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ISBN 978-3-031-45716-6 ISBN 978-3-031-45717-3 (eBook)
https://doi.org/10.1007/978-3-031-45717-3

This Springer imprint is published by the registered company Springer Nature Switzerland AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

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Acknowledgements

The production of this study in English language was supported by CIDP—Centro de Investigação de Direito Privado (Private Law Research Centre), to whom the Authors thank.

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Abbreviations

AAFDL	Associação Académica da Faculdade de Direito de Lisboa
BAG	*Bundesarbeitsgerichts*
BetrVG	*Betriebsverfassungsgesetz*
BVerfG	*Bundesverfassungsgericht*
CC	Código Civil de 1966 (Portuguese Civil Code of 1966)
Chap.	Chapter
cit.	Cited
Coord.	Coordinated by
CRP	Constituição da República Portuguesa (Constitution of the Portuguese Republic)
UDHR	Universal Declaration of Human Rights
Edn.	Edition
ET	*Estatuto de los Trabajadores* (Workers' Statute), revised by Royal Legislative Decree 2/2015, of 24 October, subsequently amended
KSchG	*Kündigungsschutzgesetz*
LRCT	Lei de Regulamentação Colectiva do Trabalho (Collective Labour Regulation Law) (Decree-Law 519-C1/79, of 29 December, subsequently amended)
ILO	International Labour Organisation
op. cit.	Work cited (*opus citatum*)
para.(s.)	Paragraph(s)
RD	Real Decreto (Royal Decree)
RDL	Real Decreto-Ley (Royal Decree-Law)
RDES	Revista de Direito e de Estudos Sociais
RIDT	Revista Internacional de Direito do Trabalho
Sect.	Section
STJ	Supremo Tribunal de Justiça (Supreme Court of Justice)
TVG	*Tarifvertragsgesetz* (German Law on Collective Labour Agreements)

Chapter 1
Introduction

Comparative law, as an academic discipline, performs the valuable role of teaching us about other legal systems and the solutions they offer to issues arising from time to time, functioning as a "precious aid to the understanding of law".[1] In a globalised world, this perception is fundamental for an "understanding of the place occupied by national law among the different legal systems" and for "assimilation of its deepest and most enduring elements".[2]

The importance of comparative law is not merely cultural; it provides real and effective input for the interpretation and reformulation of the law as it stands,[3] and the idea that comparative law offers merely theoretical insights, without any practical repercussions on the development of the law, should be regarded as definitively outdated.[4]

Centred on "comparison between legal systems (generally at a given moment in history, normally the present)",[5] comparative law offers students a better understanding of the legal system and its institutions, supporting the tasks of interpretation and application of legal rules, including the rules of private

[1] Martinez (2021), p. 123.

[2] Vicente (2019), p. 20, remarking that "no lawyer is able to arrive at a full understanding of the legal system in which he or she is trained without an awareness of the fundamental features of other systems" (pp. 20–21).

[3] Magnani (2020), p. 2

[4] As Fauvarque-Cosson has pointed out in France, the practical function of comparative law is perhaps still overlooked, and there is a need to move away from its traditional image as an "academic discipline *par excellence*, with no direct application, and therefore poorly equipped to satisfy the utilitarian aspirations of a good many students, legitimately more concerned with their professional future than with the breadth of their legal learning" (Fauvarque-Cosson (2002), p. 294).

[5] Almeida and Carvalho (2017), p. 12.

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https://doi.org/10.1007/978-3-031-45717-3_1

international law, helping to fill lacunas when the person applying the law is able to draw on the tendencies in other legal systems and serving as a tool of legislative policy.[6]

Looking at comparative law analytically, we may distinguish its epistemological from its heuristic functions.[7] The most important of the former are the (i) an understanding of national law and its position among different legal systems, as well as of many of its legal institutions, and (ii) adding to lawyers' cultural awareness and critical spirit. Turning to the heuristic functions of comparative law, we may point to its role in (i) helping to determine the meaning and scope of the rules and institutions of national law, serving as an element for interpretation of the law, (ii) encouraging the phenomenon of "circulation of legal models" also in the field of jurisprudential development, (iii) assisting in the coordination of the different national legal systems, in particular through the mechanisms proper to private international law, (iv) revealing the shared principles of different legal systems, (v) harmonising and unifying national legal systems (where it plays an essential role) and determining the limits on this.

In the field of employment, a branch of law especially sensitive to social change and the economic situation in the relevant state, the usefulness of comparative law is particular clear because, in a globalised world, the challenges and difficulties confronted by law are, to a large extent, common to the legal systems of jurisdictions characterised by a similar level of development.

The relevance of comparative law in the realm of labour law is therefore especially clear to see.

In the current socio-economic context, attempts to establish minimum standards in the field of labour relations—above all through the efforts of the ILO which, over a history of more than a century, has sought to establish common minimum conditions across different states and has played a leading role in the development and evolution of labour law in several countries belonging to the international community,[8] but also in the context of Europe—together with globalisation, as a complex phenomenon with an impact on market structure and labour relations, have had a decisive influence on comparative labour law and left their mark on its development, both facilitating it and highlighting its urgency and inevitability.[9]

At the same time, it has long been acknowledged that constitutional texts are highly relevant to labour law,[10] and scholars have established the usefulness of

[6] Almeida and Carvalho (2017), p. 17. Similarly, René David points out that comparative law is useful (i) in legal, historical or philosophical research, (ii) for a better knowledge and improvement of national law and (iii) for understanding foreign peoples and establishing a better basis for international relations (David 1978, p. 28).

[7] Vicente (2019), pp. 20 et seq.

[8] Martinez (2022), p. 191. On the role of ILO in the development of Labour Law, highlighting current challenges, cfr. Hyde (2014); Verma (2003); Ferreira (2019); Politakis (2007); Charnovitz (2000).

[9] Weiss (2003), p. 169 et seq.

[10] Cfr., in particular, Xavier (2003); Xavier (2009); Xavier et al. (2020), pp. 232 et seq.; Leitão (2021), pp. 64 et seq.; Martinez (2022), pp. 154 et seq.; Martinez (2001); Ramalho (2020),

comparative law in the field of constitutional law. Comparative constitutional law can claim to "uncover similarities and differences, projections and reactions between the constitutional institutions of more than one country or of a single country over different periods".[11]

As the importance of both comparative law and also of constitutional law in the field of employment is therefore beyond dispute, we felt it would be useful to conduct the exercise proposed in this volume, which is to analyse how labour issues are addressed in social constitutions, in a context that encourages and facilitates the development of comparative labour law.[12] Considering that Portuguese law belongs to the Romano-Germanic family, and more precisely to continental law, the authors have sought to examine how employment is addressed not only by the Portuguese constitution, but also by the constitutions of the legal systems that have the greatest influence on the Portuguese system, i.e. those of Germany, Spain, France and Italy.[13]

Starting out from a brief overview, which will look at the phenomena of constitutionalisation of labour law and the horizontal application of fundamental rights, a detailed comparison will be conducted of the institutions of collective and individual labour law, starting out from the underlying fundamental rights, as set out by the Portuguese Constitution.[14]

The authors therefore propose to examine how constitutions enshrine the right to collective bargaining, the right to strike and lock-outs, and then to consider job security and the right to remuneration.[15]

It should however be noted that the aim of this work is not to offer a comprehensive comparative analysis, but a brief description of how the Constitutions of the five selected countries address these issues, serving as a basis for a more detailed study on these topics. The production of this study in English language was supported by CIDP—Centro de Investigação de Direito Privado (Private Law Research Centre), to whom the Authors thank.

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pp. 195 et seq.

[11] Miranda (2020), p. 157, pointing out that, "as identical or similar questions arise around the world and have arisen in the past in a given country, it is important to be familiar not only with how positive law addresses them here and now but also how they are addressed in other systems or how they were considered in former times in the country in question. Hence the need for comparison between systems and over time".

[12] Weiss (2003), p. 172.

[13] On the various legal families, see, among many others, Mendes (1982–1983), pp. 127 et seq. Vicente (2019), pp. 57 et seq.

[14] Not unaware of the difficulty entailed by the institutionalist perspective of the proposed comparison, which starts out from the Portuguese example and the way in which the Portuguese Constitution regards and addresses employment and presents the fundamental rights or workers. Defending a functionalist perspective in the teaching of comparative labour law, Weiss (2003), pp. 172 et seq.

[15] On the methodology for comparative law, among many others, Cordeiro (2012), pp. 181 et seq.; Mendes (1982–1983), pp. 25 et seq. who, whilst stressing that the expression "comparison of law" would be more correct, uses that of the text (comparative law) because it is widely used and accepted (pp. 9–10); Vicente (2019), 37 et seq.

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Chapter 2
Constitutionalisation of Labour Law

2.1 Introduction

A constitution presents itself as an "element shaped by and an element shaping social relations", and is "the most immediate expression of the basic legal values accepted or dominant in the political community".[1]

It is therefore the product of a context, interacting with "dynamics of the life of a people"[2] and, as the outcome of a process of social and cultural evolution, it seeks to respond to the needs and demands that are felt from time to time.

A constitution therefore serves to guarantee the fundamental rights of citizens; "there are no fundamental rights without a constitution".[3]

Liberalism and the idea of the liberal state, originating in the French and American revolutions, led to the enshrinement in the eighteenth century of rights of freedom[4]; following on from this, the nineteenth and, above all, the twentieth centuries were marked by the successful struggle for economic, social and cultural rights, which played a crucial role in shaping labour relations, making it possible to speak of a "constitutional basis for labour law".[5]

[1] Miranda (2002), p. 510.

[2] Miranda (2002), p. 510.

[3] Miranda (2020), p. 9, asserting that "without the constitution of the modern constitutional tradition dating back to the eighteenth century, the constitution as the foundation or renewed foundation of the state legal system and indivisible from a constituent authority, the constitution as the rationalising and organising framework for the statutory norms of power and community".

[4] It may be said that the constitutions of the nineteenth century concerned themselves primarily with proclaiming rights and freedoms, and, as a general rule, ignored the function of guarantees (Bon 1990, p. 10).

[5] Punta (2022), p. 142.

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https://doi.org/10.1007/978-3-031-45717-3_2

In effect, the end of the First World War marked the demise of individualist conceptions of the liberal state and the first steps towards the inclusion, in constitutional texts, of reflections on the common man, labour and the role of the State.[6]

A paradigmatic example of constitutional enshrinement of employment rights is the Mexican Constitution of 1917, which may be regarded as the "first social constitution"[7] and proclaimed significant rights for workers, notably the freedom of labour and the right to the proceeds of labour (Article 4), limitation of the working day (Article 123, I. to IV.), right to the minimum wage (Article 123, VI.) and to equal pay (Article 123, VII.), freedom of association (Article 123, XVI.) and the right to strike (Article 123, XVII.).[8]

Two years later, the German Constitution of the Weimar Republic was approved, also dealing with employment and workers' rights. It expressly asserts that labour enjoys the special protection of the *Reich* (Article 157), providing for the right to unionisation in order to defend and improve working and economic conditions (Article 159), the moral duty incumbent on all to invest their spiritual and physical energies for the common good and the right to a livelihood through exercise of a trade (Article 163).[9]

The phenomenon of social constitutions was, to an extent, in line with the new international approach to labour issues, which led to greater harmonisation of general principles in the field of employment. It may be noted that workers' rights were "the first rights to be regulated and protected by international law […], at a time when such protection was in its infancy in many countries".[10]

Following on from the Armistice of November 1918, signed at Compiègne, bringing the First World War to an end, the Treaty of Versailles (28 June 1919) devoted a section to employment issues (Part XIII, Articles 387–427, Fundamental Law of the new entity[11]), providing for creation of a permanent organisation attached to the League of Nations (Article 387), clearly demonstrating the importance that states assigned, or rather, were forced to assign, to the welfare of workers, badly hit

[6] Ogier-Bernaud (2003), p. 53.

[7] Martinez (2022), p. 154.

[8] For a general appreciation of the constitutional framework of 1917, for example, Correa Freitas (2017), pp. 229–248; Kurczyn Villalobos (2021), pp. 151–174.

[9] For further developments, for exemple, Gil Albuquerque (2017), *passim*.

[10] Moreira (2014), p. 78. It should also be recalled that, prior to the founding of the ILO, there had been movements in the nineteenth century calling for "international legislation", such as that led by Robert Owen, in the second decade of the century, the creation of the International Working Men's Association (1864, the First International) and also, in 1876, the attempt by the Swiss federal government to organise an international congress for the protection of working men—cfr. Pic (1909), pp. 153 et seq.; Mazzoni (1936), pp. 25–26; Moreira (2014), pp. 81–92; Raynaud (1906), pp. 61 et seq.

[11] *Diário do Govêrno*, of 2 April 1921, series I, no. 67, pp. 389 (Letter of confirmation and ratification of the Peace Treaty between the Allied and associated Powers and Germany, and attached Protocol, signed in Versailles on 28 June 1919), pp. 456 et seq. (part XIII); or *The Labour Provisions of the Peace Treaties*, International Labour Office, Genève, http://www.ilo.org. On the phenomenon of labour in the Treaty of Versailles, see, for example, Clerc (1922), pp. 176 et seq.

by the global war. They accordingly undertook, for example, to "assure and maintain fair and humane conditions of labour for men, women, and children" (Article 23), as well as asserting the principle of freedom of association (recitals to Part XIII). Employment became a central issue of government as never before.

The new organisation was tripartite in structure (representatives of states, unions and employers) and its instruments naturally paid special attention to collective rights (recommendations and conventions[12]). These, as we have seen, included the freedom of association (on the part of employers and workers), which was internationally enshrined in the Treaty of Versailles, alongside many other employments issues (Article 427), clearly showing their importance as a structural element underpinning democratic states.[13]

The movement towards adoption of social constitutions was therefore a milestone in the evolution of social rights and in consolidating the democratic state; these tendencies were given fresh impetus with the close of the Second World War.

2.2 Labour in Constitutions

2.2.1 Italy

Three years after the end of the fascist regime, the new Italian Constitution was finalised in 1947, ready to take effect on 1 January 1948.[14] The text represented a "constitutional settlement" between political currents of Christian, socialist, communist and various shades of liberal inspiration.[15]

The Italian constitutional text belongs to the modern constitutional movement and, in line with the model of the Weimar Constitution and inspired by Roosevelt's

[12] The conventions are approved by the General Conference (Article 19.1, of the ILO Constitution, which may be consulted in "Documentos Fundamentais da OIT", Gabinete para a Cooperação do Ministério do Trabalho e da Solidariedade Social de Portugal, Lisboa, 2007, pp. 5 et seq.), with a number of specific requirements for ordinary international conventions, because—although they are approved and ratified by the states that then become party to them (Article 19.5, ILO Constitution)—they are negotiated not only by the states, but also by the delegates representing workers and employers. ILO recommendations, on the other hand, as the name suggests, consist merely of guidance (Article 19.6, ILO Constitution) and do not constitute international legislation; however, States are required to report periodically, to the Director-General of the International Labour Office, with regard to the measures adopted, specifying to what extent the recommendations have been adopted or to which their adoption is proposed (Article 19.6 c) and d), ILO Constitution).

[13] By way of historical example, we may point to the resolution adopted at the ninth session (1928) which, on the basis of a proposal from a German delegate (worker), stressed the importance of collective agreements as "a means of regulating terms of employment in accordance with modern principles of the social protection of workers". Resolution transcribed by Gallart Folch (2000), pp. 61–62.

[14] On the start of the proceedings, Pergolesi (1950), pp. 120 et seq.

[15] Carinci et al. (2018), p. 31; Pergolesi (1950), p. 122.