A Word with with José Luis Gil y Gil: Labour law as *derecho estatutario*.

An interview by Francesco Alifano to José Luis Gil y Gil, Professor at the University of Alcalá.

The interview took place during the 13th Edition of ADAPT's International Conference, «Towards a Workless Society? An Interdisciplinary Reflection on the Changing Concept of Work and its Rules in Contemporary Economies», held in Bergamo from 30 November to 2 December 2023. José Luis Gil y Gil participated in the event, delivering a presentation titled *El derecho del trabajo, un derecho estatutario* during *Plenary Session #3*.

Let us start from the title of our conference: are we really moving towards a workless society? What is the response to this argument from a labour lawyer?

The work can be analysed from different points of view: philosophical, economic, sociological, legal. The first verses of the Bible already illustrate the duality of work: work is an act of creation or personal development, but also a punishment or a necessity to meet basic needs. Labour law does not deal with any jobs, but, usually, with salaried work. Despite its name, labour law has been, above all, the law of employees. As the economy and society transform, the productive model is transformed and some jobs are created and others are destroyed. Just as, with the first industrial revolution, a model of providing services became generalized, in the fourth industrial revolution some jobs will disappear and others will appear. From a legal point of view, I do not believe that we are heading towards a society without work. It will be a different society, perhaps with fewer traditional jobs, but with new ones.

To refer to labour law, you spoke of a «derecho estatutario», an terminology with a double meaning, because it indicates both the law of a special category, the workers, and the law that offers protection. How can the autonomy of labour law be found compared to other fields of law? Looking at other branches of law, such as consumer law or competition law, is it still possible to identify the specificities of the labour law?

The expression *derecho estatutario* can be used in two senses: as the law of a special class of subjects and as a law that confers a protective status. In my opinion, from both points of view, labour law is a *derecho estatutario*. As for the first meaning, it only applies to a specific category of subjects: the employees. According to the second perspective, it attributes a protective status to employees through heteronomous norms: the law and collective bargaining. Article 35.2 of the Spanish Constitution of 1978 confirms the statutory nature of labour law, when it provides that "*la ley regulará un estatuto de los trabajadores*". The precept of the Constitution, which evokes the Italian *Statuto dei lavoratori* written in 1970, clarifies the recipients and the content of labour regulations.
In my opinion, the motivations that explain the *raison d'être* of labour law or, in other words, the autonomy of labour law with respect to common

private law are two: the need to protect the employee, as a weak part of the employment relationship, and to regulate, limit and control the collective powers exercised by both the employer, as head of the company, and the employees, through freedom of association, the right to collective bargaining or the right to strike. Labour law has contributed to socializing private law. Some of the institutions or principles of labour law have inspired the legislator, in cases such as consumer law, where it is necessary to protect a weak contractor. The private law (from which labour law was separated) is no longer that of the nineteenth-century codes. It is a more social law. Private law is supplementary to labour law, but labour law is a model of protection of the weak contracting party, which also influences private law.

Historically, labour law only addresses salaried workers. Is it possible today to imagine a labour law beyond salaried employment that brings together protections for employees and self-employed workers? What is the scope of labour law today?

In a social State, labour law tends to create a new professional status, which ensures its continuity beyond work experiences, and aspires to become the common law of those who work professionally, both employees and self-employed workers. But that does not mean that labour law should lose its hallmarks. In my opinion, it should continue to be the law of employees, even when a set of common rules for dependent and self-employed workers begins to be built. If a common rule is created for all workers, both employees and self-employed workers, labour law should establish the appropriate distinctions. Different statutes would thus emerge. There would be a greater number of people included in the scope of application of labour law, but the degree of protection would vary from one person to another. In this way, different protection circles could emerge, as advocated years ago by the Supiot Report to the European Commission, in which other jurists participated, such as Professor María Emilia Casas Baamonde. It also seems appropriate to protect some self-employed workers in situations of economic dependence. But, instead of expanding the scope of application of labour law, as someone advocates, another option seems more reasonable: the protection of the weak contracting party can be carried out by private law, through the application of principles that are inspired by those of labour law. An example of this perspective are the professional interest agreements of economically dependent self-employed workers, which are not true collective agreements. In this way, labour law can contribute to socialization of private law.

One of the specificities of labour law is the presence of 'heteronomous' rules. From this point of view, what is the role of law and collective bargaining in labour law? How can the provision of heteronomous rules be reconciled with the individual autonomy in the employment relationship?

Labour law is a *derecho estatutario* not only because it applies to a special class of subjects, but also because it confers a status of protection on the recipients of the labour regulations. As Sinzheimer noted, labour law must protect the worker from the social effects of dependency, which threaten his human existence. By incorporating a protection rule into the employment contract, labour law carries out an original synthesis of the two concepts. In this way, the notion of employment contract serves to bring into an exchange relationship the non-patrimonial values linked to the person who works. This protective status is generally conferred by heteronomous norms: the law and collective bargaining. Among them, fundamental social rights, guaranteed by the Constitution, occupy a relevant position. From a technical point of view, the law and collective bargaining act as sources of integration of the content of the employment contract. The legal relationship arises from the employment contract, but its content is generally regulated by the law and the collective bargain. Therefore, in labour law, individual autonomy fulfils the constitutive function of the legal relationship, but it satisfies only to a limited extent the function of regulating the contractual content. As a general rule, individual autonomy can improve but not worse the working conditions established by heteronomous norms. In short, individual autonomy can act *supra* or *praeter legem*, and perhaps *meta legem*, but not *contra legem*.

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