THE FUTURE OF COMPARATIVE LABOR LAW AS AN ACADEMIC DISCIPLINE AND AS A PRACTICAL TOOL

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I. INTRODUCTION

After having spent so many years in applying the method of comparative labor law, I consider it to be an honor and a great pleasure to contribute some reflections to the issue celebrating the twenty-fifth anniversary of the *Comparative Labor Law & Policy Journal*. Much of what I learned on how to apply and to use the method of comparative labor law is particularly based on the writings of Otto Kahn-Freund and on the cooperation with two other eminent scholars: the first editor of the *Journal*, Clyde Summers, and Bob Hepple, senior editor of the *Journal*. By co-teaching seminars on comparative labor law together with Clyde Summers at the University of Pennsylvania, I got a terrific insight into the proper use of comparative labor law in academic teaching. And together with Bob Hepple, I had the great privilege to be integrated in lucid debates on legal reform in Europe and in South Africa where I could experience the usefulness of a solid approach to comparative law in such a context.

Of course, the scholars are not to be blamed if my remarks may turn out not to be convincing for the *Journal*'s readers. The responsibility is exclusively on me.

II. THE IMPACT OF INTERNATIONALIZATION, GLOBALIZATION, AND REGIONALIZATION

Attempts to establish minimum standards of labor law date back to the nineteenth century. These efforts finally got an institutional structure by the foundation of the International Labor Organization

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(ILO) in 1919. The ILO not only has developed an impressive norm-setting activity by concluding almost two hundred conventions and a similar number of legally non-binding recommendations, but it also has established an interesting monitoring system linked to country reports. Thereby the information base for comparative research has grown significantly as well as the insight into the difficulties of how to implement universal minimum standards into the context of individual countries. In particular, it has led to the insight that labor law is by no means merely a national topic, but, to a significant degree, an international one.

Internationalization is not only important as far as norm-setting is concerned. At least as important is the factual development, known under the label "globalization." The catchword "globalization" is referring to quite a few different trends characterizing the world of today: First there is globalization of finances and capital. The capital markets are deregulated and liberalized. The international mobility of capital is achieved to a great extent. Liberalization of capital markets is combined with transparency of those markets. This means that profits can be realized in an optimal way. Or, to put it differently, capital moves to where the expectations to maximize profit are the highest. Second, there is globalization of production and services. This implies in particular the rapid increase of multinational enterprises and of foreign direct investment. Today, about 40,000 multinational enterprises (MNEs) and an estimated figure of 250,000 affiliates employ about 190 million people worldwide. Third, there is a globalization of markets and market strategies. Global strategic alliances are formed to optimize the distribution of goods and services. Finally, there is globalization of technology. To just take the most well-known example: Information-communication technology makes it possible to store, manipulate, and transmit knowledge worldwide without significant costs. This has far-reaching implications for the organization of enterprises. Global out- and in-sourcing has become a common phenomenon. "Networking" and "virtualization" have become the catchwords to describe this new organizational pattern on trans-national scale. Even if there is, up to now, no corresponding globalization of industrial relations, the complex phenomenon of globalization evidently has significant impacts on the structure of labor markets and industrial relations. To just mention the most evident and most important ones: The regulatory capacity of national states is rapidly and significantly decreasing. This increases the factual power of the MNEs and of the capital markets. Or, to put it differently, the political actors and the national states are becoming more and more dependent of the transnational economic power. In

addition, global competition leads to an increased pressure to reduce costs and to restructure (and quite often downsize) enterprises. Downsizing in this context may have the perverse effect to lift up the value of shares of the respective company. By the employers' and employers' associations' threat to transfer production elsewhere, trade unions are coming under pressure to an increasing extent. The temptation of using strategies of social dumping has become a real danger in the relationship between different countries all over the world. Since labor law is, to a bigger and bigger extent, understood as an important factor in the competition between different countries, it is pretty evident that national labor law can no longer remain disconnected from labor law elsewhere or from international labor law.

While the ILO is trying to promote universal minimum standards, regional arrangements in the meantime are trying to establish minimum standards focusing on the specific regional circumstances. Europe is a good example in this context. The European Council, in 1961, developed the European Social Charter, amended in the meantime, fixing minimum standards for all Member States ratifying the Charter. A specific supervisory body has the task to monitor the correct implementation. Here again country reports enlarge the already available information base and the difficulties of implementation in individual countries become evident. The most ambitious project in this context is the European Union (EU) which, as a supranational entity, does have far-reaching powers to legislate in the area of labor law, thereby not being dependent on the Member States' willingness to ratify international treaties. In this context, a specific legislative instrument, the Directive, has been developed to make sure that the European input remains flexible enough to be integrated into the legal structure of individual countries. The Directive only regulates the purpose to be achieved and provides some framework considerations: the institutional transposition is left to the Member States. In particular, the jurisprudence of the European Court of Justice (ECJ) is an excellent information base to study the implementation problems arising in the different Member States and to provide a comparative perspective. According to Article 6 of the EU-Treaty, the ECJ in its jurisdiction has to take account of the "principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." These common principles, of course, also govern labor law. In fulfilling its task, the ECJ by necessity has to

make a comparative assessment of how these principles are applied in the different Member States.

All these developments have a significant impact on comparative labor law. The comparative approach is not only facilitated by these developments, but it has become inevitable. The international, regional, and comparative dimension is, to a larger and larger extent, influencing the national systems. Therefore, the first conclusion can be drawn. The environment for comparative labor law as an academic discipline and as a practical tool has become more favorable than ever: a promising perspective for its future. Comparative labor law as such does not need further justification. The real problem, however, refers to the questions on what are the methodological prerequisites for comparative labor law, on what can be its use in academia and in practice, and whether there are dangers of abuse.

III. THE METHODOLOGICAL PREREQUISITES

A. Functional Instead of Institutional Approach

In labor law, the same effects may be reached by very different instruments, legal rules, or institutions. Limits of management prerogatives may be established by legislation, by collective bargaining, by systems of workers' participation or it may be organized by a mixture of all those instruments. The balance between job security and external flexibility may be achieved by rules on protection against dismissals, by rules on fixed term contracts, by rules on temporary work, or by a mixture of all these elements. Similar effects achieved in one country by the judicial system might be achieved in another country by mechanisms of alternative dispute resolution or by administrative bodies. These three very simple examples may be sufficient to demonstrate that the comparison of instruments, legal rules, or institutions is misleading and not helpful at all. The focus has to be on the function to be achieved.

This, of course, is much more difficult. It is not sufficient to merely provide an analysis of the differences in the legal structure. The focus is on their intended and real effects. This, however, is transcending traditional legal expertise. The implication is evident: Comparative labor law cannot be merely an exercise for legal scholars and legal practitioners. Of utmost importance is the dialogue with experts of social sciences: economists, experts of business administration, political scientists, sociologists, anthropologists, etc. The future of comparative labor law and the quality of this methodological approach will very much depend on whether the

institutional setting for such interdisciplinary cooperation and dialogue can be improved. Up to now, unfortunately, in many countries a strict segmentation of these different disciplines is maintained. In this respect, the Anglo-American countries, which from an early stage on have tried to focus not only on labor law but on industrial relations as a conglomerate of different academic disciplines, are in a better position than most other countries on the globe (including those of Continental Europe) where industrial relations up to now are not an established field for university teaching and research.

The insight into the need of a functional approach instead of an institutional one does have another important implication: it would be misleading to concentrate the analysis on the effect of one specific element of a country's labor law system. The function only can be properly assessed if the specific element is seen in its interaction with all the other elements of a specific system. Let's take as an example a system of institutionalized workers' participation. The functional perspective only could be revealed by putting such a system of workers' participation into the overall context of the respective country, thereby analysing not only the other parts of the overall system (as are collective bargaining, the system of conflict resolution, the minimum level guaranteed by employment law, etc.), but also the shape of the actors; the prevailing attitudes; the cultural, political, and economic environment, etc. As this example demonstrates, the elements to be analyzed are not only legal ones but also—and in particular—extra-legal ones. To take all of them into account is an extremely difficult task. Therefore, valuable studies only can be expected if in-depth investigation in respective countries takes place. Comparing functions in two different countries is already very difficult. If the comparison exceeds this sample and—what often happens—tries to compare many countries or even the whole (at least industrialized) world, the comparison most often tends to be superficial, misleading, and therefore not very helpful at all. Nowadays such studies are quite often used as arguments in the political arena, thereby only demonstrating the abuse of comparative labor law that will be discussed in more detail later on.

B. Beyond Terminology and Traditional Categories

Whoever compares labor law of different countries has to cope with terminology. At first glance, it is very seductive to assume that identical terms, whether they are expressed in the same or in a

different language, refer to identical phenomena. This, however, is by no means the case. Let's take the well-known term "collective agreement" as an example. Its meaning is by no means the same in different countries. Whereas in one country (as for example in the United Kingdom) collective agreements are merely considered to be gentlemen's agreements, they are strictly legally binding in other countries. The possibilities of normative regulation are as different as the rules on the relationships between the obligatory and the normative part. In one country, collective agreements apply only to union members, in other countries to all workers, be they unionized or not. Some countries observe a strict peace obligation, others do not. The rules on the relationship between agreements on different levels, or between old and new agreements, are different from country to country. Subject-matters for regulation by collective agreements are by no means the same: in some countries there are significant limitations, in others there are almost no limits. The rules on extension of the scope on collective agreements again are different. Significant differences also exist as far as procedures are concerned. In some countries there is a duty to bargain, in other countries such a duty is totally unknown. In some countries the proceedings of negotiation are highly formalized, in others it is more or less left to the discretion of the actors. The prerequisites for the actors are significantly different too: criteria for being representative in systems of a pluralistic union movement follow other legal patterns than criteria applied in systems with amalgamated unions. The process of conflict resolution is also regulated in a very different way. There are different institutions for conciliation and arbitration in different countries, some do not even know such kind of intervention. Even if industrial conflict in most countries is an instrument for conflict resolution, the rules on strike, lock-out, etc. are quite different. In some countries going on strike is an individual right, in others a collective one. The legitimate goals and the effects of strikes are regulated differently in various countries. Finally, the implementation of collective agreements differs from country to country: in some there is access to specialized labor courts, in others to ordinary courts, in others still to other institutions, while yet in others there is no such access at all. In short and to make the point: the example of "collective agreements" shows that the same notion has a huge variety of different meanings. Therefore, the terminology as such remains meaningless for the scholar of comparative labor law, it only reveals its meaning by being put into the whole context of its structure and its functioning.

Legal comparison quite often remains within the cage of traditional subdivisions of the legal field: public law versus private law, labor law in a narrow sense understood as the rules on collective relationships versus employment law referring to individual relationships and versus social security law. However, the bars of these cages have to be overcome for at least two reasons. First, these subdivisions do not exist in every country in the same way. Whereas, for example, in some countries the distinction between public and private law still plays a role, it has been meaningless in others from the outset. The second reason, however, is more important. In order to understand whether and how a specific function in a country is fulfilled, it is necessary to ignore these subdivisions. Only the interaction between instruments of collective labor law and instruments of employment law reveals the impact on workers and employers: as long as these two categories are studied as isolated phenomena, they are misleading as far as functions are concerned. Quite often the same question in one country is dealt with by employment law and in another country by social security law (e.g., sickness pay). If one wants to study the legal regime of external labor market flexibility, it is not sufficient to look into the rules established in labor law and employment law referring to job security, etc. Only if the mechanisms of unemployment benefits, of retraining, and of re-integration into the labor market as provided by social security law are included, a comprehensive insight into the complex situation is possible. To again make the point, the scholar in comparative labor law needs a comprehensive view, not being disturbed by traditional subdivisions of the legal field. In this respect, it may be stated that, paradoxically, comparative labor law only can be performed by exceeding the borderlines of labor law.

C. Beyond Hard Law Toward Soft Law

To a bigger and bigger extent, problems in the labor field are no longer dealt with by law in a strict sense, so-called "hard law," but by rules that are of a weaker nature. Let me give two examples to illustrate what is meant.

The first example refers to so-called codes of conduct for MNEs. In line with efforts of the ILO, the Organization for Economic Cooperation and Development (OECD), and the United Nations (UN) a significant number of MNEs based in industrialized countries in the meantime have developed codes of conduct that are supposed to guarantee minimum working standards for employees of companies of

the MNEs (and quite often also for the companies of their suppliers and even customers) in developing countries. This development was significantly pushed by Non-Governmental-Organizations (NGOs) who organized consumer boycotts in the home countries of these MNEs. The threat to lose market positions at home led to the "voluntary" establishment of such codes by which the companies promise to respect certain standards. These codes are by no means uniform as far as their content is concerned. Some are unilaterally established, others are the result of negotiations with NGOs and/or trade unions. Some do not know any monitoring system at all, others are exposed to more or less efficient internal or external monitoring systems. It is very difficult to make an assessment of their impact on the employment relationships. They are on the move and changes are going on continuously.

The second example refers to the "open method of coordination" as established in the Treaty of the European Community (EC). A good example for this method is the employment policy. In the late 1990s, "a coordinated strategy for employment" has been integrated into the EC-Treaty. The genuine competence of the Member States in this very area remains uncontested. The Community is required to contribute to a high level of employment "by encouraging co-operation between Member States and by supporting and, if necessary, complementing their action." To make sure that this aspiration has a chance to be realized, the Chapter on Employment provides for several institutional arrangements: There is the Employment Committee, which is mainly supposed to monitor the situation on the labor market and the employment policies in the Member States and the Community and thereby help to prepare the relevant joint annual report by the Council and the Commission. In fulfilling its mandate, the Committee is required to consult the social partners. In order to make sure that the activities of the Employment Committee as well as the joint annual report by the Council and the Commission do not remain without consequences, the Chapter on Employment establishes additional powers for the Community. After examination of the joint annual report by the Council and on the basis of the Council's conclusions, the Council "shall each year draw up guidelines" that, of course, are not legally binding. This arrangement has led to manifold measures and significantly increased the interrelated activities between the Member States. However, the results in detail are of less importance in the context to be discussed here. Important is the fact that the Chapter on Employment establishes a mutual learning process for the Community and the Member States, including not only governments but also the social

partners. None of the Member States can escape the permanent dialogue and the permanent pressure implied by it. Best practices do not have to be reinvented all the time, but can easily be communicated and imitated. The awareness of the media is growing significantly.

The two examples are very different. The codes of conduct of the MNEs are "rules" made by private actors, whereas the "rules" governing the European employment policy are initiated and conducted by public authorities. However, whether the source of the respective "rules" is public or private, the function is similar. Without being hard law this "soft law" does have effects and is shaping, to a certain extent, the employment relationships in the MNEs and the employment policy measures in the EU. Therefore, it cannot be ignored by comparative labor law. The example of the codes of conduct teaches us an additional lesson: rule-making can no longer be conceived as an exclusive monopoly of State authorities. It is rather to be understood as a public-private-policy mix, thereby broadening significantly the perspective for comparative labor law.

IV. THE USE AND ABUSE OF COMPARATIVE LABOR LAW

So far it has been argued that, in view of internationalization, globalization, and regionalization, the future perspectives for comparative labor law are more favorable than ever before and that comparative labor law as a method has to meet specific requests. The most important question—on what is the usefulness of comparative labor law in academia and in practice—is still left open. Therefore, an attempt is now made to indicate possible answers to this extremely complex question.

A. Better Understanding of One's Own Legal System

The perspective of studying a legal system from within is never sufficient. There is not only the danger that the occupation with too many details prevents an adequate view on the overall structure and its function. The problem is much more profound: the peculiarities of the system cannot be identified due to the lack of contrasting them with alternatives elsewhere. Only the comparison with structures performing similar or even identical functions in other systems opens one's eyes to characteristic elements of one's own system. This discovery serves as stimulus for further reaching questions referring to the cultural, political, social, or economic reasons for the pattern established in one's own country. The knowledge of the functioning

of other legal systems provides a new perspective: the possibility to assess one's own system from outside and thereby put it into the context of other experiences made elsewhere. This, in my view, is the only way to really identify the uniqueness of one's own system. It is preventing an attitude that tends to take the own system for granted or even for superior due to lack of knowledge. In this respect, comparative law is an exercise in developing modesty. And it has a further effect: it enables the development of a well-founded critical approach toward one's own system beyond the usual and mostly not very exciting controversies on details.

If the assumptions made in this last paragraph are valid, they do have tremendous implications for legal education and of course also for education in labor law. It necessarily means that comparative labor law as a method is of utmost importance in any curriculum containing labor law in whatever country. Otherwise, the effects described above cannot be achieved, the students will never be able to properly assess the peculiarities of their own system. In integrating comparative labor law into legal teaching, it is by no means recommended to cover as many other countries as possible. It is more efficient to take one or at most only few examples to simply demonstrate the functioning of the comparative method by way of providing examples that might enable the students to transfer the method to systems of other countries.

B. A Tool for Legal Reform?

The most interesting problem for academic research as well as for practical politics refers to the question whether and in what way comparative labor law can be used as a tool to legal reform and for the adaptation of the labor law system to new conditions. First, there is no doubt that comparison with other systems can significantly enrich the reformers' imagination of what could be done. Let's take the example of the scope of application of labor law. Traditionally, labor law was constructed to meet the needs of workers in the manufacturing industry where the factory is the place of work, where the workforce is relatively homogenous, and where the employment relationship can easily be defined by using the criterion of subordination. None of these assumptions still apply: the manufacturing industry, to a great extent, is replaced by the service sector, the factory as place to work is more and more replaced by network structures, the workforce is fragmented and segmented in core groups and periphery groups, the demarcation line between an

employment relationship and self-employment no longer can be drawn by simple reference to the criterion of subordination. This leads to many questions, among them the question of inclusion and exclusion: Should self-employed or at least specific groups of them also be covered by labor law? Or more generally: Should the scope of application of labor law be enlarged? Or should it be narrowed down, reserved for the core groups in the workforce, leaving those at the periphery outside? Should the periphery workers be on the same footing of protection as the core workers? These questions are not listed here in order to start an attempt to find answers. The problem to be dealt with, instead, is the question whether comparative labor law as a methodological tool can help to find appropriate solutions. Of course, the same question could be put forward if other examples would be taken: whether job security should be lowered or increased, whether it should be based on a concept of reinstatement or financial compensation, whether working time patterns should be shaped in a way to better allow compatibility between family and job obligations, etc. The list could be extended indefinitely; the problem remains always the same.

There is no doubt that comparative labor law can enrich the reformers' imagination, thereby increasing the set of alternatives to be taken into account. In this context, it has to be stressed once again that comparative labor law only provides a valid input if the prerequisites sketched above are met. Then it becomes pretty clear that solutions developed elsewhere are linked to the specific context of respective societies and therefore cannot easily be transplanted to the reformers' country. This leads to the most difficult question: Is transplantation from one system to another possible at all?

Let me take an example to illustrate the problem. In the 1970s, the EC, in an attempt to harmonize the system of workers' participation of big companies, had promoted a legal pattern whereby the German model of workers' participation in the supervisory boards of big companies (more or less) would have been imposed to all Member States. This attempt met strong opposition and turned out to be without any political chance. In the meantime, the EC has continued to develop patterns of workers' participation by significantly changing the philosophy. Instead of imposing one and the same model to all Member States, it provides for an extremely flexible framework that leaves each Member State and even the respective companies and their workforce the freedom to develop the institutional pattern that best fits their needs.

The lesson to be learned from this example is simple but far-reaching. Transplantation is not impossible. However, the possibility of transplantation refers to principles and functions (in our example, the principle of workers' involvement in management's decision-making) but not to institutional arrangements. The institutional patterns have to be shaped according to the legal, economic, political, cultural, etc. circumstances in each respective country. However, this is presently an extremely difficult task, in particular for the new Member States of the EU who each have to develop their own institutional pattern in order to integrate in their systems the flexible framework provided by European legislation. Instead of simply imitating models developed elsewhere, they have to find their own way. In this respect, Europe has become a most interesting laboratory in demonstrating how experiences made elsewhere, functions performed elsewhere, and principles developed elsewhere can be used in the debate on how to reform their own system. In addition, it should be pointed out that the insight into the limited possibilities of transplantation has led the legislative bodies on EU level to give up the concept of harmonization and uniformity and to replace it by a concept of providing minimum conditions and promoting principles to be applied throughout the Community.

The usefulness of comparative law goes beyond legal reform in a strict sense. It also applies to judge-made law going beyond interpretation of already existing statutory norms. The Courts have no choice but to take into account the possible practical impact of the rules they develop. These effects are not easily to be assessed. Quite often in the respective country—due to the lack of the rule to be developed—there might not be any empirical evidence, such an assessment can be based on. Here again comparative analysis can be a useful tool.

In taking all this together, it may be stated that comparative labor law definitely does have significant merits in law reform. However, it has to be made perfectly clear that the mere existence of patterns fulfilling certain functions elsewhere does not decide the question of whether it is recommendable to borrow such a function for their own system. The discovery, for example, that a country might have gone the way of strict de-regulation, de-institutionalization, and de-collectivization, of course, does not mean that the impact of such a strategy is to be transferred to another country. The normative (or political) decisions are still to be made autonomously by each country, even if to a larger and larger extent, such decisions are pre-determined by international or regional norm-setting.

C. The Abuse of Comparative Labor Law and the Task of Scholarship

As already indicated, one of the abuses consists in the fact that the methodological prerequisites described above are not met. Thereby, misleading results are produced. This failure is quite often combined with another one: results of such lousy scholarship are used by politicians and by interest groups as arguments in debates on reforms. The media are communicating these views, thereby strengthening the power of such strategies. An irrational debate and doubtful reforms are the consequence. The recent debate in Germany on the reform of the law on protection against dismissal was a very frightening example of this kind of abuse. Simplified, superficial, and inadequate information on systems abroad was published by interest groups and communicated by the media.

In view of this, unfortunately very often observed, abuse, academia does have an important task. By confronting the political debate with the insights of solid comparative labor law analysis scholars might bring some rationality to it. However, whether the media are inclined to transport such complex positions is more than doubtful. After all, they normally are not as popular as the ones gained superficially. Therefore, the role of scholarship in comparative labor law most likely in the future will also consist in at least developing a critical approach toward the abuse of this fascinating method.

V. CONCLUSION

As argued in these brief remarks, comparative labor law as a method will be indispensable in the future more than ever before. As I have tried to demonstrate, its impact on the development of national and international labor law will very much depend on whether the prerequisites sketched above are met. In this respect, an interdisciplinary approach is of utmost importance. The *Comparative Labor Law & Policy Journal* provides an ideal forum for promoting such an interdisciplinary dialogue as it already has proven in the past. Let's hope that scholars from all over the world will continue to use the *Journal* as a platform for an interdisciplinary exchange of ideas on the comparative method in labor law.