SOME REFLECTIONS ON COMPARATIVE LABOR LAW AND ON ITS VICINITY WITH POLICY-MAKING

Silvana Sciarra†

My affectionate and grateful tribute to the silver anniversary of the *Comparative Labor Law and Policy Journal* is centered on my own taste and experience in applying a comparative research method and in the aspirations I attach to comparative methodological choices. While taking full responsibility for what I write, I also want to express gratitude for the challenge and inspiration I received from the *Journal*, ever since its beginning. I especially want to mention Prof. Gino Giugni, my mentor in the Italian academic scene and the one who first introduced me to Prof. Benjamin Aaron. It was in my early days as a visiting scholar at UCLA that I saw the birth of the *Journal* and was able to observe the enthusiasm of its founding fathers and draw from them a clear lesson in legal research.

In the 1980s and early 1990s, I had experienced comparative labor law in the "Pontignano seminars," so called by the location where they took place, a convent owned by the University of Siena. It was Lord Wedderburn's knowledge and communicative ability in teaching that captured labor lawyers of my generation and a large number of younger ones in an open process of learning comparatively. The mastery of this experiment—that lasted for many years and was structured around a unique formula of residential teaching for one week a year—is not only due to the remote place where seminars were held, in the Tuscan countryside, but also to the fact that no written traces are left of the work done there.

In more recent years I have been fortunate in sharing the experience of comparative research with colleagues and with doctoral students at the European University Institute at S. Domenico di Fiesole. The interrelation between European law and comparative labor law, developed in our joint research, is what I have in mind as a

† Professor of Law, University of Florence, Italy.

starting point in presenting my contribution to this issue of the *Journal.*

My thoughts are centered on the assumption that, although comparative law is more frequently driven by a deep sense of curiosity and by the anxiety to discover new worlds, it may also be used as a tool by policy-makers. Whereas the former function of legal comparison relies on intellectual freedom and on objective analysis, the latter may easily be distorted by ideological choices and by an instrumental use of information drawn from foreign legal systems.

I want to argue that rigor and exactitude in legal comparison cannot be lost in the attempt to push forward transformations in one legal system, using another system as an example of a better or more efficient solution to a similar problem. The objective of the policy-maker, when implications with comparative law are at stake, is to preserve the internal rationality of a domestic system of rules. Such a protective scrutiny of one's own system does not mean that changes can never occur. Changes take place as a consequence of the system's internal transformation, often taking into account pressures exercised by significant stakeholders, representative of collective interests.

I want to explore three reasons why comparative labor law should be practiced and I do so by making a reference to national legal systems within the European Union (EU). Legal comparisons between the EU and the United States, practiced in a paramount way since the early days of the European Economic Community,[1] is still very central in current discussions, albeit in a revisited, highly stimulating methodological approach.[2] Such a comparison should be pursued even further, in consideration of the steps taken by the EU in adopting a quasi-federal structure and in finding original solutions in the recent Treaty establishing a Constitution, still in the process of ratification.

A first reason has to do with the need to detect changes occurring in national systems. The understanding is that differences among national legal orders must be kept even when, as it occurs in the EU, efforts to further integrate are pursued. The argument following this first methodological assumption is that integration through law is a powerful and inventive tool in the hands of both scholars and policy-

1. A.F. CONRAD ET AL., AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET: A LEGAL PROFILE (Eric Stein & Thomas L. Nicholson eds., 1960); 3 MAURO CAPPELLETTI ET AL, INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE: CONSUMER LAW, COMMON MARKETS AND FEDERALISM IN EUROPE AND THE UNITED STATES (1987).

2. LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES (J. Konaghan, R. M. Fischl, K. Klare eds., 2002).

makers. It brings about solutions that can facilitate the convergence of labor standards. It also favors a slow and yet continuous adaptation of national infrastructures, be they branches of the national administration or labor market institutions.

There is a very positive—albeit at times hardly perceivable—influence of all these elements in the attitude of scholars, adopting a wider scope in their legal thinking and writing. A much more evident openness in treating national law as part of a wider system of rules is expressed by judges, showing confidence when looking at non-national sources and applying European law. In a sense, judges proved to be an unexpected source of comparative law-making in applying EU law through the preliminary ruling procedures. When looking at the caselaw of the European Court of Justice (ECJ) and enforcing the rulings of the same, they took as a starting point a case originated in a different legal system and shaped into EU law by the interpretation of European judges.

Working within a comparative research group on some selected labor law cases submitted to the ECJ and decided through preliminary ruling procedures,[3] we all experienced the need to cross-examine certain subject matters. The latter were selected by us on the basis of their relevance both at a supranational level and within the—at times not well-defined—boundaries of our common legal discipline. An approach based on the study of national systems had to give way to a comparative method that took for granted certain differences—for instance different levels of the judiciary, different training of the judges, and different jurisdictions—and developed instead the integrative role of European law. We could experiment with this methodology because we were dealing with European law in its most dynamic fashion, namely the evolution of national interpretations because of a supranational norm. The subsequent intervention of the legislature to adapt domestic legal orders to European Law, was valued by all of us as the final and most efficient result in order to guarantee the maintenance of rational and well-balanced legal systems.

Massimo D'Antona's intuition, when describing national judges as if they were "federal" judges, is indicative of a scholarly attitude able to capture the reality of integration through law, beyond the formalities of a well-defined federal legal system.[4]

3. LABOUR LAW IN THE COURTS: NATIONAL JUDGES AND THE EUROPEAN COURT OF JUSTICE (S. Sciarra ed., 2001).

4. Massimo D'Antona, *Sistema giuridico comunitario*, *in* 1 OPERE 377 (2000).

A second reason aims at the mixture of comparative and interdisciplinary methods. Labor law often finds itself at the crossroad of policy choices, affecting both legal and non-legal disciplines. On the contrary, it may also happen that labor law is affected by external variables, such as economic constraints stipulated in budget laws or political pressure to depart from consolidated labor standards, in order to adapt them to new market demands and international competition. In all these cases, comparative interdisciplinary approaches should guide legislatures toward optimal solutions, without completely undermining traditions and the overall structure of acquired rights.

This recourse to comparative labor law is particularly evident in the evolution of the discipline, when departures from the standard contract of employment are pursued. Departures from previous laws, particularly in continental legal systems that had incorporated basic principles in labor codes, are such to widen the notion of non-standard contracts, up to the point of making the notion of an employment contract almost irrelevant. This is so in all cases in which mutual obligations become disproportionate and it is difficult to contain managerial prerogatives within legal and/or procedural limits. One can think of "jobs on call," or even agency work and other forms of externalization of core business activities toward other agents or sub-contractors. Interdisciplinary approaches are called to justify the need to increase employment, sometimes drawing on dubious economic analysis. Interdisciplinary cooperation is also the motivation lying behind commercial transactions, which implies taking from outside the workforce on a temporary basis and even for an unlimited time, as in the recent Italian and German laws on agency work (interesting national cases are presented in the special issue of the *Comparative Labor Law & Policy Journal* devoted to temporary work).[5]

The language of comparative labor law may appear in all such cases the right medium in order to improve the analysis of domestic law and to shorten the distance from European law. It would be a mistake, though, to interpret European law as a continuation of a comparative legal discourse, as if the final intent of national lawyers should be to drive instrumentally a comparison between each national legal system and the supranational one. This wrong perception of comparative law would bring about a disordered legal analysis, one which loses touch with the fulcrum of national law-making mechanisms. Legislative choices, when solely justified in the name of

5. 23 COMP. LAB. L. & POL'Y J. 1–250 (2001).

Europe, may hide provocative attempts to overturn internal priorities and to depart from an overall picture of reforms, mainly aiming at revisiting in a gradual way the internal rationality of a domestic system.

A "pure" comparative method follows the evolution of single legal institutions and of specific subject matters, maintaining them inside the frame of the system's overall progression. A wider circulation of labor standards, occurring because of the multiple impact of international sources, requires an even deeper consideration of ways in which such standards must become part of national legal systems.

The debate on the implementation of fundamental social rights within the EU—very relevant now that the Charter of Fundamental Rights has become part of the Treaty establishing a constitution—is indicative of the need to attach legislative reforms to basic principles, not to be waived because of contingent market pressures. Indeed, it is submitted that social rights play an equalizing function within the single market, orienting both national and supranational legislatures.

An approach giving full visibility to fundamental rights is the one we learn from Otto Kahn-Freund's scholarship, attentive to the evolution of international sources with a wider scope, for example the Council of Europe's European Social Charter. We discover a similar attention in the work of a restricted number of comparative labor lawyers, among whom Bob Hepple must be mentioned for the originality of the method adopted.[6]

EU secondary law directives centered on fundamental rights—such as the equality directives and the fixed-term and part-time work directives constructed around the right not to be discriminated—represent a fairly successful way to regulate. Directives based on the protection of the fundamental right to health and safety, a massive part of EU regulation, also indicate that harmonization of technical standards may efficiently be guided by the implementation of a fundamental right.

A third reason must be found in the most recent evolution of labor law within the European Union, with recourse to "soft law" methods, namely non-binding regulatory techniques. The tendency to bring the choices of national legislatures closer, pursued by the so-

6. B. Hepple, *A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct*, 20 COMP. LAB. L. & POL'Y J. 347 (1999); Bob Hepple, *Enforcement: The Law and Politics of Cooperation and Compliance*, *in* SOCIAL AND LABOUR RIGHTS IN A GLOBAL CONTEXT: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 238 (B. Hepple ed., 2002).

called Open Method of Coordination (OMC) in employment policies, has opened up new perspectives to comparative labor law.

The danger—if one takes seriously the urgency to come close to non-binding recommendations launched from the center of the EU to the periphery of the Member States—is to justify sudden changes and to put the system's overall internal rationality at risk. One example is the abandonment or the marginalization of consensus-building institutions and of trilateral bodies leading to concerted activities and to negotiated legislation. Another example is the succession of legal reforms, by way of progressive adjustments of existing legislation. The activism shown by national legislatures, in response to OMC, may result in deteriorating the style in legal drafting and making laws incomprehensible to interpreter. This has been, at times, experienced with recent legislation on part-time and fixed-term work, both regulated by directives and also included in the "soft" European Council's recommendations in employment policies.

A similar danger lies in the fact that comparisons among "policies" make the recourse to a strictly legal method less precise and therefore subject to unclear generalizations. Labor lawyers must, on the contrary, protect the supremacy of a legal method and ascertain that democratic deliberations are maintained, even when innovative regulatory techniques—such as OMC—are experimented.

Framing OMC within the evolution of labor law in fifteen Member States of the EU, I have come to underline the centrality of "a language of rights" in current discourses. I have done so having discovered through comparative analysis how crucial the individual continues to be in defining the scope of labor law. Granting individual guarantees and adapting them to different—and more numerous—contracts of employment is one of the greatest challenges for the future of the discipline.[7]

On a methodological ground, there is a widespread perception that research on foreign legal systems—namely systems different from one another and different from the one in which researchers feel more familiar—is important for developing comparative tools of analysis and for widening legal knowledge. However, such an approach must be complemented by an attentive and simultaneous look at more than one system, whenever this is made possible by comparable starting points.[8]

7. S. SCIARRA, THE EVOLUTION OF LABOR LAW (1992-2003), (General Report written for the European Commission) (forthcoming with all fifteen country studies in OOPEU).

8. This approach inspired the work of European and North-American scholars in more than one piece of joint research within the Comparative Labor Law Group, as recollected by B.

It is not without reason that such leading examples in comparative labor law applied research are often framed within an historical analysis of national legal systems and take account of changes as they occur, because of variable geometries inside national parliaments. Comparative labor law of this kind starts from the law and explores the ideology behind it in historical terms. It does not justify legal changes in the light of a dominant—and yet contingent—ideology, neither it values one option instead of the other, without justifications. I am not suggesting that labor lawyers should not express their own policy options. I am arguing against a vicinity of comparative research and policy-making that loses sight of a clear and solid methodological choice.

To conclude these short notes, I want to underline a few points.

- A comparative labor law research agenda for the years to come should continue to carry on studies of the EU and the United States. It should do so in force of the differences that characterize the two systems and also because of the need to clarify the often imprecise references to institutions, when comparing the transformations occurred. Another reason to continue this tradition must be found in the openness both legal systems are experiencing in exchanges with other legal traditions, because of the expansion of world trade. The impossible dialogue between the WTO and the ILO, emerged in a dramatic way after Seattle and the explosion of anti-global movements, represents a good reason to give way to comparative legal research based on the implementation of fundamental social rights and principles.[9]
- Within the EU, the tension between national and supranational law-making may be partially released favoring comparative studies on specific topics or institutions. The impact of legal reforms in a specific field—be it the first introduction of part-time work in a domestic legal system, compared to adjustments to previous legislation, or the regulation addressed to temporary work agencies in different labor markets, and so on—can lead to results based on detailed contents of

Aaron, *The Comparative Labor Law Group: A Personal Appraisal*, 2 COMP. LAB. L. 228 (1977) (and is still reflected in the editorial choices of *Comparative Labor Law & Policy Journal*).

9. Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT'L ECON. L. 61 (2001).

legal reforms, rather than on statistical measures of employment figures.

- Comparison in labor law is significantly achieved when an in-depth study of specific issues is carried on, taking into account more than one legal system. In the EU, this approach is particularly useful to confirm that differences among national traditions should not discourage comparative research. Differences represent a strong starting point in proving how rich and varied national responses may be, while pursuing the objective of legal integration.