European University Institute
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Self-employment and the Personal Scope of Labour Law

Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States

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under the supervision of

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1. SELF-EMPLOYMENT AS A CHALLENGE TO LABOUR LAW

1.1 Introduction

1.1.1 The Research Question

The past two decades has seen a growing interest, from both policy makers and scholars, in the legal regulation of work performed by self-employed workers. Increases in non-agricultural self-employment in industrialised countries, together with political and ideological shifts, have fuelled interest in self-employment as a means of increasing employment. The attractions of self-employment are manifold. To firms, self-employment is part of a two-fold change in the way firms operate: the move towards more flexibility as to the size and composition of the workforce, marked by an increased use of atypical workers and the disintegration of firms by arranging production through outsourcing, subcontracting and franchising. To workers, self-employment offers the greater autonomy connected with being their own boss, a chance of higher returns, or, at least, opportunities of gainful employment in times of high unemployment. To governments, self-employment has been seen as a means of increasing the number of small businesses, supposedly beneficial to the creation of new employment. Encouraging and removing barriers to self-employment is, therefore, a priority for many governments.

To labour law[1], however, self-employment is far from unproblematic. Traditionally, the concept of employee or contract of employment has served to define the personal scope of labour law: applying labour law to employees – or at least to those under full-time permanent contracts. But not everyone who makes a living from performing work personally is an employee. As noted by Davies and Freedland, "[w]e are accustomed to say that labour law regulates the 'world of work', but it is quite clear that in no country do all relationships, which have as their objective the

[1] Here, *labour law* denotes both individual labour law (employmnet law) and collective labour law. It does not include social security law.

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performance of work in exchange for remuneration, fall within the scope of labour law."[2] Self-employed workers, including those who sell labour only services, have been left outside of the traditional personal scope of labour law, having the relationship between them and the buyers of their goods or services regulated by other branches of law, most importantly commercial contract law. "Those which do not fall within the scope of labour law are by no means unregulated, but they will fall within the province of some other body of law, whose principles are very different from those of labour law."[3]

There have, nonetheless, always existed workers who do not fit neatly into this dichotomy, being neither the typical employees who have served as the archtype for labour law, nor the genuinely independent entrepreneurs forming the abstract actors of commercial law. Among the self-employed, we find workers who share one or several important characteristics with employees. Like employees they may be under an obligation to perform work personally, subjected to the employer's hierarchical powers, or working exclusively, or almost exclusively, for one employer. Still, they are not covered by labour law, despite some of the same concerns being raised by their relationship with the buyers of their services as those raised by the relationship between employees and employers. There is also the suspicion that some of these self-employed workers in reality are the product of deliberate attempts to contract out of labour law, or even its outright circumvention.

The subject of this dissertation is self-employed workers and the personal scope of labour law. It will show how self-employment challenges the traditional boundaries of the field of application of labour law – the concept of employee – and how legislators and courts have dealt with this problem. Further, it explores various options for reforming the personal scope of labour law to include at least some of the self-employed workers currently not covered by it. The argument

[2] Davies and Freedland (2000a) p. 32.

made is that the personal scope of labour law should be better tailored to the concerns that it seeks to address.

1.1.2 Methodology – Comparative Law

Methodologically, this study falls within the ambit of *comparative law*. The choice of a comparative approach has been made based on the assumption that if the study is based on material from several different legal systems, this will provide both a wider and deeper understanding of the issue at hand than a study based in a single legal system would. The study draws on material from the labour law of five countries – France, Italy, Sweden, the United Kingdom and the United States. Frequent references are also made to the law of the European Union. Using material from several different legal systems is nonetheless not enough to qualify this thesis as comparative law. As pointed out by Zweigert and Kötz in their *Introduction to Comparative Law*, the mere study of the law of different countries falls short of being comparative law.

> One can speak of comparative law only if there are specific comparative reflections on the problem to which the work is devoted. Experience shows that this is best done if the author first lays out the essentials of the relevant foreign law, country by country, and then uses this material as a basis for critical comparison, ending up with conclusions about the proper policy for the law to adopt, which may involve a reinterpretation of his own system.[4]

Comparisons come in different forms. In *macrocomparisons*, the structures of legal systems are compared, for example techniques of legislation, styles of codification, methods for statutory interpretation or the authority of precedent. In *microcomparisons*, focus is on specific legal institutions or problems, looking at how a particular problem has been solved in different legal systems.[5] Examining how legislators and courts have dealt with self-employed workers at the boundaries of labour law requires a microcomparison.

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[3] Davies and Freedland (2000a) p. 32.
[4] Zweigert and Kötz (1998) p. 6.
[5] For these definitions of macrocomparison and microcomparison, c.f. Zweigert and Kötz (1998) pp. 4f.

In this study, legal comparisons are used in two ways. The first is as a *tool to analyse a particular legal concept* existing in a similar form in a number of different legal systems. In Chapter 3, the comparative analysis of the concept of employee in French, Swedish, UK and US labour law is used in order to further our understanding of this concept, so crucial to the personal scope of labour law. As the concept of employee shows great similarities across the four countries we can identify the most important characteristics of this concept, an exercise facilitated by the comparative approach as we have a better overview, and run less risk of submerging in details of doctrine, than what would have been the case had the law of only one country been examined. At the same time, we can identify the differences between the concepts, becoming more aware of the particular nature of each national concept. In this part, we also look at the historical development of the concept of employee. Apart from studying the history of legal doctrines, an attempt is also made at relating these developments to changes in the organisation of work, labour markets and society at large which seems to have had an impact on them.[6]

The second way in which legal comparison is used is in the *examination of how lawmakers in different countries have dealt with the same issue*. Chapter 4 examines how lawmakers in France, Italy, Sweden and the United Kingdom have come to include in the personal scope some of those who live off selling their labour, but who fall outside the concept of employee. The difference between the type of comparison used in this part and the one used to examine the concept of employee is that instead of focusing on a specific legal concept existing in one form or another in all examined countries, we take as our point of departure a *social objective* – the extension of labour law to workers who are not employees but still deemed in need of labour law protection – and examine how lawmakers in different countries have tried to fulfill this objective. This technique has been

[6] On the close relation between comparative law and legal history, c.f. Zweigert and Kötz (1998) p. 8.

eloquently described by one of the greatest comparative labour lawyers, Otto Kahn-Freund, in his 1965 inaugural lecture at Oxford, *Comparative Law as an Academic Subject*.

> [The comparative legal scientist] is more inclined to compare methods of fulfilling social objectives than legal doctrines, functions rather than structures. To take up a useful simile going back to Jeremy Bentham, a comparative lawyer who adopts this approach will see himself as a comparative physiologist rather than a comparative anatomist […] Institutions and doctrines, statutes and judicial decisions will have to abide his question: what is your purpose, what interest do you protect, and how do the various legal techniques impinge on the effective achievement of those purposes and on the articulation and concealment of interests?[7]

In Chapter 5, the analysis of the concept of employee and the existing extensions of the personal scope are, together with scholarly writing in the field and some never adopted proposals for legislation, used to outline three options for reform of the personal scope. This places the study within the category of comparative law which Zweigert and Kötz labels *applied comparative law*. When comparative law is used in a theoretical-descriptive form, the aim is to say how and why certain legal systems are alike. Used to provide advice on legal policy, however, its task becomes different: "In its *applied* version comparative law suggests how a specific problem can most appropriately be solved under the given social and economic circumstances."[8]

The choice of countries has been made on the basis of two factors. First, countries for comparison were chosen on criteria reflecting the purpose of the comparisons. The four countries used for the analysis of the concept of employee were chosen on the assumption that there could be interesting differences in the concept of employee between four countries, which differed both in terms of labour market regulation and in legal traditions in a more general sense. To chose one Scandinavian country, one Continental country, the United Kingdom and the United States thus seemed appropriate. As to the comparison of extensions of the personal

[7] Kahn-Freund (1978) p. 279.

scope, the quest was for countries with legal institutions which could serve as examples of different techniques for extending the personal scope. The suitability of the chosen countries is further confirmed by the fact that they differ, to varying degrees, also in terms of the level and development of self-employment.[9] Secondly, as properly conducted comparative legal research requires knowledge of the language of the legal system which is to be studied, the limited linguistic abilities of the author – or at least the possibilities to learn new languages within the given temporal and spatial framework – have forced the exclusion of certain countries which might otherwise have been of interest to the study.[10]

This study deals exclusively with rich, western industrialised economies. All of the five countries used in the comparative parts are OECD countries and four are members of the European Union. The issues adressed are, nonetheless, to a large extent also relevant for countries in other stages of development, as evidenced by the attention given to the issue by the International Labour Organisation (ILO).

1.1.3 Earlier Research

Research by other and more learned scholars has paved the way to the present analysis. In a 1990 article, Collins made an influential outline of the challenge to labour law posed by independent contractors and the vertical disintegration of the firm.[11] Already some years earlier, Collins had explored the theme of the difference between market power and bureaucratic power in employment relationships, of importance not just for understanding the distinction between employees and self-employed workers, but for grasping what labour law actually does.[12]

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[8] Zweigert and Kötz (1998) p. 11.
[9] C.f. below 1.2.1.
[10] All translations from the French, Italian and Swedish are my own, except where otherwise indicated.
[11] Collins (1990).
[12] Collins (1986).

Another important contribution to the debate was made by the so-called Supiot group of experts, led by French legal scholar Alain Supiot, which under the heading "Work and Private Power" identified challenges to labour law posed by self-employment and gave an overview over different responses from legislators and courts in the European Union member states.[13] Further, in reports to the *6th European Congress for Labour Law and Social Security* in 1999, Supiot and Davies outlined respectively a continental and a common law view of the issue of self-employed workers and the personal scope of labour law.[14] In the following year, Davies, together with Freedland, explored the issue in two other articles including an outline of an alternative way of organising the personal scope.[15]

An important source of information on the status of self-employed workers in labour law have been reports produced by international organisations. he issue has on repeated occassions received the attention of the International Labour Conference, with accompaning reports from the International Labour Office.[16] An item called "The Scope of the Employment Relationship" was on the agenda of the 90th session of the Conference in June 2003.[17]

As already mentioned, this study includes an in-depth comparative analysis of the concept of employee. For the historical part of the comparative analysis, works by Bruno Veneziani[18] and Simon Deakin[19] and Spiros Simitis[20] have been particularly useful. Maybe a bit surprisingly, the concept of employee in contemporary labour law has received less attention from comparative legal scholars and in the last three decades, no large monographic comparative study has been prepared. The thesis aims to respond to this dearth of scholarly writing in this area. Some

[13] Supiot et al (2001).
[14] Supiot (1999) and Davies (1999).
[15] Davies and Freedland (2000a) and (2000b).
[16] ILO (1990a), (1997) and (1998).
[17] ILO (2003). The outcome of the proceedings was unknown at the time of writing.
[18] Veneziani (1986).
[19] Deakin (1998).

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scholars have, however, treated the concept of employee in national law in such a manner that their analysis contributes to the more general understanding of the concept of employee. Examples of such literature are Thérèse Aubert-Monpeyssen's study of the notion of subordination in French social law[21] and Marc Linder's writings on the concept of employee in US labour law.[22]

In the case of extensions of the personal scope beyond employees as traditionally conceived, there are important works which despite treating only national law are important contributions to a more general debate. Two that must be mentioned are Gérard Lyon-Caen's 1990 *Le droit du travail non salarié*, covering the extensions in French law, and Giuseppe Santoro Passarelli's 1979 *Il lavoro 'parasubordinati'* covering this particular Italian legal category. Of a different nature, but important to understand the grey area between employee status and genuinely independent businesses, is the 1999 empirical study by Burchell, Deakin and Honey of the employment status of individuals in non-standard employment in the UK.[23]

1.2 Self-employment

1.2.1 The Notion of Self-employment

Self-employment, or *self-employed worker*, is not a legal concept. Neither is it, as will be shown later in this chapter, unambigous as a statistical or sociological concept. The word is most often used to refer to persons who work for a living without being employees, such as owners of small business or people in other ways working on their own-account. Although various definitions of "self-employed", "independent contractor", "own-account worker" or the like exist in labour law, social security, tax law and other provisions of western legal orders, they do not show the same coherence, either within or between legal systems, as the concept of employee.

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[20] Simitis (2000). C.f. also the contributions by Cottereau (2000) and Hay (2000) in the same volume, *Private Law and Social Inequality in the Industrial Age*, edited by Willibald Steinmetz.
[21] Aubert-Monpeyssen (1988).
[22] Linder (1989a), (1989b) and (1999).

Here, the terms *self-employed worker* and *independent contractor* will both be used, with slightly different meanings. While *self-employed worker* is a broader notion including small businessmen, professionals and other who sell goods and services to consumers rather than to companies or the state, *independent contractors* are individuals who live off selling their labour to private and public employers, such as labour-only subcontractors. Under this definition, a worker who has other workers employed can still be considered a self-employed worker or independent contractor. Occassional reference is made to *genuinely self-employed workers*, denoting self-employed who are neither economically dependent or subordinated to the employer.

The word *worker* will be used to denote anyone who performs remunerated work personally. Under this definition, both employees and self-employed workers are considered as workers. Further, in the absence of a better word, *employer* will be used to signify the other contracting party, i.e. both the employer of an employee and someone buying the services of a self-employed worker.[24] Other than that, the term does not indicate any specific kind of contractual relationship between the worker and the employer. The word *employee* will be used according to national definitions and denote any individual working under a contract of employment or the equivalent.

The common feature of employees and self-employed workers is that they both perform work personally. The distinction most commonly applied between the two is built on the independence perceived to be the basic characteristic of a self-employed worker. In both common law countries and in continental legal systems the worker's subordination – the employers right to command what the worker does and the way in which she does it – has served as the core of the traditional concept of employee. Thus, if subordination characterises the employee, the self-employed worker is characterised by the freedom she enjoys as to how the work is performed.

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[23] Burchell, Deakin and Honey (1999).

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1.2.1 Trends in Self-employment

Despite earlier predictions that a concentration and centralisation of economic power would in the long run lead to the death of smaller units of production[25], the past three decades have seen a "partial renaissance" in self-employment.[26] In a wide range of OECD countries, the proportion of non-agricultural self-employment has risen and some countries have experienced a rapid surge. Statistics of self-employment should nonetheless be read in a very careful way. As Catherine Hakim has pointed out, "the statistics of self-employment are not designed to serve anyone's purposes, with the self-employed category being merely the 'residual' group left over once employees were identified."[27] According to international statistical definitions, the distinction is between *paid employment* and *self-employment*. In practice, administrative and taxation regulations have come to play an important role for the surveys. Being classified as self-employed for taxation purposes is often decisive both for the workers self-assessment of her status and the administrative classification.[28] This makes working owners of incorporated businesses an important borderline case treated differently in different countries.[29] "As a general rule, statistics on self-employment are best used as a rough measure of change at the macro-level. But they provide a poor basis for explaining change due to problems of validity and meaning at the micro-level".[30]

Over the past 25 years, most OECD countries have seen a growth in non-agricultural self-employment higher than the growth in total non-agricultural employment. Taken as a share of non-agricultural civilian employment, the median value of self-employment for the OECD

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[24] For a similar use of the words *worker* and *employer*, c.f. Davies and Freedland (2000a) p. 35.
[25] For an account of the traditional view that small scale production will slowly wither away, especially the Marxist version thereof, c.f. Steinmetz and Wright (1989) p. 981.
[26] The term "partial renaissance" is used by OECD (2000) p. 155ff.
[27] Hakim (1988) p. 424.
[28] OECD (1992) p. 185.
[29] Of the five countries of main interest to this study, the United States, and in some instances the United Kingdom, do *not* treat working owners of incorporated businesses as self-employed workers, giving somewhat lower figures for self-employment. OECD (1992) p. 186.

countries has risen over the past 20 years. There is, however, no convergence in the rates between different countries and the variations remain very large.[31]

A number of different explanations for the occurrence and growth of self-employment have been suggested. The OECD has identified reasons most commonly used to explain the development as overly rigid labour and product markets and high levels of taxation; changes in industrial organisation with a greater stress on out-sourcing of non-core activities and networks of small firms; and as a response by individuals to new opportunities becoming available in OECD economies.[32] Steinmetz and Wright, writing about the growth of self-employment in the United States in the 1970s, put forward the tentative explanations that self-employment can be a response to higher unemployment in an economic downturn; a result of sectoral change in the economy towards post-industrial sectors with higher levels of self-employment; and the decentralisation of older sectors of the economy leading to higher levels of self-employment.[33] Mangan describes the self-employed in terms of "economic refugees" unable to find employment as permanent employees; "dependent contractors" who have had their employment status changed by employers no longer willing to carry non-wage costs; and, on a more positive note, persons seeking self-employment for reasons of personal flexibility or in search of tax or other economic advantages.[34] In the following the various determinants will be grouped in four categories: changes in economic structure; changes in industrial organisation; attempts to escape tax and social regulation; and increased unemployment. The impact of government programs to encourage self-employment will also be mentioned.

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[30] Hakim (1988) p. 425.
[31] OECD (2000) p. 157.
[32] OECD (2000) p. 155.
[33] Steinmetz and Wright (1989) p. 983ff.
[34] Mangan (2000) p. 39.

The categories are overlapping and considering that it has been difficult to find explanatory variables that are valid across countries, the determinants of self-employment presented here should only be considered as examples of why self-employment occurs and why it has grown in many countries. In an econometric analysis of determinants of self-employment made by the OECD, it was not possible to find a consistent set of explanatory variables for self-employment valid across countries.[35] In general, a strong negative correlation between the level of GDP per capita and the share of self-employment in non-agricultural employment can be found. However, if GDP per capita was the only factor at work, self-employment would have tended to decline in all countries, which has not been the case.[36]

Changes in Economic Structure

The size of different industrial sectors within an economy affects the occurrence of self-employment. If an economy has a large share of its employment in sectors where self-employment is common (for example service industries), it will show a higher number of self-employed workers. The distribution of self-employment by industry varies considerably from country to country. In general for OECD countries, non-agricultural self-employment tends to be concentrated in service industries of different kinds while it is rare to find self-employment in manufacturing. The ISIC (International Standard Industrial Classification) sectors where the bulk of self-employment can be found are in *wholesale and retail trade* (where we have self-employed commercial agents), *hotels and restaurants*; *construction*; and *community, social and personal services*.[37] The industry sectors, which in the 1990s gave the largest contribution to the growth of self-employment, were *financial intermediation, real estate, renting and business*; followed by *community, social and personal services*. The contribution of these sectors to the growth of self-employment was larger

[35] OECD (2000) p. 174.
[36] OECD (2000) p. 173.
[37] OECD (1992) p. 156.

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than their contribution to employment growth as a whole.[38] As an example, when self-employment grew in the United States in the 1970s, this was due both to the increasing importance of industrial sectors with above-average proportions of self-employment, mainly service industries or what has been referred to as *postindustrial sectors,* and the rapid growth of self-employment in the traditional industrial sectors. In fact, some postindustrial sectors with traditionally high levels of self-employment, such as legal, engineering and professional services and medical and health services saw their level of self-employment fall while the level increased in fields such as construction and manufacturing.[39]

One important aspect of the sectoral distribution of self-employment is the difference between self-employed workers with and without employees. Self-employed workers with employees are more commonly found in sectors such as wholesale and retail trade, hotel and restaurants.[40] Some countries, among them the UK, show significant numbers of self-employed workers without employees providing personal services in the oil, construction and computer industries and among homeworkers, teleworkers and journalists.[41]

As concerns occupational groups, self-employed workers are most commonly found as sales workers, accounting for one fourth of sales workers in France, over one fifth in the United Kingdom and more than one eight in Sweden and the United States. Some OECD countries show even higher figures, such as more than half in Greece, Portugal and Turkey. Apart from sales workers, the occupational patterns vary over countries. Clerical work tends to show below average levels of self-employment in all countries.[42] In the 1990s, the occupational group

[38] OECD (2000) p. 160.
[39] Steinmetz and Wright (1989) p. 1002ff.
[40] OECD (2000) p. 160.
[41] OECD (2000) p. 162.
[42] OECD (1992) p. 189.

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professional, technical and related workers accounted for a large contribution to the growth in self-employment, as did *legislators, senior officials and managers.*[43]

Changes in Industrial Organisation

Industrial organisation can have important effects on the occurrence of self-employment in an economy. If work is organised in a way that creates opportunities for self-employment, the proportion of self-employment will be higher. The current trend towards more flexible work arrangements is often accredited with an important part in the development of self-employment, in particular the trend to contract out activities, rather than provide them internally.[44]

In models of industrial organisation, self-employed workers are often described in terms of being 'non-core workers' or located in the 'external sector' of the firm. In Atkinson's familiar model of the flexible firm,[45] the firm has a core of workers with permanent or long-term employment, possessing firm specific skills. Outside the core we find different kinds of atypical workers, with a weaker connection to the employer, such as part-time workers and workers with short-term contracts. In the most peripheral layer we find self-employed workers, sub-contractors and workers from temporary work agencies, with no employer-employee relationship to the firm. Put in other terms, the firm has an 'internal' and an 'external' sector. In the 'external sector' of the firm, we typically find workers whose skills are 'specialised but general' in the sense that they are not firm specific as the skills of workers found in the 'internal sector'. Some workers in the external sector supply professional or skilled services such as computer, accountancy or legal services (primary external sector), while others provide seasonal, casual and short-term contract work, often with low valued skills, such as homeworkers or unskilled construction work

[43] OECD (2000) p. 160f.
[44] Hakim (1988) p. 438f and OECD (1992) p. 171.
[45] C.f. Atkinson (1987) and Institute for Manpower Studies (1987).

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(secondary external sector).[46] Shrinking cores or internal sectors can translate into an increase in self-employment. Off-loading risks to the periphery through sub-contracting work and replacing contracts of employment with other kinds of contracts can be a central characteristic of a flexible work organisation.

This segmentation of the firm comes from employers' need for different forms of flexibility, which serve to make the organisation more ready to adopt to changes in the environment around it and the supply and demand for its output. Atkinson suggest three different kinds of flexibility.[47] *Numerical flexibility* is concerned with enhancing the firm's ability to adjust the level of output to meet fluctuations in input. Ways of achieving numerical flexibility are part-time contracts, the use of short-term, casual, or temporary agency workers. In this category we also find working time arrangements such as varied shift patterns and overtime. *Functional flexibility* is concerned with the versatility of employees and their flexibility in and between jobs. It consists of a firm's ability to adjust and deploy the skills of its employees to match the tasks required by changes in workload, productions methods or technology. *Pay flexibility* is concerned with the extent to which a company's pay and reward structure supports and reinforces the various types of numerical and/or functional flexibility which are being sought.

As an alternative to flexibility, Atkinson points to *distancing*, or "the displacement of employment contracts by commercial contracts."[48] Others see replacing contracts of employment with other types of contracts as a central characteristic of the trend towards greater labour market flexibility [49] The use of self-employed workers is in many cases an alternative to hiring short-term employees rather than a definitive decision to let go of a part of the production. Replacing contracts of employment with other kinds of contracts is rather a central characteristic of a

[46] Hakim (1988) p. 443f.
[47] Atkinson (1987) pp. 89f and Institute for Manpower Studies (1987) pp. 3ff.
[48] Atkinson (1987) p. 90.

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flexible work organisation than an alternative to flexibility. Self-employment is sometimes used as a way of increasing numerical flexibility. A work organisation that experiences a temporary peak in the workload can use self-employed workers instead of employees. Self-employed workers can often be hired on short-notice and the contract between a self-employed worker and a principal usually is a commercial contract, not subject to regulation concerning dismissals. Functional flexibility is generally seen as something related to the core workers, in other words: internal flexibility. But self-employed workers can contribute to an organisation's functional flexibility through offering a possibility to change – within the same total number of workers – the composition of the workforce to a workforce with other skills. Finally, the price on a self-employed's work is, at least in theory, determined on a market that is more free than the market for wage labour. If the demand for a specific type of work falls self-employed workers can lower their prices faster than the individual or collective wage agreements will be renegotiated. Thus, using self-employed workers can increase the financial flexibility of a work organisation.

Describing the extraordinary growth of self-employment in the UK in the 1980s, Hakim gives large consideration to employers' labour use strategies. A survey of these strategies "confirms that all the indications are of an increasing incidence and intensity of use of self-employed workers; […] that within plants employee labour has sometimes been replaced by self-employed labour; and that employers' reasons for using self-employed labour are not very different from their use of any other type of non-core worker, with an emphasis on the need for greater workforce flexibility and reduced labour costs".[50]

Attempts to Escape Regulation

As the legal difference between hiring an employee and contracting a self-employed worker is the replacement of a highly regulated employment contract with a less regulated commercial contract,

[49] Numhauser-Henning (1993) p. 272.

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self-employment has sometimes been seen as an attempt to escape or, even circumvent, labour law, social security or tax regulation. It has been suggested that high and rising levels of self-employment might be taken as an indication that the regulations governing employment contracts are too burdensome.[51] The reasons for employers to use atypical workers with a lower degree of protection will be greater, the argument goes, if the legal protection afforded full-time permanent employees is strong. In cross-country analyses, some evidence of a positive relationship between the strength of job security legislation and the incidence of self-employment has been found. The United States and the United Kingdom, with weaker job security legislation than most other countries but with a higher degree of self-employment, do however stand out. [52]

Further, it is often suggested that tax-avoidance – by employers, workers or jointly – can be one reason for self-employment. [53] Self-employed workers often have greater opportunities to reduce their tax burden, for example through deductions for business expenses of through simply under-reporting their income. In addition, social security contributions might vary between employees and self-employed workers, amounting to a difference in non-wage costs. Taxation and social security regulation may thus have an impact on the supply and demand for self-employment. In the case of taxes, nonetheless, "no appreciable correlation between the top marginal personal income tax rates and either the incidence of self-employment or its rate of growth", have been found on a cross-country basis.[54] For social security, some correlation can be found between the level of employers' social security contributions and self-employment, there is however, no correlation between the difference in the total contribution rates and the incidence of self-employment.[55]

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[50] Hakim (1988) p. 438.
[51] Robinson (1999) p. 96.
[52] OECD (1992) p. 178.
[53] OECD (1992) p. 178ff.
[54] OECD (1992) p. 180.

Even though the statistical evidence that attempts to circumvent labour law, tax and social security regulation are driving self-employment are weak, many authors argue that at least parts of the increase in self-employment can be accredited to this.[56] Linder and Houghton argue that some of the growth of US self-employment in the 1970s and early 1980s comes from "unilaterally imposed employer scams" where formally self-employed workers are hardly distinguishable from employees. Hakim, writing about the growth of self-employment in the UK in the 1980s, cites findings that employers reported to use self-employed workers mainly as a way to achieve a more flexible work organisation, but also, "in a minority of cases, to avoid the tax, social insurance and legal obligations attached to directly employed labour".[57] Mangan describes 'dependent contractors' as "workers who have had their employment status changed by employers no longer willing to accept non-wage costs, but who nonetheless work almost exclusively for the one employer or group of companies."[58] Independent of whether the desire to escape labour law has been a reason for the growth in self-employment or not, attempts to circumvent labour is one of the challenges that self-employment poses to labour law.[59]

Unemployment

The level of unemployment has been said to affect the level of self-employment in different ways. In periods when conditions are bad and unemployment high, 'economic refugees' unable to find permanent employment are "pushed" into self-employment as a measure of survival.[60] In periods when conditions are good and unemployment low, people are drawn into self-employment by new opportunities.[61] The two are not necessarily contradictory, as different groups of workers can become self-employed for different reasons.

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55 OECD (1992) p. 180 and p. 182.
56 Linder and Houghton (1990) p. 734.
57 Hakim (1988) p. 442.
58 Mangan (2000) p. 39.
59 C.f.below 1.3.3.
60 Mangan (2000) p. 39.

The first hypothesis, sometimes called the "unemployment push" hypothesis, that self-employment moves counter-cyclical and tends to rise in times of high unemployment has been tried by several authors. Steinmetz and Wright hold that US self-employment used to move counter-cyclical but that the effect has been declining over time and find it "unlikely that the reversal in the decline of self-employment in the early 1970s is simply a direct effect of increasing unemployment."[62] For the EU "there is no consistent correlation between inflows from unemployment to self-employment and the level of unemployment rate. In some countries, there may be signs that the inflows into self-employment move counter-cyclically, tending to increase, sometimes after a lag, when unemployment rises: in no European country is the opposite pattern evident."[63] The OECD concludes, "the absence of a positive correlation between the unemployment rate and inflows into self-employment from unemployment fails to support the so-called 'unemployment push' hypothesis: that people tend to move into self-employment in greater number in recessions due to the absence of wage employment."[64]

Even if it is hard to prove on the macro-level, employers might, however, use self-employment as a way of unloading risk when times get bad. Hakim reports that permanent employees are often recruited from non-core workers; fixed-term workers are offered permanent contracts and part-timers full-time. Self-employment however, works the other way and is being used also to shed workers with a transfer from employee-status to self-employment as a first step.[65]

Programmes to Promote Self-employment

In the 1980s, a significant number of countries introduced schemes to help unemployed persons to enter self-employment. The aim of the schemes has been to encourage the start of new

[61] OECD (1992) p. 175.
[62] Steinmetz and Wright (1989) p. 997f.
[63] OECD (2000) p. 166.
[64] OECD (2000) p. 167.
[65] Hakim (1988) p. 441.

businesses as a way for some self-employed to return to the labour market. Through providing some financial help the schemes have tried to ensure the worker adequate financial resources both for the workers own needs and for the enterprise during the difficult start-up period, often through converting unemployment benefits into start-up grants. In addition, some schemes have offered counselling and training to the workers.[66] There are also examples of changes in the unemployment benefit regulations to make it easier for unemployed former self-employed workers to return to self-employment.[67]

How effective these schemes have been is difficult to assess. The OECD has found no correlation between trends in self-employment and expenditures on schemes to help unemployed people enter self-employment. One reason why the success of the schemes is difficult to measure is the possibility of *deadweight* (workers who would have entered self-employment even if the scheme was not in place), *substitution* (a self-employment opportunity that would have been taken up by one person is taken by someone else), and *displacement* effects (a self-employed worker supported by a grant drives an unsubsidised business out of the market).[68] Many schemes do nonetheless show survival rates higher than most other schemes for unemployed. This could, however, be due to the fact that the self-employment schemes often include a selection where the potential of the workers and their projects are assessed.[69]

1.2.2 Personal Characteristics of the Self-employed

The personal characteristics of the self-employed population vary across countries. Some characteristics are, however, found in most countries. In general, self-employment can be said to be predominantly male and more common among older than among younger workers. As

[66] OECD (1992) p. 175ff and (2000) p. 178ff.
[67] In Sweden the rules have been changed so a formerly self-employed worker does not have to de-register and sell all assets in the former business in order to be eligible for unemployment benefit. Instead, the business can be temporarily dormant and the assets and registration used in an attempt to restart the business.
[68] OECD (2000) p. 182.

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regards education, the highest probabilities of self-employment are found at the ends of the scale, among the least educated and the most educated. With the exception of the UK, individuals with the least education have the highest probability of being self-employed. [70]

In contrast to other forms of atypical work, men dominate self-employment. In OECD countries, between two thirds and fourth fifths of the self-employed workers are men, and the male self-employment rate is often double that of women.[71] In France, Italy and the UK, men account for three-quarters of self-employment, while in the United States they account for two-thirds. As concerns the rate of self-employment however, the United States is an exception with a higher self-employment rate for women than for men.[72] Reading these figures one should nonetheless bear in mind that some of the differences in the self-employment rate between men and women can be explained by the fact that in a family business, the man will often be the one registered as the owner of the business.[73] A notable exemption to the rule that self-employed workers tend to be men are the self-employed workers belonging to the Italian *parasubordinati* legal category.[74]

The differences in self-employment rate between men and women can be due to many factors. Surveys carried out in the European Union show that the preferences for self-employment are considerably stronger for men than for women. Gender differences are in this respect more important than any other difference. Young men with above average educational qualifications who are about to enter the labour market express the strongest preference for self-employment. Research on Canada has shown that men are more likely than women to choose self-employment

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[69] OECD (2000) p. 182.
[70] Blanchflower (2000) p. 15f. 'Least educated' are defined as persons who leave school before the age of 15 and 'most educated' as persons who leave school at the age of 22 or later.
[71] OECD (1992) p. 190 (Table 4.A.7 and Table 4.A.8). Figures are for 1989 and 1990.
[72] OECD (1992) p. 190 (Table 4.A.7 and Table 4.A.8).
[73] OECD (1992) p. 186.
[74] C.f. below 4.3.2.

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for the independence it offers (47% to 32%), while women are more likely to say that it offers a chance to work from home (13% to 0).[75]

Further, women may find barriers to entering self-employment which are additional to those faced by men. An important barrier is found in traditional conceptions of women's role in society.[76] The alleged greater responsibility of women for unpaid housework makes it more difficult for women to become self-employed, something shown by the fact that family characteristics such as family size, marital status and the ages of children play an important role for many women in the decision to become self-employed. Further, extra difficulties in attracting finance can arise from the views held by financial intermediaries about women as less capable of running a business. In recent years, however, many countries have targeted different kinds of start-up programmes towards women.

The fact that men dominate self-employment in most countries can seem inconsistent with the rise in self-employment, as the increase has taken place at a time when female employment has grown. A possible explanation, however, is that the increase in self-employment can be an indirect effect of more women entering the labour market. For a two-income household, one member attempting self-employment while the other holds a steady income is less risky than it is for a one-income household.[77]

Self-employed workers are in general older than the average for those in employment. The youngest age group (15-24 year olds) shows very low rates of self-employment in most OECD countries, often less than one third of the average rate. The rate of self-employment then increases and the highest rate is found among workers aged 60 and above. In France the rate of

[75] OECD (2000) p. 172.
[76] OECD (2000) p. 183.
[77] Steinmetz and Wright (1989) p. 1009.

self-employment in this category is more than triple the average rate, in the United States and Italy, it is almost double and, in the United Kingdom, 50 percent higher than the average rate.[78] One possible explanation for the increase in self-employment is thus demographic. As a higher share of the workforce is found in age groups with a higher rate of self-employment, the average rate of self-employment increases.[79] Even though young women show lower rates of self-employment than older women, a survey of the UK shows that for women age has no effect on the propensity to be self-employed after the age of 25.[80] In general, the transfer to becoming solo self-employed occurs at younger ages than the decision to start or take over a small firm.[81]

Self-employment and entrepreneurial activity are often thought to be connected to a certain set of attitudes and values, sometimes described as the ideology or philosophy of self-employment.[82] This ideology emphasises individualism, self-reliance and risk-taking, attitudes that have been found among self-employed workers, persons who have just left self-employment and persons who consider becoming self-employed.[83] Research on self-employed workers in the UK also showed them to be "more liable to excess optimism" regarding future earnings than employees.[84] Other research holds that the differences have been overstated. A British survey from the mid-1980s found very few differences in attitudes towards work between employees and self-employed workers.[85]

1.2.3 Working Conditions of the Self-employed

On the general level, the working conditions of self-employed workers differ from those of employees in a number of ways. The most important differences are in the hours of work and in

[78] OECD (1992) p. 190.
[79] Steinmetz and Wright (1989) p. 1009.
[80] Hakim (1998) p. 215.
[81] Hakim (1998) p. 215.
[82] Hakim (1988) p. 433.
[83] OECD (1992) p. 170.
[84] Arabsheibani et al (2000) p. 38.
[85] Hakim (1988) p. 435.

the degree of autonomy perceived by each category of workers. There are also significant differences in job satisfaction. These differences are generalisations, and can be assumed to vary greatly not just from individual to individual, but over different branches of business and between countries. In addition, the statistics apply to all self-employed workers and do not separate labour-only subcontractors, self-employed workers without employees and others who inhabit the contested grey area between employees and genuinely self-employed.

Self-employed workers generally report average *hours of work* higher than those reported by employees. In a 1997 survey of EU countries,[86] self-employed workers without employees (own-account workers) reported an average of 45 hours a week and self-employed workers with employees 52 hours compared with only 39 hours for employees. For own-account workers and employees there were significant gender differences with males working longer hours than females. For self-employed workers with employees, average hours worked were roughly the same for male and female workers.[87]

As *autonomy* is the most important characteristic used to separate self-employed workers from employees, it is no wonder that self-employed workers tend to report a greater autonomy than employees when it comes to how to organise their work. In a survey of EU countries self-employed people were found to have a higher degree of autonomy concerning "their rate and methods of work, the order in which they perform tasks, and the pattern of breaks and holidays that they take".[88] Further, own-account workers are less likely than employees to complain about time pressure or that they are working with tight deadlines or working at very high speed. For self-employed workers with employees, however, the situation is different and they often feel that "their pace of work is 'dependent upon direct demands from people such as customers,

[86] *1996 Second European Survey on Working Conditions, European Foundation for the Improvement of Living and Working Conditions 1997*. Cited in OECD (2000).
[87] OECD (2000) p. 170.

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passengers, pupils and patients'".[89] The greater autonomy enjoyed by self-employed workers is often considered one of the attractions of this type of employment. Especially self-employed men tend to stress the chance to be their own boss as one of the important, maybe even the most important, advantages of being self-employed.[90]

Self-employed workers also tend to report a *greater satisfaction with their jobs* than employees. Several different surveys, covering different countries, have shown that self-employed workers are more satisfied with their jobs than employees.[91] In the EU, 38 percent of own-account workers and 45 percent of employers reported being "on the whole, very satisfied" with their main jobs, as opposed to 30 percent of employees. In a survey of the US, 63 percent of self-employed workers reported that they were very satisfied with their job, as opposed to 46 percent for employees.[92] The differences tend to persist even after the inclusion of a number of variables to control for the type of job.[93] There are, however, some striking gender differences concerning job satisfaction. For employees, there are clear gender differences with male employees tending to report increasing job satisfaction as hours of work rise, whereas female employees do not. In the case of self-employed workers, there are no such differences.[94]

While difference exist as to hours of work, autonomy and job satisfaction between employees and self-employed workers, other conditions of work either tend to be equal between employees and self-employed, or do not discern any distinguishable pattern. One example of the latter is the *occupational health and safety situation* of self-employed workers. On the one hand, more self-employed report working in painful positions and they are less likely to wear protective

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[88] OECD (2000) p. 170.
[89] OECD (2000) p. 170.
[90] See for example Hakim (1988) p. 434.
[91] For an overview c.f. Blanchflower (2000) p. 17ff.
[92] Blanchflower (2000) p. 20f.
[93] OECD (2000) p. 171.
[94] OECD (2000) p. 171.

equipment. On the other hand, they are more able to adjust instruments and equipment for their own comfort.[95]

Another example relates to *income levels*. Data on the income of self-employed workers tend to be unreliable. There is often an overlap between personal consumption expenditures and business expenditures and some production might be for own consumption. Further, self-employed workers have greater opportunities – legal and otherwise – to understate their incomes, mainly to avoid taxation.[96] Comparisons of median earnings between self-employed workers and employees should, therefore, only be made with great caution. In some countries, the distribution of incomes of the self-employed is more polarised than that of employees, with a high proportion of self-employed workers in the highest and lowest income levels. Among the countries where this is the case is the United Kingdom, among the countries where this is not the case is the United States.[97] Linder and Houghton, arguing that all self-employed workers cannot be considered *petit bourgeoisie*, hold that "in many low-paid occupations, the self-reported self-employed earn significantly less than employees." "These self-reported self-employed account for a disproportionate share of full-time working poor families."[98] For women, self-employment can have a positive effect on attempts to reach the highest income levels as "self-employed women are more often found in the upper reaches of the earnings distribution than are wage and salary employees".[99]

As to the *job security perceived by self-employed workers*, there are important cross country differences. In the EU, "self-employed, particularly own account workers, are less likely to agree that they

[95] OECD (2000) p. 170, built on the European Foundation Survey.
[96] OECD (1992) p. 162.
[97] OECD (1992) p. 162f. The findings have later been confirmed by other studies. OECD (2000) p. 169.
[98] Linder and Houghton (1990) p. 730.
[99] OECD (1992) p. 165.

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have a secure job than employees."[100] Concerning the United States however, there are research showing self-employed workers and workers in family businesses tending to perceive less of a chance of job loss than employees.[101] OECD explains these differences with the fact that the US result refers to possible job loss over the next twelve months, whereas the European question made no reference to any time period. Another possible explanation, as the figures refer to the perceived job security of self-employed workers as compared with employees, is that there are differences in the absolute levels of perceived job security as dismissal protection legislation is weaker in the United States.

Traditionally, self-employed workers have, with few exceptions, not been *unionised*.[102] In some instances, there are legal constraints on self-employed workers joining trade unions or taking industrial action, simply due to the fact that they are not employees and, therefore, commonly left outside of the personal scope of labour law. Further, there is often an unwillingness to join a trade union among persons who in their self-perception are businessmen.[103] In addition, trade unions have been reluctant or had difficulties in organising the self-employed, at least outside occupations, such as journalists, actors and musicians, where there is a tradition of independent contractors being unionised. The matter is further complicated by the fact that some self-employed workers employ other workers, making them employers as well.

In recent years, there are signs that this might be about to change.[104] In France, the CFDT-Cadres, launched its *Réseau Professionnels Autonomes* in September 2002, attempting to organise well-educated and qualified independent contractors.[105] In Italy, the three national trade union confederations have all formed sections for workers classified as *parasubordinati*, and even

[100] OECD (2000) p. 170.
[101] Manski and Straub (1999) p. 17.
[102] Figures on *unionisation* are absent from the otherwise comprehensive statistics on self-employment provided by the OECD and are, even more remarkably, not covered in the ILO reports on the subject.
[103] For a telling case concerning self-perception, see the case of strawberry growers in California, c.f. Wells (1987).

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conclude agreements with standard contracts with some public employers.[106] In the United States, *Washtech,* a Seattle based trade union (part of *Computer Workers of America*), has been succesful in organising independent contractors in the high-tech sector.[107] In Sweden, some professional unions traditionally have a large share of self-employed among their members, while other white-collar trade unions have come to organise independent contractors to a much larger extent than earlier.[108] Many unions that actively seek to organise self-employed workers do this through offering services different from those traditionally supplied by trade unions, for example legal advice on contracts and access to training to keep skills up-to-date, or through adapting existing services, such as insurance, to the new members.

Summing up the advantages and drawbacks, for the individual worker, of self-employment the *International Labour Office* found that "[a]t its best, self-employment can provide a person with considerable autonomy, a chance to realise his or her potential and to be rewarded in proportion to the physical or mental effort expanded, the risks taken and the savings invested. At its worst, it represents survival activities at the margin of society." [109]

1.3 Self-employment as a Challenge to Labour Law

1.3.1 The Paradigm Labour Relationship

Self-employment challenges labour law as it provides employers with a possibility to contract labour in a form which deviates from the paradigm labour relationship for which labour law was designed and to which it applies. The legal expression of this paradigm relationship is the concept of employee, in particular in its full-time indeterminate form, covering workers in large integrated

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[104] For an overview of the situation in Western Europe, c.f. EIRO (2002).
[105] https://www.professionnels-autonomes.net/ [Visited 27 March 2003].
[106] C.f. below 4.3.2.
[107] http://www.washtech.org/ [Visited 26 March 2003].
[108] Some Swedish professional unions have very high rates of self-employed in their membership, in particular among traditionally self-employed groups such as architechts and dentists, but with significant numbers also in other groups. SACO (2003) Table 7. Other Swedish white collar unions are experiencing fast increases in the number of self-employed members, such as the engineering union SIF which saw the number of self-employed members double in 2002. TCO (2002).

firms. The concept of employee will be given an in-depth treatment in Chapter 3, it is, nevertheless, necessary already at this stage to give a brief overview of this crucial concept.

Even though national differences exist, it is possible to identify some common denominators of the concept of employee across countries, crucial to the paradigm employment relationship. Firstly, for a person to be considered an employee, she must *perform remunerated work personally*. Secondly, this work must be carried out under certain conditions, which effectively draw the line between employees and self-employed workers. The most important of these conditions, sometimes decisive, is that the worker has to be in a position of *subordination* vis-à-vis the employer, performing work under the employer's orders and control, or at least as an integrated part of the employer's organisation. Other factors commonly used as signs of the worker being an employee are the duration of the contract, whether the worker works for other employer's as well, the ownership of the means of production, and the form of remuneration, with a guaranteed wage indicating employee status. It is, however, the worker's subordination which has become the most important characteristic of the concept of employee, causing the self-employed workers, on the other side of the dichotomy, to be distinguished by their autonomy, and sometimes referred to as 'autonomous workers'.

This concept of employee came about in the early 20th century, modelled on the workers of the integrated industrial firm. In the words of Collins, "[l]egal regulation of the employment relationship […] matured alongside the growth in vertical integration of production. This coincidence explains in part the limited scope of legal protection for employees. Employment protection rights […] typically vest only in employees whose jobs fit into the complementary paradigm form of employment in vertically integrated production: employment which is full time,

[109] ILO (1990a) p. 1.

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stable, and for an indefinite duration."[110] In these firms, orders and control were transmitted through hierarchical structures, and often a rather straight forward affair of foremen and punch-clocks. Through the close relation between the firm and the concept of employee, the employee/self-employed divide also came to serve as one of the boundaries of the firm. Simplified, management had the choice between work being performed inside their organisation and under their control, or buying goods or service on the market, outside of the firm and without control over the production process.

Three issues raised in relation to self-employed workers and the personal scope of labour law pose particularly important challenges. The first is the status of workers engaged in relationships that do not fit the above mentioned paradigm. The second has to do with employers, or employers and workers together, intentionally trying to circumvent labour law regulation by classifying their relationship as something else than that between an employee and an employer. Finally, the third challenge self-employment poses to labour law lays in the fact that there are self-employed workers who, *bona-fide* and more or less clearly, fall outside the concept of employee, but for whom the regulatory objectives of labour law nonetheless apply. None of these issues is new, in fact they have all been around since the early days of labour law, but developments in the organisation of work and business in later years have made some aspects of them more pressing.

1.3.2 Relationships Not Fitting the Paradigm

Legally, there is a binary divide between, on the one hand, contracts of employment or work as an employee, and, on the other, the commercial relationship modelled on two equal parties doing business at armslength distance. In reality, relationships for work do not fit this dichotomy. It is not uncommon that formally independent self-employed workers find themselves in a situation where they are dependent on and to some degree controlled by the employer buying their

[110] Collins (1990) p. 353.

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services. In a report for the 1997 session of the *International Labour Conference*, the *International Labour Office* outlined the situation in which these relationships become problematic to labour law.

> [S]pecific problems of social and legal protection may arise when job contracting is performed by individual subcontractors whose relationship with user enterprises differs from that existing in truly independent businesses. Such individual workers may carry out certain work or perform services for a user enterprise on a permanent or periodical basis and may, to a certain extent and in different respects, be dependent on it. The user enterprises may also exercise control over the performance of services provided to them by these individual workers. In spite of their formal independence, the latter actually have a status which is very close to that of a traditional employment relationship.[111]

On the other side of the dichotomy, there are employees whose relationship with their employer resembles that of self-employed workers, in particular through the freedom they enjoy as to how to perform their work, often as a result of high skills, or the task nature of their assignments. In this sense, the difference between a typical contract of employment and a contract for services has become less for large groups of the labour force. The effect of this is that some that earlier were classified as employees run the risk of falling out of that category, and, more importantly, that the binary division between employees and self-employed workers has come to appear more and more arbitrary.

This is further accentuated by the trend of 'vertical disintegration' of companies, the consequences of which was described by Collins in an often cited 1990 article. For most of the twentieth century, firms integrated vertically aiming to control more and more of the chain leading a product from raw materials to the customer. Large firms directing production through bureaucratic controls replaced small businesses linked by commercial contracts. Through integrating upstream towards the provision of raw materials or downstream towards retailing a

[111] ILO (1997) p. 12.

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firm could reduce its risk of a halt in production or sales or a reduction of profits due to changes in bargaining power between the firm and providers of raw materials or retailers. In the 1980s however, this trend started reversing, and firms began vertically disintegrating, once again organising their activities through commercial contracts with subcontractors and service providers. Collins explains the trend towards vertical integration as a consequence of firms' wish to increase the flexibility of their organisation and reduce the risk of business through transferring part of it to economic actors outside the firm.[112] The effect, according to Collins, is clear: "The recent trend towards vertical disintegration of production places many workers outside [the] paradigm and therefore beyond the range of employment protection laws."[113] A decade later, an expert meeting convened by the ILO "confirmed that changes in the nature of work have resulted in situations in which the legal scope of the employment relationship does not accord with the realities of working relationships."[114]

Another transformation affecting the distinction between employees and self-employed workers has taken place in the relationships between companies. In *network enterprises*, the performance depends on the network's ability to generate noise-free communication between its components (connectedness) and the extent to which the different components share the same interests (consistency).[115] In order to optimise the production process, it becomes necessary to enter into long-term dynamic relationships with suppliers and thus eliminate some of the risks, and distance, inherent in outsourcing and subcontracting. These *relational contracts* distinguish themselves from the discrete transaction used as the model for commercial contracts, as they persist over a period of time and the contract only provides an incomplete specification of the

[112] Collins (1990) p. 360. On self-employment as a part of labour market flexibility c.f. above 1.2.1.
[113] Collins (1990) p. 353.
[114] ILO (2003) p. 10.
[115] Castells (1996) p. 171.

obligations.[116] As parties get entwined in relational contracts, the risk of one party being more dependent than the other on the continuation of the contract might occur and invite opportunistic behaviour from the counterpart. The contract itself can also construct an imbalance giving one party more power over the development of the relationship than the other. Legally, the result is one of "hybrid organisations" in "contractual disguises" such as delivery networks and franchising systems and other distribution organisations. "Strange quasi-corporate beasts that find their ecological niche in a 'third area of allocation' in an intermediate area between organizations and markets."[117]

Taken together, these developments create a new situation described accurately by Supiot, as, on the one hand, "*l'autonomie dans la subordination*" and, on the other, "*l'allégeance dans l'independance*" making the distinction between subordinated employees and independent self-employed workers less and less clear.[118] This does not only create difficulties in applying the concept of employee, it also makes it necessary to question whether dividing workers into employees and self-employed workers is still relevant. Does the old division reflect relevant differences in the conditions under which employees work or should new divides replace it?

1.3.3 The Circumvention of Labour Law

The second challenge to labour law involving self-employed workers is the attempt by some employers, and sometimes by employers and workers jointly, to circumvent mandatory regulation – such as labour law, social security and taxation – through disguising what is actually an employer-employee relationship as one between an employer and a self-employed worker. The ILO reports of a "disguised employment relationship", meaning "one which is lent an appearance that is different from the underlying reality, with the intention of nullyfying or attenuating the

[116] For this definition of relational contracts, but also for a critique of the theory of relational and discrete contracts, see Collins (1999) p. 140f.
[117] Teubner (1993) p. 211

protection afforded by the law. […] The most radical way to disguise the employment relationship consists of giving it the appearance of a relationship of a different *legal nature*, whether civil, commercial, cooperative, family-related or other." [119] In its general observations concerning contingent workers, the *Dunlop Commission*, a high-level commission appointed by the US Clinton administration, found that current tax and labour laws gave employers and employees incentives to create contingent relationships "not for the sake of flexibility or efficiency but in order to evade their legal obligations."[120]

> For example, an employer and a worker may see advantages wholly unrelated to efficiency or flexibility in treating the worker as an independent contractor rather than an employee. The employer will not have to make contributions to Social Security, unemployment insurance, worker's compensation, and health insurance, will save the administrative effect of withholding, and will be relieved of responsibility to the worker under labor and employment laws. The worker will lose the protection of those laws and benefits and the employer's contributions to Social Security, but may accept the arrangement nonetheless because it gives him or her an opportunity for immediate and even illegitimate financial gains through underpayment of taxes. Many low-wage workers have no practical choice in the matter.[121]

For Western Europe, similar observations have been made by the *European Industrial Relations Obeservatory,* which notes that "there are employment relationships which can be regarded as 'bogus self-employment', i.e. subordinate employment relations which are disguised as autonomous work, usually for fiscal reasons, or in order to avoid the payment of social security contributions and thereby reduce labour costs, or to circumvent labour legislation and protection, such as the provisions on dismissals."[122]

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[118] Supiot (1999) p. 151.
[119] ILO (2003) p. 25.
[120] Dunlop Commission (1994) p. 62.
[121] Dunlop Commission (1994) p. 62.
[122] EIRO (2002), c.f. also Ds 2002:56 p. 89.

Fiscal reasons, including the payment of social security contributions, are likely to be the most important for the wrongful labelling or registration of work relationships. Fraudulent self-employment for these reasons is also more easy as the classifications commonly are done or accepted ex-ante by tax or social security authorities. Once classified, the content of the relationship can slide towards more control on the part of the employer and greater dependence on part of the worker, without this affecting the tax or social security contributions due. In the case of labour law, the circumvention of mandatory regulation sets the tone for the relationship, a wrong that will only be rectified ex-post in the small amount of cases that go to courts or to other procedures such as arbitration. It is safe to assume that unorganised workers are particularly vulnerable.

1.3.4 The Concept of Employee Not a Suitable Personal Scope

The third challenge self-employment poses to labour law lays in the fact that there are self-employed workers who – *bona-fide* and more or less clearly – fall outside the concept of employee, but for whom the regulatory objectives of labour law, which we will identify in the next chapter, nonetheless apply. We will come back to this argument, which is at the center of this dissertation, on several occasions. Here, three examples will be provided in order to give a first idea.

The first example is anti-discrimination law. As not only employees can suffer from the harm to a person's dignity caused by discrimination, it can be questioned whether it makes sense to limit the personal scope of anti-discrimination law to employees. "By what possible rationale should laws designed to prevent work-related discrimination against those who are other than healthy, young white men prohibit a plumbing contractor from refusing to hire a plumber merely because he or she is black, female, disabled, or old, while permitting a textile manufacturer to refuse services from a solo plumbing contractor on the basis of the same prejudices?"[123] As we will see

[123] Linder (1999) p. 223. C.f. also Maltby and Yamada (1997) pp. 266f.

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below, there are examples of countries that have given their anti-discrimination law a personal scope that goes beyond the concept of employee.

The second example is minimum wage regulation or other legal arrangements, such as minmum provisions in collective agreements, filling the same function. Regardless of whether one views the minimum wage as a means to guarantee a decent living for all workers or as way to prevent underbidding, or both, the reasons for guaranteeing the minimum wage only to employees can be questioned. Leaving independent contractors outside the scope of minimum wage legislation, or excluding them from collective bargaining, opens the possibility that these workers will be remunerated below the level set by the law, and could provoke a race to the bottom.

The final example is occupational health and safety regulation. It is not uncommon that employers take decisions that affect the health and safety not just of their own employees but of other workers as well, including self-employed. Why, then, in situations where a self-employed worker is in no better position than an employee to protect her own health and safety, should the law limit the employer's responsibility only to employees? In fact, in many countries the law has already acknowledged this and has extended some of employers' occupational health and safety responsibilites beyond their own employees.

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2. THE CONCERNS OF LABOUR LAW

The natural starting point for anyone wishing to make prescriptive statements about the personal scope of labour law must be in an analysis of the regulatory objectives of labour law. Without answering the question of what labour law is supposed to do, it is not possible to find the field of application either sufficient or wanting. As will be shown below, the rather comprehensive regulation of the relationship between sellers and buyers of labour, described as the *juridification* of labour relations, has been justified with a broad range of arguments, including human rights, social justice and economic efficiency. These justifications, however important, are nonetheless too vague to supply us with the analytical tool necessary for the task of analysing to what extent the current personal scope actually permits labour law to fulfil its objectives. This tool instead has to devised from an analysis of how labour law operates, that is, what aspects of the relationship between a worker and her employer it concerns itself with. Even though this study involves explorations into the justifications and concerns motivating the existence of labour law, the desireability of the regulatory objectives of labour law are taken as a given, why we will not enter into the much wider, and more political, debate over to what extent labour markets should be regulated.

2.1 Juridification and Justifications

2.1.1 Juridification

Remunerated work has a key function in contemporary western societies. To individuals, earning a living is almost synonymous with remunerated work. To firms (and to the state in its capacity as employer), remunerated work, performed by employees or others, is the dominant form for acquiring manpower. Outside of the economic sphere, work is also often seen as one of the most important constituents in the construction of meaning and community. Remunerated work has thus become an important matter for the state and a key concern for social and economic policy. The consequence has been heavy regulation of the world of work – and frequent changes in that

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regulation. Leaving something of such great importance to the individual, the firm and the state fully in the hands of the freedom of contract is an idea that has had few serious followers. Thus, through labour law, a separate set of rules, distinguishing the market for labour from other markets for goods and services, has been created. In particular, the contract of employment has been regulated as to its content and the rules for its conclusion and termination, partially exempting it from the freedom of contract.

The development of labour law has been described as a prime example of *juridification*, defined by Clark and Wedderburn as "a process (or processes) by which the state intervenes in areas of social life (industrial relations, education, family, social welfare, commerce) in ways which limit the autonomy of individuals or groups to determine their own affairs."[124] According to Simitis, the word juridification "[i]s probably nowhere more justified than where the structure and objectives of labor regulation are being discussed."[125]

> More precisely, under the impact of industrialization, the legal framework of economic and social processes is, as labor law reflects, reformulated. Labor is not just one of many marketable and marketed goods. The labor market is increasingly distinguished from the market generally, and subjected to specific rules. These, rather than simply aiming at the protection of individual contracts, lay down binding requirements carefully adopted to the particular characteristics of labor relations, to which all agreements concerning the supply of labor must conform. […] Each of its provisions deliberately interferes with the conditions of work, thus restructuring the scope of both employers' and employees' activities.[126]

The abstract provisions of contract law – "blind to details of subject matter and person" that "does not ask who buys and who sells, and what is bought and sold"[127] – have been replaced by

[124] Clark and Wedderburn (1987) p. 165.
[125] Simitis (1987) p. 113.
[126] Simitis (1987) p. 114.
[127] Lawrence Friedman (1965) *Contract Law in America,* 20 cited in Epstein (1999) p. 27.

provisions affording utmost importance to each party's identity. This too has been eloquently described by Simitis:

> Thus, for instance, all the *Code Civil* had to offer regarding employment relations, were two hardly noticeable, extremely abstract provisions. The *Code du Travail* replaced these with a comprehensive regulatory system including a long list of protective measures, rules securing and promoting employment and institutionalized control of work conditions. The *citoyen* is displaced by the *employeur* and the *travailleur*. It is their particular position and comportment not the role of indifferent citizen that interests the legislature. Social conflicts are no longer hidden behind purely formal regulation, but are openly addressed through clear substantive provisions. The juridification of labor relations to that extent amounts to structural change in the law.[128]

The "particular position and comportment" of the parties is what invokes the interest of the legislature in regulating the worker-employer relationship. It is as a field of law concerned with certain inherent characteristics of relationships where one party is an employer and the other a worker that labour law is best understood. If the lawmaker was to ignore these inherent characteristics the outcome would be in conflict with various policy goals of broad following. The main argument of this chapter is that an awareness of the 'position and comportment' of workers and employers, is one of the more useful lenses through which labour law can be examined. The close attention labour law affords to the 'subject matter and person' – at 'who buys and sells' and at 'what is bought and sold' – is the reason why the personal scope of labour law is such an important issue.

2.1.2 Justifications

Even though the argument that the labour market should be left to the law of contract hardly has been made in a serious way outside of the strictly theoretical arena, a common starting point for

[128] Simitis (1987) pp. 124f.

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justifications of labour law is to explain why the law of contract would lead to unacceptable outcomes or other failures if applied to the labour market.

> The regulatory agenda for the traditional field of labour law commences with a disarmingly naïve question: Why regulate the employment relation? Behind this question lies an implicit contrast between the ordinary rules governing markets and special regulation of particular markets or industrial sectors. The question should thus be reformulated: why would we exclude ordinary market principles such as the general law of contract and property from employment relations in favour of special rules? In short, why do we need employment law at all?[129]

Conceptualising labour law as an 'exception' is far from unproblematic as it implicitly places the burden of justifying labour law on the party proposing this 'intervention' into a legal order perceived as 'natural'.[130] Considering the wide scope and great importance of these 'exemptions' one can argue that they should in fact not be seen as deviations from the main principles of the legal order, but as an order of their own, of equal status with the liberal legal order. Francois Ewald argues that social law (which denotes more than labour law) "has taken on a sufficiently wide range for one to cease regarding it as a *solution* brought in to fill the lacunae of shortcomings of classical law. It is time to approach it in its own positive being[.]"[131]

Despite modern labour lawyers seldom accepting the ordinary law of contract as more 'natural', and labour law as a form of regulation, this is still the way in which most explanations as to why we have and need labour law are written.[132] The justification for labour law presented below, as protecting human rights, promoting social justice or increasing economic efficiency, follow this pattern. The claim is not that these justifications explain why labour market regulation has come

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[129] Collins (2000) p. 4.
[130] This has been argued e.g. by Christensen: "The legal orders of the 18th century perceived themselves as 'natural'. The right of property and the freedom of contract were 'natural' rights, belonging to man in his capacity of being 'human'. The 'social' becomes in this context something accidental, only valid in certain times and certain places and therefore cannot be included in the basic legal order." Christensen (1999) p. 83.
[131] Ewald (1986) p. 40.
[132] For critiques of the liberal legal order and the market distributive order followed by justification of labour law in relations to the same order c.f. Christensen (1999), Collins (1997) and (2000), and Klare (2000).

about or come to take the form it has. They are rather a short summary of discourses that have been used, often in a wild blend, to argue why labour markets should be regulated differently than other markets.[133]

Human Rights

Arguments in favour of regulating employment relationships often go back to the workers as human beings in possession of certain inalienable human rights.. The idea has been described as "human beings remain human when they come to work, and are entitled to basic dignity there as elsewhere"[134], and that human rights can be violated, not only by states wielding public power, but as well by employers and others who wield private power. Wheeler, in an article entitled *Employee Rights as Human Rights,* holds that "there is a longstanding contradiction between democracy in the political system and authoritarianism at the workplace. The question is whether there are democratic rights that exist in the political system that do, or ought to, exist and be recognized in organizational system."[135] Ewing, seeing the "protection of civil liberties" as one of five principles that ought to guide labour law, argues that analogies can be drawn from international human rights law.

> A useful starting point here is the European Convention of Human Rights, for although its provisions apply, as a matter of international law, mainly to regulate the activities of government, its principles are equally relevant to constrain those who wield private power, including the power of the employer over the worker. On what rational basis can it be argued that while the government must respect an individuals right to private and family life, an employer may be free to undermine it with relative impunity?[136]

[133] For an account of how different ideologies and political necessity shaped early labour law, c.f. Hepple (1986b) pp. 26ff.
[134] Wheeler (1994) p. 9.
[135] Wheeler (1994) p. 9.
[136] Ewing (1996a) p. 9.

On the international level, human rights arguments have frequently been used to promote labour standards.[137] The ILO has identified a number of "fundamental principles and rights at work" – the freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation – which it holds to be so fundamental that all members of the organisation have the obligations to guarantee them, regardless of whether they have signed the relevant ILO conventions or not.[138]

Human rights arguments have been most prominent in justifying *anti-discrimination* law, which has often been inspired by or had its content defined by international human rights instruments or been elaborations of constitutional norms or principles. The obligation on states not to discriminate against persons due to their sex, race, ethnicity or other grounds has thus been extended to the parties on the labour market resulting in regulation concerning access to and termination of employment, working conditions and equal pay. Many times, labour law goes even further, to promote equality of opportunity in a broader sense than just freedom from discrimination.

It has also been argued that workers should be protected from the *arbitrary exercise of power* in a more general sense. The principle which in the field of public law is known as the 'rule of law' should apply in the relationship between workers and employers as well. This principle, according to one of its proponents, implies three consequences: "a requirement that the terms of the engagement should be clear; that they should be of equal application; and that the discretionary power [of the employer] should be reasonably, fairly and lawfully exercised."[139] This notion goes beyond prohibiting distinctions based on race or sex or other things promoted by traditional anti-

[137] On the relationship between human rights and labour law in the European Union, c.f. Sciarra (1999) and (2002).
[138] *ILO Declaration of Fundamental Principles and Rights at Work.*
[139] Ewing (1995) p. 128.

discrimination discourse, striking at "all irrational distinctions made between groups of workers, whether these are based on personal attributes (such as sex, sexuality or ethnic origin) or other factors (such as length of service or number of hours worked in any given week)."[140]

Another human rights issue that can be raised in the employer-worker relationship is that of privacy. Under Article 8 of the *European Convention of Human Rights*, "[e]veryone has the right to respect for his private and family life, his home and his correspondence". In the course of an employment relationship, a number of situations in which violations of the right to privacy can occur are present. Employers frequently monitor workers and collect personal data whereby they come in possession of information which if disclosed could cause harm to the worker. Some information can even be so sensitive that just the fact that the employer has it is enough to violate workers' privacy.

Parts of labour law have also been justified in terms of political rights. There is a strong connection between the more general *Freedom of Association* and the rights to form and join a trade union, a right which to be effective have to apply between workers and employers, and not just towards the state. The *Freedom of Expression* is another political right which has figured as a justification of labour regulations, safeguarding it not just towards the state but in relation to employers, public and private, as well.

Finally, labour law can be seen as an expression of the workers' economic and social rights. Minimum wage legislation, collective bargaining and other mechanisms for setting wages work towards realising the "right [of everyone who works] to just and favourable remuneration, ensuring for himself and his family an existence worthy of human dignity" found in the *Universal*

[140] Ewing (1995) p. 128. C.f. also Wedderburn (1986) pp. 447ff.

Declaration of Human Rights.[141] In labour law, the idea that workers enjoy economic and social rights, which has consequences for their relationship with the state, with employers and with each other, is often expressed in terms of 'labour is not a commodity'.[142] Human rights and the rights of workers are often seen as mutually supporting, a relationship described by Leary in an article concerning the importance of the ILO in promoting and enforcing human rights.

> "The extent to which the rights of workers are protected provides a touchstone for evaluating a nation's respect for human rights. The rights of the individual to join a trade union and to work under decent conditions are among the most important human rights. Trade unions can function effectively only in a climate of civil and political liberties and the suppression of freedom of association for workers is a warning sign of the overall deterioration of the human rights situation. Independent trade unions often provide the only organised opposition to repressive governments."[143]

The idea that workers have certain rights is also frequently used to justify labour law beyond the field of human rights as traditionally conceived. As Collins points out, "[m]any interests of the workers are commonly regarded as rights, which signifies that these interests should be regarded as inalienable entitlements. These right should thus be respected and protected by the law independently of their allocative efficiency."[144] The rights justifications for labour has been accurately summarised by Klare, who holds that one of the primary regulatory objectives of labour law is "entrenching and protecting certain rights and entitlements that society deems fundamental and which are or may be threatened in the employment context. These can either be individual rights (e.g. protection from invidious discrimination) or collective rights (e.g. rights of association and concerted action)."[145]

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[141] *United Nations Universal Declaration of Human Rights, Article 23, para 3*.
[142] C.f. O'Higgins (1997).
[143] Leary (1992) p. 583.
[144] Collins (2000) p. 12.
[145] Klare (2000) pp. 68f.

Social Justice

A second set of justifications of labour law has to do with social justice. The market distributive order – the pattern of distribution set up by the law of contract[146] – is considered, if applied to the labour market, to establish a distribution of wealth and power in that relationship, and in society at large, which is in conflict with notions of justice and equality. The main source of these inequalities is that the worker, generally, is in a weaker bargaining position than the employer, due to the worker's dependence on having work and frequent employer advantages in terms of better information and a higher degree of experience in bargaining. Some inequalities also stem from the contract itself, giving the employer's significant control and bureaucratic power over the worker. These inequalities can, as explained by some of the great names of British labour law, go a long way to justify why most contracts for work should be governed by labour law rather than contract law.

> The main objective of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation – legislation on the employment of women, children and young persons, on safety in mines, factories, and offices, on payment of wages in cash, on guarantee payments, on race or sex discrimination, on unfair dismissal, and indeed most labour legislation altogether – must be seen in this context. It is an attempt to infuse law into a relation of command and subordination.[147]

Klare, in assessing the efficiency of different regulatory strategies for the employment relation, does this "in the light of a particular regulatory objective, which I take to be legitimate and capable of being pursued through labour law, namely, the redistribution of wealth and power." He goes on to define *distribution of wealth* as "how well social groups do in satisfying their needs and preferences" and *distribution of power* as "the relative degree of influence different groups enjoy

[146] Collins (1997) pp. 21-36.
[147] Davis and Freedland (1983) p. 18. The passage also figured in earlier versions of *Labour and the Law,* edited by Otto Kahn-Freund himself.

in socially-significant decisions, particularly those affecting the terms and conditions of employment."[148]

Exploring the social ideas underlying social law Christensen distinguished between three "basic normative patterns".[149] The *Market Functional Pattern* is the normative pattern underlying the market economy, expressed in the freedom of contract and the freedom of trade. In the Market Functional Pattern distribution is the result of bartering on the individual level. The second basic normative pattern is *Protection of Established Position.* A person who has established a certain position in society – a job, a level of earnings or a rented home – should not be deprived of that position without a just cause. The Protection of Established Position is a conservative pattern and constitutes a barrier against redistribution of rights and resources that are a part of someone's already established position. Finally, the pattern of *Just distribution* represents the idea that resources should be distributed or redistributed in accordance with some material principle of justice, such as equal distribution, distribution according to need or distribution according to seniority. The latter two can be said to reflect ideas of social justice, even though Christensen's own view was that protection of established position does not belong in this category.

Regulation concerning wages, collective bargaining and paid vacations can all be justified in terms of redistributing the fruits of the production process in a way more compatible with a notion of social justice based on equity, if not equality. Likewise, regulation of hiring, firing, promotion, discipline and other limits to the employer's bureaucratic powers can be justified as promoting some notion of justice inside the relationship. Finally co-determination and worker participation regulation try to redistribute some of the power over the production process from the employer to the workers.

[148] Klare (2000) p. 64.

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Economic Efficiency

Labour might not be a commodity but is definitely a means of production. The influence labour law has over the economy can, therefore, hardly be overestimated. In economic policy, labour law can thus serve as an instrument to guide or channel contractual outcomes to increase the total amount and change the character of goods and services produced. A commonplace view is that labour standards are *per se* economically inefficient, as parties to a contract, if they are allowed to contract as they please and transactions costs are low, will themselves find the economically most efficient contract.[150] This argument is sometimes supplemented with the argument that equity also is best served by little or no regulation, as is individual autonomy.[151] Others question these arguments and hold that labour law regulation, properly constructed, is compatible with and can promote economic efficiency.

Labour markets are flawed by imperfections – uncertainty, limited information and sunk costs – to the extent that it can never be a competitive market.[152] According to this view, the labour market is a *structural monopsony* – a market consisting of a single buyer and a large number of suppliers – or at least a *de facto monopsony*, where employers benefit from the fact that commonly workers are not in a position to choose between different employers. In a monopsony, employers buy less labour, and pay them less and give them worse working condition, than they would if they had to compete for labour with other employers. Regulation is, therefore, necessary to improve the general well-being.[153]

Further, labour markets are suffering from *information asymmetries*, problematic as perfect markets can only exist if information for both sides in the market is perfectly symmetrical. For example,

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[149] Christensen (1999) p. 89.
[150] Kronman and Posner (1979) pp. 1ff.
[151] Epstein (1984) pp. 953ff.
[152] Deakin and Wilkinson (1994) pp. 293f.
[153] Ichino (1998) pp. 300f and 306.

employers lack information regarding the worker's personal qualities, such as the workers ability to adapt to new situations, chances of falling sick or reproductive plans.[154] Here, labour law can serve as a way of distributing the risk of these negative eventualities between the parties in an economically efficient way.

Another economic efficiency justification for labour law stems from the fact that most contracts for work are inherently incomplete. As it is difficult to foresee all future needs of the work organisation, and as constant re-negotiation of the contract would be too costly, it is necessary to leave some unilateral, residual right of control to the employer. In this context, labour law regulating the exercise of power can "offer an important basis for long-term cooperation which enhances the productive potential of the employment relationship".[155] In addition, long-term co-operative relationships sometimes exposes the parties to the risk of opportunism from the side of the other, something that can have detrimental effects on the degree of trust within the relationship.[156] Labour law can thus serve economic efficiency through making promises credible, enabling the parties to capture gains from co-operation that wouldn't be attainable from private ordering alone.[157]

Labour law does not only set the standards for the relationship between employers and workers. It also sets standards for the competition between different employers and between different workers, as it regulates what means of competition can be used to compete for business and jobs. In the case of competition between firms, "the ability of one firm to adopt a high-productivity route to competitive success is limited if its rivals are able to compete on the basis of low pay and poor working conditions".[158] Labour law sets a floor under which wages and working conditions

[154] Ichino (1998) p. 304f.
[155] Deakin and Wilkinson (1998) p. 20f.
[156] Deakin and Wilkinson (1998) p. 30f.
[157] Deakin and Wilkinson (1998) p. 22.
[158] Ewing (1996b) p. 26. C.f. also Deakin and Wilkinson (1994) p. 294.

are not allowed to fall, forcing firms to improve and invest in product development, technology or management practices. Supiot, referring to "l'égalité entre employeurs", points to placing different firms on an equal footing as concerns labour costs as one of the essential functions of labour law.[159] In the case of competition between workers, labour law works the same way, preventing underbidding and making it easier for workers to enter a high-productivity route, for example through investing in training.[160]

2.1.3 The Three Concerns of Labour Law

Having identified the most important justifications for labour law – important as it is for our understanding of this branch of law – does not, however, provide us with the analytical tool necessary for the task of analysing to what extent the personal scope actually permits labour law to fulfil its objectives, and how it could be improved in this respect. The problem with the justifications is that they do not give us precise enough leads about the characteristics of the workers that ought to be included. Knowing that dismissal protection can be motivated on grounds of human rights, social justice or economic efficiency tell us very little about whether any other workers than employees ought to be covered, and in that case what the characteristics of these workers are. The analytical tool, instead, has to devised from an analysis of how labour law functions, or, more precisely, what aspects of the relationship between a worker and her employer different parts of labour law intervene in.

According to the *Oxford English Dictionary,* in the English language, the word *concern*, as a noun, refers to an "anxiety or worry", or "a matter of interest or importance to someone."[161] In the following, we will argue that labour law – regardless of whether its justified in terms of human rights, social justice or economic efficiency – has as its concern certain characteristics of the

[159] Supiot (1997) p. 236.
[160] Ewing (1996b) p. 27.
[161] *The Oxford English Dictionary* 1998 edition. Oxford: Oxford University Press.

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relationship between a worker and his or her employer. Firstly, labour law concerns itself with the consequences of the worker's *subordination* to the bureaucratic powers of the employer. Secondly, labour law is concerned with the consequences of the *worker's dependence*, both economically and socially, on having work. Thirdly, labour law is concerned with the fact that the workers are *human beings performing work personally*. These three concerns also correspond to three important characteristics of different kinds of contracts for the performance of work. Most importantly, the accumulation of all three of them gives us the paradigm labour relationship: the employee.

2.2 Subordination

Without making too broad a generalisation, labour law could be described as the law of subordinate employment. The worker's subordination to the bureaucratic powers of the employer has traditionally been seen as a key characteristic of the relationships labour law is to regulate. The source of the employer's bureaucratic powers over the worker is the contract between the parties, either expressly stipulated in the contract or as an implied term. In fact, implied terms have often been more important than expressed terms in defining the employer's control over the employee. In the United Kingdom, "[t]he idea that the employer possess a prerogative power which lies beyond the express terms of the contract […] is recognised by the common law of the contract of employment."[162] Likewise, in Sweden, the employer's right to direct and allocate work is considered as both a general principle of law and an implied term in all collective agreements.[163] The contract of employment in French law has been described as the contract which places the employee under the authority of the employer.[164] It is also common that an employee is considered to be under an obligation of loyalty towards the employer, obliging the worker to act in the best interest of the employer and avoid situations where there is a conflict of interest between her own interests and those of the employer.

[162] Deakin and Morris (2001) p. 239.
[163] For an account in English of employer prerogatives in Swedish labour law, c.f. Rönnmar (2001) p. 262.

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2.2.1 The Employer's Need for Bureaucratic Powers

Why the employer's control have come to be a central characteristic of employment relations has been explained in different ways. According to one account, particularly important in the Continental countries, giving the employer control over the employee was necessary in order to make work itself, and not just the product of work, a possible object for contract.[165] Employment contracts can be seen as a form of rental agreements, where the worker rents out her labour to the employer. As labour power cannot be physically detached from the labourer, the employer cannot take physical possession of it, and therefore needs some other way of assuring the enjoyment of the contracted good. The employer's control over the means and manner of work separates the person of the worker from her labour and substitutes for the employer's possession of the rented good.

A more elaborate explanation has to do with the incomplete nature of contracts for work. Whereas a complete contract "specifies in a manner immediately verifiable by a third party precisely what performances are required for all possible future conditions"[166], an incomplete contract will not deal with all events that may occur in the relationship between the parties. As an employer, when a worker is hired, does not know exactly what work needs to be done at every single moment of the future relationship, the employer will retain the right to give the worker instructions as to the means and manners of work. The alternative would be to renegotiate the contract every time something unforeseen happens. According to Oliver Williamson, one of the founders of institutional economics, long-term incomplete contracts, like-employment relationships, "require special adaptive mechanism to effect realignment and restore efficiency when beset by unanticipated disturbances."[167] It has therefore become distinguishing feature of

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[164] Pellisier, Supiot and Jeammaud (2000) p. 148.
[165] C.f. below 3.1.2.
[166] Hadfield (1990) p. 927.
[167] Williamson (1996) p. 96. In the context of contracts for work, trading completeness for flexibility can have several advantages. Williamson, distinguishing work modes characterised by *continuous contracting* from work modes

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the employment relation that employees, implicitly and explicitly, agree to accede to the authority of the employer.[168]

Along the same lines is the argument presented by Collins concerning governance structures in principal-agent relationships. In order to obtain the advantages of division of labour, such as the special skills of a worker, a principal (the employer) employs an agent (the worker) to perform indeterminate tasks.[169] The contracts between principals and agents are, therefore, incomplete by design, leaving the agent a margin of discretion as to how the task is going to be fulfilled. The principal, however, has an interest in monitoring the performance of the agent, so that the agent performs the task to the best of his abilities, or at least in a satisfactory way. One common way to do this is through an incentive system built on profit sharing, for example through commission to the sales force. In many other instances, where it is more difficult to measure whether the agent has performed the contract to the best interest of the principal, incentive systems are not enough.[170] The need is for supervisory and monitoring powers of the principal. This supervisory power is usually exercised through bureaucratic rules that, within some margins, can be subject to unilateral change by the principal. "The manager can direct the worker towards new tasks, and can manipulate behaviour by using the carrots and sticks of promotion and discipline."[171]

Control is not absolute and can vary in strength. In Williamson's assessments of hierarchy, the fact that "the responsibility for effecting adaptations is concentrated on one or a few agents" points to a relatively high degree of hierarchy. If, instead, "adaptations are taken by individual

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characterised by *periodic contracting*, shows how periodic contracting – i.e. work modes where "contract is used to provide framework, which is subject to reshaping at the contract renewal interval" and where "day to day operations are governed by an administrative process" – is in many aspects more economically efficient than continuous contracting which rely extensively on comprehensive contracting. Williamson (1985) p. 229.

[168] Williamson (1996) p. 33.

[169] Collins (1999) pp. 236ff. C.f. also Deakin and Michie (1997) pp. 7ff.

[170] To Williamson, the flat or low-powered incentives found in supervisory hierarchies are better suited to ensure greater and more long-term co-operation, than the more direct economic incentives of markets or profit-sharing schemes. Williamson (1996) p. 99.

[171] Collins (1999) p. 237.

agents or are subject to collective approval" hierarchy is considered slight.[172] Various ways of taking decisions inside a relationship therefore give rise to varying degrees of control.

The power vested in the supervisory hierarchy is commonly backed by disciplinary powers of the principal, ultimately the principal's right to terminate the contract. The principal's right to terminate can, in cases where the agent is more dependent on the principal than *vice versa* also make agents vulnerable to opportunism on the side of the principal, creating an unjust power relationship.[173] It is, nevertheless, important to separate the market powers and the bureaucratic powers of the employer, an argument pervasively made by Collins, in an important 1986 article.

> Even where the employee enjoys improved bargaining power, either because he benefits from collective bargaining by a strong union in a period of high employment or because he possesses a special skill which the employer needs urgently, in most instances the social dimension of subordination remains. The source of this residual managerial power springs from the form of the relations of production in advanced industrialised societies. An employee normally joins a bureaucratic organisation. He is allocated a particular role, which is defined by the rules of the institution. These bureaucratic rules create a hierarchy of ranks rising from the manual worker on the shop floor to the highest echelons of management.[174]

Whichever the explanation, the bureaucratic powers of the employer over the employee are, compared to most other principal-agent relations, both comprehensive and far-reaching. The employer "does not need to gain the consent of the employee to any and every change in the way the job is carried out; 'functional' or internal flexibility is built into the legal relationship, in the form of the employee's implied obligations of obedience, co-operation and care. This residual

[172] Williamson (1985) p. 221.
[173] Collins (1999) p. 238.
[174] Collins (1986) p. 1. A similar argument, that workers who are not necessarily the weaker party before the contract is entered into can become subordinated through the hierarchy set up by the contract, is made by Santoro Passarelli (1979) pp. 19ff.

power which vest in the employer can be seen as a layer of status 'beyond contract', or at least beyond the explicit terms of the parties' agreement."[175]

Glancing back at the justifications for labour law, from the point of view of human rights, the employer's control is a cause of concern as the powers can be used in ways which violate or endanger the civil or political rights, or rights to privacy and integrity, of the workers. The employer's control also calls for intervention in the name of social justice, as broad hierarchical powers of one individual over another easily comes into conflict with ideas of equality. Regulation of the employer's hierarchical power can also be necessary to ensure economic efficiency, through promoting trust and allowing the parties to capture the benefits of co-operation.

2.2.2 Labour Law and Bureacratic Power

Labour law has come to both underpin and limit the employer's bureaucratic powers.[176] On the one hand, the contract of employment comes with expressed and implied terms of subordination and loyalty which are not up for negotiation in the individual case. On the other, labour law tries to reign in the same powers. As for most regulations of supervisory hierarchies, labour law does not eliminate hierarchy, but rather tries to prevent abuse of the powers given to the employer.[177] To this end, a number of means are applied. Some, albeit few, absolute limits are put to the employer's power, and the employer's powers cannot be used in an arbitrary manner or for improper motives. Further, responsibilities are assigned, adding to the considerations the employer has to make in his or her exercise of power. In addition, employer's are often obliged to follow certain procedural requirements in the exercise of their bureaucratic powers.

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[175] Deakin and Wilkinson (1998) p. 20.
[176] According to Deakin and Morris "the contract of employment has a dual function: while underpinning the managerial power of the employer, it also serves as a gateway to social protection for the employee." Deakin and Morris (2001) p. 128.
[177] On the regulation of supervisory hierarchies, c.f. Collins (1999) pp. 241ff.

Even though the contract between the parties (or the collective agreement giving the employment contract its actual content) plays a relatively minor role in defining the substance of the contract, it does normally provide some limits to the employee's duties. A common principle of law is that the employer cannot order employees to perform work that lays outside the employment contract or give orders which are in conflict with the express terms of the contract. Further, an employer cannot order an employee to commit criminal acts and the employee is always entitled to disobey unlawful orders. Similarly, employees are normally not obliged to obey orders that are contrary to regulations concerning public health and safety, or that would expose her to dangers relating to life or health.

Labour law also regulates the employer's disciplinary powers. It defines for what reasons employers can apply sanctions to workers, what type of sanctions are permitted and set procedural rules for their application. The employer's measures can be the object of mediation or negotiation procedures or be subjected to scrutiny in courts. In short, labour law can in these parts be described as trying to protect workers from arbitrary decisions and improper motives. The employer is to use her powers to the best interest of the company, not for other ends. It is, however, often difficult to distinguish between the abusive exercise of hierarchical powers and economically rational decisions.

Another important expression of the employer's hierarchical powers is monitoring of the worker and the work performed. The employer's control and its need and duty to keep the workplace safe and to prevent crime can, nonetheless, easily come in conflict with the worker's right to privacy. As an example, the *European Court of Human Rights* found an employer's monitoring of private phone calls from the workplace to be a violation of the right to privacy as expressed by

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Article 8 of the ECHR, at least where no prior warning of phone taps had been given.[178] Among the issues raised in this context are employer's right to use surveillance technology, and to subject employees and applicants to medical examinations, drug-testing and searches. The law in this field is fragmented and significant national differences exist. In general, it can be said that labour law does allow the employer to monitor and gather information as long as it is relevant for the performance of the work. Another issue is how an employer is allowed to use and process the collected data. Apart from general data protection legislation not specifically aimed at the labour market, there is in some countries special legislation concerning employers.[179]

As mentioned above, labour law limits the employer's bureaucratic powers in a more indirect way through assigning responsibilities that the employer have to take into consideration in the exercise of power. This type of regulation is particularly common in occupational health and safety regulation.[180] The employer is held responsible not just for the consequences of the work environment (such as injuries and damages to workers' health), but also for taking measures to prevent or limit occupational risks. The employer can also be assigned responsibilities towards injured workers, concerning rehabilitation for example. The demands put on the employer do nonetheless have to be balanced against other interests. In general, the interventions and costs have to be somewhat proportionate to the improvements sought after in the work environment. The employer's possibilities to delegate responsibility, for example to managers at a lower level, is often limited. Occupational health and safety regulations frequently put the employer's managerial powers under the scrutiny of government inspectors or of trade union or worker's representatives in different types of co-determination arrangements.

[178] *Halford v. United Kingdom* [1997] IRLR 471.
[179] An example is the UK *Access to Medical Records Act 1988* which stipulates certain procedures to be observed in order to gain access to medical reports made for employment purposes, including a chance for the worker to correct or express her views over the report.
[180] C.f. below 4.5.

Another example of labour law limiting the employer's hierarchical powers is working time regulation. The worker contracts with the employer to put a certain amount of her labour at the disposal of the employer, an amount most often expressed in time. Labour law limits the maximum number of hours that can be contracted for and puts certain limits on how they can be located in time. Commonly, statutory limits take the form of a maximum number of hours per day or week which can be worked without the employer having to increase the rate of pay. There can also be statutory caps on overtime. Collective bargaining plays an important role in determining working time and often provide both maximum hours of work, rules for overtime pay and caps on overtime. Labour law also regulates the allocation of the permitted working time through rules on breaks, minimum rest periods, night work and holidays. Within the general framework of maximum hours and minimum rest periods, the employer is usually free to allocate work. Labour law often, nonetheless, tries to ascertain the employee some influence when overtime, working hours and holidays are scheduled, mainly through supporting collective bargaining to this effect.

The employer's bureaucratic powers are also subjected to provisions granting employee representatives or trade unions rights to information and consultation. As mentioned above, the degree of control is less if decision making power is subject to collective approval. Despite the language of many of the statutes in the area – talking of 'co-determination' and 'negotiations' – in reality these are consultation procedures where the employer maintains the right to make the decisions she finds appropriate.[181] They do, however, force the employer to motivate decisions and put forward reasoned proposals. It could also be argued that the inclusion, in some countries,

[181] A partial exemption to this can be found in Swedish law, where trade unions in certain cases can veto sub-contracting and outsourcing arrangements. In cases where "the action that the employer intends to take may be deemed to violate legislative provisions or the collective bargaining agreement or […] otherwise contravene generally accepted practices within the parties' area of agreement" the trade union can stop the employer's action. *Lag (1976:580) om medbestämmande i arbetslivet § 39.*

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of workers' representatives on supervisory or executive boards of limited corporations represents a limitation of the employer's managerial powers.

2.2.3 Self-employed Workers and Subordination

The worker's subordination to the employer is, as mentioned above, a fundamental characteristic of the contract of employment, and both reinforced and reigned in by labour law. This subordination, here defined as the worker's subjection to the bureaucratic powers of the employer, expresses itself in the worker's obligation to follow orders from the employer and to abide by rules laid down by the latter. These rules can, within certain limits, be subject to unilateral change by the employer. Furthermore, the employer has the power to monitor the worker's compliance with orders and rules and to take disciplinary action against the worker.

Employees are generally subjected to a significant degree of at least one of these mechanisms of subordination. This is the case, however, also for many self-employed workers. Developments in business organisation towards new forms of governance, workers have further accentuated the similarities between employees and self-employed, giving many employees more freedom as to how they perform their work. The *Supiot report* noted the similarities between the working conditions of many employees and those of self-employed workers: "A growing number of [employees] thus work under conditions that do not differ substantially from the terms of sub-contracted self-employed workers. Management avails itself of the contractual metaphor to conceptualize this new kind of working relationship between [employees] in the same company."[182]

[182] Supiot et al (2001) p. 10.

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As mentioned above, statistics show that sales workers is an occupational group where many self-employed are found.[183] In a study of sales workers in the British and Austrian insurance industries, Muehlberger distinguishes between three kinds of sales workers: the *direct sales force*, *tied agents*, and *independent agents*.[184] While the first category consists of employees, the latter two are self-employed workers. The tied agents, who work for one insurance company only, follow business plans developed by or together with the insurance company, and are often given training and instructions on how to sell the companies products, and even on how to live up to the 'corporate culture' of the company. In addition, financial support from the insurance company can come with stringent conditions. More direct control is also exercised, for example, through checking whether the products sold are appropriate for the customers or through ensuring compliance with regulations.[185] The use of IT equipment has given increased possibilities to monitor tied agents, as the cost of doing so has decreased.[186] In addition, incentive structures put in place by the insurance companies have a profound influence on the behaviour of tied agents.[187]

Another example is franchising where the franchisor, due to the system's sensitivity to damage to the brand name, needs to control each franchisee much more carefully than in standard undertaking-to-undertaking relationships. Before taking on a new franchisee, the franchisor has to make sure that the future partner has the qualifications to represent successfully the system concept.[188] Then, the franchisor has to control how the franchisee represents the system, often through detailed instructions defining the process of producing the goods or rendering the service.[189] The need for control is further accentuated by another important characteristic of franchising – its long-term and dynamic character. The franchising agreement is generally intended to last for a long period of time and must be able to adapt to changes in the market. The

[183] C.f. above 1.2.1
[184] Muehlberger (2002) p. 9.
[185] Muehlberger (2002) p. 19.
[186] Muehlberger (2002) p. 15.
[187] Muehlberger (2002) p. 20.

franchisor therefore, has to have the possibilities to make changes in the business concept, and to impose these changes on franchisees. The development of the products or services are of course also in the interests of the franchisees, but when a conflict on the best strategy arises, it is the view of the franchisor that has to prevail while the franchisee is bound by an obligation of loyalty.[190]

Finally, self-employed workers are often subject to the same health and safety risks as employees. Self-employed workers who work on the premises of their employer, or with machinery owned by the user enterprise, have their occupational health and safety situation largely determined by decisions taken by the employer. In this respect, the difference between this group of self-employed workers and the employees most often found on the same worksite is minimal. As we will see below, this has to some extent been acknowledged in the occupational health and safety legislation.[191]

2.3 Economic Dependence

The second concern of labour law is that the worker is strongly dependent on having work. The dependence is to a large extent, but not entirely, of an economic nature. All, but a very small minority, survive through providing their labour on the labour market, or through living in a household were someone else is a breadwinner. One of the most important consequences of the liberal and industrial revolutions was the creation of a market for labour where, in theory at least, labour power was to be bought and sold on a market operating according to the logic of supply and demand, just like any other commodity.[192] This *commodification* of labour is undoubtedly one of the most debated themes of the past 150 years of political life and social science. On the one

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[188] Joerges (1991) p 21.
[189] Joerges (1991) pp. 27f.
[190] Joerges (1991) p 28.
[191] C.f. below 4.5.
[192] On how contractual relations, also concerning labour power, came to the heart of the economic and social order c.f. Weber (1978) pp. 667ff.

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hand, making labour a transferable commodity liberated workers from the bonds of feudal arrangements, increasing the possibilities of social mobility. Further, as labour became a commodity, every worker – at least in theory and to the extent that the worker was an adult male – became the owner of his own labour. As labour was the property of the worker, relationships simply subjecting workers to the power of their master were no longer tolerable, instead relationships should be characterised by the offer and payment of services.[193] On the other hand, however, "both human needs and labour became commodities and, hence, our well-being came to depend on our relation to the cash-nexus".[194] Even though the commodity form was not absent in pre-capitalist society, people "were not dependent entirely on wage-type income for their survival".[195] Today, dependence on wage-type income, or other payments tied to past, or in a few cases future, wages is the reality for all but a very few.

2.3.1 Economic Dependence and Worker Vulnerability

Workers economic dependence on performing remunerated work has important implications for the relationship between workers and employers. Labour power cannot be stored and few workers have economic margins that allow them to withdraw from the labour market if the work or working conditions offered them are unsatisfactory.[196] This was accurately described already by Adam Smith in the *Wealth of Nations*.

> It is not […] difficult to foresee which of the two parties must, upon all ordinary occasions, have the advantage in the dispute and force the other into a compliance with their terms […] Many workmen could not subsist a week, few could subsist a month and scarce any a year, without employment. In the long run, the workman may be as necessary to his master as his master is to him; but the necessity is not so immediate.[197]

[193] Simitis (2000) p. 187.
[194] Esping-Andersen (1990) p. 35.
[195] Esping-Andersen (1990) p. 38.
[196] Deakin and Wilkinson (1998) p. 15.
[197] Adam Smith, *Wealth of Nations*, Penguin 1986, p. 169, cited in Deakin and Wilkinson (1998) p. 15.

Workers are thus generally more vulnerable to the opportunism of the employer than *vice-versa*. A threat to terminate the contract if the relationship is unsatisfactory is in most situations more credible and effective for the employer than for the worker. The threat to terminate the contract is particularly credible if the worker has invested in firm-specific skills and the employer can afford to be insensitive to the effects the termination will have on her reputation as an employer.[198]

But the importance, and thus dependence, of work for the individual goes beyond being a crucial source of income. Work, often referred to as what a person 'does', determines her position in society far beyond economic wealth. Stråth, in a discussion of the non-economic consequences of employment flexibility, points out that "[w]ork can be seen as a social phenomenon that takes on essential and primordial proportions to the extent that it defines the very essence of the human being."[199] 'Work' creates identities and is ripe with positive connotations. "Work is one of the most important constituents in the construction of meaning and community. Work is a key element in the demarcation of *us* and *them*. Work signifies diligence, industry and prosperity, yes even joy and satisfaction."[200] At times, 'work' has come to take almost religious proportions.[201] At the same time, however, 'work' comes with negative connotations. "Work is tantamount to pain, drudgery, sweat and hardship. Work as exploitation was at the core of the identity that formed the working class. It was something to be emancipated from."[202] Those negative connotations can nonetheless, particularly in times of high unemployment, be outweighed by more urgent considerations. "The negative connotation of not having a job naturally overshadows the many negative elements of those jobs that still exist."[203]

198 Williamson (1985) p. 261.
199 Stråth (2000) p. 68.
200 Stråth (2000) p. 66.
201 Bo Stråth speaks of the "deification of labour as a modern religion of existential dimensions". Stråth (2000) p. 78.
202 Stråth (2000) p. 66.

Worker's dependence on having work creates a vulnerability *vis-à-vis* the employer which can make it difficult for the workers to enjoy and exercise certain human rights. Rather than running the risk of loosing their job, workers tolerate the violation. Inequalities in bargaining power between workers and employers, between labour and capital, is also a prime concern from a social justice point of view as remunerated work is the most important system for distribution of wealth in contemporary society. The negative effects of *de facto monopsony* on economic efficiency have been explained above.

2.3.2 Labour Law and Economic Dependence

Like in the case of subordination, labour law does not try to eliminate economic dependence as such.[204] Instead, regulation is used to limit its negative consequences, or to impose a principle for the distribution of the negative consequences. Key roles in this are played by dismissal protection regulation and by collective labour law, in particular the right to strike and collective bargaining. In addition, labour law tries to keep wages on certain levels – and make sure they are paid in full and on time – and that there are possibilities to take time off from work.

Labour law regulates under what circumstances an employer may terminate a contract with an employee. In the words of the *ILO Termination of Employment Convention*, "the employment of a worker should not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service".[205] In western Europe, the idea that employees have a right not to have their employment contracts terminated without a valid reason stands out as a

[203] Stråth (2000) p. 99.
[204] The partial de-commodification of labour is more a task for social security law, through unemployment benefits, sickness benefits and pensions.
[205] *ILO Convention 158 Termination of Employment Convention 1982, Article 4.*

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principle of law so "manifest and clear" that it is "beyond question".[206] In countries following the just-cause doctrine, dismissal protection regulation tends to differentiate between different types of dismissals. Dismissals for reasons related to a particular employee are separated from dismissals related to the employer's manpower requirements in general.[207] The first type can be further divided into *discriminatory dismissals* and dismissals related to the *worker's behaviour or performance*. While dismissals related to the worker's behaviour or performance, together with dismissals related to the employer's manpower requirements, belong in the current category, concerned with the worker's dependence, it will be argued, below, that the prohibitions against discriminatory dismissals belong in the category of labour law concerned with the worker as a human being.

When the reason for dismissal has to do with the worker's behaviour or performance, the responsible court, tribunal or administrative authority generally has to engage in a fault inquiry with the aim of establishing whether the incompetence, misconduct or other reason claimed by the employer is true and justifies a dismissal.[208] The interest of the employee in keeping the job is weighted against the employer's interest in dismissing her.

Dismissals due to the employer's general manpower requirements have to do with the economic fortunes or business strategy of the company, such as downward fluctuation in demand or competitive pressure necessitating downsizing and restructuring.[209] They are often, but do not

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[206] Hepple (1997) p. 221f. In the United States, dismissal protection is regulated mainly at the state level. Generalisations should be made with great caution, but it has been said that "virtually every American jurisdiction continue to presume that an indefinite term employment contract is terminable at will by either party". (Verkerke (1995) pp. 838 f.) The employment-at-will doctrine is, nonetheless, not absolute. Apart from the limits to employer discretion found in federal and state anti-discrimination law, courts have created some common law exemptions to the at-will rule. These exemptions can be classified in three categories – the tort of wrongful discharge in violation of public policy; implied contracts not to terminate without good cause; and implied covenants to terminate only in good faith and fair dealing. Most states have adopted one or more of the three doctrines. Autor et al (2001) p 4.

[207] Writing about the UK, Collins distinguishes between three different types of dismissals, *public rights dismissals*, *disciplinary dismissals* and *economic dismissals*, where the first two has to do with the worker personally and the last with the manpower requirements of the employer. Collins (1992) pp. 52ff.

[208] Collins (1992) p. 54.

[209] In Collins terminology, this type of dismissal is referred to as *economic dismissal*. Collins (1992) p. 55.

have to be, collective in the sense that a number of workers are dismissed at the same time. In general, the employer's right to decide the scope, size and direction of the enterprise is respected, as long as the decision has been made in the interest of the enterprise. As economic dismissals are most often accepted, and the employers' business decisions not are second-guessed by courts or administrative bodies, the most important question becomes how the social costs created by the termination of the contract should be distributed.[210] Firstly, it has to be decided which employees are going to be dismissed. Secondly, how much of the cost of the termination of contract should be borne by the employer, the dismissed employee and the state respectively. The first question is commonly subject to collective agreements and negotiations but can also be subject to statutory regulation. In general, seniority is the favoured criteria for determining who is going to be laid off, protecting employees with many years of service.[211] To the second question, a number of different answers exist. In order to shift part of the social cost, for example the cost of financial support or retraining of the dismissed workers, to the employer the state can oblige her to pay severance pay or to take part, through taxes or mandatory contributions, in a compulsory pooling of social costs.[212]

Labour law acknowledges the employer's right to make decisions regarding the size and composition of the workforce, but also the fact that most employees are dependent, economically and in other ways, on their job which explains why they should not be separated from it in an arbitrary way or for reasons deemed unjust. Dismissal protection also underpins other employment rights. If workers could be fired for any reason whatsoever, it would be difficult for a worker who is dependent on her work to insists on rights, be they contractual or statutory, or resist abusive treatment. The power of dismissal has been described as the "tail

[210] Collins (1992) p. 55.
[211] On this "protection of established position", c.f. Christensen (1999).
[212] Collins (1992) p. 141.

[wagging] the whole dog of the employment relation".[213] If there is no employment protection, the employer is free to change unilaterally the terms of employment through dismissing and re-employing under new terms. Knowing that the contract can only be terminated for a just cause gives employees the possibility to exercise other rights conferred on them, without having to fear retaliatory termination of the contract by the employer. In this way, dismissal protection legislation tries to reign in the consequences the worker's dependence has on the relationship between worker and employer.

Collective labour law limits the effect of the workers' economic dependence through permitting and enabling workers to organise and to bargain and take action collectively. The workers are still dependent on performing remunerated work but their bargaining positions is strengthened by the fact that it is more difficult for the employer to play out one employee against another. In a travesty of Adam Smith, the workmen are made 'as necessary to the employer as the employer is to them'. Workers' collective action has three essential components: the right to organise, the right to strike or take other forms of industrial action, and the right to bargain collectively. The right to organise belongs to the category of labour law concerned with the worker as a human being and will, therefore, be dealt with in the next section.

The right to strike gives workers the possibility to withdraw temporarily their labour from the employer in order to seek collectively a better offer from the employer, thus overcoming one of the negative aspects of their dependence.[214] Betten, in a study of the right to strike in Community Law, spells out the connection between collective action and worker dependence.

> Ever since the time that workers have been employed, there have been strikes. As long as recognition was lacking that workers had certain rights and not just the obligation to work under conditions set unilaterally by the employer, the reaction to a strike action was simple: the employer

[213] Collins (1992) p. 270.

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> considered the employment contract to be terminated because of its being violated by the employee and the worker lost his job. In times when social security, unemployment benefit, etc. were non-existent, no job meant no money, and no money meant no food, no heating, no clothes for workers and their families. However justified a strike was felt to be by the workers, the consequences were hard to bear. Yet, strikes did occur and the awareness grew that the only way for workers to avoid these consequences, in other words, to bring pressures to bear on employers successfully was to act collectively and to ensure the solidarity of other workers, so that the latter would not go on working or take over the jobs of workers on strike. Only if work was completely stopped and if there was no possibility of replacing workers on strike, would the employer be affected severely by a strike; he would not be able to fulfil contracts with clients, nor would it be possible to make profits. These consequences were thought to make the employer willing to meet, or at least to negotiate, the demands of workers.[215]

In this category of labour law we also find regulation of the remuneration paid to the worker. Labour law tries to regulate basic rates of pay in order to ensure that employees receive a certain minimum level of income in return for their labour. This is done either directly by minimum wage legislation, or indirectly through labour law supporting a system of wage setting through collective bargaining. Minimum wage legislation typically delegates to the government or a government agency to set the minimum wage level. The minimum wage is generally applicable, but normally with exceptions made for younger workers and apprentices. Violation of the minimum wage often carries a penalty that goes beyond the due wages. In this context, we must also mention wage protection legislation ensuring that the worker is paid in full and on a regular basis. Examples of such employee protection are regulations forbidding the employer to make deductions from the worker's remuneration except for in cases provided for by law, and the right for the employee to withhold her labour until wages due have been paid. Provisions concerning annual leave can be seen both as a regulation aimed at the worker's remuneration and as an

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[214] Apart from the full withdrawal of labour power which constitutes a strike, in some countries there exists the possibility of applying less severe measures such as work-to-rule or a prohibition on overtime.
[215] Betten (1985) pp. 130f.

expression of the negative connotation of labour, as something to be liberated from, mentioned above.[216] The extent of paid vacations are often tied to seniority, either through statutory provisions or as part of collective agreements.

2.3.3 Economic Dependence and Self-employed Workers

Even though economic dependence, as will be shown below, ranks as one of the most important characteristics of employees, dependence is not limited to employees. In fact, any worker who makes a living through performing remunerated work and who draws all or the bulk of her income from one employer can be considered economically dependent. Economically dependent self-employed workers are far from uncommon, in particular among those selling labour only services. Italian statistics concerning *lavoratori parasubordinati*, a category of formally self-employed workers, showed that 91 percent of those parasubordinati who were not members of the liberal professions worked for only one employer and an additional 7 percent for only two different employers.[217]

Self-employed workers who form part of distribution networks can also be economically dependent, despite the fact that they have many different clients or serve a large number of consumers. Often, they are tied by exclusivity clauses to sell only the products of one single distributor, making them dependent on the continuation of that relationship. Non-competition clauses, where present, add to their dependence and vulnerability. An example, represented in the case law on the concept of employee in several different countries, are gas-station tenants.[218] A further example concerns franchisees who have signed exclusivity clauses granting them the right to distribute the franchisors goods or services within a defined geografic area. In the already cited study of insurance agents by Muehlberger, the tied agents, whom she also refers to as "dependent

[216] Here, legislation concerning sick pay and parental leave are seen as a part of social security, falling outside the scope of this study.
[217] Borgarello and Cornaglia (2002) pp. 23f. C.f. also below 4.3.2.

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self-employment", are distinguished from independent agents by their dependency on the insurance company. Tied agents work for one insurance company only and are, despite their formal self-employment, organisationally tied to the company.[219]

2.4 Human Being

The third and last concern of labour law needs less of elaborate explanations: workers are human beings. That human beings remain human also when they come to work has already been mentioned in the context of human rights justifications for labour law. Workers remain human beings also in a less philosophical sense: toxic substances and other physical hazards are as dangerous to human beings at work as outside of work. What distinguishes this concern from the other two (subordination and economic dependence) is that it exists regardless of the character of the workers relationship to the principal. Hazards to dignity and health are present also in situations where the worker is neither under the control of the employer nor dependent on having work.

Anti-discrimination law prohibits discrimination in employment on accounts such as race, colour, sex, sexual orientation, national origin, religion, disability or age and can be described as an expression of the principle that 'like should be treated alike'. The problem is the difference in treatment between members of the protected group and the reference group.

> What an equal-treatment prescription, or a prohibition against discrimination, amounts to is that the group which was the object of differential treatment in an unfavourable sense shall be treated in the same manner as the group already covered by the norm, or at least not worse. […] Rules on non-discrimination are always based on a comparison between the reference group and the protected group. A prohibition against discrimination does not set up any independent norms as to how

[218] For example, see the Swedish case AD 1969 nr 31 and the French case Soc. 28 nov, 1984, Bull. civ. V no 461.
[219] Muehlberger (2002) pp. 16f.

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> certain groups are to be treated; it always refers, in some way, to the norms that apply to the reference group.[220]

Large parts of anti-discrimination law deals with the entering into or termination of employment contracts. Labour law leaves the worker free to choose her employer, and employers are generally permitted an important degree of freedom in deciding who to hire. Anti-discrimination law, however, stipulates that "a party should *not* be free to refuse to enter into contracts on certain grounds."[221] Anti-discrimination law effectively limits an employer's right to choose whom to employ in the sense that the choice cannot be based on certain criteria. In countries following the just cause-doctrine, discriminatory grounds can never constitute just cause for dismissal.[222] In the case of other reasons for dismissal pertaining to the employee personally, such as productivity, occupational qualifications or disciplinary problems, an inquiry focused on the weight of the interests of the employer and the employee is made to decide whether the dismissal is justified. In the case of discriminatory dismissals, no weighing of interests is necessary. In the words of Collins, describing UK law on what he refers to as *public rights dismissals,* "[t]he fault of the employer in detracting from such public rights warrants the award of a remedy without any further need to balance the competing interests."[223] The detailed nature of the relation between the employer and the employee is of no interest, it is the discriminatory treatment as such that the lawmaker tries to prevent. Such discriminatory treatment can occur also in situations where the worker is not economically dependent on getting the job or contract: it is the refusal as such which constitutes the offence.

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[220] Christensen (2001) p. 32.
[221] Atiyah (1995) p. 22.
[222] In the United States, anti-discrimination statutes constitute the most important exceptions of the employment-at-will doctrine, covering race, sex, age and in some states further grounds. The courts' interpretation of *Title VII of the Civil Rights Act of 1964* have only left a very narrow possibility for employers to defend discrimination due to sex or race in hiring on business grounds, as a *bona fide occupational qualification.42 U.S.C. §§ 2000e et seq.*. C.f. *Diaz v. Pan American World Airlines 442 F.2d 385 (5th Circ.);* and *Backus v. Baptist Medical Center 510 F.Supp 1191 (E.D. Ark).*
[223] Collins (1992) p. 57.

Both European and US labour law adhere to the principle of equal pay, however differently defined. Under Article 141(1) of the TEC, "[e]ach Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied", whereas the US *Equal Pay Act of 1963* is only aimed at equal pay for equal work. Employers, often together with trade unions, still have a margin of discretion to set or negotiate wages, but they cannot do it in a way that discriminates between women and men.

> The fundamental principles that govern the fixing of wages and salaries are not regulated in law and never have been; they belong within the field of free contract. However, structures entailing the differential treatment of certain groups arise in this field as well. […] The principle of equal pay does not say that men and women should have the same salaries (or wages) but that the salaries of men and women shall be established according to the same norm, namely in relation to the work carried out.[224]

Obviously, the risk that employers will not always apply the same norm to men's and women's remuneration can be present regardless of whether the worker is under the control of the employer or in a state of dependence or not, which is why it can be argued that the concern of equal pay regulation is the human dignity of the men and women performing work. The problem in all these cases is the difference in treatment between members of the protected group and the reference group, a problem which is unrelated to the nature of the relationship between the worker and the employer.

Discrimination of disabled people is a problem slightly different from other types of discrimination. The fact that the protected group, disabled people, frequently have a lower working capacity than the reference group means that discrimination against the disabled normally can be motivated on rational grounds. Disability discrimination law, therefore, aims at accomplishing "equal treatment in equal situations and unequal treatment in unequal

[224] Christensen (2001) p. 33.

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situations".[225] If the disabled person is not equally able to perform the work as a non-disabled candidate, the employer is free to select the latter for employment or promotion. Disability discrimination law might, however, require the employer to make "reasonable adjustments" of the working environment or working procedure in order to give the disabled worker a chance to compete.[226]

Another issue of human dignity is the right not to be subjected to harassment in the workplace. The European framework directive on the equal treatment in employment defines harassment as "unwanted conduct […] with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment."[227] The US Supreme Court, in a 1986 decision, held that sexual harassment is present when "discrimination based on sex has created a hostile or abusive work environment" that is "sufficiently severe or pervasive to alter the conditions of the victim's employment[.]"[228] Even though litigated harassment cases often deal with situations where an employer or an employee in a supervisory position has abused his or her powers over the employee-victim, sexual harassment can also take place between equal parties, for example, two workers on the same worksite. The problem which the law on sexual harassment address is thus not limited to situations where there is a certain degree of control from the employer over the victim or where the victim is in a state of dependence. Even though sexual harassment is more likely to occur in a situation where a worker is subjected to the bureaucratic powers of someone else, or economically dependent, it can occur when power is only wielded casually, or even between equal parties, as well.

Apart from discrimination due to personal factors such as sex, race, religion, sexual orientation, disability or age, labour law also tries to prevent discrimination due to political beliefs, the

[225] Inghammar (2001) p. 327.
[226] Inghammar (2001) p. 331 and p. 337.
[227] *Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation,* Art. 2(3).

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exercise of free speech or trade union membership. The right to organise is recognised in international human rights instruments as well as in national law. Unlike the more general freedom of association which applies towards governments, the right to organise applies between private subjects as well. Among the international instruments with right to organise provisions we find the *European Convention of Human Rights* (ECHR) and the ILO 1949 *Right to Organise and Collective Bargaining Convention.* Under the ECHR, Article 11 "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests." The right to organise straddles the divide between labour law concerned with the worker's dependence and labour law concerned with the worker as a human being performing work personally. Trade unions do not just fill a function in industrial relations but also have important political functions, which explains why the right to organise not can be seen just as a means of strengthening workers vis-à-vis the employer's bureaucratic and economic powers. The concern of regulations permitting and protecting trade union membership is also to uphold the right of association in general. Protection from discrimination, in particular dismissals, due to trade union membership, therefore, falls into the category of labour law concerned with the worker as a human being, rather than the economic dependence category. The practical translation of the right to organise has been bans on anti-union discrimination, i.e. actions taken to prevent or discourage workers from trade union membership or from actively participating in trade union activities.[229] The ILO *Right to Organise and Collective Bargaining Convention* stipulates that workers should enjoy "adequate protection against acts of anti-union discrimination in respect to their employment […] particularly in respect of acts calculated to (a) make the employment of a worker subject to the condition that he shall not join a union or shall

[228] *Meritor Savings Bank v. Vinson 477 U.S. 57.*
[229] Regulation concerning of internal affairs of trade unions, existing e.g. in France, the UK and the US has been left outside of this study.

relinquish trade union membership; (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because participation in union activities […].”[230]

Another way in which labour law tries to protect the political rights of workers is through restrictions in dismissals due to the employees political beliefs or activity or exercise of free speech. A controversial issue is to what extent workers enjoy freedom of speech in matters that directly concern their employer's business. On the one hand, contracts of employment normally come with an implicit loyalty towards the employer. On the other, there is often a strong public interest in revealing illegalities and dubious behaviour. Whistleblowing is, therefore, often protected by labour law.

Discriminatory treatment and other violations of a worker's human dignity are thus possible also in situations where the worker is not subject to the bureaucratic powers of the employer and not dependent on that specific employer to make her living. Undoubtedly, most of the discriminatory acts covered by anti-discrimination regulation require the perpetrator to possess some degree of power over the aggrieved worker. But the power can be of a temporary, casual and weak nature, significantly less substantial than the power established by the employer's hierarchical powers or the worker's dependence. Commenting on British legislation extending anti-discrimination law to all who perform work personally, Davies and Freedland looked to the purpose of the law:

> So, if a person sends away the local plummer who has been called to fix a leak because he turns out to be black, that is an unlawful act, even though the plummer has lots of clients and is not economically dependent upon the discriminator. And it is not difficult to see why it should be so.

[230] *ILO Convention (98) Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively*, *Art. 1*. This idea is echoed on the national level, e.g. in *Art. L 412-2* of the French *Code du Travail*, §8 of the Swedish *Lag (1976:580) om medbestämmande i arbetslivet* and in the US *National Labor Relations Act* (*29 U.S.C. § 158(a)*). The United States can also be used as an example of a country where trade unions, in order to fall under the protection of the law must be recognised by the employer of the workers, either voluntarily or through winning recognition by means of a certification ballot. At the times of ballots employers are entitled to speak out against unionisation of their work force and often take measures aimed at discouraging unions. There are also possibilities for employers to demand a “decertification” ballot to rid the workplace of the trade union. C.f. Gould (1993) pp. 36ff and 59f.

> The purpose of anti-discrimination laws is not simply to protect traditional employees against discrimination, but to protect the relevant group in all important areas of their life in society. [231]

Finally, parts of occupational health and safety regulation can outright forbid certain working conditions, for example, work without proper safety equipment or work with certain toxic substances. In the case of risks to health and safety arising from exposure to harmful chemical, physical and biological substances, these risks do not only arise for workers who are under an employer's control or economically dependent. The danger is present no matter how the organisational or social framework of the relationship is constructed. Examples of this kind of regulation can be taken from the European Union where a number of directives intending to avoid or keep as low as possible worker's exposure to harmful substances[232] and in some cases even goes as far as banning the production of substances considered particularly harmful.[233]

2.5 Requirements on the Personal Scope

An issue crucial to this study is what the requirements should be on a suitable personal scope for labour law. The argument here is that there are three requirements according to which each design of the personal scope of labour law must be assessed. First, it must uphold the mandatory nature of labour law. Secondly, it must be constructed as to avoid unreasonable uncertainty concerning which legal regulations are to be applied on a work relationship. Thirdly, the boundaries of labour law's field of application must be drawn as to cover all, or almost all, situations where the concerns of labour law are raised.

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[231] Davies and Freedland (2000a) p. 41.
[232] *Council Directive 80/1107/EEC on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work* C.f. also directives *82/605/EEC* (metallic lead); *83/477/EEC* (asbestos): and *78/610/EEC* (vinyl chloride monomer).
[233] C.f. *Council Directive 88/364/EEC on the protection of workers by the banning of certain specified agents and/or certain work activities.*

2.5.1 Mandatory

Labour law is, with few exceptions, mandatory. Employees cannot, at least not individually, waive legal protections. An important implication of this, which we will come across in the next chapter where the concept of employee will be explored, is the low significance afforded to the label of the contract or the parties' own intentions, when deciding whether or not a worker is an employee.

The mandatory nature of labour law can be explained both as a matter of principle and in more practical terms. As far as principles are concerned, the human rights justifications of labour law, which we have explored above, militate in favour of a mandatory personal scope for at least parts of labour law In more practical terms, the mandatory nature of labour law stems from the necessity of preventing underbidding. Possibilities to circumvent or opt-out of the law inevitably will lead to a weakening of it. If employers and workers were allowed to compete for jobs with lower wages or health and safety standards, this will not only affect them, but other workers as well. The larger the possibilities to opt-out of labour law, the more difficult it will be for labour law to protect human rights and promote social justice, as underbidding will change market conditions. Likewise, labour law's capacity as an instrument to promote economic efficiency will be reduced if a large number of workers are left outside the personal scope. This is also true, however, if some categories of workers by the design of the personal scope are left outside the realm of labour law.

The difference between a narrow and a wide personal scope is not just quantitative but qualitative as well. Labour law only covering full-time, unionised employees with permanent contracts is of a different nature from and labour law covering all who perform remunerated work personally. In the first case, the regulation offers a standard contract to a part of the labour force considered particularly valuable to the employer. In the second case, it insists on rights or immunities for all

workers, filling a different role in the distribution of wealth and power in society. Thus, the formulation of the personal scope of labour law does not only concern the fraction of the workforce found in the grey area between employee-status and genuine self-employment, but affects the functioning of the whole system of labour law. As stated in the Supiot report:

> One of the historical functions of labour law has been to ensure social cohesion. It will only be able to continue to fulfil that function if it is able to accommodate new developments in the way that work is organized in contemporary society and does not revert to covering just the situations it was originally intended to address, which are becoming less typical.[234]

In order for labour law to fulfill its regulatory objectives, it must affect the everyday behaviour of workers and employers and not just be something a worker can claim in court. To what extent this is the case is largely dependent on factors other than the legal design, such as unionisation rates and the resources and effectiveness of labour inspectorates. But the legal design of the personal scope matters nonetheless, and should preferably take a form which can be understood by workers and employers and which is difficult to manipulate.

2.5.2 Avoid Uncertainty

The importance for two parties entering into a contract to know what rules are to govern their relationship is manifest. A requirement on the design of the personal scope must, therefore, be that it provides a reasonable degree of certainty concerning the legal classification of work relationships. The demand for legal certainty does, however, easily come into conflict with the mandatory nature of labour law. A simple way to increase legal certainty would be to allow workers and employers to classify their contracts themselves, and to make that classification binding in courts and *vis-à-vis* third parties. It would, however, also be detrimental to labour law's status as mandatory regulation. Also, the more the labour market moves away from the traditional dichotomy between the paradigm dependent, subordinated employee and the

independent contractor, the more difficult it has become for labour law to offer a high degree of legal certainty. As we will see, increased legal certainty has been the aim of some reforms in recent years.

2.5.3 Relevance to the Concern Addressed by the Regulation

The final requirement on the design of the personal scope of labour law is that it must cover all, or almost all, situations where the concerns of labour law are raised. Often, this is expressed as a desire that the personal scope should be tied to the *purpose* of labour law.[235] Simplified, one can call this the personal scope's *relevance to the concern addressed by the regulation*.

If the degree of relevance is low, workers may fall outside the scope of labour law, despite being in situations where concerns should be raised about the consequences of their subordination, their economic dependence or the fact that they are human beings performing work. An example would be using subordination as a necessary criterion in the personal scope of economic dismissals legislation, thereby excluding economically dependent workers who are not also subordinated. Low relevance can, however, also have the opposite effect, making labour law over-inclusive, including workers untouched by the concern the regulation is to address. This would occur, for example, if economic dependence was used as a sufficient criteria to make employers responsible for the physical work environment of homeworkers over whom they exercise no control. If relevance is high, labour law is neither over- or under-inclusive, covering only those situations where the concern the regulation is addressing are present.

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[234] Supiot et al (2001) pp. 22f.

[235] Examples of authors making the case for a connection between the "purpose" of the regulation and the personal scope are Santoro Passarelli (1979), Maltby and Yamada (1997), Linder (1999), and Davies and Freedland (2000a).

3. THE CONCEPT OF EMPLOYEE

In this chapter, we will analyse the concept of employee as it is understood in industrialised western countries, using comparative law as our analytical tool. After an account of the historical development (3.1-3.2), the different understandings of this concept in federal US labour law and Swedish, British and French labour law will be laid out (3.3-3.6). This analysis should then allows us to draw a number of important conclusions regarding the nature of the concept of employee and how well it meets the requirements we have identified for the personal scope (3.7-3.8).

3.1 Historical Development

A key to understanding the concept of employee is awareness of how the concept developed historically. In this section, we will follow the concept of employee throughout the nineteenth century, from its early historical roots in doctrines of *master and servant* and *louage d'ouvrage*, through the convergence forced by industrialisation, to the birth of the modern concept of employee in the first half of the twentieth century. The historical developments during the twentieth century will be dealt with separately for each of the four countries considered.

The presentation of the early historical roots of the concept of employee will focus on England and France. Labour law is a branch of law where the distinction between civil law and common law generally have little or no relevance.[236] Civil law (France) and common law (England) nonetheless represent two distinct tracks of legal development towards the modern concept of employee, at least until the late nineteenth century. In addition, during the nineteenth century, the master and servant relationship in the United States was regulated essentially according to

[236] An example of this view is propounded by Alain Cottereau who holds that, due to the importance of industrial tribunals in shaping labour law in France, the differences with common law disappeared early in the history of labour law. "[F]ar removed from the kind of *légicentrisme* that had been in place in France since the Revolution and closer to a typical English kind of law as seen through continental eyes: a law constituted essentially by judicial decisions, developing on a case-by-case basis, rationalizing itself by using precedents, and appealing more to common sense and the sense of justice than to interpretation of statutory texts when it came to justifying its legislative activity." Cottereau (2000) p. 204.

Engblom, Samuel (2003), Self-employment and the personal scope of labour law : comparative lessons from France, Italy, Sweden, the United Kingdom and the United States
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centuries-old English common law doctrines.[237] Sweden does not fit neatly into the civil law category which is why a short separate account is given of the Swedish law in the late nineteenth-century.[238]

3.1.1 Master and Servant

In common law countries, the doctrinal roots of the concept of employee can be found in the pre-industrial concept of master and servant.[239] The relationship between master and servant was one of the most important in defining a person's place in society, conferring on the parties a predetermined set of rights and responsibilities. This was a status relationship belonging to the law of persons. Workers, with the exception of a small group of professional, managerial and clerical workers, did not have contracts in the sense of bilateral, reciprocal rights and obligations.[240] In eighteenth and nineteenth century England, "a large but unknown proportion (probably a majority) of working people" fell under the regime of master and servant.[241] The term 'servant', as applied by judges, magistrates and justices of the peace, was ambiguous and included more than what the term household servant is generally taken to mean nowadays.[242]

A characteristic feature of the master-servant relationship was the broad authority and control that it prescribed to the master and the position of general subservience in which it put the servant. Criminal sanctions were in force against servants who left their master, which illustrates the status rather than contract character of the master-servant relationship.

> In England, jurisdiction seems always to have regarded the employment of workers as an undertaking to obey, whatever the legal justification for this: customs and statutes of varying degrees of age, then new statutes of nineteenth century, functional justifications of good industrial

237 Orren (2000) p. 315.
238 For the argument that the Nordic countries should be treated as a separate legal family, though part of a larger civil law category, c.f. Zweigert and Kötz (1998) p. 277.
239 For a comprehensive account of the development from master-servant relationships to the modern concept of employee in the United States, c.f. Linder (1989a) pp. 45-100.
240 Deakin (1998) pp. 214f.
241 Hay (2000) p. 228.

> management, and theories of the implicit contract of obedience […]:'The servant implidedly contracts to obey the lawful and reasonable orders of his master withing the scope of the service contracted for'.[243]

Still, subordination was not decisive for the application of the master and servant regime. The principal division was not between subordinated and independent workers, but between groups of workers with different social rank and status. Workers in putting-out systems and artisanal homeworkers were included among servants, and magistrates had disciplinary powers – for example criminal sanctions for workers leaving their work – over 'servants' and 'labourers' but not over higher status worker.[244] Neither was subordination decisive when the master and servant doctrine, in the mid-nineteenth century, was first applied to the new industrial employment. Instead, British courts used the notion of 'exclusive service' under which a servant could only have one master and, as a consequence, workers with several employers did not qualify as servants.[245]

3.1.2 Louage d'ouvrage

In France, the Napoleonic *Code civil* of 1804 – and the codes that followed it in Belgium, the Netherlands, Italy, Denmark and Germany – placed contracts for work in the category of *contrats de louage*, leasing agreements.[246] The society coming out of revolutionary France's break with the *ancien régime* was based on *Égalité*, the formal equality of all citizens, and on *Liberté*, referring not only to political liberties but to economic liberties as well.[247] Work, which had been regulated mostly through the guilds and feudal arrangements, was to be governed by contracts entered into between equal parties. The guilds were disbanded and servitude was abolished.[248] Workers

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[242] Hay (2000) p. 230.
[243] Cottereau (2000) p. 218.
[244] Hay (2000) p. 236.
[245] Veneziani (1986) p. 60.
[246] For the developments in Italy, c.f. Santoro Passarelli (1979) pp. 29ff.
[247] Vovelle (1995) pp. 543ff.
[248] Slavery in the Antilles did, however, live on. Vovelle (1995) p. 543.

became, at least in theory, free to leave their employer, a right denied them both under the *ancien régime* and master and servant law.[249]

The *Code civil* made a distinction between two types of leasing agreements: the letting of things (*louage des choses*) and the letting of work (*louage d'ouvrage*).[250] *Louage d'ouvrage* was defined as a contract by which one of the parties undertakes to do something for the other party in exchange for a remuneration agreed between the two.[251] The leased object was the labour power of the worker, not her person. As a consequence of the principle that human beings cannot be bought and sold, labour power could only be contracted for a definite period of time or a specific task.[252] Through the law, the person and the activity was to be treated as separate objects.[253]

Louage d'ouvrage was further subdivided into three types of contracts.[254] The first of these, known as *louage de services,* (also known under its Latin name *locatio operarum)* involved the letting of *gens de travail*, workers who committed themselves to the service of someone else, a category covering domestic servants and day labourers. The second category, the letting of *voituriers,* covered workers involved in transport; whereas the final category, *louage d'ouvrage* stricto sensu, (Latin: *locatio operis faciendi*) referred to contracts under which a worker undertook to carry out a definite task for a quote or fixed price. Similar provisions where found in the civil codes of Italy, Belgium, and the Netherlands.[255]

The distinction between *louage de services* and *louage d'ouvrage* turned on whether the object of the contract was considered as work or the result of work. The subordination or independence of the

[249] Cottereau (2000) p. 208f.
[250] Revet (1992) p. 34.
[251] [U]n contrat par lequel l'une des parties s'engage à faire quelque chose pour l'autre, moyennant un prix convenu entre elles." *Code civil, Art. 1710* quoted in Revet (1992) p. 34.
[252] *Code Civil, Art. 1780.*
[253] Revet (1992) p. 31.
[254] *Code Civil, Art. 1779*. C.f. Revet (1992) p. 35; Morin (1998) P. 129; and Veneziani (1986) p. 58.
[255] Veneziani (1986) p. 58.

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worker was a secondary issue and in both cases work was being done for the account of someone else.[256] In reality, the distinction came to be one between manual and intellectual work. Subsections of the code dealing with *louage de services* referred explicitly to domestic servants and manual workers, while the services provided by the liberal professions were found to belong in the *louage d'ouvrage*-category.[257]

The differences in regulation between *louage de services* and *louage d'ouvrage*, and between these two and other leasing agreements, were nevertheless small, all belonging to the *louage*-category of contracts and subjected to the general principles of civil law.[258] The jurisdiction of the *Conseil des prud'hommes,* the local labour courts, covered all disputes between employers and workers, regardless of the nature of the contract between the two.[259] An important difference was nonetheless that the *louage de services* did imply a submission to the employer's orders, closer to master and servant doctrines, while the *louage d'ouvrage* did not.[260] Still, to most 19th century French workers, the customs and professional regulations retained an important role in the relationship with their employers. [261] In addition, the contractual regimes of the *Code civil* were often interpreted separately for each trade or industry, and with regional differences.[262]

In Sweden – which had neither experienced any revolution nor Napoleonic conquest but was nonetheless influenced by continental doctrines – the situation in the late-nineteenth century has been described as the parallel existence of the master-servant relationship (*tjenstehjonsförhållande*), and a free contract of employment (*fritt arbetsavtal*) recognised by the courts but outside of the status relationships regulated in statutes.[263] The master-servant relationship was inspired by pre-

[256] Morin (1998) p. 129.
[257] Revet (1992) p. 36.
[258] Veneziani (1986) p. 62.
[259] Morin (1998) p. 132.
[260] Cottereau (2000) pp. 218f.
[261] Chaumette (1998) p. 80.
[262] Cottereau (2000) pp. 207f.
[263] Adlercreutz (1964) p. 8.

revolutionary continental doctrines and formed part of family law rather than contract law. The *1864 Freedom of Industry Act* (*Näringsfribetsförordningen*) included some provisions concerning contracts of employment but it was not until the last decades of the nineteenth century that the principle that contracts for employment could be based on a free contract was established. In this, continental doctrines were important establishing a distinction between *tjänstelega* and *arbetsbeting* that largely followed the *louage de services/louage d'ouvrage* difference between contracts for a certain amount of work and contracts to provide a finished product.

3.1.3 Industrialisation Forces Convergence

During the last decades of the nineteenth century, with ever increasing numbers of workers in industrial work, legal changes took place which precipitated a convergence between the law of master and servant and the civil law locatio-doctrines. The new modes of production required, on the one hand, more mobility from workers, and, on the other, a high degree of hierarchical control by the employer. "Industrialisation not only centralized and mechanized work; it also maximized the adaptation of the worker's behaviour to the demands of an efficient production process laid down in uniform rules dictated by the employer."[264] The entrepreneur's main concern was to force workers to comply with "the exigences of a production process requiring strict observance of equally strict standardized behaviour essentially determined by the use of the machines."[265]

The master-servant relationship, modelled on domestic servants, had little to do with the realities of factory work. The same was the case with the professional regulations of the old order.[266] In addition, the contract law regime of for example the *Code civil*, a system based on the presumed equality between the parties, did not hold up when it became obvious that the reality of the

[264] Simitis (2000) p. 193.
[265] Simitis (2000) p. 193.
[266] Chaumette (1998) pp. 80f.

relationship between worker and employer was of a very different kind. In England, a process of liberalisation, with reforms in 1867 and 1875, turned the master-servant relationship away from criminal sanctions and into an essentially civil matter.[267] At the same time, in France, employers and their organisations initiatied doctrinal changes that made all workers who had entered into a contract of "industrial-service" considered to have undertaken to obey the employer's orders.[268]

> From a comparative point of view, it was only then that French employment law moved closer to English law. From this point in time, the French worker once again became a kind of 'servant', an idea that was totally incompatible with the emancipation brought about by the Revolution. […] In England, on the other hand, the convergence resulted from a process of liberalization: penal sanctions for breach of contract were abolished, complementing the development towards a purely contractual justification of master servant relation.[269]

At the same time, the first modern labour law statutes came into being. "To make up for the constraints of submission, workers became the object of protective legislation and supported legal union representation."[270] As Revet points out, "the admission of the structurally unequal character of the employment relation led, inexorably, to legislative intervention" introducing a regime less unfavourable to workers.[271] What was to become labour law was, thus, born out of a rejection of both the old order and of the freedom of contract as the instrument by which the parties where to set the rules for their relationship.

The late nineteenth century did not, however, see the development of any single status, type of contract or criteria generally defining the personal scope of regulations aimed at the worker-employer relationship. In employer's liability law, the worker's subordination to the orders and control of the employer was decisive for determining whether the employer was liable for torts

[267] Steinmetz (2000) p. 279.
[268] Cottereau (2000) p. 220.
[269] Cottereau (2000) p. 220.
[270] Cottereau (2000) p. 220.

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committed by a worker, including towards other workers.[272] In the United States and the United Kingdom, this was accomplished through modified versions of the master-servant doctrines, focusing on the employer's control or right to control the worker.[273] Another example were statutes aimed at protecting worker's remuneration, in particular in case of the employer's bankruptcy or insolvency. In Sweden, the supreme court used permanency as a decisive criterion granting workers with permanent or long-term employment priority among the employer's debtors, while denying it to temporary workers.[274] In the United States, state courts adjudicating bankruptcy and insolvency laws focused not just on workers' formal subordination to the employer, but on vulnerability and economic dependence as well.[275] In 1852, a US Supreme Court decision excluded independent contractors from the personal scope of an act aimed at securing payments to workers in the building industry in the District of Columbia, because they were considered to be capable of obtaining their own securities.[276] Other regulations applied to a certain sector of industry covering all or most workers in that industry. An 1886 Swedish statute concerning responsibility for railroads assigned responsibility for industrial accidents towards all employees of the railroad, encompassing both manual and non-manual labour as well as both temporary and permanent workers.[277] Special statutes for the railroad industry were also found, for example, in the United States. [278]

Still, much of social legislation from the last decades of the nineteenth century had a personal scope largely determined in terms of social rank and status.[279] In the United Kingdom, non-

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271 "L'admission du caractère structurellement inégalitaire de la relation de travail conduit, alors, inexorablement à un interventionnisme législatif." Revet (1998) p. 41.
272 For France, c.f. Aubert-Monpeyssen (1988) p. 25.
273 Carlson (2001) p. 304.
274 Adlercreutz (1964) p. 28.
275 Linder (1989a) p. 112f.
276 *Winder v. Caldwell* 55 U.S. 434 at 445 (1852). Similar reasoning was applied in Maine and in New York. Linder (1989a) p. 111ff.
277 Adlercreutz (1964) p. 31.
278 Carlson (2001) p. 308.
279 The scope went hand in hand with legislation restricting the rights of workers, such as the *Employers and Workmen Act of 1875*. Deakin (1998) p. 216.

manual workers were excluded in such a way that workers who mixed their manual labour with any kind of trust or skill fell outside the definition. In case law, bus conductors, tram drivers, sales assistants, and hairdressers were all held to fall outside the scope of the statutes. Even in cases where the personal scope was expressly extended to cover all those employed in a certain sector – such as railways, mining and factory work – courts sometimes refused to apply the law to some categories tbereof holding that they did not belong the working class.[280]

3.1.4 The Birth of the Concept of Employee

Around the turn of the century, more coherent labour law legislation was being passed. In France, the 1898 *Industrial Accidents Act* is generally considered as the first important social legislation. It was followed by a 1907 law on the *Conseils de prud'hommes*, a 1910 pensions act, and, the same year, the first *Code du Travail*.[281] For the new legislation, the old distinctions between *louage d'ouvrage* and *louage de services* made little sense.

> [For the new organisation of work] the essential criterion was dependency and control. Both the piece-worker (a 'result-based' worker i.e. the *locator operis* or self-employed worker under the old régime) and the 'time-based' worker are dependent because they are subject to orders, control and instructions of their employer. The feature that stands out in this context is the fact that they are 'employed' and bound by a contract of employment. This was the focal point of labour law around the end of the nineteenth-century. The contract of employment defined in terms of dependency and control was used in order to define the sphere of influence[…].[282]

The *contrat du travail* came to encompass the old *louage de services* while what used to have been *louage d'ouvrage* was broken up and sometimes classified as *contrat du travail*, sometimes as work

[280] Deakin (1998) p. 216.
[281] Morin (1998) p. 133 and Veneziani (1986) p. 64.
[282] Veneziani (1986) p. 64.

similar to that of employees, and sometimes as economically independent work.[283] This development was not unique to France.[284]

> "By the early twentieth century, the Continental countries had witnessed the establishment of the contract of employment as an autonomous legal category distinct from other types of contract, such as subcontracting, self-employment and mandate. […] The new idea which pervaded the codes was the understanding of employment as a broader social phenomenon which included persons economically dependent on others, such as workers from home and self-employed."[285]

In Sweden, proposals for a law on the contract of employment from 1901, 1910 and 1911 did not go as far as to establish a general concept of employee, but were aimed at manual work, "aiming at workers in the social sense".[286] The 1910 government proposal exempted contracts for work that was not essentially manual, listing the free professions, medical doctors and artists as examples of exempted workers. The personal scope of the act was to be determined by the nature of the work, not on the employee-independent contractor distinction.[287] Two years later, the 1912 *Worker's Protection Act* (*lag om arbetarskydd*), contained a definition of 'worker' (*arbetare*) which included "all who perform work for someone else's account without being an independent contractor". In the same paragraph, 'employer' (*arbetsgivare*) was defined as someone "for whose account a worker is performing work, without any third person standing between them who in the capacity of independent contractor contracted to arrange for the performance of the work.".[288] Through the definitions, the act became applicable also towards workers other than manual workers, including foremen and those in managerial positions. The law also covered temporary workers. Exemptions were made for homeworkers and others who worked under

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283 Morin (1998) p. 133.
284 For Italy, c.f. Santoro Passarelli (1979) p. 36.
285 Veneziani (1986) pp. 67f.
286 "...dessa förslag avsåg väsentligen avtal om kroppsarbete, tog sikte på arbetare i social mening..." Adlercreutz (1964) p. 8.
287 Adlercreutz (1964) p. 8.
288 *I denna lag förstås med arbetare envar, som utför arbete för annans räkning utan att I förhållande till denne vara att anse såsom självständig företagare, och med arbetsgivare envar, för vilkens räkning arbete utföres av sådan arbetare, utan att mellan dem står någon tredje person vilken såsom självständig företagare åtagit sig att ombesörja arbetets utförande. 2§, 1912 års lag om arbetarskydd* cited in Adlercreutz (1964) p. 34.

circumstances that made it unreasonable to demand that the employer would control how the work was being performed. A similar definition, equally focused on the employee-independent contractor divide was used in the 1916 *Industrial Accident Insurance Act* (*lag om försäkring för olycksfall i arbetet*).[289] Other statutes, for example the 1919 act limiting working time (*lag om arbetstidens begränsning*), were still limited to manual workers. This was, however, done through expressively exempting foremen and others from the personal scope, a sign that the general concept of employee, in which others than manual workers were included, had established itself.[290] In the early 1930s, the term *arbetare* (worker) had generally been replaced by *arbetstagare* (employee) for legislative purposes.[291]

In the United Kingdom, the first decades of the twentieth century saw the introduction of compulsory insurance, occupational health and safety and the first minimum wage legislation. The personal scope slowly extended beyond the old notions of social rank and status, "as social legislation became more comprehensive and more egalitarian in its outlook".[292] The development was also influenced by the growing number of white collar employees and consideration that a labour law restricted to industrial workers alone was bound to be seen as class based.[293] In the *Workmen's Compensation Act of 1906*, a 'workman' was defined as "any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, is oral or in writing."[294] Old distinctions were nonetheless not done away with as statutory exclusions were made, for example, for non-manual workers with an annual salary of more than 250 GBP, and casual workers employed for work other than the employer's trade or business.[295]

[289] This act did, however, until 1926, exempt all with an income of over 5 000 kronor per year (later 9 000 kronor) from its application. Adlercreutz (1964) p. 34.
[290] Adlercreutz (1964) p. 38.
[291] Adlercreutz (1964) p. 39.
[292] Deakin (1998) p. 215.
[293] Veneziani (1986) p. 69.
[294] *Workmens' Compensation Act 1906, s. 13*, cited in Deakin (1998) p. 217.
[295] Deakin (1998) p. 217.

In health insurance legislation, similar exceptions were made, together with additional exceptions for example for married female workers.[296] Another statute which used the broad 'workman' category was the *Trade Disputes Act of 1906*, laying the foundation of the right to strike.[297]

In interpreting the concept of 'contract of service' found in the new legislation, British courts in the second and third decades of the twentieth century, came to focus their attention on the employer's control over the way in which the work was done. The same development could be seen in the United States. Important for the subsequent development of the concept of employee were the state worker's compensation statutes, enacted in the second decade of the twentieth century providing workers who got injured with compensation regardless of whether it was the employer's or a fellow worker's fault.[298] The personal scope of these statutes was commonly limited to a definition of the employment relationship that was empty or circular, leaving it to the courts to clarify the meaning of concepts such as "employee," "employer," "employment," and "in service for another". In all jurisdictions, interpretation came to be dominated by a test taken from the common law of agency, focused on the employer's physical control of the worker.[299]

According to Lord Wedderburn, "[t]he judges carried over the earlier concept of service, built from the fourteenth century upon the status and legal imagery of a pre-industrial society with agriculture and domestic labourers featuring prominently, and they used it to fill 'the empty boxes of the contract clauses' […] giving to the master powers to demand obedience that derive from the earlier relationships."[300] The result was that obedience and control came to define the concept of employee. In more recent years this view has been challenged. According to Simon Deakin,

[296] Deakin (1998) p. 217.
[297] Veneziani (1986) p. 69.
[298] Linder (1989a) p. 173ff.
[299] Linder (1989a) p. 176f. Linder criticises the tying of the personal scope of the workers compensation statute to the control test, arguing that as fault is not a criterion, control is irrelevant for the personal scope.
[300] Wedderburn (1986) p. 111.

"the control test had little to do with a pre-capitalist, personal model of employment."[301] Rather, its adoption more or less coincided with early twentieth century welfare legislation. Even though nineteenth century cases were cited as authority by the courts, control was not the principal test in deciding the status of workers in nineteenth century. Instead, 'exclusive service', whether the contract was a contract for service by the party exclusively, had been the criterion setting the limits of the *Master and Servant Act* and related statutes.[302] In Deakin's view, 'control' was not even decisive in determining vicarious liability under tort law, where cases more often focused on other parts of the employer's defence.[303] The adoption of the control test in the early twentieth century, therefore, has to be ascribed to other causes.

> A more convincing explanation is that the use of the control test was a doctrinal innovation which enabled the courts to give a restrictive interpretation to social legislation whose element of compulsion […] they found repugnant. The control test narrowed the scope of the new legislation in two ways: on the one hand it reinforced the status-based distinction between the 'labouring' and 'professional' classes, while on the other it excluded casual and seasonal workers to whom the employer made a limited commitment of continuing employment.[304]

3.2 The Modern Concept of Employee

As the historical overview has shown, in the first decades of the 20th century, the personal scope of labour law became tied to the concept of employee. In addition, the concept was also used to determine adherence to social security regimes and other types of welfare legislation. The concepts used were not always identical, with the concepts of employee used in social security often covering a slightly wider range of workers, but close enough to influence each other and in some cases eventually to converge. As a result, the distinction between, on the one hand, a broad class of employees and, on the other, self-employed workers or independent contractors became

[301] Deakin (1998) p. 218.
[302] Deakin (1998) p. 214 and 219.
[303] Deakin (1998) p. 219.
[304] Deakin (1998) p. 219.

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one of the most important distinctions, both of the labour market and of economic and social life in a broader sense.

Despite differences across countries and changes over time, a number of common features of the concept of employee can be identified. Firstly, for a worker to be an employee, she must be under a contract to perform remunerated work personally. Secondly, and crucial to the distinction between employees and independent contractors, the work must be carried out under certain conditions. Most importantly, the worker must, at least to some degree, be subjected to the employer's hierarchical powers to control the work process. In a 2002 comparative report, the *European Foundation for the Improvement of Living and Working Conditions*, it was found that in all European Union member states and Norway, "the key element in defining a dependent 'employee' is subordination. […] It is almost invariably 'legal subordination' which distinguishes between different employment relationships."[305] As will be shown below, the same is true for the United States.

Economic dependence tends to play an auxiliary role. Often, it can be used in close cases to tip the balance in favour of employee status. There are, however, also examples of economic dependence being a necessary criterion for a finding of employee status and of economic dependence, together with work performed personally, being sufficient for employee status. The first is the case in the United Kingdom when the 'mutuality of obligation' doctrine is used, while an example of the second relates to Sweden and the inclusion of dependent contractors in the concept of employee.[306]

Despite the importance of the concept of employee, statutory definitions, which exist in far from all countries, give little guidance. The concept of employee has, therefore, come to develop

[305] EIRO (2002).

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largely through case law.[307] Commonly, this has been done through the development of a *multi-factor test*, under which courts faced with classifying a worker probe into the relationship between the worker and her employer looking for circumstances that speak for or against employee status.[308] Often, the courts have a more or less set list of factors that are to be considered, laid down in case law, doctrine or preparatory works. The same factors tend to appear in one form or another in all studied countries, under different labels. Many of the factors reflect the three basic concerns of labour law identified in Chapter 2 – the worker being a human being under an obligation to perform work personally, subordinated to the bureaucratic powers of the employer, and economically dependent on performing remunerated work – while other factors have a neglibible, if any connection to the concerns of labour law.

Human Being Performing Work Personally

For a worker to be an employee she must *perform work personally*: this is a basic condition or necessary criterion for employee status in all studied countries. This should not be interpreted as meaning that the worker has to perform all the work personally. Workers working alongside helpers, assistants or family members have been found to be employees. Neither does this factor require that the contract is between the employer and a physical person as courts frequently have 'pierced the corporate veil' to find a working owner performing work personally.

Subordination

As mentioned, subordination – the worker's subjection to the bureaucratic powers of the employer orders – is one of the most important signs of employee-status. As will be shown below, subordination is a necessary criterion for employee status in three of the four countries studied here. Expressions of the notion of subordination are the right to take decisions

306 C.f. below 3.5.3 and 3.4.3.
307 As an example of a different technique, the EIRO (2002) report mentions Ireland, where a tripartite Employment Status Group drafted a code of practice on employment status.

concerning the time and place of work and the employer's power to assign the worker to new tasks within the limits of their contract. Generally, the subordination requirement is less strict for homeworkers, highly skilled workers, and others who due to the nature of their work have to be given a higher degree of freedom in the performance of their work. Courts in some countries have looked at the worker's position in the employer's organisational structure rather than at hierarchical powers, taking into account the worker's 'integration into the business of the employer', whether the worker forms an 'integral part of the employer's business', or integrated into the structure of a service or an enterprise organised by the employer.

Economic Dependence

The weight afforded the worker's *economic dependence* varies between countries, but similar factors have been used to gauge the degree of dependence. A worker working exclusively for one employer, or for a small number of employers, is likely to be an employee, while a worker who serves a considerable number of clients is likely to be an independent contractor. Another sign of economic dependence is a long duration or permanent nature of the relationship between the worker and the employer. What importance the worker's economic dependence should be granted is one of the most debated issues in the jurisprudence, doctrine and political debate concerning the concept of employee. An often proposed, and in some instances used, solution when the concept of employee has been perceived as too restrictive, has been to give greater weight to the economic dependence factors within the multi-factor test or to extend the personal scope of labour law to certain categories of economically dependent workers. A stronger emphasis on economic dependence has at times made the concept of employee of social security law somewhat wider than that of labour law. As the example of the United Kingdom will show, economic dependence factors, if used as necessary criteria, can nonetheless also serve to restrict the reach of the concept of employee by leaving out temporary and casual workers.

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[308] This technique is in wide international use, as has been reported by the International Labour Office. ILO (1997)

Other Factors

Of factors not directly linked to the three concerns of labour law, the *method of remuneration* has been one of the most commonly used to distinguish employees from independent contractors. Traditionally the difference has been that employees receive fixed salaries while independent contractors live off the profits of their undertakings.[309] In line with this employees are often referred to as ”wage-earners” while self-employed are sometimes called ”own-account workers”.[310] Payment by the hour, day or month has been a sign of employee status, while independent contractors have been paid by task or by commission. Today, courts treat the remuneration factor with great caution not affording it any decisive value. A related factor, whether the worker takes economic risks and has opportunities to make a profit from the sound management of his business, is, however, still considered indicative by many courts. In particular, the opportunity for profit appears to play a significant role in convincing courts that the worker is indeed an independent contractor. In a 1990 ILO resolution the earnings of self-employed workers were said to “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”[311].

The *ownership of tools and machinery* is another factor that traditionally has carried significant weight. If a worker invests not only her labour but also her capital in the work, this is a sign that she is an independent contractor. Since many of the new categories of self-employed are working with services directed at companies, where the need for investment in capital such as machinery or marketing is less than in manufacturing or consumer services, this factor has become less useful.

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pp. 27f.

[309] In the statistical definitions used by Eurostat the method of remuneration is decisive. *Self-employed* are ”persons who work in their own business, professional practice or farm for the purpose of earning a profit”. *Employee* is defined as ”persons who work for a public or private employer and who receive compensation in the form of wages, salaries, fees, gratuities, payment by result or payment in kind”. Eurostat (1996) p. 64.

[310] This can also be found in other languages than English. The word *salarié* in French and *löntagare* in Swedish both stem from the words for wage in the two languages.

[311] ILO (1990b) *Resolution concerning the promotion of self-employment, adopted by the International Labour Conference* , Section 3

In addition, various forms of leasing agreements for equipment between workers and their employers have made ownership a less clear cut concept. Courts have therefore become more careful in their use of this factor. Still, the worker's investment in capital has been held to constitute an important indicator of her being an independent contractor. The opposite, that a worker has made no or very small investments in capital, is generally taken as a rather weak indicator of employee status.

A third factor that often is taken into account is the *skill* of the worker, with low skills being an indication of employee status, while highly skilled workers are more likely to be independent contractors. As mentioned above, non-manual workers and professionals have historically often been left outside of the concept of employee or exempted from the personal scope of labour law through special provisions.

As mentioned, not all factors are of equal importance. While some even can be considered as necessary criteria for the existence of an employee-employer relationship, others only play a minor role. It is in the weighting of the factors that we see the greatest difference between countries (and between different concepts of employee within countries) and over time. In some cases, it has as its aim an overall assessment of the relationship between the worker and the employer, while in other cases it has a specific aim or focal point such as the degree of subordination.

Another common feature of the concept of employee across countries is that it is a mandatory concept, a consequence of the *ordre public* nature of labour law. According to the Supiot report, "no European country allows the parties to an employer-employee relationship alone to define the legal status of this relationship, since it would make labour law optional. The general principle, applied everywhere, is that ascertaining whether or not a given worker is self-employed

is contingent not upon the existence of a conventional agreement, but rather on the circumstances actually prevailing."[312] Courts and others who have to decide whether a worker is an employee look at the real relationship between the parties and disregard labels, the wording of the contract and even the expressed will of the parties. The mandatory nature of the concept of employee also has important implications for its relation to the concept of employee in other fields of law, notably social security and tax law. Tax treatment and the provisions of employment benefits are sometimes used as factors in the multi-factor tests, but have not been seen as determinative as that would be to deny labour law of its *ordre public* status.

A good summary of the general characteristics of the concept of employee, is the description of the "normal employment relationship", found in a report to the 85th session of the *International Labour Conference*:

> The normal employment relationship is based on a contract of employment (explicit or implicit, written or oral) under which a worker agrees to perform certain work for and under the authority of an employer, who in turn undertakes to provide the necessary resources, machinery, materials, tools and working premises and to pay the worker for the work performed, as well as to respect whatever obligations are laid down by law in his or her treatment of the worker. Typically, employer and worker are asymmetrically positioned against each other. The former, who bears the major ownership responsibilities and business risks, has the economic and organizational authority to decide how the business should be carried out, including the manner of labour utilization. To obtain employment in such an enterprise, the later has nothing to offer but his or her personal capacities and professional qualifications. Therefore, economic and organizational dependence has become the principal characteristic of the relationship between employers and workers.[313]

In the following four sections, accounts of the concept of employee in the United States, Sweden, the United Kingdom and France will be given (Sections 3.3-3.6). The sections also

[312] Supiot et al (2001) p. 5.
[313] ILO (1997) p. 5.

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follow the development of the personal scope of labour law in each country, focusing on the second half of the twentieth century. This is followed by a comparative analysis of the concept of employee (Section 3.7) and an attempt to answer the question whether or not the concept of employee is a suitable scope for labour law (Section 3.8).

3.3. United States

In the United States, services in exchange for money can be rendered in either of two legal forms: as an *employee* or as *self-employed*.[314] Commonly, the self-employed workers are divided in two different categories, where self-employed who are owners of unincorporated businesses[315], farmers, and ranchers are separated from *independent contractors*, the majority of self-employed workers who live off selling services in the form of labour. This distinction does not, however, have any legal relevance.[316] Almost without exceptions, the personal scope is limited to employees, without including any self-employed or independent contractors, as noted by the Dunlop Commission:

> The single most important factor in determining which workers are covered by employment and labor statutes is the way the line is drawn between employees and independent contractors. Each labor and employment law statute covers only those it defines as employees. The statutes do not protect others, notably independent contractors. [317]

A few exemptions from the rule that federal labour law only covers employees exist. Some still valid nineteenth century anti-discrimination provisions cover independent contractors, as do special provisions safeguarding the freedom of speech for government employees and contractors. A special statute on occupational health and safety in the mining industry also has a broader scope than just employees.

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[314] Public sector employment is regulated separately.
[315] In the United States working owners of incorporated business are legally employees of their own firms. Hyde (2000) p. 39.
[316] Hyde (2000) p. 39f. Prof. Hyde suggests that "[a]n independent contractor might jocularly be defined as just a self-employed individual who someone might consider an employee."
[317] Dunlop Commission (1994) p. 64.

The *New Deal*, President Franklin D. Roosevelt's program to promote economic recovery and social reforms, brought about federal protective labour legislation in the United States. During the 1930s Congress enacted the *National Labor Relations Act (NLRA),* the *Social Security Act (SSA)* and the *Fair Labor Standards Act (FLSA).* The NLRA regulated collective bargaining, the SSA sat up a pension system, and the FLSA contained provisions about minimum wage, working hours and overtime pay, and child labour. Each of the three statutes was equipped with a personal scope with the concept of employee at the centre. None, however, contained any meaningful definition of the word "employee". The NLRA's definition of "employee" did not address the issue of what an employee was and the FLSA's definition was circular, defining employee as "any individual employed by an employer". In addition to the definitions being either empty or circular, the legislative history gave little guidance for their interpretation.[318]

The definitions were given their practical meaning by a series of Supreme Court decisions in the mid-1940s. In cases concerning three key labour and social security law statutes – FLSA, NLRA, and SSA – the Court held that the traditional common law agency test, developed in the context of employers' legal responsibility to third persons for the acts of their servants, and, therefore, focused on the employer's degree of control, did not fit with the purpose of the new social legislation.[319]

In *NLRB v. Hearst Publications*, a case concerning the NLRA, the Court held that "the mischief at which the Act is aimed and the remedies it offers are not confined exclusively to 'employees' within the traditional legal distinctions separating them from 'independent contractors'". The common law test could not be "imported and made exclusively controlling, without regard to the

[318] Linder (1989a) p. 185. For exceptions from this rule, c.f. Carlson (2001) pp. 310f.
[319] *NLRB v. Hearst Publications*, 322 U.S. 111 (1944); *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947); *United States v. Silk* 331 U.S. 704 (1947); *Rutherford Food Corp. v. Mc Comb* 331 U.S. 722 (1947).

statute's purposes".[320] Independent contractors were considered to be able to suffer from the same inequality of bargaining power, being as dependent on their daily wages and unable to resist arbitrary and unfair treatment, as were employees. Therefore, if "the economic facts of the relation make it more nearly one of employment than of independent business enterprise […] those characteristics may outweigh technical legal classification for purposes unrelated to the statutes objectives and bring the relation within its protections".[321] The court argued that Congress, "[t]o eliminate the causes of labor disputes and industrial strife" had thought it necessary to create a balance of forces in certain types of economic relationships, not simply embracing "employment associations in which controversies could be limited to disputes over proper 'physical conduct in the performance of the service.'"[322] The reference to "physical conduct in the performance of the service" was an allusion to the traditional common law agency test separating *servants* from *independent contractors*. Further, the Court referred to Congress' reports on the bill recognizing that economic relationships could not be fitted "neatly into the containers designated 'employee' and 'employer'", concepts that had been developed for a different purpose, namely in connection to an employer's legal responsibility to third persons for the acts of his servants.[323]

In *Walling v. Portland Terminal Co*., a 1947 case concerning the FLSA, the Supreme Court held that "common law employee categories or employer- employee classifications under other statutes are not of controlling significance" as the Act contained its own definitions, comprehensive enough to make the Act applicable to persons and relationships outside of traditional employee and employer categories.[324] Later in the same year, in *United States v. Silk*, the Court held that the

[320] *NLRB v. Hearst Publications*, 322 U.S. 111 at 126, 127 (1944).
[321] *NLRB v. Hearst Publications*, 322 U.S. 111 at 128 (1944).
[322] *NLRB v. Hearst Publications*, 322 U.S. 111 at 128 (1944).
[323] *NLRB v. Hearst Publications*, 322 U.S. 111 at 128, 129 (1944).
[324] *Walling v. Portland Terminal Co.,* 330 U.S. 148, at 150 (1947).

concept of employee in the *Social Security Act* had to be interpreted in a broad way in order for the Act to fulfil its purpose and prevent some employers and employees from circumventing it.[325]

Instead of the common law control test, the Court favoured a test based on a number of factors where no one factor was controlling. In *Hearst* the court argued that the term employee must be understood with reference to the purpose of the act and the facts involved in the economic relationship. If the conditions of the relationship required protection, protection was to be given.[326] In *Silk*, five factors were listed – the employer's degree of control, the workers opportunities for profit or loss, investment in facilities, the permanency of the relationship and level of skill required - where "no one is controlling, nor is the list complete."[327] In *Rutherford Food Corp. v. McComb*, a case concerning the applicability of the FLSA on beef boners, the Court held that the determination of the relationship was not to depend on isolated factors but rather upon the circumstances of the whole activity and "where the work done, in its essence, follows the usual path of an employee, putting an 'independent contractor' label does not take the worker from the protection of the act".[328] In *Bartels v. Birmingham* the court stated its position as "in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service" pointing to the permanency of the relationship, the skill required, the investment in facilities for work and opportunities for profit or loss.[329]

Congress responded to the Supreme Court's decisions by amending the definitions of "employee" in the NLRA and the SSA, indicating that the traditional common law test was to be used. In the 1947 Taft-Hartley amendments to the NLRA, it was explicitly stipulated that "any

[325] *United States v. Silk* , 331 U.S. 704 at 712 (1947).
[326] *NLRB v. Hearst Publications*, 322 U.S. 111, at 129 (1944).
[327] *United States v. Silk* , 331 U.S. 704 at 713, 714, 726 (1947).
[328] *Rutherford Food Corp. v. Mc Comb* , 331 U.S. 722 at 728, 729 (1947).
[329] *Bartels v. Birmingham*, 332 U.S. 126, at 130 (1947).

individual having the status of an independent contractor" was to fall outside of the statutes definition of employee and thereby be exempted from the coverage of the act.[330] In the SSA, the term employee is nowadays defined as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee".[331] The legislative history of the amendments outlined the test preferred by Congress for deciding whether a worker was an employee or an independent contractor.

> "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages but upon the difference between what they pay for goods, materials and labor and what they receive for the end result, that is upon profits.[332]

For the FLSA, however, no such amendment was made, the old case-law continuing to be good law with regard to the FLSA. Two different tests, therefore, developed: the economic realities test used in the FLSA and the common law control test applicable to the NLRA and other labour law statutes. The difference between the tests will be examined below.

In the 1960s, a number of important non-discrimination statutes were passed.[333] In 1963, the *Equal Pay Act* (EPA) was enacted, requiring employers to pay male and female employees equal wages for equal work. One year later, due to pressures from the civil rights movement, the most important legal instrument in fighting employment discrimination, *Title VII* of the *Civil Rights Acts of 1964*, was passed. It prohibited employers, unions and employment agencies from

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330 29 U.S.C. § 152(3).
331 42 U.S.C. § 410(j)(2). Through other provisions of the same section, officers of corporations, together with some other groups of workers, such as certain delivery drivers, certain travelling salesmen, and certain homeworkers, are included in the SSA:s concept of employee.
332 House Report No. 245, 80th Congress, 1st Sess. 18 (1947), cited in Linder (1989a) p. 196.
333 Legislative efforts to protect individuals from discrimination have a long history in the United States. In 1866 and 1870, in the wake of the Civil War and the abolition of slavery, Congress passed the *Reconstruction Civil Rights Acts*. The acts provided, among other things, that all citizens regardless of colour were entitled in every state to the same right to contract as was enjoyed by white citizens, a provision potentially applicable in the employment field not only to employees. Apart form racial discrimination the acts have also been construed as to cover discrimination based on religion and national origin. Due to practical nullification by the courts, the Reconstruction Civil Rights Act was

discriminating on the bases of race, colour, religion, national origin and sex, with respect to a broad range of employment decisions, including hiring, promotions and dismissals and wages and other working conditions. In 1972, the coverage of Title VII was extended to federal and state employees. Title VII outlawed discrimination of "any individual" with respect to her "privileges of employment." Initially, and as late as 1986, courts interpreted this broad language to include a wider range of workers than just employees as understood under the common law control test.[334] Another important anti-discrimination statute, the *Age Discrimination in Employment Act of 1967* (ADEA), which contained a definition of discrimination identical to that of Title VII, was also interpreted as having personal scope allegedly wider than the common law control test. Later, however, both statutes have come to have their personal scope defined by the common law control test.[335]

3.3.1 Circular Statutory Definitions

United States labour law contains statutory definitions of the concept of employee. The definitions of the word "employee" found in the statutes does, however, give very little guidance as to the actual meaning of the word. Rather, the definitions are empty or circular. Several statutes, among them FLSA, Title VII, ADEA and ADA, define *employee* as an/any "individual employed by an employer," without providing any definition of the word *employer* useful in the context of separating employees from independent contractors.

In the case of some federal statutes, the courts have had to consider language that could be interpreted as indicating a different scope than just employees as traditionally conceived. Title VII stipulates it to be an unlawful employment practice for an employer to "fail or refuse to hire or to

more or less a dead letter, at least until the 1970s. C.f. Sullivan et al (1988) Vol II, p. 468 and Friedman and Strickler (1997) pp. 11f.

[334] *Doe v. St. Joseph's Hospital* 788 F.2d 411 (7th Cir. 1986) at 422. Maltby and Yamada reports that some courts applied the economic realities test. Maltby and Yamada (1997) p. 249.

[335] C.f. below 3.3.4.

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discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment."[336] As late as in 1986, a circuit court held that "there are no indications that 'any individual' should be read to mean only an employee of an employer."[337] The physician plaintiff in the case, therefore, only had to show that the hospital at which she had been working met the statutory definition of *employer* and that it had interfered with her employment opportunities. Later, however, the same circuit court has overruled this decision holding that "the simple fact the plaintiffs were not employees […] rendered them without the ambit of Title VII protection and precluded them from bringing discrimination actions alleging violations of the act."[338]

The *Age Discrimination in Employment Act* (ADEA) uses language equivalent to Title VII making it "unlawful for an employer […] to fail or refuse to hire any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[339] The Third Circuit, in limiting the personal scope of the ADEA to employees, reasoned that "although the Age Discrimination in Employment Act has such laudable title that might induce laymen to infer that the statute was designed to prevent *all* age discrimination against those who work for a living, its congressional purpose was far less extensive since it prohibits only some types of age discrimination."[340] According to the court, the legislative history of the statute "evinced a clear legislative intent to prohibit 'age discrimination by employers against employees and applicants for employment.'"[341] Other circuits followed the same path holding "individual" was to be interpreted as "employee."[342] For the *Equal Pay Act*, no such issue exists as the EPA definition of discrimination

336 42 U.S.C. §2000e-2.
337 *Doe v. St. Joseph's Hospital* 788 F.2d 411, at 422. (7th Cir. 1986).
338 *Alexander v. Rush North Shore Medical Center* 101 F.3d 487, at 492 (7th Cir. 1996) .
339 29 U.S.C §623(a)1.
340 *EEOC v. Zippo Manufacturing* 713 F.2d 32, at 35 (3rd Cir. 1983).
341 *EEOC v. Zippo Manufacturing* 713 F.2d 32, at 35 (3rd Cir. 1983).
342 C.f. *Garret v. Phillips Mills, Inc* 721 F.2d 979 at 980 (4th Cir. 1983). In the case, the Fourth Circuit makes references to such decisions by the Fifth and Sixth Circuits.

specifically refers to employees, stating that "[n]o employer having employees subject to any provision of this section shall discriminate […] between employees on the basis of sex by paying wages […] at a rate less than the rate at which he pays wages to employees of the opposite sex[…].[343]

The *Fair Labor Standards Act* provides similar definitions of employee and employer as other labour law statutes.[344] A difference, apart from the fact that the FLSA was not amended by Congress in the 1940s in the same way that the NLRA and SSA were, is that the statute actually contains a definition of the verb *employ*. Courts, including the Supreme Court, have at times used the inclusion of this definition as an argument to explain the different and allegedly wider concept of employee given under the FLSA. In 1992, the Supreme Court explained why case law pertaining to the FLSA is not valid in an ERISA context, despite the fact that the two statutes contain identical definitions of the word *employee*.

> The definition of employee in the FLSA evidently derives from the child labor statutes and, on its face, goes beyond its ERISA counterpart. While the FLSA, like ERISA, defines an "employee" to include "any individual employed by an employer," it defines the verb "employ" expansively to mean "suffer or permit to work." This latter definition, whose striking breadth we have previously noted, stretches the meaning of "employee" to cover some parties who might not qualify as such under a strict application of traditional agency law principles. [345]

The difference, in the eyes of the courts, between the concept of employee in the FLSA and in other labour law statutes has led to the development of two different employee-tests: the *Economic Realities Test* used in cases concerning the FLSA; and the *Common Law Control Test* used in cases concerning other labour law statutes, but also to make the distinction between employees and

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343 29 U.S.C. § 206(d). As an amendment to the FLSA, the definition of employee found in this act applies also to EPA.

344 FLSA definitions are also used by the Equal Pay Act and the Family and Medical Leave Act, which are amendments to the FLSA. In the FMLA, *[t]he terms "employ" [and] "employee" have the same meaning given such terms in subsection […] (e) and (g) of Section 203 of this title.* 29 U.S.C. §2611(3).

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independent contractors in social security and copyright law. Logically, labour law statutes that are formally amendments to the FLSA, such as the *Equal Pay Act* and the *Family and Medical Leave Act* should also fall under the economic realities test. In the case of EPA, courts have applied the economic realities test.[346] Below, the two tests and the question of what is the difference between the two, if any, will be dealt with in depth.

Apart from the limits to the personal scope provided for by the employee/independent contractor divide, labour law statutes in the United States often have additional limitations to its scope, exempting certain groups of employees from protection. Requirements that a worker must have been employed for a certain period of time or worked a certain amount of hours exclude many contingent workers from coverage. Further, workers in certain industries or activites are exempted from some labour law provisions. Even basic provisions such as the minimum wage and maximum hour requirements of the FLSA have numerous exemptions, for example for fishing, agriculture, seamen, small local newspapers, switchboard operators and certain computer programmers and software engineers.[347] The FLSA also make exemptions for certain categories of employees, regardless of which sector of the economy they are engaged in. Under the "white-collar exemption" workers who are "in a bona fide executive, administrative, or professional capacity" are exempted from the minimum wage and overtime regulations.[348] To classify for the exemption, employees have to be paid a fixed salary, i.e. a predetermined amount that may not be subject to any reduction due to the quantity or quality of work, which has to exceed a certain

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345 *Nationwide Mutual Insurance Company v. Darden* 503 U.S. 318, at 326 (1992).
346 *Brennan v. Partida* 492 F.2d 707, at 709 (5th Cir. 1974).
347 Alan Hyde refers to the Section 13 of the FLSA (29 U.S.C. §213) as "the single most revealing text in US employment law. It rolls on for pages, listing numerous employees who need not receive overtime pay or even minimum wage. The exemptions are clearly drafted by lawyers for the relevant employers. No attempt has been made to put the exemptions into uniform style, and no logic underlies them other than the political strength of relevant employer groups." Hyde (2000) p. 13, note 22.
348 29 U.S.C. § 213(a)(1).

amount. The practical implication of the exemption is that white-collar employees do not qualify for overtime pay.[349]

Other statutes, for example the NLRA[350], make exemptions for supervisors and managerial employees. Together with exemptions for members of the employer's family, this type of exemptions can be of importance for self-employed working owners of incorporated businesses. In the case of NLRA the exception does not make much difference as the working owner hardly can take part in collective bargaining with himself. The OSHA makes exemptions neither for working owners of incorporated business nor for members of their families and has been held to apply to "supervisors, plant managers, partners, stockholders, an employer's family members and even the company's vice-president and president when they are performing work for the employer."[351]

Some statutes have thresholds as to how many employees an employer must have to be covered by the legislation. Examples are Title VII and ADA, which only apply to employers with more than 15 employees,[352] ADEA with a threshold of 20 employees[353], FMLA with 50 employees threshold[354] and WARN, which applies only to employers with more than 100 employees[355]. As the thresholds are formulated in terms of number of employees, the question whether a worker is an employee or an independent contractor has the potential to be of importance also for other workers working for the same employer. If an employer runs her operations with a small number

[349] Rothstein et al (1999) Vol I, p. 403ff.
[350] The term "employee" as defined in the NLRA does not include "any individual employed as a supervisor". The term "supervisor" means "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. 152(3) and (11).
[351] Rothstein (1998) p. 14.
[352] 42 U.S.C. § 2000e(b) and 42 U.S.C. § 12111(5).
[353] 29 U.S.C. § 630(b).
[354] 29 U.S.C. § 2611(4).
[355] 29 U.S.C. § 2101.

of 'traditional' employees and a large part of the labour force is purported to consist of independent contractors, the real status of the latter will determine whether the "traditional" employees are to be covered by, for example, Title VII and ADA. This creates the possibility for cases where the status of a worker not party to the conflict has to be decided.[356]

As the statutory definitions of employee found in federal law are empty or circular, it has been the duty of the courts to work out the concept of employee, giving the judiciary considerable influence over the personal scope of labour law in the United States. Historically, two different tests, relevant for different labour law statutes, have developed to decide whether a worker is an employee or not (c.f. Section II above). The two tests are known as the *Common Law Control Test* and the *Economic Realities Test*. Arguably, courts have also used a hybrid of the two. In the case law the two tests are largely kept separate, with very few references to economic realities cases in common law control cases and vice versa. The common law control test applies to all federal statutes except the FLSA. In *Darden*, the Supreme Court relied on the FLSA's expansive definition of the word *employ* ("to suffer or permit to work") to distinguish the concept of employee in the FLSA from identically defined concepts in other statutes.[357]

3.3.2 The Common Law Control Test

The Supreme Court has held it to be a "well established" principle that where Congress uses terms that have accumulated settled meaning under the common law, "a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."[358] Thus, when Congress has used the term *employee* without defining it, the Supreme Court has concluded "that congress intended to describe the conventional master-servant

[356] C.f. *Ost v. West Suburban Travelers Limousine* 88 F.3d. 435 (7th Cir. 1996)
[357] *Nationwide Mutual Insurance Company v. Darden* 503 U.S. 318, at 326 (1992).
[358] *Community for Creative Non-violence v. Reid* 490 U.S. 730, at 739 (1989)

relationship as understood by the common-law agency doctrine."[359] Also in cases where the term *employee* is defined in the statute, but the definition gives little guidance as to how it is to be understood, the common law control test is to be used. In *Darden*, the Supreme Court found that ERISA's[360] definition of "employee" as "any individual employed by an employer" is "completely circular and explains nothing,"[361] which is why the common law test was adopted for determining who qualifies as an employee under the act.[362]

The common law of agency regulates the relationship between principals and agents. *Agents* are persons who have been authorised by another, the *principal*, to act on that person's account and under that person's control. Agents are a broad category encompassing both employees – who in the context of agency often are referred to as servants – and some independent contractors. In *Restatement (Second) of Agency*, the American Law Institute gave the following definitions of master, servant and independent contractor:[363]

> (1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.
>
> (2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.
>
> (3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent.

The distinction between servants/employees and independent contractors who are agents is of significance in cases concerning the principal's liability for torts committed by its agents towards

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[359] *Community for Creative Non-violence v. Reid* 490 U.S. 730, at 740 (1989).
[360] *Employment Retirement Income Security Act of 1974*, 29 U.S.C. § 1002(6).
[361] *Nationwide Mutual Insurance Company v. Darden* 503 U.S. 318, at 323 (1992).
[362] A variant of the common law control test is used in taxation. The Internal Revenue Service (IRS) has developed a twenty factor test which has substantial similarities with the common law control test. The twenty factors of the IRS-test were taken from court cases and from prior taxation rulings. At least one author holds that "the IRS and the courts generally apply the same test." Schwochau (1998) p. 182.
[363] Restatement (Second) of Agency (1958) § 2.

third persons. Principals are responsible for acts of servants/employees – whose physical conduct they have control over or the right to control – but not for torts committed by independent contractors – over which they lack such control. In its chapter on third person v. principal torts, the *Restatement (Second) of Agency* therefore gives a more elaborate definition of *servant* in order to distinguish servants from independent contractors, supplying a non-exhaustive list of factors to be considered:[364]

> (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.
>
> (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
>
> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with the reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is a part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> *(j)* whether the principal is or is not in business.

In 1989, the Supreme Court – citing precedent and the *Restatement (Second) of Agency*, held that "[i]n determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source

[364] Restatement (Second) of Agency (1958) § 220.

of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."[365]

Below, more elaborate descriptions of the most important factors of the common law control test are given, although they are grouped in somewhat broader categories than in the common law test. Distinguishing between the factors is not easy, but neither is it necessary as the individual factors are factors to be gauged when weighing the totality of circumstances, not mandatory requisites that have to be fulfilled.

Subordination

Under the common law control test, the typical case of an employer having *control or the right to control* the physical conduct of the alleged employee is the owner or manager of a business giving instructions as to the means and manners of work. He or she monitors the workers, and has the right to take disciplinary measures against workers who do not follow instructions. Another important part of the control of means and manner is the worker's discretion as to the location of work in time. If the employer decides the working hours, this is an indication that the worker is an employee. A mere deadline however, does not satisfy this requirement.[366]

The control can also be of a more subtle nature, with little of precise instructions. In this context, the work of professionals and highly skilled workers poses certain difficulties. A computer programmer has been considered to be under the control of the alleged employer, even though

[365] *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, at 751-752 (1989).

the work required far more skill than merely transcribing the employer's instructions. Despite being unskilled at programming, the employer was capable of directing the worker on the desired functions of the programme by giving input and programming limitations, which is why this weighed heavily in favor of finding the worker to be an employee.[367] A photographer, who took directions as to the composition of the subjects, the mood of the lighting and the emotions to be given by the images, was, however, not considered to be under the supervision of the alleged employer.[368] A physician under contract to provide emergency medical services at a hospital was considered to have "the manner in which he rendered services to his patients primarily within his own control". He had "authority to exercise his own independent discretion over the care he delivered to his patients," and was not required to admit his patients to the alleged employer hospital.[369]

The instructions do not have to come by formal authority. In a case concerning driver-distributors for a bottling company, the court found that "the record amply supports [the] conclusion that the company has the right to, and does, control the distributors' performance of their duties – not by formal authority, but by the means of suggestions which are adhered to because of the company's power to grant and revoke distributorships and to alter their value at will."[370] In a case concerning driver-salesmen selling food and beverages from a catering company, the court found that the salesmen were employees. The salesmen had been trained in the exact procedures desired by the alleged employer; drove according to a route set by the caterer; were obliged to serve only the caterer's customers and to buy all their goods from the caterer; and in reality had small possibilities to set their own prices.[371] Drivers owning their own vehicles, and under a leasing agreement putting the vehicles and their own labour at the disposal

366 *Marco v. Accent Publishing Co, Inc*. 969 F.2d 1547, at 1550 (3rd 1992).
367 *Aymes v. Bonelli*, 980 F.2d 857, at 862 (2nd Cir, 1992).
368 *Marco v. Accent Publishing Co, Inc*. 969 F.2d 1547, at 1552 (3rd Cir. 1992).
369 *Alexander v. Rush North Shore Medical Center*, 101 F.3d 487, at 493 (7th Cir. 1996).
370 *Seven-Up Bottling Co v. NLRB*, 506 F.2d 596, at 600 (1st Cir. 1974).

of a carrier company were, however, considered to be independent contractors, as they were free to reject loads for any reason; could chose the time and route; and where neither disciplined nor supervised.[372]

The control factor is in itself a broad factor consisting of sub-factors that have to be considered together. The Supreme Court has found workers who fixed their own hours of work and performed their work away from the alleged employer's offices and thus not under his direct supervision to be employees nevertheless. The workers, "debit-agents" of an insurance company, were expected to follow detailed instructions, file weekly reports, and attend weekly staff meetings. In addition, they were subjected to the alleged employer's investigations into complaints, warnings in case of poor performance and could have their contracts terminated "at any time".[373] In a case concerning musicians in an orchestra, the alleged employer, a hotel, exercised control over the type, time and location of the service produced. The workers were nonetheless held not to be employees, as the alleged employer did not appear to have the right to exert any significant authority over the manner the work was done.[374]

The Supreme Court in *Reid* listed the principal's *right to assign additional work* as a separate factor, but it could as well be considered a subcategory of control. In a case where the alleged employer had the right to and did assign other projects to the worker, the court considered it a mitigating factor that the delegation of additional projects to the worker was not inconsistent with the worker being the company's independent trouble-shooter.[375] An employer's right to require a photographer to re-shoot unsatisfactory images was considered to be merely in possession of a

[371] *NLRB v. Maine Caterers, Inc.*, 654 F.2d 131(1st Cir. 1981).
[372] *NLRB v. A. Duie Pyle, Inc.*, 606 F.2d 379, at 382-383 (3rd Cir. 1979).
[373] *NLRB v. United Insurance Co.,* 390 U.S. 254, at 257 (1968).
[374] *Hilton. Int. Co. v. NLRB*, 690 F.2d 318, at 321 (2nd Cir. 1982).
[375] *Aymes v. Bonelli*, 980 F.2d 857, at 863 (2nd Cir. 1992).

right to final approval, not a right to assign more work. The employer could not, the court stated, "for example, require [the photographer] to photograph its employee of the month."[376]

One of the boundaries of the control or right to control is towards the coordinated operations of a principal and a subcontractor. This boundary is relevant both in cases where the subcontractor as an individual is allegedly an employee and in cases concerning the employees of subcontractors, who can be considered employees of the principal. In cases concerning federal employer's liability for death and injury to workers formally employed by subcontractors, the Supreme Court has held that the coordinated operations of a subcontractor and a principal, which naturally involves the passing of information and accommodations of the activities of the two entities, is not enough to make a subcontractor, or his employees, employees of the principal.[377] If the principal exercises directive control over the individual workmen, however, employee status can be attributed.[378]

If a worker performs work that is an *integral part of the employer's regular business*, this is, according to the Court in *Reid*, evidence of the worker being an employee. As an example, the fact that a worker had been involved in producing designs for a fabric design production business was, considered evidence of the worker being an employee.[379] If the worker performs collateral tasks, for example, repairing a machine or acting as a consultant, this is a sign that the worker is an independent contractor. Courts have also looked to factors such as the workers displaying the logo or colours, or wearing the uniform, of the alleged employer, and found them to be evidence pointing in the direction of the worker being an employee.[380] Defining what is integral to the business of the employer is, however, far from easy. Whether driving is an integral part of the

376 *Marco v. Accent Publishing Co, Inc*. 969 F.2d 1547, at 1551 (3rd 1992).
377 *Kelley v. Southern Pacific Co.,* 419 U.S. 318, at 330 (1974).
378 *Baker v. Texas & Pacific* R. 359 U.S. 227, at 228-229 (1959). C.f. also dissenting opinion by Justice Douglas in *Kelley v. Southern Pacific Co.,* 419 U.S. 318 (1974).
379 *Langman Fabrics v. Graff Californiawear, Inc*., 160 F.3d 106, at 113 (2nd Cir. 1998).

business of a limousine service or trucking central, depends upon whether these are viewed as transportation companies or providers of services to limousine or truck drivers. Further, the classification of work that is vertical to the alleged employer's business, as in the case of distributors, easily comes to depend on vague ideas of the normal degree of vertical integration.[381]

Economic Dependence

Only one of the *Reid*-factors is a sign of economic dependence. If the duration of the job is short, this is considered a sign of the worker being an independent contractor rather than an employee. More permanent employment indicates the existence of an employer-employee relationship. When assessing the weight that should be given to the duration of the relationship, courts have seen the duration in the light of the overall closeness of the relationship. The fact that a photographer had for six months produced pictures for a publisher was considered only weak evidence, if any, of an employment relationship, as he had worked without a regular schedule or regular hours.[382] If the short duration of the job depends upon the closing of the worksite, not because the nature of the work or the relationship, this should not count against the worker being an employee.[383] Occasionally, courts have given consideration to more general notions of economic dependence. According to the Seventh Circuit, "financial interdependence is a factor that should be considered when determining whether an individual is an employee or independent contractor."[384] The Ninth Circuit held that the fact that a worker in the construction industry worked for 75-100 customers as an indication of independent contractor status.[385]

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[380] *Short v. Central States, Southeast & Southwest areas Pension Fund* 729 F.2d 567, at 573 (8th Cir. 1984).
[381] Carlson (2001) p. 348.
[382] *Marco v. Accent Publishing Co, Inc.* 969 F.2d 1547, at 1551 (3rd 1992).
[383] *Eisenberg v. Advance Relocation & Storage, Inc.* 237 F.3d 111, at 117 (2nd Cir. 2000).
[384] *Knight v. United Farm Bureau Mutual Insurance Co.*, 950 F.2d 377 at 381 (7th Cir. 1991). The case concerned Title VII. The Court of Appeals found that the District Court, "correctly recognized the use of the 'economic realities' test which involves the application of the general principles of agency to the facts". The Court of Appeals did, however, also hold that *Donovan v. DialAmerica* was not relevant in the case, as it concerned FLSA where the definition of "employee" is given a broader meaning.
[385] *Associated Independent Owner-Operators, Inc v. NLRB*, 407 F.2d 1383, at 1386 (9th Cir. 1969).

Other Factors

Traditionally, employees have been perceived as wage earners, being paid a fixed amount per hour, day or month. Although the exceptions from this rule have been numerous, with many employees receiving pay based on a task rate and many independent contractors charging hourly rates, the *type of remuneration* does nonetheless play a role in determining whether a worker is an employee or an independent contractor. If the remuneration, apart from the labour of the worker, also is to cover the use of valuable equipment and if the worker is to pay his own expenses from the received remuneration, this is evidence of the worker being an independent contractor. This is true also in cases where workers are paid on an hourly basis.[386] In a case concerning caterers the court also considered the workers' risk of loss and opportunity for profit as an indication of independent contractor status.[387] On the employer's side, the fact that the alleged employer had a direct financial stake, 60 percent of gross fares, in the amounts collected by the workers was considered a sign that the workers where in fact employees.[388]

Further, the *ownership of tools, machinery or premises for work*, the fact that the work is performed with the tools or machinery, or on premises owned by the alleged employer for the activity in question, is considered evidence of the worker being an employee. That workers own their own heavy equipment, such as tractors and trucks, or are paying the rental costs for the equipment, has been considered indicia that they are independent contractors.[389]

If a high *level of skill* is required to perform the job, this is considered a sign that the worker is an independent contractor rather than an employee. Computer programmers, photographers, artists and architects have been held to independent contractors at least partly built on the fact that they

386 *Associated Independent Owner-Operators, Inc v. NLRB*, 407 F.2d 1383, at 1386 (9th Cir. 1969).
387 *NLRB v. Maine Caterers, Inc.* 654 F.2d 131, at 134 (1st Cir. 1981).
388 *NLRB v. O'Hare-Midway Limousine Service*, 924 F.2d 692, at 695 (7th Cir. 1991).
389 *Associated Independent Owner-Operators, Inc v. NLRB*, 407 F.2d 1383, at 1385 (9th Cir. 1969) and *NLRB v. Maine Caterers, Inc.* 654 F.2d 131, at 134 (1st Cir. 1981).

are highly skilled.[390] Being highly skilled does nevertheless not necessarily rule out the possibility of being deemed an employee. Already in the Restatement, the authors indicated the degree of skill required was more indicative in situations where the worker was hired for a short time, and that highly skilled workers who were in an occupation ordinarily considered as incidental to the employer's business would normally be considered employees.[391]

If the employer *withholds taxes and pays benefits*, such as disability insurance, worker's compensation or medical insurance, this will count in favour of the worker being an employee. The importance of this factor is contested. In some cases it has been considered very important, in particular if the alleged employer, by paying or not paying taxes and benefits, has indicated a status other than the status claimed by the alleged employer in court.[392] In other cases, concerns have been raised that according extra weight to this factor could render the employee-independent contractor divide dispositive. "Were […] benefits and tax treatment factors accorded extra weight […] a firm and its workers could all but agree for themselves, simply by adjusting the structure of worker's compensation packages, whether the workers will be regarded as independent contractors or employees."[393]

The Supreme Court in *Reid* points out that its list of factors is non-exhaustive. Courts have, therefore, come to take a multitude of factors, some enumerated by the Supreme Court and some not, into account. Examples of such factors are whether the worker is operating under licenses and permits held by the alleged employer[394], and the intent of the parties as to what kind or relationship they wished to create. Even though it should not be possible to contract out of

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390 *Aymes v. Bonelli*, 980 F.2d 857, at 862 (2nd Cir. 1992); *Marco v. Accent Publishing Co, Inc.* 969 F.2d 1547, at 1551 (3rd 1992).

391 Restatement (Second) of Agency (1958) §220, Comment (i).

392 In a case where the employer had not offered any employment benefits and not paid the worker's payroll taxes, this counted against the employer when the employer later, for purposes of copyright, claimed that the worker was an employee. A corporation "should not in one context be able to claim that [the worker] was independent and later deny him that status" the court held. *Aymes v. Bonelli,* 980 F.2d 857, at 862 (2nd Cir. 1992).

393 *Eisenberg v. Advance Relocation & Storage, Inc.* 237 F.3d 111, at 116 (2nd Cir. 2000).

labour and employment law, courts have accorded the intent of the parties some, even significant, value, in cases where the original intention of the parties was very clear.[395]

Method for Weighting the Factors

There is little doubt that the control factor dominates the common law test of employee. The other factors can tip the balance in close cases, but it is highly unlikely that any court in the United States would find control or right to control to be lacking but yet find the worker to be an employee based on the other factors.[396] In *Reid*, the Supreme Court keeps "the hiring party's right to control the manner and means by which the product is accomplished," separate from "other factors relevant" to the inquiry, implying that a greater emphasis should be put on the right-to-control factor than on the other factors. At the end of its enumeration of factors that "among others" are relevant, the Supreme Court adds that "none of these factors is determinative."[397]

Lower level courts confirm the importance of the control-factor. Circuit courts seem always to consider the control-factor, whereas the other factors are more or less optional. The Second Circuit has held that some factors will often have little or no significance, while other factors will be significant in virtually every situation and, therefore, be given more weight. In the latter category of factors, the Second Circuit finds the hiring party's right to control the manner and means of work; the skill required; the provision of employee benefits; the tax treatment of the hired party; and whether the hiring party has the right to assign additional projects to the hired party.[398] The same circuit has later held that not all the factors outlined in *Reid* will be significant in every case. Only those factors that are actually indicative should be considered – not factors

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394 *Short v. Central States, Southeast & Southwest areas Pension Fund* 729 F.2d 567, at 573 (8th Cir. 1984).
395 *Mangram v. General Motors Corporation*, 108 F.3d 61, at 63 (4th Cir. 1997).
396 Larson, in his treatise on workers' compensation law comments the relative weight of the factors of the common law control test: "On only one point as to the relative weight of the various tests is there an accepted rule of law: It is constantly said that the right to control the details of the work is the primary test." Larson and Larson (2000) §60.03.
397 *Community for Creative Non-violence v. Reid*, 490 U.S. 730, at 751-752 (1989).
398 *Aymes v. Bonelli* 980 F.2d 857, at 861 (2nd Cir. 1992).

that do not meaningfully support one or other conclusion.[399] Other circuits may have different views concerning which of the other factors are more important, but would most likely agree that the control-factor stands out.[400]

The degree of control has to be seen in the light of the work itself and the industry in which it is performed. That an emergency room physician had to comply with detailed hospital regulations in carrying out his services was not considered a reliable indicator of whether the physician was an employee or an independent contractor. Professional standards and responsibility, shared between the physician and the hospital, required the hospital to keep appropriate records and follow established procedures. In the case, the Fourth Circuit went as far as to outline a set of factors to be used for medical doctors.[401]

An important issue is whether the weight given to the different factors varies depending on which regulation is before the court. Is there only one common law control test, or are there several? Most importantly, does the purpose of the statute at hand influence the weighting of the factors? A strong indication that the statute at hand and its purpose is of no, or only limited, importance is the fact that the leading Supreme Court case, *Reid*, is a copyright case. Copyright cases differ from labour law cases in that it is the employer who claims that the worker is an

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399 *Eisenberg v. Advance Relocation & Storage, Inc.* 237 F.3d 111, at 114 (2nd Cir. 2000).

400 In *Aymes*, the Second Circuit supplies a list of examples how other courts have considered only some of the *Reid* factors ignoring others. *Aymes v. Bonelli* 980 F.2d 857, at 861 (2nd Cir. 1992).

401 "[W]e think it relevant to consider the following factors in determining whether a doctor, performing emergency room services at a hospital, is an employee or an independent contractor: (1) the control of when the doctor works, how many hours he works, and the administrative details incidental to his work; (2) the source of instrumentalities of the doctor's work; (3) the duration of the relationship between the parties; (4) whether the hiring party has the right to assign additional work to the doctor or to preclude the doctor from working at other facilities or for competitors; (5) the method of payment; (6) the doctor's role in hiring an paying assistants; (7) whether the work is part of the regular business of the hiring party and how it is customarily discharged; (8) the provision of pension benefits and other employee benefits; (9) the tax treatment of the doctor's income; and (10) whether the parties believe they have created an employment relationship or an independent contractors relationship." *Cilecek v. Inova Health System Services*, 115 F.3d 256, at 261 (4th Cir. 1997).

employee, and the worker who claims to be an independent contractor.[402] *Reid* has, nevertheless, subsequently been cited by the Supreme Court itself in a case concerning employee pension benefits[403] and by other courts in cases concerning Title VII[404] and ADA and ADEA[405]. This can be seen as an indication that there is a uniform common law control test that is to be applied regardless of the purpose of the regulation for which it defines the personal scope. Several scholars have taken this position. According to Richard R. Carlson, in *Darden* "the question of statutory purpose [came] squarely before the court," a question the court answered in the negative.[406] Similarly, Marc Linder has criticised the courts for the "simulated statutory purposelessness" with which they treat labour law statutes.[407]

In *Eisenberg*, a 2000 Title VII-case, the Second Circuit nevertheless argued for weighing the factors differently in copyright cases and in cases where the statute in question holds a protective purpose and is of a mandatory nature. "While the rights to intellectual property can depend on contractual terms, the right to be treated in a non-discriminatory manner does not depend on the terms of any particular contract. Rather, these "public law" rights were vested in workers as a class by Congress, and they are not subject to waiver or sale by individuals."[408] In particular the employee benefits and tax treatment were to be seen in a different light. "Were […] benefits and tax treatment factors accorded extra weight […] a firm and its workers could all but agree for themselves, simply by adjusting the structure of worker's compensation packages, whether the

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[402] The common law control test has nonetheless been criticised for not providing a "good fit" in the copyright context, and not being in line with the legislators' intention of a bright line between situations where the principal owns the copyright and where the worker does. *Dumas v. Gommerman*, 865 F.2d 1093, at 1104 (9th Cir. 1989).
[403] *Nationwide Mutual Insurance Company v. Darden* 503 U.S. 318 (1992).
[404] *Cilecek v. Inova Health System Services*, 115 F.3d 256 (4th Cir. 1997) and *Eisenberg v. Advance Relocation & Storage, Inc.* 237 F.3d 111 (2nd Cir. 2000).
[405] *Metropolitan Pilots Association v. Schlosberg*, 151 F.Supp2d 511, at 519 (D. New Jersey, 2001).
[406] Carlson (2001) p. 331.
[407] Linder (1999) p. 187.
[408] *Eisenberg v. Advance Relocation & Storage, Inc.* 237 F.3d 111, at 116 (2nd Cir. 2000).

workers will be regarded as independent contractors or employees."[409] According to the court, such agreements were more acceptable in the case of copyright than under civil rights legislation.

3.3.3 Economic Realities Test

The Economic Realities Test has its origins in the Supreme Court's *Hearst*, *Walling, Silk* and *Rutherford* decisions from the mid 1940s.[410] In particular, the five factors listed in *Silk* – the employer's degree of control; the worker's opportunities for profit or loss; investment in facilities; the permanency of the relationship; and the level of skill required – have come to be of great importance in subsequent case law. As indicated by the *Silk* court, however, the list is not to be considered exhaustive, which is why other factors also have come to weigh in. "Since the test concerns the totality of the circumstances, any relevant evidence may be considered, and mechanical application of the test is to be avoided."[411] Some circuits have devised different versions of the tests, with the same focus but with an additional factor – whether the work performed by the worker is an integral part of the operation of the employer or not.[412]

The list of factors used for the economic realities is to a large extent the same as the that of the common law control test. In *Table 3.3.2* the main factors of the common law control test and the economic realities test, as expressed in *Reid* and *Silk* respectively, are summarised. Six factors – control, skill, permanency, capital investment, type of remuneration and the work being an integral part of the employer's operations – are present in both test. In addition, the last four factors of the common law control test as expressed in *Reid* have all to some extent been used also in cases under the economic realities test.

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[409] *Eisenberg v. Advance Relocation & Storage, Inc.* 237 F.3d 111, at 116 (2nd Cir. 2000).
[410] *NLRB v. Hearst Publications*, 322 U.S. 111 (1944); *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947); *United States v. Silk* 331 U.S. 704 (1947); and *Rutherford Food Corp. v. Mc Comb* 331 U.S. 722 (1947).
[411] *Brock v. Superior Care, Inc.* 840 F.2d 1054, at 1059. (2nd Cir. 1988)

Table 3.3.2 Main Factors of the Common Law and Economic Realities Tests

	Common Law Test As expressed in *Reid*	**Economic Realities Test** As expressed in *Silk**
1. Control	Hiring party's right to control the means and manners by which the product is accomplished	Employer's degree of control
	Right to assign additional projects to the hired party	
	The extent of the hired party's discretion over when and how long to work	
2. Level of Skill	Skill required	Level of skill required
3. Permanency	Duration of the relationship between the parties	Permanency of the relation
4. Capital Investment	Source of instrumentalities and tools	Investment in facilities
	Location of the work	
5. Type of Remuneration	Method of payment	Worker's opportunities for profit or loss
6. Integral Part of Employer's Operations	Whether the work is part of the regular business of the hiring party	Integral part of employer's operations*
7. Payment of Taxes and Benefits	The provision of employment benefits	
	The tax treatment of the hired party	
8. Other	The hired party's role in hiring and paying assistants	
	Whether the hiring party is in business	

**The integral part of operations factor was not listed in Silk, but has been added later by other courts.*

The factors also seem to have largely the same meaning. Under both tests, the control-factor has been considered satisfied not just by the traditional exercise of employer's prerogatives but also through other, less formal, limits to the worker's options as to the means and manners of work.[413] The skill factor also takes roughly the same shape, with the difference that economic realities cases have focused less on the absolute level of skill and more on the nature of the skill. In particular, skills allowing the worker to exercise initiative affecting the success of the business have been considered as indicative of independence.[414] The permanency-factor has also taken a more or less identical meaning under the two tests, looking not at the mere duration of the work

[412] This factor is used e.g. in *Donovan v. DialAmerica Marketing, Inc.* 757 F.2d 1376 (3rd Cir 1985); *Secretary of Labor v. Lauritzen* 835 F.2d. 1529 (7th Cir. 1987); and *Dole v. Snell* 875 F.2d 802 (10th Cir. 1989).

[413] Applying the economic realities test in a case concerning the operator of a laundry and dry cleaning business, the Fifth Circuit held that "[i]t is not significant how one 'could have' acted under the contract terms . The controlling economic realities are reflected by the way one actually acts." *Usery v. Pilgrim Equipment* 527 F.2d 1308, at 1312 (5th Cir. 1976). C.f. also *Donovan v. Sureway Cleaners* 656 F.2d 1368, at 1371 (9th Cir. 1981); and *Doty v. Elias* 733 F.2d 720, at 723 (10th Cir. 1984).

[414] In a case concerning nurses provided by a health care service, the court held that "[t]he fact that workers are skilled is not itself indicative of independent contractor status. A variety of skilled workers who do not exercise significant initiative in locating work opportunities have been held to be employees under the FLSA." *Brock v.*

but at the nature of the relationship.[415] The capital investment-factor is also more or less the same under the two tests. Under both tests, the type of remuneration-factor has come to concentrate on the workers' opportunity for profit or loss.[416] Also, the integral part of the employer's operation-factor seems to be more or less identical.[417] Finally, the four last factors of the common law test as expressed in *Reid*, even though not listed in *Silk* and not established as a part of the economic realities, have all been used by courts applying the economic realities test, with largely the same meaning. In fact, variations as to the content of the factors seem to be as large within each test as they have been between the two tests. Despite these similarities in how the individual factors have been interpreted under the two tests, courts discussing a certain factor under one test as a rule make no reference to cases under the other test where the same factor has been discussed. One of the few exceptions to this rule is the Supreme Court, which in *Reid* cites *Bartels* and *Silk* when discussing the factors other than control.[418]

The difference, or the perceived difference, between the two tests is to be found in the method for weighing the factors together. The Economic Realities Test has an expressed focal point: economic dependence. The Fifth Circuit, speaking of the five factor test it has employed in cases concerning the FLSA, has stated that "no one of these considerations can become the final determinant, nor can the collective answer to all of the inquiries produce a resolution which submerges consideration of the dominant factor – economic dependence."[419] The factors are to

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Superior Care, Inc. 840 F.2d 1054, at 1060 (2nd Cir. 1988). C.f. also *Usery v. Pilgrim Equipment Company Inc* 527 F.2d 1308, at 1314 (5th Cir. 1976).

[415] As an example, the relationship between a migrant farm worker hired for the harvest and the employer was found "permanent and exclusive for the duration of that harvest season". *Secretary of Labor v. Lauritzen* 835 F.2d 1529, at 1537 (7th Cir. 1987). C.f. also *Brock v. Mr W Fireworks, Inc* 814 F.2d 1042, at 1054 (5th Cir. 1987); and *Brock v. Superior Care, Inc.* 840 F.2d 1054, at 1060 (2nd Cir. 1988).

[416] "Toiling for money on a piecework basis " one court applying the economic realities test held, is "more like wages than an opportunity for 'profit'".[416] *Dole v. Snell* 875 F.2d 802, at 809 (10th Cir. 1989). C.f. also *Rutherford Food Corp. v. Mc Comb* , 331 U.S. 722, at 730 (1947); *Usery v. Pilgrim Equipment Company* 527 F.2d 1308, at 1313 (5th Cir. 1976); *Donovan v. Sureway Cleaners* 656 F.2d 1368, at 1371 (9th Cir. 1981); *Secretary of Labor v. Lauritzen* 835 F.2d 1529, at 1536 (7th Cir 1987); and *Martin v. Selker Brothers, Inc.* 949 F.2d 1286, at 1294 (3rd Cir. 1991).

[417] For the economic realities test c.f. *Donovan v. DialAmerica Marketing, Inc.* 757 F.2d 1376 (3rd Cir 1985) *Secretary of Labor v. Lauritzen* 835 F.2d. 1529 (7th Cir. 1987), and *Dole v. Snell* 875 F.2d 802 (10th Cir. 1989).

[418] *Community for Creative Non-violence v. Reid* 490 U.S. 730, at 751-752 (1989).

[419] *Usery v. Pilgrim Equipment* 527 F.2d 1308, at 1311 (5th Cir. 1976).

be considered as tools to gauge the degree of dependence of the workers on the business with which they were connected. "It is dependence that indicates employee status. Each test must be applied with that ultimate notion in mind."[420] Also other circuits have recognised the worker's economic dependence as the focal point in deciding whether the individual is an employee or an independent contractor.[421]

The Supreme Court in *Hearst*, explaining why the common law distinction between employee and independent contractor was not suitable to determine the personal scope of the new social legislation adopted in the 1930s, argued that some independent contractors in the common law sense of the word were as dependent on their daily wages and as unable to leave their employment as were employees.[422] This economic dependence made it difficult for the workers to resist arbitrary and unfair treatment. In *Bartels*, the Court held that "in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service."[423]

In their subsequent treatment of FLSA cases, the appellate courts have developed the notion of economic dependence. According to the Fifth Circuit, "[i]t is dependence that indicates employee status. Each test must be applied with that ultimate notion in mind."[424] The various factors are "tools to be used to gauge the degree of dependence of alleged employees on the business with which they were connected."[425] In another case, the same appellate court held that "[e]conomic dependence is not an independent variable with a life of its own—it can only be determined in conjunction with consideration of the economic reality of all the relevant circumstances."[426] The Seventh Circuit has described the economic dependence as "more than just another factor",

420 *Usery v. Pilgrim Equipment* 527 F.2d 1308, at 1311. (5th Cir. 1976).
421 *Doty v. Elias* 733 F.2d 720 (10th Cir. 1984); *Secretary of Labor v. Lauritzen* 835 F.2d 1529 (7th Cir. 1987).
422 *NLRB v. Hearst Publications* 322 U.S. 111, at 127 (1944).
423 *Bartels v. Birmingham* 332 U.S. 126, at 130 (1947).
424 *Usery v. Pilgrim Equipment* 527 F.2d 1308, at 1311 (5th Cir. 1976).

being "the focus of all the other considerations."[427] "[T]he final and determinative question must be whether the total of the testing establishes the personnel are dependent upon the business upon which they are connected that they come within the protection of the FLSA or are sufficiently independent to fall outside its ambit."[428] The Tenth Circuit has held that "the focal point in deciding whether an individual is an employee is whether the individual is economically dependent on the business to which he renders service, or is, as a matter of economic fact, in business for himself."[429]

Economic dependence is not conditioned on reliance on an alleged employer as the primary source of income. Instead, "the dependence at issue is dependence on that job for that income to be continued and not necessarily for complete sustenance."[430] The fact that all workers stopped doing work of the kind in question when the employer ceased providing such work has been considered as evidence that the workers were economically dependent.[431] Further, the fact that the work an alleged employee performed amounted to less than 30 percent of her income did not keep her from being considered economically dependent.[432]

Another sign that workers are economically dependent and not in business for themselves is that the workers have no independent business organisations that they can market and use in dealings with different employers.[433] If workers are not in a position to offer their services to many different businesses and organisations, work continuously for the same employer and have opportunities to work only when and if the employer is in need of their services, they will

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425 *Usery v. Pilgrim Equipment* 527 F.2d 1308, at 1311 (5th Cir. 1976).
426 *Brock v. Mr W Fireworks, Inc* 814 F.2d 1042, at 1054 (5th Cir. 1987).
427 *Secretary of Labor v. Lauritzen* 835 F.2d 1529, at 1538 (7th Cir. 1987).
428 *Secretary of Labor v. Lauritzen* 835 F.2d 1529, at 1538 (7th Cir. 1987).
429 *Doty v. Elias* 733 F.2d 720, at 722-3 (10th Cir. 1984).
430 *Halferty v. Pulse Drug Company, Inc* 821 F.2d 261, at 267 (5th Cir. 1987)
431 *Donovan v. DialAmerica Marketing, Inc.* 757 F.2d 1376, at 1387 (3rd Cir. 1985)
432 *Halferty v. Pulse Drug Company, Inc* 821 F.2d 261, at 267 (5th Cir. 1987)
433 *Brock v. Mr W Fireworks, Inc.* 814 F.2d 1042, at 1054 (5th Cir. 1987)

normally be considered as employees.[434] Having been an independent contractor for other companies, before starting working for the alleged employer, does "not preclude a finding that the worker might have exchanged his status for the security of the present employee relationship."[435]

Workers who do work for different employers, frequently moving from one employer to another, can nonetheless still be considered employees. The Fifth Circuit in *Seafood*, held that "[e]ven if the freedom to work for multiple employers may provide something of a safety net, unless a worker possesses specialized and widely-demanded skills, that freedom is hardly the same as true economic independence."[436]

Attention should, arguably, also be given to the negative fact of the worker not being in business on his own. The courts often come back, under different factor-headings, to the employer's control of the determinants of profits. The employer's control of the determinants of profits have been cited as evidence of the employer's degree of control[437], the worker's opportunity for profit and loss[438], as well as under the factor concerned with the skill required for the work[439].

Despite courts' arguments to the contrary, it can nonetheless be argued that economic dependence as the notion has been explained here, is not the only circumstance which must be considered when the concept of employee under the FLSA is to be applied. Otherwise, some of the factors in the five and six factor tests would seem superfluous. The attention given to the internal workings of the relationship under control-factor, for example, has little to do with the

434 *Donovan v. DialAmerica Marketing, Inc.* 757 F.2d 1376, at 1386 (3rd Cir. 1985)
435 *Robicheaux v. Radcliff Material, Inc.* 697 F.2d 662, at 667 (5th Cir. 1983).
436 *McLaughlin v. Seafood Inc* 867 F.2d 875, at 877 (5th Cir. 1989).
437 *McLaughlin v. Seafood, Inc* 867 F.2d 875, at 877 (5th Cir. 1989); and *Donovan v. Sureway Cleaners*, 656 F.2d 1368, at 1371 (9th Cir. 1981)
438 *Martin v. Selker Brothers* 949 F.2d 1286, at 1294 (3rd Cir. 1991)
439 *Usery v. Pilgrim Equipment Company* 527 F.2d 1308, at 1314 (5th Cir. 1976)

worker's economic dependence.[440] Whether or not the worker has invested capital in the operation she is engaged in also says little about her degree of economic dependence. On the one hand, investment in tools, machinery or reputation can make it easier for the worker to take her business someplace else. On the other, investments that are specific to the specific employer can make the worker more dependent than she would be had the investment not been made. Further, whether or not the work performed is an integral part of the employer's operation is a factor more aimed at the employer's dependence on the worker than vice versa.

3.3.4 The Hybrid Test

In several cases, circuit courts have applied a *hybrid test*, combining the common law control test and the economic realities test, to determine whether a worker is an employee or an independent contractor.[441] The hybrid test appears in a range of anti-discrimination cases, concerning both Title VII and ADEA, from the late 1970s and the early 1980s.

In a 1982 Title VII-case, the Eleventh Circuit held that as there was no indication that Congress intended the words of the statute to have any meaning other than their ordinary one as commonly understood, and absent guidance from the Supreme Court, the term *employee* under Title VII was to be construed in light of general common law concepts. The court then, however, went on to conclude that "the analysis […] should take into account the economic realities of the situation[.] This does not mean, however, that the economic realities with respect to the dependence of the individual on the employment will control. Rather it is the economic realities of the relationship viewed in light of the common law principles of agency and the right of the

[440] Maltby and Yamada go as far as claiming that courts "nominally adopting the economic realities test have, in fact, applied a right-to-control analysis more consistent with the […] common law test." Maltby and Yamada (1997) p. 250.

[441] The hybrid test has been applied, at one time or another, by the Third, Fourth, Fifth, Seventh, Eight, Ninth, Tenth and Eleventh Circuits. *Wilde v. County of Kandiyohi* 15 F.3d 103, at 105 (8th Cir. 1994).

employer to control the employee that are determinative."[442] In the case, despite having argued that the choice of test controlled the outcome of the case, the court affirmed the decision of the district court on the basis that the district court in its application of the common law control test had gone "beyond the simple right to control and weighed all the factors involved in the situation in making its decision."[443]

The year after, the Third Circuit had to consider which employee test was to be applied to the ADEA. The court noted that the Supreme Court had observed that ADEA in itself is a hybrid of both FLSA and Title VII, with procedures and remedies taken from the former and the substantive provisions from the latter. As the personal scope was a matter of substance the court held that "the hybrid standard that combines the common law 'right of control' with the 'economics realities' as applied in Title VII cases is the correct standard for determining employee status under ADEA."[444] In the opinion of the court, the hybrid test was narrower than the economic realities test. [445] In the case, which concerned salesmen for the Zippo cigarette lighter company, the court found the employer's low level of control over the means and manners of work and lack of supervision, together with the worker's skill, the method of remuneration, the workers' ownership of equipment and lack of employment benefits, was indicative of the workers being independent contractors. Only the duration of the salesmen's relationship with the employer was considered to indicate employee status. In the end, the court nevertheless refused to distinguish between the tests. "Therefore, even if the appellants were required to sell only Zippo products, and even if they were economically dependent on the income they earned as Zippo [salesmen], these factors are not sufficient to establish that they were employees when balanced against the other factors that tend to establish their status as independent contractors.

[442] *Cobb v. Sun Paper, Inc* 673 F.2d 337, at 341 (11th Cir. 1982). *certiorari denied* 459 U.S. 874.
[443] *Cobb v. Sun Papers, Inc* 673 F.2d 337, at 341-342 (11th Cir. 1982)
[444] *EEOC v. Zippo Manufacturing* 713 F.2d 32, at 38. (3rd Cir. 1983)
[445] *EEOC v. Zippo Manufacturing* 713 F.2d 32, at 37. (3rd Cir. 1983)

In any event, we believe that the appellants were independent contractors even under the more liberal economic realities standard as applied in FLSA cases."[446]

In another ADEA case form the same year, the Fourth Circuit agreed with the Third Circuit and held that "whether an individual is an employee in the ADEA context is properly determined by analyzing the facts of each employment relationship under a standard that incorporates both the common law test derived from principles of agency and the so-called 'economic realities' test."[447] The case concerned a salesman working essentially unsupervised, paid by commission, with a real opportunity for profit and with the tax and benefit arrangements of an independent contractor. The court concluded that even though it was a close case, the district court had not erred in finding him to be an independent contractor rather than an employee.

The status of the hybrid test post-*Darden* is unclear. Ample evidence, nonetheless, suggests that *Darden* has overruled the hybrid test. The Supreme Court, which has never applied the hybrid test itself, makes no mention of any other test than the common law control test, which is to be applied if congress has not indicated any other meaning of the word employee, and the economic realities test, which is to be applied in FLSA cases. The Second Circuit, in a case decided shortly after *Darden*, held, as a consequence of *Darden*, that "the question of whether an individual is an employee or an independent contractor within the meaning of the ADEA must be determined in accordance with common law principles."[448] The Fourth Circuit, which despite *Darden* used the hybrid test in a Title VII-case[449] as late as 1993 seem to have given up the test. In two anti-discrimination cases from 1997, concerning ADEA and Title VII respectively, the court makes

[446] *EEOC v. Zippo Manufacturing* 713 F.2d 32, at 38. (3rd Cir. 1983).
[447] *Garrett v. Phillips Mills, Inc.* 721 F2d 979, at 981 (4th Cir. 1983).
[448] *Frankel v. Bally* 987 F.2d 86, at 90 (2nd Cir. 1993).
[449] *Haavistola v. Community Fire Company* 6 F.3d 211 (4th Cir. 1993).

no mention of the hybrid test.[450] In a 1994 decision, the Eight Circuit, after having taken note of the Supreme Court's *Reid* and *Darden* decisions concluded that a district court had not erred when it applied the hybrid test to a Title VII-case. The reason, however, was that the Circuit court saw "no significant difference between the hybrid test and the common law test articulated by the Supreme Court in Darden. […] Under both tests, all aspects of the working relationship are considered. The Restatement's list of common-law factors used in both tests is nonexhaustive, and consideration of the additional economic factors does not broaden the traditional common-law test. Indeed, by adding employee benefit and tax-treatment factors to the Restatement factors in its explanation of the common law test, the Supreme Court recognized the common-law test encompasses economic factors."[451] Three years later, in an ADA case, the same circuit made no mention of the hybrid test.[452] In addition, the Seventh Circuit has, post-*Darden*, applied the common law control test in a discrimination case without mentioning the hybrid test.[453] More explicitly, a federal district court has considered the Third Circuit's earlier use of a hybrid test combining the traditional common law right to control test with the economic realities test to have been already overruled by the Supreme Court in the *Reid* decision.[454]

3.3.5 Differences and Similarities Between the Tests

As explained above, the personal scope of federal labour law in the United States is limited to employees – and in some case further restricted by thresholds or exemptions. Still, as the courts have used two, arguably three, different tests to distinguish employees from independent contractors the personal scope does not seem to be as uniform as the language of the statutes indicate. The crucial question is whether the different tests give different outcomes, whether a worker that would be considered an employee under one test would be an independent

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450 *Mangram v. General Motors Corp.* 108 F.3d 61 (4th Cir. 1997), *Cilecek v. Inova Health System* 115 F.3d 256 (4th Cir. 1997).
451 *Wilde v. County of Kandiyohi* 15 F.3d 103, at 106 (8th Cir. 1994).
452 *Birchem v. Knights of Columbus* 116 F.3d 310 (8th Cir. 1997).
453 *Alexander v. Rush North Shore Medical Center* 101 F.3d 487 (7th Cir. 1996).

contractor under another? Is it possible to envisage cases where the outcome would have differed depending on which test had been used?

The Dunlop Commission found that the line between employees and independent contractors "has been drawn differently in the different statutes, depending on the inclinations of the agency at the time or Supreme Court doing the drawing. These differences in interpretation mean that a worker might be deemed an employee for purposes of the FLSA but an independent contractor for purposes of the NLRA." Similarly, many courts seem convinced that the choice of employee-test makes a difference, a position forcefully stated by the Third Circuit in *Zippo*:[455]

> When Gertrude Stein penned her oft-quoted "A rose is a rose is a rose is a rose," she was implying some universal qualities that defined and identified the 100 or 200 species of the flowering shrubs of Rosa. In contrast to the rose, when one examines the plethora of federal cases construing the varied and disparate federal statutes one discovers the notable absence of comparable universal qualities that define and identify the status of employee so as to fit its meaning within all common law and statutory definitions. Therein lies reason for the paradoxical truth that even when the same person performs the same acts at the same time in the same place under the same conditions conceivably he could not be considered an employee under some common law standards and some federal statutory definitions while he nevertheless could be considered an employee under those of others. This absence of universality in qualities and definition unavoidably breeds ambiguity and confusion requiring courts to assess a broad spectrum of facts in their quest to clarify and determine who is and who is not an employee.

Others find no or only very small differences between the tests. Lewis Maltby and David Yamada hold that many courts have in fact "acknowledged that the distinction between the tests tend to be minimal."[456] Alan Hyde finds that the differences between the tests to have been "wildly overstated" and that the two test, together with the twenty factor taxation law version of the

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[454] *Metropolitan Pilots Association v. Schlosberg* 151 F.Supp.2d 511, at 519 (DC. New Jersey 2001)
[455] *EEOC v. Zippo Manufacturing* 713 F.2d 32, at 35 (3rd Cir. 1983).
[456] Maltby and Yamada (1997) p. 254.

common law test, "are normally applied so that a given individual who is an employee for one statute normally is an employee for all of them."[457]

There are important similarities in the methods for weighing the factors together. The Supreme Court has described the two methods in very similar language. The common law control test contains "no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[458] Under the economic realities test, "the determination of the relationship does not depend on […] isolated factors but rather upon the circumstances of the whole activity."[459] Likewise, in neither test is the list of factors to be considered as mandatory or exhaustive. Differences exist, however. The economic realities test has an expressed focal point – economic dependency – that, at least in theory, sets it apart from the common law control test. Further, the Supreme Court's statement that "no one factor [is] decisive" in the common law control test seems to have been contradicted by reality. As mentioned above, the control factor dominates the common law test and it has to be considered highly unlikely that any court in the United States would find control or right to control to be lacking but yet find the worker an employee based on other factors. It can, nevertheless, be questioned whether these differences have any practical implications.

Here, the difference between the two tests will be assessed through applying the allegedly narrower common law control test to the facts of cases decided under the allegedly broader economic realitites test. The latter test supposedly encompasses all workers who are employees

[457] Hyde (2000) pp. 12 and 49.
[458] *NLRB v. United Insurance Company of America* 390 U.S. 254, at 258 (1968).
[459] *Rutherford Food Corp. v. McComb* 331 U.S. 722, at 730 (1947).

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under the control test (or the hybrid test) together with some workers who would not be considered employees under the control test.[460]

Hearst[461] was the first case where the Supreme Court applied the economic realities test. In the case, the respondent, a publisher of four daily newspapers in Los Angeles, had refused to enter collective bargaining with workers who sold their newspapers on the streets, on the ground that the workers were not employees under the NLRA. In *Hearst*, the *control factor* – which in the control test is expressed in terms of the hiring party's right to control the means and manners of work and the employer's right to assign additional projects to the hired party – seemed to be well satisfied. The newspaper publisher's district managers supervised the vendors through assigning spots and street corners to them and could order transfers from one spot to another for business or disciplinary reasons. Further, the hours of work were "determined not simply by the impersonal pressures of the market, but to a real extent by explicit instructions from the district managers."[462] Sanctions, varying from reprimands to dismissals, were visited upon vendors. Management's instruction in helpful sales techniques, such as the manner of displaying the newspaper and the emphasis of certain headlines, were to be followed.

The control exercised by the alleged employer in *Hearst* can be compared to that exercised by the alleged employer in *United Insurance*,[463] an NLRA-case decided by the Supreme Court a quarter of a century later under the common law control test. *United Insurance* concerned workers whose primary function was to collect premiums from insurance policy holders, to prevent the lapsing

[460] Despite the economic realities test being described as broader than the common law control test, could it be possible to envisage a situation where a worker deemed an employee under the common law control test would be considered an independent contractor under the economic realities test? This would be a relationship, where a worker is temporarily under the control of an employer but does not show enough signs of economic dependence to be deemed an employee under the economic realities test. Here, this possibility will be left to one side. The presence of the permanence- and integral part of operations-factors in the common law control test and of the control factor in the economic realities test rules out such a possibility.
[461] *NLRB v. Hearst* 322 U.S. 111 (1944).
[462] *NLRB v. Hearst* 322 U.S. 111, at 118 (1944).
[463] *NLRB v. United Insurance Company of America* 390 U.S. 254 (1968).

of policies, and sell new policies to the extent time allowed. The workers were supplied lists of the company's existing policy holders, which effectively amounted to an assignment of a specific geographic area, much like the street vendors. Further, the workers were given and expected to follow detailed instructions on selling techniques and other duties, instructions that could be changed unilaterally by the insurance company. Complaints against the workers were investigated by the insurance company's management, which could issue reprimands and retain the right to terminate the relationship. In the case, the Supreme Court held that the NLRB's decision to consider the workers employees rather than independent contractors did not err as a matter of law and should have been enforced.

As to the other factors of the control test, there seem to be no important difference between *Hearst* and *United Insurance*. In both cases, no prior experience or skill was needed to start the work, the workers were not just casually employed but showed some permanency, they had made little or no capital investment, were paid by commission and were equally integral to the employer's operation. Therefore, in particular considering the high degree of control present in *Hearst*, it is not unreasonable to think that a court, confronted with the facts of *Hearst* today would find the newspaper vendors to be employees under the control test.

Marc Linder believes that *Hearst*, as well as *Rutherford*, could have been decided in favour of the workers being employees already under the common law test as it existed in the 1940s.[464] Richard Carlson, commenting on congressional intervention that followed *Hearst*, holds that "it is impossible to know whether the Taft-Hartley Act has actually affected the outcome in any particular case or for any general classification of workers. And despite Congress's particular disapproval of *Hearst*, it is still possible that even 'newsboys' are employees."[465]

[464] Linder (1989a) p. 201.

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A more recent case, and one which can be considered to be at the limits of the economic realities test, is *Secretary of Labor v. Lauritzen*.[466] In *Lauritzen*, the Seventh Circuit's finding of employee-status was questioned in a concurring opinion, in part based on the employer's lack of control over the means and manners of work. The plaintiffs in the case were migrant farm workers involved in the harvesting of pickles. For most of the year, the alleged employer ran the business by himself and with a few regular employees involved in planting, fertilising and irrigating the crop. At the beginning of the harvest, pickle plots were assigned to the migrant farm worker families. The workers then had to decide which pickles to harvets and when to pick them, so as to get the maximum yield out of each plot, being paid more for pickles of a better grade. The alleged employer occasionally visited the fields to check on the workers and the crop and to supervise irrigation. The workers referred to the alleged employer as "boss" and some believed he had the right to fire them.

Judge Easterbrook, in his concurring opinion, argued that these circumstances did not amount to the kind of control commonly associated with the control factor. "Lauritzen did not prescribe or monitor the migrant workers' methods of work, but instead measured output, the weight and kind of cucumbers picked. Lauritzen did not say who would work but instead negotiated with the head of each migrant family. Lauritzen did not control how long each member of the family worked."[467] The majority, however, held that the alleged employer had not effectively relinquished control over the harvesting to the workers. The right to control, the court held, applied to the entire pickle farming operation, not just the details of harvesting. Over the operation as a whole, the alleged employer exercised pervasive control.[468]

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[465] Carlson (2001) p. 324.
[466] *Secretary of Labor v. Lauritzen* 835 F.2d 1529 (7th Cir. 1987).
[467] *Secretary of Labor v. Lauritzen* 835 F.2d 1529, at 1540 (7th Cir. 1987).
[468] *Secretary of Labor v. Lauritzen* 835 F.2d 1529, at 1536 (7th Cir. 1987).

As for the other factors of the economic realities test, the court did not find any evidence strongly indicative of independent contractor status. Although pickle picking did require some skill, it did not indicate independence. The duration of the work, although seasonal, did not convert the workers from employees to independent contractors. The workers had made virtually no capital investments and although the pickle pickers could affect their income upwards there was no corresponding possibility for loss. Finally, harvesting was found to be an integral part of the employer's operation. Weighing it all together, the court found the workers to be economically dependent on the employer.

Had *Lauritzen* been decided under the common law control test, the outcome might very well have been different, a point made by Judge Easterbrook in his concurring opinion. It is nonetheless not entirely unthinkable that the outcome would have been the same. Courts applying the common law control test have held that control does not have to be exercised by formal authority, "but can be exercised by means of suggestions which are adhered to because of the company's power."[469] If the pickle pickers in *Lauritzen* are compared to the salesmen in *NLRB v. Maine Caterers,*[470] which were found to be employees under the common law control test, the level of control is not very different. The salesmen were assigned districts, which they had to work as best they could under a system of incentives. They had a duty to report to the employer and were subjected to occasional supervision. In addition, the other relevant factors of *Lauritzen* seem to point in the direction of the workers being employees, potentially tipping the scale in a situation where the control factor does not provide enough guidance.

A possible conclusion of the two examples, *Hearst* and *Lauritzen*, is that the two tests, even though not the same, essentially lead to the same outcomes. The possibility that a case would be

[469] *Seven-Up Bottling Co. v. NLRB*, 506 F.2d 596, at 600 (1st Cir. 1974).
[470] *NLRB v. Maine Caterers*, 654 F.2d 131 (1st Cir. 1974).

considered differently under one test than under the other has to be considered as small.[471] Maltby and Yamada, concluding their investigation of the different employee-tests, states that "it is not altogether clear that some of the plaintiffs who have been caught in the adoption of the Darden common-law test would have fared any better under the economic realities test."[472] An important aspect mediating the difference between the two tests is the inclusion in the economic realities test of the control factor. The employer's control or right to control the means and manners of work is arguably of little relevance for the economic dependence of the worker. Influenced by common law doctrines, courts have nevertheless given the control factor significant weight also under the economic realities test. On at least one recent occasion, a Circuit court applied the economic realities test without making any reference to economic dependence, instead giving significant weight to the employer's lack of control over the worker.[473] Some commentators have gone as far as arguing that the "factor of economic dependence has been marginalized or even swept aside by courts that have claimed to adopt the economic realities test."[474]

3.4 Sweden

The uniform personal scope can be seen as one of the characteristics of Swedish labour law. Few workers other than employees are covered, but on the other hand, the concept of employee is broad and the exemptions from the personal scope are few. From a comparative perspective, the fact that employees are not divided into any subcategories for blue collar, white collar or

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[471] Some support for this conclusion can be drawn from appeals courts' reluctance to change the outcome in cases where the lower court has applied the wrong test. The Eleventh Circuit, despite having argued that "a review of the record reveals, however, that the choice of tests controls the outcome of this case," concluded that the "[p]laintiff argues the common law analysis of the court did not apply the economic realities orientation of the kind set out in Spirides and Lutcher. It is clear, however, that the district court went beyond the simple right to control issue and weighed all the relevant factors involved in the situation in making its determination. We must affirm this decision of the trial court." *Cobb v. Sun Papers, Inc* 673 F.2d 337, at 341-342 (11th Cir. 1982). In a 1983 case where the plaintiff-appellant argued that the economic realities test should be applied to an ADEA case, the Fourth Circuit chose not to have an opinion on whether the economic realities test, the common law test or the hybrid test ought to be used in ADEA cases. Instead, the court held that there was no evidence that supported the conclusion that the plaintiff was an employee even under "the more liberal economic realities test". *Hickey v. Arkla Industries, Inc* 699 F.2d 748, at 751 (5th Cir. 1983).

[472] Maltby and Yamada (1997) p. 254.

[473] *Herman v. Express Sixty-Minutes Delivery Service* 161 F.3d 299 (5th Cir. 1998).

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executive employees stands out.[475] In statutes, the personal scope is most often defined as 'employees' or 'employees in private or public employment'. An example of an act with such plain scope is the *Annual Leave Act*, which grants rights to paid leave or holiday pay to all "employees".[476] Other examples are the four anti-discrimination acts, applicable to all employees without any exceptions.[477] The jurisdiction of the Labour Court is limited to disputes concerning collective agreements and other disputes concerning "the relationship between employers and employees".[478]

More commonly the personal scope is in some way modified, containing a short list of employees exempted from the personal scope. The *Employment Protection Act* excludes managers, relatives of the employer, employees working in the household of the employer, and workers in special labour market programmes from dismissal protection.[479] These workers are, nevertheless, protected against certain kinds of discriminatory dismissals by the anti-discrimination acts.

More rarely, other categories of workers are added to the personal scope. In the *Employment (Co-determination in the Workplace) Act*, the term employee "shall also include any person who performs work for another and is not thereby employed by that other person but who occupies a position of essentially the same nature as that of an employee. In such circumstances, the person for whose benefit the work is performed shall be deemed to be an employer."[480] Today, however, the most common view is that this extension to *dependent contractors* does not add any category of

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474 Maltby and Yamada (1997) p. 250.
475 C.f. Källström (1999) p. 164.
476 *Semesterlagen (1977:480), §1.* All direct quotes to Swedish statutes in this section are taken from the English translations of the statutes available on the homepage of the Swedish Ministry for Industry, Employment and Communications. [http://naring.regeringen.se/inenglish/info/index.htm.]
477 The anti-discrimination acts are *Jämställdhetslagen (1991:433)* (Sex discrimination) *Lag (1999:130) om åtgärder mot etnisk diskriminering i arbetslivet* (Ethnic discrimination), *Lag (1999:132) om förbud mot diskriminering i arbetslivet av personer med funktionshinder* (Disability) and *Lag (1999:133) om förbud mot diskriminering i arbetslivet på grund av sexuell läggning* (Sexual orientation).
478 *Lag (1974:371) om rättegången i arbetstvister, 1 kap. 1§.* C.f. also SOU 1974:8 p. 153. In the case AD 1978 nr 148, however, the Labour Court held that a dispute between two corporations could not be considered a dispute concerning a collective agreement when the party performing the work was a limited company.
479 *Lag (1982:80) om anställningsskydd 1§.*

workers to the personal scope, as the dependent contractors it was supposed to capture, has come to fall inside the concept of employee.[481] A better, but more complex, example is the *Work Environment Act*, which, on one hand, excludes certain categories of employees from its personal scope, but, on the other, adds persons under education, inmates of penal institutions and persons doing their military service to the personal scope of some of its provisions. Further, it assigns employers some responsibilities that go beyond the circle of her employees and that can include self-employed workers.[482]

Thresholds as to the size of the employers undertaking are rare in Sweden. None of the important statutes has a personal scope that is dependent on the size of the undertaking or the number of employees. Certain obligations, such as having plans of action for equality and equal pay, are nonetheless only applicable to employers with more than ten employees.[483]

3.4.1 A Uniform Scope with a Flexible Definition

Swedish labour law statutes do not contain any definition of the concept of employee. Instead, the concept has developed through a combination of judicial interpretations – in particular by the Supreme Court (*Högsta domstolen*) and the Labour Court (*Arbetsdomstolen*) – and indications by the legislators in preparatory works.[484] The most common starting point for any analysis of the concept of employee in Swedish law is a 1949 decision by the Supreme Court,[485] which has been repeated and confirmed by preparatory works of later legislation.[486] Swedish lawmakers have aimed for a more or less uniform concept of employee, to be used both in labour law and in

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[480] *Lag (1976:580) om medbestämmande i arbetslivet, § 1 2st.*
[481] C.f. below, 3.4.3.
[482] C.f. below, 4.5.2.
[483] *Jämställdhetslagen (1991:433) §§ 11 and 13.*
[484] In Sweden, preparatory works carry great weight and are used extensively by the courts. For an account in English of the importance of preparatory works in Swedish law, c.f. Frändberg (1998).
[485] NJA 1949 s 768.
[486] C.f. the thorough investigation of the concept of employee found in the preparatory works of the 1976 Employment (Co-determination in the Workplace) Act, *Government White Paper SOU 1975:1* pp. 691ff, in particular pp. 721f.

other fields.[487] At the same time, it has been considered desirable to ensure a certain degree of flexibility, allowing the concept to adapt to different statutory contexts, different sections of the labour market, and over time.

Historical Development

Since the Second World War, the development of the personal scope of Swedish labour law can be described as on a trend towards a more and more uniform scope, defined by a gradually widening concept of employee incorporating groups of workers earlier found outside the scope. Different concepts of employee and a legal category of third type workers and have been made obsolete by the extension of the flexible *private law concept of employee* (*civilrättsliga arbetstagarebegreppet*).

Never defined in any statute, different concepts of employee were used depending on which statute was to be interpreted and by what court or agency. The concept used for industrial accident insurance, occupational health and safety and working time regulations was wider than the concept used in regulations on annual leave and in collective labour law.[488] The private law concept of employee was first developed in the 1930s. At the time, the concepts of employee used by the Supreme Court (*Högsta domstolen*), the Labour Court (*Arbetsdomstolen*) and the National Industrial Injuries Insurance Court (*Försäkringsrådet*) – the three authorities that had to give guiding interpretations of the different statutes where the concept of employee could be found – differed significantly, especially between the latter two. The Labour Court took its point of departure in contract law, examining the content of the agreement between the worker and the employer, whereas the industrial injuries insurance court used the social and economic status of the parties to classify the relationship. The Labour Court's private law concept of employee was generally considered as more narrow than the *social law concept of employee* (*socialrättsliga*

[487] C.f. Källström (1994) p. 63.

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arbetstagarbegreppet) used by the Industrial Injuries Insurance Court, and was criticised for leaving workers who were socially and economically strongly resemble employees outside the scope of labour law regulation. The criticism, articulated by organisations representing travelling salesmen and gasoline distributors, led to the addition, in 1945, of a new category of workers, dependent contractors (*beroende uppdragstagare*), in collective labour law legislation. Dependent contractors were workers who did not fulfil the requirements for being employees under private law, but who were in a state of dependence in relation to the employer that made their situation essentially similar to that of employees. [489]

The distinction between dependent contractors and independent contractors, the latter still outside the scope of labour law regulation, was to be made based on the nature and the degree of the dependence between the worker and the employer. Dependent contractors where distinguished by a degree of subordination laying somewhere between that typical for employees and that of independent contractors, and by their economic dependence. The extended personal scope had the effect that a number of collective agreements covering dependent contractors were concluded, often granting them the same rights and benefits as employees.[490]

Alongside the development of the dependent contractor category in collective labour law, the concept of employee in individual labour law developed. The committee preparing the 1945 *Annual Leave Act*[491] decided not to include dependent contractors in the personal scope of its proposal. As the distinction between dependent and independent contractors was difficult to make, the committee did not consider it possible to include dependent contractors in the personal scope of an individual labour law regulation as the Annual Leave Act. Including

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[488] SOU 1944:59 p. 52f.
[489] For an account of these developments, c.f. Prop. 1945:88 pp. 5ff, SOU 1975:1, pp. 696ff and Adlercreutz (1964) 74ff.
[490] For a summary of the developments the first ten years, c.f. SOU 1957:14 pp. 46f.
[491] *Lag (1945: 420) om semester.*

dependent contractors would, due to the vagueness of the concept, lead to too many disputes and make the application of the law problematic. This concern was less strong in the case of collective labour law, where litigation in reality would be limited to a small number of organisations, not individual workers.[492] It was also foreseen that their newly granted collective rights would make it easier for many dependent contractors to achieve holiday benefits through collective agreements, instead of through statutory regulation.[493] The personal scope of the holiday act was therefore limited to "employees in public or private service",[494] by which was to be understood the private law concept of employee. The private law concept of employee was, however, the committee stated in the preparatory works, not a static concept, but a constantly developing concept that in recent years had come to encompass a wider range of workers. Other preparatory works from the same period also expressed the idea of a concept of employee which was to be influenced, for example by social and economic developments. A difference was nonetheless still to be made between the personal scope of public law regulations with a social objective, such as the occupational health and safety and mandatory industrial accident insurance, and private law regulations. The 1945 *Annual Leave Act* was considered to represent a mix of public and private law regulation, which explains why the interpretation of the concept of employee should also be influenced by social and economic circumstances.[495]

The courts picked up the idea of a rather flexible and constantly developing concept of employee, built on a integrated consideration of all the relevant circumstances. In the decision NJA 1949 s. 768, concerning the right to holiday pay of three farmers who in the winters transported timber for a forestry company, the Supreme Court held that the question whether a person is an employee was to be decided on the basis of the content of the contract. No single term of

[492] SOU 1944:59 pp. 54ff.
[493] Prop 1945:273 p. 71.
[494] *Lag (1945:420) om semester, § 1*
[495] Prop 1945:273 p 71, c.f. also Prop 1945:88 s 57ff. No examples of the mentioned "private law regulations" are given.

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contract should be decisive, according to the court, but all relevant circumstances concerning the contract and the employment must be considered. Guidance as to the interpretation of the contract could come from the economic and social position of the parties, and, if the contract was of a kind commonly used, from the legal classification generally accepted for that type of contract. [496]

Little less than a decade later, the Labour Court too adopted the doctrine outlined in the 1945 preparatory works and the Supreme Court's 1949 decision, abandoning the strictly defined private law concept of employee it had used thus far.[497] Some years later, a government committee concluded that the Labour Court and the Industrial Injuries Insurance Court had come to use the same concept of employee as the Supreme Court.[498]

The new concept of employee, despite being wide and flexible, did not include all the dependent contractors covered by the collective labour law regulations of 1945. In the 1950s and 1960s, the inclusion of dependent contractors in the personal scope of labour law regulation was subject to further investigation by various committees. In a government white paper with the title *Beroende uppdragstagare* (Dependent contractors), the committee had no fundamental objections to an extension of the personal scope of a number of individual labour law regulations. Nevertheless, it deemed an extended scope of a number of regulations to be unnecessary as it would not change the situation for the workers. Among the regulations were the working time and occupational health and safety regulations, where an extended scope was considered unnecessary as most dependent contractors would be excluded from the scope anyway under an exception applicable

[496] "Frågan huruvida någon i lagens mening är arbetstagare hos annan eller icke är att bedöma efter vad dem emellan kan anses avtalat, varvid man icke kan inskränka sig till något visst avtalsvillkor såsomt ensamt avgörande utan har att beakta alla i samband med avtalet och anställningen förekommande omständigheter. Härvid kan de avtalsslutandes ekonomiska och sociala ställning vara ägnad att belysa, huru avtalet bör uppfattas. Att förhållandena i varje särskilt fall bliva avgörande hindrar icke att, om avtalet är av en mera allmänt förekommande typ, ledning kan hämtas från den uppfattning om rättsläget som eljest mera allmänt gjort sig gällande." NJA 1949 s 768, at 771.
[497] AD 1958 nr 17 and AD 1958 nr 31. C.f. also SOU 1975:1 p 706.
[498] SOU 1961:57 p. 192.

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to "uncontrolled workers" (*okontrollerade arbetstagare*). In the case of the remaining regulations, for example, the holiday act, an extension of the personal scope was deemed technically too difficult, mainly due to the problematic distinction between dependent and independent contractors.[499]

Another government committee tried the idea of giving the concepts of employee a statutory definition under which it would be possible to include certain groups of workers in specific industries, that otherwise would be considered as self-employed. Considering the varying circumstances on the labour market, not least the freedom of the parties to design their own relationships, it was not considered possible to come up with a definition that would give any useful guidance in all individual cases. A statutory definition would also soon be made obsolete by organisational and technological change. For the same kind of reasons, the proposal to give the concept of dependent contractor a statutory definition was rejected. [500]

Since the 1950s, the method used in labour law to determine whether a worker is an employee or not has remained the same – a integrated consideration of all relevant circumstances. That the method has stayed the same has nevertheless not prevented the concept of employee from developing. As foreseen already in the 1940s, the concept of employee has developed in the light of changes in organisation, technology and society. Throughout the 1960s and 1970s, the private law concept of employee widened to include more workers. Therefore it is no longer considered necessary, as it was earlier, to speak of a distinct social security law concept of employee.[501] Today, the concepts of employee used to define the scope of or the right to benefit in social security law are built on the private law concept of employee. In some cases, such as the sickness

[499] SOU 1957:14 pp.52 f.
[500] SOU 1961:57 pp 208 ff.
[501] This view is expressed e.g. in the Government White Paper SOU 1975:1 p. 721 and by Källström (1994) p. 61. Adlercreutz expressed the view that the social law concept of employee was obsolote already in 1964. Adlercreutz (1964) p. 93.

benefit regulations, the private law concept is used practically unmodified, while other systems, such as unemployment benefit, have their own definition of employee.

The widening of the concept of employee has also led to the inclusion of categories of workers earlier classified as dependent contractors. Today, many argue that the dependent contractor category is more or less obsolete.[502] Already in the preparatory works of the 1976 *Co-determination Act*, the necessity to include dependent contractors as a separate category was questioned. Their inclusion was in the end more a security measure to make sure that the personal scope of the new legislation would not be less wide than the scope of the legislation it was to replace.[503]

3.4.2 A Broad Multi-factor Test

The Swedish concept of employee is the widest of the four in this study. Its reach comes from the construction of the multi-factor test, where no single factor is considered necessary or sufficient for the existence of an employment contract and a integrated consideration of all the circumstances has to be made. Still, for an employment relationship to exist, two essential criteria have to be fulfilled. The first criterion is the existence of a contract between the employer and the employee. In Swedish law there are no formal requirements for employment contracts. An orally concluded contract or a contract concluded through the actions of the parties is as valid as a written contract.[504] The second key criterion is that the party to the contract that is to perform work, i.e. the worker, is a natural person. This requirement does not mean, however, that the existence of a juridical person on the work-performing side of the contract rules out that it can be a contract of employment.

[502] C.f. below 3.4.3.
[503] SOU 1975:1 p 725ff.
[504] SOU 1993:32 pp 219ff.

In the preparatory works of the 1976 *Employment (Co-determination in the Workplace) Act* the circumstances that in legal practice and jurisprudence have been said to draw the line between employees and independent contractors were listed.[505]

Circumstances indicating that a workers is an employee are:

1. He is obliged to perform the work personally, whether this is stated in the contract or presumed by the parties to the contract;
2. He has in fact, completely or almost completely, performed the work personally;
3. His contract includes putting his labour to the disposal of the other party for arising tasks;
4. The relationship between the two parties has a more lasting character;
5. He is prevented from performing similar work of any significance for someone else, whether this is due to a restriction in the contract or a practical consequence of the actual conditions of the work, such as a lack of time or energy for other work;
6. He is, in the performance of the work, subject to specific orders or control as to how the work is performed, the working time or the place of work;
7. He is supposed to use machinery, tools or raw materials provided by the other party to the contract;
8. He is compensated for his expenses, for example for travel;
9. The remuneration for the performed work is, at least in part, paid as a guaranteed salary;
10. He has economically and socially the same status as an employee.

Circumstances indicating that a worker is an independent contractor are:

1. He is not obliged to perform the work personally but has the right to let someone else perform the work under his responsibility, either in whole or partially;
2. He is in fact letting someone else perform the work under his responsibility;
3. The work under the contract is limited to specified tasks;
4. The relationship between the two parties is of a temporary nature;
5. Neither the contract nor the actual conditions of the work stops him from performing similar work of any significance for someone else;
6. He decides for himself – within the restrictions necessary due to the nature of the work – how the work is performed, the working time and the place of work;

[505] SOU 1975:1 p 721f. The list has been repeated in later Government White Papers, i.e. SOU 1993:32 pp. 227ff.,

7. He has to use his own machinery, tools or raw materials;
8. He has to cover his own expenses;
9. The remuneration for the work performed is solely dependent on the economic performance of the business;
10. He is economically and socially of the same status as a self-employed worker in the concerned branch of business;
11. He holds a permit or an official authorisation for his business or has incorporated his business.

Performing Work Personally

In the 1930s and 1940s, the Labour Court made attempts to use the obligation to perform work personally as the deciding criterion as to who should be considered an employee. This development limited the concept of employee to the point where it was necessary to supplement the personal scope of some statutes with the category of dependent contractors.[506] In preparatory works of the late 1940s the Labour Court's case law was criticised and the argument that no criterion should be decisive was put forward, a debate settled by the Supreme Court's 1949 decision.[507]

The worker does not have to perform the work in its entirety, it is enough that the worker participates in the work, even if alongside other workers, hired by her. Neither has the presence of assistants stopped workers from being considered dependent contractors. Even if the wording of the contract or the original intentions of the parties do not indicate any obligation to perform the work personally, the fact that it has in reality been performed personally is of significance.[508] Even workers who have contracted with an employer to perform work together with other workers (assistants), provided by the contracted worker, can be considered employees (or dependent contractors) if other factors indicate that she is an employee (and the assistants

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and is often quoted in the literature.
[506] Adlercreutz (1964) p. 74.
[507] Källström (1994) p. 61.
[508] SOU 1993:32 p 229 and Källström (1994) p. 66.

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subsequently considered employees of the employer and not of the worker who provided them). More commonly, however, they will be considered as independent contractors and the assistants as their employees.[509]

This provision does not mean that the existence of a corporation or other juridical person on the work-performing side of the contract rules out that it can be a contract of employment. It is possible to "see through" a juridical person to find the individual actually performing the work. Piercing of the corporate veil is nonetheless rather rare and mainly reserved for situations where the parties' intention has been to circumvent labour law or where the employer has taken advantage of the worker's weaker position.[510] Nonetheless, in a case concerning a number of gas station managers, the Labour Court found the workers who had registered a joint-stock company to be independent contractors, whereas the other workers were considered employees or dependent contractors.[511]

Subordination

Two of the ten factors mentioned in the 1975 list – that "the worker is in the performance of the work subject to specific orders or controls as to how the work is performed, the working time or the place of work" and that "the worker has put his or her labour at the disposal of the other party for arising tasks" – are indications of the worker's subordination to the employer. Taken together, the two factors summarise the employer's prerogatives and represent the core of the notion of subordination.

The latter factor, that the worker puts her labour at the employer's disposal for arising tasks, does not indicate that an employee cannot have a rather specified task. Being at the disposal of the

[509] SOU 1975:1 pp 728ff. In Swedish doctrine these are known as *mellanmansfall*.
[510] SOU 1993:32 p. 224. C.f. also SOU 1987:17 p. 94f.
[511] AD 1969 nr 31.

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employer for arising tasks can, nonetheless, count in favour of the worker being an employee.[512] In a case concerning a journalist who continuously covered a remote part of a newspaper's circulation area, the Labour Court held the fact that the worker in reality had few possibilities to turn down a request from the newspaper, and that it had never actually happened, as a sign of the worker being an employee.[513] In another case, also concerning a journalist, the Labour Court considered it significant that the worker had not been obliged to put his labour at disposal for the newspaper in question for upcoming tasks when it decided not to consider the worker an employee.[514]

As in the United States, the subordination factors have not been applied uniformly. The degree and nature of control is dependent on the type of work that is to be performed. The fact that skilled workers, often with an expertise not possessed by the management, work under less supervision than less skilled workers should not be significant when it is being decided whether they are employees or not.[515] It should be noted, however, that in Sweden this goes as far as to include managing directors of companies, even if they are shareholders, within the concept of employee. This is, from a comparative perspective, "quite possibly unique".[516]

Economic Dependence

The inclusion of factors concerning the *lasting nature of the relationship* and the *worker being prevented from working for any other employer* aim to establish whether the worker is economically dependent or not. The lasting nature of the relationship refers to the same thing that in some other countries are found under the headings 'duration' or 'permanency'. Despite having been mentioned as one of the more important factors, the lack of a lasting nature has not been used to deny employee

[512] SOU 1993:32 p 229f.
[513] AD 1989 nr 39.
[514] AD 1987 nr 21.
[515] SOU 1975:1 p. 723. C.f. also NJA 1973 s 501.
[516] Källström (1999) p. 159.

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status to casual or temporary workers.[517] As to the second factor, being restricted by contract or lacking the time or energy to perform other work easily makes the worker economically dependent on the employer. In a 1977 ruling, the Labour Court held that the fact that a worker for economic reasons had to be ready to work for the employer at any time and, therefore, could not work for anyone else to indicate employee status.[518]

At times, the last factor of the 1975 list, referring to the *economic and social status* of the worker, has been expressed in terms of the worker's dependence on the employer.[519] Workers with a strong standing in the market, capable of supporting themselves even if the employer decides to terminate the contract, were not considered employees.[520] On the other hand, workers dependent on the employers marketing efforts and with small possibilities to influence their terms of contract were considered as employees.[521] Källström points to the fact that these three cases all concern identical agreements, a lease common within the hairdressing branch stipulating that the owner of the hairdressing salon rents a work space to another hairdresser.[522] The Labour Court found in favour of employee status when the worker was young and inexperienced, and had been dismissed as an apprentice to the owner, but ruled against the workers when they were experienced and had built their own stock of clients.

The degree of economic dependence necessary for a worker with a low degree of subordination to be considered an employee varies depending on the branch of business they are in. In a number of recent cases, the Labour Court has found freelancing journalists to be independent contractors, despite a high degree of economic dependence, with the employer as their only

[517] SOU 1975:1 p. 723 and SOU 1993:32 p. 230.
[518] AD 1977 nr 98.
[519] SOU 1993:32 p. 233.
[520] AD 1979 nr 12 and AD 1982 nr 134.
[521] AD 1978 nr 7.
[522] Källström (1999) pp. 181f.

source of income and in one case more than two decades of service.[523] The rulings have been explained by the fact that the Labour Court tends to apply, where they exist, employee/independent contractor distinctions established through custom in the trade or in collective agreements.[524]

Other Factors

The *form of remuneration* has traditionally been an important factor. It should be understood as employees having the right to receive at least part of their remuneration as a guaranteed wage and receive compensation from the employer for expenses.[525] In a 1987 decision, the Labour Court held the fact that a worker was not ensured any guaranteed amount or payment as speaking against the worker being an employee.[526] In a 1977 decision, the worker was considered an employee, *inter alia* due to the fact that his remuneration had the character of a guaranteed minimum income.[527] In another decision, the Labour Court found that a worker who did not have a guaranteed income, but whose remuneration was calculated to be equal to that of employees and who received compensation for expenses, was an employee.[528]

The ownership of the means of production, the *employee using machinery, tools or raw materials provided by the employer* whereas the self-employed worker uses his own, is a criterion whose relevance is strongly dependent on the branch of industry. In the Swedish forest industry, branch practice is such that a worker can own heavy and expensive machinery and still be considered an employee.[529]

[523] AD 1994 nr 104 and AD 1998 nr 138.
[524] Ds 2002:56 p. 132.
[525] SOU 1993:32 pp. 232f.
[526] AD 1987 nr 21.
[527] AD 1977 nr 98.
[528] AD 1979 nr 155, c.f. also AD 1989 nr 39.
[529] SOU 1975:1 p 723.

A notable feature of the Swedish multi-factor test is that it does not include the worker's taxation status. The distinction in taxation law between *income from employment* and *income from business*, does bear close resemblance to that between employees and independent contractors in labour and social security law.[530] Yet, it is not used by courts to decide whether a worker is an employee or not. In the everyday relations between workers, employers and authorities, however, the worker's taxation status, expressed through the holding of a business notice of assessment (*F-skattesedel*), is undoubtedly one of the most important features of a self-employed worker.

Integrated Consideration

None of the above mentioned indicators is a necessary or sufficient criterion for the existence of an employment contract. It is only through a integrated consideration of all the circumstances that the nature of the contract can be determined. The Supreme Court established this principle in 1949: "The question whether someone is an employee or not should be decided through the content of the contract between the two parties, where no single term of the agreement should be considered solely decisive, but all circumstances of the contract and the relationship considered."[531]

It is disputed whether any of the indicators are generally more important than the others or not. The technique of integrated consideration of all the indicators makes it difficult to distinguish the weight each individual indicator has been given in practice. In the Labour Court's practice from the 1930s and 1940s the obligation to perform the work personally and remuneration in the form of a guaranteed income were considered as the most important indicators. In the 1975

[530] Swedish taxation law distinguishes between two sources of income that involve remuneration for work: *income from employment* and *income from business*. Income from employment is primarily earnings from work as an employee but also serves as a residual category for earnings that do not fit into any other category. To be classified as *income from business*, earnings have to come from an independent and professionally run businesses with the aim of making a profit. Circumstances indicating independence are several principals, a large number of assignments, the fact that the worker uses his own tools or machinery, the fact that the worker is not performing all of the work personally and some degree of economic risk-taking. Lodin et al (1999) pp. 220ff.
[531] NJA 1949 s 768.

preparatory works of the *Employment (Co-determination in the Workplace) Act*, this opinion was deemed to be no longer valid.[532] In the Government White Paper SOU 1993:32 the committee argues that normally a lasting nature of the relationship and the high degree of subordination are considered strong indications of an employment relationship.[533]

From a comparative perspective, the most interesting feature of the concept of employee in Swedish law is undoubtedly that subordination is treated like one factor among others.[534] Even though subordination is an important factor, it is not necessary for a finding of employee status. In the 1975 preparatory works of the *Employment (Co-determination in the Workplace) Act*, which have been important for the general interpretation of the concept of employee, subordination is set forth as a criterion carrying great weight.[535] The courts have not, however, followed this, and subordination does not stand out as clearly more important than the other criteria.[536]

The importance of the different indicators varies between different sectors of the labour market or branches of business, as indicated by the fact that the economic and social status of the worker in the concerned trade should be taken into account. Even if this exists in many countries, it is particularly strong in Sweden.[537] It is, for example, in some trades natural that the degree of subordination is low simply because the employee is an expert with more skill than the employer or supervisor. Another example is the already mentioned custom in the forest industry that a worker can own expensive machinery and still be considered an employee. Established custom in the branch of business is given particular weight if it has been expressed in a collective

[532] SOU 1975:1 p. 722f.
[533] SOU 1993:32 p. 229.
[534] This difference compared to other legal systems was noted in SOU 1993:32 p. 231.
[535] SOU 1975:1 p. 723.
[536] SOU 1993:32 p. 231.
[537] Källström (1999) p. 166.

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agreement, as is, for example, the case with the Journalists' union's collective agreement for freelancers.[538]

Swedish legislators and courts have also been receptive to having the purpose of the regulation to be applied influence the interpretation of the concept of employee. The Swedish Supreme Court has argued that even though a uniform definition of employee is preferable, it is not possible to neglect the specific purpose of the interpreted regulation.[539] According to the preparatory works of the *Work Environment Act*, when the concept of employee is to be interpreted in cases regarding occupational health and safety regulation, this should be done in harmony with the purpose of the regulation. Therefore, special attention should be given to whether the employer can exercise a direct influence over the work environment. Responsibility should be allocated to persons who normally would have the organisational and economic possibilities to meet the responsibility.[540] In the integrated consideration of all relevant circumstances, subordination factors are, therefore, to carry more weight than for example economic dependence. Another illustration of the analysis of all relevant circumstances can be taken from collective labour law where the preparatory works of the *Employment (Co-determination in the Workplace) Act*, indicate that the concept of employee is to be interpreted widely, and, when in doubt, the presumption is for the worker being an employee.[541] As collective agreements are at the heart of the Swedish labour market regulation, a broad personal scope was desired.

As labour law regulation is of a mandatory nature, the concept of employee when it defines the personal scope a regulation is a mandatory provision. In a 1979 ruling the Swedish Labour Court stated that the fact that both parties to a contract wanted the worker to be considered self-

[538] Ds 2002:56 p. 121.
[539] NJA 1982 s. 784 and Arbetarskyddsstyrelsen's opinion in NJA 1974 s 392.
[540] SOU 1976:1 pp. 274f.
[541] "I tveksamma fall bör även vid tillämpningen av medbestämmandelagen bedömningen vara att fråga är om ett arbetstagar-förhållande." Prop. 1975/76:105 Bilaga 1, p. 324.

employed, and that the concerned worker might have voluntarily agreed to this, did not have any deciding effect on the ruling.[542] The Labour Court has also stated that the concept of employee is outside what the parties can dispose of in a collective agreement, even though a collective agreement can be an important indication of practice in the relevant branch of business.[543] The label the parties have chosen for their relationship is considered to be of no, or only a limited, importance. In deciding the content of the contract the wording of the contract is considered to be of less importance than the actual practice between the two parties.[544] In a 1977 ruling, the Labour Court stated that a worker was to be considered an employee despite the existence of a contract labelled "entrepreneur contract" and with a wording indicating that the worker was self-employed.[545] Along similar lines, the Labour Court later held that the status of two hairdressers who rented space in a hairdressing-saloon to carry out their business, with a contract stating that they were self-employed, should be decided on the basis of the practice between the parties, not the wording of the contract.[546] If the worker has formerly been an employee of the employer, this will typically create an inference that the worker is an employee.[547]

If it is the initiative of the worker to label and word the contract as something other than an employment contract, however, and if it is clear that the worker was not in a dependent position when the contract was concluded and that the contract is not an attempt to circumvent social protection legislation, the intention of the parties should be considered as an important factor when the nature of the contract is decided.[548] In the case, the Labour Court argued that subcontracting and the use of self-employed workers should not be used as a way to circumvent legislation applying to employees.

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542 AD 1979 nr 155.
543 AD 1987 nr 21. Still, as already mentioned, trade practice, in particular if expressed in a collective agreement, is important for deciding the employment status of a worker.
544 SOU 1993:32 p. 225.
545 AD 1977 nr 39.
546 AD 1979 nr 12.
547 SOU 1987:17 p. 94f.
548 AD 1979 nr 12.

An illustration of the Swedish multi-factor test is the case of franchisees. Franchisees are not given any special status in Swedish labour law and the question whether franchisees fall inside the personal scope of various regulations has to be decided on a case by case basis, according to the same principles as in all other cases. In a 1987 government white paper on franchising, the committee listed circumstances characteristic of franchising relations indicating whether the franchisee is an employee or an independent contractor.[549] Speaking in favour of franchisees being employees are the facts that franchisees typically are obliged to perform work personally and that they in fact perform work personally; that franchisees are subject to directives and monitoring from the franchisor; that the relationship between the parties is of a lasting nature; and the franchisee typically is prevented from performing similar work for someone else, whether this is a part of the agreement or a consequence of the conditions of work. Arguing against franchisees being employees, the committee found the facts that franchising relationships typically give the franchisee the right to use his own machinery, tools and raw materials and to employ other workers; that the employee has to pay her own expenses; that the remuneration is entirely dependent on the profit created by the enterprise; and that the franchisee typically holds a permit or other official authorisation or has incorporated the business. As franchising contracts vary greatly, it is not possible to make any general statements about the status of franchisees. If the franchisee is considered an employee of the franchisor, consequently, the employees of the franchisee are employees of the franchisor too.[550]

3.4.3 Dependent Contractors

As mentioned above, from the 1940s Swedish labour law contained provisions concerning dependent contractors (*beroende uppdragtagare*) which in later doctrine was sometimes referred to as *jämställda uppdragtagare*, signifying contractors who have been put on an "equal footing" with

[549] SOU 1987:17 pp. 182f.

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employees. Originally, the idea was that there were three types of workers: employees, dependent contractors and independent contractors.[551] The boundary for the personal scope of labour law thus came to lie between dependent and independent contractors. According to the preparatory works, the point of departure for distinguishing between the two was to be taken in the nature and degree of dependence. In particular, the existence of instructions for and monitoring of the work (i.e. limiting the worker's freedom) was considered to indicate dependence. Limits to the worker's freedom as to the pricing or terms of payment for goods and services provided to consumers and other third parties were, however, not considered enough to make an independent contractor dependent as they were normal practice between independent enterprises. For the worker to be a dependent contractor, the employer had to have some control of the running of her businesses. In addition, the worker's social and economic status was to be considered, including the worker's self-perception expressed, for example, through membership in an organisation built "according to the principles of a trade union".[552]

The current legal status of these third-type workers is not entirely clear. The most commonly held view is that the widening of the concept of employee has led to the inclusion of categories of workers previously classified as dependent contractors, and many argue that the dependent contractor category is more or less obsolete. Already in the preparatory works of the 1976 *Co-determination Act*, the necessity to include dependent contractors as a separate category was questioned. The committee drafting the legislation described their inclusion as a security measure to make sure that the personal scope of the new legislation would not be less wide than the scope of the legislation it was to replace.[553] In the government bill, the inclusion of dependent contractors was said to make the personal scope "slightly wider than otherwise had been the

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[550] SOU 1987:17 p. 185.

[551] Sometimes, the dependent contractors are described in terms that indicate that they should be considered as employees under the regulations with extended scope. Here, however, they will be considered as a separate category, inside of the personal scope alongside employees.

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case".[554] Less than three years later, in the government bill concerning the first equal opportunities act, the responsible cabinet minister concluded that the category of dependent contractors found in the *Co-determination Act* most likely was included in the concept of employee, without the need for any special provisions.[555] Adlercreutz holds that the workers who in 1945 were considered dependent contractors today to a large extent will be considered employees.[556] In a case from 1985, the Labour Court questioned whether there still is, due to the extension of the concept of employee, any room left for the dependent contractor category.[557] The decision, and the idea that the dependent contractor category has been subsumed by the concept of employee, has however been criticised. In the preparatory works of the *1979 Equal Opportunities Act* it was assumed that dependent contractors fell inside the concept of employee which is why no special provisions concerning that category was needed.[558] According to Sigeman, there are nevertheless indications in the preparatory works that the dependent contractor still is a distinct category. In addition, Sigeman introduces the idea that the dependent contractor concept, like the concept of employee, is dynamic and has developed to include some workers earlier considered as independent contractors, for example franchisees.[559]

3.5 United Kingdom

3.5.1 A Diversified Personal Scope

Compared to other countries, the United Kingdom labour market regulations have a rather diversified personal scope.[560] As Deakin and Morris have pointed out, "the self-employed are

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[552] Prop. 1945:88 p 21, C.f. also AD 1980 nr 24 (salesmen of sewing machines) AD 1969 nr 31 (collective rights of gas station managers).
[553] SOU 1975:1 p 725ff.
[554] "Genom andra meningen utvidgas lagen tillämpningsområde något." Prop. 1975/76:105 Bilaga 1 p. 323.
[555] Prop. 1978/79:175 p. 110.
[556] Adlercreutz (2000) p. 25.
[557] AD 1985 nr 57. The case concerned four persons who were under a contract with the local authority to take care of mentally disabled children in their own homes.
[558] Prop. 1978/79:175 p. 110.
[559] Sigeman (1987) p. 613f. Sigeman's view has been supported e.g. by Källström (1994) p. 70. For a summary on this debate, c.f. SOU 1994:141 pp. 80ff.
[560] For an early critical analysis of the personal scope of UK labour law, c.f. Hepple (1986a).

very far from being excluded completely from labour law regulation."[561] Three different concepts are used to define the personal scope of labour law in the United Kingdom – *employee*, *worker* and *employment*. While the concept of employee will be treated in this chapter, the two latter will be dealt with extensively in the next chapter.[562] Already here, however, the statutory definitions of all three will be presented. Definitions of "employee" and "worker" can be found in the *Employment Rights Act of 1996* (ERA).[563]

> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship […].
>
> (3) In this Act "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 […] 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 […]

The category of *worker* encompasses both *employees* and some, but not all, individuals who personally perform work. Excluded from this definition of worker are individuals who do not contract to supply *personal* services, but who sell an end product or a service which does not necessarily consist of their *own* work. Anti-discrimination legislation applies to all who are in *employment*, including also professionals who sell their services to the general public. The definition can be found for example in the *Sex Discrimination Act 1975:*

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[561] Deakin and Morris (2001) p. 148.
[562] C.f. below 4.4.2.
[563] *Employment Rights Act 1996 s 230 (1)-(3).*

> In this Act, unless the context otherwise requires –
>
> "employment" means employment under a contract for service or of apprentice-ship or a contract personally to execute any work or labour."[564]

Many statutes, like the *Employment Rights Act 1996*, have a personal scope that varies between different sections.[565] The provisions of the act pertaining to dismissal protection,[566] parental rights, and the right to guarantee payments apply to 'employees', while all 'workers' are protected from unauthorised wage deductions. The *National Minimum Wage Act 1998* apply to workers, with exception of the part concerning dismissals which is only applicable to employees. The *Trade Union and Labour Relations (Consolidation) Act of 1992,* concerned with collective labour law*,* applies to 'workers', even though certain immunities are reserved for employees. The *Health and Safety Act of 1971* applies to 'workers' with some extensions to persons who are not under a contract to perform work personally. The *Working Time Regulation 1998* and the *Part Time Workers (Prevention of less favourable treatment) Regulation 2000,* which both have their roots in European Union directives, apply to *workers*.

Often, being an *employee*, a *worker* or in *employment*, is not enough to be protected by the legislation. Thresholds as to length and regularity of employment limit the personal scope of certain employment rights. All dismissal protection apart from dismissals for inadmissible reasons such as discrimination or trade union membership, is, for example, conditional on one year of continuous service.[567] Another example is the *Disability Discrimination Act 1995*, the scope of which is limited to employers with more than 15 employees.[568] Other excluded categories are those workers who traditionally have not been seen as working under a contract of employment,

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564 *Sex Discrimination Act 1975 s. 82(1).* The same definition can be found in the *Race Relations Act 1976 s. 78(1); Disability Discrimination Act 1995 s. 68(1);* and *Equal Pay Act 1970 s. 1(6).*

565 For an overview of which statutory right apply to employees and what rights apply to workers, c.f. Department of Trade and Industry (2002) pp. 14f.

566 The common law of wrongful dismissals is also limited to employees, while discriminatory dismissals, regulated by the anti-discrimination acts, apply to all in employment.

567 *Unfair Dismissal and Statement of Reason for Dismissal (Variation of Qualification Period) Order 1999.*

for example "office holders" such as members of the armed forces, police officers, company directors, trade unions officers and some clergy.[569]

Historical Development

In the *National Insurance Act 1946*, old distinctions between manual and non-manual workers, and workers on different earning levels, were finally abolished, putting all persons occupied in gainful employment under a contract of service in the same category of contributors. They were distinguished from the other class of contributors, those employed on their own account, who paid lower contributions and were excluded from unemployment insurance.[570] As the same distinction was adopted for taxation, and, in the early 1960s, for employment protection, a unitary contract of employment developed, making the division between *employee* and *self-employed* the fundamental division in defining the personal scope of labour law and social security regulation.[571]

The courts' adapted to the new unitary concept of employee by developing new tests. According to Deakin "[t]he control test itself came to be regarded as excessively artificial, and gave way to the tests of 'integration' and 'business reality'. These stressed economic as opposed to personal subordination as the basis of the contract of employment."[572] Through two cases from the late 1960s, *Ready Mixed Concrete* and *Market Investigation*[573], a multi-factor approach, resembling the multi-factor tests found in US and Swedish law, was established.

As mentioned, even though the distinction between employees and self-employed workers has been, and still is, the most important line drawn between those covered by labour law and those

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568 *Disability Discrimination Act 1995 s. 7(1).*
569 Burchell, Deakin and Honey (1999) pp. 13f.
570 Deakin (1998) p. 221.
571 Deakin (1998) p. 221.
572 Deakin (1998) p. 222.

excluded from its scope of application, the United Kingdom has not relied solely on this distinction. Already factories and wage legislation dating from the late nineteenth and early twentieth centuries "accepted the idea that protective legislation should apply to certain workers who were nominally self-employed, in the sense that they were not employed under a contract of service or employment."[574]

In the mid-1970s, new legislation against racial and sex discrimination was given a personal scope wider than previous labour law, using the broader 'employment' notion rather than 'employee'.[575] An explanation that has been offered for this shift is that the legislation was drafted not in the Department of Employment but in the Home Office, where traditional labour law approaches held less sway.[576] The new legislation also covered employment agencies and temporary work agencies, as well as discrimination by a "principal" towards contract workers employed by someone else.[577] Two decades later, another important development took place, when the New Labour government made extensive use of the, not entirely new, 'worker' concept, for example in the *Minimum Wage Act 1998* and the *Working Time Regulation 1998*.[578] In the *Employment Relations Act 1999* the British parliament granted a "power to confer rights on individuals" giving the Secretary of State the right to extend by regulation the coverage of employment rights to specified categories of individuals.[579] The possible uses of this power will be dealt with below.[580]

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[573] *Ready Mixed Concrete v. Minister of Pensions and National Insurance* [1968] 2. Q.B. 497; and *Market Investigation Ltd v. Minister of Social Security* [1969] 2 QB 173.
[574] Deakin (2001a) p. 146.
[575] *Sex Discrimination Act 1975 s. 82(1); Race Relations Act 1976 s. 78(1);* and *Equal Pay Act 1970 s. 1(6).*
[576] Davies and Freedland (2000b) p. 87.
[577] Wedderburn (1986) p. 124.
[578] Davies and Freedland (2000b) p. 87.
[579] *Employment Relations Act 1999, Section 23(1) – 23(5)* and Employment Relations Act 1999 – Explanatory Memorandum, London: Para 232.
[580] C.f. below 4.4.3.

3.5.2 The UK Concept of Employee

As in the United States, the statutory definition of *employee* found in British labour law give very little guidance as to the real content of the concept, leaving it to the courts to decide the issue. Like in Sweden and the United States, courts have taken a multi-factor approach, taking a large number of factors into account and weighing them together to decide whether a worker is an employee or not. In the United Kingdom, however, there is no generally established list of factors that courts invariably take into account, in the way that is the case in the United States and Sweden.

A frequent starting point for UK courts faced with the question of whether a person is an employee or not is the following passage by MacKenna J. in *Ready Mixed Concrete v. Minister of Pension and National Insurance*:[581]

> A contract of service exists if these three conditions are fulfilled;
>
> (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.

For a person to be considered an employee there must thus be an obligation to perform work personally and a certain degree of control by the employer over the worker. As will be shown below, both these conditions are necessary for the existence of a contract of service, that is, for the worker to be an employee. According to the formula of *Ready Mixed Concrete*, the obligation to perform work and the employer's control is nevertheless not sufficient, as also the other provisions of the contract, taken together, must be consistent with its being a contract of service.

[581] *Ready Mixed Concrete v. Minister of Pensions and National Insurance* [1968] 2. Q.B. 497 (HC), at 515.

The year after *Ready Mixed Concrete*, the High Court developed its position in *Market Investigation Ltd v. Minister of Social Security* where it held, with a reference to the US Supreme Court's economic realities test as outlined in the *Silk*-decision, that "the fundamental test to be applied is this: 'Is the person who engaged himself to perform these services performing them as a person in business on his own account?'"[582]

> No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant to determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. 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 […][583]

After having established that an obligation personally to perform work existed, Cooke J proceeded by asking two questions: "First, whether the extent and degree of control exercised by the company, if no other factors were taken into account, be consistent with her being a employed under a contract of service. Second, whether when the contract is looked upon as a whole, its nature and provisions are consistent or inconsistent with its being a contract of service, bearing in mind the general test I have adumbrated."[584]

Performing Work Personally

The obligation to perform work personally is in fact a necessary condition for a contract of employment to exist. Whereas Swedish and US courts seldom look into the obligation to perform work personally, even though it has to be considered a necessary condition also in those two countries, UK courts often dwell at length over the issue. In practice, two issues have come to be decisive when considering whether there is an obligation to perform work personally: whether

[582] *Market Investigation Ltd v. Minister of Social Security* [1969] 2 QB 173, at 184.
[583] *Market Investigation Ltd v. Minister of Social Security* [1969] 2 QB 173, at 184-185.
[584] *Market Investigation Ltd v. Minister of Social Security* [1969] 2 QB 173, at 185.

the worker has the right to substitute his labour for that of another worker and whether the substitute has to approved by the employer.

In *Ready Mixed Concrete*, MacKenna J. found that the "[f]reedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional delegation may not be."[585] The case concerned a driver making deliveries for a company marketing and selling concrete in a truck he had bought under a financing agreement with the company. Together with eight other owner-drivers operating from the same plant he employed a relief truck driver who took over when one of the owner-drivers was sick, on holiday or absent for some other reason. Under the contract, the employer was nonetheless "entitled to require the owner-driver himself to operate the truck on every or any day [unless the owner driver] have a reason for not so doing which would have been valid had he been the employed driver of the company."[586] Further, the owner driver was to produce evidence to substantiate his excuses and take his holidays and vacations only as agreed in writing with the company. The court, therefore, found an obligation to perform work personally to be present in the case.

Important in this respect seems to be whether the worker has the right to substitute himself for any reason or, as in *Ready Mixed Concrete*, for reasons resembling those that would excuse an employee from work. In a later case, *Express Echo Publication v. Tanton*, the Court of Appeal found an obligation to perform work personally as lacking when the contract provided that "in the event that the contractor is unable or unwilling to perform his services personally he shall arrange at his own expense entirely for another suitable person to perform the service."[587] In the case, the

[585] *Ready Mixed Concrete v. Minister of Pensions and National Insurance* [1968] 2. Q.B. 497, at 515.
[586] *Ready Mixed Concrete v. Minister of Pensions and National Insurance* [1968] 2. Q.B. 497, at 511.
[587] *Express & Echo Publications Ltd v. Tanton* [1999] ICR 693, at 696.

right to provide a substitute was utilised from time to time and, exceptionally, for six months when the worker was ill.[588]

In a recent case, an Employment Appeals Tribunal distinguished the case before it from *Express Echo* by the fact that the workers in the case could not simply choose not to work in person. Further, the worker could not just provide anyone who was suitable as a replacement for her but only someone from a list drawn up by the employer. In addition, the substitute was paid directly by the employer and it was sometimes the employer who organised the substitute.[589] The court considered these circumstances to be expressions of the *limited or occasional power of delegation* mentioned in *Ready Mixed Concrete*.[590]

As concerns working owners of limited companies, there is no rule of law that the presence of a limited company between the worker and the employer prevents the worker from being considered an employee. "If the true relationship is that of employer and employee, it cannot be changed by putting a different label upon it."[591] In a case where the managing director and owner of 100 percent of the shares in a limited company filed for redundancy payment to himself to be paid by the Secretary of State when the company went into voluntary liquidation, the Employment Appeal Tribunal found the worker to be an employee and entitled to redundancy pay.

> The shareholding of a person in the company by which he alleges he was employed is a factor to be taken into account, because it might tend to establish either that the company was a mere simulacrum or that the contract under scrutiny was a sham. In our judgement it would be wrong to

[588] According to Davies and Freedland, one effect of the decision was that employment lawyers advising employers began advising their clients to insert such substitution clauses in work contracts in order to ensure that the workers in question would be viewed as self-employed. Davies and Freedland (2000b) p. 87, note 3.
[589] *MacFarlane v. Glasgow City Council* [2001] IRLR 7, at 10.
[590] *MacFarlane v. Glasgow City Council* [2001] IRLR 7, at 10.
[591] *Catamaran Cruisers Ltd v. Williams* [1994] IRLR 386, at 388. C.f. also *Hewlett Packard Ltd v. O'Murphy* [2002] IRLR 4, at 8.

> say that a controlling shareholder who, as such, […] was outside the class of persons given rights under the Act on an insolvency.[592]

Control or Integration into the Business of the Employer

Like the obligation to perform work personally, control has been described as a "necessary, though not always sufficient, condition of a contract of service."[593] In *Ready Mixed Concrete*, a traditional notion of control was outlined, focusing on the what, how, when, and where of the work.

> Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed doing it, the time when and the place where it shall be done. All these aspects of control must be considered when deciding whether the right exists in a sufficient degree to make one party the master and the other the servant. The right need not be unrestricted. [594]

As in other countries, British courts have had to adapt this notion of control in order to address skilled workers. In *Market Investigation*, Cooke J. held that "when one is dealing with a professional man, or a man of some skill and experience there can be no question of an employer telling him how to do work."[595] In *Lee v. Chung*, the Privy Council found the fact that a construction worker was not directly supervised to be of no importance as he was a skilled worker. He exercised no skill or judgement as to which beams to cut or how deep: "He was simply told what to do and left to get on with it."[596] In a case concerning a journalist, it was held that "the greater the skill required for an employee's work, the less significant is control in determining whether the employee is under a contract of service."[597]

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[592] *Secretary of State for Trade and Industry v. Bottrill* [1998] IRLR 120, at 124.
[593] *Ready Mixed Concrete v. Minister of Pensions and National Insurance* [1968] 2. Q.B. 497, at 517.
[594] *Ready Mixed Concrete v. Minister of Pensions and National Insurance* [1968] 2. Q.B. 497, at 515. For a similar definition in a more recent case c.f. *Lane v. Shire Roofing Company* [1995] IRLR 493, at 495.
[595] *Market Investigation Ltd v. Minister of Social Security* [1969] 2 QB 173, at 183.
[596] *Lee Ting Sang v. Chung Chi-Keung* [1990] ICR 409, at 414.
[597] *Beloff v. Pressdram Ltd* [1973] 1 All ER 241, at 250.

In the light of changes in the organisation of work, with employers relinquishing direct control and not just over skilled professionals, *integration into the business of the employer* has been used as an alternative to control, viewing the essence of employment as the employee's subjection to the rules and procedures of an organisation, rather than as subjection to personal command.[598] In *Market Investigation* it was acknowledged that "the test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation."[599] The advantage of this approach is that is has made it easier to find managers and skilled professionals to be employees. Despite autonomy as to the details of their work, these workers are well integrated into the business of their employer. Another way of describing the integration factor is in terms of Collins' concept of *bureaucratic power*. "It does not matter […] that the employee enjoys considerable independence from control or scrutiny by his supervisors in the organisation, provided that the rules of the organisation ultimately determine the content of the relationship."[600]

Another category of workers which evades control as traditionally understood is homeworkers, who work without the direct supervision of their employer. In *Market Investigation*, which concerned part-time interviewers working from home for a market-research company, the workers were issued detailed instructions on how to perform the interviews, lists of who to call, and how to report their results back to the market research company. Despite freedom as to when to do the work and no contractual provisions prohibiting the workers from doing similar work for other employers, the court found that "the control which the company exercised in this case was […] so extensive as to be entirely consistent with [the worker] being employed under a contract of service."[601] Similarly, a worker who in her home assembled shoe parts was found to fall under the control of the alleged employer. Shoe parts to be assembled were delivered to her

[598] Deakin & Morris (2001) p. 159.
[599] *Market Investigation Ltd v. Minister of Social Security* [1969] 2 QB 173, at 184.
[600] Collins (1986) p. 10.

at a specific time every day, she was told by the company how to do the work and to ensure adequate ventilation.[602] Investigating the degree of integration into the business of the employer has been said to be "appropriate to situations in which managerial authority is exercised in a de-personalised way, and subjected to bureaucratic rules and procedures. The test is arguably of less use in situations where the boundaries of the organisation are diffuse and unclear, as in the cases of sub-contract or agency labour."[603]

Other Factors

As mentioned, the formula of *Ready Mixed Concrete* stated that, apart from the performing personally work criterion, the other provisions of the contract, taken together, must be consistent with its being a contract of service. In British law, we find no established list of what these other provisions, or factors, are. While US courts run down the list of whichever test they are applying, British courts vary greatly in which other factors they consider. From the cases of the past three decades, it is nonetheless possible to identify a number of factors that courts tend to appraise in their assessment of a given relationships. Some of these factors – whether or not the worker has invested any capital, whether the worker has any opportunity for profit or runs the risk of loss, and the permanency of the relationship – are more important than other factors, which courts tend to disregard or only afford limited importance. In the second category of factors we find the type of remuneration, the tax treatment, the provisions of benefits typical for employees, industry practice and the label the parties have put on the contract.

In *Ready Mixed Concrete*, MacKenna J. gave two examples of situations where the worker should not be considered an employee, despite being personally obliged to perform work and under the control of the employer. Both examples concerned the *ownership of the means of production*. "A

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[601] *Market Investigation Ltd v. Minister of Social Security* [1969] 2 QB 173, at 186.
[602] *Airfix Footwear Ltd v. Cope* [1978] ICR 1210, at 1212-1213.
[603] Burchell, Deakin and Honey (1999) p. 6.

contract obliging one party to build for the other, providing at his own expense the necessary plants and material […] is not a contract of service but a contract to produce a thing (or a result) for a price."[604] Further, a contract which "obliges one party to carry the other's goods, providing at his own expense everything needed for performance […] is not a contract of service, even though the carrier may be obliged to drive the vehicle himself and to accept the other's control over his performance: it is a contract of service."[605] In many UK cases, the fact that the worker has invested no or only very limited capital has been considered as weighing in favour of the worker being considered an employee.[606]

Another commonly used factor, related to the capital investment factor, is the worker's *opportunity to make a profit and risk of making a loss*. In the words of Cooke J. "what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity to profiting from sound management in the performance of his task."[607]

As in the United States and Sweden, courts in the United Kingdom have looked at the length and stability of the relationship between the worker and the employer. In *Airfix Footwear*, the fact that the worker had worked for the employer five days a week for the past seven year was used as a sign that the worker was an employee.[608] Likewise, in *Nethermere*, the fact that the relationship between the worker and the employer had a history going back several years was counted in favour of the worker being an employee.[609] As will be dealt with in greater detail below, the status

[604] *Ready Mixed Concrete v. Minister of Pensions and National Insurance* [1968] 2 QB 497, at 516.
[605] *Ready Mixed Concrete v. Minister of Pensions and National Insurance* [1968] 2 QB 497, at 516.
[606] E.g. *Market Investigation Ltd v. Minister of Social Security* [1969] 2 QB 173; *Beloff v. Pressdram* [1973] 1 All ER 241; *Airfix Footwear Ltd v. Cope* [1978] ICR 1210; *O'Kelly v. Trusthouse Forte Plc* [1984] 1 QB 90 and *Lee Ting Sang v. Chung Chi-Keung* [1990] ICR 409.
[607] *Market Investigation Ltd v. Minister of Social Security* [1969] 2 QB 173, at 185.
[608] *Airfix Footwear Ltd v. Cope* [1978] ICR 1210, at 1215.
[609] *Nethermere Ltd v. Gardiner* [1984] ICR 612, at 634

permanency and other e*conomic dependence* factors in the UK multi-factor test are highly dependent on the purpose of the regulation, in some cases seen as necessary for employee status.

The *type of remuneration*, despite often being mentioned by the courts, seems to have little impact on the decision whether the worker is an employee or not. Already in the late 1960s it was held that an "appointment to do a specific task at a fixed fee [was not] inconsistent with the contract being a contract of service."[610] Later, another court found the method of calculating the employees remuneration as not being an essential part of the employment relationship.[611] In *Lee v. Chung*, the Privy Council shortly mentions what could be a more advanced approach in deciding the importance of the type of remuneration to the question whether the worker is an employee or not: "There is no suggestion in the evidence that he priced the job which is normally a feature of the business approach of a subcontractor; he was paid either a piece-work rate or a daily rate according to the nature of the work he was doing."[612]

Like in the United States, the *worker's skill* has been a factor considered by courts in determining whether a worker is an employee or not. A high level of skill and status as a 'professional' has been taken as an indication of the worker being self-employed, whereas a low level of skill and more manual work has indicated employee-status. Like the form of remuneration, skill has over time become a less and less important factor. In *Sellars Arenascene Ltd v. Connally* the Court of Appeal held that if a person's skills "were qualities which prevented a person in [a managerial/entrepreneurial] position from enjoying the status of employee, it would be a severe and unwarranted deterrent to business enterprise."[613] In *Hall v. Lorimer*, the Court of Appeal held that skill cannot be a decisive factor as "a brain surgeon may very well be an employee; a window

[610] *Market Investigation Ltd v. Minister of Social Security* [1969] 2 QB 173, at 187.
[611] *O'Kelly v. Trusthouse Forte Plc* [1984] 1 QB 90, at 105.
[612] *Lee Ting Sang v. Chung Chi-Keung* [1990] ICR 409, at 413.
[613] *Sellars Arenascene Ltd v. Connolly* [2001] IRLR 222, at 226.

cleaner is commonly self-employed."[614] The worker's level of skill can, however, still influence how other factors, in particular the control factor, is to be interpreted.[615]

In British law, there is "lack of a precise fit between the status of individuals for employment purposes and their position under income tax and social security legislation."[616] Statutory intervention has been made to make, for example, agency workers akin to employees for tax and social security purposes. This does not change their status under labour law, as was made clear in *O'Kelly v. Trusthouse*: "The industrial tribunal accepted that the tax and social security contributions are deducted as a requirement imposed upon the company by the [tax authorities] and that this is not, of itself, indicative of the legal basis of the relationship between the company and the casual staff, for employment protection purposes."[617]

In several instances, when assessing the status of a worker, the British courts have looked at whether the *employer provides benefits* typically awarded to employees, such as holidays and sick-pay. Even though it is an often cited factor, its actual importance can be questioned. In *Market Investigation*, the Employment Tribunal dismissed the fact that the employer provided no time-off, sick pay or holidays to the worker as a mere reflection of the fact that there were no fixed hours of work.[618] In *O'Kelly*, differences in terms and conditions of employment were not considered indicative of whether the worker was an employee or not.[619]

Like in Sweden, whether it is *practice in the industry* to classify a certain type of worker as an employee or an independent contractor might carry some weight. In *O'Kelly* the court found

[614] *Hall v. Lorimer* [1994] IRLR 171, at 174 (per Lord Justice Nolan).
[615] C.f. *Lane v. Shire Roofing Company* [1995] IRLR 493, at 495.
[616] Burchell, Deakin and Honey (1999) p. 10.
[617] *O'Kelly v. Trusthouse Forte Plc* [1984] 1 QB 90, at 102. According to Burchell et al, this leaves certain workers in a position where they have none of the potential tax advantages of being self-employed while they still suffer from not being covered by large parts of labour law. Burchell, Deakin and Honey (1999) p. 10.
[618] *Market Investigation Ltd v. Minister of Social Security* [1969] 2 QB 173, at 187.
[619] *O'Kelly v. Trusthouse Forte Plc* [1984] 1 QB 90, at 105.

industry practice to be "a factor, although not a particularly important factor, which the industrial tribunal were entitled to take into account as part of the background against which the parties regulated their relationship."[620]

In line with labour law being of a mandatory nature, the *label the parties put to their contract* does not usually decide whether the contract is one of service or not. In *McMeechan v. Secretary of State for Employment*, the Court of Appeal held that the label put on the contract by the parties does not change the outcome when the general impression which emerges from weighing all factors together is that the worker is an employee.[621] The weight of the label might nonetheless depend on the circumstances. In *Massey v. Crown Life Insurance*, the fact that the parties had agreed to label the worker self-employed in order to obtain tax benefits was considered to afford strong evidence that the worker was in fact self-employed. In the words of Lord Denning MR, the worker "gets the benefit of it by avoiding tax deductions and getting his pension contributions returned. I do not see that he can come along afterwards and say it is something else in order to claim that he has been unfairly dismissed. Having made his bed as being 'self-employed', he must lie on it."[622]

3.5.3 "To paint a picture from the accumulation of detail"

Like their counterparts in Sweden and the United States, British courts have taken a multi-factor approach to decide whether a worker is an employee or not. In a recent labour law textbook, Pitt writes that "there is no definitive list of necessary or sufficient conditions for the identification of a contract of employment. Nor is it clear how many have to be present before one could conclude that the contract exists. The contract of employment is a cluster concept. If one conceives of the factors as a list A-E, one contract might have A, B and C but not D and E,

620 *O'Kelly v. Trusthouse Forte Plc* [1984] 1 QB 90, at 117.
621 *McMeechan v. Secretary of State for Employment* [1996] ICR 549, at 565.
622 *Massey v. Crown Life Insurance Co* [1978] 2 All ER 576, at 581 (Lord Denning MR).

another might have D and E or A and C but not the others. All could be capable of being contracts of employment."[623] Even though the claim to no definite list of factors is made in Swedish and US labour law as well, it is probably more well founded in the United Kingdom, where there really is no generally established list of factors that courts invariably take into account.

The fact that higher courts are only allowed to overturn decisions of lower courts if they have erred in the application of law adds to the uncertainty of the factors and which weight they should be given. As Burchell, Deakin and Honey point out, "the determination of employment status is said to be a question of 'mixed law and fact' on which tribunals faced with the same or very similar facts could, legitimately, disagree. It is only if the tribunal makes an error of law – in the sense of applying a completely wrong test, or arriving at a conclusion on the facts which is 'perverse', in the sense of being a conclusion which no tribunal could reasonable reach – that an appellate court has the right to intervene and reverse the judgement."[624]

Apart from no generally established list of factors, British courts have also expressively rejected the idea that there is only one test of employee regardless of the facts of the specific situation and the purpose of the statute. On the contrary, both the circumstances of the specific case and the purpose of statute is to be afforded great importance. In *Hall v. Lorimer*, a 1994 income tax case, the Court of Appeal held that:

> In cases of this sort there is no single path to a correct decision. An approach which suits the facts and arguments of one case may be unhelpful in another. […] 'This is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered and qualitative appreciation of

[623] Pitt (2000) p. 83.

> the whole. […] Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.'[625]

The obligation to perform work personally and a certain degree of subordination are, as mentioned, necessary factors for a worker to be found to be an employee in the UK. Beyond these two basic requirements for a contract of service, it is difficult to foresee what factors a British court will find relevant, and which weight it will give them. Largely, this is due to the purposive interpretation of the concept of employee adopted by the courts.[626] According to Pitt, "[i]t may be felt […] that the decisions of courts are sometimes swayed by what is at stake, and that they are more likely to hold that the plaintiff is an employee where health and safety are at issue."[627] In *Lee v. Chung*, the Privy Council expressly linked its interpretation of the concept of employee to the purpose of the industrial injury ordinance before the court.

> But to apply the test whether a person is 'part and parcel of the organization' is likely to be misleading in the context of the statute which expressively contemplates that causal workers and workers working for two or more employers concurrently may be employed under a contract of service. In the building and construction industry the test may lead to the error of only considering those on the permanent staff as employed under a contract of service and thus excluding all those from the protection of the Ordinance who are taken on for a particular project[…]. [628]

As early as in 1985, Leighton found the courts' purposive interpretation of the concept of employee and the inclusion of those who contract personally to execute any work or labour to imply "that many of the two million-plus self-employed workers in this country are covered by

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[624] Burchell, Deakin and Honey (1999) p. 11. For a similar view, c.f. Wedderburn (1986) p. 127.
[625] *Hall v. Lorimer* [1994] IRLR 171, at 174 (per Lord Justice Nolan agreeing with the views of Mummery J)
[626] Not all authors share this view. Steven Anderman argues that "[t]he use of the same test for a wide range of statutes has meant that there is insufficient heed paid to the particular purpose of the statute." Anderman (2000) p. 237.
[627] Pitt (2000) p. 85. Burchell, Deakin and Honey are of the same opinion finding "that the economic reality test is more likely to be applied in favour of employee status in cases involving health and safety." Burchell, Deakin and Honey (1999) p. 9.
[628] *Lee Ting Sang v. Chung Chi-Keung* [1990] ICR 409, at 418.

some protective legislation."[629] In addition, on at least one occasion, a court has acknowledged that changes on the labour market have to influence its decision. In *Lane v. Shire Roofing Company*, the Court of Appeal held that the increase in self-employment and the many advantages for both the employer and the worker in avoiding the employee-label had to be taken into account when the authority of older case law was examined. As the Court found "good policy reasons in the safety at work field to ensure that the law properly categorises between employees and independent contractors" it held that the worker was an employee.[630]

"Mutuality of Obligation"

On one point, British courts' treatment of the concept of employee deviates quite markedly from their US and Swedish counterparts, and even more so from the French courts. In some cases, particularly concerning the termination of contracts, either unfair dismissal cases or claims for redundancy pay, the courts give great weight to whether or not there is "mutuality of obligation" between the worker and the employer.[631] Mutuality of obligation has been described as "the presence of mutual commitments to maintain the employment relationship over a period of time."[632] Courts look for an obligation on the one party to offer work and on the other to accept and do work if offered. Cases have commonly concerned casual workers and others who are engaged by the employer for a number of shorter engagements. Are they hired under one, 'umbrella' or 'universal', contract of employment or under several short time contracts covering only a single engagement?[633]

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[629] Leighton (1985) p. 55.
[630] *Lane v. Shire Roofing Company* [1995] IRLR 493, at 495 (per Lord Justice Henry).
[631] C.f. *O'Kelly v. Trusthouse Forte Plc* [1984] 1 QB 90 (unfair dismissal); *Nethermere v. Gardiner* [1984] ICR 612 (unfair dismissal); *Boyd Line Ltd v. Pitts* [1986] ICR 244 (redundancy pay); *Hellyer Brothers Ltd v. McLeod* [1987] ICR 526 (redundancy pay); and *Clark v. Oxfordshire Health Authority* [1998] IRLR 125 (unfair dismissal).
[632] Deakin and Morris (2001) p. 162.
[633] For a critique of the test of mutuality of obligation, in particular its interplay with thresholds of continuity of employment, c.f. Burchell, Deakin and Honey (1999) pp. 13f.

In fact, mutuality of obligation has in many cases been treated like a necessary factor alongside the obligation to perform work personally and control.[634] The House of Lords, in a 2000 case concerning on-call workers held that their claim to employee status lacked "that irreducible minimum of mutual obligation necessary to create a contract of service."[635] Mutuality of obligation does, however, only seem to apply in cases concerning statutes aimed at regulating the termination of employment contracts, whereas it is seldom mentioned in cases concerning for example health and safety or industrial injuries. In *Market Investigation*, which concerned the *National Insurance (Industrial Injuries) Act*, the court expressed its doubt that the alleged employer's claim that continuity was lacking as the work was performed under a series of contracts made any difference.[636]

O'Kelly v. Trusthouse Forte concerned wait staff that a hotel company kept on a list and relied upon to do work regularly. In exchange, the company assured theses "regular casuals" preference in the allocation of available work. The Court of Appeal found that "[t]he 'assurance of preference in the allocation of any available work' which the 'regulars' enjoyed was no more than a firm expectation in practice. It was not a contractual promise."[637] As no mutuality of obligation existed, the workers claim for unfair dismissal when the company took them off the list and stopped offering them work failed. This position of the court has been criticised for giving too much weight to formal contractual obligations instead of the reality of the relationship between the parties.[638]

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634 Under British law, most claims concerning unfair dismissal or severance pay require the employee to have a period of qualifying continuos employment, for example, 52 weeks. Protections against dismissals for inadmissible reasons, such as discriminatory dismissals or dismissals due to membership in a trade union, however, do not have any qualification period. This was the case in *O'Kelly v. Trusthouse Forte* [1984] 1 QB 90.
635 *Carmichael v. National Power* [2000] IRLR 43, at 45 (per Lord Irvine).
636 *Market Investigation Ltd v. Minister of Social Security* [1969] 2 QB 173, at 187.
637 *O'Kelly v. Trusthouse Forte Plc* [1984] 1 QB 90, at 116.
638 Anderman (2000) p. 239.

In the same year, however, in *Nethermere*, the Court of Appeal could not "see why well founded expectations of continuing homework should not be hardened or refined into enforceable contracts by the regular giving and taking of work over periods of a year or more, and why outworkers should not thereby become employees under contracts of service like those doing similar work at the same rate in the factory."[639] The court then went on to apply a multiple test under which it found the workers to be employees.

The result of the mutuality of obligation requirement has many times been to exclude causal workers from protection.[640] "In general, the mutuality test is an exclusionary one – the absence of mutuality will most likely defeat a claim of employee status, without in itself being a sufficient condition."[641] For temporary agency workers, the mutuality of obligation doctrine can make it difficult to establish employee status vis-à-vis the temporary work agency. In *Clark v. Oxfordshire Health Authority*, which concerned a nurse tied to a "nurse bank", the Court of Appeal nonetheless accepted "that the mutual obligations required to found a global contract of employment need not necessarily and in every case consist of an obligation to provide and perform work. To take one obvious example, an obligation by the one party to accept and do work if offered and an obligation on the other party to pay a retainer during such periods as work was not offered would […] be likely to suffice."[642]

3.6 France

French labour law covers all private employees, while workers in the public sector and the employees of certain government owned companies have their employment relationships governed by administrative law. In addition, workers in managerial positions are frequently excluded from the personal scope. Compared to the other countries represented in this study, the

[639] *Nethermere v. Gardiner* [1984] ICR 612, at 626-627 (per Stephenson LJ).
[640] Burchell, Deakin and Honey (1999) p. 8.
[641] Deakin & Morris (2001) p. 162.
[642] *Clark v. Oxfordshire Health Authority* [1998] IRLR 125, at 130.

concept of employee in French labour law does not stand out as either the widest or the most narrow. It does, however, distinguish itself as the concept of employee most dominated by the worker's subordination to the orders and directives of the employer. The employer's control and disciplinary powers are given a pre-eminence not found in Swedish, British or US labour law. This focus on subordination over other factors serves both to extend and limit the reach of the concept of employee.

In addition to employees, the personal scope of French labour law has been extended by legislation to cover eight other categories of workers. These workers – defined in terms of their profession, the nature of their work or its location – have as their common denominator the fact that they are economically dependent while their subordination to the employer's managerial powers are too weak for them to be covered by the concept of employee. These categories of workers will be dealt with extensively below.[643]

Historical Development

After the establishment, at the beginning of the 20th century, of the *contrat du travail* as the personal scope of labour law, as elsewhere, it fell to the courts to work out the details of the concept of employee. Initially, the *contrat du travail* was viewed as a contract in traditional terms. The worker's subordination to the employer was a consequence of the employment contract. The important feature was the legal classification of the contract for work, not the factual nature of the work. If the contract was for any reason invalid, the conditions of work, such as the degree of subordination, were of no importance: there was no contract of employment and the worker was thus not entitled to the protection of social legislation. Under this doctrine, workers under the legal minimum age and foreign workers without valid residence permits fell outside the

[643] C.f. below 4.2.2.

personal scope of social legislation.[644] Step by step, however, the *contrat du travail* came to be seen as a *relation de fait*, a factual relationship where the *contract du travail* was a consequence of the worker's subordination to the employer instead of vice-versa. This development was particularly accentuated in the field of industrial accidents, where a 1938 act expressively stated that it applied regardless of the validity of the contract and gave pre-eminence to the actual relationship between the parties.[645]

Another issue was whether the concept should have the same meaning when used in *lois d'assistance* – social security legislation – and in *lois de justice* – labour law. The two types of legislation were perceived as having rather different objectives. *Lois de justice* dealt with the legal relationship between the worker and the employer, whereas concerns about economic dependence formed the base for *lois d'assistance.*[646] From the point of view of the *Cour de cassation* it was nevertheless important to uphold the coherence of the law, which is why a unitary concept of *contrat du travail* was preferred.[647]

It did, however, take a while for the jurisprudence to settle. Some cases from the early twentieth century indicate that the courts did place considerable weight on a worker's economic dependence, also in labour law cases. If one of the parties to the contract drew the bulk, if not its entire, income from the work performed for the other party, this could make the party an employee. Under this jurisprudence, in 1909, taxi drivers were found to be employees of the taxi companies despite a lack of direct orders on which routes to take.[648]

644 Aubert-Monpeyssen (1988) pp. 31f.
645 Aubert-Monpeyssen (1988) pp. 32ff.
646 Aubert-Monpeyssen (1988) pp. 12f. and p. 25.
647 Aubert-Monpeyssen (1988) p. 25.
648 Le Goff (2001) p. 119.

By the early 1930s, legal subordination had been established as the main criterion. The economic dependence criterion was perceived as having become too all encompassing. Arguably, managing directors of companies ought to have been considered employees, as they too were economically dependent on the company.[649] In a landmark 1931 decision, the *Cour de Cassation* therefore reframed the notion making the worker's legal subordination to the employer the principal criterion. The status of employee necessarily implies the "existence of a legal bond of subordination between the worker and the person who employs him."[650]

In a series of cases the year after, the *Cour de Cassation* nuanced its 1931 decision. Still claiming adherence to a doctrine with legal subordination as the decisive criterion, the court adopted a multi-factor test, once again broadening the notion.[651] Legal subordination was not just a question of whether the worker was under the orders and control of the alleged employee: other factors also had to be taken into consideration, such as the ownership of the tools or machinery used; whether the worker could hire other workers to help him; and whether the working hours were decided by the worker or the employer.

Defining the personal scope of social legislation in terms other than legal subordination did, however, enjoy considerable political support.[652] Through legislative intervention in 1935, the existing social security legislation was given a personal scope that went beyond employees, making insurance mandatory for all employees and all French citizens working for one or several employers regardless of the nature of their relationship.[653] The restrictive interpretation of the concept of employee by the *Cour de cassation* was thus pushed aside and the personal scopes of

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649 Le Goff (2001) p. 123.
650 "…l'existence d'un lien juridique de subordination du travailleur à la personne qui l'emploie…" *Civ. 6 juillet 1931*, quoted in Le Goff (2001) p. 124.
651 Aubert-Monpeyssen (1988) pp. 26f.
652 Aubert-Monpeyssen (1988) p. 26.
653 *Decret-loi du 28 octobre 1935*. "[…] *assurés obligatoires tous les salariés et d'une facon générale, toutes les personnes de nationalité francaise, de l'un ou l'autre sexe, travaillant à quleque titre que ce [fut] et en quelque lieu que ce [fut], pour un ou plusieurs employeurs*". Cited in Aubert-Monpeyssen (1988) p. 27.

labour law and social security law separated. Existing and subsequent social legislation adopted the one of these two personal scopes depending on whether they were considered as *lois d'assistance* (social security) or *lois du justice* (labour law).[654]

Horizontal and Vertical Extensions of the Personal Scope

In the mid-1930s, the personal scope of labour law was enlarged to include categories of workers whose activity required a degree of liberty viewed as incompatible with legal subordination as understood at the time. Journalists and travelling sales representatives, and later models and performing artists, were given the protection of the entirety of labour legislation.[655] Other categories, such as gas station tenants and persons running supermarkets on behalf of a chain of stores were to enjoy the protection of parts of labour law. A consequence of the partial application of labour law to certain categories of workers was the severance of the link between labour market regulation and the concept of employee, opening a breach for applying labour law to non-employees.[656] This was manifested in labour legislation with general applicability, such as the right to receive a payslip, and labour legislation with a personal scope tied to the worker's belonging to an enterprise rather than status as an employee, such as occupational health and safety and collective labour law.

The fact that the *Cour de cassation* insisted on legal subordination as the key to the employee status did not stop the concept from developing.[657] While the assimilation of workers in a similar economic position as employees represented a "horizontal" extension of the personal scope of labour law, the evolution of the concept of employee in the second half of the twentieth century represents a "vertical" extension, reaching workers higher up the social echelon.[658] White collar

[654] The line between the labour law and social security law was not, however, very well defined. A 1932 law on family allowances was given the more narrow scope. Aubert-Monpeyssen (1988) p. 29.
[655] C.f. below 4.2.2.
[656] Aubert-Monpeyssen (1988) p. 60.
[657] Revet (1992) p. 47.
[658] For the notions of *horizontal* and *vertical* extensions of the personal scope c.f. Aubert-Monpeyssen (1988) p. 62.

workers and some members of the liberal professions thus came to enjoy the protection of labour law. The extension was contested and prompted legislative intervention to keep company directors and lawyers in private practice from being classified as employees.[659]

The Relationship with the Concept of Employee in Social Security Law

From the mid-1930s, French social security law developed its own concept of employee, breaking with contract law doctrines on the nature, form or validity of contract, instead focusing on the employee's dependency on the employer.[660] The concepts of employee in French labour law and social security law respectively were thus separated, giving social security law a wider concept, based on the worker's economic dependence rather than on the nature, form or validity of the contract between the worker and the employer. This separation was also reflected in the jurisprudence, where courts held the fact that a worker was registered for social security not to be proof of employee status.[661] There are also examples of situations were the same worker was treated differently in disputes concerning labour law and social security law respectively.[662]

The separation did nonetheless not hold up against the unifying logic calling for a single coherent concept of employee. Already in the early 1960s, courts started to accord relevance to social security registration when deciding labour law cases. In 1966, social security cases were transferred to the *Chambre sociale* of the *Cour de cassation*. With the same body in charge of both social security and labour law cases, the concepts became ever more unified, giving social security registration value as a presumption of employee status.[663] The effect of the harmonisation of the concepts of employee in labour law and social security law was a widening of the personal of

[659] Aubert-Monpeyssen (1988) pp. 64ff.
[660] Aubert-Monpeyssen (1988) p. 80.
[661] Aubert-Monpeyssen (1988) p. 80.
[662] In two cases dating from 1958 and 1962, the same shop assistant was considered to belong to the personal scope of social security law but not to that of labour law. Camerlynck (1982) p. 67.
[663] Aubert-Monpeyssen (1988) p. 81.

labour law.[664] As late as 1982, however, a prominent French legal scholar described the notion of subordination used in social security law as "a notion less purely legal, with socio-economic concerns about the protection of categories of individuals deemed 'vulnerable'"[665] In works from recent years, the consensus nonetheless seem to be that the concept of employee is the same in both labour law and social security law. Pelissier, Supiot and Jeammaud describe the relationship between the two as "despite the obvious differences between labour law and social security law, the *Chambre social* of the *Cour de cassation* has given the same definition of a subordinate relation for the two disciplines".[666]

As the development in past decade, dealt with below, shows, the concept of employee is subject to a constant debate and constant developments. The persistence of the concept of employee in labour law as a relationship characterised by legal subordination has been described as purely formal. In the words of Monpeyssen "the only persistence in the notion of subordination is terminological".[667]

3.6.1 The Multi-factor Test of Legal Subordination

A worker who works under a contract of employment (*contrat de travail)* is an employee (*salarié).* The *Code du travail* does not contain any definition of neither of the two and it has been left to the courts and the doctrine to develop the concept of employee. In a 1931 ruling, the *Cour de Cassation* held that the status of employee necessarily implies the "existence of a legal bond of subordination between the worker and the person who employs him", a bond of subordination which is "an element specific to the *contrat de travail* deriving from the fact that the employee finds

[664] Morin (1998) p. 135.
[665] "[U]ne notion moins proprement juridique, qu'à des préoccupations socio-économique de protection de catégories d'individus 'vulnerable'". Camerlynck (1982) p. 62.
[666] "Malgré cette apparente différence entre le Droit du travail et le Droit de la Sécurité sociale, la Chambre sociale de la Cour de cassation donne le même définition du lien de subordination dans le cadre des deux disciplines". Pelissier, Supiot and Jeammaud (2000) p. 151.
[667] "Le critere de subordination n'a d'autre permanence que terminologique" Aubert-Monpeyssen (1988) p. 315.

himself subject to the authority and to the direction of his employer who gives him orders as to how the work should be performed and controls and supervises its accomplishment."[668]

Three Constitutive Elements

In the doctrine, a contract of employment is commonly considered to have three constitutive elements: the performance of work by a human being; the fact that the work is remunerated; and the worker's subordination to the authority of the employer.[669] To qualify as *work performed by a human being*, the work can take many different forms and be of a manual, intellectual or artistic nature, as long as the contract concerns a human being putting her labour at the disposal of the employer, and not the provision of a finished product. The work must take place under a contract, and work must be the principal purpose of the contract.[670] The *contrat de travail* is an onerous contract and conditioned, explicitly or implicitly, on a *remuneration* of some kind.[671] It imposes mutual obligations and, if the employer is not paying the worker has no obligation to work, and vice-versa. To count as remuneration for work, the payments have to go somewhat beyond just reimbursing expenses.[672] As the *Cour de cassation* pointed out in its 1931 decision, the status of employee necessarily implies the existence of a *bond of legal subordination* between the worker and the person who employs her.[673] Legal subordination places the employee under the authority of the employer, who gives orders, controls the work process and the result of the work. As in many other countries, it is the employees submission to the authority of the employer that distinguishes employees from independent contractors.

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668 "…l'existence d'un lien juridique de subordination du travailleur à la personne qui l'emploie…" and "…élément spécifique du contrat de travail dérivant de la circonstance que la salarié se trouve soumis à l'autorité et à la directive de son employeur qui lui donne des ordres relatifs à l'exécution de son travail, en contrôle et surveille l'accomplissement…" *Civ. 6 juillet 1931*, cited in Le Goff (2001) p. 124.

669 C.f. Camerlynck (1982) pp. 52ff; Teyssié (1992) p. 211; Del Sol (1998) p. 29f; and Pelissier, Supiot and Jeammaud (2000) pp. 145f; and Cohen and Gamet (2001) pp. 792ff.

670 This means that persons performing work under other arrangements than contract, in French law for example civil servants, soldiers and prisoners, cannot be counted as employees. C.f. Savatier (1997) 643.

671 Soc. 8 févr. 1972 Bull. civ. V.102.

672 C.f. Soc. 29 janv. 2002, RJS 4/2002 no 387 and Soc. 22 mars 1989, Bull. civ. V.139.

Relevant Factors to Assess Legal Subordination

The French multi-factor test is used to decide whether the third of the constitutive elements, a bond of legal subordination, is present in the relationship, thereby separating employees from independent contractors. In the jurisprudence of the *Cour de cassation*, and in the doctrine, the following factors have commonly been used as indications of employee status: i) the work is being performed under the orders and control of the employer; ii) the work takes place on the employer's premises or at a place decided by the employer; iii) the employer has control over the hours of work; iv) the remuneration is defined in terms of time rather than for a given task; v) the employer provides the necessary material and machinery; vi) the worker does have any employees of her own; vii) the worker works exclusively for the employer; and vii) the employer behaves as such, for example, by issuing payslips or paying social security contributions.[674]

Orders and Control

In the 1996 *Société Générale* case, the *Cour de cassation* held that the employee's subordination is "characterised by the execution of work under the authority of an employer who has the power to give orders and directions, to control the execution and to sanction breaches of duty by his subordinate".[675] As the French multi-factor test essentially is a test of the worker's degree of subordination, the jurisprudence concerning the employer's orders and control, as well as other subordination factors, is particularly rich, which is why they will be given a rather extensive treatment.

The employer's orders can take different forms and can come in the implicit form of constraints on the worker's freedom of action. The tenant of a newspaper kiosk was found to be an

673 "[L]'existence d'un lien juridique de subordination du travailleur à la person qui l'emploie." *Civ. 6 juillet 1931 (Recueil Dalloz 1931, p. 131).*

674 For listings of factors in the doctrine, c.f. Le Goff (2001) p. 126; Pelissier, Supiot and Jeammaud (2000) pp. 145ff; Teyssié (1992) pp. 222ff; Camerlynck (1982) p. 54.

employee as she was receiving precise instructions "not leaving any room for initiative," and had her prices set by the distributor and her stand inspected twice daily.[676] A sales representative was deemed an employee as he was given precise instructions on sales, advertising and invoicing; and had the duty to report frequently his sales and to make monthly plans for his future activities.[677] A contract between the parties stating the place and time of work is, however, not enough to constitute orders or directives. In three 1982 cases concerning conference interpreters, the *Court de cassation* rejected employee status for the plaintiffs as the only constraint put on them was the place and time of work.[678] Neither do explanations and instructions as to how technical equipment should be used qualify as orders leading to the worker's subordination.[679]

For the employer's control to give rise to a state of subordination, the orders and control have to go further than just general instructions specifying a task, something to which many independent contractors are subject. A gardener receiving only general instructions about his task, but in whose contract the court could find no clause according to which the gardener "must, in the execution of his task, submit himself to the surveillance, the control, directives or orders of any sort" of the employer, was found to be an independent contractor.[680] Along the same lines, a construction worker was found not to be an employee, as he had not in any way been under the supervision of the alleged employer. [681] Further, a physician serving as a company medical officer left free to determine how and when he should work was found to be an independent contractor.[682]

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675 "…caractérisé par l'exécution d'un travail sous l'autorité d'un employeur qui a le pouvoir de donner des ordres et des directives, d'en controler l'exécution et de sanctionner les manquements de son subordonné…" *Soc. 13 nov. 1996*, Droit Social 1996 p. 1069.
676 Soc. 28 avr. 1960, Bull. civ. IV.316.
677 Soc. 9 mai 1979 Bull. civ V. 286.
678 Soc. 14 janv. 1982 Bull. civ. V.13 and Soc. 14 janv. 1982 Bull. civ. V.14; Soc. 14 janv. 1982 Bull. civ. V.18.
679 Soc. 14 janv. 1982 Bull. civ. V.18.
680 "…dût, dans l'exécution de sa tâche, se soumettre à une surveillance, à une contrôle, à des directives ou à des ordres quelconques…" Soc. 29 janv. 1970 Bull. civ. V.50.
681 Soc. 3 févr. 1965, Bull. civ. IV.82. In the case, it was the worker who claimed not to be an employee, in order to have the *Conseil des prud'hommes* declared incompetent for the case.
682 Ch. Reun 21 mai 1965, Bull. civ. IV.6, c.f. also Soc. 19 déc. 1990, RJS 2/1991, no 144, concerning an academic giving lectures to the clients of a company without the company having any hierarchical power over him.

The orders and control can leave some degree of discretion to the worker, in particular if the worker is in possession of expertise or special skills or if a degree of independence is inherent in the nature of the work. In a case concerning a researcher working in the laboratory of a company, the *Cour de cassation* found that the "liberty inherent in the activity of a researcher" was not of the nature to exclude the worker from employee status.[683] The *Cour de Cassation* found a diver prospecting natural resources off Colombia to be an employee even though he necessarily enjoyed some liberty as to how to perform his work due to the distance between him and the employer and the technical nature of his work.[684] Likewise, a film director was found to be an employee of the producer of the film, despite a certain degree of artistic freedom.[685] Further, in a 1978 case concerning a medical doctor, the *Cour de cassation* found that the professional independence enjoyed by a doctor was not incompatible with the existence of a bond of legal subordination vis-à-vis the direction of the clinic at which he worked. In the case, the doctor did not have the right to chose his own patients and had to work according to a schedule determined by the direction of the clinic.[686] The crucial point, pronounced in a case the year after, seems to be whether the liberty of action exceeds what necessarily follows from the doctor's professional expertise or not.[687]

The employer's disciplinary powers can play a significant role and has occasionally been at the centre of the court's attention. A football player, remunerated but not a full-time professional, was found to be an employee as his contract obliged him to subject himself to the rules and discipline of the club.[688] In a 1997 case, the *Cour de cassation* found the fact that the directors of a

[683] Soc. 14 mars 1991, Bull. civ. V. no 138.
[684] Soc. 14 avr. 1976 Bull. civ V.179. In addition, the fact that he, on top of his salary, had all his expenses covered by the employer seems to have been important for the court.
[685] Soc. 29 nov. 1962,Bull. civ. IV.713.
[686] Soc. 27 oct. 1978, Bull. civ. V.544.
[687] Soc. 7 mars 1979, Bull. civ. V.145. In the case, the doctor was found not to be an employee.
[688] Soc. 14 juin 1979 Bull civ. V.397.

mother company had dismissed the manager of a subsidiary for not having followed their instructions as evidence that the worker was in fact an employee of the mother company.[689]

Place of Work

The employer's "impératif géographique", the right to decide the location where the work is to be performed, is considered as a typical characteristic of the worker's subordination, however not decisive in itself.[690] Thus, the fact that a worker receives clients or patients on the business premises of the alleged employer is considered to weigh in favour of the worker being an employee.[691] In a 1982 case, the fact that a person working for a real estate agent was obliged to receive clients at a place and time determined by the employer was mentioned as a fact counting towards employee-status.[692] Further, a regional director of a company was found to be an employee, among other things because his place of business was being rented by the alleged employer.[693] On the contrary, a collector of insurance premiums working from his own premises was found to be an independent contractor.[694] Further, if the nature of the activity calls for an independent contractor to be present on the employer's premises or at a site decided by the employer, this does not necessarily make the worker an employee, as has been shown, for example, by cases concerning conference interpreters.[695]

Working Hours

The employer's control of the hours of work is considered as an important sign of the worker's subordination. Presented as a separate factor, it is nonetheless a part of the employer's right to give orders and control.[696] The control of working hours can express itself either as a schedule

[689] Soc. 4 mars 1997, Bull. civ. V. no 91. C.f. also Soc. 16 juin 1965, Bull. civ. IV.391
[690] Pelissier, Supiot and Jeammaud (2000) pp. 154f.
[691] Soc. 27 oct. 1978, Bull. civ. V. 544; and Soc. 11 oct. 1961, Bull. civ. IV.672
[692] Soc. 12 juin 1963 Bull. civ. IV.401.
[693] Soc. 17 juin 1982, Bull. civ. V no 403.
[694] Soc. 27 oct. 1978, Bull. civ. V.545.
[695] Soc. 14 janv. 1982 Bull. civ. V.13, 14 and 18.
[696] C.f. Pelissier, Supiot and Jeammaud (2000) p. 156.

fixed by the employer, or as an obligation to show up for work on the employer's request.[697] A newspaper vendor obliged to start her distribution of newspapers to subscribers at 5 am was found to be a employee[698], as was a cyclist, obliged to show up when convened by the team and to participate in all races indicated by the team.[699] The fact that a medical doctor was not free to set his working hours counted in favour of his being considered an employee.[700] Likewise, the fact that a person working for a real estate agent was obliged to receive clients at a place and time determined by the employer was mentioned as a fact counting towards employee status.[701]

The Method of Remuneration

Like in other countries, the fact that a worker is remunerated proportionally to the time period worked and regardless of the result has traditionally been a sign of employee status, while independent contractors have been paid by the task, regardless of the time spent thereon. Thus, the fact that a cyclist was paid a fixed sum per year and a monthly training allowance influenced the decision to grant him employee status.[702] Today, remuneration by the hour, day or month can serve as a sign of employee status, even though many independent contractors use time as a basis for their billings as well, while the fact that a worker is paid by the task does not prevent her from being considered an employee.[703] In a 1995 case concerning lorry drivers, the fact that it was the employer who sent invoices and received payments from clients, and then paid the drivers at the end of each month, after having made reductions for the renting of vehicles, was important for finding the worker to be employees.[704] In a 1979 case, however, a similar arrangement was found

[697] Teyssié (1992) p. 222.
[698] Soc. 3 déc. 1959, Bull. civ. IV.959.
[699] Soc. 8 juill. 1960, Bull. civ. IV.593.
[700] Soc. 30 janv. 1980, Bull. civ V.64.
[701] Soc. 12 juin 1963 Bull. civ. IV.401.
[702] Soc. 8 juill. 1960, Bull. civ. IV.593.
[703] Le Goff (2001) p. 129.
[704] Crim 5 janv. 1995 RJS 3/95 no 317.

to be without influence on the status of the worker, who in the end was found to be an employee.[705]

The position that the worker's risk of losses and chance of profit is more indicative than whether the pay is a function of time or not has been picked up by some French scholars but has still not made it to the *Cour de cassation* or to standard textbook accounts of the concept of employee. According to Gerhard Lyon-Caen, the independent contractor works for his own account, facing the risk of losses and the chance of profits while an employee may take part in profits but not share in losses.[706]

Provision of Raw Materials, Tools, Machinery, etc.

In French doctrine, the relevance of this factor has been explained by the ownership of capital being an inherit quality of the employer in a capitalist economy, and by the idea that the employer's authority over the worker is weaker if the worker owns the necessary materials, tools or machinery.[707] The *Cour de cassation* has thus denied employee status to a building worker who used his own tools and concrete mixer,[708] while granting employee status to a team of masons who the employer furnished with mortar.[709] Likewise, a medical doctor who paid for his use of a clinic's equipment was found to be an independent contractor and not an employee of the clinic.[710] Interpreters using equipment provided by the alleged employer were, however, still categorised as independent contractors.[711]

[705] Soc. 7 mars 1979, Bull. civ. V.145.
[706] Lyon-Caen(1990) pp. 33 and 37. Similar views have been expressed by Fabre-Magnan (1998) p. 121.
[707] C.f. Pelissier, Supiot and Jeammaud (2000) p. 157 and Camerlynck (1982) p. 72.
[708] Soc. 11 oct. 1973, Bull. civ. V.441.
[709] Soc. 6 juill. 1966, Bull. civ. IV.578.
[710] Soc. 7 mars 1979, Bull. civ. V.145.
[711] Soc. 14 janv. 1982 Bull. civ. V.13; Soc. 14 janv. 1982 Bull. civ. V.14; Soc. 14 janv. 1982 Bull. civ. V.18.

In the transport sector, persons collecting milk from farmers on behalf of a dairy were found to be independent contractors on the ground *inter alia* that they were using their own truck[712] For taxi drivers who do not own their own vehicles, this fact has been of importance for granting them employee status, as it gives the employer the possibility to deprive the workers of their instrument of work.[713] Likewise, the *Cour de cassation* has found lorry drivers renting their vehicles from the alleged employer to be employees.[714] For salesmen, for example newspaper vendors, the fact that a worker bought the goods he had to sell from the employer did not matter as he had the right to return unsold goods and, moreover, the employer decided the price to the public.[715]

The Worker Has No Other Workers Employed

If a worker has other workers employed, this tends to indicate that the worker is not an employee. In a case concerning a construction worker, the fact that he hired other workers to help him was important in denying him employee status.[716] Similarly, a medical doctor who hired and paid the nurses who worked for him was found to be an independent contractor and not an employee of the clinic where the work was carried out.[717] Using the staff provided by the clinic does not, however, count against employee status.[718] A worker does not automatically lose her employee status upon the hiring of a helper. The fact that an artisan is working together with a business partner does not necessarily make him an independent contractor.[719] Likewise, a real estate agent who had other real estate agents working for him was found to be an employee of the company he worked for, as were the agents working for him.[720]

712 Soc. 25 févr. 1960, Bull. civ. IV.175; and Civ. 2e, 25 févr. 1965, Bull. civ. II.142.
713 Civ. 2e, 6 déc. 1963, Bull. civ. II.606.
714 Crim 5 janv. 1995 RJS 3/95 no 317.
715 Soc. 28 avril 1960, Bull. civ. IV.316.
716 Soc. 11 oct. 1973, Bull. civ. V.441.
717 Soc. 7 mars 1979, Bull. civ. V.145.
718 Soc. 8 févr. 1979, Bull. civ. V.92.
719 Soc. 3 févr 1965, Bull. civ. IV.82.
720 Soc. 21 oct. 1999, Bull. civ. V no 393.

Exclusivity

If the worker reserves his work for one employer, this exclusivity is an indication of employee status.[721] The exclusivity can be stipulated in the contract between the parties, as in a case concerning an accountant obliged by the contract between himself and the employer to devote his entire professional activity to the employer's company. [722] Likewise, a cyclist who was under an obligation not to compete for any other team was found to be an employee.[723] Exclusivity can, however, also be a matter of fact, as in a case concerning construction workers working exclusively for one building company[724], or when two medical doctors were found to be employees of a rehabilitation centre as the centre was the only place they worked.[725]

In situations where exclusivity has been lacking, the *Cour de cassation* has found this relevant in denying employee status. In a 2000 case, the fact that the alleged employer was not the only company using the services of the worker inclined the court to hold against recognising employee status.[726] Along the same lines, milk collectors who, during or outside of their rounds, had the possibility to carry goods for others apart from the alleged employer were found to be independent contractors.[727] Some cases come very close to economic dependence reasoning, for example a 1989 case where the occasional nature of the work and the small amounts of remuneration paid played a role in denying the workers employee status.[728] The fact that a worker works for several different employers does nevertheless not exclude employee status, for example if a worker works only part-time for the alleged employer.[729] A midwife was found to be an

[721] Pelissier, Supiot and Jeammaud (2000) p. 158.
[722] Civ. 4 juin 1959, Bull. civ. II.274.
[723] Soc. 8 juill. 1960, Bull. civ. IV.593.
[724] Soc. 29 oct. 1985, Bull. civ. V.858.
[725] Soc. 8 févr. 1979, Bull. civ. V.92.
[726] Soc. 5 janv. 2000, RJS 2/2000 no 142.
[727] Civ. 2e, 25 févr. 1965, Bull. civ. II.142.
[728] Soc. 22 mars 1989, Bull. civ. V.140. C.f. also Soc. 8 févr. 1972, Bull. civ. V.102.
[729] Soc. 5 févr. 1960, Bull. civ. IV 112.

employee of a clinic despite the fact that she also worked as an independent contractor out of her own home.[730]

The Buyer of Labour Behaving Like an Employer

If the buyer of labour is a *'professional' employer*, this is considered as a sign that the relationship is one between an employer and employee, whereas the fact that the worker is selling her services to the general public counts in the opposite direction.[731] A lawyer, doctor or tailor would, for example, offer their services to customers who are not in the business of buying legal services, medical treatment or the manufacturing of clothes. The criterion has in practice become one of whether the buyer of labour is "behaving like an employer" or not.[732] Typical employer behaviour, according to this doctrine, is the payment of holiday pay or social security contributions, issuing payslips, and advertising the position as a job offer rather than a business opportunity.[733] The importance of the factor should not be overstated. In a case concerning a group of construction workers, the fact that the alleged employer had issued payslips and paid social security contributions was not enough to grant the workers employee status, as they could show no other signs of subordination.[734]

Gauging Legal Subordination

The purpose of the test is, as already mentioned, to determine whether a *lien de subordination*, a bond of subordination, exists between the worker and the employer. As can be deduced from the list of factors just presented, subordination in the strict sense of the word, is nonetheless not the only circumstance that has had an impact on courts' decisions.

730 Soc. 6 janv 1961, Bull civ IV.14.
731 This criteria is mentioned e.g. by Pelissier, Supiot and Jeammaud (2000) p. 150 and Camerlynck (1982) p. 61.
732 "Comportement comme employeur" Pelissier, Supiot and Jeammaud (2000) p. 150.
733 C.f. Soc. 6 juillet 1966, Bull. civ. IV.578; and Soc. 24 févr. 1977 Bull. civ. V no 149.
734 Soc. 16 mai 1962 Bull. Civ. IV.359.

As indicated in the overview of the historical development of the concept of employee in French law, the notion of legal subordination has changed over time. In the late 1970s, the *Cour de cassation* adopted a rather broad notion of bond of subordination. A bond of subordination was present if the worker was *integrated into the structure of a service or an enterprise,* making part of a *service organisé*, a service organised by the employer.[735] First used in social security law and later in labour law, the new doctrine meant that the courts went beyond the worker's subjection to the authority of the employer and asked whether the worker was integrated into the employer's organisational structure, contributing to its normal functioning.[736] The crucial point became the employer's control over the conditions of work – such as the time, place and equipment necessary for work – not the subordination to orders and control.[737] In a 1981 case concerning two doctors and a psychologist working for private education establishments, the *Cour de cassation* held that the facts that the alleged employers could call them to work; put premises at the school at their disposal; provided the patients; and paid their remuneration resulted in the "existence of a service organised in the interest of the establishment for which they worked".[738] In the case, no reference was made to the legal subordination of the worker to the employer's authority. Two years later, in another plenary session, the court found a teacher at a private school to be an employee as he worked "within an organisation under the direction and responsibility" of the school and as his activity took place "under the dependence of the employer".[739] A woman selling cosmetics through sales meetings in the homes of her clients, responsible for taking orders, delivering the goods and receiving payments, and who was paid by a mix of fixed salary and commission, was found to be in a state of subordination due to the obligations imposed on her by the employer

[735] Pelissier, Supiot and Jeammaud (2000) p. 160.
[736] Le Goff (2001) p. 128.
[737] Supiot (1999) p. 164.
[738] Ass. plén. 27 févr. 1981, Bull. civ. no.1.
[739] Ass. plén 4 mars 1983, Bull. civ. No. 3

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within the framework of an organised service.[740] The *service organisé* doctrine was consistently applied into the mid 1990s.[741]

In 1996, however, the *Société Générale* decision by the *Cour de cassation* re-emphasised the importance of legal subordination. A lower court's decision to grant employee status to workers who it had found within the framework of a *service organisé* was overturned with the argument that the workers had neither been subject to orders, directives nor control, why no bond of subordination existed.

> The bond of subordination, criteria for [the concept of employee], is characterised by the performance of work under the authority of an employer who has the power to give orders and directives, control the performance and sanction breaches. That work makes part of a service organised by the employer may serve as an indication of a bond of subordination in case the employer unilaterally decides the conditions of work. [742]

In the case, which concerned lecturers, the court found that the topic of the lectures and the remuneration had not been decided unilaterally, but agreed between the employer and the workers. Further, the workers had not been subject to any orders or directives, and not to any control of their work. Thus, no bond of subordination existed between the workers and the employer. The formula from *Société Générale*, including the remark that making part of a service organised by the employer can be an indication, but not in itself create, a bond of subordination, has been repeated by the court in later decisions.[743] Le Goff describes the decisions as a "return to orthodoxy" and Pelissier et al remark that the *Cour de cassation*, through this decision, has

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[740] Soc. 24 fév. 1977, Bull. civ. V. No 149.
[741] Soc. 22 févr 1996, Bull. civ. V. No 65.
[742] "[…] le lien de subordination, critère du travail salarié, est caractérise par l'exécution du travail sous l'autorité d'un employeur qui a le pouvoir de donner des directives et des ordres, d'en contrôler l'exécution et de sanctionner les manquements du subordonné; que le travail au sein d'un service organisé peut constituer un indice du lien du subordination lorsque l'employeur determine unilatéralement les conditions du travail […]" *Soc. 13 nov. 1996, Dr. Social. 12/1996 p.1069.*
[743] C.f. Soc. 23 avril 1997, Bull. civ. V no 145; Soc. 1 juill. 1997 Bull. civ. V no 242; and Soc. 21 oct. 1999, Bull. civ. V no 393.

indicated that *service organisé* does not replace legal subordination.[744] Jeammaud, analysing the case further, has pointed out that the *Société Générale* decision served as a reminder that subordination is the result of the employer's power over the employee.[745]

In a more recent decision which has been given great publicity, the *Cour de cassation* seems to have nuanced slightly its jurisprudence. The case concerned a taxi driver who was tied to the alleged employer by a rental contract for the vehicle he was driving, paying a fixed fee each month.[746] The driver was free to chose his working hours, his routes and his clients, but the rental contract imposed a number of other obligations. He had to drive the vehicle personally; keep the vehicle in a good state (for example, by checking oil and water levels daily); and subject it to weekly inspections by the owner. The rental contract ran for a month at a time and could be renewed by tacit agreement. The court, after having rejected the driver's economic dependence as a basis for granting him employee status, looked to the terms of the contract and the practice between the parties to determine whether or not there existed a bond of subordination between the worker and the employer. Going about this, the court took a traditional multi-factor test approach, citing, on top of the already mentioned obligations to drive personally and take care of the vehicle, the employer's payment of the driver's social security contributions and the employers possibility to end the monthly contracts on short notice. In the end, the court found the worker to be an employee. Jeammaud, in an analysis of the case, has taken it as evidence that the contract of employment in French law has not undergone any radical narrowing down and instead sees it as an expression of the *Cour de cassation*'s readiness to react to certain forms of abusive outsourcing.[747]

[744] Le Goff (2001) p. 129 and Pelissier, Supiot and Jeammaud (2000) p. 160, note 7.
[745] Jeammaud (2001) p. 234.
[746] *Soc. 19 déc. 2000, Bull. civ. V no 437.*
[747] Jeammaud (2001) p. 237.

Subordination

French jurisprudence and doctrine seem to afford the factors directly concerned with the worker's subordination to the hierarchical powers of the employer an extraordinary significance. Teyssié divides the factors into two categories, giving the subordination factors – orders and control; the place of work; and the working hours – pre-eminence as "critères principaux" while the remaining factors only offer complementary information.[748] Pelissier et al start their account of the factor concerning the employer's orders and control of the work with "C'est là un facteur décisif",[749] while describing the place of work and working hours factors as not in themselves decisive, but important.[750] Arguably, the strongest sign of subordination, which sometimes seems to be a sufficient, even though not a necessary criterion, is actually exercised disciplinary power. In several recent cases, the court has held that the fact that a worker has been dismissed or disciplined for not having followed the instructions of the alleged employer makes a clear case for the existence of a bond of subordination.[751]

An illustration of the predominance of subordination can be taken from a 2002 case concerning an insurance agent.[752] The *Cour de cassation* found the agent to be an employee as her work took place under the employer's orders and directives, as it was planned by the insurance company and she was obliged to take part in certain meetings at the company. Further, she was subjected to supervision, as there were certain business operations that she needed the authorisation of the regional sales supervisor to perform. Finally, the employer could take, and had taken, disciplinary action against the worker, as she could lose some of her right to commission if she did not follow the company's directives and had, after a conflict with a manager, been removed from the

748 Teyssié (1992) pp. 222f.
749 Pelissier, Supiot and Jeammaud (2000) p. 159.
750 Pelissier, Supiot and Jeammaud (2000) p. 155.
751 C.f. Soc. 4 mars 1997, Bull. civ. V no 91; and Soc. 1 juill. 1997, Bull. civ. V no 240.
752 Soc. 16 janv. 2002, RJS 3/2002 no 253.

management of certain clients. In the case, a full account of the insurance agents subordination is given, while no mention is made of other factors.

Economic Dependence

Economic dependence has, repeatedly, been dismissed as a decisive criterion by the *Cour de cassation*.[753] Of the factors commonly listed as signs of the existence of a bond of subordination, only exclusivity qualifies as an outright economic dependence factor. Le Goff makes the argument that economic dependence, despite having lost its status as a decisive criteria, still is used by the courts to separate employees from independent contractors.[754] Economic dependence can, in his view, play a role in two situations. In situations where legal subordination can be placed in doubt, but where there is no doubt about the economic dependence of the worker, economic dependence can play a subsidiary role. An example of this is taken from a case concerning an anaesthetist, where the fact that he worked exclusively for the employer weighted in when the issue of legal subordination was in doubt.[755] Further, economic subordination can play a complimentary role in cases where the legal subordination has been blurred and fragmented in order to avoid the application of labour law. To Teyssié, even before the *Société Générale* decision, if the facts of the case indicate economic subordination, this can contribute to the judge's decision, but it cannot, by itself, dictate it.[756]

This disinterest in the worker's economic dependence serves both to narrow and to extend the reach of the concept of employee in French law. On the one hand, workers who are economically dependent but who do not show strong enough signs of subordination are excluded. On the other, French labour law does not concern itself with the length or stability of the relationship. As Gerhard Lyon-Caen has pointed out, there is no equivalent to the

753 For a recent example c.f. *Soc. 19 déc. 2000, Bull. civ. V no 437*.
754 Le Goff (2001) pp. 123f.
755 Soc. 29 mars 1994, Dr. Social. 6/1994, p. 558.

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permanency criterion which in the UK has served to exclude casual workers from employee status.[757] In France, a short term of engagement does not prevent a worker from being considered an employee.

Other Factors

As to the remaining factors, these tend to carry little weight. Having a registered business or being registered as an independent contractor with the tax authorities has not stopped workers from being awarded employee status if the employer has a sufficient degree of control.[758] The same is true for the ownership of tools and machinery.[759] In the past, the mode of remuneration was awarded a great significance, a point that can be illustrated by a 1955 case where the *Cour de cassation* found that the lower court had erred when it had not investigated whether a newspaper vendor was being remunerated by commission or by the profits from selling the newspapers.[760] Over the past decade, the mode of remuneration has been less and less frequently cited by the *Cour de cassation*, and its importance is being questioned. Pelissier et al speak of a "rejection of the mode of remuneration as a significant factor".[761] Likewise, Le Goff refers to the method of remuneration as one factor among others, no longer with any special status.[762] As late as in 1995 however, the method of remuneration – lorry drivers paid monthly after reductions for the rent of their vehicles – was important for finding the workers to be employees.[763]

Compared to the other studied countries, the concept of employee in French labour law thus stands out for its strong focus on the worker's subordination to the employer's hierarchical powers. It is probably safe to say that a relationship showing no or only weak signs of employer

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[756] Teyssié (1992) p. 217.
[757] Lyon-Caen (1990) p. 34.
[758] *Soc. 9 mai 1979 Bull. civ. V. 286;* and *Crim. 31 mars 1998, D. 1999 p. 137.*
[759] *Crim. 31 mars 1998, D. 1999 p. 137.*
[760] Civ. 2e, 20 mai 1955, Bull. civ. II.171.
[761] Pelissier, Supiot and Jeammaud (2000) p. 163.
[762] Le Goff (2001) p. 129.
[763] Crim 5 janv. 1995 RJS 3/95 no 317.

control over how, when and where the work is carried out would not qualify as an employer-employee relationship under French law, even if all other signs of employee status where present. It is even possible to argue that a high degree of subordination is sufficient to grant a worker employee status. In a 1998 case from the *Chambre criminelle* of the *Cour de cassation,* a construction worker used his own tools and van; had another worker employed; received his remuneration after billing the alleged employer; did work for other employers as well; and was registered as an independent contractor with the tax authorities.[764] Despite all these factors pointing in the direction of the worker being an employee, the court decided in favour of employee status as they found the alleged employer to have sufficient control over the work to constitute a bond a subordination.

3.6.2 The Loi Madelin

As in other countries, the mandatory nature of labour law makes it necessary for judges to re-qualify contracts when the reality of the relationship points to an employee-employer relationship.[765] This was clearly spelled out by the *Cour de cassation* in a 1983 decision where the court held that the existence of an employment relationship did not depend either on the intention of the parties, or on the label they have chosen for their relationship, but on the actual conditions under which the activity of the workers takes place.[766] Decisions from recent years often starts by noticing that "the existence of a contract of employment depends neither on the will expressed by the parties nor by the label that they have put on their relationship, but on the conditions under which the activities of the worker are exercised."[767] The burden of proof lays with the party wishing to re-qualify the contract.[768]

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764 *Crim. 31 mars 1998, D. 1999 p. 137.*
765 On qualification of employment relations in French law, c.f. Jeammaud (2001) pp. 229ff.
766 *Ass. plen 4 mars 1983, Bull. civ. no 3.*

In 1994, the *Loi Madelin*[769] – named after Alain Madelin, at the time minister for small and medium sized businesses – created a presumption against the existence of a *contrat du travail* in cases where the worker was registered as an independent contractor in the social security registry. The Loi Madelin was in response to criticism from employers that judges' re-qualification of contracts inserted an uncertainty into the relationship between employers and independent contractors.[770] The provision in the *Code du Travail* stipulated that "natural persons registered in the *Registre du commerce et des sociétes* […] are presumed not to be under a contract of employment for the activity for which they are registered." The existence of a contract of employment could, nonetheless, be established if the person provided services to an employer "under conditions which created a bond of permanent legal subordination" vis-à-vis the employer.[771]

In the courts, the issue quickly became one of how the words "bond of permanent legal subordination" should be interpreted. Did the inclusion of the word "permanent" indicate that the relationship between the worker and the employer had to be of a permanent duration, making it practically impossible to break the presumption? Or did "permanent" refer to the legal subordination, in which case the law would not have changed compared to earlier?[772] In 1998, the *Cour de cassation* decided in favour of the second option, rending the presumption created by the *Loi Madelin* meaningless.[773] The presumption created by the *Loi Madelin* was formally abrogated in 2000.[774]

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[767] "L'existence d'une relationde travail ne dépend ni de la volonté exprimée par les parties ni de la dénomination qu'elles ont donnée à leur convention mais des conditions de fait dans lesquelles est exercée l'activité des travailleurs." Soc. 19 déc. 2000, Bull. civ. V no 437.
[768] Soc. 18 juin 1996, Bull. civ. V no 245 and Soc. 7 nov. 2001, RJS 1/2002 no 2.
[769] *Loi du 11 février 1994*.
[770] Le Goff (2001) p. 148.
[771] *Les personnes physiques immatriculées au Registre du commerce et des sociétés, au répertoire des métiers, dispose ce texte, sont présumes ne pas être liées par un contrat du travail dans l'exécution de l'activité donnant lieu à cette immatriculation. Toutefois, l'existence d'un contrat du travail peut être établie lorsque les personnes citées au premier alinéa fournissent directement ou par une personne interposé des prestations à un donneur d'ouvrage dans des conditions qui les placent dans un lien de subordination juridique permanent à l'egard de celui-ci.* Old *Article L 120-3 Code du Travail*, cited in Le Goff (2001) p. 148.
[772] Le Goff (2001) p. 148.
[773] Crim. 31 mars 1998, D.1999, p. 137.
[774] *Loi du 19 janv. 2000, art 34*.

3.7 Comparative Analysis of the Concept of Employee

3.7.1 Differences and Similarities in the Concept of Employee

Taking Otto Kahn-Freund's words of warning to the comparative legal scientist, "not to be lured by homonyms", seriously, it is necessary to compare the concepts of employee in the four studied countries.[775] What similarities and differences are there between the concepts of employee used in French, Swedish, British and US labour law and to what extent does the differences amount to differences in the personal scope of labour law?

Given that all four countries employ a multi-factor test to decide whether a worker is an employee or not, it is probable that this is the case in most western countries.[776] As can be seen in *Table 3.7.1*, courts in all four countries use lists of factors that are largely identical and whose content is quite similar but for the weighting of the factors. In all four countries, the *obligation to perform work personally*, in some form, is a necessary condition for employee status, that is, such obligation must always be present in order for a worker to be considered an employee. In France and the United Kingdom, the obligation to perform work personally has been explicitly identified as a necessary criteria for a worker to be considered an employee. In reality, this is the case in Sweden and the United States as well, even though this has not been stated explicitly in the jurisprudence.

In the UK, France and the US the worker's *subordination* to the employer's hierarchical powers is a necessary criterion for employee status. In France and under the US control test, subordination, if strong enough, can even serve as a sufficient criterion. Sweden is, however, different. Despite the fact that subordination factors do carry a considerable weight in the integrated consideration,

[775] Kahn-Freund (1978) p. 285.
[776] Multi-factor tests are, for example, used in all the Nordic countries, regardless of whether they have statutory definitions of the concept of employee (Finland) or not (Sweden, Norway, Denmark and Iceland). Källström (2002) pp. 78 and 84.

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courts can find in favour of employee status based on other factors in cases where the worker's organisational ties to the employer do not amount to outright subordination.

Economic dependence is not a necessary criterion in any of the studied countries, with the exception of the areas of UK labour law which fall under the mutuality of obligation doctrine. In Sweden, economic dependence can be a sufficient factor for employee status. Least concerned with the worker's economic dependence is French labour law.

Table 3.7.1 Categorisation of Factors of Multi-factor Tests

United States (Control test as expressed in *Reid*)	**Sweden** (As expressed in SOU 1975:1)	**United Kingdom**	**France**
		Performing Work Personally	
(Assumed) The hired party's role in hiring and paying assistants.	[The worker] is obliged to perform work personally. [The worker] has in fact, completely or almost completely, performed the work personally.	Obligation to provide his own work.	The performance of work by a human being (basic condition for an employment relation). The worker has no other workers employed.
		Subordination	
Hiring party's right to control the means and manners by which the product is accomplished. The extent of the hired party's discretion over when and how long to work.. Right to assign additional projects to the hired party. Location of the work.	[The worker] is in the performance of the work subject to specific orders or control as to how the work is performed, the working time or the place of work. [The worker's] contract includes putting his labour to the disposal of the other party for arising tasks.	In the performance of service, the worker will be subject to the employers control. Integration into the organisation of the employer.	The work is performed under the orders and control of the employter. The employer decides the place of work The employer controls the working hours
		Economic Dependence	
Duration of the relationship between the parties. Whether the party [worker] is in business for himself.	The relationship between the two parties has a more lasting character. [The worker] is prevented from performing similar work of any significance for someone else, whether this is due to a restrcition in the contract or a practical consequence of the actual conditions of work, such as the lack of time or energy for other work.	Number of employers. Permanency	Exclusivity
		Other factors	
Method of payment. Source of the instrumentalities and tools. The provisions of employment benefits.	The remuneration of the performed work is, at least in part, paid as a guaranteed salary. [The worker] is compensated for his expenses.	Type of remuneration. Opportunity for profit/Risk of loss. Capital investment/ Ownership of tools and	Method of remuneration. Provision of raw materials, tools, machinery, etc. The employer behaves as such, e.g. through paying benefits.

Skill required.	[The worker] is supposed to use machinery, tools or raw materials provided by the other party to the contract. [The worker] has economically and socially the same status as an employee.	machinery. Treatment for purpose of taxes and benefits. Skill Industry practice

The concept of employee in Swedish labour law stands out as the broadest of the concepts presented in this study. The width of the Swedish concept can be attributed to the technique of integrated consideration of all circumstances with no single factor being necessary. As subordination is not a necessary criterion, it has been possible to bring workers previously put in the dependent contractor category under the concept of employee. At the same time, workers showing a sufficient degree of subordination do not have to be economically dependent to qualify for employee status.

This can be compared to the United States where the control factor dominates the common law control test and where other factors, including economic dependence, can tip the balance in close cases. If the employer's control is low, a high degree of economic dependency does not help to make a worker an employee. The same is true for France where the subordination criteriaon may be even stricter than in the US, in particular since the *Cour de cassation's* 1996 rejection of the *service organisé* doctrine. In the US, but not in France, performing work integral to the business of the employer can still substitute for a high degree of control. On the other hand, however, the French test is more inclusive when it comes to casual workers, as the duration of the relationship is left outside of the multi-factor test.

Comparing the similar tests of France and the United States it is also important to take into account the extent to which courts can and do let the purpose of the statute influence their interpretation. Purposive interpretation seems to make for a wider concept of employee. The fact

Engblom, Samuel (2003), Self-employment and the personal scope of labour law : comparative lessons from France, Italy, Sweden, the United Kingdom and the United States
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that the French multi-factor test is used only in labour law and social security law, while the US common law test serves in tax and copyright law as well, would thus tend to make the French test more inclusive. In addition, the French multi-factor test is interpreted by the labour courts in the first instance and by the social chamber of the *Cour de cassation* in the last, while the US test is applied by ordinary courts of general jurisdiction, at least on the appeals and supreme levels. According to Hyde "US courts [of general jurisdiction] typically are more willing to define an individual as self-employed, and thus outside regulatory coverage, than the relevant regulatory agencies."[777] If it is generally true that specialised courts or agencies are more willing to make purposive interpretations and find employee status, this is another indication that the concept of employee in US law could be more narrow than that of French labour law.

In the United Kingdom, the worker's subordination to the employer's control is necessary but not sufficient for the worker to be an employee. It is also necessary that the contract looked at as a whole is consistent with employee status. While the control factor – through its broadening to "integration into the business of the employer" – is fairly generous, British courts have limited the reach of the concept of employee by establishing relatively high standards to find the contract as a whole consistent with employee status, in particular as concerns the workers economic dependence. The outcome is a concept of employee limited both on the side of subordination and on the side of economic dependence. The argument that the UK concept of employee is more narrow can also draw support from the fact that it has been considered necessary to use broader language than 'employee' to implement European directives (see below).

3.7.2 European Law and the Concept of Employee

Having identified the similarities and differences between the concepts of employee used in labour law in France, Sweden, the United Kingdom, members of the EU, and the United States,

[777] Hyde (2000) p. 53.

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it is interesting to take a look at how the concept of employee has been handled in European Law. The idea that national concepts of employee are similar but not identical gets further support from the fact that the EU has come to use both national concepts of employee and a special community concept. In broad terms, EU labour law aimed at the harmonisation of national laws, such as provisions concerning the free movement of workers, anti-discrimination and occupational health and safety, has come to use a Community Law concept of employee, while measures that only aim at the approximation of laws as a general rule use the national concepts of employee.

In its 1986 *Lawrie-Blum* decision, the European Court of Justice (ECJ) held that the term 'worker' in Article 39(1) [Ex-art 48(1)] of the Treaty,[778] which lays down the principle of free movement of workers, has a Community meaning, which applies regardless of national definitions of the Member States.

> Since the freedom of movement for workers constitutes one of the fundamental principles of the Community, the term 'worker' in Article 48 may not be interpreted differently according to the law of each Member State but has a Community meaning. Since it defines the scope of the fundamental freedom, the community concept of a 'worker' must be interpreted broadly[…]. That concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship is that a person performs services of some economic value for and under the direction of another person in return for which he receives remuneration. The sphere in which they are provided and the nature of the legal relationship between employee and employer are immaterial as regards the application of Article 48.[779]

[778] Different language versions of the treaty use terms with quite different everyday connotations. Whereas the French (*travailleurs*), the Italian (*lavoratori*) and Spanish (*trabajadores*) versions carry more or less the same connotations as the English (*workers*), the Swedish (*arbetstagare*) and German (*arbeitsnehmer*) texts use words more corresponding to the English word 'employee' while the Danish version speaks of *arbejdskraften*, i.e. 'labour power'.
[779] Case 66/85 *Lawrie-Blum v. Land Baden-Württemberg* [1986] ECR 2121, at 2144, para 16-17.

In this statement, by the references to remunerated work performed "for and under the direction of another person" and that the nature of the relationship must be decided according to the "rights and duties of the parties concerned" the ECJ captures the core features of the concept of employee as we have seen it in the three studied member states. Still, as the free movement of workers is a fundamental principle of Community law, and an area in which the community aims at the harmonisation of national laws, its personal scope must not be defined by national legal concepts of varying width.[780] In fact, the Court has gone further than national legislators and courts, establishing a community concept of employee which includes workers that would not be covered by the concept of employee in at least some of the member states. Under the community concept, it does not matter whether the worker's employment is based on a private law contract or public law status.[781] Further, the ECJ has found that the limited extent of the work, if not purely marginal and ancilliary, does not prevent workers from being covered by free movement provisions. Thus, the Court has found part-time workers to be covered by the free movement of workers despite the very limited extent of their activity.[782] Further, the Court has held that on-call workers can be covered, despite no guarantees of work or obligation to accept work if offered.[783]

As mentioned above, in areas where the Community only aims for the approximation of national laws (also referred to as partial harmonisation) without going as far as full harmonisation, the main rule is that the concept of employee in national law defines the scope also of provisions adopted at the European level. In *Danmols Inventar*, the ECJ found that as the Acquired Rights Directive was "intended to achieve only partial harmonization" and "not however intended to establish a uniform level of protection throughout the Community on the basis of common criteria", "[i]t follows that Directive No 77/187 may be relied upon only by persons who are, in

[780] C.f. also Case 53/81 *Levin v. Staatssecretaris van Justitie* [1982] ECR 1035.
[781] Case 152/73 *Sotgiu* [1974] ECR 153.
[782] Case 139/85 *Kempff v. Staatssecretaris van Justitie* [1986] ECR 1741.
[783] Case *C-357/89 Raulin v. Minister van Onderwijs en Wetenschappen* [1992] ECR I-1027.

one way or another, protected as employees under the law of the Member State concerned."[784] In later directives, and in amendments to some older directives, provisions have been included stating that the directives "should be without prejudice to national law as regards the definition of contract of employment or employment relationship."[785] The absence of such provisions should nonetheless not be seen as an indication that the community law concept of employee is to be used.[786]

Commonly, approximation directives have their personal scope defined as "contracts of employment or employment relationships."[787] According to some authors, this could imply something broader than the UK concept of employee, which, as we noted above, is rather restrictive. "The implications of this phrase for the law of the UK appears to be that some contractual relations, though not fitting exactly within the definition of employment should nevertheless be included within the scope of the regulation required by the directive."[788] Despite the ECJ having insisted that the precise interpretation of such concepts must be a matter for national law, it has been argued that "employment" in the Community context is wider than "employee" in the British context.[789] In recent years, in a number of cases, British implementation legislation of some directives has had its personal scope defined in terms of "worker" rather than "employee", for example the *Working Time Regulation 1998* and the *Part Time Workers (Prevention of less favourable treatment) Regulation 2000*.

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[784] Case 105/84 *Foreningen af Arbejdsledere i Danmark v.A/S Danmols Inventar* [1985] ECR 2639, at 2653 (para 26-27). It should be noted that in the English language versions, the terms used in the Treaty (*worker*) and in the Directive (*employee*) differ, whereas in most other language versions the same word is used in both instances. The directive was later amended to include a provisions that it should be without prejudice to national law as regards the definition of contract of employmnet or employment relationship.

[785] E.g. *Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvence of their employer,* Art. 2(2); and *Council Directive 2001/23/EC relating to the safeguarding of employees' rights in the event of transfers of undertakings*, Art. 2(2).

[786] C.f. Advocate-General Slynn in Case 195/84 *Danmols Inventar* [1985] ECR 2639, at 2644.

[787] E.g. *Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvence of their employer,* Art. 1(1).

[788] Collins et al (2001) p. 167.

[789] *Clifton Middle School v. Askew* [2000] ICR 286, at 311. Chadwick L.J. (dissenting) suggested that the term "employment relationship" in the *Acquired Rights Directive* (77/187) extended the reach of the British implementation legislation to cover a teacher who technically did not have a contract of employment at the day of the transfer.

3.7.3 A Status Notion

Seen as a whole, more than the differences between the concepts of employee found in the four studied countries, it is the similarities between them that have to be considered as the striking feature. They are all multi-factor tests, the factors used are largely the same and there are great similarities in the technique used for weighing the factors together. It is not unreasonable to assume that the outcome in the large majority of cases would be the same regardless of which country's courts were asked to consider them. The similarities become even more striking if we take into account the fact that the legal historical roots of the various concepts differ. In the civil law countries the concept of employee grew out of the *locatio/louage d'ouvrage* while in the common law countries it was the law of master and servant. Neither, moreover, has the concept of employee been the subject of harmonization on the international level. Still, the significant similarities should not come as a surprise to the comparative legal scholar. Zweigert and Kötz describe as a "basic rule of comparative law" the fact that "different legal systems give the same or very similar solutions, even as to detail, to the same problems of life, despite the great differences in their historical development, conceptual structure and, style of operation."[790] Kahn-Freund took this argument one step further suggesting a "very simple, but, I believe, very important observation":

> It is the observation that, under similar social, economic and cultural pressures in similar societies the law is apt to change by means of sometimes radically different legal techniques. The ends are determined by society, the means by legal tradition.[791]

In the case of the concept of employee, it is clear that it has been set up with the same, pre-existing, extra-legal notion in mind. As Aubert-Monpeyssen points out in her study of the notion of subordination in French law, the social legislation predates the concept of employee. It is with

[790] Zweigert and Kötz (1998) p. 39. They even suggest a *praesumptio similitudinis*, a presumption that the practical results are similar, as a working rule in comparative law.

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the development of social security and labour law that it becomes necessary to find a legal definition for the rather heterogeneous group of workers the reformers had in mind. The concept of employee was an attempt to define in law an already existing category of workers, a difficult task which is why "the legal notion of employee never exactly corresponded to the sociological entity that predated it."[792]

This 'sociological entity' was the industrial worker as found in the capitalist modes of production. Under this mode, ownership of important means of production – such as the premises for work, the raw materials, the tools and machinery, intellectual property rights – by the employer is coupled with a relationship under which the worker "stands ready to accept authority regarding work assignments" making her "subject to […] detailed supervision".[793] Further, the industrial worker was being paid a wage which at least in part was dependent on the amount of time worked. More importantly, the worker would typically have no alternative source of income to turn to but the selling of her labour, the welfare of individuals having come to "depend entirely on the cash nexus".[794] In the words of the Supiot-report:

> This concept corresponds to what in the language of industrial relations is called the 'Fordist' model, that is a large industrial business engaging in mass production based on a narrow specialization of jobs and competencies and pyramidal management (hierarchical structure of labour, separation between product design and manufacture). This model has been largely dominant throughout Europe in various different forms. […] However, the core feature of the model, present everywhere to some extent, is the crucial importance of standard full-time non-temporary wage contracts (particularly for adult men), centring around the trade-off between high levels of subordination and disciplinary control on the part of the employer and high levels of stability and welfare/insurance compensations and guarantees for the employee […].[795]

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[791] Kahn-Freund (1978) p. 280.
[792] "La notion juridique de salariat n'a jamais exactement recoupé l'entité sociologique qui lui préexistait." Aubert-Monpeyssen (1988) p. 11.
[793] Williamson (1985) p. 219.
[794] Esping-Andersen (1990) p. 21.
[795] Supiot et al (2001) p. 1.

Even though contracts of employment are entered into and dissolved, being an employee is a status in the sense that a more or less fixed set of rules and conditions, laid down in legislation or collective agreements, applies to all employees in a certain occupational category. This is reinforced as the adherence to social security systems, and sometimes to tax regimes, have been tied to the concept of employee. Therefore, as Veneziani has pointed out, "[t]he transition from status to contract has been more apparent than real. It would be more accurate to say that in the various phases of the economic, social and political evolution of the employment relationship the worker's status has changed."[796] The sociological entity to be captured by the concept of employee has been modified and could today be described as the permanent, full-time employee, performing work under the supervision and control of her employer, on premises owned by the latter.

To capture such a status notion, including changes over time, a multi-factor test makes sense. The nature of the multi-factor test dictates that it essentially looks for the overall *status* of the worker, not solely at isolated aspects of the relationship between the worker and the employer. The individual factors correspond to characteristics commonly thought typical of an employee and their weighting together to the perceived importance of these characteristics. Lord Wedderburn, describing the state of affairs in British law, called this the "elephant test".

> The legal test has splintered in the hands of the judges, leaving them to say […] that 'it is not practicable to lay down precise tests' or a 'hard and fast list', that there are too many variants; so 'you look at the whole of the picture'. Most courts now appear to use this 'elephant-test' for the employee – an animal too difficult to define but easy to recognize when you see it.[797]

[796] Veneziani (1986) p. 70.
[797] Wedderburn (1986) p. 116.

3.8 Is the Concept of Employee a Suitable Personal Scope for Labour Law?

In this last section of the chapter concerning the concept of employee, the key question will be asked: Is the concept of employee a suitable personal scope for labour law? Above (2.5), three requirements on the personal scope were identified: i) that labour law be of a mandatory nature, ii) that uncertainty as to the legal status of the relationships between workers and employers is limited as much as possible, and iii) that labour law covers all, or almost all, situations where the concerns of labour law are raised.

That the concept of employee generally has a mandatory nature – expressed by the fact that cases are being decided on what has actually taken place between the parties, giving little or no relevance to the label of the contract – has been demonstrated earlier in this chapter and will not be elaborated on further. Instead, the analysis will focus, first, on the conflict between the, in many ways beneficial, flexibility of the concept of employee and the desire to reduce uncertainty, and then turn to the issue of whether a personal scope defined by the concept of employee provides labour law with a coverage sufficient for the concerns it is set to address.

3.8.1 Flexible or Unpredictable?

The great advantage of the concept of employee in the form we have seen it in France, Sweden, the United Kingdom and the United States is its flexibility. The multi-factor technique, together with the absence or vagueness of statutory definitions, has given courts possibilities to adjust the concept of employee to changes in working life. The test has also been good at adjusting to changes in society at large, something of obvious importance to a legal concept that essentially is a status test.

The idea that the concept of employee must be dynamic and change over time has been embraced by legislators and courts in all four countries. In Sweden, this was done explicitly when

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lawmakers in the 1940s indicated in preparatory works that the concept of employee was not a static, but a constantly developing concept which was to be influenced by social and economic developments. In all the countries, the case law bears witness to the impact changes on the labour market and in the organisation of work have had on the development of the concept of employee. The best example of this is undoubtedly the development of the subordination factors. As the organisation of work has changed, with less of direct orders and control, courts have taken to look at more indirect forms of control such as the worker's subjection to the rules and procedures of an organisation, or her training in procedures suggested by the employer and their actual application. Courts ask questions such as whether the work is 'integral to the employer's regular business', whether the worker is 'integrated into the business of the employer' being 'part and parcel of an organisation', or whether the worker form part of a *service organisé*.

It also seems like that if a form of work arrangement has become common or accepted on the labour market, courts are less likely to change the status of a worker under that arrangement. One explanation to the comeback of hierarchical control in the US and France in the 1990s, could be that courts became less ready to apply doctrines accepting the worker's integration into the organisation of the employer as sufficient subordination, at the time when the occurrence and acceptance for subcontracting and other schemes involving independent contractors had risen.[798] In the UK, the Court of Appeal in *Lane v. Shire Roofing Company*, held that the increase in self-employment and the many advantages for both the employer and the worker in avoiding the employee label had to be taken into account when the authority of older case law was examined.[799]

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[798] C.f. *Community for Creative Non-violence v. Reid* 490 U.S. 730 (1989), *Nationwide Mutual Insurance Company v. Darden* 503 U.S. 318 (1992), and Société Général *Soc. 13 nov. 1996*, Droit Social 1996 p. 1069.

[799] *Lane v. Shire Roofing Company* [1995] IRLR 493, at 495 (Lord Justice Henry). As the Court found "good policy reasons in the safety at work field to ensure that the law properly categorises between employees and independent contractors" it nevertheless held that the worker was an employee.

Courts interpreting the concept of employee have also had to deal with changes in society at large, notably the progressive blurring of class distinctions throughout the twentieth century. At the end of the nineteenth century, employees, to the extent the notion existed, were manual industrial workers. Then, through the process of "vertical extension" of the concept of employee, it has gone on to cover clerical and salaried workers and, later, managers and members of the liberal professions. Being an employee is no longer synonymous with being working class but incorporates a large part of the middle and upper classes as well. In the words of a prominent Italian legal scholar, labour law lost its character of "droit ouvrier" and came to cover an "area interclassista".[800] In the multi-factor tests this is visible in the lessened importance given to factors that can be said to pertain to the social status of the worker. The level of skill required for the position, a factor often coinciding with social status, today only plays a minor roll. In addition, as already mentioned, the notion of subordination has been adapted to include highly skilled workers as well.

The flexibility of the concept of employee has, however, also been a reason for critical views of its suitability as the personal scope of labour law. The vagueness of the concept, together with, in some countries, the existence of different concepts of employee for labour law, social security and tax purposes, has been perceived as subjecting employers and workers to uncertainty as to the status of their relation. The *Dunlop Commission* found that even the relative homogenity of the concept of employee in US law presented "employers with an unnecessarily complicated regulatory maze".[801] This concern can also be seen in attempts to reduce this uncertainty, such as the *Loi Madelin*.[802] Another source of uncertainty, and of criticusm, is that the multi-factor test is a rather complicated legal technique. Westerhäll argues that the method makes the decisions of the courts less useful as precedents since it is hard to distinguish what circumstances were decisive in

[800] Gino Giugni, *Lavoro (diritto del)* Enciclopedia del novecento, Roma 1978, vol. III, p. 947, cited in Santoro Passarelli (1979) p. 13.
[801] Dunlop Commission (1994) p. 64.

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each case. She also argues that it is not possible for administrative agencies and others who have to draw the line between employees and self-employed workers on a daily basis to use the time consuming technique of the multi-factor test.[803]

At first glance, statutory definitions of the concept of employee can seem to increase legal certainty, as courts and agencies are left with less room for interpretation. The experience from the US and the UK (the two of the studied countries with statutory definitions) do not, however, lend any support to this view. It has still been left to the courts to work out the essential content of the concept of employee, largely due to the vague or circular nature of the definitions. The problem is that a more precise statutory definition would risk making the concept of employee less flexible and thus less capable of adapting to the constant changes in working life and industrial organisation. Statutory definitions can nonetheless be useful for legislators wishing to indicate that the word 'employee' is to have different meanings in certain statutes than in others. An example, even though it can be questioned whether this was the intent of the legislator, is the United States where differences in the statutory definitions of 'employee' and 'employ' have been used by courts to give a wider meaning to the concept of employee in the *Fair Labour Standards Act* and the *Equal Pay Act*, and earlier to *Title VII* of the *Civil Rights Act of 1964*.[804]

3.8.2 Coverage Sufficient to Address the Concerns?

The most important test of the concept of employee's suitability for determining the personal scope of labour law is without doubt whether it covers all, or almost all, situations where the concerns of labour law are raised. This is partially determined by whether a legal order contains one or several different concepts of employee and if and how the flexibility inherent in the

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[802] C.f. above 3.6.2.
[803] Westerhäll (1986) p. 24.
[804] C.f. above3.3.1. In its 1992 *Darden* decision, the court explicitly referred to the differences in language between the FLSA and ERISA to motivate their choice of test. *Nationwide Mutual Insurance Company v. Darden* 503 U.S. 318, at 326 (1992).

concept of employee is used. Apart from its key function in labour law and social security law, the term 'employee' often occurs in taxation and copyright law. As we have seen, in Sweden and France, labour law and social security law have come to use the same concept of employee while in the UK there is no perfect fit between the two concepts and the United States uses the economic realities test to decide over adherence to its pension system while the common law control test is used for the most of labour, taxation and copyright law. Further, the willingness of courts to take the concerns of the regulation they are to adjudicate into account varies. In Sweden, the lawmakers, through the preparatory works, have on several occasions expressly instructed the courts to take the legislation's purpose into account when adjudicating the personal scope. In the United Kingdom, the influence from what is at stake is clear in the decisions of the courts.

An apparent advantage of a unified concept of employee is that it provides a terminological coherence across the legal system, with increased legal certainty as a result. A worker will not be classified as an employee under one statute and as an independent contractor under another.[805] There are nonetheless good reasons to doubt whether this perceived advantage of a unified concept actually exists. In reality, only the very small fraction of workers and employers who have had their relationship classified by a court in the past would enjoy increased certainty. The vast majority who had not put their relationship before a court would still be in doubt about their status. An alternative could be to let ex-ante registration for tax or other purposes determine the proper classification under labour law as well. The problem is that such a solution could come in conflict with the mandatory nature of labour law as circumstances other than the actual nature of the relationship between the worker and employer would decide employee status. A good illustration of this problem is the French *Loi Madelin*[806].

[805] For this position, c.f. e.g. Dunlop Commission (1992) pp 62ff.

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The main disadvantage of a unified concept is equally obvious. A unified concept will necessarily be less adapted to the concerns of the legislation for which it defines the personal scope. The purpose of distinguishing employees from independent contractors in labour law are different from that of the same distinction in tax law, which is still different from that in copyright law where the stakes are inverse and it is the worker who claims to be an independent contractor. Critique aimed at the US common law control test's multi-function nature, can be used to illustrate the potential drawbacks of a concept of employee that is to define not just the personal scope of labour law statutes with diverse purposes, but also to fill other roles. The test loses its focus and runs the risk of not fulfilling its function in any of the situations it is applied. It is thus not strange that the common law control test has been criticised both for not providing an adequate definition for the purpose of labour law and for not providing a good fit in the copyright context.[807] Alan Hyde, commenting on what he sees as a trend towards a single employee test used in labour, social security, copyright and tax law, speaks of "the advantage of a unified approach, and the disadvantage of an approach divorced from the purposes of employment law."[808]

More fundamental than the question of whether a legal order should have one or more concepts of employee, and how this or these concepts should be interpreted, is the question of whether the concept of employee is at all suitable for defining the personal scope of labour law, or whether the coverage should extend beyond those who even under a liberal interpretation would not be considered as employees.

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[806] C.f. above 3.6.2.
[807] For the view that the common law control test does not serve the purpose of labour law, c.f. Linder (1999). For the view that it does not provide a good fit in copyright cases either, c.f. *Dumas v. Gommerman*, 865 F.2d 1093, at 1104 (9th Cir. 1989).
[808] Hyde (2000) p. 81.

Critique to this effect has been pertinently formulated by the American legal scholar Marc Linder. According to Linder, "[t]he root problem with U.S. labor law defining covered employees is the purported denial of socioeconomic purpose."[809] The legislators have, in Linder's eyes, despite the fact that many acts have as their purpose to combat ills not only confined to employees, "generally failed to consider the socioeconomic consequences of excluding millions of workers from protections."[810] Another target for Linder's criticism is the administrative agencies and courts, which he considers to have made the ill worse by taking even less consideration of the purpose of the statutes and being even more restrictive than they have to be. Administrative and judicial adjudicators have added to the irrationality of the personal scope "by arrogating to themselves the power to uncouple the scope of coverage from the statutory purposes, freeing themselves to apply a very narrow definition of covered employees the legislatures never imposed."[811] The adoption of the common law control test as the standard for most labour law statutes[812] and the control factor's dominance, makes the denial of the statutes' socioeconomic purpose even worse. Through its decision in *Darden*, the "Supreme Court unanimously enshrined such purposelessness as principle."[813]

> To interpret the definition of the class of workers protected by modern labor legislation without mentioning the statutory purpose, but solely by reference to eighteenth- and nineteenth-century judicial doctrine determining the scope of liability of coach owners for the injuries inflicted by horse owners' drivers on third parties, may seem like a hell of a way to run a twenty-first century railroad, but a method, albeit obscure, does inhere in this madness.[814]

According to Linder, the purposelessness of interpretation can be found also in the National Labor Relations Board's decisions, as the board has adopted the common law control test. For the NLRB, "control has become a talismanic object that totally displaces the NLRA's policy of

[809] Linder (1999) p. 187. C.f. also Linder (1989a).
[810] Linder (1999) p. 190.
[811] Linder (1999) p. 190.
[812] A process Linder refers to as "Dardenization." Linder (1999) pp. 195f.
[813] Linder (1999) p. 187.

encouraging [collective bargaining] and full freedom of association."[815] Control, as Linder sees it, is a bad determinant for which workers need to bargain collectively with their employer. Finally, Linder makes a connection between the way courts and legislators define the personal scope of labour laws and developments in the labour market. "Pseudo-purposeless approaches facilitate and are, in turn, reinforced by the accelerating trend toward pseudo-self-employment. The result is a massive deregulation of the labour market."[816]

Even though Linder's critique concerns the concept of employee in federal US labour law, and the interpretation given by US courts and agencies, some of his critique is also valid for the other studied countries. Despite courts in the three European countries, in particular in the UK and Sweden, being more ready to be swayed by what is at stake, the issue of the connection between the concept of employee and the concerns of labour law has been raised in the debate in Europe as well. In its overall guidelines, the Supiot-group advocated "[t]he application of certain aspects of labour law to workers who are neither employees nor employers. The need for protection tailored to the special situation of these workers has been covered in labour law in several countries […]. Those workers who cannot be regarded as employed persons, but are in a situation of economic dependence vis-à-vis a principal, should be able to benefit from the social rights to which this dependence entitles them."[817]

Seeing the concept of employee as a status concept gives a further focus to this criticism. The benefits of the flexibility provided by the multi-factor test has largely been limited to adjustments necessary to keep those perceived as members of the core workforce inside the concept of employee and thereby included in the personal scope of labour law. The individual factors are defined in terms of what is commonly thought typical of an employee, not in terms of indications

[814] Linder (1999) p. 188.
[815] Linder (1999) p. 198.
[816] Linder (1999) p. 188.

that a certain worker is in need of the protection the statute at issue has to offer. The level of skill, the type of remuneration or the payments of taxes are relevant factors for identifying an employee in the every day use of the word, but less relevant for identifying workers covered by the concerns that form the base of occupational health and safety, dismissal protection or anti-discrimination statutes. Likewise, the weighing together of the factors have the purpose of identifying an overall status. This is further accentuated in cases where the same concept of employee is to be used not just in labour law or the in related field of social security, but is to play an important role in copyright law and other fields with no relation to labour law as well.

Simply put, the problem can be described as a worker having the question whether she qualifies for employee status under a particular labour law statute decided by factors that have no connection to the concern addressed by that particular statute. In the worst cases, one worker will be excluded from the scope of occupational health and safety regulation due to the short duration and casual nature of her employment, another worker denied redundancy pay due to the freedom she enjoys as to how and when to perform her work, and a third worker left without recourse against discrimination because she works for several different employers. Support for the view that the exclusion of workers who do not fit the concept of employee is a real problem can also be drawn from the fact that lawmakers in all the studied countries have felt a need to extend the personal scope of at least parts of labour law to cover workers other than just employees. These extensions will be dealt with in depth in the next chapter.

[817] Supiot et al (2001) p. 220.

4. EXTENSIONS OF THE PERSONAL SCOPE

4.1 Motives and Techniques

Even though the concept of employee without doubt has been the most important determinant of the personal scope of labour law, there is also a long history of extensions taking labour law beyond the boundaries of the concept of employee, some of which are almost as old the concept of employee. In this chapter, different techniques for extensions, primarily taken from labour law in France, Italy, Sweden and the United Kingdom will be examined. Focus will be on the legal aspects of the extension tehniques, but, where available, research concerning the actual outcome of the extensions, in terms of covered workers, will be presented.

A common motive for extending the personal scope of labour law seems to be the desire to include economically dependent workers.[818] This should come as no surprise, considering how subordination dominates the concept of employee, leading to the exclusion of workers who are economically dependent but not sufficiently subordinated. Economic dependence is, nonetheless, not the only motive to extend the personal scope beyond employees. The part of labour law most commonly extended to self-employed workers is occupational health and safety regulations. Here, the concern is rather that the employer's can exercise control over the physical work environment of workers other than the employer's own employees. Finally, extensions of the personal scope of anti-discrimination legislation are based on concerns that workers, regardless the nature of their relationship with their employer, have the right not to suffer discrimination in the labour market.

[818] The EIRO, concluded, after having listed existing extensions, that "[i]t is interesting to note that in all these cases, the rationale for legislative intervention can be found (among other reasons) in the protection of work situations which can be regarded as 'economically dependent'." EIRO (2002).

In this chapter, we will look at four different techniques for extending the personal scope of labour law, each represented by one example. The first technique for extension is the assimilation of certain categories of workers with employees. This can be done either through statutory declarations that they are to be considered as employees, or through declaring labour law applicable to the relationship between these workers and their employers. This technique is represented by *Livre VII* of the French *Code du travail*, where a multitude of more or less ad hoc extensions of labour law can be found. The second technique is to create a third category of workers, a *tertium genus*, who are neither employees nor self-employed, and to which parts of labour law are applicable. This technique is represented by a worker category, *lavoratori parasubordinati*, found in Italian law. The third extension technique is a diversified personal scope, defining the personal scope in different ways depending on the part of labour law and its particular purpose. An example of this exists in British labour law, where a large number of the labour law provisions apply to a broader category of workers. The fourth technique for extension is to define the responsibilities of the employer. This approach has been used in occupational health and safety legislation in several countries. Here Sweden and the United Kingdom will be used as examples.

Apart from extending labour law as such to cover self-employed workers, lawmakers have also, occasionally, come to use principles typical of labour law in regulation certain commercial relationships. One such example is the European directive on self-employed commercial agents which regulates commercial agents' right to remuneration and the conclusion and termination of agency contracts, including minimum notice periods.[819] In some national legislation, there are also special provisions concerning franchising.[820]

[819] *Directive 86/653/EEC on self-employed commercial agents.*
[820] C.f. Joerges (1991) pp. 23 ff and Sciarra (1991) p. 249.

4.2 Assimilated Workers

4.2.1 'Statutory Employees' and Labour Law Declared Applicable

This category of extension could arguably be split into two different categories: one for 'statutory employees', workers who by statute have been declared to be employees, regardless of the further details of their relationship; and another for workers who have had labour law declared applicable to the relationship between them and their employer. Even though the legal technique for extension between the two categories differ, the distinction between the two is, however, not as clear cut as it might first seem. More importantly, the practical consequences and the legal issues raised by the two techniques are broadly the same, which is why they nevertheless will be treated together.

One legal category already mentioned, the *dependent contractors* of Swedish law, arguably belongs in this category, at least if one subscribes to the positions that dependent contractors still exists as a separate category outside of the concept of employee.[821] As mentioned, an alternative name for this category is *jämställda uppdragstagare*, indicating that they have been put on an "equal footing" with employees. The most important difference between the Swedish dependent contractor category and the French law which will provide the main examples of this type of extension is that the Swedish category, aimed at a wide range of economically dependent workers, is much more broadly defined than the French extensions which are narrowly defined and aimed at particular occupational categories.

4.2.2 Livre VII of the Code du travail.

The French approach to workers falling outside of the concept of employee can be described as casuistic, applying labour law or parts of labour law to narrowly defined groups of workers. Some more general extensions do exist. From the point of view of the inclusion of independent

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contractors in the personal scope of labour law, the most interesting is however, *Livre VII* of the *Code du Travail,* which contains provisions "particular to certain professions", some of which concern workers falling outside of the concept of employee as described earlier. Through legislative intervention certain categories of workers, whose status as employees would at least be in doubt if the concept of employee is applied strictly, have been given status as employees. Covered by the extensions of *Livre VII* is a rather diverse group of workers, defined in terms of their profession, the nature of their work or the place where it is carried out. In common, they have two characteristics: the absence of a bond of legal subordination and their economic dependence on the employer.[822] They are economically dependent in that "their activity is economically tied to that of another, dominating, activity and thereby absorbed by a more powerful company."[823]

This extension came about in the mid-1930s, when the personal scope of labour law was enlarged to include categories of workers whose activity required a degree of liberty viewed as incompatible with legal subordination as understood at the time. The first two groups to enjoy the benefits of being *salariés assimilés* were journalists and sales representatives, the result of pressure from professional organisations.[824] In 1935, journalists working on a regular basis, and for whom their journalistic activity represented the main source of the "resources necessary for their existence" were given the benefit of a presumption of employee status, despite their lack of subordination.[825] Sales representatives were given the same status in 1937. Initially, a formalist view by the courts, stressing the text of the contract and not the *de facto* relationship kept the latter category contained, a problem remedied by subsequent legislative intervention – only the *de*

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[821] C.f. above 3.4.3.
[822] Lyon-Caen(1990) pp. 43f.
[823] "L'activité est économiquement liée à une autre activité dominante, et comme absorbée par celle d'une entreprise plus puissant." Lyon-Caen(1990) p. 44.
[824] Aubert-Monpeyssen (1988) p. 56.
[825] Loi du 29 mars 1935 "…tir[aient] le principal ressources nécessaires à leur existence, de leur activité journalistique." Cited in Aubert-Monpeyssen (1988) p. 58.

facto relationship was to count.[826] In 1969, a status equivalent to that of journalists was given to performing artists and models.[827]

Some of the categories are fully included in the personal scope of labour law, while only parts of labour law are applicable to others. The legal techniques used for the extensions vary. In some cases, the *Code du travail* stipulates that a given type of relationship is to be considered as a contract of employment despite the absence of legal subordination. In other categories, the code declares that labour law, or parts of it, is to be applied to a certain type of relationship, without classifying the relationship as such as a contract of employment. It is the actual conditions of work that decide whether a worker is to be classified as an employee, be covered by one of the special statuses or be considered a truly independent contractor. The label of the contract, registrations and the intentions of the parties are generally of no or only limited importance.[828]

Frequently, the workers covered by these extensions end up having a mixed status: *vis-à-vis* their employers they are considered as employees, or are at least given partially the same status, whereas *vis-à-vis* their customers and clients they are businessmen and the relationship governed by general contract law or special regulation pertaining to their branch of business. [829] Finally, in cases where they have others working for them, they are considered as employers vis-à-vis their own employees.

Sales Representatives

In French, this category of workers are known under the acronym *VRP* (*voyageurs*, *répresentants*, *placiers*). Under *Art. L 751-1 Code du travail,* contracts between a sales representative and her

826 Aubert-Monpeyssen (1988) p. 57.
827 Aubert-Monpeyssen (1988) p. 59.
828 C.f. *Soc. 25 avr. 1990 Bull. civ. V no 196 and Soc.. 11 déc. 1990 Bull. civ. V. no 632* (sales representatives); *Art. L. 761-2 Code du travail* (journalists); *Art. L. 762-7 Code du travail* (performing artists); *Soc. 28 oct. 1980, Bull. civ. V no 782* and *Soc. 6 janv. 1966, Bull. civ. IV no 17* (homeworkers). For workers covered by *Art. L. 781-1 Code du travail*, c.f. Jeammaud (2002) p. 161.

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employer are, regardless of the provisions of the contract, to be considered as a contract of employment if the sales representative:

> 1. is working for one or more employers;
>
> 2. is working exclusively and continuously as a sales representative;
>
> 3. does not perform any commercial transactions for their own account; and
>
> 4. have the nature of the goods or service they offer, the region in which the work or the category of clients they are to target, and their level of remuneration decided by their relationship with the employer.[830]

Further, *Art. L. 751-1* stipulates that the absence of contract clauses prohibiting the sales representative from exercising another profession or to perform commercial transactions for their own account does not prevent the worker from enjoying the protected status of travelling sales representative.

The *Code du travail* does not, however, contain any definition of the concerned profession. In practice, to enjoy the protected status, the sales representative must have a professional identity card.[831] It is also necessary that the work includes taking orders from clients.[832] Simply arranging meetings between sellers and buyers is not enough.[833] Further, the sales representative may not employ under-agents.[834] Most importantly, there is no requirement that the worker be in any state of subordination to the employer.[835] If a bond of subordination does exists between the worker and the employer, the worker should be classified as an employee directly without any detour over status as a sales representative. At the opposite end of the spectrum, workers who are

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[829] C.f. Lyon-Caen(1990) pp. 42f.

[830] *1. travaillent pour le compte d'un ou plusieurs employeurs; 2. exercent en fait d'une façon exclusive et constante leur profession de représentant; 3. ne font effectivement aucune opération commerciale pour leur compte personnel; 4. sont lies à leurs employeurs par des engagements déterminant la nature des prestations de services ou des marchandises offertes a la vente ou a l'achat, la région dans laquelle ils doivent exercer leur activité ou les catégories de clients qu'ils sont charges de visiter, le taux de rémunérations.*

[831] Soc. 24 janv. 1974, Bull. civ. V no 71 and Soc. 2 mars 1989, Bull. civ. V no 177.

[832] Soc. 26 févr. 1986, Bull. civ. V no 42.

[833] Soc. 27 févr. 1992, RJS 4/1992 no 541.

[834] Soc. 30 mai 1979, Bull. civ. V no 487.

[835] Soc. 15 janv. 2002 RJS 5/2002 no 637.

neither subordinated nor fulfil the requirements for statutory protection as sales representatives are pure independent contractors. This is, for example, the case for those who receive merchandise to sell for their own account.[836] Together, the requirements spelled out in *Art. L. 751-1* project the image of a worker who is economically dependent, working exclusively and continuously as a sales representative, and who works for someone else's account.

As contracts between sales representatives and their employers are to be considered as contract of employment, those aspects of labour law which apply to employees also apply to sales representatives. There are however, due to the nature of sales representatives' work, some particularities in its application. It is, for example, established jurisprudence of the *Cour de cassation* that the minimum wage, SMIC, only applies to sales representatives who are subject to a working time schedule controlled by the employer.[837]

Journalists

Under *Art. L 761-2 Code du travail*, all contracts by which a newspaper, magazine, news agency or other *entreprise de presse*, come to enjoy, for remuneration, the collaboration of a professional journalist are presumed to be employment contracts. Under the same article, a professional journalist is defined as someone who has as her principal occupation, and main source of income, the exercise of the journalism profession, on a regular basis, for one or several newspapers, periodicals or news agencies.[838] Put in the same category with professional journalists are *correspondents* receiving a fixed salary and *editorial staff* such as translators, proof-readers, and photographers. Explicitly excluded from the assimilated editorial staff are workers who contribute only occasionally.

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[836] Lyon-Caen(1990) p. 49.
[837] Soc. 10 nov. 1993, RJS 12/1993 no 1245; and Soc. 22 mai 1996, RJS 7/1996 no 857.
[838] Art. L. 761-2 Code du travail. *Le journalist professionel est celuiqui a pour occupation principale, régulière et retribuée l'exercise de sa profession dans une ou plusieurs publications quotidiennes ou périodiques ou dans une ou plusieurs agences de presse et qui en tire le principal de ses ressources.*

For the employer to be considered as an *entreprise de presse*, it must have as its principal activity the production or publishing of printed or broadcasted media. Thus, a person working as an editor of a magazine published by the French consumer protection agency did not have the status of a professional journalist.[839] Likewise, a person working with the monthly publication of a chain of consumer electronics' stores was denied status as a journalist, as the publication was distributed for free, lacked financial or technical autonomy, and had marketing of the chain stores as its sole purpose. The publishing of the monthly could not be seen as separate from the main commercial activity of the company.[840] Similarly, the editor of the membership magazine of a farmers' union was not considered a journalist.[841] In the broadcasting sector, a company producing material for television was considered an *entreprise de presse,* despite not being involved in the actual broadcasting of the material.[842]

Secondly, the work has to be of a journalistic nature and have an intellectual content. A person supplying a magazine with games and tests was, despite holding a professional identity card, found not to be a journalist.[843] To qualify for status as professional journalists, editorial staff has to be involved in the "dissemination of facts and ideas".[844] An illustrator working for a gardening magazine creating illustrations demonstrating different methods of gardening was found to be a professional journalist, as her work was sufficiently connected to the magazines reporting of news.[845]

[839] Soc. 17 mars 1999, RJS 5/1999 no 760.
[840] Soc. 24 févr 1993, Bull. civ. V no 68.
[841] Soc. 10 oct. 2001, RJS 12/2001 no 1467
[842] CE 5 avril 2002, RJS 7/2002 no 909.
[843] Soc. 1 avr. 1992, Bull. civ. V no 221.
[844] Soc. 9 févr. 1989, Bull. civ. V no 109. In the case, the *Cour de Cassation* found that the lower court had erred when not investigation thoroughly enough whether the work of a typographic designer qualified as dissemination of facts and ideas or was of a purely technical nature.
[845] CE 24 oct. 1997, RJS 12/1997 no 1451.

The economic dependence character of the extension of the personal scope to journalists is clear both in the text of the statute and in the jurisprudence. The *Code du travail* indicates that journalism has to be the worker's principal occupation and main source of income, and explicitly excludes from the status those who only work occasionally.[846] At the same time, however, freelancers showing sufficient signs of economic dependence can be granted the status of professional journalist.[847] The fact that a local correspondent did not receive a fixed salary did not prevent her from being considered a professional journalist, as the work for the newspaper constituted her principal occupation and main source of income.[848] There is no specific threshold amount that has to be surpassed for the remuneration to qualify as the worker's "main source of income." A decision where the appeals court had found the amounts received by the journalist as too low to qualify as the main source of income was quashed by the *Cour de cassation*.[849]

The *Code du travail* also contains special provisions concerning the dismissal and resignation of journalists. Journalists with more than fifteen years seniority have the right to have their entitlement to compensation tried by a special tripartite arbitration body, *la commission arbitrale des journalistes*.[850] In addition, a 'conscience clause' stipulates the use of the arbitration commission, and the possibility for damages, when a journalist resigns due to a change of ownership or of the character or orientation of the newspaper or periodical which threatens the honour, reputation or moral interests of the journalist.[851]

Performing Artists

Performing artists are included in the personal scope of labour law according to yet another formula. In *Art. L. 762-1*, the *Code du travail* stipulates that any contract by which a natural person

[846] For jurisprudence confirming this, c.f. Soc. 8 mars 1995, RJS 4/1995 no 452.
[847] Soc. 1 févr. 2000, RJS 3/2000 no 345.
[848] Soc. 14 mai 1997, Bull. civ. V no 174.
[849] Soc. 7 févr. 1990, Bull. civ. V no 47.
[850] *Art. L. 761-5 Code du travail.*
[851] *Art. L. 761-7 Code du travail.*

or a legal entity secures, in return for remuneration, the collaboration of a performing artist (*artiste de spectacle*) is presumed to be a contract of employment unless the artist is in fact an organiser or co-organisers of shows.[852]

The statutory text does not give any definition of *artiste de spectacle*. Instead it provides a list of performing artists that, among others, are to be considered as *artistes de spectacle*, including actors, musicians, singers, dancers, conductors and, for the part of their work which has to do with their artistic expression, directors.[853] Jurisprudence has confirmed that this list is not closed, by affording artist status to sound and light technicians.[854] An appeals court which had to decide whether a worker participating in a commercial was a performing artist or a model held that the case turned on whether the work involved any artistic interpretation or not. As the worker used techniques typical of the theatre, she was found to be an artist, despite the fact that she was silent.[855]

As with journalists, the presumption holds up regardless of the mode or amount of remuneration, or the label put by the parties. Moreover, the presumption cannot be rebutted by proof that the artist has retained her artistic freedom, that she owns all or parts of the equipment used, or that she employs one or more persons to help her, as long as she participates personally in the show.[856] Thus, the absence of employer control and the fact that the artists used their own tools and equipment did not stop them from enjoying the benefits of working under a contract of employment.[857] Further, a festival organiser was found to be the employer of the artists performing at the festival despite his lack of control over the artists' work and despite having

[852] Concerning artist who are co-organisers of shows, c.f. Soc. 31 oct. 1991, Bull. civ. V no 470.
[853] *Art. L. 762-7, alinéa 3, Code du travail.*
[854] Soc. 8 juillet 1999, RJS 10/1999 no 1310.
[855] CA Paris 27 janv. 1995, RJS 4/1995 no 448.
[856] *Art. L. 762-7, alinéa 2, Code du travail.*
[857] Soc. 19 mai 1998, Bull. civ. V no 270.

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contracted with ensembles of artists and not with the artists individually.[858] The contract of employment has to be individual, unless the performing artists are presenting themselves as a group, act or number.[859] If the artist has another artist working with her, it is the first artist's employer rather than the first artist who is considered to be the employer of the second artist.[860] Among circumstances that can break the presumption of a contract of employment is the fact that the worker has a stake in gains and losses.[861]

Models

Models also enjoy a presumption that any contract under which they are hired is a *contrat du travail*. The presumption holds up regardless of the mode or amount of remuneration and regardless of the label to the contract. Further, the presumption can not be destroyed by the fact that the model enjoys full liberty of action as to the performance of her work.[862] Considered as models are all persons posing as models or charged with presenting a product, service, or promotional message to the public, either directly or indirectly through the use of their image, even if they only work as models occasionally.[863]

Despite the rather wide phrasing of the presumption, it has proved rather easy to rebutt. In a 1997 case, the question was asked whether a *contrat du travail* existed between a professional tennis player and a company sponsoring her, on the ground that she worked as a model for the sponsor. The *Cour de cassation,* pointing to the facts that the tennis player's obligations were limited to certain publicity campaigns and occasional meetings, and that her principal activity was tennis, not modelling, found that the lower court had not erred when denying her status as a model.[864] Despite the provision that the model's liberty of action should not rebutt the presumption, and

[858] Soc. 14 nov 1991, Bull. civ. V no 506.
[859] *Art. L. 762-7, alinéa 4, Code du travail.*
[860] Soc. 28 janv. 1997, Bull. civ. V no 34.
[861] Soc. 31 oct. 1991, Bull. civ. V no 470.
[862] *Art. L. 763-1, alinéa 1, alinéa 2, Code du travail.*
[863] *Art. L. 763-1, alinéa 3, Code du travail.*

despite no mention of principal activity as a criterion for models, the court seem to have afforded great weight to these two factors.

Homeworkers

Homeworkers, like sales representatives, journalists, performing artists and models, are fully assimilated into the personal scope of labour law. The technique used is different however. Firstly, homeworkers are brought under the protection of labour law not by the creation of a presumption that their contracts are contracts of employment, but by declaring labour law applicable to homeworkers as an independent category. Under *Art. L. 721-6*, "homeworkers enjoy the same legislative and regulatory arrangements that are applicable to employees."[865] In addition, certain special provisions, notably concerning the employer's duty to notify the labour inspector about the location, number of homeworkers and the nature of their work, apply.[866]

Secondly, to be a homeworker is not a profession, which is why the category is defined not in terms of the content of their professional activity, but through the geographic location of their work and the mode of remuneration.[867] *Art. L. 721-1 Code du travail* defines homeworkers (*travailleurs à domicile*) as those who perform work for one or several industrial establishments; receiving a fixed remuneration; and working either alone or together with family members or an assistant. If this is the case, the code stipulates that there are no reasons to investigate the existence of any bond of subordination; whether or not the employer supervises the work; the ownership of the tools and materials, whether the worker himself provides accessory equipment; or the number of hours worked. Thus, the work does not have to be of any specific nature. It does not have to concern the production of goods[868], it can be of an intellectual nature[869], and

[864] Soc. 16 janv. 1997 RJS 3/97 no 326.
[865] "Les travailleurs à domicile bénéficient des disposition législatives et réglementaires applicable aux salariés."
[866] C.f. Art. L. 721-7.
[867] Lyon-Caen(1990) p. 46.
[868] Soc. 31 janv. 1968, D.1968.492.
[869] Soc. 22 janv. 1981, Bull. civ. V no 60.

leave the worker significant autonomy.[870] Apart from the work being carried out in the worker's home, the mode of remuneration is the only other criterion.

The requirement that the remuneration should be fixed is used in order to distinguish those who work from home for their own account from homeworkers working for someone else. Thus, a worker writing historical articles without any prior agreement with a publisher, leaving the publisher free to accept or refuse his work, was denied status as a homeworker.[871] Likewise, an illustrator who was to be paid a higher amount in cases where his illustrations were accepted than if they were refused fell outside of the homeworker category.[872] To be considered as fixed, the remuneration can be fixed at an hourly rate,[873] per task[874] or calculated on some other base as long as it is fixed in advance.[875] In one case, a worker whose remuneration in reality did not vary much was found to fulfil the requirement.[876]

The threshold for economic dependence seems to be lower for homeworkers than for sales representatives and journalists. The accessory nature of work must not be an obstacle for homeworker status.[877] Further, homeworkers can work for several different enterprises without losing their status, but only as long as they do not show particularly pronounced signs of being in business on their own account.[878] The fact that a milliner had her own clientele of private individuals, besides working for a company, was crucial in denying her status as a homeworker.[879] Finally, the fact that the raw materials needed for the work are provided by the worker is of no

[870] Soc. 28 oct. 1980, Bull. civ. V no 782.
[871] Soc. 22 janv. 1981, Bull. civ. V no 62.
[872] Soc. 22 janv. 1981, Bull. civ. V no 61.
[873] Soc. 23 nov. 1978, Bull. civ. V no 797.
[874] An arrangement by which a publisher paid a worker a fixed sum per book for advice on whether to publish them in France was found to fulfil the requirement. Soc. 22 janv. 1981 Bull. civ. V no 60.
[875] Soc. 5 janv. 1995, RJS 2/1995 no 166.
[876] Soc. 28 oct. 1980, Bull. civ. V no 782.
[877] Soc. 23 nov. 1978, Bull. civ. V no 797.
[878] Soc. 5 janv. 1995, RJS 2/1995 no 166.
[879] Soc. 14 oct. 1970, Bull. civ. V no 530.

significance if the worker bought the raw materials from an employer who later acquired the processed goods, or from a provider indicated by the employer.[880]

Childminders

The first category of workers to whom labour law is to be partially applied mentioned by the *Code du travail* is childminders. Childminders (*assistantes maternelles*) are defined as workers who, in their own home, regularly and for remuneration accommodate children left in their care by physical persons or by private legal entities.[881] The *Code du travail* supplies a list of its provisions applicable to childminders.[882] On the list are, among others, regulations concerning sexual harassment, equal-pay, parental leave, wage protection, holidays, and collective agreements and trade unions. Childminders are also included in the competence of the labour courts.[883] The most significant exemption from the list is occupational health and safety. In addition, the *Cour de cassation* has found that the provisions requiring just cause for dismissals, as general principles of labour law, can be applied to child minders as well, despite not being listed in *Art. L. 773-2*.[884] They do, however, only apply between childminders and legal entities, not between a childminder and a private individual.[885] Private individuals cannot, however, dismiss their child minder for illicit motives. Discriminatory dismissals are not permitted and in March 2002 the *Cour de cassation* agreed that a private individual did not have the right to withdraw her children from an childminder due to the latter's pregnancy.[886]

[880] *Art. L. 721-2 Code du travail.*
[881] *Art. L. 773-1 Code du travail.*
[882] *Art. L. 773-2 Code du travail.*
[883] Soc. 28 juin 1995, RJS 8-9/1995 no 962.
[884] Soc. 21 mars 1996, RJS 6/1996 no 729.
[885] Soc. 31 mars 1993, RJS 5/1993 no 555.
[886] Soc. 26 mars 2002, RJS 6/2002 no 744. C.f. also Soc. 17 juin 1997, RJS 1997 no 1168 and Soc. 17 juin 1997, RJS 1997 no 1169.

Article L.781-1 Code du travail

Article L. 781-1 Code du travail provides for the partial application of labour law to a group of workers more loosely defined than those of the other extensions. Covered by this article are persons whose profession essentially consists of selling merchandise of any kind, which is being provided exclusively or almost exclusively by one single commercial or industrial enterprise. Further, the article covers persons who take up orders or receive goods for process, handling or transport on behalf of a single commercial or industrial enterprise. In both cases, the work has to be exercised under conditions and prices imposed by the enterprise, and at a place of work owned or approved by the enterprise. Initially, this partial extension of the personal scope of labour law was aimed in particular at kiosk tenants and persons selling lottery tickets.[887] Through the jurisprudence of the *Cour de cassation,* it has come to include, among others, gas station tenants and franchisees.

For the article to be applicable there has to be exclusivity or quasi exclusivity. The goods sold, processed, handled or transported must come from one single commercial or industrial enterprise. In a case concerning gas station tenants, the fact that 65 percent of their sales came from goods other than those provided exclusively by the petroleum company served to deny them protection under Art. L. 781-1.[888] The conditions and prices must be imposed by the enterprise, but do not have to be so explicitly. It is enough that the worker is in a situation where it is impossible for her to exercise a personal pricing policy, for the prices to be considered imposed by the other party.[889] Workers covered by Art. L. 781-1 can have their own employees.[890] In a 2001 case, a franchisee in the transportation business, who worked from premises rented by the franchisor, had his working hours and routes imposed by the commercial policies of the

[887] Lyon-Caen (1990) p. 52.
[888] Soc. 28 nov, 1984, Bull. civ. V no 461.
[889] Soc. 18 nov. 1981, Bull. civ. V no 895.
[890] Soc. 23 nov. 1978, Bull. civ. V no 795. C.f. Jeammaud (2002) p. 159.

franchisor, and his prices supervised by the franchisor and largely determined by the royalties due, was found to be covered by Art. L. 781-1.[891]

All provisions applicable to "apprentices, manual workers, employees, [and] workers" apply to the relationship between the persons covered by article 781-1 and their employers, with the exception, however, of the provisions concerning for example occupational health and safety, working time, and annual leave found in *Livre II Code du travail*.[892] Workers corresponding to the definition in Art. L. 781-1 are thus covered by for example legislation concerning minimum wage,[893] dismissal protection,[894] and the jurisdiction of the labour courts.[895]

Non-salaried Managers of Supermarkets

Persons who, remunerated as a proportion of their sales, run branches of supermarket chains are qualified as "non-salaried managers" (*gérants non salariés*), as long the contract between the parties does not fix the conditions of work and leaves them free to hire personnel or to substitute themselves at their own expense and under their own responsibility.[896] Non-salaried managers are, as the term implies, not employees of the companies they are under contract with. They do, nevertheless, "enjoy the benefit of all the advantages afforded employees by social legislation, in particular as concerns paid leave."[897] The occupational health and safety, working time and leave provisions found in *Livre II* of the *Code du travail* are, however, only applicable to the extent that they apply to managers.[898] Taken together, this means that non-salaried managers are, among other things, covered by minimum wage legislation, working time, and dismissal protection.[899]

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[891] Soc. 4 déc. 2001, Dr. Soc. 2/2002.
[892] Art. L. 781-1 alinéa 1 et 4, Code du travail.
[893] Soc. 5 mars 1981, Bull. civ. V no 195.
[894] Soc. 17 juin 1982, Bull. civ. V no 404.
[895] Soc. 4 déc. 2001, Dr. Soc. 2/2002.
[896] Art. L. 782-1 Code du travail.
[897] Art. L. 782-7 Code du travail. *Les gérants non salariés visés par le present titre bénéficient de tous les avantages accordé aux salariés par la legislation sociale, notamment en matière de congés payés.*
[898] Art. L. 782-2 Code du travail.
[899] Soc. 28 oct 1997, RJS 12/1997 no 1450.

There are two essential differences between employees and non-salaried managers. Firstly, non-salaried-managers do not have their conditions of work fixed by the contract between them and the supermarket chain. In a 1993 case, the *Cour de cassation* found a contract clause whereby the supermarket chain decided the opening hours of the store to be compatible with status as a non-salaried manager, as it was a clause common to commercial contracts and not a clause fixing the conditions of work. Further, the fact that the supermarket chain provided all the goods as well as the premises of the store, did not serve to qualify the manager of the individual supermarket as an employee.[900] Secondly, non-salaried managers are free to hire personnel or to substitute themselves. Le Goff describes the situation of non-salaried managers as "generally ambiguous, characterised by a real economic subordination."[901]

4.2.3 Analysis

The assimilation of workers, either through the creation of statutory employees or through declaring labour law fully or partially applicable to certain kinds of relationships, appears to be an easy solution to the problem of categories of workers not fitting the concept of employee but still working under conditions raising the concerns of labour law. A general extension through assimilation of workers in "essentially the same position as employees", like that intended by the dependent contractor extension in Swedish labour law, has the advantage of establishing a *cordon sanitaire* around the concept of employee, extending the boundaries of labour law, and thereby making it more difficult to circumvent. Finding the right reach of such an extension is, nonetheless, a rather difficult task. If the *cordon sanitaire* is kept very narrow, like in the Swedish case, it will only apply to a small number of workers, leaving many in a grey area without protection. If it is made broad, the risk is that it becomes over-inclusive, covering workers who are genuinely self-employed. These risks can even appear simultaneously, as the organisation of

[900] Soc. 15 déc. 1993, RJS 1/1994 no 90.

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work and business varies for different sectors of the economy and for different workers within the same sector. Another disadvantage is that a general assimilation of a vaguely defined group of workers easily becomes rather elusive, exposing workers and employers to uncertainties concerning the status of their relationship.

The more casuistic extensions in *Livre VII* of the French *Code du travail* have the advantage of being targeted at narrowly defined categories of workers found in particular professions, work of a particular nature, or – in the case of homeworkers – in a particular geographical location. This approach provides both the possibility to draft the extensions to the needs of a certain field or type of work, and a higher degree of legal certainty, especially as custom in the business has come to be important in the jurisprudence. The disadvantages of this approach is that it only covers narrowly defined categories of workers who by tradition have been considered in need of protection despite not fitting the concept of employee. The personal scope of labour law has become inconsistent and ad-hoc, running contrary to its mandatory nature. The casuistic assimilation of certain groups of workers will have difficulties amounting to anything more than a partial solution.

4.3 'Tertium Genus'

4.3.1 A Third Type of Workers

Another way in which legislators have tried to deal with the fact that not all workers fit neatly into either side of the employee/self-employed dichotomy is through creating a third type of worker, a *tertium genus*, neither employee nor self-employed. Thus, "a distinction is made between completely independent entrepreneurs subject to civil or commercial law and self-employed professionals who are financially dependent on one or more principals".[902] This results in three categories of workers: employees, *tertium genus*, and more or less genuinely self-employed workers.

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[901] Le Goff (2001) p. 123.
[902] Supiot et al (2001) p. 7.

The *tertium genus* can be regulated either through regulation specific for this category, or through applying parts of labour law to it.

Two countries where a form of *tertium genus* has been inserted into labour law are Italy and Germany. The main example here will be taken from Italian law, but a short mention should be made of the German regulation. In Germany, the category *arbeitsnehmerähnliche Personen*, (employee-like persons) encompasses self-employed workers that are economically dependent on one employer and considered to be in need of social protection comparable to that of employees.[903] The concept was first developed by the courts, and then given a statutory definition in the 1974 *Act on Collective Agreements (Tarifvertragsgesetz)*. The decisive criterion for separating this group from other self-employed workers is that they perform the contracted work themselves or essentially without the help of employees, and that the major part of their work must be performed for one employer. *Arbeitsnehmerähnliche Personen* only enjoy the benefits of a rather limited range of labour law, mainly the jurisdiction of the labour courts, regulation of annual holidays, and the possibility to have their working conditions regulated by collective agreements. On the international level, the draft convention on Contract work, proposed but not adopted at the 1998 International Labour Conference, has been described as an attempt at a third category.[904]

4.3.2 Lavoro parasubordinato

In 1973, a provision was inserted into the Italian *Codice di procedura civile* (Code of Civil Procedure), which extended the rules concerning individual employment disputes to cover "agency relationships, commercial representatives and other relationships of collaboration which have as their object the continuous and co-ordinated performance of work, performed predominantly

[903] C.f. Weiss (2000) pp. 45f.
[904] Among authors categorising *contract labour* as an attempt at a *tertium genus* are Biagi and Tiraboschi (1999) p. 584. For the content of the draft convention, c.f. below 5.2.

personally, even if the relationship does not have a subordinated character."[905] In Italy, the workers under these contracts are known as *lavoratori parasubordinati* (para-subordinated workers). Another term often used, in particular to denote self-employed workers other than members of the liberal professions is *CoCoCo*, an abbreviation stemming from the words *collaborazione*, *continuativa* and *coordinata* found in the *Codice di procedura civile* definition.[906] The notion of *parasubordinazione* was not completely new, but had developed in Italian doctrine for some years before its inclusion in the *Codice di procedura civile*, as a way of dealing with workers who did not show the typical features of either employees or genuinely self-employed workers.[907] Together with the extension of the employment dispute procedure, the *parasubordinati* also came to be covered by *Art. 2113* of the *Codice civile* with the effect that they cannot waive statutory rights.[908] In 1995, the *parasubordinati* were given a special status in the pension system, under which they have their own pension fund, with lower contributions (12-14 percent on wages as opposed to 33 percent for employees) and lower entitlements, a fact that has come to have important consequences for the development of this type of work in Italy.[909]

What distinguishes *lavoratori parasubordinati* is the combination of economic dependence with a degree of subordination lower than that of employees. The jurisprudence and doctrine on *lavoro parasubordinato* has come to focus on three requisites, separating *parasubordinati* from employees and genuinely self-employed workers: the extent to which the work performed personally must dominate the relationship; what is to be considered continous; and drawing the line between co-ordination and subordination.[910] As to the first requisite, the *lavoratore parasubordinato* is allowed to

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[905] "*…rapporti di agencia, di rappresentanza commerciale ed altri rapporti di collaborazione che si concretino in una prestazione di opera continuativa e coordinata, prevalemente personale, anche se non a carattere subordinato…*" *Art. 409, comma 3, Codice di procedura civile.*

[906] It has been argued that the term "lavoratori parasubordinati" is misleading and should be replaced by something more proper, e.g. "lavoro coordinato". De Luca Tamajo (2000) p. 264.

[907] Ballestrero (1986) p. 42.

[908] Santoro Passarelli (1979) pp. 11f.

[909] *Legge 8 agosto 1995, n. 335.*

[910] The three requisites have been listed as such by the *Corte di cassazione* e.g. in Cass. sez. lav. 20 agosto 1997, n. 7785. For a comprehensive and influential account of the three requisites, c.f. Santoro Passarelli (1979) pp. 59ff. For more

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use assistants, as long as the work performed by her personally is the dominating element of the contract, more important, quantitatively or qualitatively, than the work performed by others or the capital applied.[911] The requisite that the collaboration must be *continuous* can be fulfilled both through working continuously and through work repeated on several occasions for the same employer. The work does not have to take place under the same contract, but can be performed under several different contracts, concluded separately.[912] The *Corte di cassazione* has spoken of "the continuity (or the periodicity)", as something which can be fulfilled through several separate engagements which are repeated in time.[913] As an example, a person who, under directions from the user enterprise, had prepared the public relations of four consecutive fashion collections was found to be covered by the provision, even though the collections were months apart.[914] Outside of the scope fall situations where the work is only occassional and the time periods in between are long and irregular.[915]

As the category *lavoratori parasubordinati* is to be a subspecies of autonomous self-employed workers, there is a thin line to walk between co-ordination and subordination. The work has to be co-ordinated with the activities of the employer, but without the co-ordination involving the employer giving directions, as it then would be a contract of employment. The *Corte di cassazione* has come to use the notion of 'functional connection' (*connessione funzionale*), "deriving from a protracted insertion into the business organisation, or, more generally, into the ends pursued by the [employer]."[916] The employer can not give the worker instructions as to how and when work is to be performed, only how and when the worker's product or services is to be inserted into the

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recent accounts, c.f. Ferraro (1998) pp. 458ff, Leonardi (1999) pp. 518ff, and Casotti and Gheido (2001) pp. 16ff., Cardoni (2001) pp. 626ff., and Ghera (2002) pp. 74ff.

911 Cass. sez. lav. 20 agosto 1997, n. 7785, Cass. sez. lav. 20 gennaio 1992, n. 652.

912 Cass. sez. lav. 18 febbraio 1997, n. 1459.

913 "…la continuitá (o la periodicità)…" Cass. sez. lav. 18 febbraio 1997, n. 1459.

914 Cass. sez. II. 21 settembre 1977, n. 4033.

915 Cass. sez. lav. 20 agosto 1997, n. 7785.

916 "…derivante da un protratto inserimento nell'organizzazione aziendale o, più in generale, nelle finalitá perseguite dal committente…" Cass. sez. lav. 20 agosto 1997, n. 7785. The notion of 'functional connection' appeared already in the 1970s and is reported by Santoro Passarelli (1979) pp. 66f.

employer's organisation. Further, the *lavoratore parasubordinato* is only hired for a specific task, whereas the employee has to be available for arising tasks.[917]

The co-ordination requisite is crucial for drawing the line between *parasubordinati* and employees. It is not, however, very useful for distinguishing between *parasubordinati* and other self-employed workers. Many self-employed workers perform defined tasks at the time and place dictated by their user enterprise. What is in reality decisive as regards deciding what self-employed are to be classified as as *parasubordinati* is the degree of economic dependence, expressed in the continuity requisite, and the obligation to perform work personally. Explaining the distinction between *parasubordinati* and other self-employed, Santoro Passarelli pointed to the *parasubordinato's* economic dependence and inferior power in the contractual relationship.[918]

In contrast to the assimilated workers in French law, *lavoro parasubordinato* is an open category. Any worker fulfilling the criteria of the definition can be considered a *lavoratore parasubordinato*, regardless of the branch or business or type of work.[919] Among the categories of workers who according to established jurisprudence have come to be considered as *lavoratori parasubordinati* rather than employees or genuinely self-employed are, door-to-door and home salespeople; telephone surveyors and telemarketing personnel; and journalists contributing to newspapers, magazines and encyclopaedias on a regular basis without qualifiying for employee status.[920] Also members of the liberal professions can be *lavoratori parasubordinati*, in cases where they have put themselves at the disposal of a client in a such a way as to have "almost completely […] lost their

[917] Cardoni (2001) pp. 626f and Ferraro (1998) p. 460.
[918] Santoro Passarelli (1979) p. 90.
[919] Cass. sez. lav. 4 aprile 1992, n. 4152.
[920] Leonardi (1999) pp. 525f.

position of liberty and independence, finding themselves economically dependent on a single client, which has assumed a position analogous to that of an employer."[921]

The provisions on labour disputes is, in fact, the only part of labour law that has been extended to cover *lavoro parasubordinato*. In a 1997 case, the *Corte di cassazione* pointed out that the "relationship of *lavoro parasubordinato* remains subject to the regime for self-employed workers", and that "*parasubordinazione* is relevant exclusively in procedural law".[922] The *Corte di cassazione* has also found *lavoro parasubordinato* to be exempt from constitutional provisions concerning the right to a "a remuneration commensurate with the quantity and quality of their work, and in any case sufficient to ensure to them and their families a free and honourable existence".[923] In addition, the constitutional provisions concerning the freedom to join a trade union cover *parasubordinati*, as well as other self-employed workers. In a 1975 case, the *Corte costituzionale* (Italian constitutional court) held that the Italian constitution guarantees the freedom to organise in trade unions for all workers, regardless of whether they are subordinated employees or autonomous self-employed workers. Certain connected rights found in labour law statutes are, however, constitutionally possible to limit to employees.[924] Later, the *Corte constituzionale*, has found that the right to strike, guaranteed in the Italian constitution, also covers attorneys and other members of the liberal professions.[925]

Since 1998, all the three major Italian trade union confederations organise CoCoCo-workers through special organisations – Nidil (Nuove identita di lavoro) for Cgil; Alai (Associazione

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921 "…abbia quasi del tutto perduto la sua posizione di libertà e di indipendenza, e si trovi ad essere economicamente dipendente da un cliente, che abia assunto nei suoi confronti una posizione analoga a quella del datore di lavoro…" Cass. sez. II. 21 maggio 1979 n. 2918.

922 "Il rapporto di lavoro parasubordinato resta soggetto all disciplina sostanziale dettata per il lavoro autonomo, essendo la parasubordinazione rilevante esclusivamente ai fini processuali ex Art. 409 n. 3 c.p.c." Cass. sez. lav. 18 febbraio 1997, n. 1459.

923 *Il lavoratore ha diritto ad una retribuzione proporzionata alla quantità e qualità del suo lavoro e in ogni caso sufficiente ad assicurare a sé e alla famiglia un'esistenza libera e dignitosa.* Art. 36, comma 1 Costituzione della Repubblica Italiana. *Cass. sez. lav. 26 luglio 1990, n. 7543.*

924 *Corte cost. 17 dicembre 1975 n. 241.* The case concerned the right to hold union activites on the employer's premises.

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lavoratori atipici e interinali) for Cisl; and Cpo (Coordinamento per l'occupazione) for Uil.[926] In some cases, these organisations have managed to conclude agreements on minimum standards with public employers, establishing "type contracts" to be used as a basis for the individual contracts.[927]

Lavoro parasubordinato has been the subject of an at times heated debate among legal scholars. As Ballestrero has pointed out, it has the potential to serve either as an antichamber to the application of labour law or as a way to stem the tide expanding the scope of labour law beyond employees as traditionally understood.[928] Similar thoughts have been expressed by Biagi and Tiraboschi, seeing the *tertium genus* technique as *per se* neutral and possible to use both to extend and limit the personal scope of labour law.[929] Already in the 1970s, it was pointed out that the category could be used to circumvent labour law applicable to employees.[930] This has also been the main point of criticism in recent years. As a formally recognised but unregulated form of labour, which in addition is cheaper from the point of view of pension contributions, employers may have reasons to prefer this form of contract to proper employment contracts, a point which may also lure some workers, at least in the short term. Ferraro reports that "rather surrealistic" contractual clauses has been used to construct "schizofrenic work" guaranteeing employer's significant control while at the same time classifying the workers as *parasubordinati* rather than employees.[931] In contrast with employment contracts, the contracts for *lavoro parasubordinato* are most often written, a practice which could be dictated by the interest of the employer to provide herself, *ex-ante*, with a document that can be useful in case an attempt is made by the worker or a

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925 *Corte cost. 27 maggio 1996, n. 171.*
926 Scarponi and Bano (1999) p. 544. On the strategy of these organisations c.f. Gottardi (1999).
927 Scarpelli (1999) p. 563 and Vettor (1999) pp. 629f.
928 Ballestrero (1987) pp. 48 and 57.
929 Biagi and Tiraboschi (1999) p. 584.
930 Santoro Passarelli (1979) p. 132.
931 "Clausole peraltro abbastanza surreali giacché disegnano rapporti di lavoro schizofrenici." Ferraro (1998) p. 468. Leonardi claims that, reading between the lines of the contracts, one can often find ample possibilities for the employer to impose rather precise rules over the work, included working hours, the locality of work, and the use of the employer's physical capital. Leonardi (1999) p. 522.

third party to re-classify the contract as one of employment.[932] Even though courts should disregard or afford only very limited significance to the label or wording of the contract, it still greatly influences the everyday relationship between the parties and third parties such as the labour inspectorate or social security authorities. To one author, the *lavoro parasubordinato* is a "trojan horse" and its introduction a "grave error".[933] Also a more moderate author maintains that *lavoro parasubordinato*, even when it is not used for the purpose of circumventing regulation, undermines the coherence of labour law.[934]

To what extent *lavoro parasubordinato* deserves this criticism is not easy to say, not least due to the difficulties involved with measuring whether *parasubordinati* have in fact substituted employees or not.[935] Available statistics, mainly from the *Istituto Nazionale della Previdenza Sociale* (INPS) do nonethless offer some important insights into *lavoro parasubordinato*. In the INPS statistics a distinction is made between three categories of *parasubordinati*: *collaboratori*, *professionisti* and *collaboratori/professionisti*. The latter two categories refer to professionals registered in registries of professionals, such as attorneys and medical doctors. The most interesting category is the *collaboratori*, commonly seen as including some workers that closely resemble employees or who could best be described as employees in disguise, for example call-center workers with little autonomy.[936] The *collaboratori* make up over 90 percent of those registered with INPS as *parasubordinati*. Between 1996, the first year of the new pension rules, and 2001, the number of registered collaboratori more than doubled , increasing from 856.000 to 1.890.000.[937] The statistics confirm the economic dependence nature of *parasubordinati*. Of those classified as *collaboratori*, in 1999, more than 91 percent worked for only one employer, with an additional 7

[932] Leonardi (1999) p. 522.
[933] Leonardi (1999) p. 535.
[934] Ferraro (1998) p. 505.
[935] On the methodological difficulties of this type of research, c.f. Borgarello and Cornaglia (2002) pp. 29f.
[936] C.f. CNEL (2002) p. 130 and Borgarello and Cornaglia (2002) p. 12.
[937] CNEL (2002) p. 130.

percent working for only two employers.[938] The statistics also reveal signs that *parasubordinazione* does not function as transitory stage that a worker goes through to become later employed as an employee. The *parasubordinati* are largely concentrated in the same age groups as the employed population in general, with almost one third of workers in the 30-39 years age-bracket.[939] It is also interesting to note that almost half of the *collaboratori* are women and that in the south of Italy, women make up a majority.[940] As self-employment traditionally has been a predominantly male activity, the fact that women have caught up with men could be viewed as an additional sign that these workers are distinct from, and probably more precarious, than traditional autonomous self-employed workers. Cited as evidence to the contrary – that *lavoro parasubordinato* does not represent precarious employees in disguise – has been the fact that it is more widespread in the dynamic economy and labour market of northern Italy than in the south.[941]

In recent years, several proposals to reform the institution by including *lavoratori parasubordinati* in a wider range of labour laws have been discussed in the Italian parliament. In 1999, a proposal by Senator Carlo Smuraglia to extend parts of labour law was passed by the Italian Senate, but not by the Chamber of Deputies.[942] At the time of writing, a government proposal to reform the institution of *lavoro parasubordinato*, replacing it with a new type of temporary contract, *lavoro al progetto* has been put before the Italian parliament.[943]

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[938] Borgarello and Cornaglia (2002) pp. 23f.
[939] Borgarello and Cornaglia (2002) p. 7 and 10.
[940] In 2001, women made up 47.4% of the *collaboratori* in Italy as a whole and more than 55% in southern Italy. CNEL (2002) p. 131.
[941] De Luca Tamajo (2000) p. 266.
[942] *Disegno di legge n. C.5651*, approved by the Italian Senate February 4, 1999. Available at http://www.camera.it/_dati/leg13/lavori/stampati/sk6000/articola/5651.htm For a summary of the proposal, c.f. De Luca Tamajo (2000) pp. 267ff.
[943] The new *lavoro al progetto* category would encompass persons who, without a bond of subordination to the employer, perform a project or a defined program of work to accomplish a specified result. http://www.welfare.gov.it/aree+di+interesse/occupazione+e+mercato+del+lavoro/servizi+impiego/documenti/decretobiagi.htm

4.3.2 Analysis

Having three different categories of workers does, arguably, capture better the emergent realities of post-fordist organisations than a binary divide.[944] It has also been held, however, that the group covered by a *tertium genus* necessarily is too heterogenous, socially and legally, to be of any use to labour law, as there are no common interests dictating common needs for regulation.[945] The pivotal question is whether a *tertium genus* serves to give some protection to workers who otherwise would be left outside the personal scope of labour law entirely, or whether it makes it easier and more attractive to try to escape employee-status, thus undermining the mandatory nature of labour law. According to the optimistic view, the concept of employee is not affected by the introduction of a formal third category, and the borderline between employees and self-employed workers is neither moved nor blurred. In addition, the existence of a third category does not lead to any change in employer and worker behaviour away from contracts of employment.

In the pessimistic view, *tertium genus* can contribute to an escape from employee status, and thus from at least part of labour law, in two ways. Firstly, courts could, arguably, become less reluctant to find against employee status if they are offered a formal third category in which to put difficult cases. Ballestrero has claimed that the Italian legislator, through the creation of the *parasubordinato* category, has retained as self-employed, workers who otherwise could have been classified as employees.[946] Secondly, it could provide employers with a possibility to combine the lower costs and level of regulation associated with using independent contractors with the longer and deeper relationships sought from employees. Further, a *tertium genus*, unless the borders towards the concept of employee are adequately policed, could contribute to the institutionalisation of a two

[944] De Luca Tamajo (2000) p. 266.
[945] Ferraro (1998) pp. 469 and 506.
[946] Ballestrero (1987) p. 48.

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tier labour market, where the non-core workforce has less rights than the core, employee, workforce.

To a high degree, this depends upon what regulation is applied to the *tertium genus*. If *tertium genus* workers are covered by large parts of labour regulation, the risk that it is used as a refuge from labour law should be less. In the German and Italian examples, the labour law coverage offered is marginal. The social security regulations applied to the category also plays an important role, in particular if there is a difference in the coverage or the size contributions.

An advantage of the *tertium genus* technique for extending the personal scope of labour law is that it could provide a fairly good fit between the concern of regulation and the personal scope, however depending on the legal design of the category and what parts of labour law are extended. If a *tertium genus*, like in the German, but to a large extent also the Italian, example, is defined in terms of economic dependence, regulation concerned with this could have its scope extended. This is, however, not the way the *tertium genus* technique has been used. Neither in Italy nor in Germany are *tertium genus* workers covered by, for example, dismissal protection. Arguably, neither the Italian nor the German legislation are good examples of a *tertium genus*, as they do not really offer any labour law coverage, apart from procedural rules. As far as social security goes, the claim that they represent a *tertium genus* is more substantial.

4.4 The Targeted Approach

4.4.1 Diversifying the Personal Scope According to Concern

The third technique for extension is to diversify the personal scope, giving different parts of labour law different scopes. At the heart of this technique is the identification of regulations that ought to have a broader scope than just employees. In a recent discussion document, the British

Department of Trade and Industry outlined the rationale behind the diversified personal scope: the "targeted approach".

> Employment rights apply to differently defined groups of people, depending on the aims of the right in questions. Different working people may require different levels of protection, depending on the nature of the relationship with their work provider, in particular the degree of control the working person has over how they do their work and when they do it and the degree of mutual obligation between them and their work provider. The government considers that certain rights, such as the rights to receive the national minimum wage and not to suffer unlawful deductions from wages should apply to a broad category of working people, in order to ensure that work pays for all. […] By contrast, other rights, such as the right to minimum notice periods and the right not to be unfairly dismissed, provide protection for employees with a contract of employment placing particular duties on them and their employers. The advantage of this approach is that it ensures that the framework of statutory employment rights reflects the variety of different arrangements between work providers and working people. However, this 'targeted' approach invariably means that the coverage of rights varies.[947]

The United Kingdom is not the only example of this technique for extension. For quite some time, it has also been used on the European level. "The labour law of the EU, by virtue of the principles of freedom of movement and freedom of establishment, has the advantage of beginning with a broad concept of work and economic activity which potentially embraces both these categories of worker. The application of EU social and labour law to self-employed persons was always on the agenda, as illustrated by the careful attention paid to this category of workers with respect to EU law on sex discrimination, where special Directives were approved concerning self-employed workers."[948] The framework directive for equal treatment in employment and occupation applies to "all persons" in relation to "conditions for access to employment, self-employment and to occupation including selection criteria and recruitment

[947] Department of Trade and Industry (2002) pp. 6f.
[948] Bercusson (1996) p. 478.

conditions [and] promotion".[949] This is echoed in directives implementing the principles of the framework directive.[950]

In the United States, the personal scope of anti-discrimination law is generally more restricted. *Title VII* of the *Civil Rights Act of 1964* only covers employees of employers with fifteen employees or more. The *Reconstruction Civil Rights Acts*, however, has been found to have a broader personal scope. In 1999, the First Circuit Court of Appeals found that the so-called *Section 1981*[951] – which bans racial discrimination in the "making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship" – covers independent contractors.[952] In the case, an incorporated business and its working owner and sole shareholder sued a company for which they were performing services for racial discrimination due to a hostile work environment. The court found that "Section 1981 does not limit itself, or even refer, to employment contracts but embraces all contracts and therefore includes contracts by which a corporate independent contractor […] provides services to another corporation."[953]

4.4.2 'Worker' and 'Employment' in UK Labour Law

Employee status is still what determines the personal scope of the greater part of labour law in the United Kingdom. Dismissal protection (apart from protection against discriminatory dismissals covered by anti-discrimination legislation), redundancy pay, parental leave and the majority of collective rights are among the important regulations which apply to employees only. Other parts of British labour law such as the minimum wage, working time and some collective rights, apply to *workers*. In the *Employment Rights Act of 1996* the definition of *worker* is as follows:

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949 *Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. Art. 3(1*).
950 C.f. *Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, and *Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards acces to employment, vocational training and promotion, and working conditions*, as amended by *Directive 2002/73/EC.*
951 42 U.S.C. § 1981.

> (3) In this Act "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 […] 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[…][954]

The definition excludes three groups of workers: "those who do not contract to provide personal service (this leaves out those who contract to supply a certain end product); those who contract as professionals; and, […] those who have an undertaking of their own through which they contract with a 'client' or 'customer'."[955] Essentially, the definition is intended to exclude those who could be viewed as genuinely self-employed workers.[956] Some of these, are nonetheless included in the concept of *employment* found in anti-discrimination legislation, which unlike *worker* includes also professionals who sell their services to the general public.

> In this Act, unless the context otherwise requires –
>
> "employment" means employment under a contract for service or of apprentice-ship or a contract personally to execute any work or labour."[957]

For a person to be considered a worker or in employment under these definitions, she must work under "a contract the dominant purpose of which is the execution of personal work or labour."[958] The work does not have to be the sole purpose of the contract, but if the personal performance of work is only a minor part of the contract, the person is not considered to be under a contract personally to execute work.[959] In a case concerning a sub-postmaster, the Employment Appeal

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952 *Danco, Inc v. Wal Mart Stores, Inc* 178 F.3d 8 (1st Cir. 1999), *certiorari. denied* 528 U.S. 1105.
953 *Danco, Inc v. Wal Mart Stores, Inc* 178 F.3d 8, at 14. (1st Cir. 1999)
954 *Employment Rights Act of 1996 s 230 (1)-(3).*
955 Deakin (2001a) p. 147.
956 Davies and Freedland (2000b) p. 88.
957 *Sex Discrimination Act 1975 s. 82(1).* The same definition can be found in the *Race Relations Act 1976 s. 78(1); Disability Discrimination Act 1995 s. 68(1);* and *Equal Pay Act 1970 s. 1(6).*
958 *Mirror Group v. Gunning* [1986] ICR 145, at 152.
959 *Mirror Group v. Gunning* [1986] ICR 145, at 156.

Tribunal applied this 'dominant purpose' test in two steps. First, it asked whether there was any obligation under the contract for the sub-postmaster to do any work himself. Having found such an obligation, the appeal tribunal went on to ask whether the work which was demanded of the sub-postmaster himself was the dominant purpose of the contract.[960]

In *Mirror Group v. Gunning*, the Court of Appeal found that the responsibility to get work done is not the same as performing work personally. The fact that the alleged employer held an agent it had appointed responsible and found it desirable, on grounds of efficiency, that the agent personally participated in the business was not considered to be the same as a requirement that the work be done personally.[961] The same path was followed in *Sheehan v. Post Office Counters*, where the appeal tribunal found the dominant purpose of the contract to be the "regular and efficient carrying out of the post office services" and that even though the sub-postmaster had to take responsibility for the delivery of the services, he was only required to perform a limited range of activities personally.[962]

The 'dominant purpose' test suggest that also small employers, i.e. persons who perform work alongside people employed by them, can fall under the concepts of worker or employment, as long as the main purpose of the contract is for the small employer to perform work personally.[963] In a case concerning a solicitor – sole proprietor of a firm employing himself, a secretary and an assistant solicitor – the House of Lords found that a person can still be a *worker* or fall under the definition of *employment* found in anti-discrimination legislation even though some work was delegated to assistants. "Plainly, it does not cease to be a contract 'personally to execute any work

[960] *Sheehan v. Post Office Counters Ltd* [1998] ICR 734, at 744.
[961] *Mirror Group v. Gunning* [1986] ICR 145, at 153
[962] *Sheehan v. Post Office Counters Ltd* [1998] ICR 734, at 744-745.
[963] Collins et al (2001) p. 178.

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or labour' because his secretary types and posts [a defence] and his assistant solicitor goes along to file such a defence. The dominant purpose is that he will do the essential part of the work."[964]

Neither did it matter that he had his own firm as the House of Lords found that "the definition of employment is clearly wide enough to cover the provision of services by a professional man […] Whatever he called himself, he was the individual seeking employment in the sense of offering to enter into a 'contract personally to execute any work or labour'."[965] In the same case, another solicitor, practising in a partnership, was also considered to fall within the scope of the legislation. The House of Lords found the definition of employment clearly and deliberately to have been made to include contracts to provied services, a type of contract that can be entered into also by firms.[966] Having outlined two possibilities, Lord Slynn held that "[t]he intention of the statute […] is in favour of the wider definition. […] The intention of the act is clearly to outlaw discrimination on the grounds of religious or political opinion in the employment sphere. […] It is factually [as] possible to discriminate against the partners of a firm or against the firm itself as it is against a sole practitioner."[967]

One view of the 'worker' concept is that it, where applied, has moved the crucial dividing line so that it now goes between economically dependent workers and those more genuinely in business on their own. "By substituting a test of economic dependence for personal or formal subordination, the worker concept could be said to preserve the binary divide between employees and the self-employed, but with an improved functional test for distinguishing between the two groups. From this perspective, the 'worker' concept could be thought of as updating the concept of employee."[968]

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[964] *Loughran and Kelly v. Northern Ireland Housing Executive* [1998] IRLR 593, at 597.
[965] *Loughran and Kelly v. Northern Ireland Housing Executive* [1998] IRLR 593, at 597.
[966] *Loughran and Kelly v. Northern Ireland Housing Executive* [1998] IRLR 593, at 597.
[967] *Loughran and Kelly v. Northern Ireland Housing Executive* [1998] IRLR 593, at 597.
[968] Deakin (2001a) p. 147. C.f. also Davies and Freedland (2000b) p. 90.

4.4.3 The Power to Confer Rights to Individuals – UK Employment Relations Act 1999

In the *Employment Relations Act 1999* the British parliament granted a "power to confer rights on individuals" giving the Secretary of State the right to extend by regulation the coverage of certain employment rights to specified categories of individuals.[969] Section 23(4) of the Act states that an order under the section may:

a) provide that individuals are to be treated as parties to workers' contracts or contracts of employment;

b) make provision as to who are to be regarded as the employers of individuals;

c) make provision which has the effect of modifying the operation of any right as conferred on individuals by the order;

d) include such consequential, incidental or supplementary provisions as the Secretary of State thinks fit.

The power applies to any right conferred on an individual under the *Trade Union and Labour Relations (Consolidation) Act 1992*, *The Employment Rights Act 1996, The Employment Relations Act 1999, The Employment Act 2002* and any instrument made under section 2(2) of the *European Communities Act 1972*. The last refers to legislation implementing Community law. The power does not apply to the anti-discrimination acts.[970]

Deakin, in an analysis of the *Employment Relations Act 1999,* refers to Section 23 as "potentially the most important measure [and] also the most obscure – the power to extend the coverage of statutory employment rights through ministerial order[…]."[971] The power can be used to bring under the scope of labour law statutes workers who today are explicitly exempted from coverage or workers who are excluded due to the legal status of their relation, for example office holders. The most likely use, foreseen already in the UK Government's 1998 *Fairness at Work* white paper

[969] *Employment Relations Act 1999, Section 23(1) – 23(5)* and Employment Relations Act 1999 – Explanatory Memorandum, para 232.
[970] Department of Trade and Industry (2002) p. 8.
[971] Deakin (2001a) p. 137.

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is to extend the use of the 'worker' concept.[972] In July 2002, the *Department of Trade and Industry* published a discussion document asking for views on the potential use of this provision. In the document, four different options were outlined:[973]

- Maintain the status quo and consider the scope of new rights on a case-by-case basis. There may be a case for regulatory approaches to any lack of clarity in employment law or lack of awareness of employment status definitions.
- Extend the scope of some existing employment rights, on a case-by-case basis, to some or all of the groups of working people described in section 2, keeping coverage under review.
- Extend the coverage of all existing statutory employment rights across the board to the same group of working people, abandoning the 'targeted' approach to coverage, with the aim of simplifying the scope of employment law.
- Conduct a broader review of employment status and definitions, looking at the relationship between status for employment law and tax purposes. […]

The discussion document also contained an outline of the case for and against extending statutory employment rights.[974] Among the arguments in favour of extension were "concerns that some working people are being excluded from employment rights due to technicalities relating to the type of contract or other engagement they are engaged under", one example being labour only subcontractors. "These working people may, in practice, do the same type of work as employees, may be subject to similar demands in that they may have equally little autonomy over when and how they do their work in practice and may be economically dependent on a single source of work. There may be a fairness case for giving them the same protection as employees." Extending the personal scope of labour law is also mentioned as a way of increasing people's willingness to take up atypical work, "knowing their rights are secured". Further, "[e]xtending rights to all workers may also increase certainty and clarity for working people who are on the employee/non-employee borderline and their employers if a single definition were used in

[972] Deakin (2001a) p. 144.
[973] Department of Trade and Industry (2002) p. 26.

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employment rights legislation, or fewer different definitions used. This may in particular help small businesses." Many of the arguments against extending statutory employment rights focus on the increased administrative burdens any extension of the personal scope would put on employers, in particular smaller businesses, that today rely on less regulated non-employees. Additional employment rights could make atypical work less attractive to employers, but also to workers who seek a lower level of commitment towards their employer. Finally, extending the personal scope would not necessarily solve problems of legal uncertainty over worker status as they would simply move the contested borderline.

4.4.3 Analysis

The use of the 'worker' and 'employment' concepts have been seen as evidence "that statutory intervention can be used to overcome some of the limitations of the common law concept of the employee."[975] In a 1999 empirical study, Burchell, Deakin and Honey estimated the number of workers covered by the extended personal scope provided for by the concept of *worker*. In the first, quantitative wave of the study, a traditional self-assessment survey, asking the respondents for their own assessment of their employment status, was complemented by questions designed to reproduce the factors used by courts to determine employment status. On the basis of the quantitative data, the authors estimated that between 80 and 92 percent of all those in employment in the UK work under conditions that would lead a court to find them within the category of workers.[976] Compared to the concept of employee, "the use of the worker definition might protect up to a further 5 per cent of all those in employment. It is not possible to be more precise about the numbers who would be affected by this change because of the difficulties of attempting to assess employment status without examining each case individually."[977] In the

[974] Department of Trade and Industry (2002) pp. 26ff.
[975] Deakin and Morris (2001) p. 128.
[976] Burchell, Deakin and Honey (1999) p. 46. The study made no difference between *worker* and *employment*. The estimate would seem to encompass both categories.
[977] Burchell, Deakin and Honey (1999) pp. 48f.

second, qualitative, wave of the study, in-depth interviews with a subsample of the respondents were made. As far as the numbers covered by the concept of worker is concerned, the qualitative wave confirmed the results of the quantitative one.[978]

The most important advantage of the targeted approach is that makes it possible to tailor the personal scope to the concern of the regulation in question. The way it has been used to give a broader scope to anti-discrimination legislation is a good examples of this, even if it has not been used consistently, as noted by Collins, Ewing and McColgan:

> It may be possible to argue that when the legislation is primarily directed at the possible misuse of managerial authority, the legislation is confined to contracts of employment, because those contracts contain the implied terms of the requirement of obedience and performance in good faith. When the legislation is directed primarily at the operation of the labour market, however, as in the case of wages and hours regulation and laws against discrimination, the scope is broader because it is recognised that the market for performance of work extends beyond traditional contracts of employment. But this pattern behind the legislation is certainly not followed consistently. […] Furthermore, we must doubt whether the singling out of the contract of employment as the unique site where the risk of abuse of managerial power is present relies upon a satisfactory analysis of the construction of power relations in the labour market[979]

The targeted approach also has the advantage, in particular as compared to the *tertium genus* technique, that it does not establish any new full fledged status to which an exodus from employee status can occur. This can also be a disadvantage, though, as the this rather subtle extension may escape the notice of workers and employers and thus have less of an impact in the everyday workplace. This is also important from the perspective of certainty concerning the legal classification of work relationships, a point which has been conceded by the UK *Department of Trade and Industry*: "The result of this targeted approach is that employment rights legislation

[978] Burchell, Deakin and Honey (1999) pp. 75f.
[979] Collins et al (2001) p. 170.

contains a variety of different definitions (which determine the working people rights apply to) and the differences in coverage between different rights may cause confusion."[980]

4.5 Defining The Responsible Employer

4.5.1 The Functions of the Employer

The fourth, and final, technique for extending the personal scope that we will treat in this study works through defining the responsible employer, rather than categorising workers. As Deakin has pointed out "[i]t is a striking feature of modern labour law that the volume of material devoted by courts and commentators to refining the concept of the 'employee' (and, now, the 'worker') completely overshadows the few attempts which have been made to address the nature of the employer."[981] The legal nature of the employer can often be inferred from the concept of employee, simply being the entity for which the worker is performing work, to whom she is subordinated, most oftenly economically dependent, and who owns the means of production. Having acknowledged the troubles of the existing personal scope of labour law, we must, nonetheless go further.

> What is required is an understanding of how particular rights and liabilities are to be allocated when the traditional functions of the employer – in particular coordination, in the sense of managerial decision-making, and the assumption of certain social and economic risks – are divided among a number of different entities.[982]

Deakin suggests three criteria for defining the employer, or rather the enterprise of the employer: *coordination*, *risk* and *equity*. The first, coordination, associates the "concept of the employer" with the exercise of bureaucratic powers, the "implied 'authority relation' which granst the employer a certain discretion to direct the factors of production, including labour, without the need for

[980] Department of Trade and Industry (2002) p. 12.
[981] Deakin (2001b) p. 319.
[982] Deakin (2001b) p. 319.

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express contracting."[983] The second, risk, is derived from the enterprise as a mechanism for absorbing and spreading certain economic and social risks. The third, equity, refers to the enterprise as "a space within which the principle of equal treatment must be observed".[984]

Good examples of the actual use of the technique of defining the responsible employer rather than using one or more categories of workers to define the personal scope can be taken from the field of occupational health and safety. Here, responsibilities have been assigned to employers based on their possibility to influence the physical safety for all working on their premises or on a worksite controlled by them, "coordination" in Deakin's words. Under French law, employers have a general responsibility for the working conditions (occupational health and safety, working time etc.) of the personnel of sub-contractors working on their premises.[985] Further, when workers from several different enterprises are present at the same work site, their respective employers are obliged to co-operate in order to ensure the observance of occupational health and safety regulations.[986] Under the UK *Health and Safety at Work Act 1974*, "it shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as reasonably practical, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety."[987] This responsibility extends to independent contractors who work on the employer's premises or a place of work assigned by the employer, but only as far as their work can be described as part of the employer's undertaking. Auxilliary activities, such as deliveries, repairs and cleaning are not covered.[988]

The technique has also been used, to a limited extent, in Community law. The framework directive on the safety and health of workers only requires employers to give information

983 Deakin (2001b) p. 320.
984 Deakin (2001b) p. 322.
985 *Art. L. 200-3 Code du travail.*
986 *Art. L. 230-2, alinéa 2 Code du travail.*
987 *Health and Safety at Work Act 1974, Section 3(1).*

concerning work hasards to workers who are not their own employees,.[989] The directive on the implementation of minimum safety and health requirements at temporary or mobile construction sites goes further, giving co-ordination responsibilities to the client for which the construction work is carried out and to "project supervisors."[990] This is, however, not the main rule of Community occupational health and safety law, which in general only covers employees. This has caused concern, and there is a proposal pending from the European Commission for a Council recommendation concerning the extension of the personal scope of health and safety legislation to include self-employed workers.[991]

The main example of this technique will be taken from Swedish law, where some health and safety responsibilities for workers other than for an employer's own employees are allocated in situations where one of more employers are performing work at a common worksite, to persons controlling a worksite common to several enterprises, to property owners providing premises for work and to the user enterprises of temporary agency workers.

4.5.2 Swedish Occupational Health and Safety Regulation

The personal scope of the Swedish *Work Environment Act* (*Arbetsmiljölagen*) varies between the different provisions. From the principal field of application – "every activity in which employees are used for work on an employers account"[992] – a number of exemptions and extensions are made. In the discussion of the personal scope found in the preparatory works of the original

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988 *R v. Associated Octel Co. Ltd* [1996] 1 WLR 1543.
989 *Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work.* Art. 10(2) and 12(2).
990 *Council Directive 92/57/EEC on the implementation of minimum safety and health requirements at temporary or mobile construction sites.*
991 *Proposal for a Council Recommendation concerning the application of legislation governing health and safety at work to self-employed workers COM(2002) 166 final.*
992 *Arbetsmiljölagen 1 kap. 2§*. The English translation of Swedish statutory texts found in this section are taken from a translation and commentary of the Work Environment Act (1977:1160) and the Work Environment Ordinance (1977:1160) found on the web site of the Swedish Work Environment Authority. http://www.av.se/english/legislation/legislation.shtm (Visited: July 27, 2001).

1976 legislation, the purpose of the legislation took main stage.[993] The protective character of the legislation, aimed at guaranteeing worker health and safety, was said to require a wide scope for many of its provisions, which is why an extension of the personal scope to all professional activities had to be considered. At the same time, it was nonetheless considered natural that the legislation focused primarily at situations where the worker's work environment is dependent on the actions of someone else, as is the case with employees. The possibility actually to influence the working environment of the worker has been one of the more important factors in allocating responsibility under the *Work Environment Act*.

The *Work Environment Act* contains no special provisions concerning *dependent contractors*.[994] The preparatory works indicate that the category is considered to be already included in the concept of employee.[995] Before the 1978 *Work Environment Act*, Swedish occupational health and safety regulation exempted so called "uncontrollable work" (*okontrollerbart arbete*), work performed in circumstances where the employer cannot be expected to monitor the work, from the personal scope. The exception was mainly applicable to homeworkers, but also to service mechanics and engine fitters working away from their employers premises, and domestic helpers. Even though this kind of work is difficult to supervise, a fact that will in practice affect the employer's responsibility, it was not considered reason enough to leave it outside the personal scope of the act.[996]

Under the *Work Environment Act*, the employer is to "take all precautions necessary to prevent the employee from being exposed to health hazards and accident risks"[997] and "systematically plan, direct and control activities in a manner meeting the requirements of [the *Work Environment*

[993] SOU 1976:1 pp. 273ff.
[994] C.f. above 3.4.3.
[995] SOU 1976:1 pp. 276f.
[996] SOU 1976:1 pp. 277f.
[997] *Arbetsmiljölagen 3 kap. 2 §*.

Act] and provisions issued by authority of the same."[998] Further, the employer has the responsibility to investigate health hazards and industrial injuries, to document the working environment and to inform the employees of potential hazards. The employer also has to make sure that there are occupational health services and possibilities for rehabilitation of injured workers.[999]

Apart from responsibility for the employer's own employees, (and those held responsible under product safety rules), some responsibility is also given in the following cases: i) two or more persons (legal or natural) simultaneously engaged in activities at a common worksite; ii) persons controlling a worksite common to several enterprises; iii) landlords and other property owners who provide premises for work or as personnel facilities; and iv) user enterprises of temporary agency workers. The first three concern rather specific situations and are more or less fashioned on construction sites or similar situations. Commonly, independent contractors are captured by these extensions. The fourth aims at a wider range of situations, but applies to temporary agency workers only.

When two or more persons (legal or natural) are simultaneously engaged in activities at a common worksite, they are to consult each other and co-operate to achieve satisfactory safety conditions. In addition, each of them is responsible for not exposing any person working at the site to the risk of ill-health or accident, including self-employed workers.[1000] A common worksite can be described as more than one undertaking at a time carrying on activities which are not physically segregated. If two undertakings share the same premises or devices, as happens at construction sites, certain department stores or when a cleaning company or transport company enters a factory or office to work there, a common worksite exists.

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[998] *Arbetssmiljölagen 3 kap. 2a §.*
[999] *Arbetsmiljölagen 3 kap. 2b§ and 3§.*
[1000] *Arbetsmiljölagen 3 kap 6§.*

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If a work site is permanent and common to several enterprises and the site is under the control of one of them, the person controlling the worksite will be responsible for co-ordinating safety measures. The same is true for someone who commissions construction or heavy engineering work. Co-ordination responsibility may by agreement be transferred to one of the other persons conducting work at the worksite. In other cases, for example when there is no permanent worksite or when none of the employers is in control of the worksite, the employers can agree that one of them will assume the co-ordination responsibility. If no such agreement has been reached, the Work Environment Authority may ordain who is to have such responsibility, or if there are special grounds, ordain co-ordination responsibility on a person other than the one agreed by the parties.[1001]

The responsibility to co-ordinate health and safety measures is defined by the *Work Environment Act* and concerns ensuring the co-ordination of the work to prevent risks of ill-health and accidents – including timetables, general and special safety devices and personnel facilities and sanitary devices.[1002] Other employers and persons working at the common worksite shall comply with the directions issued by the person responsible for co-ordination. The co-ordination responsibility is not the same as the employer's responsibility and the co-ordination responsibility does not relieve the other employers present from their responsibilities under occupational health and safety legislation. The line between the two is, however, difficult to define. The point of departure is that the person who legally and factually has the best possibilities to take measures to protect workers and promote a good work environment is the one who should be responsible for them.[1003]

[1001] *Arbetsmiljölagen 7 kap. 6§.*
[1002] *Arbetsmiljölagen 3 kap 7§.*
[1003] Prop. 1993/94: 186 pp. 28f.

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In addition to the co-ordination responsibility, a person controlling a worksite "shall ensure the existence on the worksite of permanent devices of such kind that a person working there without being an employee in relation to him is not exposed to the risk of ill-health or accident".[1004] The provision is aimed at protecting visiting personnel, involved with, for example, distribution, transportation and cleaning; and persons carrying out inspections. It was introduced on the grounds that someone who can influence the health and safety situation of a worker, will have the responsibility to do so, even if she is not under her supervision.[1005] Naturally, this includes responsibility *vis-à-vis* self-employed workers.

Finally, landlords and other property owners "who provide premises, land or a space below ground for work or as personnel facilities" who do not have any direct responsibility for the work environment can be subject to inspections or even to prohibitions against continued letting if they do not rectify deficiencies.[1006]

In 1994, a responsibility for the user enterprises of temporary agency workers was introduced. The employer – i.e. the temporary work agency – has the primary responsibility for the health and safety of the worker, in particular for long term measures such as training and rehabilitation. Under the *Work Environment Act*, the user enterprise is nonetheless responsible to "take the safety measures which are needed in that work."[1007] This means that the user enterprise will have to take the same safety precautions as she would have taken for employees, but the responsibility is limited to the work in question.[1008] The background to the provision was that temporary work agencies were considered to lack the control necessary to take responsibility for the work

[1004] *Arbetsmiljölagen 3 kap 12 §*.
[1005] Prop 1993/94: 186 p. 31. C.f. also *Directive 89/391/EEC* and *92/57/EEC*.
[1006] *Arbetsmiljölagen 7 kap 13§*. c.f. Prop. 1993/94: 186 pp. 36f.
[1007] *Arbetsmiljölagen 3 kap 12§*.
[1008] Prop. 1993/94:186 pp. 33f.

environment of the user enterprise, while the responsibility for persons controlling a worksite was not considered enough to cover the needs of temporary agency workers.[1009]

In the government bill introducing these changes, the question was raised whether user enterprises of self-employed contractors should be given the same kind of responsibility for the work environment of the self-employed workers.[1010] The idea was rejected by the government on the grounds that the concept of employee had developed to include workers previously not covered and that the responsibilities already being assigned by the act would cover many self-employed workers. Further, the government held that there typically were significant differences between self-employed contractors and temporary agency workers. Temporary agency workers were considered to be more "physically integrated" into the user enterprises, being subject to the managerial prerogatives of the user enterprise and working under conditions resembling the user enterprise's own employees. Self-employed contractors, the argument went, were often hired to do work that was not part of the user enterprise's normal operations. In addition, an important reason for using self-employed contractors was to perform work for which the employer lacked the necessary skills or know-how, including how best to protect the worker from the hazards of the work. Finally, the government did not want private persons buying services from self-employed contractors to become responsible under occupational health and safety legislation.

4.5.3 Analysis

The technique of defining the responsible employer has the potential to provide a good fit between the personal scope and the concerns of labour law. In the example above, we have seen how the concern addressed by health and safety legislation – the employers control of the

[1009] Prop. 1993/94:186 p 34. For other Swedish regulations of temporary agency work, c.f. Prop. 1990/91:124 and Bet. 1990/91:AU20. C.f. also *Directive 91/383/EEC supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed- duration employment relationship or a temporary employment relationship.*
[1010] Prop. 1993/94:186 pp. 35f.

physical work environment – has been used to define the employer responsible under certain physical health and safety provisions.

The technique also has the advantage of being, at least in one sense, difficult to circumvent, as the personal scope is defined not in terms of workers having a particular status, but by the employer's functional powers. As the employer's responsibility extends to all "who may be affected thereby"[1011] or to "ensure the existence on the worksite of […] devices of such kind that a person working there […] is not exposed to the risk of ill-health or accident",[1012] it cannot be avoided through changing worker status through clever drafting or labelling of contracts.

At the same time, however, in some common worksite situations it might be unclear which one of several different employers present is responsible. Main contractors may even try to unload deliberately responsibility on subcontractors. Another problem can be that the responsbile employer is unaware of the responsibilities and, therefore, neglects to take required precautionary measures. A survey performed in the early 1990s by a Swedish government committee indicated that while employers responsible for larger commons worksites, such as large construction companies, were well aware of their responsibilities, worksites common to a number of smaller companies were more problematic.[1013]

[1011] United Kingdom, *Health and Safety at Work Act 1974, Art 3(1).*
[1012] Sweden, *Arbetsmiljölagen 3 kap. 18§.*
[1013] SOU 1993:81 pp. 59f.

5. REFORMING THE PERSONAL SCOPE

There are, as the previous chapter has shown, many different ways that the personal scope of labour law has been reformed to extend beyond employees. In this chapter the possibilites for reforming the personal scope will be investigated, using the analyses of the concept of employee and the existing extensions of labour law, together with some of the more elaborate reform proposals found mainly, but not solely, in academic literature. Three main options for reform will be investigated. The first option is to recast the concept of employee (5.1). The second option is to extend parts of labour law to other workers than employess, creating concerntric circles of labour law coverage (5.2). The third and final option is to tie the personal scope to the three concerns of labour law, organising the personal scope as overlapping circles of coverage (5.3).

5.1 Recasting the Concept of Employee

One of the observations earlier made about the concept of employee is that it is flexible and has a proven record of adapting to changes in the organisation of work, on the labour markets and in society at large. As employers' bureaucratic powers have taken on new and less hierarchichal forms, new notions of subordination, replacing hierarchical control with looser organisational criteria such as integration into the employer's organisation, have developed. Similarly, in some countries, economically dependent workers have been included in order to cover arrangements where formal subordination is weak or absent, but where a need for regulation has been considered to be present nonetheless. The concept of employee, as we have seen, is not static, and will follow socioeconomic developments, albeit with a certain lag. Given this, it would be neglectful not to investigate the proposition that a recasting of the concept of employee is enough to overcome at least some of the challenges self-employment poses to labour law.

A frequently suggested reform is to replace subordination with economic dependence as the most important or decisive factor of the concept of employee. This idea is far from new. As we

Engblom, Samuel (2003), Self-employment and the personal scope of labour law : comparative lessons from France, Italy, Sweden, the United Kingdom and the United States
European University Institute
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saw in the account of the historical development of the concept of employment above, already in the first half of the twentieth century it was questioned whether subordination to someone else's orders really matched the personal scope of labour law to the actual need for protection, and whether economic dependence would not provide a better fit.

Along these lines, in the United States, the *Dunlop Commission* proposed a wider application of the economic realities test.[1014] Concerned with employers using independent contractors solely to avoid labour and tax regulation, the commission held that while this did not render the use of independent contractors or other forms of contingent work inherently illegitimate, the goal of public policy should be "to remove incentives to use them for illegitimate purposes."[1015] The substance of the law – "based on a nineteenth century concept whose purpose is wholly unrelated to contemporary employment policy"[1016] – together with the formalism of the employee tests were considered a problem as they provided employers and workers with "a means and incentive to circumvent the employment policies of the nation."[1017] The definition of employee in labour and tax law should, it followed, be "modernized, simplified and standardized."[1018] Congress was advised to "adopt a single, coherent concept of employee and apply it across the board in employment and labor law."[1019] The test of choice was the economic realities test.

> The determination of whether a worker is an employee protected by federal labor and employment law should not be based on the degree of immediate control the employer exercises over the worker, but rather on the underlying economic realities of the relationship. Workers should be treated as independent contractors if they are truly independent entrepreneurs performing services for clients – i.e. if they present themselves to the general public as an established business presence, have a number of clients, bear the economic risk of loss of their work, and the like. Workers who

[1014] C.f. above 3.3.3.
[1015] Dunlop Commission (1994) p. 62.
[1016] Dunlop Commission (1994) p. 64.
[1017] Dunlop Commission (1994) p. 65.
[1018] Dunlop Commission (1994) p. 63.

> are economically dependent on the entity for whom they perform services generally should be treated as employees. Factors such as low wages, low skill levels, and having one or few employers should all militate against treatment as an independent contractor.[1020]

Through applying the economic realities to all tax and labour laws, the commission hoped to "eliminate the incentives to use the independent contractor form to evade the obligations of national workplace policy while leaving it fully available where its use is truly appropriate."[1021]

Another option for recasting the concept of employee is to increase the flexibility of the multi-factor test even further, holding no single factor to be solely decisive. Such a reform was, for example, included in the guidelines from the Supiot group of experts: "The technique of an array of possibilities, tried and tested in case law, must allow for the scope of labour law to be adapted to the new ways in which power is exercised in companies. At the same time it must ensure [that] no restrictive definition of subordination is formulated on the basis of a single criterion (including 'economic dependence' or 'integration into someone else's company')."[1022] The group also emphasised the importance of upholding the mandatory nature of the concept of employee, piercing corporate or contractual veils if necessary. The group saw a need for a "reassertion of the essential principle whereby the parties to an employment relationship are not vested with the power to establish the legal status of the relationship."[1023] Labour law is mandatory regulation, *ordre public*, and it must not be possible to contract out of it.

Neither the proposal of the Dunlop Commission nor that of the Supiot group, as far as the concept of employee is concerned, amounts to any extensive broadening of the personal scope of

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[1019] Dunlop Commission (1994) pp. 65f.
[1020] Dunlop Commission (1994) p. 66.
[1021] Dunlop Commission (1994) p. 66.
[1022] Supiot et al (2001) p. 220.
[1023] Supiot et al (2001) p. 219.

labour law.[1024] Both groups would probably be content with the width of, for example, the concept of employee in Swedish labour law.[1025] In fact, flexibile as it is, there are limits to how far the concept of employee can be stretched. The most important limit comes from the relation between flexibility and legal certainty. If the concept is made more flexible, for example through the inclusion of more factors or through embracing the view that no sole factor should be necessary, this naturally means that the outcome of any adjudication will be more difficult to predict. As one author puts it, an "ever-expanding catalogue of 'factors'" have resulted in a complex multi-factor analysis with a less than predictable outcome: "After nearly two hundred years of evolution, the [multi-factor test] begs the question as much as it answers it."[1026]

In addition, as 'employee' is a well established concept not just legally, but in everyday life, any bending or stretching to cover workers that fall outside popular notions of who can reasonably be considered an employee do not only add uncertainty, but may lack support in public opinion. Over time, popular notions may change, possibly even as an effect of actions taken by courts and legislators, but this process is rather slow. Even if the concept of employee is stretched to its limits, it will not include all workers working in relationships and under conditions with which labour law concerns itself, as noted already in Chapter 3.

5.2 Concentric Circles of Labour Law Coverage

If it is not possible to capture all workers to whom one or more of the concerns of labour law apply under the concept of employee, even in a recasted fashion, another possibility is to organise the personal scope in different layers. An attempt to visualise this is made in Figure *5.2.1*. At the core of this model we have subordinated, economically dependent, workers performing work

[1024] As noted above, it is highly questionable whether the economic realities test is actually any broader than the common law control test. C.f. 3.3.5.
[1025] From the Swedish horizion, the rapporteurs of Ds 2002:56 conclude that the debate in some other western European countries to a certain extent can be interpreted as a quest for a method reminicent of the one established in Sweden already through the Supreme Court's decision *NJA 1949 p. 768*. Ds 2002:56 p. 128.
[1026] Carlson (2001) p. 299.

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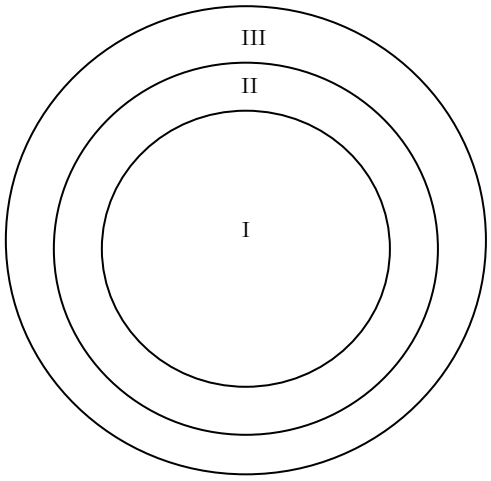
personally, to which all of labour law applies (I). Then, depending on how much a group of workers deviate from this core, which more or less corresponds to the traditional concept of employee, we have other groups of workers, arranged in concentric circles with an ever-diminishing application of labour law the further we move out from the core (II and III).

Figure 5.2.1 Concentric Circles of Labour Law



Of the existing extensions of labour law presented in Chapter 4, the *tertium genus* as found in Italy and Germany can be described in terms of concentric circles of labour law, but only constituting a single extra circle, and a rather thin one at that, with very little content in terms of labour law coverage. The model can also be used to describe the *targeted approach* found in British labour law. Most of labour law applies only to the core of employees as defined in the common law, while extensions have brought anti-discrimination law, minimum wage, working time and some collective right to bear also on a second layer (*worker*) and, as far as anti-discrimination is concerned, a third layer of workers (*employment*). In the debates among labour law scholars and policy makers, in recent years, various ideas along the lines of a personal scope organised in concentric circles have been fielded. Here, three of these will be presented, taken from the Supiot

report, a proposed (but never adopted) ILO convention, and a scholarly work by Davies and Freedland.

The Supiot group of experts expressed a "desire to extend the scope of labour law to cover all kinds of contracts involving the performance of work for others, not only strict worker subordination."[1027] The group advocated that certain aspects of labour law be applied to workers other than employees. In particular, economically dependent workers "should be able to benefit from the social rights to which this dependence entitles them."[1028]

> Generally speaking the group believes that it is advisable to prevent a gulf from forming between employees protected under contract and persons working under other kinds of arrangement that afford less protection. One of the historical functions of labour law has been to ensure social cohesion. It will only be able to continue to fulfil that function if it is able to accommodate new developments in the way that work is organized in contemporary society and does not revert to covering just the situations it was originally intended to address, which are becoming less typical.[1029]

Some years earlier, the head of the group, Alain Supiot, had in an article suggested that social law protection should be "indexed" in accordance with the need for protection and outlined "four circles of social law".[1030] While the outermost circles, with the widest coverage, concerned "universal social rights" such as health insurance and family benefits, the personal scope of labour law was divided between the two circles at the centre. At the core were employees, covered by all of labour and social law, and the only ones to be covered by regulation directly linked to their subordination to the employer. In the first circle outside of the core, Supiot placed all who perform professional activities, covered by the freedom to organise and bargain collectively, anti-discrimination law, and occupational health and safety regulations. This reasoning could also be found in the recommendations of the Supiot group.

[1027] Supiot et al (2001) p. 219.
[1028] Supiot et al (2001) p. 220.
[1029] Supiot et al (2001) pp. 22f.

> [T]he expert group supports the veiw that it is appropriate to extend coverage in some circumstances to other kinds of work contracts and relationships. The approach then, is to favour the establishment of a common, broadly-based labour law, certain branches of which might, in turn, be adapted to cover many and varied kinds of labour relations (subordinate work in the traditional sense; 'para-subordinate, that is financially dependent work).[1031]

At the International Labour Conference held in June 1998, a proposal for an ILO convention on contract labour was presented but in the end not adopted. "Contract labour" is a notion covering situations "in which the substance of the relationship appears to be similar to an employment relationship while the form is a commercial one, or at least where there seems to be some combination of employment and commercial aspects to the relationship established."[1032] The proposed Article 1 of the convention defined 'contract labour' as workers who were performing work personally and in a state of dependency or subordination similar to that of employees, without being classified as employees under national law.

> For the purposes of this Convention:
>
> (a) the term 'contract labour' means work performed for a natural or legal person (referred to as a 'user enterprise') by a person (referred to as a 'contract worker') where the work is performed by a worker personally under actual conditions of dependency on or subordination to the user enterprise and these conditions are similar to those that characterize an employment relationship under national law and preactice and where either:
>
> (i) the work is performed pursuant to a direct contractual arrangement between the worker and the user enterprise; or
>
> (ii) the worker is provided for the user enterprise by a subcontractor or an intermediary.[1033]

In the *Proposed Recommendation Concerning Contract Labour*, presented together with the draft convention, it was stated that in determining whether the conditions concerning dependency and

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[1030] Supiot (1997) p. 241.
[1031] Supiot et al (2001) p. 22.
[1032] ILO (1998) p. 6.
[1033] Proposed Article 1 of the draft contract labour convention.

subordination were met, members "could consider one or more criteria". A statement followed by a non-exhaustive list of factors, all, with the exception of "the user enterprise provides substantial job-specific traning to the contract worker", well known from the multi-factor tests for employee status.[1034] This definition would include those independent contractors most closely resembling employees, together with employees of subcontractors and intermediaries.[1035] In particular, the proposed convention could have had an effect on economically dependent workers who for the moment are excluded from labour law on the ground that they are not working under a sufficiently high degree of subordination.

Materially, the proposed convention tried to put contract labour on an equal footing with employees, including a provision obliging member states to "promote equality of treatment between contract workers and workers with a recognized employment relationship, taking into account the conditions applicable to others performing work which is essentially similar under similar conditions".[1036] The proposed convention expressedly mentioned that contract workers should be given the same protection as employees concerning right to organise and bargain collectively, freedom from discrimination, and child labour.[1037] Further, measures should be taken to ensure contract workers "adequate protection" as regards working time, maternity protection, occupational health and safety, remuneration and statutory social security.[1038] The notable exception from these lists is dismissal protection, on which both the proposed convention and the proposed recommendation are silent. The content of the proposed convention can be described as inserting a rather narrowly conceived *tertium genus* between employees as traditionally conceived and genuinely independent contractors. Workers in this

[1034] Proposed Section 2 of the draft contract labour recommendation.
[1035] The proposed Article 2 would exempt employees of private employment agencies from the scope of the convention.
[1036] Proposed Article 5 of the draft contract labour convention.
[1037] Proposed Article 6(1) of the draft contract labour convention.
[1038] Proposed Article 6(2) of the draft contract labour convention.

cordon sanitaire would be covered by parts of labour law, and have their own regulation concerning other parts, but would be exempted from the crucial area of dismissal protection.

Building on the targeted approach in British law, but taking it further, Davies and Freedland develop a "typology of work contracts", identifying four different groups of workers.[1039] The first group are employees as traditionally understood, dependent or subordinated workers working under a contract of employment. The second group are "employee-like" workers, such as German *arbeitsnehmeränhliche personen* or Italian *para-subordinati*, but also British *workers*, who are not in a position of legal subordination but who do perform work personally and are highly economically dependent upon one or a small number of employers. The third group consists of persons "who have contracted to render a personal service, but who, unlike the second group run an identifiable business of their own."[1040] They usually, but not always, avoid a high level of economic dependency. Characteristic of the fourth group is that they have not contracted to render a service personally, but simply to produce a result. This four-fold categorisation is not exclusive and many variations of the four are possible.

Davies and Freedland argue that, for each of the four types of work, a different mix of labour law and commercial law regulation should be applied. While the first category might be governed entirely by labour law principles, and the fourth almost entirely by commercial law principles, the second and third category will have to be governed by a combination of labour law and commercial law. To explore this, they start from the proposition that the decisive test for the application of labour law is to be economic dependency.

> [T]he single test for the application of labour law should be the criterion of whether the worker is economically dependent upon the employer. This test would operate both positively and negatively:

[1039] Davies and Freedland (2000a) pp. 34f.
[1040] Davies and Freedland (2000a) p. 35.

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> if there was economic dependence, the whole of labour law would apply; if there was no economic dependence, none of it would apply.[1041]

This would result in the application of labour law to the second category in their typology, employee-like workers, a proposal which Davies and Freedland claims not to be as radical as it might seem, if one considers that some economically dependent workers already have been included in the personal scope of labour law, or parts thereof, through legislative extensions or broadened concepts of employee.[1042] The authors also investigate the negative side of the proposition, i.e. to exclude from labour law those who are not economically dependent. They admit that this, if rigorously applied, would risk excluding some workers currently covered by labour law from protection, and conclude that "economic dependence is a sufficient reason to give a worker the protection of labour law, but it is not the exclusive reason."[1043] Instead, they turn their attention to the relationship between the personal scope of labour law and the "functions" of the regulation. "The functions of labour law which are not related (or not directly related) to the economic dependence may also provide […] a basis for extending some parts of labour law to workers in the third category."[1044]

Davies and Freedland provide two examples. The first example is labour law which "role is that of the protection of human rights in the workplace", notably anti-discrimination law.[1045] Also workers who work for many different employers or customers and, therefore, show a low degree of economics dependence vis-à-vis each individual employer or customer, can be discriminated against. The second example is occupational health and safety law which, as has been shown above, in many cases already has been extended beyond employees. The conclusion is that there

[1041] Davies and Freedland (2000a) p. 36.
[1042] Davies and Freedland (2000a) pp. 37f. As examples the authors take the 'worker' extension in the UK, German and Italian third category workers and the broadening of the concept of employee in Swedish labour law to cover dependent contractors.
[1043] Davies and Freedland (2000a) p. 40.
[1044] Davies and Freedland (2000a) p. 40.

are good reasons for extending the personal scope of some parts of labour law to relationships falling in the third category, persons who have contracted to render a personal service, but who run an identifiable business of their own.

> We have suggested two categories of labour law which it might be appropriate to apply to such workers, namely human rights law and health and safety law. In both cases the existence of a dependent work relationship does not form a crucial part of the arguments in favour of the imposition of liability.[1046]

Finally, Davies and Freedland consider whether their fourth category, individuals who have not contracted to render a service personally, should have any aspect of their relationship with the buyers of their services regulated by labour law. In other words, should an obligation to provide personal service be the outer boundary of labour law. Davies and Freedland answers this question in the affirmative – "the intutive reaction that labour law has a limited role to play with our fourth category of contracts is no doubt correct"[1047] – but lists three reasons why labour law does not necessarily have to accept personal service as its outer boundary. Firstly, this boundary is open to manipulation by the contracting parties who can put an incorporated business between the worker and the employer or insert contract clauses allowing for substitution even though thus in reality would be very difficult or impossible. Secondly, "it is far from clear that the freedom not to do work personally is a fully reliable indicator of non-dependent work relationships", illustrated by the case of homeworkers who have had the possibility of employing assistants. Thirdly, commercial law might benefit from the application of certain labour law principles. Summing up their position, Davies and Freedland stress the necessary connection between the personal scope and the substantive content of labour law.

> [T]he personal scope of any particular labour law must be a matter of discussion and decisions as much as is the substantive content of the law. Indeed, the two issues interact with one another; a

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[1045] Davies and Freedland (2000a) p. 40.
[1046] Davies and Freedland (2000a) p. 42.
[1047] Davies and Freedland (2000a) p. 43.

> broad personal scope may suggest a relatively light regulatory structure; a more focussed personal scope may permit tougher regulation.[1048]

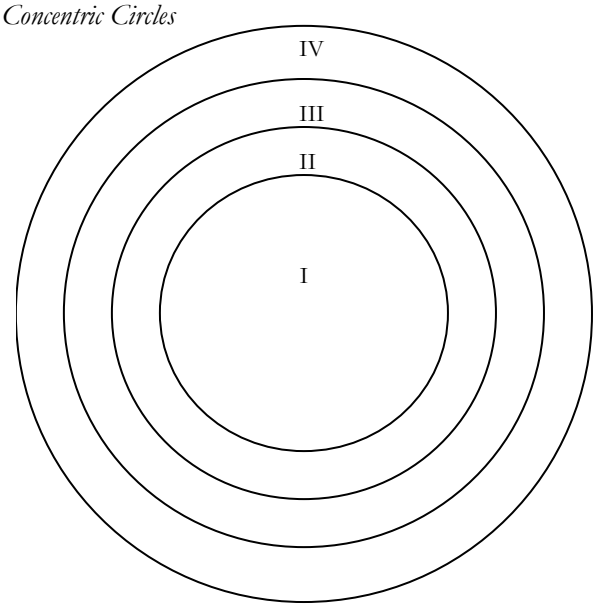
Davies and Freedland visualise their idea through a graph were the x-axis represents the degre of similarity with an employee as traditionally understood and the y-axis the extent to which labour law (lower part) or commercial law (higher part) should govern the relationship between the parties. Here, however, their idea will be expressed in terms of concentric circles (*Figure 5.2.2*). At the core (I) we find employees, whose relationships with their employer are governed entirely by labour law. Outside of the core we have the "employee-like" (II) covered by large parts but not all of labour law. Moving out we then find the "genuinely self-employed" characterised by having contracted to perform work personally (III) covered by anti-discrimination law and occupational health and safety regulation. Finally, in the outermost circle, we have workers who have not contracted to perform work personally (IV), who have their activities governed almost entirely by commercial law applies, but where some principles from labour law might be applied.

Figure 5.2.2 The Davoes-Freedland Proposal as Concentric Circles

Entirely governed by labour law:
I. Employees

Governed by mix of labour law and commercial law:
II. Employee-like
III. Contracted to render a personal service

Governed (almost) entirely by commercial law:
IV. Not contracted to render a personal service, but to produce a result.



[1048] Davies and Freedland (2000a) p. 45.

Advantages and Disadvantages of the Concentric Circle Model

Organising the personal scope of labour law in concentric circles has several advantages, provided it is done in a prudent fashion. Going back to the three concerns of labour law – subordination, economic dependence and the fact that a worker is a human being – we can construct a personal scope in three layers. At the core, we place workers who are performing work personally, economically dependent and subordinated to the bureaucratic powers of the employer (I). In the second layer, we place those who are performing work personally and who are in a state of economic dependence (II). In the third layer, we place those under a contract to perform work personally, but who are neither subordinated nor economically dependent (III).

We then use the three circles as boundaries for the personal scope of different parts of labour law, dependening on the concern the regulations are to address. The outermost circle, thus encompassing workers in all three layers, we use to determine the personal scope of those parts of labour law concerned with the worker as a human being, such as anti-discrimination legislation, freedom of association and other civil and political rights. The second circle marks the boundary for labour law concerned with the worker's economic dependence, defining the personal scope of, among others, dismissal protection, minimum wage and collective bargaining. Finally, the innermost circle defines the personal scope of labour law concerned with the subordination of the worker to the bureaucratic powers of the employer, notably regulation of the employer's monitoring and disciplinary powers, working time and occupational health and safety.

Organising the personal scope in concentric circles, could, just like the *tertium genus*, lead to an exodus from employee status, employers being inclined to hire workers under contracts which, at

least on the face of it, would place the workers in the second or third layers. The stronger connection between the concern which a particular piece of legislation is to address and its personal scope should by itself make this strategy less succesful. An employer attempting to place a worker in the second layer rather than at the core would only escape those parts of labour law concerned with subordination, not, as in the case of the *parasubordinati*, virtually the whole package of labour regulation.

Organising the personal scope of labour law in terms of concentric circles does, however, fail to take into account the fact that more combinations of performing work personally, economic dependence and subordination are possible than what can be accounted for in the concentric circle model. A worker can be subject to the employer's bureaucratic powers without being economically dependent. An example would be a worker who comes in does the odd job or two for an employer, taking instructions or abiding to rules decided by the latter. If the personal scope of labour law is organised in concentric circles, there is an obvious risk that this worker would end up in the outermost category and thus not be covered by, for example, health and safety regulations. This problem has been acknowledged in the existing law of many countries, where the personal scope of occupational health and safety regulation has been extended.[1049] Davies and Freedland acknowledge this problem when they write that "economic dependence is a sufficient reason to give a worker the protection of labour law, but it is not the exclusive reason."[1050] Thus, despite the many advantages of organising the personal scope in concentric circles, it is nonetheless necessary to explore further possibilities for the organisation of the personal scope of labour law.

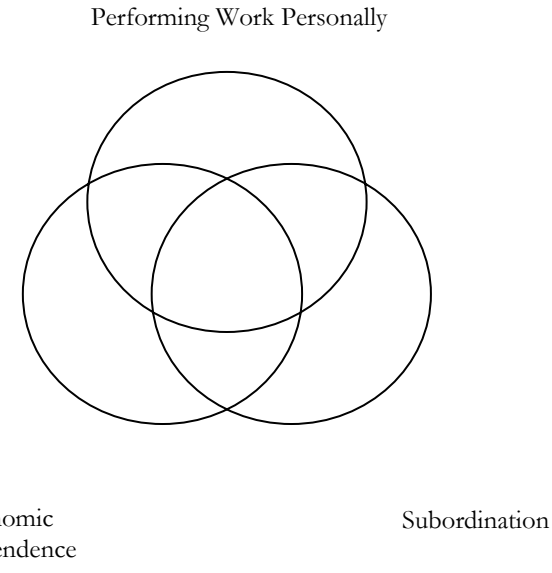
[1049] C.f. above 4.5.
[1050] Davies and Freedland (2000a) p. 40.

5.3 Overlapping Circles of Labour Law Coverage

Having considered the possibilities represented by an extended concept of employee and a personal scope organised in concentric circles, we now move on to a third option which, or so it will be argued, has better possibilites of providing labour law with a suitable personal scope. Remaining with the circle metaphor, this option can be described as a personal scope organised in *overlapping circles*. An important part of the argument in favour of this way of organising the personal scope is that the same model of overlapping circles can be used both to visualize different kinds of contracts for work, and to describe an ideal personal scope of labour law.

In this model, there are three circles, each representing one of the three concerns of labour law, which also correspond to the three characteristics of work contracts (*Figure 5.3.1*). The top circle represents the personal performance of work, the left circle economic dependence and the right circle subordination. In the areas where two or three circles overlap both or all three of the concerns/characteristics are present.

Figure 5.3.1



By *performing work personally* is to be understood situations in which the party performing the work is a human being. The dominant purpose of the relationship is that a certain human being is to perform a given task or amount of work, or at least most of it. In some situations, this human being may be hidden behind a legal entity, as when a person sells labour only services through a company of which she is the owner. Still, this is a human being performing work personally, falling inside of the circle. Outside the circle, we find relationships in which the genuine parties to the contract are companies or organisations, and where the person who performs the work has another identifiable employer.

Economic dependence occurs when an individual draws all or a significant part of her income from an employer. Even though a lengthy duration of the work relationship is an important sign of economic dependence, it can occur also in situations where the worker only works for a short period, such as a couple of weeks, if the worker during that period draws all or a significant part of her income from the employer. Work of a genuinely casual nature, distinguished by its short duration and limited extent, does not, however, make the worker economically dependent, and fall outside of the circle. Finally, *subordination* signifies the worker's subjection to the bureaucratic powers of the employer. This is expressed in her obligation to follow orders, be the subject of the employer's monitoring and discipline, and to abide by rules laid down by the latter. Outside the circle we find situations where the worker controls the how, when and where of work, and where the employer cannot unilaterally change the rules governing the relationship.

First, we use the model to visualise different kinds of contracts for work, letting the circles represent characteristics of contracts for work (*Figure 5.3.2*). In the area marked I, we find work contracts characterised by all three traits – the personal performance of work, economic dependence and subordination – that is, employees as traditionally understood. In area II we have individuals who perform work personally and who are economically dependent. Examples

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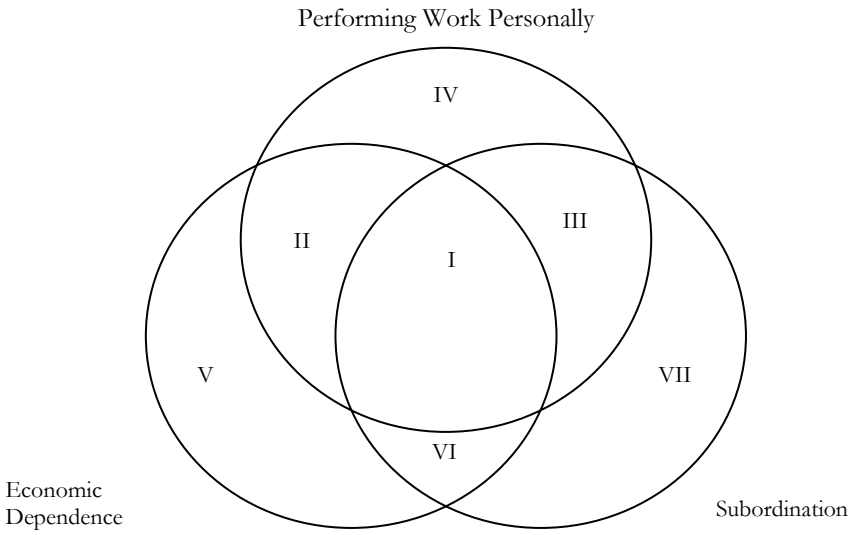
could be the dependent contractors in Swedish labour law and Italian *parasubordinati*, as long as they are not in fact sufficiently subordinated to end up in area I. In area III we have workers who are subordinated but not economically dependent, for example construction workers working for several different contractors or consultants with many different clients. In area IV, we find genuinely independent contractors who are neither economically dependent nor subordinated to the employer's hierarchical powers. Finally, in areas V, VI and VII, work is not being performed personally. Examples would be subcontractors of different kinds, where the service rendered is impersonal or aimed at producing a result and the person performing work has another identifiable employer. An advantage over the concentric circle model is that all possible combinations of the three characteristics of work contracts can be accounted for.

Figure 5.3.2. The Location of Work Contracts in the Overlapping Circle Model

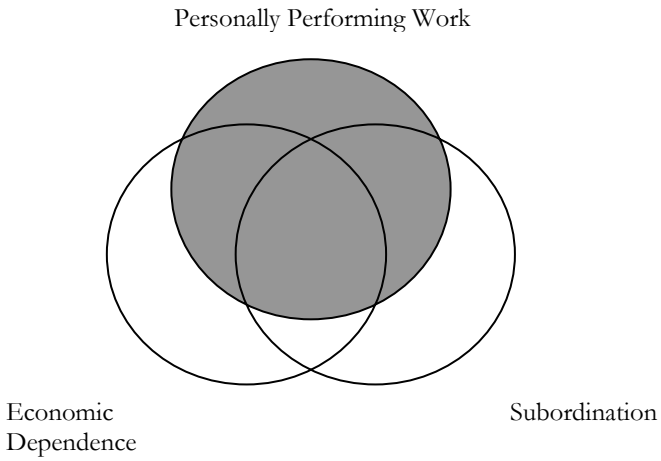


Secondly, we let the circles represent the three concerns of labour law and fill them with the parts of labour law corresponding to each concern. In the top circle, we place those regulations which we identified as concerned with the worker as a human being.[1051] Here we find anti-discrimination law (including equal pay and legislation aimed at combatting sexual harassment);

[1051] C.f. above 2.4.

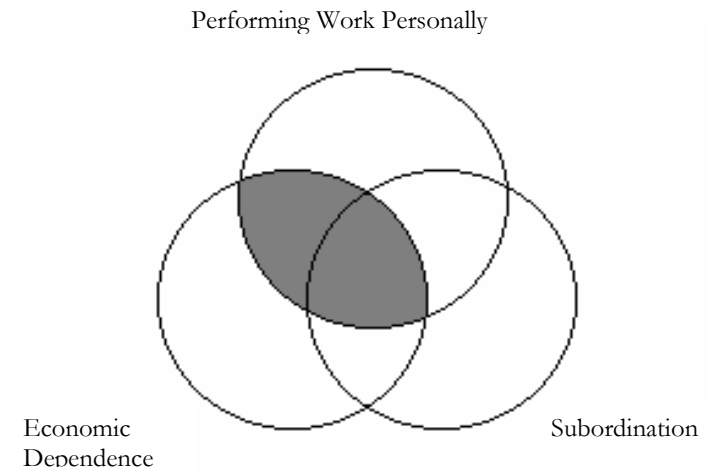
regulation protecting workers' exercise of free speech and other political rights; and the freedom of association, the right to organise and participate in trade union activities. Finally, the category also includes the regulation of things harmful to the human being in a less philosophical sense, such as physical dangers not related to the nature of the relationship between the worker and her employer, such as the use of toxic substances. Logically, these parts of labour law should apply to all who perform work personally, found in the shaded area in *Figure 5.3.3*.

Figure 5.3.3 The Personal Scope of Labour Law Concerned With the Worker as a Human Being



We then move on to labour regulation concerned with the workers dependence, such as dismissal protection; the right to bargain collectively and to strike; and minimum wage and other regulations concerning worker's remuneration.[1052] These are to apply to all who are in a situation of economic dependence, but only if they are also performing work personally. Graphically, this is represented by the shaded area in *Figure 5.3.4*, thus leaving out subcontractors who are economically dependent but who are not performing work personally. This would mean an extension of large and important tracts of labour law to cover economically dependent workers, such as the Italian *parasubordinati*.

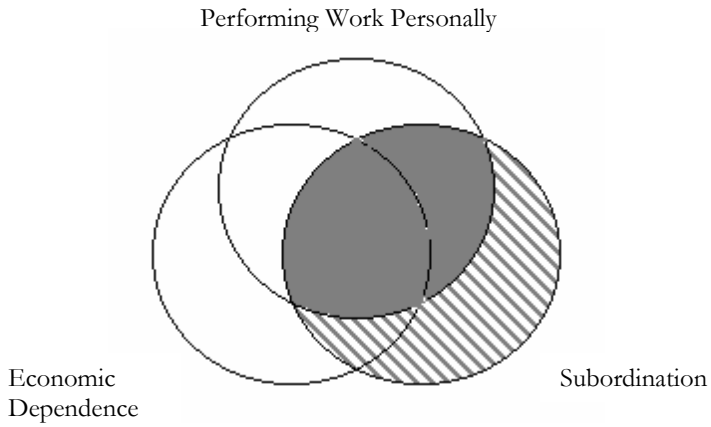
Figure 5.3.4 The Personal Scope of Labour Law Concerned With Economic Dependence



Finally, we deal with labour law concerned with the worker's subordination to the employer's bureaucratic powers. Here, we have to construct the personal scope in a somewhat more complicated fashion than in the two prior cases. As far as individuals who are *both* in a state of subordination *and* performing work personally – found in the shaded area of *Figure 5.3.5* – all labour law concerned with subordination should apply, including those basic principles of labour law defining and limiting the employer's prerogatives, such as regulation of the employer's right to monitor and discipline workers. As for occupational health and safety legislation and working time regulations concerned with the workers health, safety and the safety of others, matters are more complex. The principal concern labour law is trying to address goes beyond just those workers who are performing work personally, evidence of which is given in the common practice of extending the personal scope of occupational health and safety legislation beyond employees.[1053] Also subcontractors and the employees of subcontractors ought to be covered by regulation pertaining for example to the safety conditions at common worksites. This is represented by the striped area in *Figure 5.3.5*.

[1052] C.f. above 2.3.2.
[1053] C.f. above 4.5.

Figure 5.3.5 The Personal Scope of Labour Law Concerned With Subordination



A document which, at least to some extent, takes an approach similar to this model is a proposal presented in 2002 by the Italian centre-left Ulivo-alliance, written by senators and legal scholars Giuliano Amato and Tiziano Treu, former prime minister and minister of labour respectively.[1054] Their proposal contains a radical overhaul of the personal scope of Italian labour law dividing it into three parts: Title I, *Diritti fondamentali e norme di sostegno per i lavori autonomi*, applicable to all who contract to perform work personally; Title II, *Diritti delle lavoratrici e dei lavoratori economicamente dipendenti,* applicable to economically dependent workers; and Title III, *Statuto delle lavoratrici e dei lavoratori subordinato,* applicable to subordinated workers.

Title I would cover all contracts that have as their object the performance of work, also if of an intellectual nature, with a predominantly personal contribution by the worker, but without a bond of subordination.[1055] This personal scope would be assigned to legislation concerning the exercise in the workplace of the freedom of expression, freedom of association, equal pay, basic occupational health and safety, maternity and paternity rights, the right to notice periods in case of termination of contract, and rights concerning employment services, training and pensions.[1056]

[1054] *La Carta dei diritti delle lavoratrici e dei lavoratori.*
[1055] "…una prestazione di opera, anche intellettuale, con apporto prevalentemente personale, senza vincolo di subordinazione." *Carta dei diritti…,* Art. 2(1). It would also be applicable to e.g. apprentices, volonteers, and members of the employers' family and persons in training.
[1056] *Carta dei diritti…*, Art. 3-12.

The proposal's *Titolo II*, *Diritti delle lavoratirce e dei lavoratori economicamente dipendenti*, would apply to "work relationships characterised by a situation of economic dependence on the side of the party performing work"[1057] Considered as such are relationships "having as their object the predominantly personal performance of co-ordinated and continuous work, even without a bond of subordination."[1058] With this personal scope, we find, among others, anti-discrimination regulation, regulation concerning sexual harassment, the right to a fair wage, the right to carry out trade union activites in the work place, and the right to strike.[1059] The third title of the proposal – *statuto delle lavoratrici e dei lavoratori subordinati* – is to supplement the current legal regime for subordinate work found elsewhere in the law, by adding a small number of new provisions concerning, among others, the implementation of European directives concerning information and participation in cases of collective dismissals or collective transfers of workers, and the right to redundancy pay in case of involuntary unemployment.[1060] The proposal, which has the advantage of being formulated as a proposed statutory text, demonstrates that even a radical rethinking of the personal scope is feasible. Perceiving the personal scope in terms of overlapping circles could add clarity to such a project and provide a coherent framework for a reform of the personal scope of labour law, adjusting it to the needs of various types of atypical workers, not just the self-employed.

Finally, we turn our attention to how a reform such as the one outlined here could be realised in legislation. A personal scope organised as overlapping circles could, if it is to be stringent, be designed in one of two different ways. The first option, and maybe the easier as it does not require giving up the concept of employee all together, is to equip each statute with a personal scope consisting of "employees" and all other workers who are covered by the relevant concern.

1057 "…rapporti di lavoro caratterizzati da una situazione di dipendenza economica del prestatore di lavoro." *Carta dei diritti*…, Art. 13(1).
1058 "…i rapporti di collaborazione aventi a oggetto una prestazione d'opera coordinata e continuative, prevalentemente personale, svolta senza vincolo di subordinazione…" *Carta dei diritti*…, Art. 13(2).
1059 *Carta dei diritti*…, Art. 16, 18, 19, 26 and 27.

This would give three formulae: a) employees, and others who perform work personally; b) employees, and others who perform work personally and are in a state of economic dependence vis-à-vis the employer; and c) employees, and others who perform work personally and who are in a state of subordination. This technique is possible, as all parts of labour law would apply to *Area I* in *Figure 5.3.2*, where we find employees as traditionally conceived. As we have seen, a similar formula has been used in the United Kingdom, where "worker" is defined as all who "works under a contract of employment or any other contract whereby the individual undertakes to do or perform personally any work or service for a third party."[1061]

The second option, and more radical as it requires the abandonment of the concept of employee altogether, is to define the personal scope solely in terms of the personal performance of work, economic dependence and subordination. In both cases, a fourth formula would have to be constructed to cover those parts of occupational health and safety law that would cover also subcontractors and others who are not performing work personally. One advantage of the first option, keeping the concept of employee but adding extensions, is that such a reform clearly marks an enlargement of the personal scope, not just a reorganisation. On the other hand, the second option, starting anew with unadulterated concepts, could be more appropriate for dealing with new forms of work.

In terms of legal certainty, the overlapping circle model for the personal scope has the disadvantage, shared with other 'fragmentations' of the coverage, that there is no one sole gate to labour law protection. On the other hand, the model has the advantage that the applicability of the law will depend on only one of the concerns at a time. Even though courts very likely would have to develop tests where a number of different circumstances are taken into account to assess whether a person is subordinated, economically dependent or performing work personally, these

[1060] *Carta dei diritti*…, Art 28-33.

tests would be less complicated and more focused than the present multi-factor test for the concept of employee. Subordination could be an issue of the worker following orders or abiding by rules laid down by the employer and being subjected to the employer's monotoring and disciplinary powers. Economic dependence could be decided based on whether the worker draws all or most of her income from one employer. In the case of performing work personally, courts could look to the conctract but also be prepared to 'pierce the corporate veil' to find the worker actually performing work. A fragmentation of the personal scope would thus not necessarily be of detriment to legal certainty.

Organising the scope in overlapping circles, also has apparent advantages when it comes to upholding the mandatory nature of labour law. As in the case of a personal scope defined by employer's responsibilities, this approach has the advantage of tying labour law coverage to functional criteria rather than a particular status.[1062] Employers looking to enter contractual relationships with certain characteristics, for example a high degree of control over how and when the work is done, will have to take the legal regulation that comes with that characteritic and cannot avoid it through keeping the worker at arms-length in some other respect, such as only offering casual employment. A similar proposition has been made by Deakin, who concerning the allocation of employer responsibility in the case of temporary agency work, suggests that "one route for the legislator is to ensure that if the 'risk' and 'coordination' functions of the employer are to be split […] between the agency and the user, the obligations which would normally attach to the exercise of these functions are to be imposed upon the relevant parties in each case."[1063] This approach obviously lessens the risk of manipulation, even though it can never eliminate it totally.

[1061] C.f. above 4.4.2
[1062] C.f. above 4.5.3.
[1063] Deakin (2001b) p. 322.

5.4 The Legal Construction of the Personal Scope

In this study, we have arrived at some important insights regarding the legal construction of the coverage of labour law, valuable for any attempt at reform of the personal scope. Most importantly, the mandatory nature of labour law carries certain implications for the construction of the personal scope. Implications that at times come into conflict with the desire to avoid uncertainty as to the legal nature of the relationship between worker and employer. If workers and employers were allowed to contract freely over the status of their relationship, uncertainty would not be a problem. At the same time however, if the mandatory nature of labour law is to be upheld, courts must have the power to make the final decision concerning the true nature of a contested relationship.

The personal scope must be built on the actual relationship between the parties. For several reasons, the real content of the relationship between a worker and an employee can only be assessed ex-post. The relational nature and inherent incompleteness of contracts for work, as well as the often unequal bargaining powers of the parties, provides ample possibilities for discrepancies between the contract as expressed ex-ante and the subsequent reality of the relationship.[1064] One consequence of this is that courts must have the power to requalify relationships that have been wrongfully labelled, or where practice between the parties have changed during the duration of the relationship. This makes ex-ante certification procedures, which from the point of view of legal certainty can seem attractive, problematic, even if they only provide a presumption of a certain employment status, such as under the now repealed French *Loi Madelin.*[1065] The creation of legal presumptions concerning the status of workers, either through classification or registration, may compromise the mandatory nature of labour law as it can be used to reinforce wrongful, or fraudulent, classifications of workers. This conflict between the desire for legal certainty and the mandatory nature of labour is present also in the case of

Engblom, Samuel (2003), Self-employment and the personal scope of labour law : comparative lessons from France, Italy, Sweden, the United Kingdom and the United States
European University Institute
DOI: 10.2870/68969

tertium genus. As we saw with the Italian *lavoratori parasubordinati*, the institution of a third category can give a definite status to workers in the grey area between employees and genuinely independent contractors, but can also contribute to an exodus from labour law as workers are hired as *parasubordinati* rather than employees.[1066]

Further, the relationship with other fields of law, where homonymous distinctions – materially identical or not – are used, can be of great importance for the personal scope. If the same word is used in for example social security, copyright or taxation law as in labour law, courts may very well come to interpret them in an identical way, despite the difference in regulatory objectives between the four fields. Another problem is that the ex-ante decisions by administrative agencies which determine a worker's status for tax or social security purposes, easily comes to influence her employment status as well, creating an informal *prima facie* case for a particular status. If labour law is to guard its autonomy and mandatory nature, it better not have its personal scope mixed up with that of other fields of law.

[1064] C.f. above 2.2.1.
[1065] C.f. above 3.6.2.
[1066] C.f. above 4.3.2.

6. CONCLUSIONS

At the outset of this study, three challenges posed by labour law were identified. Firstly, the traditionally binary divide between employees and self-employed workers makes less and less sense as many self-employed are in a similar situation of dependency and under the employer's control as are employees, and many employees enjoy a freedom to carry out their work traditionally attributed to the self-employed. Secondly, self-employment status has been used as a way to circumvent labour law and other social regulations. Thirdly, the concerns that labour law is to address are not only raised in connection employee but are sometimes valid also in the relationship between genuinely self-employed workers and their employers.

Subsequently, an analytical tool was created through identifying the three concerns of labour law: workers' subordination to the bureaucratic powers of the employer; workers' dependence on remunerated work; and the simple fact that all workers are human beings. In a third triple, the requirements that must be put on the personal scope of labour law were laid down. The personal scope must be constructed as to guard, as far as possible, the mandatory nature of labour law, avoid uncertainty, and be relevant in that each part of labour law covers all who work under conditions in which its particular concern is raised.

In a comparative analysis of the concept of employee, we found this concept to be a form of status notion, similar across countries and set up with the same extra-legal notion in mind: the industrial worker in a fordist corporation. In all the studied countries, the concept of employee took the form of a multi-factor test, in which several different circumstances were weighed together, with the personal performance of work was a necessary factor and subordination crucial for separating employees from self-employed workers. The concept of employee has proved to be a very flexible legal concept and has managed to accommodate great changes in the

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organisation of work and society at large. Still, it has not come to cover all situations in which the concerns of labour law are raised.

Due to this deficiency of the concept of employee, lawmakers have, since the early days of labour market regulation, tried to extend labour law coverage to at least some self-employed workers. One technique is to assimilate certain categories of workers to employees, either through declaring them to be employees or through stipulating that the same regulation should apply. Another technique is to create a third category of workers, a *tertium genus*, to which some part of labour law applies. Further, lawmakers have diversified the personal scope defining the personal scope in different ways depending on the part of labour law and its particular purpose. In the area of occupational health and safety, the coverage has been defined in terms of employer responsibility rather than the status of the worker.

Finally, we investigated different possibilities for a reform of the personal scope. The most obvious solution – to use the flexibility of the multi-factor test to recast the concept of employee – was rejected as it cannot reasonably be stretched to encompass all who ought to be covered by labour law. The personal scope must be diversified, defined depending on the concern addressed by the regulation. One way of doing this, suggested by a number of authors, would be to arrange the personal scope in several layers, laid out as concentric circles. At the core, we would have individuals performing work personally, in a state of economic dependence and subordinated to the bureaucratic powers of the employer, to which all of labour law would apply. In a second layer we would place economically dependent workers and in a third layer those who perform work personally without being either subordinated or economically dependent, with a declining quantity of labour law applicable. Such a reform would have many advantages, but suffer from the flaw that it does not take into account all the different combinations of subordination, economic dependence and obligation to perform personally work that exist. We, therefore,

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outlined a third possibility, arranging the personal scope as three overlapping circles, representing subordination, economic dependence and the personal performance of work respectively. This would make it possible to give every part of labour law a personal scope which corresponds to the concern it is aimed to address.

There are, naturally, a number of outstanding questions which have not been dealt with in this study, but which could be the subject of future research. In general, the field would benefit from more empirical research into the actual working conditions in the grey area between employees and genuinely self-employed workers. The study by Burchell, Deakin and Honey on the employment status of individuals in non-standard employment in the United Kingdom should inspire followers in other countries. Such studies, and other empirical research into the contracting practices between employers and formally self-employed workers, could serve to deepen our understanding of the connection between the contents of contracts for work and the concerns of labour law. Such research could also further our understanding of the firm. Implicit in the preference for a personal scope organised as overlapping rather than concentric circles, is the argument that the 'flexible firm' should not be seen just as a 'core' and various layers of 'periphery', as famously described by Atkinson. Instead, a model of the firm must distinguish between the different kinds of ties between the employer and the worker, acknowledging that there are different implications of being tied to the firm by a bond of subordination and being bound through economic dependence.

Another area for future research would be to look at how legal classifications of work contracts affect the everyday reality in the workplace. The daily relations between workers and employers take place against the backdrop of the legal framework they perceive as governing their relationship. It is this perception, and not the actual regulation, which in reality governs relationships in the workplace. Upholding the mandatory scope of labour law is thus not only a

question of allowing workers who bring their grievances to court to have their relationships classified correctly, but to make sure that it informs the everyday employer-worker relations. Apart from the ever important task of informing the parties of their rights and obligations, this also raises the question of how labour law can be better policed ex-ante. Are there ways in which labour inspectorates and trade unions can work pre-emptively with the issue of employment status, the same way as is done in the field of occupational health and safety?

Finally, as reported in the opening chapter, self-employed workers tend not to be unionised, for various reasons. In times when union membership is declining in most countries, it might seem over-optimistic to ponder on the possibilities of unionising self-employed workers. Still, as unions in some countries are making efforts to organise self-employed workers, the subject deserves attention, not least because the issue constitutes an interesting future subject for research, policy making and trade union strategy. Under the existing personal scope, as well as under any reformed scope, unions are crucial in policing the borders of labour law. In this, unions must aim to fulfil a two-fold strategy. On the one hand, they must take action to requalify wrongfully labeled contracts, returning some independent contractors to employee status. On the other, they must try to organise and represent also those workers that still fall outside the concept of employee.[1067] The latter of these tasks will require creative legal solutions, as evidenced by the Italian trade unions negotiating standard contracts between *parasubordinati* and public employers.[1068] Unionisation, and the still distant prospective of collective bargaining, would open up new regulatory avenues, at least for some self-employed with a latent collective dimension in their relation with their employer. As Sciarra has pointed out in the case of franchisees, "[o]nly 'procedural' law is capable of following subjective positions in their constant evolution and

[1067] This approach has, for example, been adopted by the French CFDT-Cadre. http://www.professionnels-autonomes.net/actualites.php?op=edito [Visited 27 March 2003].
[1068] C.f. above 4.3.2.

ensuring their place in the universe of contractual relationships which require constant control from without and within."[1069]

Hopefully, this study has contributed to proving the fruitfullness of using comparative methods in labour law research, both as a tool to analyse particular legal concepts and to investigate how specific problems can most appropriately be solved. There is a vast research agenda in comparing legal concepts and legal solutions, in a way that goes beyond the mere description of different legal systems, into real *microcomparisons*. This is particularly true in the European Union, where employment policies are to be forged through the *open-method of coordination*, an organised learning process promoting the exchange of experiences and best practices.

[1069] Sciarra (1991) p. 246.

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