LEGAL ORIGINS, LABOUR LAW AND THE REGULATION OF EMPLOYMENT RELATIONS

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A major question within comparative employment relations and comparative law has been how best to explain differences in the form that regulation takes in different national settings. Over the course of the last decade and a half, an explanatory theory of cross-national differences in regulatory arrangements in a wide range of economic and social domains, including labour law, has emerged. This approach emphasises the role of a country’s ‘legal origins’ in determining its regulatory style and, hence, its economic and social characteristics. Legal origins has proved to be one of the most influential theories in comparative economics, political science and law. It has, however, also proved highly controversial. For example, the following questions arise. To what extent can the insights from the legal origins theory be applied to understand cross-national differences in labour market regulation? To what extent can these differences provide an adequate basis to understand divergent outcomes in labour management practices and employment relations in different countries? Are such differences correlated with employment relations outcomes? And to what extent are legal origins effects disappearing over time? The aim of this chapter is to provide an overview of the theory of legal origins and its application to the study of labour law and employment relations.

1. Introduction

The proposition that a country’s legal institutions and regulatory approach are likely to condition the operation of labour markets and employment relations has been a persistent theme in the social sciences. Even in a period in which it was often presumed that globalization would undermine the distinctive institutional features that distinguish one national system from another (Mills et al. 2008), the idea that countries could be classified into different ‘families’, ‘types’ or ‘varieties’ has persisted. Indeed, over the course of the last decade, it has again emerged as one of

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the most important questions among economists, political scientists, sociologists and other social scientists, including those in the field of industrial relations. This renewed interest in comparing national institutions is not merely a response to globalization; it is also a consequence of the transition of former socialist economies in Eastern Europe and Asia to market economies, and the rapid growth of the developing economies of South-East and East Asia.

One of the most influential approaches in classifying and analysing national institutions to emerge in the 1990s has been this theory. The theory of legal origins emerged in the late 1990s from the work of a group of economists located principally at Harvard and Yale Universities and at the World Bank (Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert Vishny – collectively referred to as LLSV). In a series of highly influential articles, these authors argued that there is a strong empirical correlation between a nation’s regulatory style and the origin of its legal system. This approach has been particularly prominent in comparative law and comparative economics, and the core journal articles authored by LLSV have been among the most widely cited research in business and economics over the past decade.

The influence of legal origins theory has not been limited to academic debates. The research it spawned has formed the basis of ranking systems, such as that deployed in the World Bank’s Doing Business reports (2004-2010), which evaluate the extent to which countries adopt ‘business-friendly’ regulatory frameworks.

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2 Legal origins theory shares some common ideas with a number of alternative approaches, most particularly, the ‘varieties of capitalism’ literature and business systems theory, both of which are dealt with elsewhere in this volume. The distinction between liberal and coordinated market economies, which is central to the varieties of capitalism approach pioneered by Hall and Soskice (2001), has a great deal in common with legal origins theory. Liberal market economies are typically aligned to common law countries, while coordinated market economies typically include civil law countries. There are, however, a number of important differences. Whitley’s (1992, 1999, 2005) business systems theory similarly draws connections between the regulatory approach, corporate governance and employment systems. For a discussion of the commonalities and differences between these alternative theories of comparative capitalism, see Jackson and Deeg (2006).

3 Thomson’s ISI rankings shows that Shleifer, La Porta and Lopez-de-Silanes are the three most cited scholars in related fields of business and economics. La Porta et al. (1999) is the third most cited paper in business and economics over the last ten years. See ISI Web of Knowledge <www.isiwebofknowledge.com>, last accessed on 30 October 2009.

4 See www.doingbusiness.org for details of the annual reports.
Countries which fail to do so, for example by passing laws ostensibly protecting labour, come in for regular criticism. Given the World Bank’s role in promoting economic reforms in developing countries, the agency’s adoption of the legal origins approach in several of its operations demonstrates that legal origins theory has clear and practical policy impacts.

The rapidly expanding legal origins literature has brought comparative law from relative obscurity to the forefront of international debates about business and labour market regulation. It has also resuscitated a taxonomy of legal systems that has long been controversial. Until recently, whether the ancestry of a country’s laws could be traced to English common law or French civil codes did not seem to be especially relevant to the operation of its labour laws, let alone economic resource allocation. Now, many influential economists claim that that legal ancestry is not only a relevant but a dominant factor in determining a country’s approach to regulation and, consequently, its economic performance. Many social scientists will view this claim with surprise. Is not political context, for example, more important in shaping a country’s labour institutions than the early history of its legal system? However, the influence of legal origins theory on international agencies and the large number of publications citing or critiquing the approach compel scholars and policy makers to take its claims very seriously.

This pervasive influence suggests that legal origins theory deserves examination in a book on comparative labour relations. The aim of this chapter is, therefore, to provide a critical overview of the theory of legal origins, both in general terms and as it relates specifically to comparative labour law and industrial relations. The chapter begins by explaining what is meant by ‘legal origins’ and how it has been deployed to compare and assess regulatory arrangements in different countries. We then look at some of the main criticisms of the legal origin approach, both conceptual and methodological. We conclude by considering, in brief, some of the implications which arise from an application of legal origins theory to employment relations institutions and outcomes.
2. Comparative Law and the Theory of Legal Origin

*The Concept of Legal Families*

Comparative lawyers have long sought to categorise legal systems, although there is much disagreement about the usefulness of the various taxonomies that have been devised (Biddulph and Nicholson, 2008). One basis of classification is to trace the historical source of a country’s key legal concepts and institutions, its legal origins. This approach has led many comparative lawyers to group countries together in ‘legal families’.

One of best known attempts to classify countries in this way, one which has been particularly influential in the writing of the main progenitors of the legal origins literature, is by German scholars Zweigert and Kötz (1998). They claim that each family has its own ‘legal style’ (Zweigert and Kötz, 1998, pp. 63-73). Legal style is determined by five factors: a legal system’s historical development; its distinctive mode of legal reasoning; its legal institutions; its sources of law; and its ideology. This last factor is defined by Zweigert and Kötz as ‘a religious or political conception of how social and economic life should be organised’ (Zweigert and Kötz, 1998, p. 72). This concept of ‘legal style’ (and the closely related term ‘regulatory style’) assumes central importance for legal origins scholars (see La Porta et al., 2008, Djankov et al., 2003).

In the third edition of their major work published in 1998, Zweigert and Kötz, identify four ‘great legal systems of the world’, all derived from Europe. Among these four great systems, one, the ‘Nordic’ legal family, is confined to Scandinavia. This means that the large majority of the world’s countries are grouped into the remaining three families.

One of these legal families consists of those jurisdictions whose legal style is said to derive from England. This is the ‘Anglo-American’ or ‘common law’ legal family. This family is largely co-extensive with former parts of the British Empire and includes most of the United Kingdom, the United States and Canada, as well as many

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5 Note that this is different from examining how the rules were introduced (e.g. colonization, voluntary adoption), which is also of interest to many comparative lawyers.

6 They also treat as residual categories Chinese and Japanese law, as well as religious legal systems (‘Islamic and Hindu Law’). These categories are described rather cursorily and inaccurately, in comparison with the ‘four great legal systems’. The third edition also excises a section appearing in previous editions on the ‘socialist’ legal family, presumably in view of the collapse of communism in Europe.
jurisdictions in the Asia-Pacific, Africa and the Caribbean (including Australia, India, Malaysia, Kenya, Hong Kong, and so on). Characteristic of this family is the prominent role of the judge and of judgments in creating the central principles of private law.

Even more numerous are jurisdictions that are classified as part of the French or ‘Romanistic’ legal family. One of the main characteristics of this group is the fact that the fundamental doctrines of private law (contract, property, inheritance and so on) are to be found in codes, rather than in the decisions of courts (as is the position with the common law). This means that judges in the French civil law family have, at first glance, less capacity to mould the law than those in common law countries. This is partly a consequence of the formative period of modern French civil law. The French codes, although infused with concepts dating back to Roman law, were first enacted during the Napoleonic era, when the state desired to comprehensively set out the law, and to curb the power of judges. With the French conquest of much of Europe, the codes spread through that continent to countries including Spain and the Netherlands, and subsequently into European colonies in Latin America, Africa, and to parts of Asia, such as Indonesia (Zweigert and Kötz, 1998, pp. 98-118).

German law, like French law, makes extensive use of codes to state central private law doctrines. Both jurisdictions (sometimes together with the sui generis Nordic legal systems) are therefore described as being part of the broad ‘civil law tradition’ in contrast to the common law. However, while influenced by French law, the modern German legal system was constructed almost a century later, when the country was in an advanced stage of industrialization (Deakin, 2009, p. 50). It has a sufficiently different ‘legal style’ in the minds of many comparative lawyers to warrant the creation of a separate legal family. This style includes a prominent role for academic jurists, the influence of distinctive philosophical concepts such as the Rechtsstaat (‘state of law’) and a more expansive role for judges and judgments than in the French system. Many jurisdictions share features derived from German law or from related systems such as those of Switzerland and Austria. This is largely as a result of voluntary adoption rather than (as is the case with the other two families) colonization. Thus, several Eastern European states have many features derived from

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7 This term is confusing because it also refers to private or non-criminal law; thus, it is possible to speak of the civil law doctrines within common law systems.
German and Swiss law. German and/or Swiss law has also provided a model for parts of legal systems in East Asia, including those of Japan, South Korea and Taiwan and, more recently, China.8

*From Legal Families to Legal Origins*

The taxonomy of legal families long remained the preserve of comparative lawyers. That has now fundamentally changed. Beginning with two ground-breaking studies in 1997 and 1998, legal origins economists have been the leading proponents of the contention that a country’s legal origin has significant impacts on its economic performance (La Porta et al., 1997 and 1998). The initial studies examined financial law, specifically laws protecting business investors external to the firm (shareholders and creditors) from expropriation by corporate insiders, using a sample of forty-nine countries.

As these scholars were economists, not comparative lawyers, their methodology was quite different from those who had developed the concept of legal families. Instead of providing detailed descriptive accounts of rules and institutions – the preferred methodology of comparative lawyers – they employed a ‘leximetric’ approach (see Lele and Siems, 2007 and Siems, 2005). This approach involves the quantitative measurement of the economic effects of legal rules on businesses and other economic actors. More particularly, it involves identification of a specific area of regulation, such as the law pertaining to the rights of minority shareholders or casual employees, then comparison of a selection of rules applicable to these groups. The rules are given a numerical value, assigned according to, for example, the level of protection provided to minority shareholders or casual employees. This conversion of legal rules into numbers enables each country to be coded.9 Statistical analysis can then be used to compare the ‘rigidity’ of different legal systems and the consequences for a wide range of economic outcomes.

On the basis of this approach, La Porta and his colleagues purported to show that levels of protection provided to shareholders varied systematically depending on the legal family to which a country belonged, with common law countries being most protective and members of the French civil law family least.

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8 See below, footnote 14.
9 For the purposes of constructing an index of the degree of regulation, all variables are normalised to take a value of between zero and one, and all variables equally weighted in the final index.
In the ensuing years, LLSV and their collaborators and other scholars adopting a similar methodology, extended their analysis to many areas of business law, producing three general categories of research findings relating to: (1) investor protection (2) government regulation of economic activity (including labour market regulation) and (3) the judiciary and judicial enforcement of contractual and property rights. These findings were reviewed in a survey of the legal origins literature published by three of the original authors (La Porta, Lopez-de-Silanes and Shleifer, 2008). They conclude that:

In all these spheres [of law], civil law is associated with a heavier hand of government ownership and regulation than common law. Many of these indicators of government ownership and regulation are associated with adverse impacts on markets, such as greater corruption, larger unofficial economy, and higher unemployment… In still other studies, we have found that common law is associated with lower formalism of judicial procedures and greater judicial independence than civil law. These indicators are in turn associated with better contract enforcement and greater security of property rights (La Porta et al., 2008, p. 286).

The explanation for these correlations is said to lie in a legal family constituting an ‘involuntary transmission of different bundles of information across human populations’ (La Porta et al., 2008, p. 287). Drawing on Zweigert and Kötz’s concept of legal style, the legal origins scholars observe that when a legal system is transplanted (say from France to Spain, Germany to Korea, or from England to New Zealand), it is not only ‘black letter’ laws which are conveyed but also the underlying features and values of the originating system, such as its distinct institutional structures and ideological perspectives. LLSV argue that, historically, the common law, being fearful of abusive state control, tended to limit governmental interference in markets and permit more assertive and independent judges whereas the civil law (at least from the Napoleonic period during which the French codes were devised), being fearful of disorder, supported stronger government intervention and a weak role for judges. These differing ideologies, which have been transmitted around the globe through colonization and adoption, continue to exert a powerful impact today, outweighing political influences (such as whether a country has a social democratic or

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10 While these authors contrast civil law and common law in this and many other passages, it is clear from their studies overall that the principal contrast is between Anglo-American law and French law. In several of the regression studies, the German and Nordic jurisdictions (in aggregate) are much less associated with adverse market impacts that the French legal systems.
neo-liberal government), national culture or historically significant events (La Porta et al., 2008, p. 287).

In terms of the precise mechanism through which legal origins continue to have an impact on economic outcomes, legal origins scholars point to at least two possible mechanisms. One is that civil law systems are prone to greater political ‘interference’ because their alleged preference for statutory law over judge-made law exposes them to the attempts of legislators to mandate solutions to social problems. These solutions may be market-restricting, especially in the event of rent-seeking by interests supporting a legislative measure. The common law, given its claimed predilection for judge-made law, is said to be less vulnerable to these pressures, and less market-distorting. A second claimed advantage of common law systems is their adaptability. As judge-made law develops incrementally, and in response to specific cases, it is said that it gradually improves over time, in the sense that it becomes more responsive to changing business needs.

While La Porta et al. consider that the diverse regulatory patterns are likely to continue, they have predicted continued movement towards the ‘market-supporting regulation’ favoured by common law systems (La Porta et al., 2008, p. 327). The timing of this prediction has, however, proved to be a little unfortunate since it rested on the assumption that the world economy would remain ‘free of war [or] major financial crises’, circumstances under which they acknowledge civil law approaches to regulation may be advantageous (La Porta et al., 2008, p. 327).

3. Critiques of Legal Origins Theory

Unsurprisingly, given its generally negative view of civil law jurisdictions and of government intervention (at least when the world is not awry), the legal origins literature has come under intense scrutiny. Despite the increasingly sophisticated methodology of its proponents, central contentions of legal origins seem startling; for example, is it really the case that France, Germany, Japan, China, Sweden and Switzerland have greater in-built legal impediments to efficient resource allocation than the United States, India, Australia or Ireland? Is the fact that a country has a predominantly social democratic political history, as opposed to a conservative one,

11 For a more detailed discussion of the benefits and pitfalls of political interventions in a legal origins framework, see Djankov et al. (2003) and Glaeser and Shleifer (2002).
really less significant for its labour law than the ancestry of its private law? Critiques have come from a variety of directions, not least from labour scholars.\textsuperscript{12}

\textit{Classification and Hybridity}

One line of criticism maintains that the principal legal origins scholars (being financial economists, not lawyers) – misclassify the legal systems that they are attempting to study. It is argued that their division of world legal systems into (largely) the common law and French and German civil law traditions is overly simplistic, failing to take seriously enough the extensive comparative law literature demonstrating the limitations of the legal families concept.

Most comparative lawyers treat the taxonomy of legal families with considerable caution, and sometimes scepticism.\textsuperscript{13} A major difficulty is that many jurisdictions do not readily fit into the legal family framework; there are very many \textit{hybrid} systems (Örücü, 2004 and Siems, 2007). Even in the ‘core’ common law countries of the United States, the United Kingdom and Canada, the legal systems of Scotland, Louisiana and Quebec operate with many civil law elements. Moreover, in discrete areas of law, such as capital markets and corporate governance, internationalisation and international conventions have been associated with varying degrees of hybridisation, rather than convergence, of legal systems (Clift, 1997). But entire countries defy easy classification. For example, Sri Lanka, Israel, South Africa, the Philippines, and Thailand have mixed common and civil law legacies. Brazil, Turkey and Greece have both French and German features. In many countries, indigenous or religious legal traditions remain highly significant and are a source of legal rules even in commercial settings. Islamic societies are the most obvious examples of this (see, for example, Lindsey, 2007). Indeed, the multiplicity of influences on the laws of South-East Asian countries has led Andrew Harding (2002, p. 49) to assert that, in this region, the concept of legal families ‘makes no sense whatsoever’.

Again, countries in transition from socialist legal systems, such as China and Russia, do not fit comfortably into the legal origins classification of legal families.

\textsuperscript{12} For critiques focusing on labour law/labour market economics perspective, see the very helpful literature review by Lee, McCann and Torm (2008).

\textsuperscript{13} For critical analyses of taxonomies, see Rosen (2003). Some comparativists argue that other points of analysis yield better insights into legal diversity, such as a focus on the social context of law; see, for example, Nelken and Feest (2001) or, less plausibly, whether law is ‘traditional’ or ‘modern’; see Mattei (1997).
(Partlett, 2008). In 2004, China was classified by legal origins scholars as a socialist legal system (Botero et al., 2004), but as a member of the German civil law family in the 2008 review (La Porta et al., 2008, p. 288) because it was claimed German law has been the major influence on its commercial law. However, as Mathias Siems (2007a, p. 66) has pointed out, China’s commercial law has multiple influences and, unlike Germany, it does not (yet) have a civil code.14 The example of these two major transition economies also illustrates that legal systems are dynamic, and even their fundamental elements can undergo radical change.

Further, some countries might be grouped into different families depending on the area of law that is considered. Zweigert and Kötz themselves make this point when they note that while England and the United States on the one hand, and Germany and France, on the other, display a common legal style in relation to private law; in constitutional matters, England is more similar to France and the United States to Germany (Zweigert and Kötz, 1998, p. 64). This is unsurprising since the ‘legal family’ distinction was developed predominantly to examine long standing areas of private law, such as rules for making various kinds of contract and for passing property. These were areas which, at the end of the nineteenth century, were largely governed by judge-made law in the common law countries and by codes in the civil law states. However, even, in this field, the distinction between systems is blurred. In common law states, very many forms of contracting are now closely regulated by statute (see, for example, Collins, 1999). Conversely, judge-made law has become important for adapting codes in civil law countries to new situations.

Moreover, the areas of central concern to the legal origins scholars are mostly governed by statute in both common law and civil law countries. Thus, as LLSV acknowledge, labour and financial markets (Roe, 2006) are extensively regulated by legislation in both common and civil law countries (Braithwaite and Drahos, 2000). While the legal origins scholars contend that common law statute making is heavily imbued with judicially-inspired concepts, Deakin has challenged this view, suggesting that most of the business law innovations, even in the nineteenth century were in fact statutory (Deakin 2009, p. 51). For example, many of the distinctive doctrines of

14 China has been quite eclectic in choosing models for its reconstructed legal system. American influence, for example, has been extensive. For overviews of its legal system; see Chen (2008) and Peerenboom (2002). China has a uniform Contract Law and General Principles of the Civil Law. However these two laws do not constitute a code in the same way as the French and German models do.
labour law developed in common law countries were located in longstanding Master and Servants Acts, even well into the twentieth century (Hay and Craven, 2004).

The Importance of History and Politics

LLSV respond to these critiques by acknowledging hybridity and the role of statutes in common law countries, but assert that ‘generally a particular legal tradition dominates in each country’ (La Porta et al., 2008, p. 288 and pp. 306-309)\(^{15}\) and that despite changes in specific legal rules, the underlying style of the originating legal system persists: ‘[s]uccessive generations of judges, lawyers, and politicians all learn the same broad ideas of how the law and the state should work… it is [this] incorporation of beliefs and ideologies into the legal and political infrastructure that enables legal origins to have such persistent consequences for rules, regulation, and economic outcomes’ (La Porta et al., 2008, pp. 307-308).

This idea of an underlying disposition transmitted through time and space and influencing social and economic outcomes is plausible. Even some of the sharpest critics of LLSV note that the orientation of business rules (such as the extent of mandatory requirements) can differ according to a country’s legal family (Deakin 2009, p. 42). However, these critics contend that the existence of such a disposition does not obviate the need for close analysis of how strongly and in what respects a disposition manifests itself in modern legal systems. In any one country, other influences may be at least as significant. Thus, Pistor and her collaborators have found that, in relation to corporate regulation, while membership of a legal family is an important factor in accounting for the style of corporate regulation in originating countries (England, France), in transplant countries corporate law evolved quite differently from the original model – with several cases of both stagnation and erratic changes (Pistor, Keinan, Kleinheisterkamp and West, 2003). Similarly, a number of researchers have highlighted the role of related factors such as colonisation and language which may be important (Siems, 2007b; Acemoglu, Johnson and Robinson, 2001).

\(^{15}\) They also make the highly questionable assertion (at pp. 290-291) that the increasingly extensive use of legislation in common law countries does not imply the decreasing importance of judge-made law. Contrast this with Collins’ (1999) influential study arguing that ‘legal systems are in process of transition from the dominance of traditional private law regulation to one where welfarist regulation increasingly provides the basic discourse of the legal regulation of contracts’ (at p. 8).
Other critics have stressed the relevance of politics. For example, Roe, writing about corporate regulation, has argued that it is not so much legal origins that prevents a country from adopting market friendly regulation, but political history (Roe 2006). Thus European governments sought to restrain capital markets and protect labour, as their populations, devastated by World War II, did not support pro-market policies. This was not simply a consequence of the greater ‘political interference’ in the law permissible in civil law societies (according to LLSV), but because of specific exogenous historical events. LLSV contend that Roe misinterprets the empirical evidence, and that their data and regressions demonstrate that political variables, while significant, are not as important in explaining variation in legal rules as legal origins (La Porta et al., 2008, p. 321).

The Leximetric Problem

The debate between Roe and legal origins scholars illustrates that the quantitative measurement of legal rules and statistical analysis of the resultant data is another of the more contentious aspects of the debate over legal origins theory. Another line of critique is directed at this leximetric methodology and argues that the leading legal origins exponents have made multiple methodological errors. Deakin and Siems, and their collaborators, claim to have identified, and sought to correct, many of these. They have begun to produce their own leximetric data in relation to shareholder, creditor and worker protection. These results come to quite different conclusions from the legal origins scholars (Ahlering and Deakin, 2007; Siems and Deakin, 2009).

First, they maintain that legal origins researchers have tended to compare formal legal rules rather than ‘functional equivalents’. While the concept of functional equivalents is not uncontroversial in comparative law (Legrand and Munday, 2003), it has the merit of directing attention, when comparisons are made, not simply to the formal law but to wider forms of regulation which interact with those formal rules. Thus, in many countries, labour markets are not merely regulated by statute, but by collective agreements and/or industry awards. If these are excluded from consideration, a misleading impression will be created as to the rules in place and a country will be incorrectly coded. Similarly, failure to deal adequately with the distinction between the ‘law on the books’ and the ‘law in action’ (that is, whether it

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16 Although other methods are used, see, for example, Djankov, Hart, et al. (2008).
is actually implemented and enforced in practice) can generate error. Although several of the later legal origins studies do attempt to address questions of enforcement (Djankov, Hart, et al., 2008), it is difficult to identify without close socio-legal study the interplay between legal rules and actual behaviour (Ahlering and Deakin, 2007, p. 884).

Second, in coding countries, the legal origins scholars weigh each variable equally, and they are simply aggregated, even though they may not be equally important. For example, it is not self-evident that the variable in Botero et al.’s (2004) study of labour market regulation concerning termination rights should be treated equivalently to that relating to whether there is a right to establish a works council. Deakin et al. (2007) also highlight the fact that different rules may have differential impacts across sectors and, consequently, may need to be weighted accordingly in different national settings. Thus, while strong employment protection is likely to represent a significant area of labour market regulation in those sectors where product market demand is volatile or subject to fluctuations, it may have significantly less importance in a more capital intensive sector or where markets are more predictable.

Third, most empirical research testing the claims of legal origins theory research is cross-sectional, not longitudinal. Thus it fails to capture developments within legal systems over time. As the work of Pistor et al. and more recently Deakin et al. has illustrated, legal systems can change markedly, even radically, over time and a static analysis will ignore this. Deakin and collaborators have constructed times series data on shareholder, creditor and worker protection for the period 1970 to 2005 for five countries: the originating jurisdictions of England, France, Germany and the two major ‘transplant’ countries of the United States and India (Amour, Deakin, Lele and Siems, 2009). They find that each of these areas of protection show diverse patterns of change, with only the area of labour law showing some evidence of a clear legal origin effect. To this extent, the more detailed, historically nuanced, approach of Deakin and his colleagues suggests that the differences between legal families, and their effects, are not as dominant as legal origins scholars have proposed. They describe this as evidence of distinctive legal cultures, rather than differences in the
source of legal rules. These different legal cultures, they suggest, are manifest in different ‘legal ground rules’, which:

...allocate responsibility for the control of economic relationships differently in the common law and civil law... Thus in civil law, the tendency is for freedom of contract to be socially conditioned when, in common law systems, it is formally constrained (Ahlering and Deakin, 2007, p. 901).

4. Legal Origins and the Regulation of Labour

While international comparisons between industrial relations and labour law jurisdictions are common in academic writing, until recently little emphasis had been placed on the concepts of legal family and legal origin. Consequently, in seeking to account for differences between labour law regimes, scholars have focused on factors such as political context or the difficulties associated with transplanting a foreign legal model (Teubner, 1998; Cooney et al. 2002).

The widespread interest in legal origins as a mode of analysing differences between labour law systems is thus a very recent phenomenon. Legal origins scholars turned their attention to labour market regulation in 2004 with the publication of ‘The Regulation of Labor’ (Botero et al. 2004). Continuing with their leximetric methodology, Botero et al. evaluated labour and social security law across more than 60 dimensions in 85 countries by scoring each jurisdiction in relation to a number of variables based on specific legal rules purporting to protect employees. The more a law was evaluated to impose a cost on employers, or to restrict the capacity of an employer to make an unconstrained choice, the higher the value it was assigned. For example, their variable concerning ‘the cost of dismissal’ measured the cost of firing 20 percent of the firm’s workers; while a variable capturing the costs of using non-standard employment arrangements measured the extent to which alternatives to the ‘standard employment relationship’ were legally permissible. If the labour law of a particular country placed considerable restrictions on termination or on the engagement of workers on a non-standard basis – such as prohibiting the use of fixed term contracts for ongoing tasks – a value close to one would be assigned.

17 The term ‘legal ground rules’ derives from the work of Pistor, who along with Deakin has been one most forceful critics of legal origins theory; see Pistor (2006).
18 A longstanding well known example is Kahn-Freund (1974).
19 In order to compare dismissal costs across jurisdictions, it was further assumed that 10 percent were fired for redundancy while the other ten percent were fired without cause.
To enable aggregation, the scores from each of the individual variables were first normalised to take a value of between 0 and 1, and then aggregated by calculating the mean value of all variables that form the sub-indices of the extent of regulation in three areas of labour law: employment laws; collective relations laws and social security laws. Finally, the overall labour market regulation index for each country was calculated as the mean of these three sub-indices.

Botero et al. (2004) found that there was a strong relationship between high aggregate scores on these indices and legal origin, much stronger even than the relationship between labour laws and the political orientation of the enacting government. Consistent with their earlier studies, the authors found that the civil law countries, and especially those in the French civil law family, were, overall, more protective of labour (or, from the authors’ point of view, less protective of business investors) than those of common law origin. The authors went on to consider correlations between these aggregate variables and several indicators relating to the health of a country’s labour market (including size of the unofficial economy, workforce participation and employment rates). They found that the more protective labour regulation associated with the civil law countries had generally ‘no benefits, and some costs’ (Botero et al., 2004, p. 1375). These costs included a larger informal sector, higher unemployment (especially youth unemployment) and lower male workforce participation. However, the statistical significance of most of these results was found by Botero et al. to be weak.

The analysis in Botero et al. (2004) study of labour market regulation was soon taken up by the World Bank in its Doing Business project. Its ‘Employing Workers Index’, which is based on the employment law variables in Botero et al. (2004) ranks countries according to the degree to which their labour laws allegedly impede business. Countries are accordingly praised for making working hours more flexible, reducing compensation for dismissal and reducing restrictions on non-standard work (World Bank, 2009).

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20 The authors contrast New Zealand and Portugal.
21 These findings are similar to the recent labour market analyses which (without invoking the concept of legal origins) claim negative effects for many forms of regulation intended to protect labour; see, for example, Haltiwanger, Scarpetta and Schweiger (2006) and Poschke (forthcoming).
Qualifications, Extensions and Challenges

Beyond the landmark study conducted by Botero et al. (2004), a number of more recent studies have now been published which examine the interaction between legal origins, labour law and its consequences. Some of these were concerned principally with critically reviewing the application of the leximetric approach to the study of labour law, whilst others have been concerned with qualifying and extending it.

One of the most wide ranging methodological critiques is provided by Pozen (2007). He concludes that ‘the methodological weaknesses’ of Botero et al. (2004) ‘severely undermine its putative contributions’ (Pozen 2007). His critique highlights three main problems with the way Botero et al. have measured and assessed the relationship between legal origins and labour market regulation: measurement and coding issues; omitted variables; and ahistoricity. All three parallel to a degree the critiques that have been directed at legal origins research more generally. Scholars at the International Labour Organization have also drawn attention to the unrepresentative nature of the model ‘business’ and ‘employee’ used in the Botero research; they are atypical in developing countries, in particular (Lee et al., 2008; Berg and Cazes, 2007).

The most significant group of studies which attempt to rework the leximetric approach has been those conducted by Deakin and his colleagues (Ahlering and Deakin, 2007; Amour, Deakin, Lele and Siems, 2009; Deakin, 2008 and 2009; Deakin, Lele and Siems, 2007; Deakin and Sarkar, 2009). These authors accept that there are ‘significant differences in regulatory style between the common law and civil law’, and that these may ‘hamper the flow of ideas from one system to another’ and, conversely, that they may ‘facilitate the exchange of legal models within the main legal families’ (Deakin et al., 2009, p. 137; emphasis in original). ‘To that extent, a legal origin effect could be expected to arise from the division of systems into different legal families’ (Deakin et al., 2009, p. 137). As we have noted above, however, the legal origins arguments are criticised by Deakin as overstating, or misstating, the role of legal origins in legal evolution. Deakin, Lele and Siems (2007) stress, in particular, that the strength of a legal origins effect ‘would differ from one

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context to another’, and that it cannot be assumed *a priori*. Thus, the impact of legal origins is a matter for empirical analysis (Deakin et al., 2007, p. 137-141; Jones and Mitchell 2008). Important issues to be taken into account include the extent to which foreign legal rules may be adapted to local economic, cultural and political conditions (endogenization), the strength of ‘opposing tendencies for the convergence of legal rules’ deriving from various harmonising and transnationalizing influences, and particularly the timing and nature of legal innovations in relation to the process of industrialisation. Rather than a strong ‘functionalist’ legal origins effect, the force of legal origin depends on ‘context’: this is a ‘weak’ legal origins effect (Deakin et al., 2007, p. 141).

Deakin et al. (2007) illustrate the importance of the timing of industrialisation by reference to the evolution of British labour law (this was referred to briefly above). When the process of industrialization commenced in Britain, the old forms of labour regulation based on master and servant laws and feudal obligations of service were still extant, whereas in Europe the codified private law of contract was already in place at the time of major scale industrialisation (Deakin, 2008). In Britain the old forms of regulation persisted into the late nineteenth century (and in its colonies, for much longer), continuing the tradition of strong managerial prerogative through ownership, and employment as service, enforced through criminal sanctions. In regulating labour markets it was these ideas, in the form of different variants of master and servant legislation, that were passed on to the British colonies rather than the idea of the ‘efficiency’ of free contracting between the autonomous parties to industrial relationships (Hay and Craven, 2004). The contract of employment as it is now understood in the common law world did not fully emerge in Britain until the 1920s-1930s (Deakin 1998, 2009).

The Deakin studies can also be distinguished from the Botero et al. (2004) study of labour market regulation in terms of how labour law is measured. Although the Deakin studies have adopted a leximetric approach to investigating cross-national differences in labour law, the authors have discarded some of the variables used in the Botero et al. index,\(^{23}\) and have adopted a longitudinal index, charting labour law

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\(^{23}\) The index of labour market regulation developed by Botero et al. includes measures of social security. Neither these measures, nor any equivalent measures of social security provisions, are included in the index constructed by Deakin, Lele and Siems.
regulation from 1970 to 2005, thus allowing for investigation of legal evolution over time rather than at a fixed historical point. In compiling their index the authors have also accounted for the role of self-regulating mechanisms (such as collective agreements), and the extent to which laws were mandatory or capable of modification by the parties (default rules). Unlike the Botero et al. study, Deakin et al. (2007, p. 44, footnote 9) also cite specific sources for each of their variables.

Together with our colleagues Shelley Marshall and Andrew Stewart, the present authors have applied an approach similar to Deakin’s and completed a longitudinal coding of Australian labour law (Mitchell et al., 2009). This coding suggests that ‘the timing of stages of economic development, perhaps the type of labour market and industry structure, and changes in the political environment, may be more important for explaining the direction of legal evolution than legal origins’ (Mitchell et al., 2009, p. 37). There is nonetheless, some evidence of a weak legal origins effect; that is, the protective strength of Australian labour law tends to resemble other common law jurisdictions (such as the US and UK, much less so India) more than it does civil law jurisdictions (Germany and France), but with significant variation over time.24

Other labour law researchers engaging in legal origin debates have questioned the implicit normative commitments associated with legal origins measures. For example, Lee and McCann have argued strongly that the negative evaluation of working time regulation in Botero et al. (2004) and the World Bank’s Doing Business reports conflict with International Labour Office (ILO) Conventions (Lee et al., 2008). They maintain that there is a fundamental failure to appreciate the potential benefits of labour regulation, such as the positive health impact of limiting excessive working hours or restrictions on arbitrary and discriminatory dismissal (Lee et al., 2008, p. 421-422).

Lee et al. (2008) also question the claimed link between ‘deregulated’ jurisdictions and prosperity. They point out that the Botero et al. methodology as applied in Doing Business leads to highly questionable evaluations, when specific countries are considered. Thus, employment flexibility in Haiti, Afghanistan and New Guinea is ranked more favourable than for Finland, the Netherlands and Sweden, despite the

24 Details of the data used in this study and a full report are available from: <www.buseco.monash.edu.au/mgt/research/acrew>.
manifestly superior employment and productivity performance of the latter group. As a result of these and other concerns, the World Bank Group decided to revise the Employing Workers Indicator in 2009 and suspended its use for policy purposes.

5. Consequences of Legal Origins for Employment Relations

Much of the legal origins literature has been concerned with identifying whether legal origins have shaped the *style* and *extent* of government regulation in different domains of economic activity. As we have seen, the essential logic of legal origins theory has been applied to labour market regulation and labour law. Although considerable debate remains over the *extent* to which legal origins effects are evident, even the fiercest critics of the legal origins research accept that a country’s legal origin has significant consequences for the form and extent of labour market regulation. What is not clear from the discussion so far, however, is whether these effects on labour law have clear consequences for employment relations and labour management practices.

*Globalisation and the Consequences of Legal Origins*

This issue is particularly salient given the question of how the changing economic environment and globalisation have undermined cross-national differences in labour market regulation and patterns of employment relations. A major debate within the social sciences has been the extent to which public policy and regulatory arrangements in different countries have, over time, converged. A key concern in this debate has been the extent to which labour standards and labour law have converged across national settings, particularly as globalisation has created pressures on countries to adjust regulatory settings to promote competition and direct foreign investment (see Drezner, 2001, for a review of this literature). While the precise meaning of the term convergence in this context is somewhat ambiguous, it has been

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25 In 2009, for instance, Azerbaijan and Burkino Faso were complimented for easing restrictions on fixed-term contracting and removing dismissal requirements. On the other hand, China was criticized for making dismissal more difficult (because of its landmark Labour Contract Law), the United Kingdom for increasing paid annual leave, and Sweden and Korea for increasing restrictions on fixed-term employment.


27 Debates over convergence are typically traced to the work of Clark Kerr and his colleagues; see Kerr, Dunlop, Harbison and Myers (1960).
asserted that a process of convergence may reflect a number of forces (Drezner, 2005). Perhaps the most prominent view has been that economic forces of globalisation and competition have made it increasingly difficult for national governments to maintain distinctive systems of labour market regulation. From this perspective, it is generally argued that competition among countries to attract direct foreign investment is associated with a ‘race to the bottom’ – a tendency to reduce the protective strength of labour law to a common low standard (Braithwaite and Drahos, 2000). While there is substantial case study evidence of multinational corporations shifting production and jobs to low-cost countries (Tonelson, 2000), the evidence of a ‘race to the bottom’ effect on labour standards is at best mixed (OECD, 1996; van Beers, 1998). Legal scholars have suggested globalisation may nonetheless induce a level of convergence in legal systems towards a single model through the influence of international institutions (such as the World Bank) or via the influence of major economic powers. These influences may arise due to the perceived potential economic benefits associated with transnational harmonisation of legal rules, or as a direct consequence of the diffusion of more efficient rule making procedures among countries with diverse legal systems. Researchers using this argument suggest that globalisation is associated with a process of convergence towards a particular regulatory type, notably some variation of a common law model, which provides greater flexibility and a reduction in employment security (Keleman and Sibbitt, 2004).

While these arguments have been used to support the proposition that convergence is towards a single model, other scholars have hypothesised that convergence may involve a ‘bipolar convergence’ around two competing styles (Drezner, 2005). This may occur, for example, where rivalry between economic powers, ‘combined with increasing returns to scale of regulatory harmonization’, leads countries ‘to attract as many allies as possible’ (Drezner, 2005, p. 856). In the context of legal origins theory, this argument has been associated with the view that colonisation resulted in the transplant of legal systems from Europe to other countries, which were subsequently ‘locked-in’ and have remained divergent (Glaeser and Shleifer, 2003).

A third possible variation would suggest that there may be a degree of convergence between countries of different legal origins and legal cultures, without specifying the model to which those countries are converging. This type of argument would tend to indicate that other factors, such as economic and/or political unification, will
ultimately be more powerful than legal origins in driving convergence. Significantly, this process would potentially result in the creation of ‘hybrid’ legal systems which do not necessarily conform to the predictions of legal origins theory. For example, Deakin et al. (2007, pp. 152-153) suggest that, notwithstanding their different legal origins, the degree of convergence observed in the UK towards France and German, reflects its openness to European Union influences.

As most of the data collected by legal origins scholars is cross-sectional, it is not possible to make any assessment of any of these alternative convergence hypotheses from that source. However, longitudinal data on the protective strength of labour market regulation in a considerably smaller sample of countries has been collected by Deakin et al. (2007) and, more recently, supplemented by Mitchell et al. (2009). Figure 1 shows the value of the Labour Market Regulation Index over the period 1970 to 2005 for six countries for which data is available (Australia, France, Germany, India, United Kingdom, and the United States). Although the small number of countries makes it difficult to draw strong conclusions, the data illustrate a persistent legal origins effect on the protective strength of labour law.
To what extent does the data indicate convergence in the protective strength of labour law over time? Whilst the data do show that the level of labour market protection in many countries has ebbed and flowed over the period for which the data are available, it is difficult to conclude from Figure 1 that there has been convergence to any great degree. There is no evidence of a regulatory ‘race to bottom’ or convergence on a variant of the common law model of labour market regulation. Nor does the evidence support of a ‘bi-polar convergence’ around a common law and civil law models of labour market regulation.

Employment Relations Outcomes

The Botero et al (2004) data provides a broad indication of the way legal origins can influence a range of employment relations outcomes. In order to illustrate the
connection between legal origins and employment relations outcomes we have extracted from their data some indicative differences in labour market regulation across some legal families (see Table 1). Table 1 reports on variables that relate to three core sets of employment relations outcomes: the protection of worker entitlements, limits on managerial prerogative and forms of employee voice. Here the mean value for each variable is given for all countries (Column 1), and then for groups of countries in each legal family in subsequent columns. Statistically significant differences in the mean value between groups are reported for each variable, with common law countries as the base group.

Across most variables, it will be seen that common law countries have a weaker level of protection than other legal families. This is particularly evident in relation to the level of protection afforded to most worker entitlements. Moreover, common law countries are typically less likely than each of the civil law groups of countries to provide universal coverage of entitlements, notably through the extension of collective agreements to non-union workers. Compared with countries from other legal families, common law countries are, on average, significantly less likely to place limits on managerial prerogatives through, for example, restrictions on the use of fixed-term contracts or requirements to notify a third party (such as a government agency or union) of intentions to make workers redundant. With the exception of legal provisions providing for worker or union representation on company boards, however, legal protection for employee voice was not significantly different from that in other countries. Interestingly, with the exception of countries from the Scandinavian civil law family, there were no statistically significant differences in union density rates across common and civil law countries.

As noted earlier in this chapter, there are several reasons to be cautious in accepting the validity of this data, but it does serve the purpose of indicating the importance of the issue.

Countries designated as belonging to the socialist legal family are excluded. For common law countries, the test is for a statistically significantly difference in the mean value for each variable for common law countries as a group, compared with the mean value for each variable for all other groups combines. For all other groups, the test for statistical significance is between each group and the group of common law countries.
<table>
<thead>
<tr>
<th>Protection of Worker Entitlements</th>
<th>(1) All countries</th>
<th>(2) Common Law (n= 24)</th>
<th>(3) French Civil Law (n=32)</th>
<th>(4) German Civil Law (n=6)</th>
<th>(5) Scandinavian Civil Law (n=4)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Overtime Premium</strong></td>
<td>1.4 (0.25)</td>
<td>1.4 (0.25)</td>
<td>1.4 (0.05)</td>
<td>1.4 (0.05)</td>
<td>1.5 (0.00)</td>
</tr>
<tr>
<td><strong>Annual Leave Entitlement</strong></td>
<td>18.9 (7.37)</td>
<td>13.0*** (0.06)</td>
<td>21.7*** (1.00)</td>
<td>22.8*** (2.30)</td>
<td>25.8*** (1.89)</td>
</tr>
<tr>
<td><strong>Redundancy Notice Period</strong></td>
<td>4.7 (3.23)</td>
<td>4.4 (1.36)</td>
<td>4.5 (0.60)</td>
<td>4.6 (0.90)</td>
<td>8.1* (0.55)</td>
</tr>
<tr>
<td><strong>Redundancy Payment</strong></td>
<td>7.07 (0.60)</td>
<td>4.3** (0.74)</td>
<td>10.2*** (1.40)</td>
<td>5.7 (2.63)</td>
<td>0.0 (0.00)</td>
</tr>
<tr>
<td><strong>Extension of collective agreements</strong></td>
<td>0.5 (0.50)</td>
<td>0.3** (0.10)</td>
<td>0.6** (0.10)</td>
<td>0.7* (0.21)</td>
<td>0.8* (0.25)</td>
</tr>
<tr>
<td>Limits on Managerial Prerogatives</td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td><strong>Limits on use of fixed-term contracts</strong></td>
<td>0.4 (0.35)</td>
<td>0.1*** (0.06)</td>
<td>0.5*** (0.05)</td>
<td>0.4* (0.14)</td>
<td>0.4* (0.15)</td>
</tr>
<tr>
<td><strong>Limits on use of part-time contracts</strong></td>
<td>0.9 (0.28)</td>
<td>0.8 (0.07)</td>
<td>0.9 (0.04)</td>
<td>0.9 (0.08)</td>
<td>0.9 (0.13)</td>
</tr>
<tr>
<td><strong>Max. working hours (annual) before overtime is paid</strong></td>
<td>2088.5 (189.97)</td>
<td>2171.6*** (33.84)</td>
<td>2063.6*** (32.78)</td>
<td>2060.6 (77.89)</td>
<td>1831.0*** (30.0)</td>
</tr>
<tr>
<td><strong>Requirement to notify third parties of dismissals</strong></td>
<td>0.5 (0.50)</td>
<td>0.3** (0.10)</td>
<td>0.6*** (0.09)</td>
<td>0.3 (0.21)</td>
<td>0.8* (0.25)</td>
</tr>
<tr>
<td><strong>Requirement to gain approval from a third party to make dismissal</strong></td>
<td>0.2 (0.39)</td>
<td>0.2 (0.09)</td>
<td>0.2 (0.07)</td>
<td>0.0 (0.00)</td>
<td>0.0 (0.00)</td>
</tr>
<tr>
<td><strong>Limits on capacity to dismiss striking workers</strong></td>
<td>0.8 (0.40)</td>
<td>0.7 (0.10)</td>
<td>0.9 (0.06)</td>
<td>0.8 (0.17)</td>
<td>0.8 (0.25)</td>
</tr>
<tr>
<td>Employee Voice</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Right to join a union</strong></td>
<td>0.8 (0.40)</td>
<td>0.7 (0.95)</td>
<td>0.9 (0.06)</td>
<td>0.8 (0.17)</td>
<td>0.8 (0.25)</td>
</tr>
<tr>
<td><strong>Representation on Company Boards</strong></td>
<td>0.1 (0.29)</td>
<td>0.0** (0.00)</td>
<td>0.0 (0.03)</td>
<td>0.3*** (0.21)</td>
<td>0.8*** (0.25)</td>
</tr>
<tr>
<td><strong>Mandatory Works Council</strong></td>
<td>0.4 (0.49)</td>
<td>0.3 (0.10)</td>
<td>0.3 (0.08)</td>
<td>0.7 (0.21)</td>
<td>0.8 (0.25)</td>
</tr>
<tr>
<td><strong>Union Density</strong></td>
<td>0.3 (0.22)</td>
<td>0.2 (0.04)</td>
<td>0.2 (0.03)</td>
<td>0.3 (0.05)</td>
<td>0.8*** (0.02)</td>
</tr>
</tbody>
</table>

**Note:** See Botero et al. (2004) for full variable definitions. The table shows the mean value for each variable. Standard errors are in parentheses.

**Statistical significance:** *** p<.01, * p< 0.05, p<0.1. For common law countries, the test is for a statistically different mean for each variable from all other groups; for all other groups, the test is for statistically significant difference in mean value of each variable compared with the mean value for common law countries.
5. Conclusion

The application of legal origins theory to the study of labour law and employment relations is an emergent area of research which is generating both extensive scholarship and policy recommendations. As we have seen, legal origins theory has been subject to vigorous criticism, not least because the theory has been invoked to attack labour standards.

There are clearly many shortcomings in the approach taken by the original legal origins scholars to labour regulation. Despite its flaws, however, it does not follow that the attempt to find relationships between legal rules at particular points in time and socio-economic circumstances is uninteresting or unimportant. Certainly, any attempts will be beset with methodological difficulties and be provisional. Nonetheless, in suggesting that such relationships may exist (albeit not necessarily the ones they find) the legal origins scholars have opened up intriguing possibilities for research. Are there, for example, correlations between particular legal rules (such as those regulating the labour market) and/or particular legal styles and social indicators, such as those relating to poverty? Do reforms to particular legal rules really have much effect on resource allocation and economic performance if the nature of the legal system as a whole remains unchanged? How do laws protecting workers interact with those protecting shareholders and creditors? What is the relationship between legal rules and legal style and the ordering of employment relations within the business enterprise? What are the points of similarity and difference with alternative theories of business operations in market economies?

Work on these questions is just beginning, and we can expect a proliferation of illuminating and controversial findings in the near future.
References


