

Let's Deconstruct the Meaning of "Dependent Work" to Enlarge the Scope of Labor Law

Barbara Grandi¹

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ABSTRACT

The article proposes to deconstruct the essence of the "dependent work" phenomenon into its three dimensions (facts, definitional legal category, and normative effects) in order to explore a common ground of concepts and possible definitional categories that consider the topic from a trans-national perspective. The study is mainly based upon an English-Italian comparison; by means of a "de-constructive theoretical framework", it argues that some benefits would possibly derive from defining a worker's dependency just as a measurable fact related to the income as gained by the worker from a unique employer.

1. The Problem of Defining the Dependent Worker: The Italian and The English Legal Systems as Two Examples from the Common Law and the Civil Law

It is well known that there has been and there is still an important discussion amongst academics and lawyers about the meaning of "dependent worker/dependent work" (ILO 2006). It is known also that in both the common law and civil law systems the meaning of "dependency" is far from being a fixed point in employment law, meaning also that it is far from being indicative of a clear fact. Indeed, it is not even clear if we are supposed to deal with it as a matter of fact rather than as a matter of law².

What is certain is that beyond the definition of dependent worker/employee, there is a huge struggle in terms of social policy, since by that definition we have traditionally derived the scope of employment law. It is the classification of a worker as a dependent one that generally implies a protection by the State which is very different from that granted to an independent worker. This is true both for labour law and for social security law: both labour rights and social protection are allocated depending on whether the worker is dependent or a self-employed contractor.

It is no coincidence that every legal tradition focuses on the issue of defining dependent work as a fundamental issue in employment law.

Italy and United Kingdom are two representatives of the civil law and common law.

The most interesting reason for comparing a common law country to a civil law one in respect to our subject matter is the possibility to focus on the different contribution that the case law, one side, and the statutory law, on the other side, might offer in these different systems.

We need to carefully consider the temporal perspective. The position of any jurist who is searching for "compliance/not-compliance" with a rule is different from the position of the one who is searching, instead, for "the making" of a new ruling, just like focusing on case law is different from focusing on statutory law. Highlighting the temporal dimension gives us the opportunity to better distinguish a typical pragmatic approach (the English common law one) from a typically conceptual/theoretical approach (the civil law one). In such a perspective, the case which is in dispute, itself, establishes the "time-point" for approaching the phenomenon theoretically/conceptually rather than pragmatically.

To analyse the topic of dependence and subordination from these chosen national experiences, can furthermore demonstrate how the searching about employment problems could imply the using of legal tools that work well in both kind of systems. This means that a common approach to such a common

¹ Former researcher at Rome La Sapienza University, Independent lawyer, E-mail: bg.grandi@gmail.com

² This complex matter is theoretically approached by Bove, M. (1993) *Il sindacato della Corte di Cassazione, contenuto e limiti*, 1993 Giuffrè, 24, writing from an Italian legal perspective. This is particularly relevant in the appeal procedures, which can be open only to matter of law and not to matter of fact as well (it is the case of the trial before the Italian Corte di Cassazione but also before the Appeal Employment Tribunal and High Court in the UK).

problem is arguable, despite the distance existing between the common law and civil law, considered for too long time as two opposite traditions in the field of labour law.

It is commonly known how globalization affected labour markets and illustrated an ineffectiveness of the old definitions of employee as just fixed around the old big industries. Legal systems have generally gone through this economic-social evolution by adjusting themselves on a case-law basis, rather than on a statutory-law one.

The Italian system, similarly to other civil law legal frameworks, codified the definition of dependence in a generic way (art. 2094 Civ. Cod. 1942), by stating that the employee is someone "who agrees to collaborate with an enterprise for remuneration, carrying out intellectual or manual labour in the employment of and under the direction of the entrepreneur³".

Such a statutory definition has focused on the presence of a power of direction, exercised by the hirer, as the determining factor; this definition has been applied through the years by law interpreters to determine the personal scope of the all labour rights (Nogler L. 2010), while courts have played a major role in giving flexible interpretations, and sometimes tried to accord labour rights broadly (Lunardon F. 2007). Scholars have contributed as well to give "dependence" a broader meaning, especially by analysing the economic and social dimension of the phenomenon (De Luca Tamajo R, Flammia, Persiani M., 1997). From another point of observation, also a restricted meaning of "employee" has been derived from the Italian Civil Code definition, in order to prevent recognition of the strongest protections to individuals not matching a real need to be protected (this has been the case of occasional workers).

It can be remarked that, according to legal theory, the written law having expressly referred to an individual or a group of individuals, cannot be applied to individuals different from that named person or named group of persons. It is via that written concept, which is a legal definition/concept, that the personal scope of a law is declared. This is particularly true in the civil law tradition, where the connection between the formal wording of the statutory law and the judicial interpretation is formally established and it is more rigid than in the common law.

The statutory descriptions of what an employee is are redundant in the English legal system, and this has lead many scholars to conclude that in the United Kingdom, as well as in other similar legal traditions (Perulli A. 2002), no proper definition of dependent work is given by statute. According to English statutory law (ERA 1996, sec. 230) an employee is: "the individual who has entered into or works under ... a contract of employment", where a "contract of employment is a contract of service or apprenticeship, whether expressed or implied and (if expressed) whether oral or in writing". This norm clearly adopts a generic concept for employment, not describing any specific fact determining the dependent position: it is a generic definition which gives the judge the chance to extrapolate any circumstances that he thinks might be expression of such implied significance.

The common law judges frequently adopt a purposive approach to the definition of employment status: they tend to search for a meaning that is compatible with the purpose of the law. Generally we assume that the UK approach to employment (similarly to the American one) is that of "free style" contract, and this supports the idea that English lawyers are more naturally confident with the statute-law purpose approach (rather than with an "a priori" classification of workers). The English tradition, more than the Italian one, is ready to investigate the normative effect that the statute is seeking to allocate; the Italian tradition uses to first consider the personal scope of a statute. This is what resulted in the case *Byrne & Brothers vs. Baird* in 2002, for example, when the judges found the law on minimum wage and work-time just meant to protect not only regular employees but other vulnerable workers as well (Grandi B. 2013). This is turning into the impression that in the UK they have adopted a "varying" significance of what "employment status" means: if the purpose of a given statute is considered to be that of protecting an economically weak worker (as in *Byrne & Brothers vs. Baird*), then an economic type of dependence is investigated. Problems might emerge when the purpose of the law is not expressed in clear terms, and thus requires a difficult investigation by the interpreters who would find themselves in position to go beyond the formal wording. Interpreting the aim of the law can be difficult in the common law as well in the civil law.

³ Translation from M.TIRABOSCHI & M. DEL CONTE, *Employment contract: disputes on definition in the changing Italian labour law*, at: <http://www.jil.go.jp/english/reports/documents/jilpt-reports/no1.pdf>

The scenario is one where in both Italy and United Kingdom, judges are still working without clear and/or uniform directions in recognising what the factors showing the dependent position of a worker are. No predominant importance has been given to any particular factor for solving ambiguous relationships: factors like “control/integration” mutuality of obligation/duration and also “economic dependence” have been investigated, albeit in different manner, but none of them, as a single factor, can be said to be solving of all cases.

This is worthy of close analysis if we accept the perspective of searching for a common ground of legal development in labour law.

The most interesting difference when comparing English law to Italian law as for the several factors indicating dependence is the slightly divergent consideration/interpretation given by the courts and the legislator to the concept of economic dependence.

Recently, Legge n. 92/2012 ⁴ has introduced into the Italian statutory framework what can be called the “economic dependency” legal category in labour relations; although the academic debate was struggling over it since many years ago, this is the first time the Italian legislation is paying more than little attention to the economic relevance of any performed work.

The consequence of this “lack of attention” in Italian statutory-civil-law, despite the efforts of many studies, is that the range of labour rights, even those that directly derive from European law, can only comprehend individuals who are defined as subordinated workers meant as hierarchically controlled workers, and not also economically dependent workers.

In contrast, in the Anglo-Saxon common law, whenever also a substantial/economic form of dependency according to (also) the economic reality test would be proved, the courts have had the ability to openly deal with dependent labour rights.

2. Dependency in its Three Constituent Components

While studying the matter of defining “dependency” within an employment relationship from both Italian civil law and English common law, a preliminary consideration of the legal method by which the two legal systems do differently approach the issue has actually emerged. After breaking through the barriers of language, it is necessary to set some common methodological rules in order to deal with patterns, definitions and the layers of regulations which often operate very differently in the common law and in the civil law.

A relevant point to bear in mind for comparing institutions of an Anglo-Saxon common law based legal system to a continental European civil law based legal system, is to keep separated the different dimensions that constitute the considered phenomenon of dependent work.

When dealing with the different dimensions of the considered phenomenon (dependent work) I am referring to:

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

It is necessary to separate the meaning of dependency as a “fact” from the meaning of dependency as a “legal concept/category”, and also from the meaning of dependency as a “normative effect” deriving by law to the individual being in a dependent position.

The exercise of keeping these three aspects separated from each other should continue as long as the comparative study develops itself, since it helps in capturing the relevant similarities and differences while dealing with the different legal patterns (Freedland M. & Countouris N. 2011).

⁴ In force from the 18th July 2012.

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

In the first place, "facts" are dealt with by judges or by other qualified interpreters of law as they are the concrete elements emerging from cases in order to apply the law and its normative implications; they are a matter of concern for any judging activity. It is the "compliance/non compliance verification" the moment that is in point here.

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

As a legal concept/legal category, the matter of dependency becomes a matter of language, a matter of definition, something typically emerging at the "law making moment". It may emerge as a legal discourse within a common law based legal system, while in a civil law tradition it assumes the essence of a precisely written wording, that is the content of the "norm", presenting both a description of facts and a statement of discipline (Freedland M. & Countouris N. 2011) in the considered statute.

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

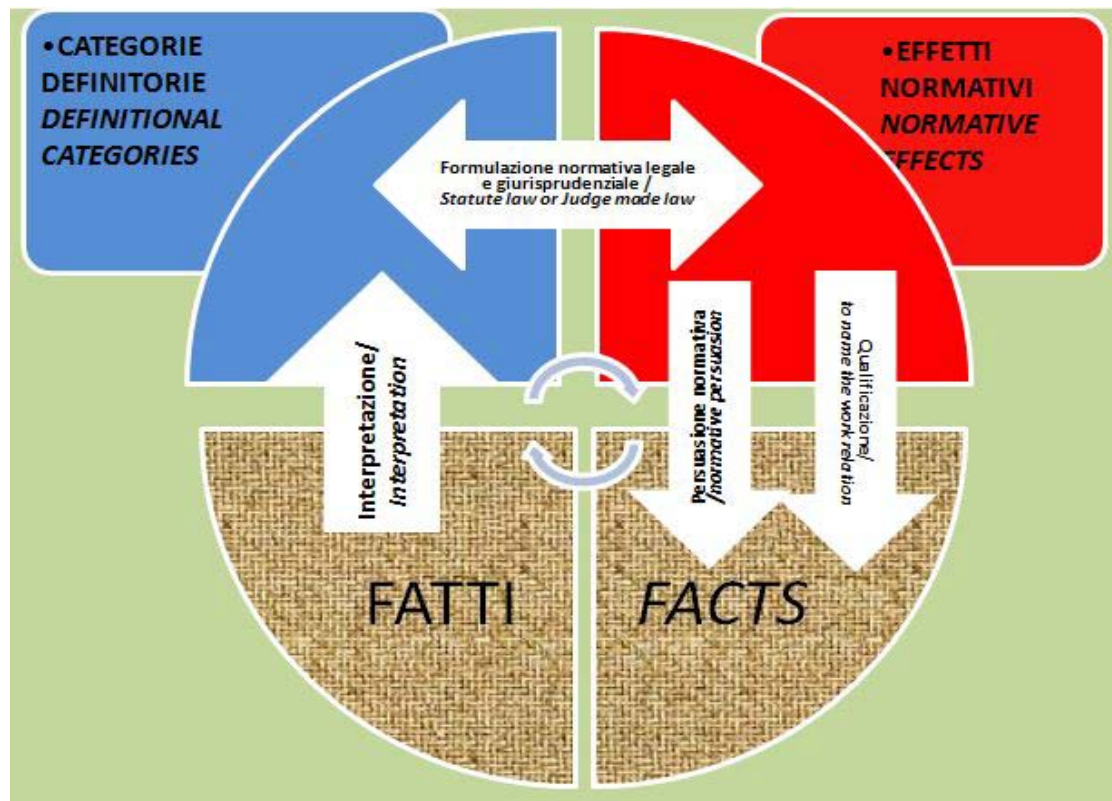


Fig.: To define the personal work relationship: the elements and the process/ *La definizione del rapporto di lavoro dipendente: gli elementi e il processo*

Thirdly, “normative effects” are what is established by the discipline, they reflect the exercise of the normative power in its strictest political sense. They are what the political body (represented by the Legislator or its delegated authority) has chosen to connect to a certain fact in order to drive individuals’ behaviours.

Therefore, as a normative effect (one may refer to a “point of ruling” also) dependency is a strict point of policy: it is a matter of ruling over the employment relationship. It is the issue of discipline in terms of individual rights and duties that have to be recognised by the legal system in a certain historical moment.

Obviously these dimensions are strictly linked one to each other, and from an overall perspective they are co-existing: the boundary conception of “personal work relation” does have a normative role itself, not only a definitional one (Freedland M. & Countouris N. 2011). Nevertheless the proposed theoretically-separated vision allows us to look at the phenomenon clearly and make us reflecting on some steps towards new possible legal constructions that could renew the scope and purpose of the discipline.

Every normative formulation, be it statutory or resulting from case-law, contains, on the one side, facts/acts just fixed in some definitional categories giving them the abstract essence of a legal terminology, and on the other side they contain normative effects. Each of these dimensions is to be linked to the other by means of a different intellectual activity; to ascertain if the considered intellectual activity comes before or after the happening of the relevant fact, is what changes the perspective of the legal interpreter, in other words, it is what changes the way the matter should be approached.

3. Dependency as a Matter of Fact

Which facts do establish dependence?

Let us assume that the facts establishing the worker’s dependent position can be considered to be the same in the English common law as well as in the Italian experiences.

This could be the real scenario, considering that most of the factors indicating dependent labour have been examined “similarly” from the Italian and the Anglo-Saxon legal systems and few facts have been rather “equivalently” investigated.

Despite the fact that the type and number of dependency indicators vary widely from one country to another, and that there is no clear order of priority assigned to them, some of these seem to be most significant in determining a subordinate employment status in all the European traditions (think about the exercise of control, the worker being part of the employer’s organization, not himself being exposed to personal financial risk in carrying out the work, not being able to fix the terms of payment, being the worker obliged to work for set hours or a given number of hours per week or month, and the worker not owning the materials and equipment for the job, etc. ⁵).

Now, in civil law, if a fact is not specified within a clear legal wording, it cannot be considered as binding on the courts.

Although dependency in labour law has been historically connected with a social-economic vulnerability of the worker, this vulnerability may have no real significance before a court in case the statutory law doesn’t specify its factors clearly. This is why, in Italy, no proper importance was given to a pure economic dependence before the approval of Legge n. 92/2012. This is also why the bearing of a financial risk by the worker has been considered as an economic type of indicator by some Italian jurisprudence, although this is not binding on future disputes.

⁵ Factors as the direction-control exercised by the hirer, the duty to perform in person (and not by delegating other people), and so on, are just some of the many factors that all the legal systems do consider for the definition of an employee, likely, by manners which turn to give possible equivalent results.

4. Dependency as a Matter of Terminology/Legal Categories

Having realised that dependency may result from the same facts in every social context, we must consider the strict juridical consequences of this: firstly we need to consider the perspective of the legal terminology/legal definitional categories that can be used to describe such relevant factual situations; secondly, we will need to consider the perspective of the normative effects, that is the normative impact that the legal system, in its more political drive, is going to derive from the occurrence of those facts.

As for legal terminology (keeping in mind that the "factors/indexes" themselves represent the abstract/legal terminology by which the facts are described) we can see that, on the one hand, the Anglo-Saxon common law investigates the factual nature of the employment contract by using criteria/indexes which focus on the relationship as it appears once the case has been put to trial (*ex post*), so it doesn't really make use of a descriptive terminology. On the other hand, it is known that the Italian civil law tradition tend to predict and pre-fix the factual points of the relationships, by describing them in abstract, thus establishing a connection to a legal-abstract-category (*ex ante*).

This latter juridical technique has proved to be not easily adaptable to a complex and changing factual situation like that of dependency in employment, with the result that many statutory definitions in civil law do not mention nor describe any determining factor, but rather set a general terminology. In other words, the complexity of a labour relationship, which is linked to the possible evolution of the many circumstances related to work agreements, has been dealt with statutory wide-general definitions for "dependent worker" that, somehow, "may freeze" the employment relation. This has led to a situation in which, not differently from the common law, the relevant facts showing a dependency do not really emerge statutorily, in advance, rather they emerge *ex post* by means of an evolving judge-made law.

As already remarked, in Italy the main labour rights are assigned to those workers that can be defined as "subordinated workers", according to the norm of art. 2094 of the Civil Code (Spagnuolo Vigorita L. 1967; Pedrazzoli M. 1985; Ichino P. 1989). The whole Italian social security system, from unemployment benefits, protection against unfair dismissal, to the protection of illness benefits, is connected to the status of being a "subordinated" worker and there are only a few exceptional rules that recognise social rights to atypical workers even if these are substantially vulnerable for their social-economic dependence on the employer.

In other words, the term "subordination" and the term "dependency" have had the same meaning in Italian labour law (as in other similar legal cultures) (Pedersini R. 2002).

Italian labour scholars and lawyers have had a number of opportunities to discuss deeply and carefully the meaning of subordination/dependency, but only recently the need to consider clearly "economic" dependence as separated from subordination, meaning the latter a functional and hierarchical/organizational kind of dependency, begun to be stressed also at a law making-level. Subordination is thus beginning to represent a sort of sub section within the broader concept of "dependency". By following this approach, dependence can become a container for several different "facts" as relevant within the employment relations.

The Italian Act Legge n.92/2012⁶, in this path, has recently introduced a statutory definition for semi-dependent workers which implies the consideration of a pure economic factor: a worker is *presumed* to be a semi-dependent worker, thus requiring a special form of contract ("*contratto a progetto*") whenever she or he is matching at least two of the following requirements: 1) duration of the contract for not less than 8 months, 2) having gained from that client/employer some 75 % of his or her total professional income, 3) having had a stable position inside the employers' premises⁷. Dependence is thus derived, possibly, from the relationship between the income of the worker and his or her contribution solely for that client (Carinci F. 2012; Magnani M. 2012; Marazza M. 2012). The *legal presumption* does not work for workers considered to be strong, like those gaining high incomes or doing a highly skilled type of work.

⁶ Legge n. 92/2012 art. 1 co. 23-27.

⁷ This presumption of semi-dependence is rebuttable, and the Act says it does not operate in case the worker's competences are of a high level, in case the total income of the worker is beyond a certain level, in case it is involved a regulated profession (typically this is the case of intellectual professionals).

In the UK, the more traditional criteria/index to determine the dependent position of a worker in the common law is called “control test”⁸, which aim is to investigate any sign of the employer’s power to determine the purpose, the manner, as well as the location of the worker’s job.

There is also the more recently coined “mutuality of obligation test”, aimed at considering express or implied terms in the contract that may have established a stable obligation to offer and to do the job over a certain period of time, although the job may be required and performed time by time (O’Kelly v. Trusthouse Forte, 1983) (this test has been mainly used to distinguish an employee from a casual worker, considering the latter to be not dependent because of the assumption that dependent employment must imply a continuing, long lasting type of relationship). Both the control test and mutuality of obligation test find relevantly similar significance in the Italian jurisprudence dealing, respectively, with “subordination/hierarchy” and “continuity”⁹.

Moreover, we find the British “integration test” and the “economic reality test”. The first is aimed at checking if the worker is part of the enterprise or if he is not, and if his job is peripheral or integral to the enterprise¹⁰. The “economic reality test” considers, instead, the nature of the relationship from a financial/economic point of view¹¹: whose economic interest is to be realised with that job/service? Is it the economic interest of the employer or is it the economic interest of the worker? How may the economic situation between the worker and the employer be defined? Is the worker economically dependent on the employer or is he working for more “employers/clients” so as to appear in the same position of an independent professional? These are the questions that the economic reality test considers in order to find substantial proof of the dependent/independent nature of the employment relationship.

Recently the case law has been more akin in using a multi-factor test when investigating a worker’s dependence, according to the increased complexity of law and its purposes, and according to the increased complexity of the working relations as well¹². This kind of investigation does imply the use of control, mutuality of obligation and economic reality test in the same case¹³.

It can be appreciated that the comparative analysis may face significant obstacles while dealing with deep similar substantial circumstances, although having different names¹⁴.

5. Dependency as a Matter of Normative Effects

Dependency is a concept meaning also “the discipline” ruling the relationship. Dependency as a normative effect can be referred to as the many legal effects that are deriving on both contractors, reciprocally, once the employment relation has been established.

Being a dependent worker implies having a number of duties as well as rights, just as it does being an employer. The dependent worker is subject to the control of the employer when performing his or her duties, also according to the type of job which is in contract; he or she is obliged to serve the employer with loyalty and fidelity and has the right to be paid regularly in accordance with the type of economic agreement. These are just some of the possible normative effects deriving from a position of dependency.

⁸ “A servant (employee) is a person who is subject to the command of his master as to the manner in which he shall do his work” in *Yewes v. Noakes* 1880; “Control includes the power of deciding the thing to be done, the means to be employed in doing it, the time and the place where it shall be done” in *Ready Mixed Concrete (South East) Ltd v. Minister for Pensions and National Insurance*, 1968.

⁹ See dissertation over the factor of “eterodirezione” and “stabilità” in Lunardon F. (2007); Nogler L. (2010). As for the “relatively” equivalent significance of mutuality of obligation and “stabilità” the similarity is significantly to be found in the fact that according to mutuality of obligation and to the Italian concept of “stabilità” the employment relation oblige both parties to keep in force that agreement in a manner that can recall an “overall umbrella agreement” giving stability to the employment relationship despite the fact that the parties can disregard some single assignment.

¹⁰ See *Stevenson Jordan & Harrison v. MacDonald & Evans* 1952, for the English System, declaring “..under a contract of service a man is employed as part of the business and his work is done as an integral part of the business; whereas under a contract for service, his work, although done for the business, is not integrated into it but is only accessory to it”. An Italian likely similar significance is given to the indicator of “integration”, see in Nogler L. (2010) cit. above.

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

¹² See *Market Investigation Ltd v. Minister of Social Security*, 1969.

¹³ See *Quashie v Stringfellows Restaurants*, 2012 for an overview of the considered factors and case law.

¹⁴ About the importance of a simple wording as a point for efficiency in a legal context see “The Decalogue of Smart Regulation” adopted in Stockholm in 12th November 2009 by the High Level Group of Independent Stakeholders on Administrative Burdens (see at <http://www.pietroichino.it/?p=6836>).

Some of these effects might derive from the intervention of a third party too, as it happens in relation to the organised social security system, be it private or public. This is because the execution of a professional relationship is connected by law to the social need to assist the community in case of old age or unemployment.

Such aspect of dependency directly reflects the various policies underlying the employment relationships as governed by the legal system. It is what actually defines the way that the legal system has decided to protect the worker; the way that the legal system has decided to limit the freedom of individuals exchanging labour which is personally executed.

6. The Need to Use Specific Terms for Specific Kind of Dependency

In an earlier study, exploring the opportunity of adopting a European comprehensive definition of the term "employee", as applicable in all relevant legislative models, I argued that this adoption would not solve the problem of workers' misclassification (Grandi B. 2008).

That study did not pay the sufficient attention to distinguishing the dimension of defining dependency at the law making level from the different dimension of defining dependency as a matter of compliance. The complexity of an employment relationship will probably never be solved via a simple re-wording of the statutory-law, nevertheless a preliminary de-construction of the phenomenon can suggest how some steps forward can be done, at that level too.

Once it is established that dependency, as a complex factual phenomenon, should be legally analysed bearing in mind its three different components (facts, terminology, normative effects), it logically follows that not only different facts, but also different legal concepts, need to be the object of our specific attention.

Firstly it has become of peaceful acceptance the idea that, at a level of terminology/legal category, the borderline between the term "subordination" and the term "dependency" must be clearly drawn. An employment relationship may show a dependency, but not a subordinated condition of the worker at the same time, since the worker may be asked to serve the employer with full autonomy, which is something that occurs nowadays and more often in the global economy, and still that worker may economically rely on that employer only for his role in the labour market.

Moreover, according to the three dimensions approach which is driving this analysis, one can argue that dependency meant as "subordination" - which is equal to "the subjection to a power of control" and emerges in both common law and civil law - is a word that in statute can actually indicate not a "factual point" (not a concrete manner as executed), but it rather remind the "normative effect" deriving from the contract.

The consequence of this observation is that by adopting the term subordination in order to define dependent work (i.e. to define the scope of any social legislation) can be misleading as for the protection to be allocated, since it results in qualifying the relationship on the basis of its ruling (normative effects), instead of the established facts.

As international practitioners know, one of the golden rules for classification of employment relationships is "the primacy of facts" (ILO 2003). By virtue of this rule, lawyers are supposed to address labour rights on the basis of facts rather than on the basis of any formal indicators, since these latter can be easily manipulated by the employer to the detriment of the weakest party¹⁵.

All labour lawyers are used to deal with a galaxy of norms which are mostly mandatory; these norms cannot be derogated by the private parties, in accordance with the social nature of labour legislation and its character of public and super partes intervention (Ichino P. 1993; Wedderburn L. 1992). This is why a national or even supranational definition of "employee", if identified via any reference to a normative effect (like the hierarchical/functional subordination or the mutuality of obligation can be) is definitely turning

¹⁵ Not all the sources of labour law do act as norms protecting the employee, but even when dealing with that called as the "enterprise-protective models" of employment contract (for instance temporary contracts, stressing the need of the enterprise for flexibility) the statutory regulation is meant to be not modified by the parties mostly as a protection on the workers' side.

out to be pointless in avoiding the misclassification of workers. The norm conceiving the scope of its own application by referring to certain “normative effects” (the taxation regime, disciplinary regime, employee’s rights etc.) is not of any capability in preventing misclassification: such a norm is not useful to prevent the problem of the parties misusing the name of the agreement as established in facts.

7. Steps towards the Development of Employment Contract Law; the Statutory Definition of Economic Dependency and the Different Approaches in Italy and in the UK

It is too early to give a significant evaluation of the new Italian Legge n. 92/2012, which is changing substantially the Italian regime for employment relations in respect to the contracting models.

What is more important as for the legal technique, is to note that it introduced a general presumption of economic dependence, recalling the Spanish ¹⁶ and the German ¹⁷ experience. This is innovating under several ways:

Firstly, the statutory definition is based on a clearly described “fact” that can make up the real case, rather than on a “normative effect” that can be easily manipulated by a formal agreement to the advantage of the strongest party. Such a fact (the worker’s receiving the majority of his income from that single employer) can be said to be existing as an *ex post* verifiable circumstance. Unlike the worker being subject to the employer’s control, this is not something that can be the object of an *ex ante* agreement between the parties, since the worker may always be receiving some “aliunde perceptum” (other remuneration from other clients/employers).

Moreover, economic dependence in this concrete meaning does not give floor to any psychological tensions that can exist amongst the parties, while hierarchical relations do it, and this is particularly important to prevent any possible soft manipulation of the weakest party by the employer whilst directing and organising the performance of his or her collaborators. Any reference to a metaphysical aspect, rather than to a real fact, poses at a maximum level the problem of abstraction, as posed by any “normative effect” just used to practically classifying a worker (rather than dealing with her/him).

Since misclassification concerns many work relationships where the parties are only motivated - when naming the relationship as self employment or of independent contractors - by the need to escape from the normative effects connected to the traditional employment contract, it can be arguably envisaged that once the juridical recognition of the economically dependent work is made possible, then the interest in misclassifying the contracts will decrease.

The provision expressly provides for a presumption of economic dependence under the normative context of the semi-dependent employment relationship as newly ruled in 2003; the reader must be careful here, since beneath a simple concept, the legislator introduced several dispositions to prevent from a simple, but too strong politically speaking, intervention.

New art. 69-bis D.lgs 276/2003 (as amended by Legge n. 92/2012) states that, given a percentage of remuneration from a unique employer/client (75% of the income in a year, having considered a period of at least 8 months) and perhaps the availability, by the latter premises, of a place to work, there it could be ascertained an economic dependence which is going to classify the contract as one with semi-dependency (according to the traditional terminology in art. 409 c.p.c.), and most importantly for employment protection purposes, as needing “a formal project” which absence is leading directly to the establishment of a permanent subordinated-dependent employment. An economically dependent worker to whom the new law could be applied, is in position to claim for the major protection provided by Italian employment law (unfair dismissal, minimum wage, paid maternity and paternity leave, sick pay, state pension contribution etc.).

¹⁶ Spain has a statutory definition for economically dependent workers which is intended to consider individuals that actually receive the 75% of their income from that single employer only (see the Real Decreto 197/2009 (Estatuto del Trabajo Autónomo en materia de contrato del trabajador autónomo económicamente dependiente). See Ojeda Aviles A. (2010) *La decostrucción del derecho del trabajo*, Madrid, Wolkers-Kluwer.

¹⁷ German law too provides for specific measures to apply to those perceiving from one employer the 50% of their income.

Now, the simple, but politically very strong concept of economic dependence, has just been overwhelmed by several legal dispositions working against the basic quantitatively presumption: the economically dependence presumption just does not work in case of:

- 1: the worker has high level skills,
- 2: the worker is receiving an annual income which is not below a minimum as required by the law on state pensions and contribution,
- 3: the worker must be not a professional whose activity is ruled by a professional corporation (like a lawyer or a doctor, or an even a less specialised professional corporation)

These three dispositions actually stop the wide spread potential of the law in term of allocating labour rights, but does not prevent labour lawyers from the future consideration of a fundamental factor while classifying the employment relationships, a factor which in the past could not be used as a legal argument in tribunals: the economic dependence of some pony express was considered before the employment tribunal in 1996¹⁸, but then rejected by the Court of Appeal.

It has been argued that this statutory provision puts the employer in a position of uncertainty, because the law will apply not depending on a choice of the employer himself but rather on the "*aliunde perceptum*" of the worker (Razzolini O. 2011).

This argument, although to be considered at first glance, is not finally convincing for two main reasons: firstly, the employer is in a position to influence the worker's "*aliunde perceptum*" when he determines the results he is expecting from the worker's performance in terms of quality and quantity. Both jobs involving an intellectual profession and jobs that do not involve this¹⁹, can be dealt with by employers who approximately can preview the time to be spent on the task as assigned, on the base of experience, also of others, in the same sector. Unless we are about to consider employers as genuinely unaware about the effort that the work they are requiring is implying in term of mean time - which should not be the case - we can conclude that they can quite easily forecast how much time left the workers will have. What the employer cannot know, actually, is how much the workers are capable to receive from different jobs, perhaps fully different job positions, but this argument can be overcome by introducing a contractual obligation on the workers to inform the employer about their other incomes, in order to benefit from the dependence regime. Secondly, the relative meanwhile uncertainty that would be present in the ongoing relationship has not a different significance from any other uncertainty regarding the economic circumstances that directly might affect, on the other side, the enterprise, and the possibility to dismiss the worker for economic reasons consequently. Thereafter it can be said that such a statutory provision, via the enforcement of more transparency on labour relations in their substantial consideration (remuneration), establishes a tool for the sharing of the labour market risk, which is slightly different from the traditional way of sharing: we do have a sharing of the risk in real time: as the market sets its opportunities and options, there both the employers and the workers can make their choices. It is not the employer who brings upon all risk coming from the market, but it is both the employer and the worker that are sharing in real time the risks, and insofar the worker is fully effectively (economically) dependent, only there he will require more protection. Protection and labour rights can be claimed when facing a pathological circumstance, an extraordinary event, while the condition of the market is part of the regular play.

So far, the obstacle of the employer's uncertainty is not convincing for intellectual professions neither (although the Italian law in 2012 kept out these jobs from the novel): the "preventive approach" following from an Act giving protection to an economic dependence does not pose itself differently if we consider the job of an office secretary or of a gardener from the job of a doctor²⁰. It is not in point, when we speak about labour relations, the autonomy as just naturally connected to the use of science and culture, fully present in the case of a doctor and generally quite absent in the case of a secretary or a gardener. The need that the employer act reasonably and in respect with fundamental rights is not different for all these workers.

¹⁸ Some Italian judicial decisions have given floor to the socio-economic condition of the worker (Pret. Milano, 20 giugno 1986, in RIDL, 1987, II, 76, with comment by Ichino P. See also ICHINO P. (1987), *Libertà formale e libertà materiale del lavoratore nella qualificazione della prestazione come autonoma o subordinata*, in Riv. it. dir. lav., 1987, II, 76.

¹⁹ But the observation is particularly relevant for not intellectual type of jobs.

²⁰ This is confirmed by the fact that is normal to work as a doctor (or a lawyer) both independently and dependently in Italy (in France, for example, a lawyer must choose if working as a self contractor rather than a dependent contractor).

Nor it is convincing the idea that the quantitative index is not granting a stable normative frame: it is not the legal frame to be unstable, it is the reality of the economic relationship, against which the system is supposed to intervene, that might be unstable, while nothing is preventing from a stable type of economic dependence even lasting for years and based on different percentages of income.

It is sure that Italian judges will be far prudent while applying the new law, for the simple reason that the law has been constructed in order to “fully” protect economically dependent workers, while it lacks in term of re-distributing labour rights (positive normative effect).

The Italian judge is still embarrassed while allocating, even fundamental, protections on atypical workers (not strictly dependent according to art. 2094 c.c.): for example, medical doctors working for the National Health Service, just because they are formally not dependent workers according to the label of their contract, can be required to work extra-time beyond the European standards²¹. Again some categories of medical doctors just subjected to severe cuts from the public administration, and thus finding themselves just unemployed, cannot regularly claim their right to unemployment benefits.

If a disposition similar to this new Italian would be statutorily introduced in the UK, it would be easier to refer to such classified workers a reasonable part of the present employment protection (for example a reasonable remedy in case of unfair dismissal). Referring to “a measured level of economic dependency”, arguably would represent a step forward also in the Anglo-Saxon common law indeed.²² This is because it would be given relevance to a factor, amongst the several economic ones, which is the most indicative of a substantial economic dependency. Today the English lawyer cannot make a sense of economic dependence from a comparable percentage of income: the English employee is the one who is considered to be dependent on the base of several factors, amongst which the predominant one is still the exercise of control based on a mutual obligation.

Most of the cases that can be classified as an economic reality test application found their conclusions on indexes like the way the parties have shared the economic risk of the business, or the obligation on the worker not to perform for other employers; now, it can be observed that these latter can more directly be considered as “normative effects”, rather than “facts”, so they are rather useless to avoid an intentional misclassification. In other words, those indicators of an economic dependency are not going deeply into the factual substance of the economic status as the fact of an “ex post” measured income does.

In a recent court of appeal case on workers classification, it has been considered the claim of a lap-top dancer in London²³. She was dismissed by the club where she was supposed to dance, assuming she was involved with drug on the premises (fact that she denied); while the Employment Appeal Tribunal (EAT) found her to be an employee, on the premise that a mutuality of obligation was established, and a sufficient amount of control was in the facts of that case, the Court of Appeal reversed the decision by saying: “that premise (the presence of a mutuality of obligation, n.r.) was not open to the EAT in view of the Tribunal’s findings”²⁴, meaning the EAT should have not gone into the facts as already emerged before the Tribunal. The judge remarked by saying: “Those mutual obligations would constitute a contract but they certainly would not compel the conclusion that it was a contract of employment. The analogy with the caddie was in my view an apt one”.

Easy to say that such a reasoning is a sort of a round about, to conclude that because the mutuality of obligation is an *ex post* verified fact (verified to be not present by the first Tribunal) then, because of the appeal jurisprudence being limited to matter of law, it had no way to state anything in contrast. In order to add some convincing argument on a point of law, connecting to a precedent case, the judge sentenced that the lap-dancer was not an employee just like the caddies for a golf club²⁵ are not.

²¹ See the European procedure for infraction [http://europa.eu/rapid/press-release MEMO-13-470 it.htm](http://europa.eu/rapid/press-release_MEMO-13-470_it.htm)).

²² The problem in such a qualifying definition for being a dependent worker may be that it poses some tackles in assessing the required relative income on short time employment, during less than one year, but in a wished formalised economy, where the relevant exchange of money are recorded, a simple arithmetic proportion would solve the matter.

²³ Stringfellow Restaurants Ltd vs Nadine Quashie 2012 (see at: <http://www.bailii.org/ew/cases/EWCA/Civ/2012/1735.html>)

²⁴ Disposal is: “I would uphold the appeal and restore the finding of the Tribunal that the claimant was not employed under a contract of employment. It follows that the Tribunal has no jurisdiction to hear her claim of unfair dismissal”.

²⁵ See Cheng Yuen v Royal Hong Kong Golf Club, 1998.

A statutory definition on a quantitative factor to rely upon, would have been here much clarifying: if the lap-dancer would have taken the main part of her income from another club or even from one only client meeting her at respondent club, the purpose of protecting her from the club unfair dismissal, would correctly not be risen.

Also this case shows how there is no specific "a priori" political choice in such a technique to develop a legal definition for economic dependence (apart from the consideration of the percentage/proportion that quantitatively can be chosen to establish economic dependence, which does actually imply an economic/political compromise): both conservative and democratic representatives could appreciate the simple and neutral fact which is considered. This is notable when considering the process of accepting politically such change in the law²⁶. It rather seems to be the clearest way to define dependency as it nowadays appears in the labour market all over the Continent, where the so called "open firm" or "de-structured enterprise" still represents the central entity around which personal work contracts continue to be established. The crucial political aspect does rise later, at the moment when the law maker decides consequentially "which kind of normative effects are going to rule" a defined dependent position as such defined.

It is, on another side, questionable whether the major protections addressed today to employees are to be distributed to the larger range of economically dependent workers. Of course this is a huge policy concern, dealing with matters of public finance as well as public social security. To draw a very brief conclusion, since lawyers used to close the circle by imagining a borderline between fundamental rights and rights at will, it can be said that while the point of extending which protection to whom may remain questionable, at the same time the idea of one or more definitional categories capable of extending the scope of fundamental rights to all workers can be supported²⁷. The hardest task is for the politicians.

8. Economic Dependency in the Making of European Law

Even harder could this task be for European politicians, since they must assemble together so many different national wills. But the weakness of national politics is recently giving a lot of strength to European institutions to impose their goals, and this should be taken into particular account nowadays.

They have been suggested some possible paths in order to enlarge the boundaries of labour law and reinvent a discipline that can play its traditional role (a protective role) in the new globalized scenario (Kenner J. 2009). It has been recognized a legal framework "applicable to all those who are economically dependent on another for work, regardless of the type of contract". The more ambitious proposal is to adopt a framework directive, relying also on the outcomes of the 2006 ILO Recommendation n. 198.

According to this proposal it would be up to the Commission to directly set common indicators defining an employment relationship. It is thereafter suggested to use the indicators as listed in the ILO report, which are the most used ones and they would be counted in a combination that would result from a negotiation amongst representatives of the Members States. Amongst these indicators should be the inclusion of a measurable economic dependency, as already in force in some national specific legal provisions or at least proposed legal provisions.

The effectiveness of the directive would be reliant on specification and clarity of the norm, precisely over the link existing between the legal category used to name a dependent worker, the factual elements that make its content (the personal scope of the law) and the legal consequences deriving from it (the normative effects).

²⁶ Still, it is politically to be considered as a sign of a "state intervention" into the contractual employment agreement.

²⁷ This approach is the same that pragmatically the European judges have adopted while applying fundamental European rights to workers: they have an open wide category for fundamental rights but dispose a restricted personal scope in case of specific protections (es. Transfer of undertakings Directive). It is known that whenever dealing with fundamental European law (unfortunately to be considered binding only for few aspects like freedom of movement for services and persons), any worker who is involved must be intended in the broadest meaning, going beyond the duality between subordinated and autonomous workers. The personal scope of European law is quite more restricted in case of specific protections, such as rights in the event of a transfer of undertaking instead. About the variety of the possible definitions of workers according to the European Law see Giubboni S. (2009) *La nozione comunitaria di lavoratore subordinato, in Il Lavoro subordinato* (a cura di S. Sciarra - B. Caruso) Giappichelli, 2009, 35. For the leading case on the meaning of worker see Case Lawrie Blum, European Court of Justice, 3 July 1986, C-66/85.

It is here important to consider the nature of legal presumptions as contained in such norms.

There could be “relative” or rebuttable presumptions, which imply that being it present, in a given case, a factual element (eg. type of remuneration), that element must be considered by the judge as the proof of a dependent employment, but any contrary proof can be given nonetheless to demonstrate a different scenario²⁸. Then, there could be “absolute” presumptions, according to which the law maker fixes the decision over certain elements of fact to found the nature of the contract, and any contrary proof that lawyers might give to demonstrate a different nature would be irrelevant. In other words, an absolute presumption obscures any other factual element even that showing an appreciable independent kind of working contract (Patti S. 2007). The problem with absolute presumptions is that they collapse with the inderogable nature of the main part of labour law, paradoxically with the essence of labour law, a discipline which protects the dependent worker from vulnerability. It could be that, in a particular case, the worker is not vulnerable at all. It is the case, to give an example, of one Italian “a progetto worker” to whom the employer might have accorded stability for at least three-four years, who was paid a high amount of money, assured against damages in case of dismissal before the three years etc. It is the typical situation of highly skilled workers or of some managers.

The inderogable nature of a ruling concerning the employment relationship frequently emerged also from a European perspective. This is why the European Court of Justice has declared the national provisions in France and Greece about absolute presumptions of dependent work for specific categories of workers to be in contradiction of the fundamental European right to free movement²⁹.

There after, we cannot rely upon a legal definition for a complete solving of issues regarding classification of dependent workers, not at a national level, nor at a European level. Nevertheless the proposed provision would be very useful, correctly driving the judicial activity and giving uniformity in interpretation of many cases. Such an awareness could be amongst the motivations for activation by the European Parliament: see European Parliament Resolution in 2014, January 14th, regarding “Social Protection for all, including self-employed workers”.

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²⁸ A particularly far-reaching presumption applies in the Netherlands. There, a person performing work for the benefit of another person against remuneration for at least three consecutive months, on a weekly basis, or for no less than twenty hours per month is presumed to perform such work pursuant to a contract of employment.

²⁹ See ECJ, C- 398/95, Sent. 5th June 1997 ; C-255/04, Sent. 15th June 2006.

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