COMPARATIVE LABOR LAW—QUO VADIS?

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I. THE STARTING QUESTION: TO DO OR NOT TO DO COMPARATIVE LEGAL RESEARCH?

Tokyo or Stockholm, Stanford or Lund, Sapporo or Stockholm, Ann Arbor or Lund. Such have been the choices of my abode for nearly the past three decades. Everywhere my work has been the same, some teaching, mostly study. Research I call it, perhaps presumptuously.

During all these years, the object of one field of my studies, comparative labor law, has been twofold. First the immediate task involving a process of discovery. It consists of four steps, i.e., to uncover facts, to learn those facts, to understand those facts at the legal level, and, finally, to try to make some sense out of those facts. A humble task, perhaps. Second, and more important, the two "Why" questions that are the overriding concern of all my comparative work. First: Why are things the way they are in that foreign country? Second: Why are things different in my country and this other country? The challenge to find answers to such questions is the triggering and ever recurrent reason for me to do comparative work. It is a challenge that I struggle to meet. Mostly, if not always, in vain, I suppose.

What am I talking about? First, I am saying that the subject-matter of my study always has been the facts at hand, the reality of my actual place of abode, and the reality of the material presenting itself. Second, I am saying that the reality is only the starting point for the trip into the unknown that the two "Why" questions provoke. In other words, I am talking about explorative legal research of a comparative nature. Since I have spent a good part of these nearly three decades doing such research, one might presume that I should

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possess quite some expertise in the field. Still, I feel far from being the seasoned expert. I feel more like the amateur practitioner.

How come? I suppose that part of the explanation is that, to the best of my knowledge and understanding, there is no such thing as prescribed or generally-accepted methods or techniques that are specific for "comparative legal research," explorative or otherwise. If those existed, one could hope to arrive at mastering them and thereby become the seasoned expert. Another reason for my persisting feeling of amateurism is the fact that there is no substantive body of law that is "comparative law" that I have been able to sit down and learn. Specializing in labor and industrial relations law, I am used to a vast mass of material in every country that lacks nothing in terms of solidity and substance. Much to sit down and learn, in other words. No problem here "denn, was man Schwarz und weiss besitzt/kann man getrost nach Hause tragen."[1] That is precisely what I have done. Given time and effort, one does indeed become the seasoned expert. But it is a fact that, when embarking on the route of explorative comparative research, nothing of the same kind presents itself; nothing is "schwarz auf weiss," more like a quagmire.

The third, and by far most compelling, reason for my feeling of uncertainty is that my two "Why" questions often enough cannot be answered in any truly finite way at all. These questions are the ones primarily deserving serious consideration in my world of comparative research. Yet at the same time there might not be satisfactory answers to them no matter how perceptive and analytical the observer is.

So why not give up and be content with the experience of the student in Goethe's *Faust*? The answer is that there are certain countervailing factors.

The fact that many books on comparative labor legal research in general exist is comforting. Particularly comforting is the fact that some books do provide perfectly reasonable answers to "Why" questions of the kind I ask. The fact that I have written a text or two of explanatory nature should also be comforting, in particular since the exercise has given me immense joy. Dampening that joy, however, is the nagging feeling that I have misunderstood or misinterpreted fundamental issues and features.

Positively exhilarating is the promise that engaging in comparative legal research "is like escaping from prison into open

1. JOHANN WOLFGANG VON GOETHE, FAUST, SCHÜLER IN DER SCHÜLERSZENE ("since, what you can have in black and white/that you can safely bring back home").

air." Jubilation fills you when contemplating such prospects. Promised, in addition, that once you are out of prison you will enjoy, "like the itinerant craftsmen of old, some spiritual Wanderjahre."[2] Even the gloomiest person would give up everything else and jump at comparative research.

Or would he? Once I listened to an inaugural lecture by a newly appointed professor. She described the hardships and uncertainties connected with doing research in her particular discipline. Answering a hypothetical question by a male student as to whether she would recommend him to start writing a dissertation in her discipline comparing development in two different countries, she stated, jokingly but with poorly subdued seriousness as well: "Don't do it!" Is a similar piece of advice called for when a student ventures into explorative comparative labor law? Perhaps. In other words, explorative comparative labor law: to do or not to do?

On balance I would most affirmatively say: "Do!" The field of explorative comparative studies in labor and industrial relations law is rich in pleasures and pitfalls, nature being bountiful in both respects. Challenges are as numerous as dandelions in May. So are the many days of despair when everything seems opaque and incomprehensible. But rewards are more delicious here than elsewhere, making the toil and trouble worthwhile.

To put it differently one can say: "All things considered, there are only two kinds of men in the world—those who stay at home and those who do not. The second are the most interesting."

II. THE CLARIFYING QUESTION: WHAT COMPARATIVE LABOR LAW ARE WE TALKING ABOUT?

It is necessary to define what we are talking about when using the expression "comparative legal research," in particular the explorative variant. Leaving the words "legal" and "research" behind as known concepts, the issue is what "comparative" and "explorative" mean. Comparative law, we are told, "is a study of the relationship . . . between legal systems or rules of more than one system."[3]

In his famous lecture "On Uses and Misuses of Comparative Law,"[4] Otto Kahn-Freund (Sir Otto, really) distinguished between

2. 1 FREDRICK LAWSON, COMPARATIVE LAW, SELECTED ESSAYS 68, 73 (1977).

3. ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 9 (1974).

4. Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974).

three purposes of comparative law, i.e., as a tool of research, of education and of legal reform. The methods differ radically between these three purposes, he says. While Sir Otto focused on legal reform, the present observations focus on legal research. When discussing legal reform, the overriding questions are two "Will" questions: "Will what works in that other country, work in our country as well?" and "Will what is appropriate there, be appropriate here as well?" When doing legal research, the overriding questions are the "Why" questions asked above. Different questions not only produce different answers but also call for different ways of proceeding.

Are these "Why" questions a mandatory element in comparative research? No, definitely not, I would say. Mainstream comparative legal research asks "What" questions. The lodestar for "What" questions is ascertainment. For "Why" research, it is understanding.

The choice depends on the goal of the study and the personal inclination of the scholar. *Per se* none is better or more relevant than the other. The scholar must make a personal choice. For me, the "Why" approach has always been the preferred route.

III. THE CHOICE QUESTION: "WHY" RESEARCH OR "WHAT" RESEARCH?

The two approaches differ profoundly in three respects. They have different purposes, they ask different questions, and they call for different kinds of knowledge.

The questions differ. The "Why" approach asks the "Why" questions mentioned. The "What" approach asks these questions: "What is the law in that other country in this respect?" and "What contribution can what we see there make on this present study on domestic law?"

The purpose differs. Traditional legal research focuses on stating law as it is, perhaps also proposing solutions to loopholes and lacunae. Legal dogmatism is at the heart of such research. Comparative legal research can be part of such research. Its aim is to provide additional insight into and understanding of the domestic legal issues studied.

For such comparative legal research, the questions asked are the same as those in every other dogmatic legal study, i.e., "What is the law in this respect?" and "What should the law be in this specific situation where so far no authoritative answer has been given?" The purpose is the same, i.e., dogmatic elaboration *de lege lata*. The material needed for such comparative research does not differ from that used for domestic research. It consists of the material that all

legal scholars use and are familiar with, e.g., statutes, caselaw, and legal writing. The field of knowledge is also the same, i.e., the techniques for researching the law and the analysis of the legal material.

It is quite another matter what contribution such comparative research can make to a domestic study. It may or may not provide much. In some areas, law has become a domestic affair in its details to such an extent that it does not easily lend itself to clarification by making use of non-domestic material. In other areas, domestic law has foreign roots, is influenced by foreign law, or is the result of a common international effort. In all such instances, much useful insight can be gained by studying the appropriate foreign law.

Two examples more or less at random!—Swedish equal opportunity law and the law of protection against discrimination provide fertile ground. That body of law is primarily of foreign cloth. United States law is the model for all European law in these respects. The law of collective agreements is of much older vintage. Swedish statutory law in this respect was based on extensive study of German law. Incidentally, German law also heavily influenced Japanese law on collective agreements. In a funny twist of coincidence, the net result is that Japanese and Swedish law on collective agreements is rather similar despite the fact that they have had no contact of any sort at any time! It is less astonishing that equal opportunity law looks rather much alike in many Western countries. They are fashioned from the same model and they have been made at a time when interaction in the legislative field is very much indeed the vogue.

Mainstream comparative legal research is perfectly suitable even if the aim of the study is broadened to provide answers *de lege ferenda* and *de sententia ferenda*. The purpose would again be to use foreign material to enrich the discussion on domestic law. Most scholars would probably agree that mainstream comparative research is at its forte in this particular respect. New ideas and solutions are offered free of charge and can be studied gratuitously.

Much to its credit, mainstream comparative legal study tends to produce some other wholesome and valuable results. One result is a sobering relativism. The comparative scholar realizes that what exists in her or his country is not the sole and single way of doing things. It is, I suppose, a rather common experience for comparative scholars to come to the conclusions that "everything" exists somewhere, that "everything" works in some environment and that "everything" can produce more or less the same result as the—purportedly superior—regulation found in the author's country.

Let me illustrate by referring to a personal experience dating back some twenty years. I was involved in an international exercise in comparative labor law. One of the themes dealt with who is to provide the rules for employment conditions in the labor market. Alternatives such as these were to be discussed: employers unilaterally (e.g., by means of company manuals), employers and employees (e.g., by means of collective agreements), or society (e.g., by means of statutes). Some twenty national reports were submitted to me. In great detail they all described the genesis of employment rules in their respective countries. Countries differed considerably; "everything" existed. However, what struck me most was that all authors, explicitly or implicitly, seemed eager to express that the way their country produced employment rules was the best conceivable! I was surprised to notice this. Perhaps I should not have been. "Ubi patria, ibi bene," "My home, my country"![5]

Another wholesome result of mainstream comparative research is a better understanding of the law of the scholar's own country. It might seem a curious and rather unexpected result of the study of foreign law; a dysfunctional result, one might feel tempted to say. Still, it might even be that the scholar learns more about domestic law than foreign law as a result of the study of—foreign law! Be that as it may, the experience of learning about oneself is there.

By means of illustration, let me quote one of the most perceptive contemporary scholars in comparative labor and industrial relations research. "The path of comparative law seems an unduly long and tortuous one to reach self-awareness. Do we really need to study another labor system to ask searching questions to our own?" Yes, he answers. "Most of us are bound by unconscious premises and have difficulty envisioning what we have not seen. When we have known only one labor system we are captives of its purported premises and their claimed consequences. We cannot easily imagine that essential parts might be otherwise; we do not see many of the questions worth asking"[6] There is nothing new here, of course. For example, some two hundred years earlier, German national poet Johann Wolfgang von Goethe reached the same conclusion during travels in Italy: "Das

5. For a summary of this exercise, *see* Reinhold Fahlbeck, *Collective Agreements—A Crossroad Between Public and Private Law* (1987), *alternatively available at* 8 COMP. LAB. L.J. 268 (1987).

6. Clyde W. Summers, *Comparisons in Labor Law: Sweden and the United States*, *in* SARTRYCK UR SVENSK JURISTTIDNING 589, 615 (1983).

Bekannte wird neu durch unerwartete Bezüge, und erregt, mit neuen Gegenständen verknüpft, Aufmerksamkeit, Nachdenken und Urteil."[7]

At best, the mainstream comparative legal scholar can hope to uncover hidden biases and assumptions and pinpoint traits and characteristics in the regulation or set-up of that other country. Domestic scholars and observers might not think about those. After all, nothing is more difficult to perceive and put into perspective than the well known, the obvious. Here is where the foreign observer can harbor some hope of making a contribution to the understanding of arrangements in the foreign country. The non-domestic scholar enjoys the privilege of possessing an unbiased mind and of being able to see things with fresh eyes. That gives him an advantage that can—and should—be exploited.

To actually reach this stage is *nirvana* for the mainstream comparative scholar, I would suggest. It is not an easy stage to reach. It should not be. Dangers lure. Self-overestimation, or downright hubris, is the devil that might lure the scholar into believing she or he has reached *nirvana*. The risk is imminent that the scholar might have arrived at little more than meaningless or superficial platitudes and generalizations. Everyone who has done comparative work knows that it is easy to arrive at conclusions of a generalized and seemingly perceptive nature. But we also all know that we often find ourselves in difficulty when challenged by a domestic scholar in possession of the intimate knowledge that we all have about our own country.

A "What" scholar who arrives at meaningful "behind-the-screen" answers of this kind will also have reached common ground with the "Why" scholar, I assume. They start with different searchlights but here they find common ground. How come? To answer that question, it is time to examine the task of the explorative comparative scholar.

When studying a foreign system in search of "Why" answers one is confronted with an entirely different situation. Purpose, questions, and field of knowledge take on a radically different character.

The purpose of the "Why" approach is not to state domestic law as it is, nor to propose solutions *de lege* or *sententia ferenda*. Its purpose has no such practical orientation. It aims at explaining domestic and foreign law in their environments and their symbiosis

7. "The well-known is shown in a new light thanks to unexpected connections and, because of being associated with new objects, attracts attention, reflection, and estimation." Johannes Schregle, *Überlegungen zur internationalen Vergleichung im Arbeitsrecht*, *in* IN MEMORIAM: SIR OTTO KAHN-FREUND 675 (1989).

with those environments. It is functional rather than dogmatic, explorative rather than ascertaining, inquisitive rather than affirmative. It does not use foreign legal material to analyze or supplement domestic law. Foreign law is not used as a means to reach other goals. Foreign law is the goal in itself. Foreign law is not an intermediary but an end. Foreign law is not used to illustrate anything related to domestic law or vice versa. In a way, explorative comparative research is not comparative at all!

The purpose of the "Why" study is understanding. That purpose is twofold. First, the scholar aims at understanding foreign arrangements in the respect studied. Second, the scholar aims at using that understanding for the second purpose, i.e., to understand the differences between the domestic model and that of the foreign country.

The knowledge needed is different as well. The locus of knowledge is equally divided between home and host country.

The immediate task for the scholar is to comprehend what makes a foreign rule, a foreign complex of rules or arrangements, or an entire foreign system work. Such an insight is not easy to reach. It is a daunting task *per se*. It calls for extensive knowledge about the country studied. Such knowledge cannot be confined to legal matters. It must go far beyond the legal realm and probe the environment of the legal system and it foundations. Jokingly, perhaps, a German scholar once stated that, without some knowledge of Goethe's writings, a non-German cannot expect to fully grasp what is behind German "co-determination"![8] The same author also states the following: "The famous 'Book of Tea', published at the beginning of the 20th century, in which Kazuko Okakura explains Japanese values and patterns of behaviour to the Western world, naturally does not explain present-day Japanese labor relations but the book is nevertheless a must for anyone attempting to understand industrial relations in Japan."[9] Exaggerated? Ridiculous expressions of highbrow superiority? No, I do not think so.

If the knowledge needed is what Johannes Schregle here says who can hope to manage? "An industrial relations comparativist," I submit,

> must . . . be a polyhistor of sorts. Without a sound understanding of the political power structure of the society under examination

8. Johannes Schregle, *Comparative Industrial Relations: Pitfalls and Potential*, 120 INT'L LAB. REV. 15, 29 (1981).

9. *Id.* at 28 *et seq*.

> the industrial relations comparativist is more likely than not to go astray. Furthermore, since economic domination of men by other men seems to be ubiquitous regardless of political system, familiarity with the religious and moral values of the society under scrutiny—their spiritual history and status, as it were—seems to be of paramount importance.[10]

However, difficulties differ according to the level of abstraction chosen. Detailed rules are often astonishingly similar in different countries, so studying them is completely different from studying the overall landscape. When writing about or engaging in exploratory comparative legal research, I usually conceptualize a three-level approach, the grass root level, the tree top level, and the eagle's level—i.e., low, medium, and high level of abstraction. Another way of expressing the same idea is to talk about the surface level, the rose root level, and the deep soil level.

At grass root level, the comparison focuses on precise, well-defined, and rather detailed phenomena. The area studied is limited. There is little need for knowledge about political, cultural, or other characteristics of the countries studied. At tree top level, the area studied is wider. A concomitant need to broaden the study in other respects as well arises, e.g., into the historical, political, and cultural environment of the area studied. Yet there is no need for extensive studies since the area studied is rather limited after all. At the eagle level, the perspective is widened radically, sometimes covering vast areas, perhaps an entire legal field, e.g., labor law. The task here is to map and analyze this area, this system, and its components, from an overriding perspective. Much like an ecologist, the comparative scholar here looks for structures and balances within an eco-system.

The eagle's level is the true territory for the "Why" scholar. It is also at this overriding level that the daunting difficulties present themselves. It is when engaged in this kind of study that the scholar needs to be familiar with Goethe if Germany is studied or the "Way of the Tea" when Japan is examined. At the same time, it is at this level that the dangers are the greatest. The ambitions are high and so are the stakes. Pretentious and pointless generalities lure.

Indeed, daunting difficulties arise even if the task is to analyze one's own national system to a foreign readership. Tadashi Hanami has written an analytical introduction to industrial relations in his own country, Japan. It proved less than easy.

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10. Reinhold Fahlbeck, *East is East and West is West?: The Swedish Model for Industrial Relations*, 73 ACTA SOCIETATIS JURIDICAE LUNDENSIS 35 (1984).

> The second problem which caught my attention when writing this book is one which is more elusive and at the same time more fundamental to comparative studies in general. I began to appreciate more and more the overwhelming difficulty in comparative studies and the reasons why the researcher is often driven to desperation and tempted to give up altogether.[11]

IV. THE IMPOSSIBLE QUESTION: WHY, ALL THINGS CONSIDERED, IS IT SO THERE AND DIFFERENT HERE?

The time has come to introduce one or a few "Why" issues of the kind that present themselves at the eagle's level. Here are three:

- Why is union density very high in Sweden (as well as in Denmark and Finland) and not falling when very low in the United States and still falling? Why is the same true in Japan?[12]
- Why are employers in the United States adamantly opposed to unions when Swedish (as well as Danish and Finnish) employers are not, indeed even accept them?
- Why is statutory collective labor law very extensive, detailed, collectivist, and based on heavy intervention by an agency of the federal government (the National Labor Relations Board, NLRB) in the United States when virtually nothing of all this is found in Sweden (nor in Denmark or Finland)?

The two first questions are standard in comparative literature dealing with any countries. The third question is much less discussed. All three are perfect illustrations of "Why" questions in labor and industrial relations research. The questions are also quite intriguing, making them even more interesting.

It is outside the scope of this contribution to even sketchily discuss these three issues here. Only a few words.

Why is union density so low in the United States? A standard explanation is that employers oppose them and have fought them ever since they first appeared. There is much to that explanation. But the curious will not stop there. A further question is: Why are employers in the United States adamantly opposed to unions? Standard explanations include answers like the following. Wages and other employee benefits are higher in unionized firms making it more

11. TADASHI HANAMI, LABOR RELATIONS IN JAPAN TODAY 15 (1979).

12. *Cf., e.g.*, Reinhold Fahlbeck, *Unionism in Japan: Declining or Not?*, *in* LABOUR LAW AND INDUSTRIAL RELATIONS AT THE TURN OF THE CENTURY: LIBER AMICORUM IN HONOUR OF PROF. DR. ROGER BLANPAIN 707–34 (1998).

expensive to operate in a unionized environment. The presence of a union also limits employer freedom to act unilaterally. Furthermore, unions might engage in industrial actions crippling production. All these explanations are perfectly reasonable and all certainly influence employers. No wonder employers in the United States adamantly oppose unions.

Or do these explanations provide truly satisfactory answers in a comparative perspective? It can be doubted. The reason is that these same factors all also operate in Sweden (as well as in Denmark and Finland) and with the same force. So why do these factors produce different reactions in the United States and Sweden? This is the exact point where true difficulties begin. This is also the point where knowledge other than that limited to labor matters strictly begins to become necessary. This is in fact the point where the true challenge begins.

Is it necessary to face the challenge? The answer is both Yes and No.

Yes, it is necessary to face it. Why? Curiosity and intellectual discipline so command. What can be said to meet it? Much.

No, it is not necessary to face the challenge. Why? Experience demonstrates that it is impossible to meet the challenge. Does it?

V. EXPLORATIVE COMPARATIVE LABOR RESEARCH—QUO VADIS?

Where is explorative labor research heading? Toward a multidiscipline approach.

It simply is not possible to find sound and realistic answers to "Why" questions that go beyond the surface without a multidisciplinary approach. Answers are simply too complex and elusive to be within the reach of any single discipline. Perhaps a twofold approach should be used, a socio-political method and an anthropological method.

The socio-political method studies the industrial relations system and its components as a sub-system in society along with other sub-systems, e.g., the political, economic, and social systems. The IR-system is young, younger than the other three sub-systems mentioned. There is every reason to believe that these sub-systems influence each other. Since the IR-system is the youngest, there is every reason to

believe that it has been shaped to a great extent by these other systems.[13]

One example to illustrate. Why is collective bargaining extremely centralized in the Nordic countries but extremely decentralized in the United States? It is because political and economic power is extremely centralized in the one country and the extreme opposite in the other? By all likelihood the answer is affirmative.

The anthropological method studies human values and concepts about human life and human intercourse. It tries to draw "cultural maps," as it were, and to infer from them likely outcomes in various fields of life.[14]

"Cultural dichotomies" can be a useful tool to look behind the screen and find answers to often baffling differences. A few examples to illustrate:

Equality	
equality is primarily a matter of	
equal opportunity	equal result
Group Belonging	
to belong to and rely upon groups means	
suppression of one's personality	enhancement of one's personality
risk for personal suicide	protection for survival
An Individual, Who Is That?	
an individual is identified as someone who acts	
autonomously	in a human relationship
Individualism, What Is That?	
display of responsibility	selfishness
A Contract, What Is That?	
an embodiment of rights and duties enforceable in court	an ongoing relationship calling for mutual accommodation

13. A seminal study along such lines is COLIN CROUCH, INDUSTRIAL RELATIONS AND EUROPEAN STATE TRADITIONS (1993).

14. A seminal study in this respect is GEERT HOFSTEDE, CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES (1980).

Answers to questions such as these will provide material for answers to "Why" questions. Prevailing opinions and sentiments in a country on the values expressed in dichotomies like those mentioned will determine the contents of the law. For example, legislation in many fields will be profoundly influenced if equality is perceived as meaning equal opportunity (as is by and large the case in the United States) rather than equal result (as is by and large the case in the Nordic countries). Therefore, anyone who wants to really understand why the law is the way it actually is in any particular field in any particular country had better analyze the social values of the country in terms such as those mentioned.

Obviously, the legal scholar is not well-equipped to apply neither the socio-political method nor the anthropological method. Not only that, a multidiscipline approach is necessary, cooperation between scholars representing these various disciplines is also necessary. So far, there has been very little of that, despite the existence of multi-disciplinary institutes for industrial relations. The future of successful explorative comparative labor and industrial relations research will greatly depend on the ability and willingness of scholars to engage in multidisciplinary endeavors. From the manifold of approaches, answers can hopefully be found, a scholarly *E pluribus unum*, as it were.