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Labour Subordination and the Subjective Weakening of Labour Law

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1. A DEFIANT AND COMPLEX CONTEXT; THE SUBJECTIVE WEAKENING OF LABOUR LAW

A. About a Trend

TO PLACE IN the right context the subject this work is about, it is necessary, in my opinion, to see it within a process that, with different nuances and intensities, seems to have an almost universal extension. We are talking about the weakening tendencies that appear to affect the social law and which are seen in, at least, three dimensions that will be schematically stated below:

i. The social law suffers a *normative weakening* as a result of labour flexibility demands, deregulation, reduction in the intensity of protection. In short, *a loss of resources of protection.*
ii. It also experiences a *subjective weakening* as a result of a number of phenomena such as unemployment, increasing informality, the vertical disintegration of companies and the productive decentralisation trends, fraud by evading obligations and several signs of the so–called 'escape from labour law',[1] public policies that allow the treatment of dependant workers as if they were not (eg, home workers, lorry drivers, apprentices etc.), ambiguous relations in which it is highly difficult to establish the nature (dependent or autonomous) of the links.[2] In short, a *loss of personal scope of the social law.*
iii. Finally, it suffers an *applicative weakening* which is the indirect consequence of the phenomena already mentioned above and of others

[1] M. Rodriguez Piñero, 'La huida del derecho del Trabajo' [1992] *Relaciones Laborales (Madrid)* 85.
[2] The latter will be, precisely, the subject we are aiming at in these lines.

such as the decrease of political significance or the limitation of the competences of the political actors who are in charge of the application of labour law and social protection (Labour Ministry, labour inspection, labour courts[3] etc.) or its plain and simple suppression, together with the scattering of its powers,[4] as well as the social actors' (weakening and loss of unions' influence), all of which usually goes together with the ideological devaluation of the labour law and other forms of social protection, despised as signs of anachronistic paternalism, etc. In other words, a *loss of effectiveness* 'stricto sensu' *of the social law.*

Certainly, this is not the occasion to deal with the causes of and reasons for such critical processes, which, in any case, have been thoroughly explored by specialised literature.[5]

Nevertheless, it must be said that those generic biases of *normative, subjective and applicative weakening of social law* do not necessarily lead us to a pessimistic vision of its future, since together with those tendencies and those critical causation factors other important counterbalances—institutional, political, ideological, economic, productive and technical—that seem to sustain the logic of protection coexist.

B. The Subjective Weakening of Labour Law

The modern debate around labour subordination undoubtedly fits in the subjective facet of that process of weakening of labour law. However, this facet includes other convergent factors of reduction of the personal scope of labour law. Among them—as stated before—are the high levels of unemployment, the growing incidence of informality, the processes of vertical disintegration of companies and decentralisation of the ways of organising production, fraud and other ways of escaping from labour law,[6] the legislative policies that consider certain dependant labour relations as if they were not, the ambiguous relations, ie those which even showing a strong economic worker's subjection do not seem to include the feature of labour dependence.

[3] This is the case in Argentina, where competences previously given to labour courts have been transferred to other jurisdictions (the commercial one, specifically in the case of bankruptcy) as well as granting labour courts competences that did not belong to them (dealing with statutory protections provoked by the restriction on the availability of bank deposits).

[4] A process described by Harry Arthurs (of York University, Toronto, Canada) in his contribution to this volume.

[5] See, for the whole and for its great power of synthesis, the very recent Arturo Bronstein study, 'Los retos actuales del derecho del trabajo' [2006] *Derecho del Trabajo* (forthcoming).

[6] See above n 1.

This subjective weakening of labour law appears both in industrialised economies and in those still in process of developing. But while in the former factors prevail that are consequences of technological and organisational innovation (though other less sophisticated ones, such as informality and fraud, are also present in a lesser extent), in developing countries the subjective weakening process finds its most deeply rooted expressions in informality and other analogously primitive factors. Notwithstanding, in the latter, though to a lesser degree, other more modern and newer factors can also be recognised, especially in the more advanced technological areas.

2. LABOUR DEPENDENCE; A CATEGORY PUT TO THE TEST

A. What's it All About?

In such a context, and among those factors which determine that process of the subjective weakening of labour law, it is my belief that the institution of labour *dependence or subordination,* given its virtual condition of 'master key' that enables the effective application of the rules of labour law to the specific relations containing them, is one of those (the institutions) which require a most careful follow-up. It remains to be seen whether, both at present and in the not so distant future, the idea of labour subordination itself keeps correspondence with the prevailing ways in which human labour is hired and carried out, whether all of them fit into that traditional mould and, as a consequence, whether they provide an answer to their specific needs of regulation and protection; whether, in any case, the universal categorisation of the traditional concept of subordination leaves enough room for the regulatory diversity which is required by the growing productive heterogeneity.

Nevertheless, one cannot help wondering what the importance of these theoretical reflections is in countries such as those in Latin America, where the systems for the protection of work and workers are impaired by some other prevailing factors of subjective weakening, like those which were mentioned above. We should ask ourselves then, given the existence of such circumstances, if it would not be enough to make use of the traditional concept of subordination to encompass in a satisfactory manner 'the remains' of protected work? Isn't wondering in this way 'about the margins' of the system of protection to be under a kind of intellectual delusion, when such a great number of the most intimate components of its condition are within a danger zone, or even directly in a catastrophic situation? From my point of view, this latter thought—even under the circumstances we are going through—does not deserve those objections if we refer to the subject in its plain terms: 'raising the issue' of the category of subordination is worthwhile and sensible only if it is unreservedly admitted that such *issue*

still has not achieved a quantitative centrality. However, the crisis in the capacity of labour subordination to cover a wide number of cases is undoubtedly *a far from negligible part, in qualitative terms*, of what is currently taking place. To ignore this involves the risk of leading the system of protection to its own lethargy and death, after its centre of subjective imputation has been gradually wasted away.

B. An Early Hypothesis about the Relative Validity of the Category

By the way, it is convenient to remember that the recognition of the theoretical consistency of the category—even at the height of its success—has been far from peaceful. Not long ago, Paul Davies, quoting Wedderburn, suggested its possible falsehood.[7] Gérard Lyon-Caen would moderate the accusation: he said it was not necessarily false but that it prevailed in the absence of a better one.[8] According to Deveali, this would be, just as happens in other branches of the law and even in other sciences, a concept that is formulated initially to serve as grounds for a specific solution and from then onwards it steadily acquires a general scope and is accepted without further argument, *as if such concept were true and definite, and without taking into account the special circumstances which gave rise to its appearance*.[9]

At the same time, I would like to add a hypothesis to which I will return when I ponder about the necessity to re-formulate the category: the concept of labour subordination was effective until the present because the large majority of the relations it attempted to cover was either clearly within its frontiers or clearly outside them, and neither of these two variations demanded an effort to be qualified. The concept had been conceived from a *dominant social type i*n whose presence the process of qualification of the relation—*simple, evident and almost intuitive*—did not require the formulation of the logical, volitive and complex operation inherent in the practice of using the *indicia* procedure.[10] And here is where its hypothetical weakness

[7] P.L. Davies, 'El empleo y el autoempleo. El punto de vista del common law' in *Actas del VII Congreso Europeo de Derecho del Trabajo* (Varsovia, Wydawnictwo Naukowe, 'Scholar', 1999), 175.

[8] G. Lyon-Caen, *Le droit du travail non salarié* (Paris, Sirey, 1990).

[9] M.L. Deveali, *El derecho del trabajo: en su aplicación y sus tendencias*, (Buenos Aires, Astrea, 1983), ii, 179.

[10] A. Montoya Melgar, 'El futuro de la subordinación en la evolución del Derecho del Trabajo' in *Le transformazioni del lavoro. La crisi della subordinazione e l'avvento de nuove forme di lavoro* (Milan, Fondazione Giulio Pastori, Diritto e politiche del lavoro—Franco Angeli, 1999). The indicia procedure is a legal technique used to determine a particular relationship between a worker and someone who pays his wages constitutes—whether or not—an employment contract. This procedure considers a set of factical indicia illustrating the presence of a dependent (in both economic and legal aspects) relationship to establish whether all these indicia, considered as a whole, are more significant that others, detected in the same relationship, suggesting the independent character of the worker.

lies. This technique, which is apt for providing marginal answers in the so-called 'grey cases' (those with a significant low impact in proportion[11]) would have brought to light its evident unfeasibility in terms of *effectiveness and efficiency* if reality had claimed for its systematic 'try out'. What I am suggesting is that the indicia test is a good one only if it is used in a marginal way (to solve situations which exceptionally drift away from the strict model) or that, in other words, the fewer times it is applied, the much more effective it is. The hypothesis would be complete by putting forward the fact that what is happening these days, as regards the deep transformations under way, is that the 'simple, evident and almost intuitive' application is losing its historic prevalence; the exploration of the frontiers of the employment relationship becomes more and more habitual and the technique of the set of indicia unveils—on account of its increasing use—its congenital weakness.

3. THE TRANSFORMATIONS UNDER WAY

This is not the opportunity to enumerate all the determining factors in raising the issue of the category of subordination;[12] it seems more proper to achieve that by referring to the literature which has unveiled more rigorously its judicial, technological and organisational features.[13] Nevertheless, it is convenient to give some information with a view to preventing further thoughts from sinking in the sheer abstraction of theoretical categories.

A. The Changing Work Conditions

Among other phenomena, talk about the changing work conditions is about the dismemberment of the old factory practices which are increasingly diluting due to the increasing circulation of capital,[14] the transformations in

[11] And which as a consequence labour law, being busy with social effects of a higher impact, can deal with. On this, I refer to M.L. Deveali, 'El elemento cuantitativo en las normas del derecho del trabajo' in Deveali, above n 9, 84.

[12] In an accurate expression, a basic technical document prepared under the direction of Enrique Marín Quijada for the 'Reunión de expertos sobre los trabajadores en situaciones en las cuales necesitan protección' meeting, convened by the ILO in Geneva from 2000, 25 No 134. The labour rule and the person it is to protect appear to be dissociated.

[13] Among many others, see J.-E. Rey in several studies, such as 'Le droit du travail . . . une nécessaire adaptation' [1996] *Droit Social* 351; 'Nouvelles technologies et nouvelles formes de subordination' [1992] *Droit Social* 52; 'Le Droit de Travail à l'épreuve du télétravail; le statut de télétravailler' [1996] *Droit Social* 121; 'De Germinal a Internet; Une nécessaire évolution du critère du contrat de travail' [1995] *Droit Social* 634. Also, see J.-L. Beffa, R. Boyer and J.P. Touffut, 'Le droit du travail face à l'héterogénéité des relations salariales' [1999] *Droit Social* 1039, as well as The Commission chaired by Jean Boissonnat, 'Le travail dans vingt ans', La documentation francaise (Paris, Editions Odile Jacob, 1995).

[14] J. de Maillard, 'Scolie sur le rapport de subordination' [1982] *Droit Social* 20.

qualifications and the trend towards the prevalence of executives and middle management, intellectual professions, the trades in education and information.[15] It is also about the trends towards less physical and more intellectual work and its consequence, about working hours, which are no longer those of Taylorism, when time was delimited and perfectly measurable in time units. Now time has become diffuse and fragmented, and therefore reluctant to be captured by a labour law that regulates employment in the traditional dimension of time. Such a devaluation of material time, a consequence of the de-materialisation of work, causes the substitution of the subject-matter of the obligations undertaken, which, in turn, becomes more difficult to be expressed as an *obligation of means* (action to be taken), but instead is more easily seen as an *obligation of result*. The institutions and categories of the labour law of arms and bodies and of the labour law of the factory should give way to a labour law of minds;[16] something which implies, without a shadow of a doubt, a noticeable change as regards the level of technical and functional autonomy of the worker but, even greater still, a change in the ways of exercising power by the employer.

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B. The Productive Decentralisation

At the same time, the phenomena of productive decentralisation and the strong trend towards the outsourcing of functions, together with the appearance or the widespread use of practices which, in different ways, imply directly or indirectly the recruitment of human labour (subcontracting, casual work, and other means of intermediation, franchising, engineering, supply of goods, concession, distribution, and so on), pose an additional threat to the traditional concept of dependence. Such types of contract actually imply a growing segmentation of attributes and responsibilities inherent in the condition of employer, by virtue of which the power of direction, the appropriation of the fruits of labour, the determination of the place of work, the ownership of the economic interest under whose name the service is rendered, the authority to organise the work to be done, the responsibility for the fulfilment of the services derived from the obligations undertaken, among other attributes and responsibilities, are fragmented or distributed among various contracting parties.

In many of these assumptions, the figure of the 'immediate' employer seems diminished by what we once called the *inconsistency of the employer* derived from the fact that the latter is not, in many of these assumptions,

[15] Boissonnat Commission, above n 13.
[16] J.-E. Ray, 'De Germinal', above n 13, and also in 'Nouvelles Technologies', above n 13.

the owner of the main productive asset for which the services are actually rendered.[17] In such cases, the type of relation or the rate that normally exists between the number of workers that the employer hires to work under his charge and the fixed capital destined for its exploitation is broken.[18] Such outsourcing is directed both at auxiliary companies—here is where the possibility for the monetary 'inconsistency' of the employer lies—and at external collaborators under the ever growing form of self-employment, to the detriment of dependent work and not always in violation of the law.[19] Often, those collaborators set up relations that are exclusive, stable and lasting, and which have technical and functional autonomy but which lack a material equality of positions.

D'Antona states that some of the productive transformations of outsourcing make it possible for certain professional services to be hired either under a regime of subordinate employment or under a self-employment one.[20] Pedrazzoli warns that the wide range of labour regulatory schemes blurs the limit between both systems of providing services (subordinate and self employment) 'resulting in a *continuum*; a greater propensity to the blending of the previous forms comprised in either of the two systems'.[21] This blending would be confirmed by 'a wider liberalization . . . of the regulations governing subordinate employment',[22] 'making labour cheaper'[23] and which would replicate such *continuum* in the legislation.

C. Public Policies and Actions by Employers

In many of the phenomena described so far, the will of those who create public policies and that of the parties to the contract would come together, if it actually did, under the utilisation of the contractual options permitted by new technological or organisational advances which would carry the greatest innovative potentialities. Furthermore, we should consider those cases in which resorts to will prevail more directly (the will of the legislating bodies

[17] See my 'Trabajo precario y negociación colectiva' in *El empleo precario en Argentina* (Buenos Aires, CIAT/OIT, 1988), 107.

[18] Our communication to the 'Seminario sobre *Libertad de empresa y Relaciones Laborales*' La Toja-Santiago de Compostela, 12–16 Apr., 1993 on the topic 'Las empresas de trabajo temporal en la Argentina', reproduced at (0000) 53 b *Derecho del Trabajo*, 1031.

[19] W. Sanquinetti Raymond, 'La dependencia y las nuevas realidades económicas y sociales; ¿un criterio en crisis?' [2000] *Doctrina Judicial Laboral* No 2, 5.

[20] M. D'Antona, 'La subordinazione e oltre. Una teoria giuridica per el lavoro che cambia' in M. Pedrazzoli (ed.), *Lavoro subordinato e dintorni. Comparazione e prospettive* (Trento, Il Mulino, 1989), 43.

[21] M. Pedrazzoli, 'Las nuevas formas de empleo y el concepto de subordinación o dependencia' [1989] *Derecho del Trabajo* 1481.

[22] *Ibid.*

[23] Such is the expresion used by A Ojeda Avilés, 'Encuadramiento profesional y ámbito del Derecho del Trabajo' [1988] *Relaciones Laborales (Madrid)* 148.

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or, in the proper case, that of the contracting parties). The phenomena of treating salary as if it is another kind of payment (using a spanish neologism, *'desalarización'*, in English, perhaps de-salarisation) or treating a dependent worker as if he is an independent one (also in Spanish, *'deslaboralizacion'*, perhaps de-laborisation) are settled by law itself.[24] A certain reversion in the expansive trend of labour law—here legislation and judicial precedents go hand in hand—should also be considered.[25] Contrary to that expansive trend, 'de-laborisation' is now growing, and the presumptions of labour relationships lose effectiveness and prestige. A certain revaluation of the qualifying capacity of the free will of the parties to a contract[26] can be noticed, which revaluation is sometimes introduced in the legislation itself.[27]

Finally, the growing trend towards what we named 'de-laborisation' at the instance of the employers themselves in a situation which Rodríguez Piñero not long ago called 'avoidance of Labour Law', should be mentioned.[28] This trend also expresses itself by simulation of other types of contracts, the generalisation of the 'atypical' contractual modalities, the 'individualisation' of the labour relationships (avoidance of collective law and of collective activities per se). It also expresses itself by certain expressions of productive decentralisation and, in order to round off with modalities previously attributed to the process of organisational transformation, the deliberate and increasing recourse (whether actual or faked) to independent or self-employment.

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[24] In Argentina, Law 24.700 'de-salarised' several additional benefits, while transporters or freighters were 'de-laborised' by Presidential Decree 1494/92 as well as the contract of apprenticeship by Law 24.465 ('re-laborised' later by Law 25.013). The same logic was applied to mechanisms such as scholarships and traineeships, vouchers and food baskets, etc. As from 1994, the Spanish Employment Legislation (s 1.3 g) excluded 'from the labour area the activity of the people who, holding duly authorised administrative permits, render transport services charging the corresponding price with commercial vehicles fit for public transport whose ownership or direct power of disposition they hold, even when those services are rendered in a continuous way for the same carrier or marketer'.

[25] This trend was based on a complete denial of the capacity of the free will of the parties to qualify the nature (dependent or self-employed) of the employment contract and the validity of a virtual 'in dubio pro laborale': Melgar, above n 10.

[26] M. Rodriguez Piñero, 'La voluntad de las partes en la calificación del contrato de trabajo' (1996) 18 *Relaciones Laborales (Madrid)* 1, states—in my opinion—the matter in its precise terms when he affirms that the will of the parties is relevant at the time of choosing and carrying out the true nature of the relationship—the actual character of the services rendered by the worker—but it is not relevant at the time of qualifying the relationship, whenever such qualification intends to depart of the relationship's true nature.

[27] It is the case of the so-called Madelin law passed in France on 11 February, 1994, establishing that the worker's registration as self-employed expressed an act of will that make possible the presumption of his independent insertion into his job. It was a simple presumption, according to public order character of the contract of employment, and could be enervated by means of the accreditation of one performance in a permanent juridically subordinated relationship. Strongly criticised by one part of the doctrine, and without visible effects on the employment situation, this presumption was abrogated by the second law on the 35 hour week (law of 19 Jan., 2000): J. Pelissier, A. Supiot and A. Jeammaud, *Droit du Travail*, (20th edn, Paris, Précis Dalloz, 2000).

[28] Piñero, above n 1.

4. MORE HYPOTHESES FOR A RE-DEFINITION OF THE CENTRE OF IMPUTATION OF LABOUR LAW

A. A Defensive Reaction

It is true and also noticeable that, in a context where such deep transformations are taking place, the traditional concept of labour dependence is aligned with a tendency—which seems to be increasing and irreversible—towards narrowing its scope.[29] This implies that constantly growing cohorts of workers do not respond, as they clearly did in the past—in a way that I have already referred to as 'simple, evident and almost intuitive'—to the paradigmatic figure of the salary-earner. This is why their belonging to the area of protected labour has become doubtful, to say the least.

This time it is not about demands for the softening of the intensity (in scope and contents) of the protection regime, which has always been demanded (but in a much stronger way and by more people during recent decades) by economists and businessmen in an attempt for flexibility or even de-regulation. It is more than that. It is the plain and simple suppression of the condition of protected worker. *It is the most direct path to a situation of 'zero protection'*; a path which, in addition, shows a notorious resistance to ideological challenge since, as it is derived from a whole net of transformations that cannot always be attributed to the will of the interested parties, it does not allow charging responsibilities, requiring compensations or moderating effects by way of settlement in all cases.

Nevertheless, we, should not be surprised by the fact that, even in times of involution of protection, labour law scholars unanimously concur in recognising the importance of this problem.[30] I do not believe this is the time in which the prospective generalisation of labour law will materialise finally to encompass all forms of labour activities.[31] On the contrary, I

[29] The process is especially slow in less technically advanced countries, such as those in Latin America. However, in any case, this matter is also present and is part of the current context in these countries.

[30] It was analysed in the European Regional Congress which was held in Warsaw (1999), the World Congress on Labour Law and Social Security (Jerusalem, 2000) and the American Regional Congress (Lima 2001). Also, in the so-called 'Supiot Report' (*Au delà de l'emploi. Transformations du travail et devenir du droit du travail en Europe* (Paris, Flammarion, 1999). It is also being considered and analysed in the ILO (see above n 14). In Argentina, the topic had been discussed in the Jornadas de la Asociación Argentina de Derecho del Trabajo y de la Seguridad Social held in Córdoba in 1995.

[31] I am not referring here to the modern form of the contract proposed by the Boissonnat Report—discussed in the last paragraphs of this chapter—but to the one proposed by Gérard Lyon-Caen (above n 8) which includes salaried and non-salaried workers, who together are the *active workers*. I am also refering to the contracts of activity which Mario Deveali discussed (above n 9, at 163), who held that at one time it would be necessary to abandon the concept of labour contract to group in a large family—that of the contracts of activity—all the contractual forms regulating human activities, such as contracts for services, professional services, agency, industrial companies, cooperatives of production, etc.

believe we face a strictly *defensive* exercise of a regulated system that runs the risk of losing the very cause of its existence[32] if it tolerates losing its subjects.

How is that *defensive* reaction to materialise? Jurists tend to think that if the application of labour law rested on a generic category—that of the *dependent worker* or, more theoretically, that of *dependence or subordination*—and if hypothetically this category stopped interpreting the reality that it intended to refer to, it would be necessary to re-design or create an alternative category, one that has a better correspondence with that reality. As evidenced by the theoretical efforts made in recent years, this task is far from being simple and, moreover, one that I am not able to carry out. But I will try to identify some of the factors that explain the difficulties that hinder the fulfilment of such task. It does not matter how complex it may be, it always seems more proper than the attempt to accommodate by force the facts and relations that currently prevail within the categories formerly used to contain them.

B. 'De-construct' in order to Understand

In an attempt to understand, I have chosen to analyse the way in which the category of subordination was constructed. To do this, one has to retrace the logical path along which it was created to see to what extent it is possible to use a similar methodology and a similar starting point to reach another destiny (another reality, another category).

Even acknowledging that it is possible to decline into simplification, I consider it useful to characterise the process of construction of the concept of labour dependence as a product of the inductive examination of the features characterising the manner in which a typical industrial worker and the owner of a productive organisation related in the setting of the capitalist society. In other words, first came the relationship (what an evocation of Aristotle!) and only after that the theoretical construction of the concept, using the factual contents perceived in every typical individual relationship, reproduced as constants in those relationships of the same type, and transferred inductively to higher levels of abstraction. In this way, a reference 'matrix' is created and this matrix is the conceptual and abstract projection of the actual and material figure of the typical subordinate worker.

From then onwards, the determination of the existence of a dependence relation in each of the specific relationships is the result of its comparison with and adjustment to that 'matrix'. Or, as D'Antona proposes, in a closer

[32] Of course, the fact that from such a big crisis a broadening of the centre of imputation of labour law may result cannot be disregarded, nor predicted. As I said earlier in the text, I do not believe this is the perspective that explains the urgent need to think about this topic.

manner (and anticipating the conceptual 'expansion' which I will describe shortly): 'closer to a similarity judgment, in a case by case basis, to the figure of a subordinate worker which has been empirically re-constructed than to an inclusion judgment of a legal type'.[33]

The truth is that labour dependence, whether as a conceptual matrix of reference or as a simple figure, satisfactorily fulfilled the qualifying 'inclusive/excluding' role that the regulatory system assigned to it. It expressed a dominant way of working that enabled the vast majority of relationships to identify themselves without any difficulty at all—I repeat once again, *simple, evident and almost intuitive.* But that matrix also meant a *stylisation of the determinant social type* that would allow the inclusion of other subjects demanding protection,[34] normally in a trial, only now not by means of a strict adjustment operation but by means of a resemblance, similarity,[35] or likeness judgment, whose judicial instance—if it has the appearance of a dependant relationship, then it will be treated as one; if the relationship is too different from a dependant one, then it will be treated as an autonomous one—has always been a political option which the judges have set aside to exercise in each case.[36]

From my point of view, in that process—and in its sustainability—what had a significant impact was the presence of that dominant figure that, in most cases allowed, one to do without that logical and voluntary operation as is the application of the *indicia* method, a method which would only be put to the test marginally, to those cases which are not clear enough and are tried before the courts of law.[37]

Even though the true original rationale of labour legislation lies in the *economic hypo-sufficiency*, as Deveali reminds us, the dominant type mentioned is better noticed in the personal subordination which derived almost invariably from such economic relationship.[38] Hence, the correlative preponderance of the indicators of the *juridical aspect of*

[33] Above n 20.

[34] According to M. Rodríguez Piñero ('Contrato de trabajo y autonomía del trabajador' in *Trabajo subordinado y trabajo autónomo en la delimitación de las fronteras del derecho del trabajo* (Estudios en homenaje al Profesor José Cabrera Bazán) (Madrid, Tecnos y Junta de Andalucía, 1999) 23, such separation of the social model of origin—that which, in my opinion, is the product of the 'stylisation' exercise—permitted the construction of a general and universal category of worker, category an extremely broad, that surpasses and exceeds the initial range of the industrial labourer, 'even though this will continue being the ideal model of reference for a long time'.

[35] When M. D'Antona refers to 'a similarity judgment on a case by case basis to the figure of a subordinate worker reconstructed empirically' (above n 20), he summarises the whole process: the formulation of a similarity judgment involves both the total adjustment to the conceptual 'matrix' and the use of what we call 'approximation parameters'.

[36] T. Sala Franco, *Lecciones de Derecho del Trabajo* (Valencia, Tirant lo Blanch, 1987), 243.

[37] In absolute terms, a lot; but very few if considered as a percentage of the aggregate number of situations in which services are rendered in an employer–employee relationship.

[38] Deveali, above n 9, at 179.

dependence (instead of its economic one) in the theoretical construction of the concept.[39]

The importance awarded to the juridical-personal aspects of dependence is improper but it has not been problematic so far.

It is improper because, as evidenced by the very protective system,[40] there is no protection regarding the power of direction within the contract—a functional or organizational instrument that does not necessarily result in consequences which are likely to get social reproach—while there is protection regarding the unilateral areas enjoyed by the employer (given his patent bargaining power superiority, of a clear economic nature) at the time of fixing (and later keeping or changing) the working and employment conditions. A careful observation of the rules of protection proves that their purpose is to restrict the otherwise unlimited and unilateral power over fixing such conditions initially and, subsequently, over limiting the employer's hierarchical authority with a view that such conditions cannot be amended unilaterally. Thus, the limits to *ius variandi* (in order to avoid an improper amendment of the contents of the contract), to the *power of direction* in general (to prevent abuse of the employer's authority to specify the contents that were not defined in the contract), to the *disciplinary power* (when exercised, the fulfilment of the contractual conditions is questioned). Contrary to what Deveali stated,[41] it is not the duty to obey but the contractual unilateralism at the time of fixing (and, if applicable, keeping or changing) the working and employment conditions that justifies the protection.

But it has not been problematic so far because in the dominant social type—the one perception of which we have already characterised as simple, evident and almost intuitive—the *power of direction, expressed in the juridical aspect of subordination, coincides in a correlative and general manner with the unilateral predominance of the employer in his power to fix and keep/amend the terms and conditions set out in the contract*. In other words, upon the existence of the legal-personal aspect of dependence what was also implied—being *quod plerumque accidit*—was the contractual predominance of the employer and the resulting social ineffectiveness of the exercise of individual self-regulation, something which justified the collective action and the protective regime.

[39] Its economic aspect has been considered a prejudicial fact, 'a fact prior to the contract and alien to it . . . and therefore not useful to qualify it', whereas 'the distinction between contracts should take into account, not the economic standing of the parties, but the legal relations arising from them' (several citations of A. Plá Rodríguez, Cursode Derecho Laboral (Montevideo, ACALI, 1978), ii, at 129 and of A. Rouast, 'Contrat de Travail' in M. Planiol and G. Ripeat, Traité Pratique de Droit Civil Français (Paris, LGDJ, 1932), xi, at 13.

[40] I believe, as I will try to propose later, that not only is the protection regime a prescriptive correlation of categories but that such protective regime has a strong influence in the configuration of the category.

[41] Above n 9, at 181.

C. New Ways of Exercising Power

There are changes, such as the ones I have summarised under the previous heading, that involve, as regards matters concerning this analysis, a noticeable alteration in the exercise of power and a tendency towards the vanishing of the dominant type. Both factors tend to undermine that implied idea. In many cases the legal-functional dependence does not last long (*however, not necessarily) regarding the contractual unilateralism to fix the working and employment conditions nor with the resulting need for protection)* and, in any case, the dominant type bursts into a spectrum of growing heterogeneity whose inclusion in the category of legal dependence, for this reason and for the ones mentioned before, ceases to be simple, evident and almost intuitive.[42]

Regarding the first of those factors—noticeable alteration in the exercise of power—it is enough to go over the incomplete inventory of technological, legal and social transformations that I have already mentioned to notice—as obvious as it is—how such alteration shows. One can appreciate the manner in which the discretionary power gives way to the functional power that shows in more complex and diffuse forms.[43] It shows the greater the functional autonomy, the fewer obligations of means, the removal of controls—from the regulation of operations, as is proper of the scientific organisation of work, to the regulation of the criteria for people's performance, according to company principles, rules and standards whose internalisation is required.[44] Outsourcing introduces mediations in the exercise of power which, as a consequence, becomes less consistent; the enjoyment of unspecific and fundamental rights at work is claimed, which rights involve further limitations on such exercise. The de-materialisation of labour and the preponderance of intelligence over the effort of arms and bodies render senseless strict hierarchies, legal subordination, fixed and collective timetables, and disciplinary power.[45]

These and other reasons—namely, the urgent phenomenon of de-standardisation of labour,[46] reclassification and the growing productive heterogeneity—wear down the *dominant type*, which by its gravitation alone legitimated the use of a category, that of legal subordination, which that type invariably displayed.

[42] M. Rodríguez Piñero, citing Luca Tamajo, states that the social type and the regulatory prototype—related to a protection system—lose coherence and interdependence when the social changes fragment the unity of the typical social model, allowing the emergence of a plurality of figures that require a differentiation and modulation of the *quantum* and of the modality of rights (above n 34).

[43] See, eg, 'Supiot Report', above n 30.

[44] *Ibid.*

[45] Ray, above n 16, at 647.

[46] A.G. Baylos, 'Igualdad, uniformidad y diferencia en el derecho del trabajo' in [1998] *Revista de Derecho Social* 11.

D. Another Equation to Determine the Needs for Protection

The formula which served as grounds for the application of the protection system [labour + legal-personal subordination] implied, in fact, the bargaining power hypo-sufficiency at the time of fixing and keeping the employment conditions because that was the way the dominant type showed. In an elliptical and pragmatic exercise the focus was placed on the legal aspect of dependence, the easiest to apprehend, actually to reach the ever implied phenomenon of unequal bargaining power, a conspicuous manifestation of economic hypo-sufficiency. Today, legal subordination is losing consistency and the type that contains it, in turn, tends to lose its dominant character. In a constantly increasing number of cases, it has ceased to appear, or, if it appears at all, such presence has a tendency towards not being 'simple, evident and almost intuitive' and requires legal proceedings to be acknowledged.[47] In the best of cases, it seems it is bound to be just one of the varieties in which the formula which really requires a protection system shows, such formula being [labour + contractual inequality], one that lacks novel components. The need for protection has always had its deepest grounds in the terms of that binomial; what is novel is the fact that contractual inequality no longer finds in the legal aspect of dependence its most visible material 'alter ego', its effective intermediary criterion.[48]

[47] J.L. Ugarte Cataldo, *La subordinación jurídica; crónica de una supervivencia anunciada* (document presented in the V American Regional Congress on Labour Law and Social Security, Lima, 16–19 Sept., 2001) affirms that the legal aspect of dependence can more satisfactorily meet the requirements of *effectiveness and efficiency,* since it is perceived more easily by courts. However, if effectiveness involves achieving the goal of protecting all those persons who need such protection and efficiency involves doing that at the lowest possible cost, those requirements are only truly met when the need to resort to the courts is only marginal (as it was until not long ago, on account of the immediate capacity of the legal aspect of dependence of being perceived—in a simple, evident and almost intuitive manner).

[48] Almost 50 years ago (!), Deveali said, with an ability for anticipation which will never cease to surprise, (in *Derecho del Trabajo* [1953]53) that 'it is our opinion that the *concept of legal subordination . . . is doomed to disappear*'. That prediction was not grounded on the relative positions of the planets, but on the idea that 'the concept of legal subordination adopted to characterize the employment contract does not always coincide with that of hypo-sufficiency, which constitutes the real rationale behind labour legislation'. This should be understood as follows: whenever it becomes impossible to sustain the dominant coincidence between economic hypo-sufficiency and legal subordination, the latter criterion will lose its qualifying effectiveness at that moment (at this moment?) and we will have 'to start again from scratch'.

E. The 'Third Category'

The efforts made in recent years by theory, by the legislation of some countries[49] and even by the system of international rules on labour[50] seem to confirm that the matter goes along those paths: the greater the contractual subjection—the contractual inequality—the less perceivable the legal—personal subordination as a generic indicator of imputation of the protection system.[51]

By the way, the response to the challenge of facts—of those facts—is far from being unanimous. In some countries, such as Italy and Germany,[52] the strategy has consisted in tracing the contours of some collectives of autonomous workers in unequal contractual conditions and assigning them protective legislation[53] (I am referring to the *para-subordinate worker* of the Italian experience and the *quasi-employee* of German legislation). However, it should be pointed out that such movement, which was started some decades ago, still did not acknowledge the most recent 'inclusion crisis' of the legal-personal aspect of dependence, but, instead, it did acknowledge dissatisfaction with the dichotomy criterion—dependence/autonomy[54]—which had been taking place over time, and which left (leaves) certain situations that had always included contractual inequality without protection. As Paul Davies has perspicaciously pointed out, this way of constructing the 'third category'—one which many view as an alternative solution to the more modern conceptual problem generated with regard to the centre of imputation of labour law[55]—involves 'penetrating' the interior territory of autonomous workers in order to draw there inner borders (businessman, individual entrepreneur, simple autonomous worker), an exercise we are not used to undertaking.[56] The

[49] As pointed out, the Italian legislation, as from Law 533/1973, which introduces the idea of 'para-subordination' and the German legislation, with the figure of the 'quasi-employee', defined in s 12 of the 1974 Law on Collective Agreements. In a less 'intense' way, we should mention the Canadian Code on Labour Matters, which grants the right to collective negotiation to every person, whether or not such person has been hired under a contract of employment or renders services for another person under a contract for services, and the relationship with this person is one of economic dependence (see Davies, above n 7, at 197). Also, the final provision of the Spanish Employment Law which allows progress towards a figure analogous to that of the 'para-subordinate' (the autonomous worker in a situation of economic dependence who needs protection), while it provides that 'work done in condition of self-employment shall not be subject to the labour legislation, except for those aspects specifically and expressly prescribed by law' (Raymond, above n 19).

[50] In the process tending to promote the approval of an international agreement on employment that takes responsibility for the needs of protection of workers whose relationships cannot be clearly included within the category of labour dependence (see, specially, n 12 above).

[51] A. Supiot, 'Trabajo Asalariado y trabajo independiente' in *Actas*, above n 7, at 137.

[52] The German experience has been described by M. Weiss, in 'The Evolution of the Concept of Subordination: The German Experience' in *Le transformazioni*, n 10 above, Milan, 57.

[53] Raymond, above n 19.

[54] M. Grandi, 'El problema della subordinazione tra attualita e storia' in *Le transformazioni*, above n 10, at 11.

[55] Among others, J. Barthélémy, 'Le professionnel libéral et les 35 heures' [2000] *Droit Social* 490.

[56] Davies, above n 7.

concept of the autonomous worker has been built in most countries by means of a residual technique (all those workers who are not salaried) which means that the conceptual effort has been invariably oriented towards the salary-earner.[57]

F. Economic Dependence, another 'Set of Indicia'?

There is a second path in sight, which is that of attempting the recovery of the inclusive capacity of the concept of labour dependence by letting it lie mostly on its economic aspect. Of course, it is not enough to state that criterion; in order to make it 'earthly' it would be necessary to rebuild the set of indicia—the indicia system—so that it is fit to fill the set of assumptions to which we intend to submit the protection regime.

Legal scholars, case law and several national pieces of legislation have undertaken this venture, after the purpose of identifying the traces of economic subjection.[58] It is not my aim, at this point, to devote to those traces the analytical efforts they truly deserve; therefore, I shall now proceed, by way of illustration only, to enumerate some of them and continue to sustain hypotheses and interrogations.

As is evident, and before any other consideration, this is about the personal performance of the labour; that condition is present in the Italian concept of *para-subordination,* in the German *quasi-employee,* in some legislation in the Netherlands and even in the United Kingdom, where the distinction lies between the contract for personal services and that contract which can be performed by means of the provision of workers.[59] Another relevant matter is related to the intensity of the performance and, particularly, to the priority the payment of salary has in the worker's income. Also connected to this matter, but in different ways, are the exclusiveness, the ownership (or not) of a client portfolio by the person who considers himself a worker,[60] the continuity of performance.

An interesting experience, described by Manfred Weiss, reports on the efforts of a group of German scholars in search of a new criterion to replace

[57] Lyon-Caen, above n 8.

[58] A venture whose viability, anyway, Paul Davies questions in the light of the energetic resistance that nowadays opposes any form of growth of the system of protection (above n 7).

[59] P. Davies and M. Freedland, 'Labour Markets, Welfare and the Personal Scope of Employment Law' (2000) 16 *Oxford Review of Economic Policy* 84.

[60] V. Renaux-Personnic, *L'avocat salarié: entre independence et subordination* (Marseilles, Presses Universitaires d'Aix, 1998), 106, wonders what employer would allow a full-time dependent to develop a personal client portfolio in the same area of business as he acts for such employer? The non-salaried worker owns his tools, bears the risks of his economic activity and enjoys the benefits. Specifically, he chooses his clientele. On the possibilities of an autonomous worker of building his own personal clientele, see also M. Fabre-Magnan, 'Le contrat de travail défini par son objet' in *Le travail en perspectives dirigé par Alain Supiot* (Paris, LGDJ, 1998), 101.

the declining category of subordination.[61] Based on the notion of 'company risks', their research is about a proper balance between the risks and the chances of the company. From this perspective, when an individual is undergoing a situation which poses a business risk to him, but does not allow him to enjoy the correlating advantages, such individual is an employee. On the contrary, he is not an employee if he can act as a businessman in his sole interest and can also enjoy the advantages derived from his activity. Logically, each criterion has its own characterising set of *indicia*: the individual does not own a business organisation, has no collaborators (except for the members of his own family), carries out his activities personally, does not have offices or capital, does not perform activities in the market by himself, is not free to choose the work place or the timetable, does not have his own clients and is not free to set the price of the goods or services. Tested on 938,000 people, the system evidenced superior capacity to acknowledge economic subjection.[62] However, even Manfred Weiss warns about the doubtful usefulness of the proposed criterion. It is a very complex approximation, a new set of indicia whose confirmation would require the formulation, case by case, of a complex, descriptive and logical operation, incompatible with the criteria of *effectiveness and efficiency* that demands the application of legislation such as that of employment protection, characterised by the quantitative data.[63]

It would seem, and this is the hypothesis I consider relevant to formulate at this stage, that in the absence of a perceivable dominant type with the simplicity and evidence which denoted the historical dependent worker, an indicia system built with components such as those proposed—whose reasonableness does not seem debatable to us—may be theoretically rigorous and valid, but, even so, not apt to ensure the efficient allocation—universal, fast, of limited costs—of the protection resources which were created to shelter it.[64]

[61] Weiss, above n 52.

[62] While with the traditional criterion of subordination 48% of self-employed workers (19% were clearly employees clearly and the remaining 33% could not be characterised) were registered, with the concept experimented the percentage of self-employed workers decreased to 30% (44% included in the protected category of employees, and 26% who could not be qualified).

[63] Deveali, above n 11.

[64] We mean the criterion of effectiveness described by *ibid.* where he states that while civil law, in seeking perfect justice, usually limits itself to abstract statements which are difficult—sometimes impossible—to apply to the multifarious reality, thus creating conflicts between justice and equity. Labour law, whose rules often have a circumstantial character as they are passed to solve some problems which require an urgent solution (without concern about the principles that could be affected or about the influence the extension of the new rule could have), sacrifices the view of perfect justice for the need of less perfect justice, but one of easy and certain application to all cases. An *indicia test* of such a complex application would not meet such sense of effectiveness, in my opinion. This sense of effectiveness is also implied—although in support of the preservation of the traditional categories—in Grandi's call for attention regarding the risk of substituting the regime of dichotomy of types and subtypes for another regime that introduces the seed of uncertainty and precariousness means that the intervention of a judge is inevitable in order to confirm their adscription (above n 54).

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G. The Hypothesis of Protection Segmentation and the Qualifying Capacity of the Protection Techniques

Another possible response could recognise anticipatory signs in the cases of certain professional groups that were assigned specific protective legislation on account that, in spite of not showing clearly the functional-legal subordination, they did evidence, from an economic perspective, a clear situation of subjection and a resulting need for protection.[65] We might sustain the hypothesis that if a generalisation process of this trend were unleashed, the construction of new conceptual categories would demand a subsequent inductive process, after which they would be the result of the regulations on protected groups, more on account of the assigned protection techniques than on defining features nor necessarily homogeneous.

The starting point of that assumption is the idea that, just as nobody programmed the theoretical construction of the concept of labour dependence, in my opinion, nobody will be able to programme the construction of the categories that will replace this concept. Even so, it is worth formulating some hypotheses which may allow us to interpret some of the directions this process may take. One of them refers to the qualifying capacity of the techniques and contents of protection. This idea, broken into concepts, proposes that the categories in whose search theory displaces, do not refer to an ontological condition that calls for discovery, but they are or will be—at least in a significant dimension—the product of the way (needs, techniques, contents) in which they are assigned a regime or system of protection. Because this is about protection, and the categories that are to have specific protection treatment shall be recognisable '*ex post*', on account of the common legislation they have been assigned.

I think that Rodriguez Piñero, in the negative, evokes a hypothesis such as that when, citing Luca Tramajo, he points out that the social type and the regulatory prototype (our 'reference matrix', or the 'figure' of the remembered D'Antona) that relates to a whole compact protection system loses coherence and interdependence when social changes fragment the unity of the social model, allowing the emergence of a plurality of figures that call for a differentiation and modulation of the *quantum* and of the modality of guarantees.[66]

In that same orientation—acknowledging protection as determinant to the conceptual qualification—we could include the phenomenon of broadening the category of dependence, which took place in France when it was

[65] In Argentina, it is the case with fruit and vineyard contractors, diary middlemen and tallerista (the owner of a small texttile factory who works or demand, according to the orders of an entrepreneur). In France, in the words of the Book VII of the Labour Code, it would be the case of certain house-workers, travelling salesmen, and sales persons dedicated to specific territorial areas, reporters, artists and models, material assistants, branch managers, etc: Lyon-Caen, above n 8, at 42.

[66] Above n 42.

necessary to provide more people—legally non-dependent—with access to social security protection.[67] I believe we could also add (although this time not as from the construction of the category but as from its effects[68]) when, as Thérèse Aubert-Monpeyssen wittily points out, they choose a particular worker, or they choose the contract that will govern his performance, not due to circumstances conceptually linked to his category, but by the protection legislation that he has with him.[69]

According to this hypothesis, if the fragmentation already mentioned of the dominant type, the growing heterogeneity of the working processes, their de-standardisation and correlative fragmentation of the traditional categories[70] generated a massive assignation of differentiated protection legislation—also breaking the logic of a sole legislation as historically corresponded to that dominant type[71]—it is probable that the construction of broader centres of imputation of the labour legislation will materialise 'ex post', by means of regrouping the categories resulting from such fragmentation on account of common needs—and availabilities—of resources and protection.

If this were the case, these new centres of regulatory imputation, beneficiaries of some common protective content but different in each case in the rest of their legal regimes, would be the result of a specific re-qualifying process. This process would be determined, to a lesser extent, by the subjective nature of the beneficiaries, and to a greater extent, by the common techniques conceived for their protection.

The process could have one more component. On one hand, such correspondence between the sole and exclusive feature of its centre of regulatory imputation (based on the notion of dependence) and the subsequent unity and universality of its protection legislation could 'burst' into a plurality of legislation which would, in turn, determine a correlative variety of specific groups.[72] On the other hand it is probable that another convergent movement, which makes no difference between the more independent (from a juridical perspective) wage-earner and the self-employed, tied by a growing economic subjection impinges on this situation.[73] The definition of some

[67] Supiot, above n 51.

[68] Effects that may rebound on the category originating them, requiring their re-definition or that of its legislation.

[69] T. Aubert-Monpeyssen, 'Les frontières du salariat à l'epreuve des stratégies d'utilisation de la force de travail' [1997] *Droit Social* 616.

[70] Baylos, above n 46.

[71] The fragmentation of the protection legislation, which used to be considered a pathological phenomenon, should now be admitted as a natural phenomenon and even as a condition to enable the integration of situations which were previously difficult to incorporate: J. Cruz Villalón, 'El proceso evolutivo de delimitación del trabajo subordinado' in *Trabajo subordinado y trabajo autónomo en la delimitación de las fronteras del derecho del trabajo, Estudios en Homenaje al Profesor José Cabrera Bazán* (Madrid, Ed. Tecnos y Junta de Andalucía, 1999), 170.

[72] Renaux-Personnic, above n 60.

[73] Supiot, above n 51.

new categories—new centres of imputation of labour law—would be in that case the complex expression of those simultaneous trends of diversification and convergence.

5. INCLUSIVE CAPACITY OF DEPENDENCE AND CONTINUITY OF PROTECTION

Together with the conceptual 'out of focus'[74] put forward by what we have denominated 'inclusion crisis' of the idea of dependence, there is one additional 'out of focus' stemming out from the other term of the protection equation.[75] We will deal now with the loss of effectiveness of the protection system owing to the temporal asymmetry paradox between the needs for protection and performance at work: the continuity of the need for protection is impaired by increasing discontinuities of performances and careers.

To pose both problems in a way that relates them, we could say that, in the first case, the problem is how, from a synchronous perspective, we can make the system of labour protection protect, at the same time, all of the persons entitled to protection; in the other case, the question raised, from a sequential perspective, is how to protect each one of them all the time.

Indeed, this is an issue different from that of the *frontiers of labour dependence* and that is why, I will not deal with this in depth (it deserves reflections much lengthier than the whole of this document); I just want to point out in what way they are different, but also to what extent the answers to one of those issues could prove functional to solve the following.

Speaking more generally, the problem consists in securing the continuity of the protection during the transition between one paid job and another, of 'filling the gaps'. Apart from the working times paid (dependent, autonomous, assimilated to one or the other), this is about the times of unemployment, but also of professional training, of paying attention to family commitments, of solidarity work, of performing civic duties, of resting.[76]

[74] An image the origin of which we identified in n 12 above.

[75] An equation that relates the protected subject (centre of imputation of the labour legislation) to the legislation that defines techniques and contents included in such protection.

[76] Alain Supiot states that the rights of workers should concern all forms of personal activity at somebody else's service, which forms may mix and take place in the life of any of them. This includes voluntary work which, in the author's opinion, is fundamental for survival in a certain society (he gives as an example work within the family in order to enhance working power). As long as the job is useful for society, it would be convenient to assign it a set of social rights and a protection system (his introduction in *Le Travail en perspective* (Paris, LGDJ, 1998), 1.

The Boissonat Report[77] states that situations such as those can be dealt with through traditional insurance techniques which 'rest on the ground of quotation—service', a solution which would not introduce significant fragmentation with the current management forms. However, the Boissonat Report itself also states that such a solution would only provide a response to those situations under the classical labour contract and, therefore, would exclude those who are outside it (for example, independent work and its own 'gaps').

A. Some Proposals

And that is why, in the context of a proposal for a radical transformation of the legal and institutional frame, the Boissonat Report proposes the creation of a new legal category consisting in a framework agreement with a moral person (association, group of public interest, local states, local companies, institutions of public or private education), which coordinates employment policies together with their needs and guarantee the employee, during his dependent performance, but also at different stages in his career (such as those of autonomous work, the time of training, resting time, time for paying attention to family commitments, of solidarity work, of performing civic or family duties, etc.) the continuity of minimum compensation and certain social protection.[78]

In this way, the limitation of an individual relationship to a contract between a salaried worker and a legally defined employer responsible for only one company would be avoided, allowing the diffusion of social and economic liability beyond the company, particularly in the area of sub-contracting and co-contracting. From that perspective, the contract of activity would favour mobility, which would not amount to precariousness, insecurity or exclusion; in turn, the system would itself benefit from the adaptation skills required and those companies with flexibility and ability to react will contribute to improving their competitiveness starting from a cooperative organisation and a mutual flexibility. To that end, the contract of activity would enjoy productive flexibility, work evolution and continuity of personal careers.

A further consideration, that of the Supiot Report, adds that the construction of the contract of activity brings to life the idea of defining

[77] This is what the research work *Le travail dans vingt ans*, rapport de la Commission présidée par Jean Boissonnat, La documentation francaise (Paris, Editions Odile Jacob, 1995) is called.

[78] I choose a grossly schematic characterisation, for the purposes of this mention, even at the risk of incurring disloyal simplification. See F. Gaudu, 'Travail et activité' [1997] *Droit Social* 119. By same author and about the same topic, also see 'Du statut de l'emploi au statut de l'actif' [1995] *Droit Social* 535.

professional legislation to form part of the demands for individualisation and mobility of the professional careers required by employers and that labour law should take into account so as not severely to hinder the display of the modern methods of work organisation. In such context, he concludes, there is an attempt to guarantee, by all means, the continuity of protection, not necessarily on the grounds of holding a job, but about the continuity of protection legislation that transcends the various situations a worker experiences along his professional career.

B. A Latin American Appreciation

It is evident that they are highly sophisticated institutional constructions, whose financial mechanics seem far out of reach at present in the countries of Latin America, given the scarcity of economic and organisational resources.[79] However, it is interesting to include in this chapter this reference by the strength with which both documents—the Boissonat and Supiot Reports—have caused figures of this type to be present in the European debates. It is also interesting because institutional creations of this type, even far from their integral materialisation, may serve to lead the way and explain the direction of the intermediary stages in a sequence of conceiving a new design which labour law will hardly be able to prevent.[80]

Finally, it is interesting (and mainly this is why we have given it this schematic mention) because it enables us to perceive in what way a figure like the one proposed, when the protection system is assigned exterior frontiers significantly more inclusive—and included within such frontiers we can find dependent or autonomous employment, and all the intermediary variations, time for professional training, for resting, for paying attention to family commitments, etc.)—it certainly reduces the negative balances that, in terms of protection resources, can be noticed in its limits or interior frontiers (in such context, the frontiers of dependence are circumscribed).

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[79] It can be financed by the State, by the social security institutions, by mutual joint committees, by companies, by the worker himself in the form of credit for time worked but not paid, waiver of part of a previous income, etc. (from the Supiot Report; in the same sense see Gaudu, above n 78). Its utilisation is proposed in the Supiot Report; it should be subject to a financial logic proper of the social drawing rights which the worker holder of a contract of activity could use to apply them to a specific social imputation (that of its support). This would be a function—right, which means it could not be freely endorsed for the benefit of a third party. I considered this proposal (specially the version included in the Supiot report) from a Latin-American point of view in a paper published in (1999) 20 *Comparative Labour Law and Policy Journal* 681, under the title 'Labour Law beyond Employment: A Latin-American Perspective'.

[80] T. Priestley, 'A propos du "contrat d'activité" proposé par le rapport Boissonnat' [1995] *Droit Social* 955.

6. BY WAY OF CONCLUSION

Not long ago, Robert Castel wondered whether the labour protection system would undergo either a process of mere re-deployment (to recover or include those categories of workers which currently seem to have been left out of its rules and institutions) or a deeper transformation, a true *institutional re-foundation*.[81]

Castel was inclined, very cautiously, to believe the first of these two alternatives.

I am not quite sure. If it is true that labour law is trying to lay new foundations on an equilibrium which still has to be achieved, if the policies on labour law cannot recognise and adapt to contexts that have changed considerably and keep doing so, if the prevailing techniques will no longer be necessarily the same, if the legislation will have to re-define its very centre of imputation of labour rules and regulations, then we should not discard the possibility that labour law has a *re-foundational*[82] destiny ahead.

A re-foundation without founders, as was the origin of the labour law we are engaged in, but which should also express that fight, probably never-ending, that mankind has always taken part in for equity and justice.

[81] R. Castel, 'Droit du travail: redéploiement ou refondation?' [1999] *Droit Social* 438.

[82] It is probable that this reference to the idea of *re-foundation* has, in the French experience and in Castel's evocation, a specific meaning linked to episodes and proposals that were generated in their own context. My use of the term was not intended to convey such specific national background.