of Sociology 81, 88.

began to diverge at an early period. The key difference between the UK and the USA, Canada, and Australia is the fact that only the UK was influenced by a strong external supranational power with a real legal effect. The question remains, therefore, what direction might the UK have taken had it never joined the EU? And would it align with the paths of any of the comparator countries? Answers to these questions may provide an indication of the changes yet to come.

3 EU Law in the UK Post-Brexit

3.1 The Mechanisms of Brexit

Leaving the EU is going to require major changes to UK statutes and the British constitutional framework.[7] To accomplish this, a European Union (Withdrawal) Act 2018 was introduced and nicknamed the tongue-twisting "Great Repeal Bill"[8] was enacted on 26 June 2019. While it clearly defined "exit day" as 29 March 2019, but this has since been extended to 12 April/22 May, then to 31 October, and at the time of writing, "exit day" stands at 31st January 2020.[9]

The Great Repeal Act stands in parallel with the European Union (Withdrawal Agreement) Bill, which will be discussed in the next section. The Great Repeal Act has three main aims. First, it will repeal the European Communities Act 1972. It ends the authority of EU law in the UK and transfers the powers to the UK from Brussels. It will also convert the body of existing EU law into UK law with a view to preserving stability, after which Parliament can review what has been converted and decide if reforms or repeals are needed.[10] It has been said that this:

> "maximises certainty, not only for individuals but for businesses and consumers, by ensuring that the rules do not simply disappear or change overnight on exit."[11]

Conversion will not be the end of the work, however, as much EU derived law will no longer be capable of achieving its desired legal effect in the UK due, for example, to references to an involved EU institution.[12] Thus, EU law will not be simply "copied out", rather it will be transferred wholesale.[13] While this does not go far in clarifying just how the transformation of the British statute book will take place, it does acknowledge that the process will not be

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[7] House of Commons Library, 'Legislating for Brexit: The Great Repeal Bill' Briefing Paper 7793 2 (May 2017) <www.parliament.uk/commons-library>.
[8] The European Union (Withdrawal) Bill, Bill 5 57/1.
[9] Current as of 5th January 2020.
[10] Department for Exiting the European Union (DEEU), 'Legislating for the United Kingdom's withdrawal from the European Union' (March 2017) Cm 9446, para 1.11-1.12.
[11] Queens Speech, Hansard Online, Volume 783 (28 June 2017), <https://hansard.parliament.uk/> accessed 25 September 2017.
[12] DEEU (n 9) para 1.14.
[13] idem, para 2.8.

simple. The aim appears to be to ensure that the law of the UK does not change more than is strictly necessary on the day that the UK departs the EU.[14]

The Act also delegates statutory power to ministers so that following the exit, they can make changes to the statute book so that technical issues can be corrected in EU-related legislation so that it will function and to give effect to any withdrawal agreement between the UK and the EU, if one is ever agreed.[15] These delegated powers are derived from an antiquated convention, the Henry VIII Power,[16] which allowed the King to legislate by proclamation. This, therefore, allows individual ministers to make statutory changes outside of the scrutiny of parliament.[17]

While the Act may attempt to ensure a smooth exit as desired by the Government, what happens afterward in a legislative sense is of interest for the purposes of this article. Theresa May has promised that following conversion of the law and the UK's exit from the EU, Parliament will be able to decide which elements of the law to keep, and which ones to amend or repeal.[18] Once all EU law has been domesticated, it will then be subject to normal repeal and reform procedures as provided for by the UK constitutional framework, thus the laws that are only newly converted, may then find themselves on the proverbial chopping board. A long-term process of choosing what the Government and Parliament want to do with the laws it has incorporated from the EU will ensue.[19] The shape of the statute book ten years from now may indeed be significantly different.

3.2 The EU (Withdrawal Agreement) Bill (2019 & 20)

The EU (Withdrawal Agreement) Bill was first introduced during the 58th Parliament of the UK and aimed to implement the Brexit Withdrawal Agreement resulting from Brexit negotiations with the EU into domestic law. The Brexit Withdrawal Agreement[20] revised by the Boris Johnson Government was agreed with the European Council on 17th October 2019, with a political agreement at UK Parliamentary level on 19th October. The first Brexit Withdrawal Agreement Bill, drafted under the Theresa May Government, varied in some significant and, for the purpose of this article, important ways from the now approved Withdrawal Agreement. The first Bill lapsed on 6th November 2019 with the dissolution of Parliament in preparation for the December 2019 general election.

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[14] Legislating for Brexit (n 7) 10.
[15] idem, 44.
[16] Statute of Proclamations 1539.
[17] Legislating for Brexit (n 7) 62-64.
[18] HM Government, 'The United Kingdom's Exit from and New Partnership with the European Union' (February 2017) CM 9417, para 1.3.
[19] BBC News, 'EU Withdrawal Bill: A Guide to the Brexit Repeal Legislation' (13 November 2017), <www.bbc.co.uk/news/uk-politics-39266723>.
[20] Officially referred to as the draft Agreement on the Withdrawal of the United Kingdom from the European Union

The objectives of both the 2019 and 2020 versions of the Bill are to domesticate the Withdrawal Agreement between the UK and the EU, including financial settlements and the position on citizens' rights. It also sets out the details of the implementation period; allows for EU law to continue to be legally binding during the transition period, amending the European Communities Act 1972 to preserve this effect; and to allow for Parliamentary scrutiny and oversight of the process through primary legislation. However, section 34 of the 2019 EU Withdrawal Bill, "protection of workers' rights," has been removed from the 2020 Bill, which is not surprising given Prime Minister Johnson's clear wish to fully unshoulder the yoke of EU legislative interference. During his introduction to the second reading of the new Withdrawal Agreement Bill on 20th December 2019, Johnson stated that:

> "[t]he Bill ensures that the implementation period must end on 31 December next year, with no possibility of an extension, and it paves the way for a new agreement on our future relationship with our European neighbours, based on an ambitious free trade agreement."
>
> "This will be with no alignment on EU rules, but instead with control of our own laws, and close and friendly relations."[21]

Section 34 of the 2019 Withdrawal Agreement Bill required an amendment to the European Union (Withdrawal) Act 2018 to include additional provisions that would guarantee an equivalency of protection of workers' rights in line with EU protections after Brexit. It intended to add a new section 18A to the Act, referring to schedule 5A of the 2019 Bill, which included statements of non-regression in relation to workers' retained EU rights and provided for higher level of reporting requirements and parliamentary oversight in relation to new EU workers' rights.[22] Schedule 4 of the 2019 Bill also intended to add Schedule 5A to the Great Repeal Act, which in addition to specifying the content of the new sections to be added to the Great Repeal Act, listed the EU Directives which comprised retained EU workers' rights.

The safeguards set out in section 34 of the 2019 Withdrawal Agreement Bill were based on draft clauses published in March 2019.[23] In order to amend retained workers' rights, a Minister would have had to consult with businesses and unions about the impact of the changes and also to formally state if their legislative actions would reduce retained rights. The Government would also have been required to report regularly on any new workers' rights adopted by the EU, including a statement as to whether UK law already provided for

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[21] European Union (Withdrawal Agreement) Bill, Hansard Online, Volume 669 (20 December 2019) column 147 <https://hansard.parliament.uk/> accessed 5 January 2020.
[22] European Union (Withdrawal Agreement) Bill 2019 (Bill 7/57/2) s 34(1).
[23] 'Protecting and Enhancing Worker Rights after the UK Withdrawal from the European Union' (CP 66, Secretary of State for Business, Energy, and Industrial Strategy 6 March 2019).

the same kind of rights and if not, whether there were plans to amend, reform, or add new rights to UK social legislation.[24]

While the EU (Withdrawal Agreement) Bill 2020 does not include any protection for workers' retained rights, the Government did indicate its intention to introduce an Employment Bill that would ostensibly provide the same protection. The justification given by Michael Gove for removing section 34 was in the interests of simplifying the process and to "have a straightforward approach to getting Brexit done, to getting that withdrawal agreement through."[25] That said, at the time of writing it is not apparent how the Government intends to protect workers' rights in the proposed Employment Bill. [26] What is clear though is that if an Employment Bill is on the horizon that intends to protect workers' rights acquired through the EU, the act must be passed prior to the end of the implementation period of the Withdrawal Agreement as after that period the Government of the day will be free to any reduce workers' rights derived from EU law.[27]

There is also uncertainty as to how any future trade-agreements will deal with workers' rights. Though they often have reciprocal agreements in relation to labour standards, the level of standard will depend on the parties. While there is currently a non-binding Political Declaration agreed between the Government and the EU that states that any future trade agreement will have a "level playing field clause," ostensibly committing the UK to maintain high employment standards aligned with the EU, [28] it was reported in October 2019 that the Government was actually intending to deregulate the labour market post-Brexit.[29]

The incorporation of legislative protection for EU retained workers' rights would have made it more difficult to slash the protections that UK workers have gained during EU membership. Without these additional provisions, the Directives implemented into UK law, mostly via secondary legislation in the form of regulations, will face the standard repeal and amendment process and will thus be subject to the vagaries of what ever government is in place when these protective regulations come up for review following Brexit. Thus, the future is certainly unclear, making an examination of other common law systems timely and helpful.

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[24] Daniel Ferguson, 'Removal of Workers' Rights in the New EU (Withdrawal Agreement) Bill (House of Commons Library 20 December 2019) <https://commonslibrary.parliament.uk/brexit/legislation/workers-rights-and-the-new-eu-withdrawal-agreement-bill/> accessed 5th January 2020.
[25] Chris Smyth, 'Tories Vow to Stand up for Workers' Rights' (The Sunday Times 18 December 2019) <https://www.thetimes.co.uk/article/tories-vow-to-stand-up-for-workers-rights-jwdjvtdmm> accessed 5th January 2020.
[26] Daniel Ferguson, 'Removal of Workers' Rights in the New EU (Withdrawal Agreement) Bill (House of Commons Library 20 December 2019) <https://commonslibrary.parliament.uk/brexit/legislation/workers-rights-and-the-new-eu-withdrawal-agreement-bill/> accessed 5th January 2020.
[27] *ibid*.
[28] *ibid*.
[29] Jim Pickard and Jim Brundsen, 'Fears Rise over post-Brexit Workers' Rights and Regulations' (Financial Times 25 October 2019) <https://www.ft.com/content/5eb0944e-f67c-11e9-9ef3-eca8fc8f2d65> accessed 5th January 2020.

3.3 Brexit and the Future of EU Social Policy

One of the loudest siren calls of the opponents of Brexit has been the future of workers' rights once the UK has left the EU. This has been an issue since the early days of Brexit following the referendum.[30] It was recognised that this legislation was justified on the basis that much of the social policy related laws implicated in the Brexit watershed are not: -

> "small, inconsequential or obscure areas of employment law; they are up front and centre for many working people today who, in an increasingly unstable labour market, rely more than ever on the protections that can be afforded to them under that legislation."[31]

In addition, these laws have protected minimum working standards despite political leanings of particular governments. The Government promised in late 2016 that Brexit would not undermine workers' rights but has failed to introduce legislation that would provide the needed protection.[32]

Further Parliamentary discussion has echoed this issue, with opponents of Brexit focusing on the ability of Parliament and the Government to treat the converted EU law as any other UK law, subject to the equal possibility of repeal or amendment. When asked directly about TUPE, the debate was diverted to other rights that the UK protects well, such as statutory maternity and paternity pay.[33] Later in the same debate, the subject of TUPE returned along with a general argument about the stripping away of the EU protections for the floor currently present in the UK of workers' rights.[34] Finally, Melanie Onn, Labour MP for Great Grimsby noted that she and her colleagues were particularly:

> "concerned about a chipping away at workers' rights after we have left the EU, in the name of efficiency, cutting red tape, easing the burdens on business and streamlining regulation."[35]

Contrary arguments have not alleviated these concerns.

Workers' rights continue to be an important theme in the Brexit conversation. However, it has also been acknowledged that "UK employment law already goes further than many of the standards set out in EU legislation" but that the Government "will protect and enhance the rights people have at work."[36]

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[30] See the Workers' Rights (Maintenance of EU Standards) Bill, Bill 62 56/2 and discussions in Parliament in HC Deb 7 September 2016, vol 614, col 364.
[31] HC Deb 7 September 2016, vol 614, col 364.
[32] idem, col 365.
[33] HC Deb 7 November 2016, vol 616, col 1304.
[34] idem, col 1326.
[35] idem, col 1340.
[36] HM Government, 'The United Kingdom's Exit from and New Partnership with the European Union' (February 2017) CM 9417 chapter 7.

This has the sense of a double-edged sword. The Command Paper 9417 refers to protecting the flexibility of paternity and maternity leave, living wage provisions, and other UK derived protections present in the UK employment regime, but also notes that it should be considered if employment rules need to change in order to keep pace with modern business models.[37]

Buried in the petty in-fighting of the House of Commons has been a theme of protecting workers' rights, but considering whether such rights are appropriate in the modern age.[38] Thus, given the controversial nature of TUPE and the complaints of business leaders who must adhere to it, and the emphasis on keeping pace with a modern economy, it is submitted that this regulation may well find itself on the cutting room floor in the coming years.

3.3 Potential Impact on EU Social Policy Directives

In the UK, a number of provisions have been introduced during the UK's EU membership, many of which do not fit easily within the UK legal system. Apart from often fundamentally different socio-economic imperatives in legal regulation, as EU law is generally modelled in the style of Continental legal practice, it is not always easily implemented into the UK's Common Law legal system.[39]

However inadequate the implementation legislation may be, there are three main legal instruments implementing EU Directives that are applicable to employees in the event of their employer's insolvency. These directives form a part of the UK legal cannon, but will be subject to parliamentary scrutiny and reform following Brexit.

The current legislative protections present in the British legal cannon that implement EU social policy objectives indicated during insolvency and corporate rescue procedures include, firstly, the Collective Redundancies Directive,[40] implemented in the Trade Union and Labour Relations (Consolidation) Act 1992.[41] Secondly, the Employers in Insolvency Directive,[42] implemented via Part XII of the Employment Rights Act 1996, guarantees a payment to an employee of an insolvent employer out of the National Insurance Fund.[43] It is upon third social directive implicated in corporate restructuring, the Acquired Rights Directive

[37] HM Government, 'The United Kingdom's Exit from and New Partnership with the European Union' (February 2017) CM 9417, para 7.6; see also Matthew Taylor (chairman), The Taylor Review of Modern Working Practices, 'Good Work', (July 2017).
[38] HC Deb 27 April 2017, vol 624, col 1205.
[39] Jennifer L L Gant, *Balancing the Protection of Business and Employment in Insolvency: An Anglo-French Perspective* (Eleven International Publishing 2017) 151.
[40] Council Directive 98/59/EC on the approximation of EU countries' laws regarding collective redundancies OJ L 225.
[41] Part IV, Chapter 2.
[42] Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer OJ L 283.
[43] Employment Rights Act 1996, s 182.

("ARD"),[44] that this article will focus due to the long-standing controversy surrounding both its implementation[45] and application to business transfers in the UK.[46]

The ARD and its implementation in the TUPE Regulations is an excellent example of an EU social policy related law that has found an awkward place in UK law. In short, the ARD requires the transfer of employment contracts upon the sale of a business undertaking, including those occurring during corporate restructuring. This has caused problems in terms of maximising the value of a transferring business due to the social costs associated with the transferring employment contracts. In some instances, this has led to a failed rescue and the liquidation of the business as a result. Thus, the ARD/TUPE provides a good legislative foundation upon which to assess the potential impact of Brexit with a comparative look at those jurisdictions that share a common socio-political and legal ancestry with the UK and have not diverged in the same manner.

Harmonisation is also fading from focus as the UK prepares its exit. Once the EU connection is broken, the way may be opened for a new species of a race to the bottom where the UK has the advantage of a potentially more flexible labour market. It has been said that due to Brexit, progress toward harmonisation for the UK with the rest of the EU is essentially over.[47] As legislative paths between the UK and EU are likely to diverge in the coming years, leading potentially to a more competitive labour market, it is important to have an inclination of where the law may be going.

4 A Path-Dependent Approach to Prophetic Pronouncements on Social Policy

The following sections will explore the three comparator countries and their historical development in the area of labour protection, with a specific focus on transfers of undertakings. These will be tied together in a discussion of the UK's position prior to its accession. The final section will present comparisons of the legislative paths of social policy related directives with a view to determining which of the two jurisdictions the UK is most likely to align with in the future. Recommendations will also be made as to how the UK might be able to improve its position in terms of the functioning of employment protection during transfers of undertakings following the final day of its membership of the EU.

4.1 The American Highway

[44] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses OJ L 82 (ARD).

[45] Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) as amended by The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 (SI 2014/16).

[46] For more information on the practitioner view of TUPE, see Gant (n 28) 191-195.

[47] Lorenzo Stanghellini, 'The European Union' in *The Implications of Brexit for the Restructuring and Insolvency Industry: A Collection of Essays* (INSOL International 2017) 39-42.

4.1.1 Summary History of Labour and Employment

Key characteristics of the United States in terms of its approach to labour and employment include an emphasis on independence and a distaste for paternalism and big government.[48] While these views tended to be an obstacle to industrialisation, during the period following the Civil War many of the obstacles were overcome,[49] allowing America to become a part of the industrial world.[50] Until World War II, the United States was the most protected home market in the world due to the view that the government should protect and promote American manufacturing,[51] which assisted in rapid industrialisation. However, rapid development also meant the sacrifice of social justice to the requirements of economic growth.[52] It was during the early twentieth century that Darwinism joined with the ideal of *laissez-faire* economics

> "to define the poor as physically and morally unfit and label able-bodied men without income as 'shirkers,'"[53]

creating the concept of social Darwinism that continues to underpin policy decisions by the American political right today.

The American labour movement began with the formation of the National Labor Union in 1866, but both American business and the government were horrified by the risks of industrial unions associating themselves with radical politics and were therefore generally not accepted by American employers.[54] This was supported by the government through a number of acts that suppressed unionisation.[55] As a result, the American labour movement was marginalised as early as 1900.[56] The power of collective labour was continuously dampened through the early twentieth century, as was progress in terms of social policy, until the Great Depression and the introduction of the New Deal,[57] which was the most socially progressive period in US history. In 1935 and thereafter there was an upsurge in labour organisations and

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[48] Michael Lind, *Land of Promise: An Economic History of the United States* (Harper 2013) 78-79; See Drew R McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* (University of North Carolina Press 1996).
[49] Lind (n 37) 102-103.
[50] Claude S Fischer, *Made in America: A Social History of American Culture and Character* (University of Chicago Press 2010) 45.
[51] Lind (n 37) 145; Frank W Taussig, *Some Aspects of the Tariff Question* (Harvard University Press 1918) 118.
[52] Lind (n 37) 150.
[53] Fischer (n 39) 48.
[54] Lind (n 37) 171-172.
[55] See the Sherman Antitrust Act 26 Stat. 209, 15 U.S.C. §§ 1; The Clayton Antitrust Act 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53; and *Loewe v Lawlor*, 208 US 274, 301 (1908).
[56] Lind (n 37) 173.
[57] idem, 244, 263; Jacob S Hacker and Paul Pierson, 'Business Power and Social Policy: Employers and the Formation of the American Welfare State' (2002) 30 Politics Society 277, 296; Norman H Davis, 'Trade Barriers and Customs Duties' (1928) 12(4) *Proceedings of the Academic of Political Science* 69.

striking throughout the industrialised United States aided by New Deal legislation that helped level the playing field between labour and employers.[58]

From its peak following the New Deal era, many of the welfare state programmes have been retrenched.[59] Employment remains largely within the prevue of the states with regulatory frameworks heavily tempered by the concept of individual liberty. State laws generally tend to uphold rights to freely enter contracts for the hiring of services,[60] though there is no statutory requirement for an employment contract. These key ideals are difficult to change as doing so undermines that central theme of independence and the individual responsibility that is connected to it.

[58] Oliver Stone and Peter Kuznick, *The Untold Story of the United States* (Ebury Press 2013) 58-59; Fischer (n 39) 52.
[59] P Pierson, *Dismantling the Welfare State* (CUP 1995) 17.
[60] CA Scott, 'Money Talks: The Influence of Economic Power on the Employment Laws and Policies in the United States and France' (2006) 7 San Diego Int'l LJ 341, 350-351.

4.1.2 The Employment Protection Framework

Key to understanding the American approach to employment regulation is the concept of the "as-will" doctrine. Essentially, this relies on basic laws of contract that once governed the whole of employment law in the UK. There are no statutory notice periods, requirements for severance, or redundancy pay, or procedural requirements for dismissal. For any of these to apply, they would have to be included in a collective agreement or an employee handbook. Employers can lay-off employees for any reason that does not violate anti-discrimination statutes or that constitute an act of bad faith.[61] However, collective bargaining agreements, where they exist, may provide some security as American courts have authorised their continuation through some corporate changes in identity based on the continuous operation of the enterprise with the same workforce,[62] but only on a case by case basis,[63] which does not provide much certainty for employees whose job security is threatened by business transfers and sales. Whether or not a successor employee will be bound by a collective bargaining agreement will usually depend on the decision of an arbitrator.[64]

Although there are certain employee rights available under the American Bankruptcy Code, these do not adequately protect employees who might be subject to drastic reductions in the workforce. An employee does not have the right to be transferred with a business to which he is associated[65] and if he is, there is no continuity of employment between the previous employer and the new one. Otherwise, employees will only transfer if the transferee formally offers them employment and continuity of employment is not guaranteed.[66] The only protection present with regard to job security during insolvency is the WARN Act,[67] which requires notification only of redundancies. Employees will essentially just have to suffer the loss of their jobs and associated benefits.[68] In addition, collective agreements and employment contracts can be summarily terminated under the Bankruptcy Code.[69]

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[61] PA Susser, AM Wever and SJ Friedman, 'Employment and Employee Benefits in the US: Overview' (2014) Practical Law Multi-Jurisdictional Guide on Employment and Employee Benefits <http://global.practicallaw.com/1-503-3486> first accessed 28 October 2014.

[62] Referred to as the successorship doctrine. See *Howard Johnson Co v Detroit Local Joint Exec Bd* 417 US 249, 264 (1974); *John Wiley Sons Inc v Livingston* 376 US 543 (1964); *NLRB v Burns International Security Services* (406 US 272 (1972); and *Fall River Dyeing & Finishing Co v NLRB* 482 US 27 (1987).

[63] Leslie Braginsky, 'How Changes in Employer Identity Affect Employment Continuity: A Comparison of the United States and the United Kingdom' (1994-1995) 16 Comp Lab LJ 231, 234-235.

[64] Mary Ann S Bartlett, 'Employees' Rights in Mergers and Takeovers – EEC Proposals and the American Approach' (1976) 25(3) ICLQ 621, 624.

[65] Braginsky (n 52) 231.

[66] Scott (n 49) 377.

[67] An Act to require advance notification of plant closings and mass layoffs, and for other purposes (WARN Act) enacted by the 100th United States Congress, Pub. L. 100-379 102 Stat 890.

[68] See for example *Re Eastman Kodak Co. et al*, Voluntary Petition for Chapter 11 Bankruptcy, Case No 12-10202, So, Dist. NY (2012) available from <http://bankrupt.com/misc/Kodak_StipSpectra073013.pdf> first accessed 30 October 2014.

[69] Susser, Wever, Friedman (n 50).

Compared with the protections available to employees affected by the insolvency of their employer in the UK and other EU countries, the WARN Act merely recognises that employees are affected, but offers very little in terms of real security or protection. This is where the regulatory protections provided to American employee job security in the event of an insolvency ends.

4.2 The Road to Oz

4.2.1 Summary of History of Employment and Labour

While many view Australia as a society derivative of its British and European roots, there are several differences between Britain and Australia, particularly Australia's industrial relations system.[70] Like the UK, the Australian concept of employment is based in ancient master and servant laws derived from the Master and Servant Act 1747.[71] The approach of master and servant laws was in some ways paternalistic,[72] where each side owed duties to the other, but in which the law was balanced in favour of the master. While there were some protective provisions, the coercive provisions were far more dominant.[73] Thus, like in Britain, labour was viewed as a resource, a commodity, to be used in the service of the community through the authority of a master.[74] These ideals would be carried over into the early employment relationship, though the coverage of master and servant laws were generally broader than they were in Britain[75] as a result of the periodic labour shortages suffered by Australia due to its isolation as well as specific events placing greater demand on labour.[76]

While the Acts continued to be in force until the twentieth century, they came to be used far more frequently by servants than by masters as a convenient means of recovering wages.[77] The coercion of labour began to diminish, giving way to the concept a contractual relationship between equal parties.[78] Labour was able to grow yield greater power than in either America or the UK due to the scarcity of man-power.[79]

Following significant labour unrest in 1890,[80] there was a change in approach that would spread trade unionism throughout Australia.[81] At the time it was viewed by some that

[70] William O. Coleman, 'The Australian Exception' in William O. Coleman (ed) *Only in Australia: The History, Politics, and Economics of Australian Exceptionalism* (OUP 2016) 1, 6.
[71] Master and Servant Act 1747 (20 Geo II c 19).
[72] Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin Pty Ltd 1995) 110.
[73] Mary Gardiner, 'His Master's Voice? Work Choices as a Return to Master and Servant Concepts' (2009) 31 Sydney Law Review 53, 61.
[74] idem, 62.
[75] Michael Quinlan, 'Pre-Arbitral Labour Legislation in Australia' in S Macintyre and R Mitchell (eds) *Foundations of Arbitration* (OUP 1989) 29.
[76] Gardiner (n 62) 65.
[77] Kercher (n 61) 111-112.
[78] Gardiner (n 62) 67-68.
[79] Edward Shann, *An Economic History of Australia* (first published 1945, CUP 2015) 316-325.
[80] idem, 323-325; Manning Clark, *A Short History of Australia* (Penguin Books 1963) 201.

unionism threatened freedom of contract, a concept connected to the government fighting to support capitalism, rather than supress lawlessness in industrial unrest.[82] There was clear antagonism between the goals of unionists and their labour constituents, industrial employers, and the government. Legislatures responded by establishing specialist courts and tribunals to hear industrial disputes through either conciliation or arbitration. Decisions resulted in binding awards and essentially banned industrial action such as strikes or lock-outs. The aim of these procedures was to ensure industrial peace and avoid economic and social turmoil.[83]

Compulsory arbitration is now a key characteristic of the Australian labour system.[84] This rested on the recognition that the antagonism between capital and labour was not likely to diminish so long as the means of production continued to be privately owned,[85] which was not likely to change. While the idea of compulsory arbitration was first rejected by workers, the Australian Workers Union eventually adopted the concept when it realised that while its supplies to feed collective action were limited, non-unionist supplies were inexhaustible, thus collective action could not be guaranteed to achieve its aims every time. Thus in 1894, Conciliation and Arbitration Acts were passed among the Australian states.[86] The enactment of compulsory arbitration and conciliation was an important catalyst for the expansion of trade unionism as it provided specific benefits to registered unions and provided measures to avoid industrial unrest.[87]

The *Harvester*[88] judgment was a turning point for the enactment of protective labour regulation in Australia, finding that Parliament had a responsibility to provide some protections to employees.[89] It was recognised at this time that the labour market could not be relied upon to provide the outcomes desired by labour, and left to its own devices, would likely deliver undesirable outcomes.[90] It therefore rejected *laissez faire* liberalism and is "posited on a denial of the verities of Smithian economics" by accepting that it is impossible for the labour market to fairly regulate itself.[91] Australia therefore began to depart from English labour law following the institution of compulsory arbitration and the *Harvester* judgment. This began a more interventionist style of regulation in the labour market and opened the door to more significant labour reforms.[92]

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[81] Shann (n 68) 365-366.
[82] Clark (n 69) 202.
[83] Kercher (n 61) 145.
[84] idem, 144-145; Shann (n 68) 368.
[85] Clark (n 69) 215.
[86] Shann (n 68) 368-372.
[87] Phil Lewis, 'Australia's Industrial Relations Singularity' in William O. Coleman (ed) *Only in Australia: The History, Politics, and Economics of Australian Exceptionalism* (OUP 2016) 119, 123.
[88] *Ex parte H. V. McKay* (1907) 2 CAR 1.
[89] Clark (n 69) 237; Lewis (n 76) 121.
[90] Lewis (n 76) 122.
[91] Frank Carrigan, 'A Blast from the Past: The Resurgence of Legal Formalism' (2003) 27 Melb U L Rev 163, 174.
[92] Kercher (n 61) 146.

4.2.2 Employment Protection Regulation Today

Today the Fair Work Act 2009 (Cth) provides for redundancy pay obligations for employees laid off by their insolvent employer. In terms of collective redundancies, there are also consultation obligations in the event an employer has decided to make a significant change to the workplace.[93] Australia also provides a state guarantee fund through the Fair Entitlement Guarantee scheme.[94] Australia's position on transfers of undertakings, however, offers more protection than the US, but does not go far as the current TUPE regime in the UK.

While there is no compulsory transfer of employment contracts upon the transfer of a business undertaking in Australia, there are some cases in which liability for employee entitlements can be transferred to the new employer. This is as a result of the operation of s149(1)(d) of the Workplace Relations Act 1996 (Cth).[95] If in substance, the new and old private sector employers bear the same character, then it will

> "usually be the case that the new employer has succeeded to the business or part of the business."[96]

Associated connections include transfers between associated entities, where there is a transfer of assets, outsourcing, and insourcing.[97] If this test is satisfied, employees will be able to both keep their jobs and claim entitlements from the solvent new employer, including the recognition of continuous service. However, if the new employer becomes insolvent, employees may find themselves in a less advantageous situation than if the insolvency practitioner had simply dismissed them, in which case they could have proven for their entitlements in the first insolvency.[98]

When it comes to the transfer of employees, the principle of freedom of contract remains paramount. In Australia, it has been regarded as fundamental to the traditional concept of the employment relationship as a contract to which all parties have freely agreed, a concept derived from the English case of *Nokes,*[99] to which the British legal system ascribed prior to the introduction of the ARD. This again goes back to the idea that an employee should have the right to choose his own employer, else the line between employment and forced labour might be crossed.[100] The assurance that an employee is able to agree to any changes in the contract relationship is therefore key. It was noted in *McCluskey v Karagoizis*[101] that if

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[93] Henry Skene, Darren Perry, and Mitchell Brennan, 'Employment and Employee Benefits in Australia' (Thompson Reuters Practical Law Company 2017) 20.
[94] idem, 24.
[95] Michael Gronow, 'Insolvent Corporate Groups and their Employees: The Case for further Reform', Legal Studies Research Paper No. 130 (University of Melbourne 2004).
[96] *PP Consultants Pty Ltd v Finance Sector Union* (2000) 201 CLR 648 at [15].
[97] Skene, Perry, and Brennan (n 82) 22.
[98] Gronow (n 84).
[99] *Nokes v Doncaster Amalgamated Collieries* AC 1014 [1018], [1020] per Lord Simon and [1026] (per Lord Atkin).
[100] Gronow (n 84).
[101] *McCluskey v Karagoizis* [2002] FCA 1137.

consent to a transfer is given by employees, then in that case the restructure could have been effective with the employees transferred to the purchaser. In that case, the transfer would have been to a shell company with no assets, which would not have been to the benefit of employees in any event.[102]

In the event that employees do transfer to an associated entity, their length of service and entitlements must be recognised by the new employer. However, if the employee transfers to a new entity that is not associated with the previous employer, the new employer can choose whether or not to recognise length of service for entitlement purposes. If service is not recognised, the entitlements should be paid out on termination by the previous employer.[103] There is no obligation to redeploy or prohibition on dismissal because of the transfer and employers are allowed to standardise terms and conditions where the transfer of business rules do not apply.

4.3 The Trans-Canada Trail

This paper has developed from a paper published following the 2016 INSOL Europe Academic Forum conference in Warsaw.[104] The primary development since that presentation is the introduction of Canada as an additional common law comparator. While the depth of research does not meet the depth of the United States, Australia or the United Kingdom, there is enough to discuss here to provide an additional instructive perspective.

The Canadian economy has, for historical reasons dating back to the colonial period, been heavily influenced by both the British and French economies and legal systems.[105] Equally, being as it is the Northern neighbour to the United States, it is highly susceptible to American economic and competitive pressures as the United States set the pace of economic expansion on the North American continent.[106] These influences are evident in the development of the Canadian economy and its social policy.

4.3.1 Summary of History of Employment and Labour

One aspect that significantly differentiates Canada from both Britain and the United States, in particular, is its lack of fully-fledged industrial revolution in the nineteenth century. Canada has largely been an "economic satellite" of other more advanced nations, exporting raw materials while importing manufactured goods.[107] While the Industrial Revolution was in full

[102] Gronow (n 84).
[103] Skene, Perry, and Brennan (n 82) 14.
[104] Jennifer L L Gant, '"Prophesying Britain's Future in the Balance of Social Policy and the Rescue Culture – Challenges to Post-Brexit Harmonisation' in Jennifer L L Gant (ed), *The Rise of Preventive Restructuring Schemes: Challenges and Opportunities* (INSOL Europe 2017) 17-39.
[105] W T Easterbrook and Hugh G J Aitken, *Canadian Economic History* (University of Toronto Press 1988) 3, 10-19.
[106] idem, 355-365.
[107] idem, 515.

swing in the UK and America, during the same period the Canadian workforce was able to maintain a reasonable level of material well-being, while the country developed a cohesive infrastructure and a politically unified nation that allowed it to provide the industrialised areas of the world with the raw materials and foodstuffs needed.[108]

That said, the Reciprocity Treaty[109] between Canada and America brought about a reconceptualization of Canada's economic orientation, encouraging entrepreneurs to begin considering alternatives to raw materials and agriculture, such as manufacturing.[110] Canada did not fully enter the industrial age until the end of World War I when manufacturing output finally exceeded agriculture and raw material exports, though most manufactured goods were consumed by the Canadian market.[111]

Canadian entrepreneurs of the mid nineteenth century were not generally advocates of *laissez faire* like their British or American counterparts. Rather, their complaints revolved around unfair competition and they preferred government involvement in large schemes of public development, such as the railways, and accepted government power to grant public service monopolies. Businessmen were inclined to minimize competition wherever possible, even if that had to be done through governmental regulation.[112] Canadian entrepreneurs wanted their livelihoods protected rather than engaging in the risk that comes with a free market economy.

However, like the UK, Australia, and the United States, a labour movement occurred along with the growth of trade unionism in parallel with Canadian industrialisation and the growing need to deal with problems of social welfare that characteristically accompany industrialism.[113] Canadian trade unionism developed primarily under British influence in terms of the legislative and political programmes of the Canadian labour movement, beginning in the 1820s.[114] Nevertheless, in terms of economic policies and internal organisation, Canadian unions tend to reflect patterns set by labour unions in the United States.[115] Overall, Canadian labour movement developments largely reflect those occurring in Australia at a similar period of development.[116]

Businesses viewed organised labour as an illegitimate combination designed to "erode the right of the individual to run his business as he saw fit."[117] However, the Canadian state was more receptive to protecting the rights of labour to organise over the complaints of

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[108] ibid.
[109] The Elgin-Marcy Treaty of 1854 covered raw materials and was in effect from 1854 to 1866 and represented a move toward free trade.
[110] J M Bumstead and Michael C Bumstead, *A History of the Canadian Peoples* (5th edn, OUP 2016) 202-203.
[111] Easterbrook and Aitken (n 94) 521.
[112] Bumstead and Bumstead (n 99) 278.
[113] Easterbrook and Aitken (n 94) 558.
[114] Franca Iacovetta, Michael Quinlan, and Ian Radforth, 'Immigration and Labour: Australia and Canada Compared' (1996) 71 Labour History / 38 Labour/Le Travail 90, 92.
[115] Easterbrook and Aitken (n 94) 558.
[116] Iacovetta, Quinlan, and Radforth (n 103) 90.
[117] Bumstead and Bumstead (n 99) 278.

businesses, leading to an opposite approach to labour organisation to that taken in the United States. Union activities were legalised as early as the 1880s.[118] However, at the turn of the century, Canadian courts institutionalised a market-based conception of justice by treating both employers and employees as juridically equal, but giving priority to property and contract rights, thus favouring the employers.[119] This voluntarist approach by the judiciary continued, limiting the availability of compensation for work related injuries, for example, on the assumption that employees assumed a risk of being injured in the workplace in exchange for wage remuneration.[120]

The Conciliation Act 1900 provided the first legal framework allowing for federal intervention into labour disputes, authorising ministers to investigate disputes and arrange conferences between the parties. The underlying purpose of the act was to encourage voluntarism in the restoration of production, rather than advancing some form of economic justice.[121] During the Depression and inspired by Roosevelt's National Industrial Recovery Act, Canada passed industrial standards acts that conjoined collective bargaining with minimum standards of employment protection, constructing a framework of joint labour-management regulation that could resist the adverse impact of competitive local markets, rejecting the commoditisation of labour and recognising that voluntarism was not going to work.[122]

Following World War II, industrial voluntarism became untenable[123] and Canada began to develop a legislative framework and an institutional infrastructure to facilitate grievance arbitration to reduce disruptions.[124] This included, in 1943, legislation containing an amalgam of compulsory bargaining, conciliation, and grievance arbitration. However, the compulsoriness was depleted by a lack of means of enforcement against employers, thus disagreements continued to be resolved ultimately by a test of economic strength.[125]

In the late twentieth century, like in the United States, there was a trend toward the retrenchment of employment rights and an increase in privatisation. While this was mitigated to some extent by Canada's membership of the International Labour Organisation, in contrast to the United States, they largely ignored charges of violating convention rights Canadian workers.[126] In the 1990s the federal government embraced a policy of labour market flexibility as the defining characteristic of a well-functioning labour market, rather than

[118] ibid, 278.
[119] Judy Fudge and Eric Tucker, "Pluralism or Fragmentation? The Twentieth Century Employment Law Regime in Canada" (2000) 46 Labour/Travail 251, 256.
[120] idem, 260.
[121] idem, 258.
[122] idem, 271-273.
[123] idem, 270.
[124] idem, 258.
[125] idem, 275.
[126] idem, 290-291.

insisting on a commitment to full employment,[127] bringing Canada closer in perspective to the UK's approach outside of EU influence.

Northern American Continental influences such as NAFTA have drawn Canada closer to the American market.[128] Economic continentalism has since come to symbolise the hegemony of neo-liberalism and market driven restructuring of the continental labour market.[129] As a result, competition with the US continues to be a key factor in the reduction of working conditions and retrenchment of labour rights as the United States continues to be Canada's most important trading partner.[130] Thus there is a risk of a race to the bottom of labour standards to account for their impact on the costs of production.[131] Given the possibility that Britain will leave the EU without a deal, trading competition will be an important consideration and may herald a renewed race to the bottom of the labour market should Britain choose more labour flexible trading partners.

4.3.2 Employment Protection Regulation Today

Employment is decentralized for most sectors of the Canadian economy, falling outside the Federal jurisdiction with each state having its own laws, although they are said to be similar across all states other than Quebec.[132] Ontario, for example, is covered by the Employment Standards Act 2000.[133] The Canada Labor Code deals with employment laws that do apply at Federal level for workforces such as the railways, airports, postal service, telecommunications and the military.[134] In addition, the federal Government operates a Wage Earner Protection Programme (WEPP) created by the Wage Earner Protection Program Act[135] to protect employees of bankrupt employers or in receivership.[136] Some employee claims also rank as a super priority in distributions.[137]

Employees subject to collective redundancies can rely on special rules that apply to the calculation of the statutory notice period. While the threshold varies among Canadian states, at the federal level a group dismissal occurs when 50 or more dismissals are intended over a

[127] idem, 295.
[128] Kevin Banks, 'Must Canada Change its Labour and Employment Laws to Compete with the United States?' (2013) 38 Queen's LJ 419, 423-424.
[129] Fudge and Tucker (n 108) 295.
[130] Banks (n 117) 423-424.
[131] idem, 428-431.
[132] McMillan LLP, 'Employment law in Canada: provincially regulated employers' (2011) <http://www.mcmillan.ca/files/Employment%20Law%20in%20Canada%20-%20provincially%20regulated%20employers.pdf> accessed 23 January 2018.
[133] Employment Standards Act 2000 <https://www.ontario.ca/laws/statute/00e41> accessed 23 January 2018.
[134] Canada Labor Code, RSC 1985 <http://laws-lois.justice.gc.ca/PDF/L-2.pdf> accessed 26 January 2018.
[135] Wage Earner Protection Program Act http://laws-lois.justice.gc.ca/PDF/W-0.8.pdf accessed 23 January 2018.
[136] ibid.
[137] Brian W Burkett, John D Craig, and Christopher Piggott, "Employment and Employee Benefits in Canada: Overview" (2018) Thompson Reuters Practical Law Company 26.

four-week period at a single establishment,[138] a lower threshold than in America, but much more generous than both UK and Australia. In some jurisdictions, employees benefit from employer consultation which may extend to discussing ways to eliminate the necessity of termination, or to minimize the impact.[139]

Continuous service is an important characteristic for certain employment protection regulations, such as parental entitlements, notice periods, and vacation periods. In the event of a business transfer through the sale of assets, the employee's employment will end and a new period of employment will begin with the purchaser if the employee accepts the change in employer. However, length of service will normally be maintained at common law, avoiding the loss of continuous service benefits. However, the traditional common law position has been eroded, lessening the job security previously available to employees.[140] In addition, employees are not protected against dismissal by reason of the transfer and it is the purchaser's choice whether to harmonise employment terms of transferring employees.[141]

[138] idem, 23.
[139] ibid.
[140] idem, 14-15.
[141] idem, 24-25.

4.4 Britain's Road Not Taken

4.4.1 Summary of Protective Regulation Prior to Accession

In the UK prior to 1963, labour law and employment protection were largely dealt with through the common law and collective bargaining. Legislation was present only inasmuch as it concerned the regulation of trade unions, wage protection, health and safety, or the protection of women or children workers.[142] Before the passage of the Contract of Employment Act 1963, which required reasonable notice be given before a dismissal an the provision of written particulars of a contract of employment, most employment related issues were dealt with through the voluntarist system of industrial relations.[143] Since 1963, labour regulation has grown significantly, and since 1973 this legislative growth has been largely influenced by developments emanating from the EU.[144]

Shortly after accession the UK, the Conservative governments when in power resisted the increasing encroachment of EU social policy into its labour system, which can be explained in part by nature of the labour movement in Britain. Given the development of trade unions outside the political sphere and the far-reaching freedom to act that they had been given through immunities, it is not surprising that they were not supportive of the encroachment of regulation into industrial policy.[145] Britain's adherence to orthodox economic beliefs in the free market, collective *laissez-faire,* and the lack of political ambitions in early unionist dogma meant that there was little support for any progressive labour regulation.[146] This non-interventionist stance has remained popular in British politics, though successive Labour governments have tempered this with more progressive legislation, particularly in view of Britain's acceptance of the EU Social Chapter, while Conservative governments persistently try to reduce labour regulation in favour of market flexibility.[147]

The UK position has not been assisted by the fact that there are significant differences between the UK labour system and those on the continent. There is no institutionalised system of worker representation and no requirement for employers to recognise or to bargain with labour unions.[148] The fact that the UK is common law while the EU is based largely in civil law style legislation does not assist in legislative cooperation. Essentially, the UK

[142] The Trade Unions Act 1871 (34 & 35 Vict c 31), the Truck Acts 1831 (1 & 2 Will 4 c 37), the Factory and Workshop Act 1901 (1 Edw 7 c 22), the Coal Mines Act 1911 (1 & 2 Geo 5 c 50, and the Employment of Children Act 1903 (3 Edw 7 c 45).
[143] M O'Sullivan, et al., 'Is Individual Employment Law Displacing the Role of Trade Unions' (2015) 44 ILJ 222.
[144] G S Morris, 'The Development of Statutory Employment Rights in Britain and Enforcement Mechanisms' in L Dickens (ed), *Making Employment Rights Effective* (Hart Publishing 2012) 8-10.
[145] J Tomlinson, *Public Policy and the Economy Since 1900* (OUP 1990) 131.
[146] R Lowe, 'Hours of Labour: Negotiating Industrial Legislation in Britain, 1919-39' (1982) 35(2) Econ Hist Rev 270.
[147] Gant (n 28) 174-175.
[148] B Hepple, 'Social Rights in the European Economic Community: a British Perspective' (1989) 11 Comp Lab LJ 425, 435-437.

system was and perhaps still is so different from the labour and employment regimes in continental Europe that the way in which Directives were drafted did not fit with the mechanisms of UK law.[149]

4.4.2 Protective Employment Regulation Post Accession

While redundancy had been recognised as something requiring regulation without the intervention of the EU, obligations relating to collective redundancies, the provision of a state guarantee fund for employee entitlements in insolvency, and the mandatory transfer of employment contracts to the purchaser of a business would be implemented only due to the passing of EU Directives on these matters. Provisions relating to collective redundancies are fairly uncontroversial, apart from some interpretative issues in the recent years.[150] The UK implemented the state guarantee fund in the form of the National Insurance Fund, and the provisions allowing employee access to this fund are actually more generous than the minimum requirements in the Directive.[151] However, implementation of the Acquired Rights Directive[152] has been difficult, messy, and controversial.[153]

In the UK prior to the introduction of the ARD, the position of employment contracts upon the transfer of a business relied upon rules of contract. Employment contracts were personal in nature and could not be transferred to a new employer who was not already a party to that contract. There was no concept of automatic transfer, as this would conflict with the fundamental freedom of contract. Individuals have a negative freedom not to consent to a change in employer, as the requirement of automatic transfer would be against the principle contrary to what is fundamentally forced labour,[154] a similar view taken of the situation in Australia and Canada. Thus, a purchaser of a business could not generally expect to receive a trained workforce, nor could employees be assured of any job security in such situations.[155]

The first UK legislation conferring continuity of employment on a business transfer[156] would apply only if the employees were voluntarily retained by the purchasing firm, a similar position in both Australia and Canada, though the latter relies on a common law framework. The ARD 1977 and its implementation changed the common law position in the UK, under

[149] See Bell (n 5).
[150] See Case C 80/14 *Union of Shop, Distributive and Allied Workers (USDAW) and B. Wilson v WW Realisation 1 Ltd and Others* (30 April 2015) which dealt with the definition of 'establishment' for the purpose of the application of the collective redundancies directive.
[151] Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer.
[152] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses OJ L 82.
[153] Gant (n 28) 150-153.
[154] See *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014.
[155] C Barnard, *Employment Law* (3rd edn, OUP 2006) 620.
[156] Contracts of Employment Act 1963.

which employment contracts were personal and could not be transferred to another employer without the termination of the contractual relationship.[157]

The life of the ARD as implemented in the UK has been difficult and controversial,[158] particularly in its application to those business transfers occurring out of corporate rescue procedures, which can have an impact on creditor distributions due to a decrease value of a business associated with the mandatory transfer of all employment contracts. This has raised a question as to whether a balance can be found between the interests of corporate entities trying to survive through business sales and the interests of those employees associated with those businesses. The spectre of Brexit may indeed offer an opportunity to review the implementation of this particular EU Directive with a view to improving its functioning and mitigating its adverse impact on business survival, but comparisons to the US and UK may also indicate its natural tendency.

5 Comparisons, Conclusions, and Silver Linings

The UK has always had a difficult time fitting in with the EU legislative and policy framework. The UK position was not assisted by the fact that there are significant differences between the UK labour system and those on the continent. There was no institutionalised system of worker representation and no requirement for employers to recognise or to bargain with labour unions.[159] Essentially, the UK system was and perhaps still is so different from the labour and employment regimes in continental Europe that the way in which Directives were drafted did not fit with the mechanisms of UK law.[160] The UK has struggled to comply with the requirements of EU social policy, due not only to its economically liberal stance and desire to maintain its sovereign power, but also to the differences in the Continental legal systems as compared to the UK common law system, on the former of which most EU law is based.[161] Rather, the UK was forced into a path that was not its natural direction in terms of both legal origins and policy objectives.

The UK, like Australia, has always embraced "master and servant" ideology for employment relationships, demonstrating a close connection in their developmental stages. The UK has also exhibited close connections to the neo-liberal approach in the USA, although with the continued adherence to welfare state ideals, which began outside of the EU's influence, it is unlikely that the UK will strip away the level of protections needed to align itself fully with the American model, in similar fashion to Canada's trend following the joining of NAFTA. That said, if a trade deal is not forthcoming with the EU, the UK may need to make itself more competitive in order to deal more closely with the USA on trade, which may mean some levelling of the protections that the UK has derived from the EU over the last forty years.

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[157] A Baker and I Smith, *Smith & Woods Employment Law* (10th edn, OUP 2010) 541.
[158] Gant (n 28) 154-162.
[159] Hepple (n 137) 435-437.
[160] See Bell (n 5).
[161] Gant (n 28) 135 & 164.

Given the sanctity the UK continues to give freedom of contract, and its continued resistance to interfering with that certainty, the approach to transfers of undertakings that more closely aligns with the pre-accession approach taken by the UK is evident in the Australian and Canadian approaches. Thus, it is more likely on balance of the path alignment that the UK will veer in the direction of either Canada or Australia, keeping protections in some circumstances, while re-establishing the pre-eminence of contractual freedom as was its preference prior to accession and as both Canada and Australia have continued to follow. However, the Australian labour system is significantly different from the UK given the effectiveness of compulsory arbitration, an aspect of the Canadian system that does not have the same strength. Thus, given the UK's equally and arguably more voluntarist tendency of labour framework, it could be that Canada is the more likely and closer companion in the race to the bottom with American trade competition.

Considering, however, the right leaning shift in the direction of the Government following the resignation of Theresa May and the succession of Boris Johnson, the last general election results in a Conservative majority, and the subsequent changes to the Withdrawal Agreement Bill to exclude workers' rights, the direction of social change is likely on the side of deregulation. Further, the cosying up with President Trump on trade further points to deregulation considering the likely expectations that any trade agreement with the United States will have, including a more level playing field to American standards, which are inarguably lower than current UK standards and certainly EU standards. That said, large social changes will not be without their obstacles.

Ripping out TUPE, or indeed any other protective regulation derived from the EU that as provided obvious benefits to workers, is likely to cause significant problems due to the length of time it and other EU provisions have been relied upon by UK employees. Given that amendments or repeals will rely on the authoritarian power of Henry VIII, particularly now that the 2020 EU (Withdrawal Agreement) Bill has extracted any protection for retained workers' rights, unions will note the undemocratic nature of any unilateral action and act to impede changes that adversely impact their constituents. However, ministers could instead take a more nuanced approach and consider that they have an opportunity to amend TUPE to balance business interests and employment rights within the UK legal framework. By taking a nuanced approach predicated on the size of a business and its ability to be rescued with the burden of transferred employment contracts and liabilities, ministers can provide continued certainty for employees affected by the insolvency of their employer.

Unfortunately, where once this writer saw a potential silver lining in the increased flexibility for the UK to ameliorate the conflict between employment protection and business interests as a result of Brexit, the potential partnership with the United States does not augur well for the impact on employees, not to mention consumers, that a potential race to the bottom of deregulation may have on the UK's welfare state. It does not bode well for the future of the UK's place in Europe as an exemplary welfare state or, indeed, the world.