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Let's deconstruct the meaning of "dependent work" to enlarge the scope of labour law

1. The problem of defining the dependent worker: the Italian and the English legal systems as two examples from the common law and the civil law

It is well known that there has been and there is still an important discussion amongst academics and lawyers about the meaning of "dependent worker". [1] It is known also that in both common law and civil law the meaning of "dependency" is far from being a fixed point in employment law, meaning also that it is far from being indicative of a clear fact. Indeed, it is not even clear if we are supposed to deal with it as a matter of fact rather than as a matter of law.[2]

What is sure is that beyond the definition of dependent worker/employee, there is a huge struggle in terms of social policy, since by that definition we derive the scope of employment law. It is just the classification of a worker as a dependent one that generally implies a protection by the State which is severely different from that granted to an independent worker. This is true both for labour law and for social security law, thus meaning that both labour rights and social protections are allocated depending on whether the worker is dependent or self contractor.

Therefore, not at all by coincidence, every legal tradition (wherever being an expression of a modern economy) focuses on the issue of defining dependent work as a fundamental issue in employment law. This "definitional category" is cardinal for limiting the scope of our legal discipline in countries like Italy, United Kingdom, as well as United States, Sweden, France, Germany, Australia, Spain, Japan, etc.[3]

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[1] It is a common feature within the modern legal systems to determine the nature of a dependent employment relationship by deriving it from several indicators. As T. Akari & S. Ouchi pointed in *Comparative Labor Seminar, The mechanism for establishing and changing terms and conditions of employment/The Scope of labor law and the notion of employees*, in JILPT Report No. 1 2004, "In the countries mentioned during the seminar the concept of employee is determined by taking various factors into consideration. But which factors take precedent over others is not clear and factor dependent and case-by-case approach are widespread. No theoretical basis has been established to help clarify what criteria should be used when approaching this question" (that comprehensive comparative study is also published in digital version in http://www.jil.go.jp/english/events_and_information/0309_report.htm). The consciousness of a worldwide common problematic when defining dependence in labor law stems also from *The Scope of the Employment Relationship* – Report V to the 92th Session of the International Labour Conference (2003) on the ILO website.

[2] This complex matter is theoretically approached by M. Bove, *Il sindacato della Corte di Cassazione, contenuto e limiti,* 1993 Giuffre, 24, writing from an Italian legal perspective.

[3] Comparative contributions over this topic have been offered by S. Engblom (2003) Self employment and the personal scope of labour law quoted above. S. Ouchi gave a contribution for Japan (*Labor law coverage and the concept of worker*), K.G.Dau Schmidt contributed for the U.S. (*The definition of employee in American*

Although the present research moves from a full analysis of the Italian and the English legal system only, the perspective of searching for a possible common legal theory makes it necessary to observe the Italian and the English systems as examples of the two main legal traditions, the common law and the civil law. Of course by taking Italy and United Kingdom as representatives of the civil law and common law we could face the risk of an unfair generalisation. Nevertheless, any further highlighting about specific aspects taking distance from the comparative approach as here proposed would contribute to rise the debate, and to provoke the search for a common theoretical framework concerning a topic that is asking for deeper investigations.[4]

It is commonly known that globalization affected labour markets and evidenced a state of ineffectiveness of the old definitions of employee as just fixed around the old big manufactory industry and around the blue collar type of employee. The increasing demand for work in the services sector, the need for outsourcing, the diversification of working styles, all this has made it particularly difficult to determine whether a subordinate position does exist in the relation between the worker and the enterprise.

The legal systems have generally gone through this economic-social evolution by adjusting themselves on a case law base rather than on a statutory law base.

As for the national legal frames analysed, we could briefly recall that the Italian system codified the definition of dependence in 1942, by stating that the employee is the one "*who agrees to collaborate with an enterprise for remuneration, carrying out intellectual or manual labour in the employment of and under the direction of the entrepreneur*[5]" (art. 2094 Civ. Cod.), thus focusing, as for the determinant factor, on the presence of a *power of direction* actually exercised by the hirer.

This definition has been applied by law interpreters through the years to determine the personal scope of the major Italian labour rights.

Italian jurisprudence has played a major role in giving a broader interpretation to that definition, trying to accord labour rights to those worker who could have been told "under the direction" of the employer in a broad sense.[6] Scholars have contributed

labor law and employment law), Joo-Cheong Tham for Australia (*The scope of Australian labor law and the regulatory challenges posed by self and casual employment*), C. Barnard for the U.K. (*The personal scope of the employment relationship*), R. Wank for Germany (*Diversifying Employment patterns, the scope of labor law and the notion of employees*), P. Lockiec for France (*The scope of labor law and the notion of employee: aspects of French labor law*), M. Tirabochi & M. Del Conte for Italy (*Employment contract: disputes on definition in the changing Italian labour law*), M. Ronnmar for Sweden (*The personal scope of labor law and the notion of employee in Sweden*), all these are included in 2004 JILPT Report No. 1 as quoted above.

4 The reader may find few specifications concerning specific countries in the following footnotes (see f.n. 8, 11, 25).

5 Translation from M.Tiraboschi & M. Del Conte, *Employment contract: disputes on definition in the changing Italian labour law*, in 2004 JILPT Report No. 1.

6 For an Italian dissertation over the case law dealing with indicators of subordination see F. Lunardon (2007) *La subordinazione, in Diritto del lavoro* - Commentario diretto da F. Carnici, UTET, Torino, Volume

as well to give "dependence" a broader meaning, especially by analysing the economic and social dimension of dependence.[7] From another point of observation, also a restricted meaning of "employee" has been required, in order to prevent from recognizing the strongest protections to individuals not matching the strict meaning of dependent workers nor needing such a strong protection.

According to legal theory, if the written law is expressly referring to an individual or a group of individuals, then it cannot be applied to individuals different from that named person or group of persons. It is via that name, which is a legal definition, that the personal scope of a law is declared.

This is particularly true in the continental legal tradition, where the connection between the formal wording of the law and the judge interpretation is more rigid than it is in the common law.[8]

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7 De Luca Tamajo - Flammia - Persiani (1997) *La crisi della nozione di subordinazione e della sua idoneit selettiva dei trattamenti garantistici. Prime proposte per un nuovo approccio sistematico in una prospettiva di valorizzazione dei un terzium genus, il lavoro coordinato,* in Atti del Convegno 27 maggio 1996 Centro Studi di diritto del lavoro D. Napoletano, 1997, Bari; L. Nogler (1990) *Metodo tipologico e qualificazione dei rapporti di lavoro subordinato,* in Ridl, I, 182, Pessi R. (1988) *Spunti per una riflessione sulla fattispecie di lavoro subordinato,* in DL, I, 513; Spagnuolo Vigorita L. (1967) *Subordinazione e diritto del lavoro, problemi storico critici, ed.* Morano, Naples.

8 As for the *French system*, the scope of labor law rests on the idea of dependence as well, although the definition of "employee" is not a statutory definition. It rather developed through case law, the latter making the definition quite adaptable to the evolution of industrial relations. The system provides for some legal presumptions in case of self employment (art. L 120-3) and in case of some particular profession (art. L 751-1 for sales representatives, art. L.761-2 for journalists, art. 762-1 artists and model), see P. Lockiec, *The scope of labor law and the notion of employee: aspects of French labor law* in 2004 JILPT Report No. 1.

In *Germany,* the employment contract (Dienstvertrag) finds different definitions in different legal context. For examples in sec. 7 SGB IV (Sozialgesetsbuch IV, Social Security Law Book IV) we can read that items for an employment relationship are work following orders and integration in the work organization of the person giving orders. There is not full acceptance that this can be taken as a general definition, but it can be observed that the various legal definitions tend to be similar (see R. Wank , *Diversifying Employment patterns, the scope of labor law and the notion of employees,* in 2004, JILPT Report No. 1).

As for *Sweden,* the notion of employee is not statutorily defined, it is a mandatory legal concept that derives from an overall assessment by the courts, based on several indicators like the personal duty to perform according to the contract, the remuneration being a guaranteed salary, till also the economic and social situation of the worker being equal to that of an ordinary employee (see K. Kallstrom, *Employment and contract work,* in Comparative Labour Law & Policy Journal, Vol 21, 1999, p. 167). See also S. Engblom (2003) *Self employment and the personal scope of labour law. Comparative lessons from France, Italy, Sweden, United Kingdom and United States,* European University Institute of Florence.

The *Japanese system* provides statutory definitions of worker for labour law purposes and collective bargaining purposes. Art. 9 of the Labour Standard Law (the basic statute in this area) says that the worker is the one who is employed at an enterprise or place of business and who receives wages therefrom, without regard to the type of occupation while art. 3 of the Trade Union Law defines the worker as the one who lives by her/his wage, salary, or other remuneration assimilable thereto, regardless to the type of occupation, thus including unemployed too.

In Austria a presumption of subordination is applicable in the case of sales representatives, pharmacists who work in dispensaries open to the public and sportspeople (for whom a mandatory presumption of subordination has been established (R. Pedersini, *Economically dependent workers, employment law and industrial relations,* 2002, Eurofound Publishing).

In any common law legal system it has been a direct duty of judges to legally define the position of a dependent worker.

The statutory descriptions of what an employee is are quite empty in the English legal system. According to English statutory law (ERA 1996, sec. 230) an employee is: "*the individual who has entered into or works under ... a contract of employment*", *where a "contract of employment is a contract of service or apprenticeship, whether expressed or implied and (if expressed) whether oral or in writing*".

This norm clearly adopts a generic concept for employment, not describing any specific fact determining the dependent position: it is a redundant definition, giving the judge the chance to extrapolate any circumstances that he thinks might be expression of such implied significance.[9]

The common law judges uses to adopt a purposive approach to the definition of employee: judges tend to search for a meaning being coherent with the purpose of the law. [10] For example, if the purpose of the statute is to protect an economically weak worker, then the economic type of dependence has been investigated.[11]

A problem raises when the purpose of the law is not expressed in fully clear terms, when it is made of a multiple purposes Act for example, thus requiring a difficult in-

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[9] This is also the case for some civil law based legal systems: France, Sweden, Japan, as recalled in the note above, do provide for wide open definition. I have remarked elsewhere that common law and civil law tend to get closer when considering the labour law field (see B. Grandi, *Definizione della dipendenza ex ante e definizione ex post, rilievi dopo uno studio comparato,* in RIDL n.2/2010)

[10] The purposive approach may have the effect of "individuals finding themselves classified as employees for tax purposes (...) but not employees for the purpose of employment legislation and so enjoy no employment protection" (C. Barnard, *The personal scope of the employment relationship,* in 2004 JILPT Report No. 1). See in this respect *Byrne v. Baird,* 2002. For English case law, please see reference on http://www.bailii.org/.

[11] The *American System* uses to adopt a definition of employee to meet the purpose of each individual Act. For example, under the National Labour Relation Act it is the control test that determines who is an employee (A. L. Goldman (1996) *Labour and employment law in the United States,* 1996, 133), with the exception of managerial employees, while under the Fair Labour Relation Act it is the economic reality test to make the play (see Goldberg vs Whitacker House Co-op, Inc., 366 U.S. 28 (1961); Rutherford Food Corp. v McComb, 331 U.S. 722 (1947). One may see also G. Golisano G. (2008) *Il rapporto di lavoro e la worker misclassification nella giurisprudenza USA,* in Il lavoro nella Giurisprudenza, 8, 776 and G. Greenhouse G. (2007) *Investigating mislabeling of workers,* in The New York Times, June, 9th 2007. Linder M. (1999) *Dependent and Independent contractors in recent U.S. labour law: an ambiguos dichotomy rooted in simulated statutory purposelessness,* in Comparative Labour Law & Policy Journal, 21.

As for the *Australian system*, we note that there are key pieces of labour legislation which are generically applying to both employees and independent contractors, notably much of the income tax system and the unemployment income support are concerned regardless to the nature of the working relationship. Nonetheless, "the scope of Australian labour law significantly depends on the demarcation between workers that are employees and those who are independent contractors". The definition of employee relies upon common law investigated factors: "the prevailing approach for determining whether a worker is an employee considers a range of factors, with the key factor being the degree of control the alleged employer ha over the worker's activities" (Joo-Cheong Tham, *The scope of Australian labor law and the regulatory challenges posed by self and casual employment,* in 2004 JILPT Report No. 1).

vestigation by the interpreters of law, who are supposed to go well beyond the formal wording.

Conclusively, in both the common law and the civil law, judges are still working without strict directions in recognising the factors showing the dependent position in a given case.

No proper priority has been given to a factor as just capable of solving ambiguous relationships, but a rather common attention has been paid by both the traditions to some factors as the "control/integration" and the "economic dependence", although using relevantly different legal approaches as I will try to explain hereafter. This is worthy to be closely analysed in the perspective of searching for a common ground of legal development in labour law.

The most interesting gap while comparing the English law to the Italian law having the same purpose concerns the consideration by the judges of the economic dependence. Actually there is still no proper reference in the Italian statutory framework to what can be called the "economic dependency" although the academic debate has been traditionally highlighting that point. Italian legislation tributes little attention to the economic relevance of any performed work[12].

The consequence of this "lack of attention" in Italian law is that the range of labour rights, even those that directly derive from European law, can only benefit those who are defined as subordinated workers (hierarchical dependence), whilst in the Anglo-Saxon common law judges are in power to deal "more broadly" with dependent labour in order to allocate protections whenever a substantial form of dependency according to also the economic reality test would be proved

1. The common debate over the concept of "employment relationship"

The concept of "employment relationship" itself, as a general category, naming a bilateral agreement which obliges the employee to give a service according to a certain method, and the employer to pay a salary for it, can represent the basic legal framework for any employment relationship. Despite this, it doesn't seem sufficient to properly consider and define the position of vulnerability distinguishing a dependent worker from any other contractor.

12 To mention a very marginal relevance of the economic dimension of the agreement for classification purposes, it can be recalled that according to D.lgs 276/2003 art. 61, a level of 5.000 euro per year is the sum the worker is supposed to earn for his contract to be defined occasional, thus not implying any form of proper dependency on that employer.

Such lack of meaning can be possibly connected to an ambiguity lying underneath the legal concept of "employment relationship": is the employment relationship a contractual relationship or is it a status position?[13] Is that a condition in which duties and rights derive from a mutual agreement or is it a condition in which duties and rights derive directly from the law in a broader sense? Of course the aspect of the worker's vulnerability is theoretically considered from divergent points of view according whether the relation is meant as a contract or as a status.

Going back deeper into that old debate, that can be translated in "how far is the worker vulnerable", and that is common to the Italian[14] and the English tradition[15], we consider that the point is how far the "external sources" of regulation (statutes, collective agreements, work rules, custom and practices) can affect the "internal elements" of the bilateral contract of employment itself.

Finding the roots of any employment relationship inside the category of the contract, rather than inside the law, implies both political and judicial consequences indeed[16].

From a political point of view, if we move from the assumption that employment should be rooted in a private contract, then the legal system will turn out to have a very marginal role in governing the relationship.

According to this theory, at its very extreme consequences, the balance between the worker and the employer is left to the market force and adjustments and the best protection the State can offer to workers is to set easy conditions for them to claim for their contractual rights, as well as to grant the most transparent exchange of information to prevent any breach or frustration of their contract[17].

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13 The theory of the "*Eingliederung*" to say it with the original German term, as introduced later into the Fifties by the European labour doctrines, must here be recalled (see for a re-construction of the contractual vs. institutional/communitarian ground of the work relationship, the debate in the Fifties by P. Ichino (2008) *Dalla liberazione alla legge sui licenziamenti, in Il diritto del lavoro nell'et repubblicana*, P. Ichino (a cura di), 28.

14 See R. Scognamiglio, *La natura non contrattuale del lavoro subordinato,* in Rivista Italiana Diritto del Lavoro, 2007, 4, 379.

15 See also S. Deakin & G. Morris, *Labour Law,* 2005, Hart publishing, 121.

16 The matter is also relevant from a strictly legal point of view, in the sense that according to a different nature of rights as derived from the employment relationship, statutory or contractual, lawyers are obliged to follow different procedures once there is need for legal defence: in Italy we find differences as for the burden of proof while dealing with contractual rather than statutory rights; in the United Kingdom they even provide for different judging authorities depending weather the right is contractual or statutory. Of course such different normative regimes are connected to particular normative aspects of the employment relationship, but nevertheless to ground such norms in the framework of a certain legal model - the given definitional category - rather than another, has a potential influence in all cases where the source of a given right and entitlement is in doubt.

17 See the noble price D. Mortesen & C. Pissarides (1994) *Job creation and job destruction in the theory of unemployment in Review of Economic Studies* 61, pp. 397–415 on the importance of information as for unemployment rates.

On the other hand, if we find that the employment relationship should find its roots in the law intended as the law of the State, then a deeper public intervention by the State in ruling the relationship between the worker and the employer would be justified. According to such a theory, the content of any employment relationship in terms of normative effects may be greatly determined by the State, in order to govern the relationship as well as to protect employees against any abuse from employers.

Scholars from both legal traditions suggest that, beyond the struggle between these two theories, a fixed point can be achieved: every legal tradition actually bases the employment relationship upon a contract and every legal tradition provides for a minimum of statutory and/or fundamental inderogable norms, determining the content of the relation. Therefore, the theoretical struggle (contract vs community) should be eventually reconsidered over any specific normative consequences deriving from the employment relationship, rather than on the relationship in its whole factual dimension; in other words, the problem should be approached not at the classification of workers level, but rather at the normative effects - discipline level[18], whenever there is the need for a specific aspect of the relationship to be disciplined by a private ruling rather than to the State-community governance or the reverse.

3. Dependency in its three constituent components

Studying the matter of defining "dependency" within an employment relationship from both a continental and a common law perspective, the importance has actually emerged of a preliminary consideration of the legal method by which the two legal systems do differently approach the issue of "dependency/subordination".

After breaking through the walls of language, it is necessary indeed to set some common methodological rules in order to deal with patterns, definitions, different layers of regulations which often operate very differently in the common law and in the civil law.

A relevant point to bear in mind for comparatively proceeding towards a deeper knowledge in the legal sector, especially when comparing institutions of an Anglo-Saxon common law based legal system to a continental European civil law based legal system, is to keep separated the three dimensions that constitute the considered phenomenon.

I am referring to:

1) the factual essence of the phenomenon,
2) its legal definition,
3) its normative effects.

[18] See more precisely in the following section.

Thereafter, it comes up to three different theoretically relevant meanings of dependency in employment law: it is necessary to separate the meaning of dependency as a "fact" from the meaning of dependency as a "legal concept/category", and also from the meaning of dependency as a "normative effect" deriving by law to the individual being in a dependent position.

The exercise of keeping these three aspects separated from each other should continue as long as the comparative study develops itself, since it helps capturing the relevant similarities and differences while dealing with different legal patterns.

Looking at the three components of the phenomenon closely, one may note that each of them does have a connection with a fundamental public function within the legal system.

In the first place, "facts" are dealt with by judges or by other qualified interpreters of law, they are considered as the concrete elements emerging from the real case in order to apply the law and its normative implications; they are a matter of concern for any judging activity.

So, as a matter of fact, dependency refers to a complex factual situation in which the employee may be giving his work or service in accordance with any order received by the employer. For example, we refer to physically staying inside the employer's premises, or the use of tools owned by the employer, or the operating for a fixed time every day, as well as receiving in return a monthly salary, and so on.

Secondly, *"the definitional categories"* are the words used by law in a certain context of time and space to indicate the fact which is intended to be ruled; they are functional to connect the law with the real case, so they are instrumental to the exercise of the normative power in its more technical aspect. In other words, definitional categories work like tools for applying the law, be it a judge-made law or a statutory/codified law.

So, as a legal concept, or as a legal category, the matter of dependency becomes a matter of language, definition. This may emerge as a legal discourse within a common law based legal system, while in a civil law tradition it assumes the relevance of an exact written wording, that is the content of the "norm", containing both description of facts and statement of discipline.

Thirdly, *"normative effects" are* the discipline, they reflect the exercise of the normative power in its strictly political sense. They are what the political body (represented by the Legislator or its delegated) has chosen to connect to a certain fact (as described by a definitional category) in order to drive individuals' behaviours.

So, as a normative effect (one may refer to a "point of ruling" also) dependency is a strict point of policy: a matter of ruling over the employment relationship which is

showing a worker's factual dependent position. It is the issue of discipline in terms of individual rights and duties that have to be recognised by the legal system in a certain historical moment.

4. Dependency as a matter of fact

Let us assume that the facts establishing the worker's dependent position are the same in the common law as well as in the continental European experiences.

This could be the real scenario, considering that most of the factors indicating a dependent labour have been commonly examined from the Italian and the Anglo-Saxon legal systems, while few facts, instead, have been equivalently investigated[19].

The Anglo-Saxon common law investigates the factual nature of the employment contract by using some criteria which focus on the relationship as it appears once the case has been put to trial (*ex post*).

On the other side, it is known that European continental traditions tend to predict and pre-fix the factual points of the relationships, by describing them in abstract, thus establishing a connection to a legal-type (*ex ante*).

Such latter juridical technique has proved to be not easily adaptable to a complex factual situation like that of dependency in employment, with the result that most part of the statutory definitions do not mention any determinant factor. In other words, the complexity of a labour relationship, which is linked to the possible evolution of the many circumstances related to any work agreements, has been dealt with statutory wide-general-empty definitions for "dependent worker". This has lead to a situation in which, not differently from the common law, the relevant facts showing a dependency do not really emerge in advance, they rather come out afterwards, by means of an evolving judge-made law.

The more traditional "test" to determine the dependent position of a worker in the common law is the well known "control test"[20], whose aim is to investigate any sign of the power of the employer to determine the purpose, the manner, as well as the location of the worker's service.

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19 Factors as the direction-control exercised by the hirer, the duty to perform in person and not by delegating other people, and so on, are just some of the many factors that all the legal systems do consider for the definition of an employee.

20 "*A servant (employee) is a person who is subject to the command of his master as to the manner in which he shall do his work*" in *Yewes v. Noakes* 1880; "*Control includes the power of deciding the thing to be done, the means to be employed in doing it, the time and the place where it shall be done*" in *Ready Mixed Concrete (South East) Ltd v. Minister for Pensions and National Insurance*, 1968 . *See reference in f.n 11 for the American System.*

Then there is the more recently coined "mutuality of obligation test", aimed at considering express or implied terms in the contract that may have established a stable obligation to offer and to do the job all over a certain period of time, although the job be required and performed time by time[21]. This test has been mainly used to distinguish an employee from a casual worker, considering the latter not as dependent because of the assumption that dependent employment must imply a continuative kind of agreement.

Moreover, we should consider the "integration test" and the "economic reality test".

The first one is aimed at checking if the worker is part of the enterprise or not, if his job is peripheral or integral to the enterprise[22].

The "economic reality test" considers instead the nature of the relationship from a financial/economic point of view[23]: whose economic interest is to be realised with that service? Is it the economic interest of the employer or is it the economic interest of the worker? How may the economic situation between the worker and the employer be defined? Is the worker economically dependent on the employer or is he working for more "employers/clients" so as to appear in the same position of an independent professional? These are the questions that the economic reality test should consider in order to find substantial proof of the dependent/independent nature of the employment relationship.

Recently the case law in the UK has been more akin in using a multifactor test when investigating a worker's dependence, according to the increased complexity of law and its purposes, and according to the increased complexity of the working relations as well[24]. This kind of investigation does imply the use of control, mutuality of obligation and economic realty test in the same case.

Apart from facts arising from this last economic reality investigation, which does not find a proper equivalent in the continental legislation, it can be said that the Ital-

21 See, for the English system, *O'Kelly v. Trusthouse Forte*, 1983 wherein the employer used to hire workers on a causal basis, and to give preference in future hiring to the most frequently engaged once. The court didn't find evidence of a proper mutuality of obligation in that case. See then *Carmichael v. National Power plc*, 2000, *Nethermere v. Gardiner*, 1984.

22 See *Stevenson Jordan & Harrison v. MacDonald &Evans* 1952, for the English System, declaring "under a contract of service a man is employed as part of the business and his work is done as an integral part of the business; whereas under a contract for service, his work, although done for the business, is not integrated into it but is only accessory to it".

23 See for the English system, *Consistent Group Ltd v Kalwak* del 2007; *Lane v. Shire Roofing Ltd* del 1995, nonchè *Byrne & Brothers v Baird* del 2002. As for the American System see in f.n. 11 above.

24 *See Market Investigation Ltd v. Minister of Social Security*, 1969, stating: "*The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and the factors which be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of responsibility for investment and management he has, and whether and how far he ha san opportunity of profiting from sound management in the performance of his task*".

ian judge (not differently from many other continental judges) pays approximately the same attention to facts revealing the position of a typical employee as the English judge does: all those facts that can prove the exercise of a control over the worker's performance and his integration within the enterprise, as well as the facts that may prove a mutuality of obligation between the worker and the employer, all of these facts are likely to create a situation of dependent labour according to both Italian and English standards.

More precisely, facts that judges from the common law and judges from the continental tradition have commonly taken into consideration to give substance to an employment relationship are almost the same insofar as we refer to a large concept of personal employment contract, thus including the so called semi-dependent workers[25];

Three main *factors* can be actually recalled as establishing dependent relationships such as broadly meant[26].

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25 By **semi-dependent workers** we mean another legal category which content is quite difficult to comprehend. Atypical workers can be substantial employees not formally recognized as dependent workers, as well as actual and genuine independent contractors being linked to the employer by a certain degree of dependence.

According to the Italian system, semi-dependent workers are those named "lavoratori parasubordinati" (literally those individuals collaborating personally and continuously with the enterprise according to art. 409 Civ. Proc. Cod).

On the English side, such a larger range of personal work contracts may include agreements with those that can be named as just workers, as defined by the Employment Rights Act 1996 defining "workers" as those "Individuals who have entered into or works under a) a contract of employment or b) any other contract weather expressed or implied and (if expressed) weather oral or in writing, whereby an individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or costumer of any profession or undertaking carried on by the individual" According to some case law in UK (see in particular the case *Byrne & Brothers v Baird, 2002*) the Working Time Regulation 1998 as later amended, and some academics too (G. Davidov (2005) *Who is a Worker?* ILJ, 34, 57) the workers who are entitled to the protection therein provided are supposed to be in "a substantial position as an employee when facing the employer" thus implying their economic vulnerability. For workers as mentioned in the Minimum Wage Act 1998 can be argued the same.

In *Portugal,* the law has introduced the notion of ‚equivalent employment' which refers to formally autonomous employment relationships "which are considered to be close to subordinate work and therefore are believed to deserve the same protection" and in *Greece,* employment relationships based on ‚contracts for services' can be considered as possibly involving economically dependent workers "as they are midway between dependent employment and self-employment and they are not covered by labour legislation"(R. Pedersini, *Economically dependent workers, employment law and industrial relations,* 2002, Eurofound Publishing).

For more details on semi-dependence as an hypothesis of a mid-way legal category between self contracting and subordination, see S. Engblom, *Equal treatment of employees and self employment,* in Int. J. Com. Lab. Law&Ind.Rel. 2001, 211, 222; T. Akari & S. Ouchi et. Al. *Comparative Labor Seminar, The mechanism for establishing and changing terms and conditions of employment/The Scope of labor law and the notion of employees,* in JILPT Report No. 1 2004.

26 "Duration", that is a different concept from "continuity", is dealt with when we consider special type of contracts, for instance an apprenticeship or a temporary work; we also deal with duration when aiming to apply a specific entitlement as connected to duration (as it happens in the case of protection against dismissal in the English system).

1) In the first place there is the prevalent "personal contribution" of the person to the activity to be done, notwithstanding the fact that he/her may have opportunities to ask for help from others. Any kind of help and collaboration from a third party must not obscure the main personal activity just done by that worker. This is a pure "fact-based-factor".

2) Secondly, the performance of work is supposed to be "continuous" for a certain period of time. This factor does emerge from the mutuality of obligation test in the common law as well as from the Italian jurisprudence dealing with the so called "*lavoro parasubordinato*". Nevertheless a specific duration is not generally required, nor what kind of regularity is required to establish continuity is specified, therefore *this "factor" turns to be a general and abstract "concept" thus interpretable by judges.* In other words, continuity should be intended more like a strict definitional category indeed, rather than a pure *fact.*

3) The third factual element is the "power of the employer to direct", to some extent, the performance of the worker. And here comes the main traditional issue: identifying the facts that can represent a relevant direction of the worker's performance by his employer. Similarly to the element of continuity, here too the specific factual grounding establishing a "control" is necessarily delegated to the interpretation of lawyers. It follows that *this factor too represents a legal and abstract concept rather than a pure fact.*

It is lastly, again, remarkable that facts arising from the English-American "economic reality test" cannot similarly be taken into consideration from a European continental judge, since in most of the countries, the legal definition do not provides for such an open economic related provision [27].

Such a lack of concern by the Italian jurisprudence [28] (not by the doctrine as well, as I will point out later) is possibly due to the rigid interpretation given to art. 2094 of Italian Civil Code, as well as to other European legal definitions, which are norms defining the subordinated worker by using a terminology focusing on a hierarchical/functional dependence as noted above.

5. Dependency as a matter of terminology

After realising that dependency may result from the same facts in every social context, now we must consider the strict juridical aspects of this: firstly from the perspective

[27] It must be recalled the particular exception of Spain, as I will mention later. I may do not give an updated information on similar provisions introduced recently in other countries.

[28] As examples of cases where the economic reality test has been stressed out there are: *Consistent Group Ltd vs Kalwak*, 2007; *Lane vs Shine Roofing*, 1995; *Byrne & Brothers vs Baird*, 2002. See also R. Pedersini, *Economically dependent workers, employment law and industrial relations*, 2002, Eurofound Publishing

of the legal terminology that can be used to describe such a relevant factual situation, secondly from the perspective of the normative effects, that is the normative impact that the legal system, in its more political drive, is going to derive from the happening of those facts.

As for the terminology, it can be appreciated that the comparative analysis may be of great relevance for the development of law as far as it turns out into a legal wording that can be directly understood by any reader from the other legal tradition[29]. On this path, the use of the English language as the simplest language may just help, in the sense that it could represent a reference for finding a common wording: if a legal discourse, written or spoken, is given in a form that can be directly translated in English, in other words if it is given with a vocabulary easily reproducible in English, then it would also be easier for lawyers from different traditions to talk and to interact with each others.

At first, when I started studying comparatively the meaning of dependent work, I concentrated, on the side of the Italian tradition, on the meaning of the term "*subordinazione*" - "subordination".

The "subordinated worker" can be recalled as the main definitional category in Italian labour law, as it is the legal definition that limits the application of all the major social protections: all the main rights are addressed, in Italy, to those workers that can be defined as "subordinated workers", according to the norm of art. 2094 of the Italian Civil Code.[30] The whole Italian security system, from unemployment benefits to the protection of illness is connected to the status of being a "subordinated worker" and there are only few exceptional rules that recognise social rights to atypical workers[31].

The Italian tradition, through all the years from the origin of labour law as an independent field of studies, has recognised the category of subordination as the one defining the dependency of the worker on the employer: in other words, *the term subordination and the term dependency* have had the same meaning in Italian labour law.

Italian labour scholars and lawyers have had several opportunities for discussing deeply and carefully the meaning of subordination[32] but only recently the need to

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29 About the importance of a simple wording as a point for efficiency in a legal context see "The Decalogue of Smart Regulation" adopted in Stockholm in 12th November 2009 by the High Level Group of Independent Stakeholders on Administrative Burdens (see at http://www.pietroichino.it/?p=6836)

30 See amongst many other important studies: L. Spagnuolo Vigorita, *Subordinazione e diritto del lavoro,* 1967, ed. Morano; M. Pedrazzoli, *Democrazia industriale e subordinazione,* 1985, Giuffr ; P. Ichino, *Subordinazione e autonomia nel diritto del lavoro,* 1989, Giuffr .

31 According to the study of R. Pedersini, *Economically dependent workers, employment law and industrial relations,* 2002, Eurofound, also Belgium, Austria, Denmark, Finland, France, Italy, Portugal (Spain) do provide for a central terminology of subordination to mean the workers' dependence.

32 See, for a deeper analysis into the French and Spanish case for the definition of the economic and bureaucratic dependence in personal work relations (as well a for more details on the scholars' and judicial approach to the matter in Italy and in the United Kingdom) O. Razzolini, *The need to go beyond the contract:*

consider clearly the economic dependence as separated from what has been mainly interpreted as a functional and hierarchical kind of dependency (subordination) begins to be stressed also at a law making-level. *Subordination is thus on the way to represent a sort of sub section within the broader concept of "dependency".*

The inability of the Italian legal system (not differently from other European continental systems) to describe the workers' condition of weakness while facing the employer has thus been revealed.

6. Dependency as a matter of normative effects

Dependency does mean the discipline ruling the relationship also. Being a dependent worker does imply having several rights and duties, like being the employer on the other side does[33]

The dependent worker is subject to the control of the employer when performing his duties, he is obliged to serve the employer with loyalty and fidelity, he has the right to be paid regularly according to the economic agreement, he is obliged to contribute

economic and bureaucratic dependence in personal work relations, in Comp. Labour Law & Policy Journal, Vol. 31, Num. 2, Winter 2010. The Author is there moving from the need to go forward what are considered as traditional antithetical terms (equality versus subordination, contract versus hierarchical organization, freedom of contract versus employment relationship) and argues the opportunity of reducing the attention paid to formal agreement "to focus instead on the day-to-day facts of the relationship, denoting a condition of economic and bureaucratic dependence of the worker *vis-a-vis* the other party".

33 Let us have a look at the main rights that the English legal system and the Italian legal system draw out from a dependent relationship.

Taking the Italian legal system, amongst the subordinated worker's major rights is the right to a sufficient and proportional wage according to art. 36 of the Constitution, quantitatively interpreted by judges as the level of wage resulting from the collective bargaining. The subordinated worker has the right not to be dismissed but for justified reasons as mentioned in the law, and to claim for damages when the dismissal is unlawful. He has the right to a lump sum once the contract has finished and linked to the duration of employment, he has the right to social security treatments in case of illness and maternity and she cannot be dismissed in such periods; he/her is obliged to contribute to the social security system with a deduction of 33% of the total income, and, regardless to the fact that contributions have been regularly paid (by the employer, who is asked to directly operate the deduction) he/her will be able to access to social security treatments.

In the English legal system, amongst the major rights that a dependent worker may claim for, there is the one to a minimum wage as stated in the National Minimum Wage Act 1998; he has the right to claim against a wrongful or unfair dismissal and to consequential damages (Employment Rights Act 1996); the employee has the right to a contractual and economic protection in case of illness and maternity; moreover, he is obliged to contribute to a certain scheme as for tax purposes, and to contribute to the social security system according to the Class 1 scheme (instead of Class 2 concerning independent workers).

Looking closer at the English statutory and case law, it is firstly to be noted that some of the main rights do not apply to subordinated workers only, but broadly they apply to "employees" meant as dependent workers; furthermore, occasionally they apply to "workers" not further defined, as in the case of the National Minimum Wage Regulations, the scope of which is extended beyond the area of the typical dependent employment.

to the tax and social security system in a percentage on his income which is different from the contribution of an independent worker, and so on.

These are just some of the possible normative effects deriving from a position of dependency; some of these effects derive from the intervention of a third party, as it happens in correlation to the organised social security system, be it private or public. The latter intervenes because the execution of a professional relationship is connected by law to the social need to remedy to old age or unemployment.

Such aspect of dependency reflects the policies underlying the employment relations as governed by the legal system: it is what actually defines the way the legal system has decided to protect the worker, the way the legal system has decided to limit the individual freedom of individuals exchanging labour to be personally executed.

7. The need to use specific terms for specific kind of dependency

In an earlier study, exploring the opportunity of adopting a European comprehensive definition of the term "employee", as applicable in all relevant legislative models, I argued that this adoption would not solve the problem of workers misclassification[34]. I reached such a conclusion after considering the content of national and European definitions for employee, but further considerations can now emerge. Beyond the assumption that several different facts may constitute a "dependent work" when this comes to be concretely executed, it was yet not clear to me that also an effort in distinguishing at the level of terminology (describing the facts) was required. Once cleared out that dependency, as a complex factual phenomenon, should be juridically analysed bearing in mind its three different components (facts, terminology, normative effects), it logically follows that not only different facts, but also different legal concepts, need to be the object of our specific attention. Then, considering that dependency as a definitional category may assume a comprehensive meaning, it would be more useful, to the aim of reforming labour law for the progress of our society, to give "dependency" some different and more specific meanings.

Specifically, what could be distinguished at a level of terminology, is the borderline between the term "subordination" and the term "dependency": an employment relationship may show a dependency but not a subordinated condition of the worker at the same time, since the worker may be asked to serve the employer with full autonomy, as it happens nowadays and more repeatedly in the global economy, and still that worker may rely on that employer only for his role in the labour market.

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34 B. Grandi, *Would Europe benefit from the adoption of a comprehensive definition of the term 'employee' applicable in all relevant legislative modes,* in International Journal of Comparative Labour Law and Industrial Relation, 2008,24,4, 495.

Moreover, according to the three dimensions approach which is driving this analysis, dependency just meant as "subordination" ("the subjection to a power of control"), emerged in the common law and in the civil law, is a word actually indicating not a factual point, not a concrete execution, but rather the normative effect deriving from the contract. In every employment relationship the exercise of control over the performance of the individual is a direct normative effect based on the contract as on the legal system that recognises that contract. Another thing is "the fact" of actually accepting such a control by the worker and behaving consequently, as well as "the fact" of actually exercising that control on the part of the employer, that has to be included indeed within the factual dimension. These latter things are supposed to be the object of an *ex post* interpretation by judges and lawyers. By contrast, the normative effect stands within the legal system at an abstract level, *ex ante,* independently of how the parties will actually act in reality. Therefore the temporal dimension turns out to be crucial in such a distinction.

The consequence of this observation is that adopting the term subordination in order to define the dependent work (that means to define the scope of any social legislation) can be misleading: *it results in qualifying the relationship on the basis of its ruling (normative effects), while any relationship should be* legally qualified, instead, on the basis of the facts that are actually establishing it.

As the international operators do recall indeed, one of the golden rules for classification of employment relationships is "the primacy of facts" [35]. By virtue of this rule, lawyers are supposed to address protections and obligations on the basis of facts rather than on the basis of any formal indicators, since these latter can be easily manipulated by the employer to the detriment of the weakest party[36].

All labour lawyers are used to deal with a galaxy of norms which are mostly mandatory, norms that cannot be derogated by the private parties, in accordance with the social nature of labour legislation and its character of public and *super partes* intervention, at least to some extent[37]. This is why a national or even supranational definition of "employee", if identified via any normative effect (like the functional subordination or the mutuality of obligation are) as it actually is in some countries in Europe, definitely turns out to be pointless to avoid misclassification of workers.

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35 See on this specific principle, the ILO Conference 91th Session 2003, *The scope of employment relationship.*

36 Not all the sources of labour law do act as norms protecting the employee, but even when dealing with that called as the "enterprise-protective models" of employment contract (for instance temporary contracts, stressing the need of the enterprise for flexibility) the statutory regulation is meant to be not modified by the parties mostly as a protection on the workers' side.

37 On the theme of inderogability of labour law, see also L. Wedderburn, *Inderogability, Collective Agreements and Community Law,* Industrial Law Journal, 1992, 245. Against the rule of labour law inderogability, there are possible more liberal interpretations, as meant to stress the parties' freedom of contract and their intention of determining the level of autonomy, see P. Ichino (1993) *Autonomia privata e individuale e qualificazione del rapporto di lavoro,* Giuffr .

Such a limitation is demonstrated by the huge number of disputes pending before employment tribunals in Europe and concerning relationships which do only appear to be contracted *for* service, while a contract *of* service is often hidden under the mask of such a formal agreement. This is happening because it is easy for the employer to force the worker *ex ante* to agree to perform with autonomy, but actually to control him with specific directions during the execution of the job.

The norm conceiving the scope if its own application by referring to certain normative effects is not of any capability in preventing misclassification: simply, such a norm is not useful to prevent the huge problem of abusing the name of the agreement established by the parties. This norm may still be useful to allocate part of the discipline once the facts have been actually verified by judges: for example, if the real case shows, *ex post,* that a worker has been actually subjected to the power of the employer (he performed his job by staying for all the working time in the premises of the employer and so on), then the law may well derive some specific normative effects from this, that is entitlement of the worker to a specific regime for dismissal, tax contribution, period of notice, or whatever the policy may suggest.

In the light of the arguments exposed so far, I may now come to a significantly different conclusion about the opportunity of adopting a comprehensive definition of employee. Considering that the misclassification of workers cannot be solved by an *ex ante* legislation, nevertheless the opportunity and effectiveness of a European (as well as a national) definition for "employee", or "dependent worker", does rely on the possible content to put in this definition: *the more the statutory definition is capable to identify a concrete fact, the more it will reduce the ability of individuals, after their agreement, to escape from the legal agreement.*

8. Steps towards the development of employment contract law; the statutory definition of economic dependency.

In recent years scholars and academics all over the world have been fruitfully working on the re-framing of the law concerning personal work contracts. Only little steps have been taken towards the necessary legislation, notwithstanding the large amount of proposals. Spain now has a statute definition for economically dependent workers which is intended to consider individuals that actually receive the 75% of their income from that single employer only.[38]

On the English side, professor Mark Freedland's research on the personal work contract dated 2003, as later adjusted and developed[39], is probably still one of the most

[38] See the Real Decreto 197/2009 (Estatuto del Trabajo Autónomo en materia de contrato del trabajador autónomo económicamente dependiente).

[39] M. Freedland, *The personal employment contract* 2003, Oxford university press; M. Freedland (2007) *Application of labour and employment law beyond the contract of employment,* in International Labour Review,

comprehensive contributions. His group has been involved in a sort of re-wording of employment law on the basis of an acceptance that its scope must be enlarged beyond employment as traditionally meant.[40]

Italian lawyers have also published significant contributions. Beloved Professor Marco Biagi and his collaborators challenged the traditional legal framework from a technical point of view, expressly basing his inspiration on the English legal System, as one can appreciate by reading the White Book dated 2001 presented by the Government[41]. Unfortunately, just few of those suggestions, extrapolated from their whole original context, have been adopted by the legislator in the 2003 Reform: new models of work contract have been formally ruled, mostly flexible types of contracts, but little attention has been devoted to the need to redistribute rights and social protections consequentially. Only the contractual flexibility has been achieved, but no proper balance on the part of the needed protection by the legal system has been granted, with the result that self employed workers ("*a progetto*", independent contractors) only have little recognition and actually remain with no access to the main protections like being entitled to a minimum wage[42], being entitled to unemployment benefits, being covered by an appropriate social security system for pensions purposes, being covered against dismissal justified on economic reasons etc.

Nevertheless, some studies developed both by academic lawyers and economists have been recently presented to the Italian Parliament, and amongst their declared intentions there is that of extending the scope of fundamental employment laws to workers outside the scope of the protection now in force. These proposals[43] do aim at

Vol., 146, no. 1-2; M. Freedland – N. Kountorius, *Towards a comparative Theory of the contractual construction of personal work relations in Europe,* Industrial Law Journal, 2008, 37. All these works have enhanced the progressive idea to go beyond the meaning of employment as traditionally referred to the old master-servant type of relationship.

40 See other precious contributions by Collins H. (2006) *Multi-segmented workforces, comparative fairness, and the capital boundary obstacle,* in Davidov e Langille, *Boundaries and Frontiers of Labour Law*, Oxford and Portland, Oregon; Collins H. (1990) *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws, Oxford Journal of Legal Studies,* 1990 Vol. 10, 353; Davidov G. (2005) *Who is a Worker?* 34, ILJ, 57; Davidov G. (2002) *The three axes of employment relationships: a caracterization of workers in need of protection,* in University of Toronto Law Journal, 52, 357; Deakin S. (2007) *Does the "personal employment contract" provide a basis for the reunification of employment law?',* ILJ, 36, 68; Happle B. (1986) *Restructuring Employment Rights,* in ILJ, 15, 69; Honeyball S. (2005) *The Conceptual Integrity of Employment,* Vol. 36 Cambrian Law Review. For further details on bibliography see, in particular, the contributions as reported in G. Davidov - B. Langille, *Boundaries and frontiers of labour law,* Oxford and Portland ed., 2006. Burchell, B., Deakin, S. and Honey, S., The employment status of individuals in non-standard employment, Department of Trade and Industry, 1999.

41 Libro Bianco sul mercato del lavoro in Italia, proposte per una società a attiva e per un lavoro di qualit (see at *www.comitatoleggebiagi.it/web/documenti/libro_bianco.PDF)*

42 Legge n.296/2006 (Legge finanziaria 2007) art. 1 co.772 now require the "progetto workers" to be compensated in accordance to art. 36 of the Constitution on the sufficient and proportionate salary. There is a questionable norm in the Legge n.2/2009 stating the right of individuals with "a progetto contract" to access to a 90 days maximum unemployment benefit, that should be financed with a contribution of 20% of the benefit by the collective bargaining.

43 See Disegno di legge n. 1481/2009, Disegno di legge n. 2000/2010, Disegno di legge n. 1540/2009 at http://www.senato.it/index.htm (proposals are from Prof. Tito Boeri, Pietro Garibaldi, Pietro Ichino,

introducing, as a definitional category, that of workers who are actually economically dependent on a sole employer by whom they derive the most of their annual income. Literally, the proposals define the *economically dependent worker as the individual who earns more than 2/3 of his total annual working income from the relationship with that employer-enterprise*.

The introduction of these definitional dispositions in the Italian system, similar to the Spanish case, would be deeply innovating under several aspects. Firstly, this definition is based on a "fact" that can make up the real case, rather then on a normative effect that can be easily manipulated by a formal agreement at the advantage of the strongest party: such a fact (the worker's receiving the majority of his income from that single employer) can only exist as an *ex post* verifiable circumstance of the case. Unlike the worker being subject to the employer's control, this is not something that can be the object of an *ex ante* agreement between the parties, because this economic dependence is *ex ante* only predictable by the parties, because it refers to a global situation which is not (completely) at will. It can happen that the worker receives compensation for his services from other employers insofar that at the end of the year he could find himself in an economic position not completely relying on a single employer[44].

Moreover, economic dependence in this concrete meaning does not consider any psychological tensions that can exist amongst the parties and this is particularly important to prevent any possible soft manipulation of the weakest party by the employer while directing and organising the performance of his collaborators. It is well known that many legal protections allocated to dependent workers are thought, expressly or implied, to make the interest of an individual who is considered potentially threatened by the action and the attitude of the employer. This subjective vulnerability is actually recognised by the legal systems: for instance, the Italian Constitutional Court has already declared in the Sixties the principle according to which the deadline to claim for unpaid salary starts running when the relationship is finished[45] and not already when the worker may ask for his salary. This jurisprudence accorded this favourable procedure on the part of the worker on the consideration that the so called worker's "*metus*" (the Latin word for the psychological vulnerability), might frustrate the worker's effective entitlement to the salary as accorded by the Constitution. Some scholars' theories too have tried to give importance to the psychological condition of the worker, although that seems to be a rather difficult operation to be translated into a legal category. Moreover, any reference to a metaphysical aspect, rather than to a real fact, poses at a maximum level the problem of abstraction, as posed by any "normative effect", on the path to practically classify a worker.

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44 See Corte Costituzionale n. 63/1966. Time is intended to be running also during the course of the employment relationship, exceptionally, in case the contract is assisted with a regime of permanency and maximum protection according to the legislation on unfair dismissal.

45 See the argument in this respect by G. Davidov, *The three axes of employment relationships: a characterization of workers in need of protection,* University of Toronto Law Journal, 52, 357.

A norm which would point out what the condition of the economic dependence is, may represent (in the continental legal tradition with its attitude to codify and set systematically all rules in advance) the legal category giving meaning to those facts that *can* be already considered by the English and American judges, namely the partition of the financial risk, the reliance of a worker on a single employer etc. which is possible through the economic reality test.

Referring to "a measured level of economic dependency", measured upon the global income of the worker, moreover, arguably represents a step forward also in comparison to the Anglo-Saxon common law. [46] This can be argued because it gives relevance to one, amongst the economic indexes, which is the most indicative of a substantial dependency. Considering that most of the cases that can be recalled as an economic reality test application ground their conclusions on facts like the way the parties have shared the economic risk of the business, or the worker being working for that single employer only, or the obligation of the worker not to perform for others, it can be observed that these can correctly be considered as just normative effects, rather than facts, therefore they are not really significant to avoid misclassification and to avoid the connected frustration of law. In other words, those indicators of an economic dependency are not going deep into to the factual substance of the economic status as the fact of an *ex post* measured income derived from the enterprise does.

There seem to be no specific political choice in such a technique to ground a legal definition for an economic dependence. It rather seems to be the clearest way to define the dependency as it nowadays appears in the labour market all over the Continent, where the so called "open firm" or "de-structured enterprise" is still represent as the central entity around which personal work contracts continue to be established. The crucial political aspect does rise later, only at the moment when the Parliament decides consequentially "which kind of normative effects are going to rule" a defined dependent position.

Not reforming employment contract definitional categories means letting the old inadequate categories (such as that of "*subordinazione*" for the Italian system or the focus on that control test for the English system) prevent from analysing the real phenomenon judicially. This would denounce a weakness of the legal system, specifically a weakness of its administrative and political actors that are asked to keep the law effective and operational.

Since misclassification concerns a lot of work relationships whose parties are only motivated – when naming the relation as self employment or of independent contractors – by the need to escape from the normative effects connected to the traditional

[46] The problem in such a qualifying definition for being a dependent worker may be that it poses some tackles in assessing the required relative income on short time employment, during less then one year, but in a wished formalised economy, where the relevant exchange of money are recorded, a simple arithmetic proportion would solve the matter.

employment contract, it can be arguably envisaged that once the juridical recognition of the economically dependent work is made possible, then the interest in misclassifying the contracts will decrease.

It is questionable that the major protections addressed today to employees and subordinated workers are to be distributed to the larger range of economically dependent workers. Of course this is a huge policy concern, dealing with public finance as well as public social security. To draw a very brief conclusion, since lawyers use to close the circle by imagining a borderline between fundamental rights and rights at will, it can be said that while the point of extending which protection to whom may remain questionable, at the same time the idea of one or more definitional categories capable to extend the scope of fundamental rights to all workers can be supported[47]. The hardest task is of the politicians.

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Abstract: The article proposes to deconstruct the essence of the dependent work phenomenon into its three dimensions (facts, definitional legal category, normative effects) in order to explore a common ground of concepts meaning dependency from a comparative perspective. The study is mainly based over an English-Italian comparison and argues about the benefit that would possibly derive from defining the worker's dependency like a measurable fact specifically described by a statutory provision.

47 This latest approach is the same that pragmatically the European judges have adopted while applying fundamental European rights to workers: they have an open wide category for fundamental rights but dispose a restricted personal scope in case of specific protections (es. Transfer of undertakings Directive). It is known that whenever dealing with fundamental European law (unfortunately to be considered binding only for few aspects like freedom of movement for services and persons), any worker who is involved must be intended in the broadest meaning, going beyond the duality between subordinated and autonomous workers. The personal scope of European law is quite more restricted in case of specific protections, such as rights in the event of a transfer of undertaking instead. About the variety of the possible definitions of workers according to the European Law see S. Giubboni, *La nozione comunitaria di lavoratore subordinato,* in *Il Lavoro subordinato* (a cura di Silvana Sciarra - Bruno Caruso) Giappichelli, 2009, 35. For the leading case on the meaning of worker see Case Lawrie Blum, European Court of Justice, 3 July 1986, C-66/85

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Barbara Grandi: Vizsgáljuk meg a „függő munka” fogalmát a munkajog hatályának kiszélesítése érdekében!

Az összehasonlításhoz elengedhetetlen, közös alap kimunkálása érdekében, a cikk a „függő munka” fogalmát három elemre bontja, úgy s mint: tények, jogi definíció, valamint normatív hatás. A szerző angol-olasz összehasonlításra alapoz, állítása szerint haszonnal járna, ha a munkavállaló függő helyzete mint jogszabályba foglalt, mérhető tény lenne definiálva. A cikk az alábbi nyolc kérdéskört vizsgálja: 1) A „függő munkát végzők” fogalom meghatározásának problematikája, a romanista és az angolszász rendszereket illusztráló olasz és angol példán keresztül; 2) A „munkaviszony” koncepcióját érintő általános vita; 3) A függőség három komponense; 4) A függőség mint tény; 5) A függőség mint terminológia; 6) A függőség mint normatív hatás kiváltója; 7) A lényegi függőség speciális kategóriái speciális terminológiát igényelnek; 8) Út a munkaszerződés jogának kialakítása és a gazdasági függőség törvényi definíciójának kidolgozása felé.