WHAT DO WE TALK ABOUT WHEN WE TALK ABOUT LABOR LAW?

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I. FOREWORD: NOT JUST ANOTHER FUNNY NAME

Labor law scholars devote themselves to research and writing in the field of labor law. This statement is so clear that it does not need any further explanation. In fact, we are labor lawyers because we study labor law, this is our field of specialization, the scope of our attention that qualifies us, that gives us our name. In this collective work, a number of labor law scholars deal with the question of what means scholarship in this field of law; this paper tries to contribute to this debate by adding a new perspective that I hope can be useful to illustrate some of the topics being dealt with. Its scope is not so much to define our functions and tasks as scholars, but rather something simpler and, in a way, previous: the definition of labor law or, more precisely, the question of its limits and frontiers. If we are defined as social scientists by the fact that the object of our research and teaching is labor law, then the question of what this object is, of what labor law is, becomes an essential one. Depending on the answer we give to this simple question, a number of consequences affecting our academic activity will occur.

One of the objectives of this paper is to show that the question of defining the limits of a given field of scholarship is a crucial one. It is surprising, then, how little attention is paid to its answering. In very few cases, some reflection is given to this fundamental issue. And this in a context where lots of thought is devoted to other questions clearly related, such as what the concept of worker is, to which workers should labor law rules apply, what is the function of labor law, and the like. It is well known that ours is a field of law that tends to be rather

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self-referential;[1] labor law devotes a lot of its regulation to define to whom and how it is applied and—especially—by whom and how it is created, this being a real distinguishing mark of our discipline.[2] In this context, this lack of reflection cannot be ignored, because it's really striking. It is probably caused by the general absence of studies purely devoted to labor law as a scholarship, as an academic activity, this collective work being a clear exemption. Or probably it is the consequence of this question being a real *a priori* to any research and thinking in this field; we do not feel the need to set the boundaries of our field because they are so clear for all of us. Moreover, this question can be self-answered, as we labor lawyers are continuously answering it by doing our research: anything a labor lawyer studies is, by itself, labor law. I still think, nonetheless, that this matter deserves some attention, particularly in the context of this collective work; this explains its title, which does not try to be funny or witty but only expressive of its content and purpose.

In the last few years, a big debate has arisen in Europe and everywhere else about the widening of the personal scope of labor law, opening it to some groups of workers who do not qualify, from a technical point of view, within the definition of dependant worker on which this branch of law has been traditionally constructed.[3] The well-known "Supiot Rapport" is but one of the numerous contributions to these debates, a very qualified one indeed, that reflects perfectly well what the climate about this question is in many European countries. The reference to some peculiar categories of workers, half-way inside the scope of labor legislation, is continuous, indicating the direction for further developments: "paralavoro," "Arbeitnehmerhänlichen Personen," "trabajo autónomo dependiente," or "TRAED" are well in the center of labor debates arena and the focus of much attention, research, and writing. Although this is a debate about the limits of labor law, this is not the question I will be concerned with in this paper. In all these cases what is questioned is whether these persons should be inside the scope of labor legislation, whether they should be considered as workers for the purpose of applying it. This application would mean, in a way, a re-definition of the limits of these pieces of legislation, something that is already well on its way in a number of fields of labor law, such as

1. R. Rogowsky & T. Wilthagen, *Reflexive Labour Law: An Introduction*, *in* REFLEXIVE LABOUR LAW 3 (1994).

2. G. Vardaro, *Giuridificazione, Colonizzazione e Autoreferenza nel Diritto del Lavoro*, 4 POLITICA DEL DIRITTO 601 (1987).

3. DIRITTO DEL LAVORO E DINTORNI (H. Pedrazzolli ed., 1989).

health and safety regulations. In many cases though, this opening is done not by a new set of boundaries, but rather by a reconstruction of the concept of worker. The very name that is given to some of these workers—"paralavoro," semi-workers—is rather expressive of this approach, which is clearly more conservative than the alternative of really redefining labor law. Labor law is still the law of the workers, we just play with the delimitation of the worker himself. This does not mean in any way that these new trends are of no interest; on the contrary, they represent the most important move toward a real and far-reaching change that labor law has witnessed in the last decades, and I am sure it will be a major element in securing its ability to fulfill its task of protecting the weaker part in the labor market.

A final remark: this paper is part of a collective work about scholarship in labor law, which is published in a journal specializing in comparative labor law. Being a paper about labor law in general, its perspective should not be confined to a single national experience, and it won't; therefore, it is not a paper on Spanish scholarship or Spanish law. Nevertheless, because of its author's formation and experience, some specific references and the general background will inevitably have to do with his own national law, which in this case mean both Spanish and European labor law. Some information will be taken as well from those other national experiences with which the author is more familiar, i.e., European systems.

II. THE DIFFERENT MEANINGS OF LABOR LAW

When you try to define a given concept, the most difficult obstacle you can find is talking about many different things using the same word. This is the case with the expression "labor law," although many times we labor lawyers are not aware of this fact. Therefore defining it becomes a tricky task, and some careful analysis can be helpful.

It is not that the content and nature of labor law differs from one legal system to another. This is something unavoidable, and we are all well aware of these differences; besides, these national differences are usually not so important as to determine we talk about different things. In many cases, furthermore, some of these national differences are purely terminological, having to do with the legal language used in each national legal system. A clear example of these terminological variances is the expression "labor law" itself, that in the United States refers exclusively to collective bargaining and workers' representation, whereas in Europe—and mostly everywhere—this

expression tends to be a generic term that includes all branches and sectors of our discipline. But this is a very particular case, the rule being that this name is used everywhere, meaning mostly the same thing.

On the contrary, I am talking about another difference in the meaning of labor law, as a concept with a plurality of meanings depending on the perspective you use. This plurality of contents appears also at a national level, inside each legal order, and it is perhaps at a national level where this fact becomes more evident.

Labor law is, to begin with, a branch of the legal order, a number of rules and regulations that are considered as part of a same entity because they share a common element, their relationship with dependant employment. Nowadays we should probably have to use a wider definition of this sector of the legal system, to include those regulations having to do with the labor market and labor relations as well, even if no contract of employment is present. In this sense, "law" means "legal order," and "labor" qualifies a part or segment of it from a material or substantive point of view, because it regulates that part of the social order produced around "labor" in a broad sense. In the continental tradition we call it a "special law," to distinguish it from the "common law"—in the roman tradition meaning of the expression, a "*lex specialis*" of workers in the labor market.

This is the concept of labor law we are more familiar with, the one we usually talk about in our academic work. Labor law scholars study the regulation of labor, those rules governing the contract of employment and labor relations with a legal content and nature, regardless their origin—public or private—and their way of development—statutory or judiciary. Although we might tend to consider that this branch of the legal order is labor law and that these regulations are equivalent to the concept itself, we must be aware of the fact that this is not so. On the contrary, sometimes we use the same expression, always "labor law," to denominate something completely different, something that does not confine itself to pure legal norms. Let's see what I mean.

Labor law is also a branch of the legal sciences. This is what we are mostly dealing with in this collective work, when we talk about scholarship in labor law. From this point of view, we are a group of scientists working on the same topics and problems, and the result of our activity is also called "labor law."

Once you accept that there are different paradigms of science, some of them differing from the traditional sciences of nature, there

are no longer doubts about the existence of law as a science. Law is also a branch of the legal sciences that builds on the legal system and whose origins, by the way, can be traced as far back as the Roman Republic.[4] There is a scientific approach to law, as there is one for every social phenomenon.[5] This approach has its own methods and instruments and is expressed in academic works that, when written according to these, deserve the qualification of being scientific. From the very beginning of law as a social regulation you can distinguish between the practice and the study of law, between the practitioner and the scientist—even though, in our discipline, these are sometimes one and the same. Law, or at least the study of law, can be considered as a science, as a *scientia juris*, Rechtswissenschaft, or jurisprudence—in its historical meaning. Its object is the scientific analysis and explanation of law as a social technique and as a social construction.

In this science there are, of course, different branches and sectors, depending on the perspective and method you use—History of Law, Philosophy of Law, Sociology of Law—but also depending on whether you focus on a certain part or sector of law—Administrative Law, Criminal Law. From this second point of view we can talk about labor law as a branch of the social sciences, whose object is a sector of the social phenomenon that is labor law. Probably the right way to put it is that there is a "science of labor law," whose purpose is the reflection and study on that part of the legal system called labor law.[6] This would probably be too ambitious a name, and we labor lawyers are modest people; therefore, we use the same expression, labor law, for the former and the latter. It is an autonomous branch of the legal science because of its object and because of the adaptation and particular use it makes of the general methodology of the legal sciences; a legal science it is, anyway, and thus its language and its main instruments of analysis are still those of law, which are shared by its different branches and perspectives.[7]

The link with the previous concept of labor law is clear and simple: labor law scholarship is built on labor laws, i.e., those norms regulating labor, it deals with them as the substantive object of analysis. But it is just as clear that both concepts do not match up. Generally speaking, the labor lawyer as a social scientist performs his or her research on those pieces of legislation and collective

4. F. CARNELUTTI, METODOLOGIA DEL DIRITTO (C.E.D.A.M. 1990) (1939).

5. K. LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT (1979).

6. A. Montoya Melgar, *Sobre el Derecho del Trabajo y su Ciencia*, 80 REVISTA ESPAÑOLA DE DERECHO DEL TRABAJO 65 (1994).

7. M. ALONSO OLEA, INTRODUCCIÓN AL DERECHO DEL TRABAJO (1999).

agreements deserving the qualification of labor law; many times, though, the object of his or her attention lies outside this block of norms.

For instance, when a labor lawyer is analyzing the historical development of a given regulation, he or she is studying something we cannot consider a part of the legal order, because these pieces of legislation were derogated. Being outside the current legal order, they are no longer part of labor law in the first meaning of the expression. When a labor lawyer constructs the fundamental institutions of the labor legal order, he or she is somehow departing from the rules that are being studied to reach a different level, which is not that of legal rules but the level of legal concepts, of juridical constructions. Many times the labor lawyer adopts a proactive role, developing a critique of the current situation of the discipline, and offering alternative solutions, talking of *lege ferenda*, of a law that does not exist, though it should. Sometimes even labor law as a social science becomes the object of analysis itself—that's what we are doing right now, in this very monographic issue; in this case, we study what the labor lawyers do, not what the lawmakers or the social partners produce in the form of legal or collective norms. Depending on the kind of work he or she is performing, and depending on his or her approach to labor laws, the link with those legal norms will be close or distant. Commenting on a piece of legislation or a judicial case is not the same as defining the main features of one's own national labor law or drawing the basic lines of its evolution.

This first diversity of contents do not exhaust all the possible meanings of this expression. If we follow this analysis a bit further, we find out that labor law is also a university course. In fact, it is a course that is part of the curriculum of different programs in universities worldwide. In most universities, labor law is a core course within the academic programs of the law schools; if not compulsory, at least students can take it as an eligible course. In many cases, courses on labor law are taught in other university centers, such as management schools, industrial relations schools, and political science schools—depending on the country, you may find courses on labor law in other schools as diverse as hotel administration, social work, journalism, etc.

At first sight, one could ask what is the point of analyzing these issues, which deal exclusively with teaching, in a paper about the concept and limits of labor law; something which, at least theoretically, is independent and previous to its presence at the university system. In my opinion, there are some reasons that justify the presence of these reflections here. First of all, teaching is also a

part of scholarship, particularly in law. In law it is common that the scholar combines both roles, the professor and the researcher, although the second aspect is the one to get the more attention. Secondly, because both aspects of his activity interact, conditioning each other and, in a way, the research activity is strongly affected by the teaching function of the labor law professor.

Experts on the history of the university point out how important it is that a given subject appears in the law studies of public universities.[8] In some ways, the instruction program of a law school in any historical moment reflects the conception of power and social structure the social body shares, and its evolution over the centuries expresses its changes and revolutions. First of all, the tension between *ius civile* and *ius canonicum* at the early universities of the Middle Ages, which reflected the struggle of power between the Church and the civil authorities. Second, the fight to introduce the study of national law in law schools, whose main object was the maintenance of the tradition of Roman Law, which was considered the only relevant law; only after the Enlightenment did the universities accept that their role was to teach the real law, the one really being applied by courts and public bodies, which was already a national law. Third, the struggle to introduce specific courses on the new branches of law that were appearing after the movement of the Codification, when law schools devoted themselves exclusively to the study of the great Codes of the nineteenth century; what meant that legal instruction was reduced to a handful of courses in civil law, commercial law, criminal law, and procedure law. In the last decades, the debate has been about the convenience or need to introduce new courses on those new sectors of the legal order that have been appearing as the consequence of social or political changes, and that find no place in traditional disciplines: environmental law, computers' law, European law, consumers' law, and the like. All these changes in the formative project of the law schools are but reflections of previous changes in society, in the political system, and in the legal culture. It is not surprising how the evolution of the law studies at the different universities has become a major topic of research for historians of law in the last decades.

In particular the introduction of courses on labor law in the academic programs of the state universities reflects a change of attitude of the state towards the workers' movement and the social

8. M. GONZALEZ NEIRA, EL ESTUDIO DEL DERECHO: LIBROS DE TEXTO Y PLANES DE ESTUDIO EN LA UNIVERSIDAD CONTEMPORÁNEA (2001).

regulation of the labor market, accepting its importance.[9] Generally speaking, only when labor legislation has reached a certain level of importance and development, and only when its practice has become common, university authorities have considered it adequate to impulse its study within the framework of the different academic programs. But there are other factors to be taken into account, such as the political climate at every historical moment, something easy to understand, bearing in mind the profound ideological content and meaning of labor law. It is not surprising, then, that in some European countries labor law appears at the public university system during the years of fascist regimes, one ideological basis of which was precisely the protection of the worker by the state through legislation and administrative intervention. Nowadays, when most European constitutions recognize individual and collective rights of workers as fundamental rights, the presence of labor law courses at the different universities is a must.

In many countries, the introduction of such courses has played a very important role in the birth of a labor law doctrine, as it forced the existence of specialized chairs and other teaching positions, produced the demand for handbooks and other written materials, etc. In other countries, things worked differently, and it was not after a significant doctrine on this field existed that it began to be taught as an independent course.

The link between the university course and the other meanings of labor law that were identified earlier is also clear: the object of these courses is to teach the students the basic institutions and regulations of labor law—as a branch of the legal order—and the basic constructions built around them as a social science. The relative importance of each perspective will depend on the purpose and general approach to the legal education, whether to instruct practitioners or to offer a broader education in law. In any case, the scientific constructions play an important role as a pedagogic instrument for the teaching of the legal regulations of labor.

This is no total coincidence, though: not every piece of labor legislation is taught at the labor law course, as only the more relevant ones are object of attention at the lectures and seminars. The usual duration of these courses, which, in most cases, is confined to one academic year, or even a semester, does not allow a full-detailed analysis of the discipline. Academic research has reached a level of

9. M. Rodríguez-Piñero Royo, La Enseñanza del Derecho del Trabajo en España (forthcoming).

development, both in extension and in dogmatic construction, that only some pieces of it can be included in the courses—not to speak about its relative utility for college students. In general, there is a rather standard program for these courses, in which in a rather summarized way all the institutions of individual and collective labor law are dealt with—and, in some cases, also some Social Security issues are included. Naturally, the specific content will depend on the situation of each legal order and its legal treatment of the different labor institutions. It will also depend on the administrative organization of legal training, whether there is only one monographic course on labor law—as tends to happen in law and management schools, or a number of them. This usually happens only in specialized programs on labor relations.

Anyway this link exists, and it produces a great deal on coincidence on these three levels, the legal, the academic, and the university. Except for marginal or too specific regulations, the university course will tend to include all labor legislation currently in force. And labor law professors will try to show their students the whole of the discipline they work on. This link works both ways, as in practice, academics tend to identify their field of activity with those traditional contents of the general course they teach at the law school. There is a clear example of this coincidence: the confusion that exists in many countries between the handbook on labor law as an instrument of study and as an academic work that gives a general and complete overview of the discipline. There are many cases in which the same book performs both functions, thus proving that the object of a university course in labor law is the study of all labor law as an academic discipline; and labor law scholars tend to consider their role to work on those institutions included there.

This identification has a clear reductive effect as it focuses the scholar's attention to a reduced number of institutions and regulations, those included in the course's program. Besides, it tends to apply the label of "labor law" only to those institutions traditionally included in these programs, which are, generally speaking, difficult to change over time.

In some countries, as it happens in Spain, this effect of limiting the content of labor law has happened in an open and direct way. Once the number and denomination of the different courses to be taught at the law schools was set in the 1950s—the same for the whole country, as Franco was then in power—the Ministry of Public Education organized the body of university professors of law in a number of units, called "*áreas de conocimiento*," literally "areas of

knowledge." These areas were designed on the lines of the courses being taught at the law schools throughout the country—the same process was followed in all schools and sciences, and as a result we have all human knowledge clearly divided in independent units—and their object was precisely one of the traditional disciplines in which law was divided, which roughly corresponded with one or two of these courses. A legal definition of each of these was given, identifying its contents.

Each and every law professor in Spain belongs to one of these units, in our case the area called "*Derecho del Trabajo y de la Seguridad Social*," "Labor and Social Security Law"—here is another meaning for labor law, by the way. So he or she is entitled to teach only those subjects included in the definition of his or her area, and his or her chair bears the name of the area to which it belongs. His or her research performance is evaluated on the basis on the work done on those topics included in his or her area of knowledge. To get a chair only his or her teaching and research experience in the very area to which the position belongs will be considered. At the end of the day, all his or her academic activity will be guided by the actual content of the area of knowledge in which he or she is enlisted; and this, as we saw before, is basically the content of the traditional courses at the law school. A very similar process occurs in other countries, particularly in those that have chosen the civil service model for university staff. I have the feeling that something close to this happens everywhere, regardless the structure being used to organize the university teaching—whether chairs, departments, areas of knowledge—professors are hired to teach a given course, and their performance is evaluated just with regards to it.

At the end, the effect becomes a cause: labor law is a branch of the legal order on which a given scholarship is built; both of them, the body of norms and the scientific construction, are to be taught at the university, and a course bearing its name is introduced at a given moment in the law schools' programs. After some years, though, once the courses of labor have become a normal element in these schools, they are the ones to define what we understand as labor law. Their programs guide the activity of researchers, identifying the topics on which they work.

III. THE IMPORTANCE OF BEING LABOR LAW

Once we have seen the different meanings the expression "labor law" holds in our legal culture, we must ask ourselves whether the

qualification of a given piece of legislation or a given academic paper as being labor law has any consequences. That is, whether being or not being labor law really matters.

Let's begin with the first meaning of labor law, that branch of the legal system regulating work and employment. The first comment to make is that the legal order does not qualify its elements as being part of a given sector of it, that is, it does not consider a norm as being labor, administrative, or criminal law. These divisions are usually purely academic, an attribute given by those operators applying and studying it after it has been officially published. It is usually the kind and rank of the norm being enacted the only qualification it gets from the law-making bodies producing it, whether an act, an executive order, etc.; and, of course, a number, a name, or both, depending on the tradition in each country.

A collection of legal texts on labor law, a typical product of the legal publishing industry everywhere, contents a number of texts whose presence is the sole decision of his or her editor, without any clue from the legislature itself. The same can be said for a casebook in common law countries. Although the law-making bodies ignore this segmentation of the legal order, it is usually easy to characterize any piece of legislation, including it in any of these categories. This happens because there are clear customary definitions, generally accepted, of each of these divisions.

Furthermore, the State usually uses a different logic when framing its norms, designing them with a different systemic, if not purely political, convenience. It is normal, then, to find pieces of legislation whose content does not correspond to any of the traditional divisions of law, as its norms belong to more than one of these divisions. Now an act on insolvency will include commercial, civil, procedural, and labor law all together, luckily in different chapters. Not to speak about the legislative technique of the "Omnibus Act," increasingly common in all countries, where all kinds of regulations are included in a single piece of legislation for no reason at all except the pure convenience of the State authorities. The "good old times" of *le Codification*, when there was a big Code for every branch of the legal order, including all the relevant legislation, are long over; IRTI spoke long ago about "the age of decodification."

Sometimes pieces of legislation that, at first sight, would be considered clear examples of labor law might include norms that would lie outside the limits of this branch of the legal order. Any act on temporary help agencies—as labor law as it can be—includes norms regulating the relationships between the user firm and the

agency: a contract between two firms would hardly qualify as labor law by any standards. Employment promotion programs include, many times in a same normative body, labor regulations, Social Security provisions, and some tax regulations.

The distinction between what labor law is and what administrative law is becomes diabolical in most European states of continental tradition, as the state intervention remains as one of the main features of their labor policy. Many pieces of legislation regulating labor affairs would include some specific dispositions about the procedural and administrative aspects of its implementation, thus combining labor, civil process, and administrative law. The same can be said about the presence of rules regulating the consequences of breaches to its mandates, what in many cases means the introduction of criminal law in these "labor law" norms.

Despite all these problems, it is out of question that we operate with a legal system that appears divided in specialized branches. We accept these divisions, and we specialize in one of them. But the question is, then, if this situation has any legal effects; that is, whether there are any consequences of a given piece of legislation to be qualified as being part of labor law. From my point of view, a number of them can be mentioned.

A first consequence takes place in those countries with a system of justice administration in which organization there is a specialized branch of the judiciary for labor affairs. When dealing with cases that imply the application of labor law, a comparative analysis shows that there are many ways in which States organize their courts: common law courts, with the normal procedure; common law courts, but with a special labor process; common law courts, but with some of them specializing in labor affairs; special courts for labor affairs, with their own specific procedure; and, finally, special courts for labor affairs, and some other special courts for Social Security cases. In many of these alternatives those labor law cases—that is, cases that solution implies the application of labor law—are judged by special courts—that in some cases form a real special branch of the judiciary—most commonly through a special procedure that applies only to them. Then, knowing which cases are to be dealt with through these special courts and procedures is a rather important issue; this implies knowing beforehand which norms are considered to be labor law.

Consequently, you must have a legal instrument to characterize the cases being brought to courts, in order to decide to which branch of the judiciary, or through which special procedure, they correspond. Being or not being "labor" matters, then. Usually, there is a legal

definition of which cases correspond to these labor courts, or a list of matters, or both. An act on the special procedure for labor affairs is also common, including the definition of its scope, the organization of the labor courts, and the regulation of its functioning. In these countries, we do have a somewhat clear definition of what is, legally, labor law; at least we have some legal instruments to decide it, and some direct consequences of such description.

In many cases, though, the law does not speak about labor law and labor courts, but of "social law" and "social courts" instead. In these cases, the expressions "labor" and "social" are, if not synonymous, at least very close, meaning almost the same block of issues and regulations. Even at a supranational level, this use of the term "social" meaning "labor" occurs: the chapter on social policy of the Treaty of Rome, gives an outstanding example, it contains those provisions more closely related to labor law; at a national level, we would most likely have talked about labor policy instead.

A second context in which a clear relevance of being qualified as labor law can be found is that of those international organizations in which a transference of powers from the Member States to a supranational entity exists. In these experiences, relatively few and most of them rather recent, the organization has a regulatory power of itself, which enables it to produce regulations in those fields where this transference has taken place. The supranational entity will be capable of creating a labor law of itself only if the Member States have previously agreed, conferring it the regulatory competence to do so. This kind of empowerment is usually restrained to a given subject or field, conforming a list of sectors in which the organization may legislate. If such an attribution exists, then it is also relevant to know which is the extent and limits of a given entitlement, say to produce labor law norms. You must know, clearly and doubtlessly, what is and what is not labor law, in order to control whether this power is being properly used, and whether each regulatory intervention is acceptable.

In the case of the European Union, the most advanced experience so far in political integration through law, things are more complicated: it is not only that the Union has or doesn't have the power to intervene in labor affairs, which it does; a test of subsidiarity is to be passed as well, before any piece of European labor law can start is a difficult journey trough the Union's legislative procedure. At the end of the day, the scarce growth of an European labor law is the most eloquent evidence of these difficulties.

Continuing with this example, we can see that the Treaty of Rome does not use the technique of recognizing the Union a general

regulatory power on labor affairs; instead it enumerates a number of subjects on which it may intervene—either by qualified majority or unanimity—and another group of subjects on which this intervention will not be allowed. Because all of them are labor law, what we find is the recognition of a partial power for regulating labor issues; depending on which institution is to be regulated, then the Union will have the power or not.

Closely related to this scenario is that of States with a decentralized political power, either federal—as the United States or Germany—or regional systems—such as Spain or Italy. In this context, the transference of power is internal, from the federation to the States—or *vice versa*, depending on each country's constitutional history—and the game is the balance between the central and the peripherical authorities. A clear rule is needed in order to know which of them holds the regulatory power in any given field, including, of course, labor issues. Once again, the assignment of a given piece of legislation as being a part of labor law is relevant, as it determines which authority is competent for its enactment and implementation.

In old constitutional traditions there is no reference to labor law in the Constitution, and consequently no express recognition of regulatory powers exits. In practice, this has forced the use of general mechanisms, such as the commerce clause or the implicit powers clause, to solve this question. In modern constitutions, enacted when labor law was already an existing branch of the legal order, explicit references to it when dealing with the distribution of regulatory powers are common. Even in these later cases the question is far from being easy, and some problems always arise: the distinction between regulation and execution, for instance, is a classic one. Sometimes the problem has to do with the concept of labor law itself. In Spain, to use a real example, the Constitution talks about "labor legislation," but does not talk explicitly about "employment policies" as one of the powers of either the state or the regions. In the last two decades, the debate, just partly solved by the Constitutional Court, has been about who was entitled to develop them, looking for an empowerment for them. What is "employment policy"? Is it part of labor law? It could be, as it uses labor law institutions such as temporary contracts and the regulation of working time. Or is it part of the general economic policy? Depending on how you look at it, a different attribution of regulatory powers follows.

These are probably the most evident consequences of the qualification of being part of labor law, but some others can be pointed out. One example is that of those advisory bodies for the

government specialized on social issues, whose purpose is to bring the opinion of the social partners to the legislative process; this is the model of the Social and Economic Council—or Committee—existing almost everywhere, and whose competence is limited to some fields of the State's policies. One of these fields, of course, is that of labor legislation, and the Council's opinion must be compulsorily issued before any new piece of legislation in this field can be enacted. In these institutions the word "social" is used once again. In this case, though, its meaning is somehow different, broader than in the use we saw before: it is not just labor, but also consumers' interests, social economy, self-employed workers, etc.

Once again, knowing when a proposed act deserves or not this qualification becomes a relevant issue, as the legislative procedure for its enactment itself may change. In practice, this becomes a source of political struggle, as governments tend to escape from these duties just by putting a legislative proposal under a different label.

A final example: in some countries there are some specialized professions on labor issues, such as the Spanish "*graduado social*" and the Italian "*consulente del lavoro*." These professionals are entitled to act as legal counselors on labor-related issues, conforming a rather peculiar paralegal profession. In some cases, they are even allowed to act at Labour Courts, as a kind of "labor law attorneys," being the only case in which a non-lawyer is entitled to do so. Here again, knowing perfectly well which are the limits of labor law becomes a crucial issue, because it defines the limits for their professional activity.

As a final conclusion taken from these few examples it can be said that in a number of situations being or not being labor law counts; that, although being a label in a way strange to the legal system, it nevertheless has some legal consequences. The legal order has accepted and internalized this division, originally academic, and it operates following a logic of segmentation by specialization.

So much for the branch of the legal order called labor law. The next thing to do is to find out whether being labor law in the other meaning of the term, the academic, does have some consequences. I am not talking, of course, about the legal consequences of this label. Science is one, and the researcher is free to pursue his or her activity without any constraint or limitation, regardless of his or her specialization. The divisions of science in general, and of the legal sciences in particular, operates just for administrative purposes, mainly for personnel management reasons. Scholarship, at least in democratic countries, is guided by the academic freedom most

constitutions grant.[10] Therefore, from the point of view of research activities, the rule is that any researcher is completely free to choose the topics on which he or she will work, and the method he or she will use. This freedom is designed in wide terms, and operates regardless of any other consideration including, of course, the branch of the legal order traditionally involved in the study on a given topic. The scarce limitations to this freedom are justified by other considerations, such as ethical or safety issues. Another completely different thing is, of course, the practice of this freedom, where peer pressure, corporatism, or other social controls can limit its exercise, putting *de facto* boundaries to the subjects a researcher can devote his or her attention to.

What I mean is something completely different, what the consequences are for a given legal institution to be perceived as being part of labor law, from the point of view of its study, analysis and construction. Being labor law, from this material point of view, means *inter alia* to be considered as a research object for the community of labor lawyers, and this could mean something in terms of its perception and evaluation. Let's put it this way: Does it make any difference for a given topic or subject to be included within the scope of attention of labor lawyers? Does it matter to be studied by a labor law scholar or by a researcher from any other branch of the legal sciences?

The answer to this question is a difficult one. Before you can try it you must have the answer to a question at least as complicated as this one: What are the features that characterize the community of scholars in labor law? What are those elements we all share because we work in the same discipline, that give us an identity as a scientific collective? One could think of another question, which will make things even more difficult: Does a community of labor law scholars exist? Can we talk in terms of one single entity? If we take into account the profound differences we find in the practice and construction of labor law between different countries and legal cultures, and the various "schools" we find inside each country, one could wonder whether all these questions might have a single answer at all.

Let's assume that there is such a thing as a scientific community of labor lawyers, and then the question will be whether or not labor lawyers differ from other colleagues who work on other areas of the legal system. In a way, I have the feeling that we do form a distinctive

10. A. EXPÓSITO, LA LIBERTAD DE CÁTEDRA (1994).

community inside the legal academia; this is the case in my country, and it is in some others I am familiar with. This is the feeling you get when you attend to international scientific meetings, as the one that produced this collective work. And I am sure that this is the conclusion at which you arrive from the various papers that form it, all of them devoted to reflects on what scholarship means in our discipline.

What do we have that distinguishes us? These peculiar identifying features have been analyzed in detail in this seminar, so we are at least aware of them. Let me just point out some of them. First of all, labor law has its own method, its own approach to the norms, institutions, and problems it studies. It is not that the methods we use differ completely from those used by other law scholars; in fact, as it was said before, above all we are law scholars, and we make use of the same instruments and techniques that have been developed over the centuries by generations of law professors. Dogmatic construction or interpretation of norms are not strange to us, as we use them on our daily activity. But it is nonetheless true that we do differ from other law scholars from a methodological point of view. We somehow make a different use of these methodological items, adapting them to our own priorities and needs

All this probably sounds too vague, and surely it is. As a branch of the legal science, we share some common instruments and views about the legal system. But it is fair to say that labor lawyers do not easily follow the standard approaches to the legal system that are usually ill-suited for the complexities and peculiarities of labor relations. And when new methodological trends appear, we usually follow them, as we have done with economic analysis of law[11] or feminist jurisprudence, to use just a couple of examples. This link between labor law and methodological renewal is, in fact, bi-directional: labor lawyers are always attentive to the new trends, and experts in legal theory use labor law as an example of new currents and models in law. The paradigm of law as an autopoietic system is a perfect example of this strong link.[12]

In fact, our very historical origin is strongly linked to the critic to the methodological stance generally accepted by law scholarship in the nineteenth century. The analysis of the contract of employment from a realistic and sociological perspective, abandoning the

11. P. Ichino & A. Ichino, *A Chi Serve il Diritto del Lavoro*, I LAVORO E DIRITTO DEL LAVORO 460 (1994).

12. A. Lo Faro, *Teorie Autopoietiche e Diritto Sindacale*, 1 LAVORO E DIRITTO, AÑO VI 129 (1993).

traditional, purely formal and dogmatic construction of it, was a crucial moment in the birth of a distinctive labor law doctrine. In the seminal works of Salvioli or Menger, this search for the reality under the legal institutions was the basis for the critic of the traditional State's attitude towards labor relations. The demands for new social legislation were rooted in this perception about how private law really worked in the labor market. Before this renewal of legal science in the nineteenth century, only the formal analysis of the legal institutions counted; from this perspective no need for social legislation was felt.[13]

The search for substantive equality, beyond formal equality, is one of our distinguishing marks; it is also, in a way, a methodological standpoint. We are much more concerned by the real situation of workers in the labor market and in the social system than by the legal structure of the employment relationship. What matters is what really is, not the legal appearance.[14] This methodological standpoint is not limited to scholarship in labor law, but it affects its practice and administration. The search for the real nature of a contract of services, regardless of its formal qualification, or the analysis of the real effect of a legal institution from the gender point of view are but some examples of this influence on the practical implementation of labor legislation. That's why a distinguished colleague of ours, the late Massimo D'Antona, defined labor law as a "post-positivistic anomaly," a field of the legal science atypical from a methodological point of view, which does not accept the purely positivistic approach to the legal experience.[15]

This methodological attitude has some relevant consequences. On the one hand, we are open to methodological renewal, as we have seen, being sensitive to new developments in this field. Gino Giugni said a long time ago that ours was an extremely fertile field for the methodological renewal of all legal science.[16] On the other hand, and this is one of the main aspects of this methodological stand, interdisciplinary analysis is common in our work, something that does not happen in other branches of the legal science. The search for the reality in labor relations has forced labor lawyers to lay on

13. THE MAKING OF LABOUR LAW IN EUROPE (B. Hepple ed., 1986); U. ROMAGNOLI, EL DERECHO, EL TRABAJO Y LA HISTORIA (1997).

14. T. Sala Franco, *El Realismo Jurídico en la Investigación del Derech del Trabajo*, *in* V.V.A.A., EL DERECHO DEL TRABAJO ANTE EL CAMBIO SOCIAL Y POLÍTICO 40 (1997).

15. *See* Massimo D'Antona, *L'anomalia Post Positivista del Diritto del Lavoro e la Questione del Metodo*, 1-2 RIVISTA CRITICA DEL DIRITTO PRIVATO 208 (1990).

16. Gino Giugni, *El Desafío de la Innovación en el Derech del Trabajo*, II RELACIONES LABORALES 368 (1994).

sociological, organizational, and economical analysis, combining them with our traditional tools for the interpretation of law.[17]

Besides these methodological peculiarities, labor law as a branch of the legal science is characterized by a given ideology.[18] This is something that has been long discussed in this seminar, and therefore I won't develop this idea much further. I will only recall that labor law has a strong ideological content, probably stronger than any other branch of contemporary law. Its very existence is based on some assumptions about the role of the state and the market with a clear political meaning; each and every one of its institutions reflects political decisions. Labor law is, to a great extent, labor policy and labor politics.

This ideology is part of the general culture of the labor law community, another of its distinctive features. As any branch of the legal academia, it has developed a culture of its own, conformed over the years by a plurality of elements that define our identity as scholars. One of the crucial elements of this culture, and another aspect distinguishing it from other branches of the legal science, is the special sensibility labor lawyers show toward social problems. From the very historical origin of labor law, its scholars have been concerned by the impact of the regulations they studied on individual workers and their families, in a moment in which the main methodological current was still based in a formal and aseptic analysis of the world of norms, with nothing to do with the real world. Work is too important an issue to ignore the social consequences of its regulation, and so labor lawyers have studied it.

This sensibility to the social impact of labor market regulations is combined with a clear sympathy toward the weaker party in labor relations. As labor law is—or at least was at a given point—the law of the worker, labor lawyers are, in a way, social scientists concerned about his legal status and his protection through law. This sympathy—or empathy—is part of the general ideology of our discipline. Of course there are different currents and political orientations within labor law scholars; all of them, though, show a kind of sympathy toward the worker. That's why labor law has been called by an eminent colleague a branch of law "made to measure" for human beings, "un diritto alla misura dell'uomo."[19] In fact, you can

17. C. Zoli, *Metodo Interdisciplinare e Attivitá del Giuslavorista*, 5 LAVORO E DIRITTO 441 (1991).

18. *See* M.C. PALOMEQUE LOPEZ, DERECHO DEL TRABAJO E IDEOLOGÍA (1999); G. TARELLO, TEORIE E IDEOLOGIE NEL DIRITTO SINDACALE (1972).

19. *See* U. ROMAGNOLI, IL LAVORO IN ITALIA (1995).

find protective attitudes both in right-wing and left-wing oriented authors, each one in his own way. You might often find anti-union positions, but rarely anti-worker ideas—if you have them, you probably won't be a labor lawyer. Neutrality, a must in social sciences in general, has never meant too much in labor law research. Working in a sector of the legal system justified by the protection of the worker and with a general *pro operario* attitude,[20] the labor law scholar has always shared this orientation and, in many cases, has defended it against reforms in labor legislation justified by economical reasons.[21]

The combination of all these elements, this methodological stand, this ideology, this culture, and this sensibility does have an effect on the way labor law scholars perform their research and teaching activities. In this context, the analysis of legal regulations and institutions is conditioned by the cultural environment in which they operate, and its outcomes are clearly determined by this fact. Does it influence the way these norms are perceived and constructed?

In my opinion, it does in a number of ways. For instance, in the identification of the topics to be dealt with, as labor law researchers tend to focus their attention on those issues that have an actual impact on the living and working conditions of workers, as at every historical moment, our interest has always been their real problems. Those topics having a purely dogmatic interest are rarely between our priorities. Once working on a given topic or institution, the way we analyze it is also determined by this common culture we share, starting from the instruments we use, either from the tradition of the legal sciences or from other scientific disciplines; labor law scholars make a flexible use of them, adapting them to their needs and priorities. From all the possible perspectives we will choose those that will allow a better view of the interests and social effects involved. The impact on the contractual and social situation of workers will be carefully studied, and those situations lacking legal protection will be pointed out.

Consequently, to conclude this section I think that it is correct to say that the fact that a given institution is considered as being within the boundaries of labor law, and therefore as an object for the attention of labor law scholars, has an impact on the way it is scientifically analyzed, constructed, and perceived. Scholars from

20. M.R. Alarcón Caracuel, *La Vigencia del Principio Pro Operario*, *in* V.V.A.A., CUESTIONES ACTUALES DE DERECHO DEL TRABAJO 870 (1990).

21. M. Rodríguez-Piñero Bravo-Ferrer, *Diritto del Lavoro e Mercato*, 1 LAVORO E DIRITTO 39 (1995).

other legal disciplines will see it in a different way, according to their own culture, methodology, and sensibility.

IV. THE LIMITS OF LABOR LAW AND THE ROLE OF THE LABOR LAW SCHOLAR

As we have seen in the previous pages, being labor law matters, both as a branch of the legal order, and as the object of attention of a particular academic community, that of labor law scholars. Therefore, the definition of the object and limits of our discipline is a relevant issue, with important practical consequences. We should be able to know for sure what is, and what isn't, labor law. The problem is that we don't. From the point of view of the legal order, there is no explicit definition of it, and neither the limits between its different sectors are clearly stated. From the point of view of the law researcher, academic freedom admits no limitation to the law scholar's interest and curiosity.

Nevertheless, and from the perspective of the labor law scholars, in practice there are some limits to our activity, a definition of the area on which we should perform our activity. These limits come from different sources, and their effect is to restrain the issues and matters studied by labor lawyers. As we saw before, the organization of the teaching of labor law at the university system has had the effect of drawing a standard model of which the institutions and regulations included in this sector are. This has produced the effect of limiting the scope of our attention to the common contents of a labor law university course. The idea is that what is outside its syllabus is not proper labor law. In some cases, the administrative organization of university professors, which includes an explicit definition of each one's field of specialization, has had a similar effect. Besides, the boundaries, more or less clear, of labor law as a branch of the legal order have limited our activity as well, as we felt our task was to work on those norms included in it. Generally speaking, and although we could not talk of a legal and explicit limitation to what we study, there are nonetheless customary definitions, a tradition of what we should and should not work on. The practice of scholarship in labor law has defined the object of our research, and we all know what issues lie inside and outside it.

The effect of such limitation is to exclude all these institutions considered outside our field from our attention, because they are not really labor law; if they aren't, then they should not interest us and we probably won't be prepared to deal with them, as our formation

allows us to work only with labor institutions. This does not mean, of course, that these institutions are short of scientific study; it is only that they belong to the natural field of operation of some other branch of legal academia. All these non-labor institutions will be studied, then, by other, non-labor law scholars. And they will do so with their own culture and their own method.

This exclusion from labor law doctrine implies that all these distinctive features that distinguish labor law as a particular and peculiar academic community will not operate. Particularly this sensibility toward the social consequences of legal institutions will not apply in the analysis of those non-labor law issues. This makes sense in most cases, but not in all, particularly because we are in a moment in which the labor market is witnessing the growth of a number of contracts other than the contract of employment whose object is the provision of professional services by individual persons. These persons, who work through a different contractual agreement, are in many cases in a social position very close to that of the dependant worker, but they are nonetheless excluded from the scope of attention of labor law scholars. I am not talking about the application of labor law regulations to these non-dependant workers, which is another question; I am talking about our study of these forms of employment, even though they are not regulated by labor law, therefore falling outside the boundaries of the discipline.

This would mean, of course, a new conception of scholarship in labor law, and even of labor law as a social science. It must open itself progressively to these other forms of work, not confining itself to the scope of application of labor law norms. In a way, it should have as its object all forms of personal work in the labor market, regardless of the legal instrument through which it is exchanged in the market: a *Recht der Arbeit* rather than an *Arbeitsrecht*, a "*Droit du Travail salariè e non-salariè*." By doing this, it will become a real "labor law," of all forms of labor, instead of "dependant work law" as it is conceived nowadays; thus acting as a "Common Law of Labor," "*Derecho Común del Trabajo*."[22] And probably labor law scholars will be preparing themselves for a future in which labor law norms will apply to some groups of non-dependant workers.

One element that has acted as a guide to define our field of study is the contract of employment. Labor law was born as the law of dependant workers, and it is still defined and perceived this way,

22. J. Rivero Lamas, *La Formación del Jurista y la Enseñanza del Derecho del Trabajo*, *in* LA ENSEÑANZA DEL DERECHO 279 (Gil Cremades ed., 1985).

although nowadays we cannot talk properly any more in these terms. In fact, there are increasingly situations in which no employment relationship can be found, but where nonetheless labor law norms apply, this being one of its distinctive features at the beginning of the twenty-first century. Some labor law regulations have a scope of application that exceeds dependant workers, including other groups of workers with a different legal status. Collective rights of civil servants, that, in many countries, are regulated in the same normative texts as those of private sector dependant workers, are a good example. So it is the regulation of social protection or health and safety of self-employed workers together with dependant workers in the general legal texts on these matters. Notwithstanding all these new trends is the idea that the contract of employment defines our field of specialization is still strongly rooted, and it is, to a large extent, responsible for this restrictive conception of our task as social scientists.

The contract to provide services is one of those institutions that has suffered from this restrictive conception. Not being a contract of employment, it has traditionally been outside the scope of application of labor laws, and has never been the object of our attention—when it has, it has been by trying to distinguish it from dependant work. The doctrinal debate in our academic community has been about the application of labor regulations to these self-employed workers, or about the design on a specific legal status for them; as a private contract under private law regulations, its current situation in most countries, it has not been studied by labor law scholars. And they probably would have something to say. First of all, because, in most countries, this kind of contract has received little attention from private law scholars; and these have been scarcely attentive to the new forms and economic functions this form of work has acquired over the years. Besides, for a private law scholar, a contract to provide services is but another contract, and its analysis won't differ much than that of any other private agreement. A labor law scholar will look at it under a completely different light, as a source of income for the self-employed worker. From this point of view other elements will call our attention: the stability of the contractual relationship with the client, working conditions and working hours, the global retribution the worker will get from his or her activity, health and safety issues, and the like. All these with this particular sympathy and sensibility toward his or her personal situation in society that we have always shown. An autonomous worker will be, above all, a worker, regardless of the fact that his or her contractual link is not a contract of employment. In a

moment in which this contractual framework has spread over all sectors and activities, in many cases substituting dependant work, this kind of analysis becomes more and more important. We don't have to wait until these contracts are included with the scope of labor regulations to pay them some of our attention.

Even more evident is the case of public employees subject to administrative law. Due to the juridical nature of their link with their employer, a public contract under public law, labor law scholars ignore them as a field of study; the knowledge of administrative law is the task of specialists in this sector of the legal order, so it must be up to them to study the legal status of civil servants. In some countries, you find the paradoxical situation in which collective rights of civil servants are studied by labor law scholars—because they are an expression of freedom of association, a "labor right"—whereas their individual employment relations are the object of study of administrative law specialists.

In my opinion, this is a serious mistake that unreasonably reduces our field of study, exempting from it an enormous number of workers. It is true that they lack a contract of employment, as their relation of services has its origin in a different juridical title; and it is true that there are important differences in their legal status, particularly regarding the conditions of accessing and leaving employment. But these do not justify a complete exclusion from the field of labor law. From a material point of view, their situation is similar to that of private dependant workers: they personally perform a professional activity, normally to make a living on it, under the direction and control of another entity, in this case a public authority. In fact, in many cases a civil servant is nowadays closer the traditional paradigm of dependant worker than a private worker, whose position toward the employer is more flexible and autonomous. The consideration in both cases is the same, the exchange of personal services for a salary. Both the worker and the civil servant seek the same thing: to get a job; so do a private and a public employer: to get workforce. In practice, the contract of employment and the administrative contract of services are two alternative ways through which workers can find employment, and through which public employers can hire their workforce, with no major differences among them.[23] The ways they are perceived and studied are, nonetheless, completely different, because labor law and public law scholars have a different approach to

23. M. Rodríguez-Piñero Bravo-Ferrer, *Trabajo Privado y Trabajo Público*, 6 RELACIONES LABORALES 3 (1989).

employment relations, as a consequence of their different background and formation. The consequence is that millions of civil servants around the world do not benefit from the experience and sensibility of labor law doctrine.

This exclusion of civil servants is being superseded in some countries, particularly in those where a process of privatization of public employment is in course. This is the case in Italy, and Italian labor law scholars have made extremely interesting contributions to the study of public sector employment relations in the last decades.

Contracts for services and public employment are but two examples of the main feature of the labor market in the early twenty-first century, the diversity of forms of employment. A number of further examples could be noted, and I will point out just one, the workers of the so-called "social economy," those providing their services in firms adopting the form of cooperatives. These persons are members and owners of the enterprise where they work, not their employees. No contract of employment exists, and so we have a relationship excluded from labor law; in most countries, these particular enterprises are studied by commercial law scholars. But these firms are rather peculiar ones because their main object is to provide jobs to their members. The logic of cooperativism is radically opposed to the logic of capitalist firms, closer to the logic of labor institutions because the situation of a member of a cooperative firm is materially similar to that of the dependant worker, regardless of his or her condition as a share-holder of the firm for which he or she works. It is not surprising then, that in some countries, there is a tendency among labor lawyers to study the different forms of social economy, something that theoretically should be commercial law. The late Marco Biagi, to whose memory this seminar was dedicated, wrote a seminal book on this topic, and it has been followed by a number of others in different countries.

Labor law as a branch of the legal order and as discipline were born in a moment in which the contract of employment was the common instrument for the exchange of services and wages. Today, the diversity of instruments is the rule and we should adapt ourselves to this evolution, extending our attention to all these alternative ways to provide services whose presence in the market is equally important, and that are increasingly producing social problems.

A hundred years of academic activity on dependant workers has provided us with both a particular ability and a remarkable sensibility for the study of juridical relationships through which personal services are provided. It is our responsibility as social scientists to make the

best use of them, utilizing them in as many cases as possible. At a time in which these relationships of services are a central element in our societies and economies, and a number of highly relevant social problems are arising, all this experience and know-how must be properly used in all their extent, without restraining them to a single modality, the contract of employment.

We must not forget our own history. At the beginning, some scholars were concerned about the social situation of the working class, and demanded a solution. Labor law was an answer to these social problems, a number of rules governing the working conditions of dependant workers. At that time, they were the ones to need a protective intervention from the state, and in a way the state operated under a presumption, according to which persons in the employment of others needed and deserved legal protection. Today, this is only partly true because there are other social groups in a similar situation of weakness in the labor market, besides dependant workers. As our predecessors did a century and a half ago, we must devote our efforts and knowledge as social scientists to the better protection of all persons demanding it. The job for labor law scholarship in the twenty-first century, as it is for labor legislation, is to define who should benefit from it, a kind of in-and-out in labor law.