PART I

1

New discourses in labour law: part-time work and the paradigm of flexibility

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1 The centrality of comparative labour law in the open method of co-ordination

In deciding to undertake collective research on the regulation of part-time work, the authors of the present book agreed on a few methodological claims.

One had to do with the urgent need to revisit a long-lasting comparative tradition in European labour law and to do so from the new perspective of an ongoing process of integration in the European Union. Implicit in this choice was the equally strong urgency to confirm the centrality of a legal discipline – labour law – in the current debate on the European Employment Strategy (EES) and in the many concurring ways of implementing it.

The need to uncover a disciplinary point of view just at the time when EU institutions are developing a culture of co-ordination of all existing processes of integration – economic, structural and to some extent social – is due to the deeply rooted conviction that there is – and should continue to be – a specificity of legal analysis in this particular field.

In ascertaining the contribution of comparative law to labour law, Gerard Lyon-Caen wrote at the end of the 1960s that labour law 'was born comparative', because it aimed at providing answers to similar needs and aspirations inherent in the industrialised world. Solutions found in different legal systems were 'spontaneously analogous' at least as far as their purposes were concerned. Furthermore, in both civil law and common law systems, labour law endeavoured to gain autonomy from general

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principles enshrined in other legal disciplines and did so irrespective of the different legal families to which it belonged.[1]

Over the years such a disciplinary pride strengthened its rational, as well as its passionate, grounds. Contemporary research dealing with countries of the European Union reveals the overall continuity of labour law institutions and their capacity to spread well across the boundaries of the discipline. This is so because labour law embraces in its legislative and academic tradition more than one field. It covers individual contracts of employment as well as collective labour law and links with the vast and fascinating territory of social security. In all these areas collective actors are present and capable of contributing both in the law-making process and in autonomous processes of norm-setting.[2]

While all these fields remain predominantly national, they are also closely intertwined with European law. It appeared very clearly to the authors of this book that a method which would blend national diversities into an indistinct process of Europeanisation could lead to weak results and – what is most to be avoided – to imperfect generalisations. We argue, on the contrary, that concrete choices made by national parliaments deserve to be fully evaluated and framed in a national historical context. The role of employers' associations and of trade unions must also be kept in the picture.

The proposition underlying this project is that the adoption of a comparative method facilitates the understanding of national labour law traditions in their entirety, namely a combination of individual and collective sources, a mixture of protective and supportive legislation, a system of norms more or less adaptable to external changes.

Legal comparison may also help to reveal the tension – if there is one – between national and supranational law-making. The inclusion in the spectrum of comparison of collective actors and national tripartite or bipartite institutions dealing with labour matters sets in place the controversial question of how to balance legal and voluntary sources in the regulation of part-time work.

[1] G. Lyon-Caen, 'Les apports du droit comparé au droit du travail', in a special book issued by the *Revue International de Droit Comparé*: *Un siècle de droit comparé en France (1869–1969)* (Paris: Revue International de Droit Comparé, 1969), pp. 315–16.

[2] This point, always at the heart of Lord Wedderburn's comparative analysis, is confirmed in Lord Wedderburn, 'Common Law, Labour Law, Global Law', in B. Hepple (ed.), *Social and Labour Rights in a Global Context* (Cambridge: Cambridge University Press, 2002), pp. 19 ff.

One further reason stands in favour of a comparative legal method, which would draw attention to labour law and to its centrality in current discussions on new regulatory approaches.

In the early 1990s, when Jacques Delors was still one of the main advocates of the enhancement of growth and the lowering of unemployment rates in Europe, labour market reforms – and among those the regulation of part-time work – became central to the co-ordination of macroeconomic policies and employment policies. In the Council held at Essen in 1994[3] a complex evolution of employment policies began and was further developed in subsequent Council meetings. The criteria agreed upon at Essen represent the precondition of what then developed into a more elaborate plan of action.

The launch at Lisbon of the EES and the subsequent emphasis placed on the Open Method of Co-ordination (OMC) as a way to implement employment policies[4] have activated a series of new regulatory techniques, useful to understanding changes that have occurred in labour markets and to fostering more advanced ones.

Structural indicators, the result of long and detailed research undertaken by the Commission in consultation with Eurostat and the Member States' statistical offices,[5] are meant to favour the measurement and the evaluation of both institutional and economic performances pursued by Member States through active employment policies or through structural and legislative reforms.

Attempts have been made to combine quantitative and qualitative analysis of all fifteen Member States' National Action Plans (NAPs) submitted within the Employment Strategy, on the understanding that such an

[3] This Council meeting, held on 9–10 December 1994, was the last one attended by J. Delors as President of the European Commission. It is interesting to observe the continuity between the Delors White Paper, *Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21st Century*, COM (93) 700 final, Brussels, of 5.12.1993, and the Essen criteria, aimed at facilitating reforms of the labour market and combating unemployment.

[4] Presidency Conclusions, Lisbon European Council, 23 and 24 March 2000.

[5] See, for instance, Communication from the Commission, *Realising the European Union's Potential: Consolidating and Extending the Lisbon Strategy*, COM (2001) 79 final, Brussels, 7.2.2001, Volumes I and II. This contribution to the Spring European Council held in Stockholm in March 2001 is a good example of the steps forward taken after Lisbon, in order to link employment growth to specific targets. Volume II collects general economic background indicators, data on employment presented with different breakdowns and data on innovation and research, as well as on economic reform and social cohesion. The early policy of the Commission can be read in its *Communication on Community Policies in Support of Employment*, COM (1999) 167 final, Brussels, 13.4.1999.

exercise could only capture the 'declared employment strategies' at that given moment in history and not reflect the overall national policies in their evolving patterns.[6] The results achieved by such sophisticated statistical approaches prove that there exists a variety of national responses and that it is artificial to constrain them within ideal–typical employment regimes.

In extending OMC to social inclusion,[7] objectives have been incorporated in social indicators. This has empowered the Commission to set the social agenda and to move it forward, with the technical support of a sub-group on social indicators established within the Social Protection Committee (set up according to Art.144 Nice Treaty). The outcome of this analysis now forms the basis of EU policy-making and is evaluated very positively in scholarly analyses, although comparisons between the first set of NAPs reveal great disparities.[8]

National policy-making remains a variable which cannot be entirely predicted. A stated aim of co-ordination is to support national actors, but it clearly does not operate to sanction reluctant or imprecise responses by the Member States, by virtue of the subsidiarity principle. Co-ordination also relies on comparable data, collected with similar techniques such as standardised questionnaires administered to representative samples in each country.[9]

Indicators have been linked to benchmarking, another technique of measurement and evaluation brought about by the OMC and then developed into a widespread practice for the enforcement of employment policies. They both reveal the necessity to 'compare the situation spatially,

[6] A 'cluster analysis' of the 1999 NAPs is proposed by P. K. Madsen and P. M. Munch-Madsen, 'European Employment Policy and National Policy Regimes', in D. Mayes, J. Berghman and R. Salais (eds.), *Social Exclusion and European Policy* (Cheltenham: Edward Elgar, 2001), pp. 255 ff. and in particular p. 261.

[7] Presidency Conclusions, Lisbon European Council, 23–24 March 2000, para. 32.

[8] This is reported by T. Atkinson, 'Social Inclusion and the European Union' (2002) 40 *Journal of Common Market Studies* p. 625 at 628–9. Social indicators proposed by the sub-group are: financial poverty, income inequality, regional variation in employment rates, long-term unemployment, joblessness, low educational qualifications, low life expectancy and poor health. See also T. Atkinson, B. Cantillon, E. Marlier and B. Nolan, *Social Indicators: the EU and Social Inclusion* (Oxford: Oxford University Press, 2002): research produced by successful collaboration between academics and policy-makers sponsored by the Belgian Presidency in 2001.

[9] Atkinson, 'Social Inclusion' at 631, refers to the work undertaken by the European Community Household Panel, which was replaced in 2003 by a new instrument for the preparation of statistics on income and social exclusion, the European Union Survey of Income and Living Conditions.

between Member States, and temporally, through time'.[10] Benchmarking, in particular, applies to situations in which national actors are eager to learn and, if necessary, compete in order to reach a common objective. They often choose to do so because a European frame of reference helps them to push forward national reforms, without having to find agreement on all detailed provisions.[11]

The principle of subsidiarity, which supports the overall structure of OMC, also applies inside each state, among different levels of government administration and among sub-national authorities, such as regions and municipalities. Each administration finds its own internal organisation to guarantee compliance, at times introducing indicators from higher to lower levels and therefore expanding the spectrum of comparison.[12]

There are no specific rules to manage this constantly spreading network of institutions and sub-institutions. National experience shows that ad hoc committees created for the enforcement of a specific NAP end up having a very limited impact on the state administration, if there is no stable structure to refer to. Even a high turnover of experts produces limited results in preparing the so-called 'Implementation Report' to be annexed to NAPs, whereas the setting up of a centralised 'Monitoring Group' has facilitated the collection of homogeneous data on employment policies at decentralised levels of the administration.[13]

The study on the UK reveals how different branches of the Government have been involved in the implementation of the Part-time Directive, while also ascertaining compliance with EU employment policies.[14] This

[10] C. de la Porte, 'Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?' (2002) 8 *European Law Journal* pp. 38, 41. The author distinguishes between different levels of indicators, some influenced by the European statistical database, some mixed, some purely national. She also describes the selected national experts as high-level civil servants, who prepare the ground for Council decisions. Final orientations are political and driven by bureaucratic elites.

[11] De la Porte, 'Is the Open Method of Coordination Appropriate?' p. 43.

[12] The Italian example of a 'Master Plan', elaborated in 2000 by the Labour Ministry in collaboration with ISFOL, a research institute for the development of training, shows how qualitative and quantitative indicators have been offered to local authorities as a basis on which to improve the reform of placement offices, following the negative evaluation of the Commission on Italian NAPs for 2000 and 2001. This is reported in M. Ferrera and E. Gualmini, 'La strategia europea sull'occupazione e la governance domestica del mercato del lavoro: verso nuovi assetti organizzativi e decisionali' – a paper prepared for ISFOL within the project 'Impact Evaluation of the European Employment Strategy' – edited by C. Dell'Aringa and published in the ISFOL papers (Rome, May 2002).

[13] Ibid., pp. 6 ff.

[14] See further the country study by C. Kilpatrick and M. Freedland in this volume.

example too seems to confirm the uneasiness of national administrations in dealing straightforwardly with European sources, either because of a lack of practice or, at times, due to an intentional manipulation of both hard and soft law measures, so that the national priorities may prevail.

The Commission itself admits that, despite the attempt to bring together national impact evaluation studies under a 'standardised structure, with a range of thematic questions covering policy reforms, performance and impact', it has proved difficult to constrain Member States' responses and to force them into a pre-defined scheme.[15] It is also true, as once more the Commission points out, that a positive evaluation of OMC cannot be proposed in a vacuum, nor can it be separated from an understanding of a broader economic context, wherein some economic improvement was achieved. A shift is proposed in focusing national policies 'away from managing unemployment, towards managing employment growth'.[16]

This observation highlights one further point: disparities in economic performances may not mechanically affect the evaluation of legal reforms. The latter must still be regarded as specific results of national legislative choices, albeit within the context of a Europe-wide co-ordinated economic policy.[17]

There are – as one can see – several reasons to write 'Lisbon' in capital letters in the history of European Council meetings. On that occasion the urgency to make all EU processes interact with one another and to foster their co-ordination was transformed from a platitude into an important innovation. The Portuguese proposal was, in fact, simple and pragmatic: refraining from adding a new process meant concentrating on the co-ordination of the existing ones.

The Commission now welcomes 'synchronisation' within the overall process of implementation of the Lisbon agenda, but also wishes that economic and employment objectives be considered autonomously. It is from this rather subtle perspective that we must interpret the Commission's recent commitment to simplify the Employment Guidelines and to focus more on implementation mechanisms.[18]

[15] Communication from the Commission to the Council, the European Parliament, the ESC and the Committee of the Regions, *Taking Stock of Five Years of the European Employment Strategy*, COM (2002) 416 final, Brussels 17.7.2002, p. 22.

[16] Ibid., p. 2.

[17] An analysis of Member States' willingness to implement the most important social policy Directives and yet to let the national priorities prevail is provided by O. Treib, *EU Governance, Misfit and the Partisan Logic of Domestic Adaptation*, at www.mpi-fg-koeln.mpg.de/socialeurope.

[18] *Taking Stock*, respectively at p. 21 and p. 19.

The impression we get from looking at the ways in which national administrations have internalised the proposals coming from European institutions and adapted them to the evaluation of their own domestic policies is that procedures are left intentionally undefined and that the choice is to proceed by trial and error.[19]

The still-experimental nature of both national and European procedures is giving rise to a new comparative method, extraneous to legal comparison. Documents and information exchanged while practising the OMC provide invaluable help in detecting phenomena which then become the object of legal regulation. Labour lawyers' uneasiness – almost too shameful to admit – has to do with an inborn fear that the language of statistics and economics may obscure the language of legal institutions.

Such a fear is not a new one. A solid methodology in comparative labour law was developed in order to explain the commitment of national lawyers to maintaining economic policy considerations as separate from legal ones and avoiding too contingent an analysis of legal institutions. 'Functional' comparison implies information on political and social institutions and appreciation of the role played by collective actors. A 'structuralist' approach – like the one suggested – gives priority to comparing the means and the goals, and concentrates on the functioning of a specific social policy.[20]

We argue, in drawing conclusions from this project, that comparative legal analysis can most usefully enrich the study and evaluation of economic and structural trends. We also maintain that the pressure to establish well-developed – and yet not too rigid – schemes of comparison is particularly healthy when dealing with labour market regulations and with welfare state responses to high unemployment.

Research carried out in neighbouring fields confirms that a variety of circumstances must be considered in order to establish a valid comparative framework. Part-time patterns are affected by different components, such as household structure, firms' behaviour and the state.[21] The state, in particular, attracts the attention of researchers dealing with 'societal

[19] Findings in the country studies on the UK and Italy seem to be going clearly in this direction.

[20] Lyon-Caen, 'Les Apports', pp. 316–17, with interesting references to French comparative studies not very often acknowledged in comparative literature.

[21] C. Fagan and J. O'Reilly, 'Conceptualising Part-time Work', in J. O'Reilly and C. Fagan, *Part-time Prospects. An International Comparison of Part-time Work in Europe, North America and the Pacific Rim* (London: Routledge, 1998), p. 13, show how theories on the segmentation of labour markets have gradually developed into more sophisticated approaches, taking into account cultural values and cross-national differences.

employment systems',[22] who must be attentive to the evaluation of social and cultural values when drawing up comparative schemes of analysis.

In a broader context of research on welfare regimes, states occupy a pivotal role in transferring income and in supporting family networks. These circumstances may change the nature of unemployment and consequently influence the selection of comparable data.[23] It is crucial that the family as an institution be considered central to the understanding of labour market reforms. Even the analysis of data on family instability reveals valuable comparative patterns and prompts policy recommendations as regards measures to be addressed towards unemployed people. A social policy leading to 'de-familialisation' or detachment from the family puts more weight on the state for the provision of services which are, otherwise, assigned to families.[24] The study of unemployed individuals in their household context, undertaken in comparative terms,[25] is relevant too for understanding the features of unemployment, so different across European countries and so central for the understanding of other labour market phenomena.

Indirectly, results of such studies are very important for labour lawyers dealing with measures to create new employment. Family support may very well channel the choice of unemployed people towards non-standard forms of work and make that choice a more permanent one, especially when earnings are very low or non-continuous.

On a methodological note, comparative research undertaken within disciplinary areas somehow related to labour law shows the emergence of diversities between countries and even within groups of countries held together by common geographic or historical traditions.[26] Different

[22] M. Maurice, 'Convergence and/or Societal Effect for the Europe of the Future', in P. Cressey and B. Jones (eds.), *Work and Employment in Europe* (London: Routledge, 1995), pp. 28 ff.

[23] See D. Gallie and S. Paugam (eds.), *Welfare Regimes and the Experience of Unemployment in Europe* (Oxford: Oxford University Press, 2000). This research project was centred mainly on 'the effort to achieve a high level of comparability of data', as we learn from the editors in the introductory chapter 'The Experience of Unemployment in Europe: the Debate' (p. 1). See also G. Esping-Andersen, 'Comments', in G. Bertola, T. Boeri and G. Nicoletti (eds.), *Welfare and Employment in a United Europe* (Cambridge, Mass: MIT Press, 2001), pp. 127 ff., criticising the approach taken by the editors of the book, which ignores the role of families in proposing European reforms for social inclusion.

[24] Gallie and Paugam, 'The Experience of Unemployment', at pp. 14 ff.

[25] I. Bison and G. Esping-Andersen, 'Unemployment, Welfare Regime, and Income Packaging', in Gallie and Paugam, *Welfare Regimes*, pp. 69 ff. and at pp. 84–5, where they deal with the issue of the young unemployed who receive family support, as opposed to the incurring of the costs of labour mobility.

[26] F. Maier, 'Institutional Regimes of Part-time Working', in G. Schmid (ed.), *Labor Market Institutions in Europe* (New York: M. E. Sharpe, 1994), pp. 151 ff.

'styles' of welfare state approaches facilitate the search for specific measures and help avoid deregulation of the labour market as the only remedy against unemployment.[27]

This explains the urgency, underlined in this book, of enriching legal comparison with a whole variety of institutional variables and of paying attention to all actors involved in the complex redefinition of national competence, when promoting domestic legislation and complying with European law.

When we look at the European institutional context, we notice that analysis pursued by European institutions in reviewing national employment plans (Art. 128 ECT) or in assessing national economic policies (Art. 99 ECT) appears inherently different from a comparative legal approach. Whereas the latter moves from the understanding of the ways in which legal and social institutions interact in a given system of norms, the former concentrates on objectives and results.

The rhetoric of the European institutions – monitoring, reviewing, evaluating, recommending – and the responses of Member States – drawing up programmes, showing compliance, proving efficiency and promising future improved accomplishment – enrich a political discourse which finds in the co-ordination of policies the ultimate goal. We want to ascertain, while drawing conclusions from this project, whether this net of soft rules hides a hierarchy of values and whether the apparent circularity of information conceals instead an asymmetric decision-making system, whereby priorities are often set at the top, rather than being jointly co-ordinated. To verify whether this element of the EES is not a negative outcome, but mirrors the search for a new arrangement of legal powers and competence within the EU social field, we need to explore further the potential of OMC.

The above-mentioned political discourse is inextricably linked to a soft regulatory technique, which is gaining ground and spreading to other fields: social inclusion, pensions.[28] Even policies on immigration seem

[27] Structural differences are highlighted by F. Scharpf, 'The European Social Model: Coping with the Challenges of Diversity' (2002) 40 *Journal of Common Market Studies* pp. 645, 651.

[28] On the application of OMC to social protection and social inclusion, see Presidency Conclusions, Lisbon European Council, 23 and 24 March 2000, para. 32, and Presidency Conclusions, Nice European Council, 7–9 December 2000, para. 20; on the application of OMC to pensions, see Presidency Conclusions, Nice European Council, 7–9 December 2000, para. 23, and Presidency Conclusions, Stockholm European Council, 23 and 24 March 2001, para. 32. See also C. de la Porte and P. Pochet, *Building Social Europe through the Open Method of Co-ordination* (Brussels: P. I. E. – Peter Lang, 2002), and Scharpf, 'The European Social Model', 655, interpreting the choice to expand OMC to pensions reforms