
Introduction to the Comparative Labor Law Handbook

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1. THE CHALLENGE OF COMPARATIVE WORK AND THE HANDBOOK'S OBJECTIVES

We begin with a rumination on the organic nature of law. Law has a shelf life. As the society in which law is embedded changes, parts of the law wither away or become vestigial; parts are extended or renewed in novel application; new law is fashioned whole, to commence the life cycle afresh. Consequently, the study of law, when not totally fixated on the here and now, is inherently comparative. Students of the law look to the before and the after – to discern change, to explore reasons for change, to ask whether there is need for change, and to see how it all fares.

But some look beyond their borders; for counterpoints, parallels, or counterfactuals. This adds another dimension. It confronts differences in legal systems and cultures – sometimes superficial, sometimes not – sometimes couched in vernaculars that lack equivalents or are so steeped in the unspoken that the meaning can and often does elude even the astute non-native. But the non-native, in open-eyed wonder, may give voice and form to that which has become so ingrained in a foreign system, is so much a matter of second nature to those who live in the system that those who live in it fail to appreciate its significance. These are the challenges and rewards of studying law comparatively.

Unlike ancient institutions long subject to comparative legal study – real property, the family, the use of violence – labor law is a young discipline. At its core, it concerns the institution of wage labor and the situation of the waged worker, which did not emerge as a major focal point for the law's concern until well into the nineteenth century, and was not a subject of systemic legal academic study until the twentieth. Labor law arose as a consequence of the rise of capitalism and industrialization – both global phenomena. In that sense, labor law from the outset was a comparative enterprise insofar as it developed in separate nation states, but in reaction to common methods of production and common means for the deployment and administration of labor on a global scale. Efforts to produce manufactured goods with interchangeable parts in the mid-nineteenth century evolved into mass industrial production,¹ accelerating the extreme division of labor characterized by the assembly line, which took on the sobriquet of “Fordism” worldwide. Meanwhile, the growth of large and complex organizations entailed the development of bureaucratic means for the administration of

¹ David Hounshell, *FROM THE AMERICAN SYSTEM TO MASS PRODUCTION 1800–1932* (1984); cf. A.E. Musson, *British Origins* in *YANKEE ENTERPRISE: THE RISE OF THE AMERICAN SYSTEM OF MANUFACTURES* 25 (Otto Mayr & Robert Post eds 1981).

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people and not only in manufacture. Railroading was an early mover in that regard.² So, too, the department store.³ The comparative perspective was important already at the evolution of the field, accounting for different legal arrangements in what seemed to be similar organizational settings, with ideas such as ‘Fordism’ crossing borders, maintaining the unique features of its origin and changing with the culture of many national orders.

As solutions to the ‘labor problem’ developed, they continued to draw on the interplay of common ideas and different methods of implementation. In the 20s and 30s, Frederick W. Taylor’s ‘scientific management’ drew an enthusiastic following in Western Europe and the Soviet Union.⁴ In the post-war period, ‘human relations’⁵ eclipsed scientific management, succeeded in turn by the ‘industrial relations’ school that was thought at the time to bid fair for global convergence.⁶ In the 80s and 90s, the work of Edward Demming⁷ and Douglas McGregor⁸ in the U.S. bore fruit in Japan, becoming *kaizen*⁹ and *Theory Z*,¹⁰ which rippled across the seas. Today, the call to the return to ‘core competencies’¹¹ has spurred the growth of alternative business models – subcontracting, franchising¹² – echoes internationally.

The deployment of common ways to treat those who made the goods and supplied services in nation states with very different legal regimes, histories and shared assumptions about how people should be treated makes the comparative project both difficult and, if done well, insightful. Economic imperatives confront social values. Ideologies of management meet ideologies of law – if by ideology we mean assumptions, express or implied, about how the existence of a set of facts or legal results simultaneously explain and justify why they are or what they should be. The latter injects a normative component to the comparative enterprise that will be touched upon below.

A necessary predicate for comparative analysis is an accurate depiction of the law. Given difficulties of translation, and the fact that some concepts have no good cognates

² See e.g. Walter Licht, *WORKING FOR THE RAILROAD: THE ORGANIZATION OF WORK IN THE NINETEENTH CENTURY* (1983) with P.W. Kingsford, *VICTORIAN RAILWAYMEN: THE EMERGENCE AND GROWTH OF RAILWAY LABOUR 1830–1870* (1970); F. Jacqmin, *RAILROAD EMPLOYEES IN FRANCE* (1877).

³ See e.g. Michael Miller, *THE BON MARCHÉ: BOURGEOIS CULTURE AND THE DEPARTMENT STORE, 1869–1920* (1981); Ralph Hower, *HISTORY OF MACY’S OF NEW YORK 1858–1919* (1943).

⁴ Judith Merkle, *MANAGEMENT AND IDEOLOGY: THE LEGACY OF THE INTERNATIONAL SCIENTIFIC MANAGEMENT MOVEMENT* (1980).

⁵ Reinhard Bendix, *WORK AND AUTHORITY IN INDUSTRY* (1956).

⁶ Clark Kerr *et al*, *INDUSTRIALISM AND INDUSTRIAL MAN* (2d ed. 1964).

⁷ W. Edward Demming, *OUT OF CRISIS* (1986).

⁸ Douglas McGregor, *THE HUMAN SIDE OF ENTERPRISE* (Annot. by Joel Cutcher-Gershenfeld, ed. 2006).

⁹ Maasaki Inai, *KAIZEN: THE KEY TO JAPAN’S COMPETITIVE SUCCESS* (1986).

¹⁰ William Ouchi, *THEORY Z: HOW AMERICAN BUSINESS CAN MEET THE JAPANESE CHALLENGE* (1981).

¹¹ David Weil, *THE FISSURED WORKPLACE* (2014).

¹² Tony Royle, *WORKING FOR MCDONALD’S IN EUROPE* (2000).

in other legal vernaculars, the ability to achieve goodness of descriptive fit is a professional skill of no small dimension. There is much good depiction in what follows.

The chapters in this Research Handbook mingle subjects of long-standing comparative concern – freedom of association, representation outside collective bargaining, discrimination, the very forms of law¹³ – with matters that have pressed to the fore in recent years because of the expansion of modes of entrepreneurial control and knowledge-based employment (e.g., covenants not to compete); or, because of the ever-growing fracturing of responsibilities in chains of contracting (e.g., the determination of what the subject of the law is). Even traditional subjects of comparative treatment are placed in a new light by economic and managerial change: a generation ago, scant notice would have been paid to what we now call ‘soft law’ as a player on the global stage; attention must now be given to emerging geographic zones – to Europe as a whole, to the former members of the Soviet bloc, and to rapidly developing economies.

In substance, these chapters speak for themselves. No introduction to what they say under their various heads is needed. We focus here on what runs through these chapters that is largely unspoken: the methodological assumptions and practical difficulties of doing labor law comparatively. These conundrums our authors tend not to confront head-on. But we believe it pays to lay them out.

Good description is a necessary, but it is not a sufficient condition for good comparative work which confronts not only the practical barriers to full comprehension, but also the unarticulated values the law embraces. Trending between the two, this volume suggests the various forms comparative work can take. These themes are strongly interrelated. They also intersect with the dialectics of shared scholarly values.

2. WHY ENGAGE IN A COMPARATIVE STUDY?

It may seem obvious that comparisons are useful, but upon probing more deeply into the literature different reasons emerge. At the one end of the spectrum, comparisons can be viewed as a way of identifying ‘best practices’, diffusing them (‘transplantation’) and improving the legal system. This in fact was an important trigger for Otto Kahn-Freund’s famous warning, suggesting that simply transplanting a legal (or industrial) institution from one country into another may be a fool’s errand, as institutions cannot be so easily detached from their social context.¹⁴

A stronger normative purpose can be found in policy making – in legislatures, at think tanks and the like, although at present, perhaps following Kahn-Freund’s warning, it is less pervasive in scholarly work. The normative objective can have a stronger or a weaker version. The stronger assumes some kind of legal Darwinism, according to which the best legal arrangements hold sway and become more common. This

¹³ See XV INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (Bob Hepple ed. 2014) [“Labour Law”], INTERNATIONAL ENCYCLOPEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS (Roger Blanpain ed. 2007) (with supplementation).

¹⁴ Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974).

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assumption should be distinguished from the discussion on convergence to which we will refer later in this chapter. Identifying convergence, in itself, does not assume the positive normative assessment that Darwinism makes. For example, many findings in this volume identify convergences that evolve from the fragmentation of the standard employment relationship. This may reflect a form of Gresham's Law instead of Darwinian development. However, the authors that identify such convergence do not necessarily assume that the corresponding legal fragmentation (or attempts to counter such fragmentation) are necessarily 'good' or 'bad'. There are further 'labor values' that need to serve as the normative benchmark, and the prevalence of a particular legal arrangement is not enough in itself.

A weaker version of the normative objective may be to identify diverse solutions that are then assessed and measured according to relevant 'labor values'. The objective of the comparative study is to advance a normative claim, but the comparison is only a first step, and not an end in itself.

The normative objective is not a purpose of this volume, but it appears in several of the chapters. For example, Alan Bogg and Keith D. Ewing (**Freedom of Association**) implicitly draw on the comparative approach for normative purposes. They claim that Kahn-Freund's warning against transplantation, though warranted in particular instances, should not have a chilling effect on the venture. Comparative labor law should progress from the comparison of nation states to observe global trends and patterns. The normative claim the authors make is unique and should be carefully read. In their words, 'the fetish with difference in the modern world is a deviant activity that causes us to lose sight of major developments of convergence that threaten the very existence of labor law traditionally understood, and the need from labor lawyers for a credible response.' This claim resonates more with the weaker version of the normative claim. Identifying convergence is but a step towards assessment of global trends, but not an indication, in itself, of what the law *should be*. In fact, their normative comment contradicts the assumptions of Darwinism. Convergence of major developments are identified to indicate processes that need to be reconsidered, rather than entrenched and held to be the inevitable outcome of legal evolution.

The relative absence of the normative objective of this volume may be the result of its scholarly emphasis. Perhaps a different image would be obtained from a survey of the comparative method in case-law and policy reports. A different explanation may also suggest that at least the strong (Darwinist) normative claim is usually market-driven and in tension with the epistemic community of labor scholars, who despite differences of views among them, adhere to the importance of labor market institutions. Finally, the strength of Kahn-Freund's warning is at present a staple of academic scholarship that avoids black-letter comparisons and emphasizes instead the social context and implementation of labor law. Not only in this Handbook, but also more generally, it is rare to see recommendations to simply copy and paste arrangements of one country on to the legal system of another.

What then can be the purpose of the comparative study? Unlike the normative objectives, comparative methodology is often suggested as way of understanding solutions developed at one place or at one point of time, by identifying alternative options; i.e., it is an analytical tool. For example, Guy Davidov, Mark Freedland and Nicola Kountouris (**Employees**) discuss the question of who is viewed as an

'employee', suggesting that such a study can take a historical perspective (how did the current doctrine develop over time), or a normative perspective (who should be considered as an employee). The comparative approach supplements such studies by helping identify important moments in the development of doctrines, revealing which steps in the historical development are more universal and which are embedded in local circumstances, and revealing various options that can clarify normative choices. In this, the comparative approach aids in questioning what sometimes is presented as a matter of truism or an inevitable development of the law. Developments in other countries are not suggested as a normative recommendation, but merely as expanding the legal imagination and the range of possibilities.

Another reason given for the comparative task is that it can add depth to the study of law. Precisely for the reason that legal institutions are socially embedded, the comparative project can help in identifying how the social context matters. Demonstrating this claim, Matthew Finkin, Rüdiger Krause and Hisashi Takeuchi-Okuno (**Privacy**) view the engagement in the comparison of legal solutions to employment problems as a looking-glass through which fundamental cultural and legal differences between countries can be realized. This ambitious objective is essential to the study of employment and labor relations. Work is central to individual and communal values alike. It therefore rests on a host of values that extend beyond the daily relationship between an employer and employee. The focus of this chapter on matters related to privacy, dignity and autonomy, encompassing ideas of far broader context than that of employment, is particularly suitable to such an extended objective for the comparative task.

Kevin Banks, Roberta Nunin and Adriana Topo (**Workplace Discrimination**) pursue a similar objective, displaying the relationship between legal developments and deep cultural differences. Their study of the law on equality and workplace discrimination explains differences on the basis of the distinct social problems that triggered legal developments in the legal regimes they study. Although the authors' objective is similar to that of '**Privacy**', the direction of their inquiry is the opposite. '**Workplace Discrimination**' seeks to draw on legal comparisons as an instrument to reveal differences in legal and social cultures. By contrast, '**Privacy**' seeks to explain legal diversity by historical and cultural processes that shaped the law. Together the two chapters suggest complementary ways of drawing on comparisons for revealing the dialectical relationship between law and culture.

While normative and descriptive objectives have been set out as different ends, there is a spectrum of objectives between them. For example, Sean Cooney, Darcy Du Toit, Roberto Fragale, Roger Ronnie and Kamala Sankaran (**BRICS**) use comparative methodology to understand whether BRICS countries, which in many respects are very different, have some kind of a special recipe for economic success that can be traced in regulatory solutions in the field of labor law. The study does not end in a clear prescriptive answer, particularly given the data that indicates that some developments may have contested outcomes on matters such as inequality. At the same time, the framing of the question bids fair to continue various studies that tie policy measures with variable indicators of the nations' social and economic performance, and reveal the tradeoffs. The comparison, in itself, cannot suffice for normative prescriptions, but

it can aid in identifying policy measures that should be analyzed on the basis of separate normative criteria.

3. THE COMPARATIVE METHODOLOGY

Sequencing Concepts and Findings

At first glance, the methodology of comparison can be described rather simply as ‘country *a* does X, and country *b* does Y.’ Easier said than done, and not always very productive. Several chapters point to the need for a broader set of options and strategic choices.

Sometimes the comparative task commences with a comparison between several countries, from which different models are identified. The sequence is first a descriptive analysis of the state of the law in the chosen countries, and then a stylized amalgamation of similar legal prescriptions into categories that distinguish some countries from others. The authors encounter a rich world of primary sources and seek to ‘simplify’ by categorizing solutions. For example, the chapter by Alan Hyde and Emanuele Menegatti (**Employee Mobility**) surveys the law of many countries and splits the countries into three tiers of enforcement levels with respect to covenants not to compete.

In others we see a reverse sequence. The authors reach the comparative table with an idea about stylized differences and seek evidence in various countries that fit one category or the other. For example, Luisa Corazza and Orsola Razzolini (**Employer**) bring at the outset a distinction between two rival conceptions – that of the ‘single employer’ and the ‘plural employer’, and then identify countries that resonate with one or the other. In turn they identify how the differences are gradually being blurred and particularly how the single-employer pattern is being relaxed to accommodate the notion of multiple employers. Similarly, the chapter on **Privacy** approaches the comparative project with a conceptual framework that views issues, such as monitoring in the workplace, at the junction of three concepts – privacy, autonomy and dignity. The comparative task commences with a general description of the legal status accorded to each of the three concepts in the countries they study. Only after establishing this broad basis for the study, can they provide the particular legal responses in each country.

Monika Schlachter and Achim Seifert (**Employee Voice**) pay particular attention to this approach. They organize their comparison of non-union collective voice institutions according to a list of common institutions, such as – works councils and representation on the board of directors. They view these as ‘ideal types’ for which they seek appearances in various countries. However, they appropriately caution that such ideal types are a ‘heuristic device’ or a ‘hypothetical concept’. These help in organizing the discussion, but they do not suggest that each identification of a works council, for example, in one country or another, denotes the replication of the ideal type. Using ideal types requires movement beyond the mere designation to portray the actual institutional design. Moreover, the appearances of ideal types in each country require identifying the institution’s relationship to other institutions. Finally, a study of the ideal type’s national appearance also requires studying how it functions ‘in action’ and

not only 'de jure'. Despite all the steps that are required over and above the identification of ideal types in each country, it is a useful strategy. Ideal types help in making the comparison clearer, more manageable for the readers. They give the clarity at the outset and accommodate a more precise account of differences as analysis proceeds.

Apples and Oranges – Comparison Between Whom?

Another challenge for comparatists is to decide what and who to compare. Comparisons involve a tradeoff. It is easier to compare when (a) many factors are controlled for, as is the case in the comparison of relatively similar countries, or (b) when the subject of comparison is very focused. It is more difficult to compare across numerous and distinct jurisdictions and across a broad spectrum of topics. There are however no strict rules and the question of what and who to compare is strongly related to the purpose of comparison. Here we observe several strategies.

Perhaps, the most difficult task was entrusted to Marilyn Pittard and Stuart Butterworth (**Sources**), who were asked to use the comparative method to present the sources of labor law. Given that labor law is well known to be polycentric, at the junction of various legal fields, and the differences in the legal systems of many countries, wholly unrelated to the problematics of labor law in particular, render a comparison difficult to manage. While the authors could have adopted a strategy of contrasting a few countries (perhaps very similar – such as commonwealth countries), or focusing on particular dilemmas that crystalize the problem of polycentric sources (such as the hierarchy of norms in labor law), the authors decided to take a plunge. They chose to create an inventory of sources and forms, demonstrated by examples from various countries. They cherry pick examples, with no prior commitment to any legal system, in which the central guideline navigating their choice is to display institutional diversity. Such a task cannot be accommodated by a preliminary selection of countries or topics, as both types of selection are likely to produce a relatively limited inventory. At the same time, such a strategy also carries a price, as it is difficult to grasp the systemic nature of any particular country, or to identify functional legal substitutes that govern the same problem, but in different bodies of law. There is no 'right' or 'wrong' in this selection, as it depends wholly on the definition of objectives. A descriptive display of diversity requires a different methodology than a prescriptive or critical study of functional alternatives.

In contrast to the broad strategy that was adopted in **Sources**, other authors opted for more focused alternatives. One is to delimit the list of countries studied. However, the actual choice of countries to compare is itself a challenge. A pragmatic constraint often requires comparing countries with which the researcher has a sound basis and familiarity with the details and nuance of the legal doctrine. Researchers are generally at home in some systems, while for others they rely on secondary sources and can easily miss important developments, misinterpret the significance of legal change, under- and over-estimate the importance of a particular case, or fail to see the systemic effect in which one rule maybe compensated by another in a different area of the law.

The choice of countries must therefore rely first and foremost on the countries with which the authors have a sound sense of legal developments. For example, the chapter

on **Employees** chose to focus its attention ‘on legal systems we feel reasonably familiar with.’ The importance of this decision is revealed in the analysis, whereby the authors demonstrate that although the legal formulations for identifying an ‘employee’ are often very similar, the differences are revealed in implementation. Similarly, in the chapter on **Employee Voice**, the authors explain that one of the reasons for the European thrust of their comparison is that the authors are European. This, however, is not merely a matter of convenience. For those seeking to compare non-union employees’ voice, institutionalized forms exist most readily in Europe.

Beyond the preliminary constraints of familiarity and deep understanding, the choice of countries may rest on different logics. It is possible to compare very similar legal systems to identify how small differences matter. Other times it is more effective to choose very different countries to amplify differences in the law. Again, there is no ‘right’ or ‘wrong’ in this decision, but it is important to be aware that the set of countries compared may bias the findings and conclusions. Consequently, various chapters have adopted diverse approaches.

Most notably, the third section of this volume commences with countries that share a common trait, but in other respects are marked by significant differences. Erika Kovács, Nikita Lyutov and Leszek Mitrus (**Eastern Europe**) compare the similar origins of the countries influenced by the Soviet Union, and the paths they have taken since 1991, with the collapse of the U.S.S.R. and its dominant position in the region. These three countries scarcely reflect the full panoply of possibilities in labor law, and therefore the chapter does not attempt to provide an inventory; but it is the only strategy that can accommodate the understanding of institutional change and the circumstances that affect the focus of the common theme. The choice provides a high resolution of comparison as the authors demonstrate that while the countries started in analogous positions and moved in similar trajectories, considerable difference in the paths of transition emerged.

The **BRICS** chapter starts with a predefined set of countries that have little commonality except their state of economic development, their exceptional growth levels, and the loose institutional clustering of these countries.¹⁵ To foster a meaningful comparison, the authors had to give up the attempt to compare their labor law’s systems wholesale. While some bird’s-eye view could have been conducted, the outcome was assumed to be irrelevant for any kind of theoretical or policy-oriented objective. The authors therefore focused their comparison on the area of atypical/informal/precarious arrangements – a choice reflecting the common effort to move from an informal to a formal labor market – with a particular focus on the regulation of temporary work agencies. It is not argued that this is the pivotal regulatory arrangement that can explain the respective national systems’ relative success (or difficulties). Instead, the choice of topic was one that could best demonstrate both common underlying tensions that are

¹⁵ Russia was not included in this comparison of the five-nations BRICS and was studied instead in the chapter on **Eastern Europe**. It is rather clear that the portrayal of Russia would have taken a different trajectory if it was included in the BRICS comparison, instead of the chapter on Eastern Europe. These different perspectives are merely different ‘parts of the elephant’, although they may still give different impressions of the Russian system as a whole.

repeated in political arguments in all four countries, as well as the divergence of institutional solutions and balances.

When comparing the two regional chapters, the chapter on the countries influenced by the former Soviet Union start with shared origins and similar paths of change, while the **BRICS** faced a more difficult challenge. The legal origins of the four countries, as well as their political and social structures, are remarkably different. Consequently, the interplay of similarity and difference in the choice of countries appears in both chapters, but their weights are very different.

The selection of countries to compare is also discussed in chapters of the Handbook's first and second sections, which are coordinated on a thematic basis. One strategy is to pre-select countries that are characterized by a specific difference. The chapter on **Privacy** chooses three countries that are distinguished from each other on the basis of two axes: the importance of the individual in law and culture (demarcating Japan from Germany and the U.S.), and the extent of state intervention in the employment relationship (demarcating Germany from the U.S., with Japan being qualitatively different from the others in this respect as well). The study emphasizes the interaction between cultural norms and legal arrangements, and therefore the choice of countries aids in trumpeting differences that crystalize the comparison. We can only speculate on the findings of a similar thematic comparison in countries that are more similar on both axes (for example – Germany, Netherlands and Belgium), and ask whether a similar comparative methodology and framing of questions could have been used.

The authors of **Workplace Discrimination** chose three regimes that do not nest comfortably within the classification of comparing similarities *or* differences. Their choice of the U.S. and Canada (usually identified as 'similar') and the EU (usually suggested as a comparator for North America) reveals that in the context of discrimination in the workplace, the three countries pose three distinct historical tracks. Although they allude to the legal origins in the title and the analysis, their discussion contests fixed and often-used distinctions. Rather than comparing within the common law regimes, or between the common law and civil law regimes (as will be discussed in the following section of the Introduction), their choice of countries is based on a different criterion for selection, one that touches on the social history of the three regimes.

Frank Hendrickx and Stefano Giubboni (**European Social Model**) describe the development of a European social model and suggest a different form of comparison altogether; one that is diachronic in nature. They emphasize that the quest for understanding what can be a *European* social model requires seeking the particular features of a unitary concept developed at the European level. When defined as such, the topic may seem to be in tension with the nature of the comparative task, because the European unitary concept is unmatched by similar regional arrangements, and is distinct from an attempt to conglomerate or compare the various member states' position on what makes the 'European' model distinct. It is therefore best to characterize the comparative nature of the chapter as a comparison among the ever-changing institutional and substantive arrangements that constitute the Union. At the same time, the chapter depicts a dialogue between developments at the European Union level and changes in the member states, offering a synchronic difference in the ways member states affect, and are effected by, developments at the European level.

A diachronic approach within states also appears in other chapters. For example, the chapter on **Eastern Europe** provides a dual comparison – between the communist and post-communist periods, and between three countries that experienced a similar transition. While all countries undergo change over time, the significant rift that marks the transition away from communism merits the view that a comparison of two eras within one state is part of the comparative project as well as a comparison between separate states at a single point of time in which similar political, social and cultural conditions prevail.

Admittedly, this inclusion of the diachronic dimensions as part of the comparative project might appear unduly to extend its task and functions; it runs the risk of becoming an omnium gatherum for all of labor law. Is the comparison of the decisions of different federal Circuit Courts in the U.S. a ‘comparative study’? Is the treatment of conflicting decisions between labor courts in the same jurisdiction – Germany, for example – a ‘comparative study’? Does the comparative method refer to just *any* kind of comparison? On one level, these questions would seem to place an undue weight on terminology: it really does not matter how we label a study as long as the study makes sense. But these are significant questions for the epistemic community of comparatists, because, traditionally, comparative study brings with it an emphasis on national, social, or cultural differences. This is the sphere of inquiry in which researchers or policy makers must look beyond their own system.

Apples and Oranges: Comparison of What?

Side by side with the need to select the legal and industrial systems for comparison, researchers also seek methods to limit the scope of the field of comparison. Like the tradeoffs in selecting countries for comparison, there are vices and virtues in selecting either a narrowly focused comparison or a broad one. A high degree of specificity can accommodate a more accurate comparison, but avoids the systemic context and may also miss some functional alternatives. A general framing of the subject for comparison may correct these problems, but at the same time can bring too much information that defeats a hoped-for clarity. The chapters in this Handbook take different approaches to this dilemma.

The utility of specific focus is demonstrated by the authors of **Employee Mobility**. They were originally assigned the general topic of information-driven economies but decided to concentrate on contractual covenants not to compete. This focus enabled them to compare legal responses in diverse countries, and to forge a typology that distinguishes between various models. The focus – covenants not to compete – renders it difficult to illuminate general systemic difference between the countries discussed, but it allows a closer examination of the rationales given for the legal approaches taken in the various models, and even allows some attention to the question of implementation (‘law in action’).

Similarly, the authors of **Privacy** opted to operationalize the comparison of privacy in the workplace by looking into three specific questions: employer access to employee (or candidates’) correspondence in social media, the use of geographic tracing devices, and biometric identification. While the road for comparison loops through a study of very broad concepts, the final comparison pinpoints with relative precision the legal

responses to these three questions. Using the three questions provides a closure to the comparative journey, although it seems that the main lessons to be learned from the chapter are learned from the journey itself.

A similar strategy we see in the chapter by Joanna Howe, Esther Sanchez and Andrew Steward (**Job Loss**), where the authors seek to display the diversity of arrangements regarding protection from job loss. The authors refer to Kahn-Freund, noting that ‘in comparing labor laws, the comparatist is faced with a multiplicity of choices in order to select which jurisdiction to study and upon which aspects of the law to focus.’ The authors’ focused topic for comparison allows them to choose several countries. They establish a list of countries that is a result of a priori screening, with the intention of showing both the common influences of international law and the diversity of national arrangements. Hence, there is a potential tradeoff between the range of countries chosen and the scope of the topic studied. Focusing on one dimension enables expansion on the other.

4. LEGAL ORIGINS

Framing the comparison by selecting the countries and themes for the study, can lead even seemingly similar comparative projects in very different directions and it can be used for different purposes. However, in this fluid scheme, there is always a quest for identifying the genetic code of law, or more particularly of labor law. Is there one overreaching explanation, which trumps all others, that can account for most legal differences and similarities? This is the Genome project of labor law. None of the chapters in this volume endorse such a view, but several address at different levels of specificity such attempts, and most notably, the work on **Legal Origins**. The idea of legal family – civil law, common law – as having a powerful explanatory role has long been a feature of comparative law.¹⁶ It has been applied more recently to labor law. Drawing on a quantitative method, adherents of the theory pinpoint the civil law/common law distinction as the animating difference that can account for divergent paths and outcomes.¹⁷

Silvia Bonfanti, Cynthia Estlund and Nuno Garoupa (**Market Efficiencies and Failures**) address the Legal Origins theory most directly, noting its important contribution, but also underscoring the common critique – that the distinction between two predominant forms of legal origins is too crude for both descriptive and predictive purposes. A similar critique is made by other authors, for example in the chapter on **Job Loss**. These lines of argument, however, do not lead the authors to establish a wholly idiosyncratic path determined account of legal developments in each and every country. Such a claim, in its extreme form, would basically undermine the usefulness of the comparative project. Instead, the authors of **Market Efficiencies and Failures** prefer to rely on the more sophisticated literature that distinguishes between liberal

¹⁶ Jaako Husa, *Legal Families* in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 491 (Jan Smits ed., 2d ed. 2012); LEGAL ORIGIN THEORY (Simon Deakin & Katharina Pisto eds, 2012).

¹⁷ Bottero et al, *The Regulation of Labor*, 119 Q. J. ECON. 1139 (2004).

decentralized economies and centrally managed economies ('Varieties of Capitalism'¹⁸). The authors aptly note that while there is a strong correlation between the claim of Legal Origins and the discussion of the multiple forms of capitalism, their emphases are different. The neo-institutional literature on the varieties of capitalism facilitates a better conceptual framework for seeking incremental change, unlike the literature on origins that traces back processes to historical roots. In a sense, the difference between the two types of studies resonates with the distinction between *nature* (origins) and *nurture* (institutional change). In a similar vein, the authors of **Employees** acknowledge the importance of legal tradition in accounting for judicial decisions, but demonstrate that legal tradition is not dispositive. Path dependence is not determinative and there are examples in the study that suggest what the authors designate as 'path departures'.

As an approach the Legal Origins theory is also taken in the chapter on **Workplace Discrimination**. It accounts for differences between three legal regimes on the basis of legal origins; but the origins they highlight are not those that distinguish the civil and the common law systems. Instead, the historical roots the authors reveal are concerned with cultural differences and the social problems each country faced at the time the law on employment discrimination developed (race, religion, ethnicity and gender). Hence, the common interest in historical origins that brings the two approaches together masks the fact that actually they are quite apart in their view of history. Historical artifacts are many, and there is a need to identify those with the best explanatory power in the context of the comparison.

Even so, the hypothesis about Legal Origins and how they demarcate differences between legal systems runs throughout the volume. No chapter claims to endorse it in full, but it is interesting to note that also no chapter fully refutes the role of legal origins either, or of significant difference between civil law and common law countries. It has become generally recognized that a rigid adherence to the common law/civil law dichotomy rather over-emphasizes one distinction at the expense of other important differences; even, perhaps, that the civil law/common law diverts attention away from other valuable differences.

For example, the chapter on **Employer** identifies a distinction between civil law systems that adhere to a single-employer framework in triangular employment relations, while common law systems are more receptive to a plural-employer framework. However, a closer inspection reveals differences *within* and *between* the two clusters, and, moreover, a gradual process of partial convergence. The convergence is partial because it does not suggest that all systems develop a single framework, but that differences are less marked and the original split between the two clusters lends itself to different types of similarities and differences that cannot be accounted merely by legal origins.

Finally, it is important to note that the debate over the significance of legal origins is totally absent from some chapters. This may be simply a matter of emphases and

¹⁸ See generally, Simon Deakin & Beth Ahlring, *Labour Regulation, Corporate Governance, and Legal Origin: A Case of Institutional Complementarity?* EGI-Law Working Paper No. 72/2006. Kathleen Thelen has pointed out, just as there are varieties of capitalism, so, too, are there varieties of liberalism. Kathleen Thelen, *VARIETIES OF LIBERALISM AND THE NEW POLITICS OF SOCIAL SOLIDARITY* (2014).

choices of reference points; the Legal Origins theory is not a canonical form or a truism that demands address. Indeed, its absence may also indicate its limits. For example, the study of **Eastern Europe**, with its illustration of difference in countries undergoing seemingly similar processes of transformation, cannot benefit from the Legal Origins theory, although it is clearly concerned with origins in general. It commences with a rather particular origin, and like other chapters here underscores the importance of institutional change rather than merely the origin. Similarly, Legal Origins is also missing from the **BRICS** contribution, where origins are tremendously different even as the economic performance of these countries converge.

Seeking where the theory of Legal Origins appears and where it has no relevance, raises the question of whether the theory is primarily applicable to a relatively short list of (the more developed) countries that resonate with the theory's a priori assumptions. To the extent that it aids in demonstrating an important, albeit not the sole, cleavage, it tends to be confirmed by some chapters and contested in others, but not really refuted. To the extent that it is intended to provide a key to unlatching the secret Genome code of labor law, it is for the most part rejected, implicitly or explicitly, throughout the volume.

5. CONVERGENCE/DIVERGENCE

One of the most important themes the Handbook seeks to identify is whether there is a growing convergence between different legal systems. As noted at the outset, this is perhaps one of the central questions that motivate comparative studies, as well as a basic question in the literature on industrial relations. This debate is in part theoretical and in part also strongly associated with ideology. Findings of convergence are often presented as evidence of an essentialist process; that is, similar pressures on different legal and industrial systems are likely to end in outcomes that are sustainable and economically feasible, leading to convergence. By contrast, findings of divergence are applauded by those who seek the continuity of labor market institutions. Consequently, there is much passion in this debate, but it is difficult to assert the facts. Empirical studies can easily display convergence or divergence, depending on the resolution of the study. Low-resolution studies, such as 'changes in the employment contract', can easily portray convergence. Many countries are facing the growth of the 'atypical' form of employment. But high-resolution studies may seek to demonstrate that the pattern of allegedly atypical contracts is very different in the countries compared. In some there is a growth in temp-work, in another in part-time work, work-sharing, outsourcing and other forms of flexibilization. Do these represent divergence or convergence? How do we decide? Most chapters in this volume reach these questions at one stage or another. Often times the framing of the comparison's objectives and the comparative methodology affect the interpretation of the findings.

One end of the spectrum, the chapter on **Sources**, celebrates diversity. This is not a verdict in the convergence-divergence debate, but an outcome of the chapter's objective. The authors launched an expedition the very objective of which was to demonstrate the 'richness of the panoply of labor laws.' To enrich the findings, the authors chose examples from different countries. The objective colors the conclusion that 'we will

continue to see great divergences in the details of the laws and the degree of intervention.' This finding does not undermine signs of convergence that are revealed throughout the chapter, for example, with regard to problems in the prescription of who is an 'employee' or the pervasive difficulty in identifying the precise nature of the standard employment relationship at times when 'atypical' forms of employment are gradually becoming the standard itself. However, these similarities are mentioned in passing, because the authors are looking to satisfy a wholly different objective.

At the opposite end, perhaps the strongest argument on convergence is made by the authors of **Freedom of Association**, who realize that there are differences between systems, but emphasize the importance of convergence processes. They claim that, 'in the field of freedom of association, it is only the most willful who will fail to detect a global pressure in the direction of de-unionization and worker dis-empowerment.' However, convergence in their description extends beyond the general complaint of (or, for economic neo-liberals, applaud for) declining unionism. They observe counter-forces of increasing use of human rights instruments, at the global and national levels, that seek to secure the right to associate and its derivatives. It is in a sense a 'convergence of contradictions' that play against each other at different levels, and not a simple claim of institutional convergence. The authors admit, and in fact clearly describe, that different models of collective bargaining persist, different judicial decisions on the scope of the right to associate remain on the global table, and different institutions are applied in different countries. However, they direct the readers' attention towards processes that affect this diversity in a similar direction. The convergence of effects leads to their juxtaposition of 'convergence' with 'consistency' and 'adaptation', unlike more superficial – political and theoretical – attempts at convergence that are associated with 'transplantations.'

A similar view is demonstrated in the chapter on **Employees**, which identifies convergence in the legal indicia for determining who is an 'employee.' The authors explain that the problems the courts confront are very similar, employers' attempts to evade the law are similar, and hence solutions become markedly similar, concluding that it is 'hardly surprising that courts in different countries are experimenting with similar solutions.' The authors' conclusion seems to indicate a strong belief in convergence of overall trends. However, they acknowledge divergences with regard to the particular legal formulations, especially with regard to the way in which legal formulations are being applied in fact.

The authors of **Employee Mobility** provide at the outset an interesting portrayal of the question of convergence or divergence. The authors first present what may seem to be a paradigmatic formula for balancing between the different values that affect the law on employees' mobility. This formula is derived from the American Law Institute's *Restatement of Employment Law*. However, they are quick to dismiss the appearance of a universal formulation, noting that it 'masks considerable conflict and diversity in the potential application of these rules.' Differences are found in the industrial reality that renders the problem of covenants not to compete more relevant in some regime than in others. Other differences are found in the concrete specifications of very broad balancing tests. Finally, the authors also draw on personal communications and secondary literature that illustrate the implementation of legal formulas in practice. A balancing test that allows the prevention of competition, but is never used to that extent,

cannot be considered identical to a similar formulation that is being constantly practiced towards restrictions on mobility as a matter of course. Consequently, the introductory presentation of what may seem to be a convergence around the *Restatement*, quickly becomes a heuristic device to highlight difference.

Most chapters follow suit and maintain a position that intentionally avoids clear statements on convergence and divergence. For example, the authors of **Employer** identify a ‘growing global trend towards a plural employer pattern.’ This is not the result of doctrinal replication across borders, but a result of a global eradication of the notion that there can be a single employer, which can, and should bear the liability for the employees’ rights. Legal solutions tilt between signs of persisting divergence (with reference to the Legal Origins theory) and emerging convergence. Similarly, the authors of **Market Efficiencies and Failures** draw on quantitative studies to demonstrate divergence, but then adopt a qualitative framework that rests on incremental path-determined change and find that ‘[a] nuanced exploration of labor laws turns out to reveal similarities across legal families as well as significant differences within them.’ Both chapters suggest that placing a pin on the continuum between convergence and divergence is highly sensitive to the comparative methodology and the adopted conceptual framework.

The chapters on **Privacy** and **Workplace Discrimination** identify strong differences between the regimes they compare. In both studies the findings of divergence are not surprising because the authors selected countries that would underscore such differences. In both there is a strong connection between differences in the general legal and social cultures that account for the findings of difference. These findings, although predicted by the methodology at the outset, are not trivial. Issues of privacy and discrimination are currently on the forefront of the legal agenda in the field of labor law everywhere. Technological advances trumpet the former, and social dynamics that forge exclusion, differentiation and segregation entrench the latter. While the problems are universal and persistent, the legal responses remain different. In both chapters we also see the authors find developing patterns of similarity that are derived from mutual learning, as well as predictions for potential convergence in the future. These however are at the margins of difference they identify.

The chapter on **Job Loss** follows the chapter on **Sources** in its search for divergence. The list of countries they compare is chosen to display different models and national solutions. At the same time their emphasis on divergence is offset by several factors – their historical interest in the effect of the ILO’s convention 158, as well as the interest in the theoretical debates on the justifications for protections from dismissals that overlap national distinctions. Their depiction of the topic therefore spans two directions – differences between nations and a sense of unity with regard to basic choices, as voiced by scholars and international institutions.

6. EFFECTS OF GLOBALIZATION

Does comparative labor retain vitality or should it be replaced by international labor law as a focus of research? At the extreme, if the International Labour Organization’s (ILO) vision of the past, according to which there will be one grand legal labor codex

that all member states will join, would have materialized, differences would, perhaps, have been abolished and study would concern itself with the dull task of comparing identical, or cloned national legal codes. Needless to say, that this is not the case at present, nor does anyone assume that the future of international labor law lies in that direction.

Kerry Rittich and Guy Mundlak (**Globalization**) claim that globalization does not undermine the importance of the comparative project, but it does require a reconsideration of some of its methods. Globalization is first unpacked, indicating three distinct phenomena: a social and economic force; the emergence of institutions beyond the boundaries of the nation state (international, transnational, regional, contractual) and a set of values that highlight both economic neo-liberalization and universal human rights. The manifold meanings of globalization require reconsidering the common method in which comparative labor law compares the legal arrangements of one nation state with that of another. Comparisons must take into account the many levels in which labor law is authored; the influence of the nation state on new institutions, and vice versa; and the relocation of labor law into legal fields that are becoming more important for establishing the rights of workers in a global village, such as trade law and migration law. In fact, globalization percolates throughout the Handbook, indicating that its implications are seeping into the comparative nest, unsettling its inhabitants.

Resonating with the claim of **Globalization**, the chapter on the **European Social Model** provides what perhaps may be the strongest challenge to the traditional comparative project. As previously noted, the study of the European Social Model cannot be conducted by comparison to other similar institutions and requires an internal comparison. This requires looking at both the influence of discrete states on the transnational level, as well as the reverse – the influence of the transnational on single countries. Some countries in the study appear more frequently as having ‘influence over,’ while other countries tend to appear more commonly in the list of ‘being influenced by,’ designating that inter-state power relations mold the development of global institutions and therefore affect each other’s domestic law on a transnational basis.

As a *social force*, globalization is often presented as an important factor, affecting firms ‘restructuring and delocalization’, as aptly demonstrated in the chapter on **Employers**. The options available for the movement and the reorganization of capital are increasingly growing, but workers enjoy a much smaller range of choice.

Supra-national institutions have an impact on changes that are described in various chapters. Some global institutions appear to have more influence and appear throughout the Handbook; but the role of others remains more tentative. The former include the EU and the ILO. The latter may be viewed in the study of **BRICS**, a loosely clustered set of countries still lacking coherent political vision and with little infiltration into national politics. In the middle, the OECD, WTO, or human rights instruments that are authored by various international organizations, as well as corporate codes and soft forms of international coordination, appear from time to time (and are clearly part of the inventory presented in the chapter on **Sources**), but their importance throughout the volume remains often time speculative.

The effects of the European Union, perhaps the most rigorous institutional arrangement beyond the single nation state, are emphasized in different chapters, but they are

not uniform. The chapter on **Employers** discusses EU directives that have a converging effect on the member states. At the same time, the relatively strong impact the European Union has on its members states is also the source of divergence described in the chapter on **East Europe**, where the borders of the European Union differentiate the course of change experienced by countries with similar origins, some of which joined the Union while others remained outside.

Despite the weakness sometimes attributed to more encompassing global institutions, their impact is found to be significant as well. The chapter on the **Freedom of Association** emphasizes that globalization extends beyond the common reference to global economic pressures. It also includes international instruments on human rights, including ILO Conventions 87 and 98. Hence, globalization has a dialectic effect. On the one hand, it accounts for the growing pressure for the de-centralization of collective bargaining. On the other hand, it provides support for claims regarding the importance of unionization.

Globalization as a vehicle of new ideas: The chapter on **Job Loss** discusses the evolution of national protections against dismissals as the outcome of the ILO's Convention 158. But the authors also emphasize that globalization serves as vehicle for the transmission of ideas; in this context, for example, the concept of flexicurity. Globalization is, inter alia, a process that diffuses ideas to different nation states; and a driving force of convergence that diminishes differences rooted in the legal origins and traditions of different countries. This is not a wholesale claim about the homogenization of law throughout the global village, but rather an explanation on how converging effects come to pass.

These examples suggest that the study of globalization's effects intertwine, and are perhaps inseparable, from the quest to identifying patterns of divergence and convergence. The chapter on **Employees** identifies globalization as an important factor in favor of growing convergence, emphasizing both the role of international agents (such as international courts) and international instruments (such as ILO conventions). Why, then, do global agents and instruments not lead to complete convergence? Their answer speculates on several options that point to locally embedded traditions and habits of mind that find expression in the decisions of labor courts and legislatures. Should this lead to a dichotomy between the pairing of globalization and convergence vis-à-vis sustained national focus and divergence? The various chapters in this volume resist this dichotomy. Neither legal origins, nor globalization, justify a simple verdict on when – or whether – convergence or divergence will predominate.

