The Making of Labour Law in Europe

Edited by Bob Hepple

A Comparative Study of
Nine Countries up to 1945

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STUDIES IN LABOUR
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The Making of Labour Law in Europe

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PREFACE

This comparative study has been a long time in the making. In 1978 Thilo Ramm prepared an outline and recruited a group of legal scholars who each prepared a national report in response to an agreed questionnaire. The reports covered the then Member States of the EEC: Belgium (Eliane Vogel-Polsky), Britain and Ireland (Bob Hepple), Denmark (Ole Hasselbalch), France (Jean-Claude Javillier), Germany (Thilo Ramm), Italy (Bruno Veneziani) and the Netherlands (Antoine Jacobs), and account was also taken of Luxembourg. These reports were discussed at a meeting in Bad Schlangenbad in December 1979, and individuals were then assigned to draft the separate chapters. Drafts were discussed at a series of further meetings in Canterbury (September 1980), Bari (December 1980), Bordeaux (September 1981), Vught (May 1982) and Bari (May 1985). The drafts were rewritten in English by Bob Hepple, who also edited the book as a whole and prepared the various appendices. The book is thus a co-operative effort, although individuals have accepted ultimate responsibility for particular chapters.

Our purpose, more fully explained in the Introduction, has been to explain the origins of, and the relationships between, the labour laws of nine European countries in their formative period from the beginning of the industrial revolution until 1945, from the viewpoint of comparative law. This is not a 'history' in the traditional sense, but it will be obvious that we have drawn extensively on the writings of historians, sociologists and other social scientists as well as many now forgotten law books. We run the risk of being criticised by the historians for inadequate narrative, by the sociologists for a preoccupation with rules and institutions and by the lawyers for too little technical detail. But the subject has been sadly neglected, and we shall be satisfied if we stimulate a broader perspective in comparative law and in the study of comparative labour relations. We hope that our colleagues in Member States which joined the EEC after this study was begun, and elsewhere, will match their national experiences against the trends discussed in this book. The study could also now be carried forward into the period since 1945.

The book is likely to be used by students who have relatively little knowledge of the development of the constitutions, legal systems, political parties and trade unions of all the countries covered by this study. For their benefit we have included a short guide on these matters (Appendix I), a chronology of labour law from 1789 to 1945 (Appendix II) and comparative statistics (Appendix III). The selection of documents (Appendix IV), which has had to be limited for reasons of space, makes available in English a few examples of the diversity of labour laws in this period. The Bibliography (Appendix V) includes not only works from which direct quotations will be found in the text, but also a wide range of other publications on which the authors have relied.

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We acknowledge the permission of Macmillan, London and Basingstoke, to draw on statistics from *European Historical Statistics 1750–1970* by B. R. Mitchell, and from *European Political Facts 1848–1919* and *European Political Facts 1918–1973* by Chris Cook and John Paxton.

We received financial assistance from a number of sources to cover travel and some other research expenses. We express our gratitude to the British Academy; the Commission of the European Communities (grant for the development of joint programmes of study between higher institutions in the Member States); Ministero della Pubblica Istruzione (Italy); Ministerium für Wissenschaft und Forschung des Landes Nordrhein-Westfalen (Germany); the Social Science Research Council (Britain)/Deutsche Forschungsgemeinschaft research exchange scheme for social scientists; and the Danish Employers' Confederation research fund.

1. Attention is drawn to the article by Christopher Williams based on his experiences in this translation, 'Towards an Italian–English Glossary of Labour Law Terminology' in *The Incorporated Linguist*, vol. 22 (1983), pp. 70–7, and the comment by Martin Weston, ibid., pp. 207–11.

We had the advice of the late Sir Otto Kahn-Freund in planning this project. With the permission of his widow, this book is dedicated to his memory.

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INTRODUCTION

Bob Hepple

AIMS, METHODS AND SCOPE

The title of this book uses the word 'making' in order to underline the theme that labour law is part of a *process*. This theme stands in opposition to conceptions of labour law as a relatively static and neutral set of rules and institutions which regulate employment. The authors share the view that the rules and institutions are shaped by the historically given possibilities within which various sectional groups pursue their often conflicting objectives. Labour law is made by men and women in a society not of their own making.

This idea is far from being a new one. In recent years it has influenced, either explicitly or implicitly, a number of studies of national labour laws. However, save in the hands of a few masters of the craft, such as Kahn-Freund, comparative studies have tended to concentrate on narrow topics within a very limited time-frame. Sometimes there is a brief 'historical introduction', but then all ideas of process are forgotten as the author becomes immersed in the ephemeral details of the present. Much of comparative labour law remains in the age of still photographs and is only beginning to discover motion pictures.

What this book seeks to contribute to the understanding of labour law as part of a process, is an explanation of the relationships between the development of labour laws in a number of European countries, in the formative stages of those laws from the start of the Industrial Revolution until the end of the Second World War. Those relationships are of two main kinds. The first is the direct historical relationship of legal transplants. The second is the 'inner' social, economic and political relationship of parallel developments in different countries.

The adaptation of the model of nineteenth-century British factory legislation by other countries was described by Stephan Bauer (1924, p. 401) as being at least as important for humanity as the reception of

the Roman law of property and obligations. Bauer (1865–1934) was Secretary of the International Association for Statutory Workers' Protection, founded in 1901, and Director of the International Labour Office (ILO), which became an organ of the League of Nations in 1919. His claim was extravagant, not least because the British Acts cannot be compared with the Romanistic legal techniques which promoted national civil laws (see Ch. 2, below). But his analogy serves to emphasise the historical relationship between the labour laws of different countries.

Many other examples will be found in the pages of this book. These include the extraordinary influence of the *Code Napoléon* in the development of contractual ideas of the employment relationship in Belgium, the Netherlands, Luxembourg, Italy and the German territories west of the Rhine, long after the withdrawal of French occupation (see Ch. 1, below); the spread of Bismarckian-style schemes of compulsory insurance to the Netherlands, Luxembourg, Britain and later to most other European countries (see Ch. 3, below); the emulation in Britain of the German system of labour exchanges; the popularity of the Belgian (Ghent) system of publicly subsidised voluntary unemployment insurance in the Netherlands, Germany, Italy and France; and the inspiration given by Article 84 of the Weimar Republic's Works Councils Act of 1920 to the concept of unjustified dismissal throughout Europe (see Ch. 4, below). The internationalisation of labour law, especially since the foundation of the ILO, has accelerated this process of 'harmonisation upwards'. The ILO's conventions and recommendations are based on the practice of leading countries and have had an important influence on national developments (see Ch. 7, below).

The point is that many rules of national systems of labour law are either derived from or have been strongly influenced by other systems. The generalisation that 'borrowing (with adaptation) has been the usual way of legal development' (Watson, 1974, p. 7) is at least as true for labour law as it is for other branches of law. These borrowings prompt the question: Do transplantations survive, and if so, under what circumstances and with what adaptations? In considering this question, two theoretical insights are useful. The first belongs to Renner (1949): the same rule can have different functions at different times dependent upon changes in material society. To this Watson adds a comparatist's rider, that 'a rule transplanted from one country to another . . . may equally operate to different effect in the two societies, even though it is expressed in apparently similar terms in the two countries' (1974, p. 20). An example from the present study (see Ch. 1, below) is the material change in function of the Romanistic concept of *locatio conductio* (letting and hire) in the civil law countries to

support the employer's power of subordination and control of dependent workers in large-scale capitalist enterprises.

A second insight belongs to Kahn-Freund (1974): while the transplantation of rules directly regulating the individual employment relationship may be relatively straightforward, rules and institutions relating to collective labour relations are usually too closely connected with the structure and organisation of political and social power in a particular environment to be successfully imported elsewhere. The emergence of trade unions from illegality was a series of parallel developments rather than the adoption of 'models'; the timing and extent of the repeal of the bans on combinations and strikes was heavily influenced by national features such as the ideology and strength of the workers' movements, the stage at which the working-class was enfranchised and the power enjoyed by the judiciary within the different legal traditions of the common law and civil law systems. Moreover, there were different routes to trade union recognition, through positive legal rights in some countries such as Germany (1918–23) and France (1936–39), but by negative immunities and voluntary methods in Britain and Denmark (see Ch. 5, below). This did not, however, preclude foreign influences on specific matters. For example, German and French ideas moulded the law of collective agreements in the Netherlands (see Ch. 5, below), and Luxembourg copied the German law on works councils (see Ch. 6, below).

Historical relationships of the kind described are the most obvious form of connection between legal systems, including labour law. A second, far more complex object of comparative study is what has been described as the 'inner relationship' between systems (Watson, 1974, p. 8). At times the search for such a relationship has rested upon the belief 'now regarded as invalid . . . that mankind, with its common psyche, follows the same path of development in everything regardless of location or race' (Zweigert and Kötz, 1977, p. 8). The idea that a natural relationship exists between all early legal systems and that each system follows the same process of development until special national characteristics are imprinted upon it, was influential in the nineteenth century, through the writings of legal anthropologists such as Sir Henry Maine (1861). As recently as 1933 Edouard Lambert could write that the comparative history of law endeavoured to 'bring out . . . the rhythms or natural laws of the succession of social phenomena which directs the evolution of legal institutions' (1933, p. 127). This approach still dominates some contemporary theories of labour law, such as the claim that there is a universal trend in democratic industrial societies towards 'juridification' (Simitis, 1984), and the much-criticised convergency thesis that the 'logic of industrialism' (i.e. the structural