

ON THE RATIONALES AND PITFALLS BEHIND GREY ZONES: IS IT RIGHT TO OVERCOME LABOUR LAW'S GREAT DICHOTOMY?

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1. The founding dichotomy

In the process of systematization and organization of its field of analysis, each discipline tends to divide its universe into two parts that result to be reciprocally exclusive and cumulative comprehensive. This is an operation of classification, which has traditionally been defined as the great dichotomy¹. Still, the personal experience of any of us seems to prove that since our childhood we tend to understand concepts and ideas using great dichotomies of opposites, recognizing the ones contrary to the others.²

In the field of labour law, subordination operates as the element of demarcation between two, opposite categories of obligations that are comprehensive (i.e. exhaustive) of any obligation having as its object the provision of work³.

In the first half of the 20th Century, the distinction was between manual work and intellectual work,⁴ which lead to the introduction in many legal systems of a division between blue-collar and white-collar workers. Later on that division lost most of its significance,⁵ and the important borderline became that between subordinate labour and self-employment.

This last distinction is driven by some underlying assumptions:

- a) Subordinate labour needs to be protected from a contract law point of view, due to the unbalance between the contracting freedoms of the two parties.
- b) Subordinate labour implies an inherent (and by definition) subordinate position of the employee vis-à-vis the employer in terms of entitlement and exercise of powers and prerogatives.
- c) Subordinate labour reflects an economic inequality between the parties: at the level of the individual, because the employee's income derives almost entirely from her salary; at the level of the market, because the labour market functions as a monopsony, so that there will always be more job seekers than jobs available.
- d) Subordinate labour needs therefore to be protected from an axiological perspective, because it is reasonable, fair, just, and in line with the values in force in liberal democracies to do it.

The result of the combination of such assumptions was that the use of the term “work”, and the legal regime applicable thereto, ended up covering only subordinate work relationships, leaving outside everything else.

The wide spectrum of individual work relationships (deducted in a contractual agreement) included different sub-types of employment, as well as self-employment contracts. The legal qualification of such relationships has always been a matter of mixed facts and law,⁶ because the contractual type is superimposed by the law on the individuals' will as a consequence of the primacy of facts (principle of reality).

At one point in the history of all labour markets in Europe, the great dichotomy started to waver, as the facts troubled its apparent solidity.

It is somehow inaccurate, when not misleading, to barely say that this was due only to the emergence of new forms of employment. What is more precise, let alone from an historical point of view, is that some of the same elements that can contribute to

demarcate the legal prototype of subordinate labour did not reflect entirely the very situation of workers; and likewise, some other elements typical of subordination were characterizing self-employment relationships.

2. The emergence of grey zones

Between the 70s and the 90s some domestic legislators in Europe started introducing third categories in between subordination and self-employment, often called grey zones. This marked a sharp difference between those countries and the US legal system, which is still nowadays based on a dichotomic division between workers and independent contractors.

The apparent aim of some European legal systems to create third categories was twofold: by the one side, they served the need to reflect in the law what contracting parties experienced in reality; by the other side, they overcame the rigidity of the great dichotomy, particularly helping distributing the benefit of some labour law entitlements to a wider array of subjects.

2.1. Italy was the first system to nominate such grey zones in 1973 in the reform of the Code of civil procedure.⁷ The purpose of the Italian legislator was at that time limited to the extension of the rules on judicial labour proceedings – which were simpler, faster, free of charge, and thus more favourable to the claimant – also to those relationships of *continuous collaboration* where the person was to be *coordinated* with the employer's organization (hence the acronym of co.co.co.). During the years, particularly in the 90s, a few labour and social security provisions were extended to such form of relationships and despite their formal belonging to the area of self-employment they have started to be gathered under the label “para-subordination”. Due to the lower rate of social security contributions attached to them, employers started to massively enter these forms of contractual relationships, often hiding a bogus self-employment status. To reduce their unrestrained, often abusive propagation, the 2003 labour market reform introduced additional requirements to enter a co.co.co. agreement, imposing to the parties to direct the new contractual type towards the fulfilment, for a limited time, of a specific work *project* or *programme* (hence the new acronym co.co.pro.). More recently, the so-called Jobs Act reform of 2015 abolished the co.co.pro. and – reversing the technique based on strict contractual requirements – extended the application of all labour laws to those relationships in which the tasks of the collaborator are directed by an employer, particularly with regards to the time and place of performance. The focus is therefore on the concrete form of collaboration: only when the tasks are directed by an employer, all labour law protections apply; in the negative, the collaborator remains a self-employed person with little few specific protections.

2.2. Germany introduced the concept of employee-like person (*Arbeitnehmerähnliche Person*) in 1974,⁸ in the framework of the reform on collective labour agreements. According to the definition provided in section 12a(1) of the Act on Collective Agreements (*Tarifvertragsgesetz*), employee-like persons are persons who are “economically dependent and in need of social protection comparable to an employee (...), work on the basis of a contract of service or a contract for work and services for other persons, perform the services they are obliged to perform *personally* and

essentially *without* the collaboration of employees and (a) *predominantly* work for one person, or (b) on average, more than half of the total *remuneration* they are entitled to for the performance of work is paid by one person”.⁹ The consideration of the concrete existence of such elements – one typological, the other one quantitative – is left to the discretionary appreciation of the judge on the basis of all circumstances of the case. According to the German Federal Labour Court, “employee-like persons are not employees and thus not personally dependent. In contrast to employees, they can determine their working hours on their own. The duration of contractual relationships is therefore of no relevance for the commitment of an employee-like person to a client”.¹⁰

Employee-like persons are only entitled to a minor share of the rights typically conferred to employees.¹¹ Homeworkers and commercial representatives are the two most important categories of employee-like persons. Employee-like persons, while covered by some pieces of legislation (antidiscrimination laws, H&S protection, paid annual leaves, social security), fall outside the scope of important laws such as the law against unfair dismissal (*Kündigungsschutzgesetz*), the system of collective bargaining, and that of workplace representation.¹²

2.3. A rather different approach is that of the French Code du travail. The legal tool to extend some or all protections provided therein is the presumption of subordination extended to a given set of professions, such as journalists (C. Trav. L. 7112-1), models (C. Trav. L. 7123-3), or home workers (C. Trav. L. 7412-1). In addition to that technique, French labour law includes in its scope those workers performing a wide range of personal work services calling them “workers *assimilables aux salariés*”: their contract is not considered as a contract of employment, so they are not under a *lien de subordination*, but nevertheless some important provisions of the Code apply to them. In the case of “gérant-succursalist” (C. trav. L. 7321-2), for instance, the law requires for three conditions: economic dependency, fixation of H&S conditions by the principal, and imposition of prices by him. In the case of “entrepreneur salarié” in the context of work cooperatives, the law allows an individual to figure as a sort of employee of the cooperative society for maximum three years.

Last, since 1994 the French legislator introduced a legal presumption of independency, which is now regulated by article L. 8221-6(II) of the Code du travail. The provision presumes that some persons are not to be bound with the client by a contract of employment in the execution of the activity.¹³ It is using this provision that the French Cour de Cassation has recently held found a *lien de subordination* in the relationship between a delivery web platform (Take Eat Easy) and one of its bikers.¹⁴

2.4. Spain has introduced its TRADE status in 2007, in the context of a general reform enhancing various rights for autonomous workers through a dedicated and coherent Statute of independent contractors (Estatuto del Trabajo Autonomo, Ley n. 20/2007).¹⁵ Its aim was to attach some protections typical of subordinate labour also to forms of self-employment characterized by the quasi-exclusive relationship between an independent contractor and a client/employer.¹⁶ This relationship is typical of those who perform their economic or professional activity for a company or client from which they receive at least 75 percent of their income. Hence the intrinsic

oxymoron of such relationships, defined as “(economically) dependent self-employment”. Despite the systematic importance of TRADE, recent surveys show a marginal impact of the introduction of this third category in the Spanish labour market. Probably this is also due to the stringent requisites imposed by the law to be considered a TRADE.¹⁷

2.5. The British statutory law introduced the concentric circles comprising of the worker status and the employee status in 1996, for the original purpose of the right not to have arbitrary deductions made from wages. The well-known Sec. 230(3) ERA 1996 stipulates that «“worker” ... means an individual who has entered into or works under (or, where the employment has ceased, worked under) (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the 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 customer of any profession or business undertaking carried on by the individual; and any reference to a worker’s contract shall be construed accordingly». In the years, workers have benefit from the coverage of the National minimum wage legislation (sec. 54, NMWA 1998), that on working time (reg. 2, WTR 1998), that on collective rights (sec. 296(1) TULRCA 1992), and that on disciplinary sanctions and procedures (sec. 13, EReLA 1999).

The introduction of such category has helped employment tribunals to employ a “second best option” every time the strict common law tests on the employee status – particularly the contested mutuality of obligation test – failed to give satisfying results.¹⁸ Some judgments from the Supreme Court might help overcoming those tests whenever the “relative bargaining power of the parties” renders unrealistic what has been agreed in writing in the contract, this being “a purposive approach to the problem”.¹⁹

The UK Government recently commissioned the Taylor Review of Working Practices, concluding that the current demarcation between workers and employees functions reasonably well, and that clarifications on the tests of mutuality of obligation, personal service and control should be introduced.²⁰

3. Three models for comparison

Not all European countries accept the idea of grey zones, intermediate between subordination and self-employment.²¹ For those who did, an overall comparative assessment helps identifying three main models, which the experience of the legal systems previously mentioned has variably combined, also diachronically.

In a first model, being the concept of subordination a very technical one, dependent on the strict interpretation given by labour judges of a legal definition or of a set of factual elements, the only way to provide some forms of protection to those who naturally fall outside the scope of labour law is to *create a proper third category*, repealing the great dichotomy with a tripartite scenario. The creation of a third category means that not only the consequences, but also the same elements of it are strictly defined by the law: normally what is essential for such model is that obligations are personally performed and the relationship between the parties is exclusive.

A second model relies on the preservation of existing categories of persons providing work personally and designs *concentric circles* to which apply a progressive set of entitlements. To be included in a bigger circle, the legal elements essential to denote subordination are somehow relaxed in order to accommodate a wider number of situations.

A third model *enlarges the same concept of subordination* expanding its potential, leaving thus untouched the great dichotomy. In this model no gradation is needed, as one of the two ends of the spectrum gains space towards the other one. Labour laws' coverage is deliberately unbalanced to cover more and more relationships.

4. What is at stake?

All the different models above mentioned are centred on the basic assumption that labour law protection imply, for the employer and/or for the taxpayers, an increase of monetary and normative costs. The two main controversial items that have been put at the core of any policy reform are, one the one side, the coverage of unfair dismissal laws; on the other side, the coverage of social security entitlements (which goes together with social security contributions). The more a legal system is incline to expand the personal scope of application of subordination, the more its public expenditure to grant social security benefits will grow. Moreover, according to some economists,²² the more a legal system protects its employees against unfair dismissal, the less employers will be persuaded to increase their workforce. Some wage dynamics experts, instead, advocated for abandoning the current definitions of employee and self-employed, rather giving everyone active in the labour market a basic and universal "share" of the "Global Social Product".²³

The complex and original scholarly proposal of tracing a "personal work nexus" as the funding concept of labour law, on which all protections should be built,²⁴ has shown (amongst the many layers of analysis) the inaccuracy of third categories and the risks thereof.

Who recently endorsed a purposive approach to the problem, usefully recognised the pitfalls of intermediate categories, as they grant only minimal (additional) protections at the price of "legitimizing the existing order in which workers who often have all the characteristics of employees are excluded from full protection".²⁵

It remains to be seen what, if any, will be the role of the EU in re-shaping the categories of labour law. The proposal for a revision of the information directive (transparent and predictable working conditions) (COM(2017) 797 final), put forward in December 2017 and fuelled by the European Pillar of Social Rights, may lead to increase some rights including a wider spectrum of individuals performing work personally. Many doubts however remain, particularly as the proposal still focuses on workers as those "who for a certain period of time perform services for and under the direction of another person in return for remuneration",²⁶ thus leaving the interpretation of the concepts of "under" (i.e. subordination) and "direction" (i.e. employer's power on day-to-day tasks) open to the judicial scrutiny.

For sure, a more relaxed typological test, to be used by labour courts, would help reducing the dualism of labour markets between insiders and outsiders. But the simple lowering of the thresholds to get access to labour law entitlements is nothing without a re-organization of those very protections now granted to employees.

Do we need then to look for a fresh, innovative great dichotomy?

Notes to the text

¹ N. Bobbio, *La grande dicotomia*, in Id., *Dalla struttura alla funzione*, 1980, 145.

² See the recent illustrative book by O. Brenifier and J. Després, *Le livre des grands contraires philosophiques*, Nathan, 2013, where the Author notes: "Quand on est tout petit, on apprend à penser avec des livres de contraires, et on comprend que "petit" est le contraire de "grand", que "haut" est le contraire de "bas". Quand on grandit, on peut aborder des notions plus complexes, plus abstraites, mais on a quand même besoin de visualiser pour comprendre".

³ L. Spagnuolo Vigorita, *Subordinazione e diritto del lavoro*, 1967, 61.

⁴ Vardaro, *Tecnica, tecnologia, ideologia della tecnica*, in *Politica del diritto*, 1986, 75.

⁵ In Belgium it was declared discriminatory by the Cour Constitutionnelle with decision of 7 July 2011. It must be recalled that the Constitutional Court had already found in a judgment of 8 July 1993 that the difference in treatment between *ouvriers* and *employés* based exclusively on the nature of work could hardly be regarded as a distinction based on an objective and reasonable criterion. It was then incumbent on the legislator to ensure, at least in part, a rapprochement between the status of *ouvriers* and *employés*.

⁶ For the UK see *O' Kelly v. Trusthouse Forte* [1983] ICR 728; for France see the *arrêt Labbane* (Cass. Soc., 19 December 2000).

⁷ F. Martelloni, *Lavoro subordinato e subordinazione. L'interferenza delle collaborazioni a progetto*, Bologna, 2012.

⁸ The notion has however doctrinal origin dating back to the 1920s: see E. Merlasch, *Deutsches Arbeitsrecht*, Berlin/Leipzig, 1923, 24.

⁹ W. Daübler, *Working People in Germany*, in *CLL&PJ*, 1999, 77.

¹⁰ NZA 2006, 223 (u. II. 2b).

¹¹ T. Klebe, J. Heuschmid, *Collective Regulation Of Contingent Work: From Traditional Forms Of Contingent Work To Crowdwork-A German Perspective*, in E. Ales, O. Deinert, J. Kenner (eds.), *Core and Contingent Work in the European Union. A Comparative Analysis*, 2017, 185 ff.

¹² W. Daübler, *Working People in Germany*, cit.

¹³ Such presumption applies to: a) natural persons registered in the trade and companies register, in the trade register, in the register of commercial agents or in the unions for the recovery of social security contributions and family allowances for the recovery of family allowance contributions; b) individuals registered in the register of road transport companies of persons, who carry out a school bus activity provided for by Article L. 214-18 of the Education or Transport Code on request in accordance with Article 29 of the law n° 82-1153 of December 30th, 1982 of orientation of the interior transports; c) the directors of legal persons registered in the trade and companies register and their employees.

¹⁴ Cour de Cassation, Ch. Soc., 28 November 2018 (case no. 17-20.079).

¹⁵ <http://www.seg-social.es/wps/wcm/connect/wss/36dda0b6-8f3e-4006-bbfd-7462dff14578/1.Ley+20.2007.pdf?MOD=AJPERES&CVID=> .

¹⁶ J. Cabeza, *The Status of Self-Employed Workers in Spain*, *International Labour Review*, 2008, 91.

¹⁷ The TRADE, in fact, must not have self-employed or subcontract part or all of the activity with third parties, although there are some exceptions (people at risk during pregnancy, during periods of breastfeeding, throughout the maternity or paternity leave, if you are taking care of children under seven years or by having a family member up to the second degree dependent or with a degree of 33% or higher of disability). TRADE must also organize the professional activity as they see fit, they must have their own means to work and must receive the payment considering the result of their work according to the agreement with the client. The TRADE shall have the right to an interruption of his / her annual activity of 18 working days, without prejudice to the fact that such regime may be improved through a contract between the parties or through agreements of professional interest. Likewise, by means of an individual contract or professional interest agreement, the weekly rest regime and the one corresponding to holidays will be determined, the maximum amount of the working day and, in the event that it is computed by month or year, its distribution weekly. The performance of an activity for a period longer than that agreed contractually will be voluntary and may not exceed the maximum increase established by agreement of professional interest. In the absence of an agreement of professional interest, the increase may not exceed 30% of the ordinary time of activity individually

agreed. The activity schedule will seek to adapt to the effects of being able to reconcile the personal, family and professional life of the TRADE. The TRADE, who is a victim of gender violence, will have the right to adapt the work schedule in order to make effective their protection or their right to comprehensive social assistance. See more at:

http://www.mitramiss.gob.es/es/Guia/texto/guia_2/contenidos/guia_2_6_3.htm

¹⁸ *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, in which MacKenna LJ held that “An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract (a task like that of distinguishing a contract of sale from one of work and labour). He may, in performing it, take into account other matters besides control.”

The subsequent *O'Kelly v Trusthouse Forte plc* [1983] ICR 728 held that “waiters were not “employees” because they did not, technically, have to turn up to work for a shift, and they could be dismissed at any time. Sir John Donaldson MR said therefore, that the contract lacked “mutuality” and could not be described as one between an “employee” and “employer”. Because they were not “employees” they did not have a right to claim unfair dismissal.

More recently, in *Stringfellow Restaurants Ltd v Quashie* [2012] EWCA Civ 1735, the Court of Appeal held that the employer was not under any obligation to pay anything to Ms Quashie (a lap dancer in the clubs run by Stringfellow): she paid Stringfellows to be able to dance at the club (and often ended up earning nothing once commission, fees and fines had been deducted) and she was paid by the customers. In that regard, Ms Quashie took the economic risk of not being paid, which was “a very powerful pointer against the contract being a contract of employment”. This was further supported by the fact that Ms Quashie accepted in the terms of her contract that she was self-employed, and so she conducted her affairs on that basis (for example by paying her own tax), and she did not receive sick pay or holiday pay.

¹⁹ *Autoclenz Ltd v Belcher* [2011] UKSC 41.

²⁰ For an articulated critique see H. Collins, *A missed opportunity of a unified test for employment status*, UK Labour Law Blog 31st July 2018. The original Taylor Review is available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679767/180206_BEIS_Good_Work_Report_Accessible_A4_.pdf

²¹ B. Waas, G.H. van Voss (eds.), *Restatement of Labour Law in Europe*, Vol. I. The Concept of Employee, Hart, 2018, lxv.

²² P. Cahuc, F. Malherbet, J. Prat, *The Detrimental Effect of Job Protection on Employment: Evidence from France* (2018), http://conference.iza.org/conference_files/EVAL_2018/cahuc_p73.pdf

²³ See for instance J. Janssen, *Wage_worker, a Universal Civil Status, not Employment Dependency*, E-Journal of International and Comparative LABOUR STUDIES, vol. 5, no. 3 September-October 2016.

²⁴ M. Freedland, N. Kountouris, *The Legal Construction of personal Work Relations*, OUP, 2011.

²⁵ G. Davidov, *A Purposive Approach to Labour Law*, OUP, 2016, 136.

²⁶ A definition taken from the leading case *Lawrie Blum* (CJEU, *Lawrie-Blum v Land Baden-Württemberg* [1986] Case 66/85) and the subsequent jurisprudence, on which see N. Kountouris, *The Concept of ‘Worker’ in European Labour Law: Fragmentation, Autonomy and Scope*, in *ILJ*, 2018, 192.