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COMPARATIVE LABOR LAW: SOME REFLECTIONS ON THE WAY AHEAD

Thomas C. Kohler†

Any consideration of the future of comparative labor law requires some comment about the remarkably changed profile of the field itself. Just a few years before the *Comparative Labor Law & Policy Journal* was founded, the redoubtable Otto Kahn-Freund lamented the fact that so few labor lawyers showed even the slightest interest in comparative law.¹ That hardly seems true any longer, as the existence of this publication and its sister journals, members of the "Club of Labor Law Journals," attests. Since the founding of the *Journal* a quarter-century ago, and particularly during the past decade or so, numerous periodicals dedicated to the topic of comparative labor and employment law have appeared.² What once was a sparse literature that popped-up only sporadically, strewn about here and there, has become a rich body of information set out in books, monographs, and in articles published in journals wholly devoted to the field.

Academic interest in comparative labor and employment law continues to grow. Another and perhaps even more remarkable sign of the changing times, however, is the emergence of continuing legal education programs for practicing lawyers that either feature, or are wholly devoted to, discussions of the treatment of employment law issues in comparative perspective. Likewise, treatises devoted to foreign employment law systems and to international agreements affecting employment regulation now crowd the library shelves of law firms where once only domestic law reports and commentaries would have been found. "American lawyers," Mary Ann Glendon wrote about fifteen years ago, "tend to view an interest in foreign legal

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1. Otto Kahn-Freund, *Pacta Sunt Servanta—A Principle and its Limits: Some Thoughts Prompted by Comparative Labor Law*, 48 TUL. L. REV. 894, 906 (1974). He also lamented that so few comparatists showed any interest in labor law, something that has not changed in the least.

2. Their number, incidentally, has been dwarfed by the number of journals devoted to international and comparative business, corporate, and tax issues.

systems as similar to a taste in good wine—some familiarity with them is a sign of good taste and refinement, but to specialize in them is apt to be considered wasteful, extravagant, or worse.”³ Undoubtedly accurate then, I think the characterization bears less force today. As an advertising slogan from a few years ago might have put it: “Comparative labor law—it’s not just a fashion statement anymore.”

One should not exaggerate. The palates of American lawyers have not undergone some sort of fundamental transformation that has left them the equivalent of legal gourmards, eager for the experience of subtle and exotic dishes and knowledgeable about the vintage years of small but noble vineyards. The same can be said of most of their foreign colleagues. Lawyers work with their eyes down, the legal historian J. H. Baker has observed, and they do so by necessity. The grand, unified, field theory of the universe may be fascinating, but the brief due tomorrow morning takes precedence.

Nevertheless, while specialization in foreign systems remains an activity that most would still regard as being at best immoderate, in a time of globalization, some familiarity with what other legal regimes require simply has become a necessity. Even the United States Supreme Court has begun to look at foreign sources in addressing issues of domestic law, although admittedly this has occurred over the strong protest of some of its members. Attention to the comparative dimension in the labor field no longer constitutes a luxury, but because of the changing nature of business and economic arrangements, an increasingly necessary part of the lawyer’s stock-in-trade.

As interest in comparative labor law research has grown, the field that it studies has undergone tremendous and rapid changes and it remains in a state of unprecedented flux. Insurance and pension systems, worker training schemes, safety and health regulation, and other legislation intended to protect and enhance the status of individual employees always have represented topics for investigation by those with an interest in comparative labor law. Research on the structures for collective representation and voice, however, traditionally has made up the heart of the enterprise and for good reason. These institutions have played a primary role in employment ordering and have influenced or driven the development and operation of the rest of the regulatory schemes for employment. The withering of these bodies and the worker associations that once

3. Mary Ann Glendon, *A beau mentir qui vient de loin: The 1988 Canadian Abortion Decision in Comparative Perspective*, 83 NW. U. L. REV. 569, 570 (1989).

supported them will change the nature and direction of the comparative undertaking.

At the time of the *Journal's* founding twenty-five years ago, collective bargaining in the United States represented an institution under growing pressure, but one recognized as so crucial to the nation's wellbeing as a democracy that even a senior member of the Reagan Administration rallied to its defense. In recent years, however, the political parties have assigned labor and employment law issues a relatively low priority, while worker participation through collective bargaining nearly has become an endangered species. The title of a reflection on the legal future of employee representation written about a decade ago by our colleague, Michael Gottesman, more or less says it all: *In Despair, Starting Over*.⁴

This does not mean, as non-Americans sometimes suspect, that the United States has no law regulating the employment relationship. With the advent of statutes like the Americans with Disabilities Act and the expansion of remedies under the employment provisions of our civil rights acts, which Congress enacted during the early 1990s, the United States has more formal individual employment law than ever. Despite its framers intentions, however, much of it tends to act primarily as unfair discharge protections for middle and upper level managerial employees, especially those nearing the end of their careers. Moreover, none of it affords employees a voice in workplace decision-making.

American labor and employment law statutory schemes, like those of most developed nations, assumed the sort of long-term, stable employment relationships and internal labor markets that once represented the norm. The social and economic substrate on which these schemes rest, however, continues to change, which has posed increasingly severe challenges to the ability of employees at all levels to control their fate in the market or to plan for the futures of their families. As American radiologists and engineers have discovered, their work is every bit as transportable as that of factory employees. Work is an activity, not a place, and human ingenuity is not confined to particular nations, continents, or peoples.

Even a decade ago, one might have been tempted to regard the weakness of unions in the United States and the growing frailty of the nation's basic labor law as an example of American exceptionalism

4. Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI-KENT L. REV. 59 (1993), reprinted in THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION 57 (Matthew W. Finkin ed., 1994).

and the result of our rather extraordinary form of insistent individualism. Today, however, the free-fall in union membership has spread everywhere, even to "communal" societies like Germany and Japan, which once were characterized by union-density rates unheard of in the United States. Wherever one looks, one sees the same thing: a steep and continuing drop-off in union membership, a decline in collective bargaining and in European countries at least, mounting pressure to diminish the sorts of elaborate legal protections traditionally afforded the individual employee. In late-night conversations with non-American colleagues, a visitor hears, occasionally in resigned tones, that labor law as we have known it is dead, that the old order is irretrievably passing away. While a matter of much discussion, little consensus exists about what might, or should, come next.

As in the United States, these developments have occurred hand-in-hand with a rising form of individualism that exhibits itself in numerous ways that have significant social impact and important implications for the existence of civil society. These include such things as an overall decline in membership in sodalities and voluntary associations of all sorts; an unprecedented plunge in both marriage and birth rates, made all the more remarkable because they are occurring in a time of relative peace and record prosperity; rapidly aging populations; and an historic number of "households" that consist of a single person, living alone. Something far larger than a change in the patterns of employment and industrial relations is afoot.

So, if the underlying field is in such a state of uncertainty, and if employment, like life's other relationships, may be on the way to becoming a series of "spot" dealings, where does this leave the enterprise of comparative labor and employment law? Does it have a future, or is its only job to talk about what once was, and how beautiful it all used to be? The questions about labor law, by the way, can be extended to law generally. How effectively can we order in a time when the importance of the nation-state and the influence of its political and legal institutions are weakening? How does globalization affect the rule of law and our ability to order the conditions of our lives democratically? These are large questions and none of them admit of easy answers. All of them, however, point to the growing significance that I believe comparative research will assume.

Little more than a century ago, the field of labor and employment law did not exist. In both the common and civilian law systems, the

field had to be invented,⁵ and its eventual emergence reflects the collaborative efforts of jurists, legislators, social thinkers and activists, academics, workers, and businesspeople to develop a legal order that responded to the needs of an era characterized by unprecedented social and economic arrangements. Just as for our fore bearers, the task of bringing forth a new order for work confronts us, but this time around, the challenges will be different. The social context in which humans work will need to be taken into account as we go forward. Family structures, changing demographic patterns, and the relative weakness of many of the institutions of civil society will all condition the sort of order that emerges. A new order will also require an international framework within which more localized and supple orders can respond to differences in culture, working patterns, etc. This implies new sorts of collaborative research, and attention to new questions and areas that might once have seemed rather distant from the sorts of things that have concerned labor and employment specialists.

To date, work in comparative labor law largely has tended to occur in what one might call the classical mold. Here, researchers identify, describe, and critically analyze the operation of the legal institutions that play similar functions in the systems being compared. While this sort of comparison may generate numerous insights into history, culture, political economy, etc., the goal of such work typically has been practically-oriented: learn how another system handles a common problem, from which ideas might be drawn and adapted for use at home. This approach has generated a great deal of valuable information, and in some cases, has played an important role in the adaptation of systems from more- to lesser-developed economies. Such work also can assist in critically evaluating the strengths, weaknesses, and direction of domestic institutions. This sort of work will remain important, but the transformations in society and economy will compel changes in the nature and scope of the comparative enterprise as well.

What we compare in terms of ordering regimes has and will continue to change. Increasingly, transnational agreements, the impact of orders established by NAFTA, the European Union, as well as international organizations like the World Trade Organization, will

5. Speaking of the German case, the legal historian Franz Wieacker termed the development of labor law "one of the few indisputable achievements of our jurists in this [the Twentieth] century." FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE, WITH PARTICULAR REFERENCE TO GERMANY* 435 (Tony Wier trans, 1995). The development of this law represents an undeniable achievement, but not one of the jurists alone.

come within the scope of matters to which comparative labor lawyers must devote increasing attention. The same will be true of the work of non-governmental organizations, whose influence will continue to rise as the importance of the nation-state wanes. We will come to an expanded and more supple understanding of what we regard as law.

Along with these changes will come changes in the way comparative work proceeds. Comparative law, we long have been told, is not a topic but a method.⁶ The comparative law literature, however, has not always made clear what the term method signifies, and there is some debate about whether such a method even exists.⁷ In light of this, a suggestion or two about the meaning of method might be helpful.

A method is not a set of rote procedures intended to produce some pre-determined result, e.g., the foolproof method to make a perfect quiche.⁸ Rather, a method constitutes a dynamic, open-ended framework that promotes collaborative ingenuity and inquiry in matters where the outcome remains speculative. A method is a normative pattern of related operations that generates cumulative and progressive results. In other words, a method pursues questions so that the resulting answers open onto the next appropriate query. It not only delivers a body of knowledge, but continues to push researchers forward by posing answers as potential subjects for further investigation. The cycle not only repeats, it advances. A method progressively generates a chain of insights, each of which coalesces with all the previous valid insights. The emergence of knowledge, however, is a matter of probability, not certainty. We may desire to understand, but we cannot through an act of will produce it. Adherence to method makes the occurrence of valid insights more likely, but does not guarantee it.

Intelligent questioning about why something is, how it came to be, what it means, what we ought to do, and why that is desirable

6. E.g., Otto Kahn-Freund, *Comparative Law as an Academic Subject*, 82 LAW. Q. REV. 40, 41 (1966).

7. For the past several years, comparative law scholars have been engaged in a lively discussion and debate about the tasks, methods, achievements, and future of their field. For some representative articles, see Hein Kötz, *Alte und neue Aufgaben der Rechtsvergleichung*, 57 JURISTEN ZEITUNG 257 (2002); Ralf Michaels, *Im Westen nichts Neues?: 100 Jahre Pariser Kongreß für Rechtsvergleichung—Gedanken anlässlich einer Jubiläumskonferenz in New Orleans*, 66 RABELS ZEITSCHRIFT FÜR AUSLANDISCHES UND INTERNATIONALES PRIVATRECHT 97 (2002); Mathias Reimann, *Stepping Out of the European Shadow: Why Comparative Law in the United States Must Develop Its Own Agenda*, 46 AM. J. COMP. LAW 637 (1998); Symposium, *Centennial World Congress on Comparative Law*, 75 TUL. L. REV. 859 (2001); Symposium, *New Directions in Comparative Law*, 46 AM. J. COMP. LAW 597 (1998).

8. For further discussion of these points, see BERNARD J.F. LONERGAN, *METHOD IN THEOLOGY* 3–27 (1990).

constitutes the heart of a method. It requires being truly attentive to data, trends, potential problems, and the work and observations of others. Such a state of attentiveness is not easily achieved or maintained. Not only does it require enormous energy, but our biases perpetually threaten to sabotage the process by deflecting our attention from raising questions about long-held suppositions or cherished but ultimately untenable beliefs. By ruling certain questions out of court because we simply don't want to deal with them, we can halt the process before it begins.

From questioning follows the effort to understand, to develop explanations that jibe with all the relevant facts and can take into account all the data. This stage of method entails the exercise of true creativity, to noticing new possibilities and assembling information in completely novel ways. It also marks another point for collaboration, for taking into account what those working in other fields might know, for raising to them questions about what the data may suggest.

In the second stage of method, one formulates hypotheses and attempts explanations. We attempt to describe what we think we know and ask ourselves whether our account squares with all the relevant data. We try out our proposed explanations on others to see whether they can poke holes in what we have managed to formulate. This is a stage of searching, probing, and testing. When we have a response for all the questions others have posed to us, and an answer to all the misgivings we have about our own proposal, when we have tortured ourselves and others but no further relevant questions emerge, we reach the stage of judgment. Is this explanation right? Do I have it? Can I justify why the proposed course of action is better than other things we could do?

Judging unavoidably entails commitment. In judging, we take a stand. We make claims about how something really is or works or what in human affairs ought to be. We bind ourselves to a certain understanding of the world and its meaning. Our judging constitutes us as individuals and brings about the social order in which we live. Whether we like it or not, the process is inherently moral and represents something we cannot avoid. So much for value-free science.

This little sketch not only outlines the basic characteristics of method. It also suggests something about the directions comparative labor law research might take. The founders of comparative law as an independent branch of legal research posited the development of "a

common law of civilized humanity” as the field’s ultimate goal.⁹ A civilized order of the employment relationship for humanity would represent a great achievement. I doubt that we stand anywhere near its common formulation, but I believe that substantial agreement probably exists about the sorts of thing comparative labor law research should address. In addition to some of the themes mentioned above, it would include further work in such familiar but important topics as employee privacy and security of health information; more effective schemes for worker participation, particularly at the global level; anti-discrimination regimes and means of increasing work opportunities for the disabled, etc.

I would like to add three themes to this list, which the discussion of method evokes. The first is what philosophers generally refer to as the anthropological question. Every employment law order assumes certain things about the character of human beings. These assumptions are deeply embedded in employment law regimes and explain their rationale, operation, and outcomes. Not only do different legal regimes rest on different assumptions. In the case of the United States, for example, different portions of the National Labor Relations Act rest on different and conflicting assumptions about human character. Moreover, the Wagner Act portion of that statute rests on assumptions that clash deeply with those that typify the American legal system. No wonder the American version of collective bargaining can seem inscrutable, or that the provisions of the law governing it so often appear to work at cross-purposes.

Getting our assumptions straight, looking at what other systems have to tell us, and raising questions about the accuracy and the omissions of any of these presuppositions constitutes an important part of evaluating what sort of employment orders are desirable and consistent with our true humanity. This sort of work also sheds light on the reasons that various regimes operate in ways we might not expect. If a new employment order must be developed, getting a better handle on those for whom it is intended might be helpful.

The relationship between religion and employment law represents a second area ripe for comparative research. Religion is a neuralgic topic for most scholars, and that seems particularly true of those with an interest in labor and employment law. While we do our best to ignore it, religion and religiously-inspired movements have had an immense effect on the development of the law we study. The Civil

9. KONRAD ZWEIGERT & HEIN KÖTZ, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG 2 (3d ed. 1996)

Rights movement of the 1960s, for example, emanated largely from the African-American Protestant churches, whose leaders, many of them ordained ministers, framed their claims for equality primarily in biblical language, and not in the language of rights so familiar and so comforting to lawyers. They made moral demands of the United States, and the Civil Rights Act of 1964, including its employment provisions, is its fruit. Likewise, Catholic and Protestant social thinkers like Emmanuel von Ketteler and Abraham Kuyper, and the movements of which they were part, exercised an important influence on the development of employment legislation in both Europe and the United States. One of their heirs, the German Jesuit Oswald von Nell-Breuning, the “Nestor” of Twentieth-Century Catholic social thought, subsequently became an important figure, among many other things, in the movement for worker co-determination. These examples could be multiplied many times over.

Religion gives people one of their deepest motives for acting, and it fundamentally shapes their understanding of their relationship and duties to others. It is no mistake that rates of union membership among Catholics and Jews in the United States have been vastly out of proportion to their representation in the American population. This disproportionality becomes even more pronounced when the representation of these groups in union leadership positions is considered. One cannot fully understand the significance of employment law regimes without taking the religious voice into account. As we work toward a new employment order, labor scholars can no longer pretend that religion and religious belief is extraneous to their work.

Further, comparative study of issues like immigration control, the impact of job protection, and other regulation that affects the poorest and weakest participants in the market represents a third area of need. Markets are good at spreading opportunity. The movement of jobs off-shore, the lowering or removal of the bars to immigration, the encouragement of worker mobility all have substantial costs of their own. At the same time, they have improved the standard of living of many previously excluded from the world’s prosperity and opened life chances to large swaths of the globe’s population that would have been undreamed of a generation or two ago. Developing employment orders that can protect the legitimate interests of workers in developed countries without depriving the poorest of their place at the table or postponing the protections due them represents a tremendous and pressing challenge.

The three themes that I have proposed for further research flow from one another. In some cases, pursuing these issues pushes our traditional agenda in unaccustomed directions and requires collaborative arrangements with those who generally have been strangers to our undertakings. This is a good thing. Work is for humans, not the other way around. Because work touches every aspect of human personality, we need to broaden the scope of the comparative enterprise and delve into areas that we previously resisted. We must also keep in mind that by its very nature, law is, like it or not, a morally-charged enterprise. Moreover, few areas of the law touch people more directly or constantly than the part of it that orders the employment relationship. That fact gives work in this field special significance.

Comparative law and the field of labor and employment law are natural allies. The two became recognized as distinct fields of law at about the same time, a little more than a century ago. Both represented authentic and rather audacious innovations in the lawyer's craft. Both are, by nature, interdisciplinary and cooperative undertakings. Labor scholars and lawyers, one noted commentator has observed, are "like vagabonds without a permanent home, border crossers without papers or residence permits, an impudent, pushy lot, who gladly graze in alien fields, or harvest in someone else's garden."¹⁰ Because it deals with the conditions of daily human existence, labor law is a porous enterprise, which naturally reaches out to other fields to shed light on relationships that it seeks to understand and to order. More than ever, work in the field will involve labor lawyers and other scholars in a new, more dynamic, and more challenging comparative enterprise.

10. Bernd Rütters, *35 Jahre Arbeitsrecht in Deutschland*, 1995 RECHT DER ARBEIT 326 (1995).