

## The Future of Employment Status: Exploring the Notion of Autonomy

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### Abstract

*In line with the Future of Work agenda of the ILO, this paper considers the fitness for purpose of our current legal delimitations of employment status. In particular, the paper investigates the binary division between employees/workers and self-employed persons which underpins access to employment or labour rights in many social systems, including the EU. This binary division has traditionally been based on the understanding that self-employed persons are autonomous and therefore not in need of protection, whereas employees or workers are lacking in autonomy and therefore require state support. However, the ILO has been at the forefront of challenging this divide through, for example the universal application of some of its Conventions (for example Convention 87 of 1948 on Freedom of Association and the Protection of the Right to Organise). Moreover the ILO Future of Work agenda has identified that changes in the organisation of work have led to a growth in self-employment and, at the same time, a growth in vulnerability. This in itself calls the binary divide into question. This paper draws on social and political theory (and particularly vulnerability theory) to argue that the root of the problem is the narrow and individualistic way in which 'autonomy' is defined and understood in this context. It is suggested in this paper that in order to ensure a more universalistic and sustainable approach to protection, a more relational notion of autonomy is necessary, one which emphasises the importance of collective experience in developing and enhancing autonomy.*

### 1. Introduction

The binary division between employees on the one hand and self-employed persons on the other provides an extremely influential normative framework for the design of labour law and other rights. According to this normative framework, the contract of employment presupposes a relationship of 'subordination' of the employee to the employer. This subordination can be understood in a number of different ways but in this context usually refers to the existence of command and control by a specific employer over its employees driven by the inequality of bargaining power between the parties. This subordination is problematic because the fact that an employee has to follow the orders of a boss infringes on the employee's autonomy and freedom.<sup>1</sup> The law needs to step in to equalise the bargaining power and allow employees to regain their autonomy and ability to pursue their own goals (through work). On the other hand, self-employed persons do not suffer from subordination in their working relationships. They already have autonomy in the way in which they can select assignments and manage their work. They are not subject to the control that employees are and are not in need of statutory protection. The employment rights of self-employed workers have therefore tended to be limited.

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<sup>1</sup> G Davidov, 'Subordination v Domination: Exploring the Differences' (2017) 33 (3) *International Journal of Comparative Labour Law and Industrial Relations* 365, 373

Despite the influential nature of this binary division, it has become clear that it is not a suitable model in practice for matching employment rights to those in need of protection. These problems are practical, but they are also conceptual. It is argued in this paper that the problem comes down to our understanding of 'autonomy', and the assumptions which are made about autonomy in the design of our labour law.

## **2. The neglect of autonomy in labour law**

Whilst the notion of 'subordination' at the heart of labour law has been recognised as problematic, there has been much less challenge or consideration of the notion of 'autonomy' in this context. It might be argued that there are several reasons for this neglect. First and foremost, it could be argued that the failure to examine autonomy in the context of labour law is symptomatic of a wider failure of legal thought. Fineman has argued that the ideal of personal autonomy is so central to liberal legal thought that it has achieved 'mythical' status. The result is that the notion evades self-conscious consideration.<sup>2</sup> However, there is now a considerable bank of literature which has considered the nature of autonomy in liberal legal thought and its implication for the design and application of law.<sup>3</sup> This bank of literature has not yet been very influential in the labour law field. The problem is that the centrality of autonomy is not always recognised in labour law, perhaps for reasons different to other areas of (liberal) law.

Superficially, it might be considered that autonomy lies outside the central concerns of labour law. Personal autonomy is concerned with humanity, and this humanity exists prior to the work relationship. In extreme cases, personal autonomy is threatened by the existence of a work relationship, but in most cases, it is merely 'restricted' or 'compromised' but not lost altogether. So autonomy in that sense is not a central concern of labour law. Rather the central concern is the social structures which create the conditions in which autonomy is modified. Once these are modified (there is a greater equality of bargaining power between the parties), then labour law has achieved its aim. It is the process of equalisation rather than the precise outcomes (in terms of autonomy) which are most in issue. Moreover, personal autonomy is a characteristic which exists in self-employed workers, who themselves are not in need of protection. Autonomy is achieved where labour law applies the least. Thus labour law has an ambivalent relationship to autonomy; in some ways it results from the application of labour law, in other ways it is independent of that application.

Unfortunately, the presentation of 'autonomy' as outside labour law's concerns in this way is actually damaging and limiting to the labour law project. It means that it does not take advantage of the self-conscious consideration which has been so valuable in other areas of (liberal) law. At the same time as it accepts the traditional liberal view of autonomy, it suggests that this view of autonomy is not core to its project. This means that the 'modification' of liberal law that it seeks will only be superficial, because it does not challenge the conceptual base on which it depends. Instead, the modification will only be constructed in accordance with how labour lawyers view social reality at any point in time. As we have seen, this is a shifting quicksand, and inevitably favours certain interests over others. In order to make a difference, labour needs to see the social reality of the legal concepts which underlie the discipline and challenge those as well as the outcome of their operation on labour.

## **3. Re-examining autonomy in the binary divide**

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<sup>2</sup> M Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press 2004) 25

<sup>3</sup> Yael Braudo-Bahat, 'Towards a Relational Conceptualization of the Right to Personal Autonomy' (2017) 25(2) *Journal of Gender, Social Policy and The Law* 114

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The binary divide between employees on the one hand and the self-employed on the other which informs the allocation of employment rights not only promotes the externalisation of autonomy, but also promotes a certain *view* of autonomy. This is a liberal, individualistic view which describes the ability of a person to follow their own life course, unhindered by excessive interference from outside.<sup>4</sup> Moreover, it is an absolutist, all-or-nothing view. On the liberal view, personal autonomy is held by all persons, by virtue of their inherent rationality. It is this autonomy of will, the rationality and reasonableness of all human individuals which sets us apart from the rest of the animal kingdom, and infers that humans have 'rights'. This personal autonomy can be threatened by exploitation, but except perhaps in very extreme conditions, this personal autonomy does not disappear. It is possessed by employees, workers, the self-employed alike. The difference is that self-employed persons are able to use their personal autonomy to inform their work, whereas employees are not. During the course of the employment relationship, employees are subject to an authoritarian contractual regime which is defined by the work-wage bargain rather than the self-realisation of individuals. Autonomy of employees still exists but more outside work than inside it.<sup>5</sup>

The autonomy that is achieved by self-employed persons means that they come the closest to reaching the liberal citizen ideal. The ideal liberal citizen is that individual who discards any vestiges of dependency and who is completely independent and self-reliant. This implies economic self-reliance. Only if we are able to supply the economic resources to meet our needs can we be considered independent. Moreover, this independence is self-fulfilling, because it allows persons to develop skills which ensure that their independence continues even where they are subject to market risk. Examples of such skills include the development of reasoned opinions, innovation and enterprise.<sup>6</sup> It appears that the self-employed of the binary divide display these characteristics, and it is possible to find descriptions of self-employed status which set out these virtues. A good example is provided by the description of the distinction between employees and self-employed persons during the course of the ILO's Report of the Committee of self employment:

There are some fundamental characteristics which distinguish the self-employed from wage employees. In particular they are distinguished by the mode of regulation. The earnings of the self-employed represent a return on capital as well as labour entrepreneurial skill and risk-taking, whereas the wage employee receives a payment for his or her labour. Unlike most employees, the self-employed person, generally has a considerable degree of independence, controls labour time and use, is responsible for the range of economic and financial decisions and bears a major share of the risks of failure.<sup>7</sup>

The self-employed as the ideal liberal citizen are revered by the system. The system values their independence, self-sufficiency and lack of reliance on the state. As a result, the ideal self-employed citizen is rewarded for their independence and self-sufficiency by the granting of further independence by the system. Autonomous citizens are both freed from regulatory governmental action as a reward for their ideal (economic) status. They are also freed through governmental structures from interference by other private actions.<sup>8</sup> Autonomy is therefore self-fulfilling.

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<sup>4</sup> Ibid 116

<sup>5</sup> This is described by John Gardner as the 'contractualisation of work'. J Gardner, 'The Contractualisation of Labour Law' in H Collins, G Lester, V Mantouvalou (eds) *Philosophical Foundations of Labour Law* (OUP 2018)

<sup>6</sup> J Mill, *On Liberty* (1863) 17--18

<sup>7</sup> *Record of Proceedings*, ILC, III (Conference Agenda) 77<sup>th</sup> Session 1990) 32/16

<sup>8</sup> M Fineman (n 2) 4

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Autonomous agents earn autonomy and thereby gain further independence, and the possibility for even greater self-sufficiency and creativity.

### **4. Problems with the binary divide**

There are a number of problems with the way in which the binary divide is constructed, and how it is used to allocate rights. On the one hand, those problems are practical, as over time it has become clear that the binary divide does not reflect the reality of lived worked experience. Many employees do have a level of control and autonomy in their working relationships with their employers, even though that may be circumscribed in various ways.<sup>9</sup> Likewise, many self-employed people find that in practice their autonomy is limited, either by market forces or in the way in which contracts are designed. Indeed, a 'new class' of self-employed persons have been identified who do not meet the traditional profile of the self-employed worker at all.<sup>10</sup> They do not aim to grow a business or employ others in the future, and are much less independent and financially stable than the traditionally self-employed. In this context, self-employment is not a result of the assertion of autonomy, but rather individuals are forced into it as a result of a lack of alternative options. Indeed, in some cases, this self-employment status turns out to have been constructed in the interests of employers, and to represent a false or bogus picture of the actual relationship between the parties.<sup>11</sup> The ILO have been particularly alive to this possibility.

It is also possible to argue that these problems are also deeply conceptual. The binary division works to effectively downgrade employee status and the value of regulation in the employment sphere. The aim of labour regulation is the end of labour law: if all persons achieved the self-employed ideal then labour law would no longer be necessary. Moreover, the central liberal value of personal autonomy is extremely reductive. If the aim of labour law is understood in terms of the achievement of 'dignity' in the Kantian sense (the true expression of rationality and reason), then employees are not seen as anything more or apart from contractors, or contracting entities. We not recognise the non-contractual features of the employment relationship, just as we do not recognise the non-contractual features of individuals. Labour law is subsumed in a set of liberal ideals about the equalisation of playing fields and the rejection of diversity and difference. In particular collective solutions are rejected as they do not fit with the individualised notion of autonomy at work in the binary divide.

### **5. Relational autonomy**

There have been a number of innovative legislative attempts to better reflect the reality of the labour market and to ensure that labour laws reach all those deserving of protection. For example, in a number of jurisdictions, intermediate categories have been inserted into the binary divide.<sup>12</sup> It is hoped that these intermediate categories better capture all those in dependent relationships, but who find it difficult to attain employee status. There have also been new statutory protections for the self-employed, which attempt to address their vulnerabilities.<sup>13</sup> Some of these new statutory

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<sup>9</sup> H Collins, 'Is the Contract of Employment Illiberal' in H Collins, G Lester and V Mantouvalou *Philosophies of Labour Law* (OUP 2018) 54

<sup>10</sup> V Daskalova, 'Regulating the New Self-Employed in the Uber Economy: What Role for EU Competition Law' (2018) 19 *German Law Journal* 461

<sup>11</sup> As in the recent UK case of *Uber v Aslam* [2018]

<sup>12</sup> In the UK, the worker category was inserted into statute to stand between 'employee' status and 'self-employed status'. See section 230 (3) Employment Rights Act 1996

<sup>13</sup> Italian Law No. 81/2017 known as the 'Self-employment statute' entered into force on 6 June 2017 and introduces a series of rights and protections for self-employed workers.

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protections also hope to capture some of the 'new self-employed' who are viewed as deserving protection. At international level particularly, there have been initiatives to expose and deal with 'false self-employment'.<sup>14</sup> On rare occasions, the binary divide has been transcended altogether in favour of a much more inclusive definition of 'worker' which cuts across the traditional divisions.<sup>15</sup>

However, the binary divide remains prevalent and accepted along with these legislative innovations. Even those policies (within the ILO) which reject the binary divide distinction in the case of a particular policy area do not reconsider the binary divide in a normative sense. Rather these policies exist alongside other policies which accept the validity of this binary divide and the institutions that support it. If the binary divide is to be seriously challenged, then the concepts at its heart also need to be challenged. One of these concepts is the notion of the value and personal autonomy. This needs to be replaced by a more 'relational' notion of autonomy in order that it is a useful conceptual basis for taking forward the labour law field.

The relational approach sees people as constitutively interrelated with each other and argues that key social concepts, such as law, autonomy and rights should be viewed in terms of those relationships.<sup>16</sup> In terms of autonomy, this shifts the conceptual view away from the 'original' state of autonomy towards a view in which our autonomy is constituted by interactive relationships with others.<sup>17</sup> In turn the relational approach identifies that social structures, including the law have relational consequences. Thus the law itself is not neutral. Rather it structures relationships and the interactions that people have with others. This in turn affects their 'autonomy'. As such, autonomy on this relational scheme is something to be developed, and is ever shifting according to (economic, social, political) circumstances. This is a rather empowering suggestion and a suggestion which narrows the binary divide in existence in the law.

The relational view of autonomy is empowering because the development is possible by all persons, no matter their social position, whether they are 'employed' or 'self-employed'. At the same time, no person is immune from suffering from an autonomy deficit. This reflects better the reality of employment in the modern era, with self-employed persons just as vulnerable as other labour market participants.<sup>18</sup> As vulnerability and a lack of autonomy is assumed across all groups, then the focus can turn to the ways in which the law can help all labour market participants to build resilience. There is the potential also to move away from boundedness to contractual form, which is so easy to manipulate by those with increased market power. In this scenario extending minimum rights to the self-employed can be much more easily justified than at present. At the same time, restricting employment rights to a very narrow set of 'employees' who can show a level of subordination and 'mutuality of obligation' also makes very little sense. Indeed, there may be an argument for the complete reconsideration of subordination at the heart of rights allocation, if the level of relational autonomy provides a much more suitable framework.

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<sup>14</sup> ILO Recommendation R 198 – Employment Relationship Recommendation, para 4

<sup>15</sup> Article 2 of ILO Conventions 87 provides that 'workers and employers without distinction whatsoever' are entitled to its protections. From the comments in the 2012 General Survey, it appears that this is intended to cover all workers including the genuinely self-employed as well as those in disguised employment relationships.

<sup>16</sup> M Friedman, 'Relational Autonomy and Individuality' (2013) 63 *University of Toronto Law Journal* 327, 328

<sup>17</sup> J Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law* (New York: OUP 2011) 31

<sup>18</sup> K Cruz, K Hardy and Teela Sanders, 'False Self-Employment, Autonomy and Regulating for Decent Work: Improving working Conditions in the UK Stripping Industry' (2016) 55 (2) *British Journal of Industrial Relations* 274

Furthermore the collective solutions and approach can be viewed as much more central to labour market experience. In the Anglo-American system of labour law at least, there is a disconnection between 'individual' labour law on the one hand and 'collective' labour law on this other. Although the former is associated squarely with upholding personal autonomy, the latter does not have the same connection to personal autonomy, and indeed there have been a number of disputes around the boundaries of personal autonomy in the context of collective relationships and agreements.<sup>19</sup> This lack of consistency can mean that collective bargaining rights are not supported in the same way as other labour rights. However, on the relational view, collective relationships are essential to building autonomy, and cannot be separated from it. This means that collective bargaining rights must be extended to allow all labour market participants to benefit from increased autonomy and resilience, including 'self-employed' workers. This stands on all fours with the enduring ILO approach to the importance of collective bargaining and the width of its coverage.

## **6. Conclusion**

This paper suggests that it is necessary to reconsider the foundations of our labour law as resting on 'personal autonomy'. It is suggested that this is a very narrow version of autonomy, and one which is extremely divisive. It feeds into and maintains the 'binary divide' at the heart of labour law between employees on the one hand and the self-employed on the other. This binary divide does not reflect the reality of labour law, and is also self-defeating (the end of labour law is self-employment which is outside the bounds of labour law). It is argued in this paper that replacing the notion of personal autonomy with a more relational approach will cause a reassessment of the binary divide and the beneficiaries of labour law as a whole.

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<sup>19</sup> ASLEF v United Kingdom 11002/05 (ECtHR)