

## **The Subjects of Labor law: “Employees” and Other Workers**

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### **I. Introduction**

Who is an employee? Which workers ought to be covered by the protective panoply offered by labor law? These are questions with a long history. Courts all over the world have been struggling with these issues since the beginning of modern labor law, approximately a century ago, but variations of the same question have been troubling courts for several centuries beforehand. Laws regulating the labor market usually give rights to “employees” without defining this term. Frequently confronted with the need to decide if one can claim such labor/employment rights or not, courts had to develop tests and indicia to assist in this task and provide guidance to employers and workers. Those tests have developed over the years. Occasionally, the legislature has also sought to take the lead in this area by introducing specific legislation aimed at recognizing labor rights to particularly defined categories of “employees” or “workers”. One useful way to approach this topic is accordingly by way of an historical analysis (Linder, 1989; Deakin and Wilkinson, 2005).

As in many other fields, the law on “who is an employee” has not always been consistent and coherent. It is therefore extremely valuable to examine the law (especially case-law) of one legal system deeply and expose inconsistencies, shortcomings in application and hidden goals/assumptions. Such a descriptive/analytical/critical approach to study this problem has also been very useful (Freedland and Kountouris, 2011; Fudge, Tucker and Vosko, 2002).

“Who is an employee” is also a question with a heavy normative baggage. A decision on “employee” status usually determines if one is entitled to a significant package of rights or to no protection at all. It establishes a line between a group of workers who enjoy substantial regulatory support, and a group who has to accept the dictates of market forces. Developing and applying tests to decide who is an employee is therefore equal to deciding the scope of labor law, which obviously necessitates an engagement with the normative foundations of this field. To determine the scope of labor law, one needs to have a clear view about its goals and justifications. Another useful way to approach this topic is therefore through a normative analysis (Davidov, 2002).

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In the current contribution we take a different perspective – comparative – but this could prove useful for all the other perspectives mentioned above as well (Veneziani, 1986; Hepple and Veneziani, 2009). Our aim is to highlight similarities and differences between different legal systems. This cross-national analysis can in turn assist the national analyses. Understanding how others have been approaching the same problem can help us better understand our own legal system, including in terms of its historical development and in identifying shortcoming, inconsistencies and hidden assumptions. Understanding to what extent the problem and solutions are universal can also assist us in identifying the normative foundations behind the law.

We are aware, of course, of the difficulties in comparing different labor law regimes. It seems, however, that such difficulties are not very pronounced in the specific context of determining who is an employee. Because this question is so fundamental – deciding who gets to enter through the gates of labor law – the answer is not strongly dependent on complex characteristics of the labor law system itself (at least compared with other labor law problems). Nonetheless, being sensitive to this concern, we focus our attention in this chapter on legal systems we feel reasonably familiar with: UK, USA, Canada, Italy, France, Spain and Israel – with some (more minor) references to other legal systems as well.

The chapter proceeds as follows. Part II provides a brief overview of the tests used in different countries to decide if one is an employee (and covered by labor law), showing some points of diversity but for the most part significant similarities, with a trend towards greater convergence. The chapter then turns to examine some relatively recent developments in different legal systems through three prisms. First we discuss the response in different countries to employers’ evasion attempts (Part III). We show how in some systems courts and legislatures remain inactive in the face of evasion, and the stagnation of the law leaves room to massive misclassification of employees as independent contractors. In other countries, on the other hand, creative solutions have been used to contain or minimize this problem. Next we consider the dialogue between the judiciary and the legislature in determining who is an employee (part IV). We show how in some countries, judicial approaches to the problem have triggered a legislative response, while in others the legislature remains silent, possibly to signal approval or simply out of disinterest. Finally, we examine the breaking of the binary divide between employees and independent contractors (part V). We show that a third (intermediate) category has been added in an increasing number of countries, as a response to similar problems in classifying workers who share only *some* of the characteristics of employees. In the conclusion (part VI) we return to reflect on the issues of diversity vs. convergence, in light of the developments discussed in the previous parts.

## **II. Between Diversity and Convergence**

The basic structure of the “employee” category is similar across the different legal systems we have surveyed, and includes three pillars. First, the term appears in

legislation but its definition (if there is one at all) leaves broad room for judicial discretion.<sup>1</sup> Courts have accordingly stepped in and developed tests and indicia – which they apply to decide if one is an “employee” or not (For a comparative overview see Casale, 2011, especially chapter 2). Second, although the employment relationship is contractual, the agreement of the parties concerning the status of “employee” is not determinative (ILO, 2005, at 7). Sometimes courts do show a degree of deference to contractual stipulations – and there are important differences between legal systems in this respect, which we discuss shortly – but it is generally understood that the mere agreement of an employee to be considered an independent contractor cannot be sufficient reason to deprive her of employment rights. Third, courts use multi-factor tests, which include a number of components neither of which is determinative in itself (Casale, 2011, at 54-57). The idea is to consider all the factors together and make a decision based on the picture emerging from the cumulative evidence. Sometimes the examination is formulated as a two-stage test, the first stage including some *necessary* preliminary requirements, for example an agreement of work for pay, and the performance of work personally. However even those requirements are understood to have exceptions in most countries (for example, getting occasional help from someone does not preclude the possibility of a contract to perform the work personally;<sup>2</sup> and the fact that one was not paid still leaves open the possibility that he was *supposed* to get paid<sup>3</sup>).

As far as this general structure is concerned, the main area of divergence concerns the weight attributed to the contract. In some countries the contractual terms – almost always drafted by the employer – play no role in determining the status of “employee”. If the facts of the relationship appear to contradict what is written in the contract, then the contract is simply ignored (ILO, 2005, at 24-25). This approach is based on the understanding that there is inequality of bargaining power between the parties, or at least market failures that systematically favor the employer, coupled with the fact that employment regulations are costly for employers, creating a strong incentive to try to evade them. Under these circumstances, deference to the contract means that employers are given the power to unilaterally escape their legal responsibilities. In other legal systems an employer enjoys a presumption in favor of the status agreed in the contract, however this can be rebutted if the facts suggest otherwise. In practice, in Israel for example, such presumptions have not been very meaningful; courts tend to examine the facts and usually ignore the written contract.<sup>4</sup>

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<sup>1</sup> Cf. e.g. the UK Employment Rights Act, 1996, c. 18, § 230(1)-(2); the Italian Civil Code, Codice civile [C.c.], Art. 2094; the French Labor Code, CODE DU TRAVAIL [C. TRAV.] art. L. 1211-1; the Indian Industrial Disputes Act, 1947, s. 2(s); and the Japanese Labor Standards Law, Article 9; though compare the broader definition contained in the South African Labor Relations Act 66 of 1995 § 213, or in the Irish Industrial Relations Act 1990 (Act No. 19/1990), s. 23.

<sup>2</sup> See, e.g., *James v. Redcats (Brands) Ltd*, [2007] UKEAT 296 (I.R.L.R.).

<sup>3</sup> See, e.g., *Sarugi v. The National Insurance Institute* 39 PDA 686 [2001] (Isr.).

<sup>4</sup> See, e.g., *Issac v. Tahal* 36 PDA 817 [1998] (Isr.).

The UK is notable for taking a different route, at least until recently, with courts showing significant degree of deference to the written contract. Although it has been long recognized that “sham” arrangements will not be enforced, the burden of proving a “sham” has been traditionally extremely high (Davies, 2009; Bogg, 2012). In many cases over the years, British courts have tended to favor contractual stipulations over the true nature of the relationship, which even from the judgments themselves can be seen to be entirely different.<sup>5</sup> Notably, the specialized employment tribunals have been more sensitive to the discrepancy between contract and reality,<sup>6</sup> but this approach has been consistently rejected by the higher courts for many years.<sup>7</sup> Very recently, however, there seems to be a positive change of heart among British judges. In a recent case the Court of Appeal noted that “the focus of the enquiry must be to discover the *actual* legal obligations of the parties. To carry out that exercise, the tribunal will have to examine... evidence of how the parties conducted themselves in practice”,<sup>8</sup> and the Supreme Court concluded that “[t]he question in every case is... what was the *true agreement* between the parties”<sup>9</sup> and even added that “the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part”.<sup>10</sup> It remains to be seen whether this trend will continue, but there are certainly signs that the UK is heading towards greater convergence with other countries in this respect.

In terms of the tests themselves, there is some variation in the number of tests (factors, indicia) used in different countries and their exact articulation. For example, in Canada courts sometime refer to a “fourfold test”,<sup>11</sup> while in the U.S. courts prefer a 13-factor test or even a 20-factor test.<sup>12</sup> The ILO Recommendation concerning the

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<sup>5</sup> For a recent example, see *Stringfellows Restaurants Ltd v. Quashie* [2012] EWCA Civ. 1735, [2007] UKEAT 296 (I.R.L.R.).

<sup>6</sup> The President of the Employment Appeal Tribunal, Elias J., noted in *Consistent Group Ltd v. Kalwak* [2007] UKEAT 560 (I.R.L.R.) [57]-[58]: “The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship... In other words, if the reality of the situation is that no-one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship.”

<sup>7</sup> See, e.g., *Consistent Group Ltd v. Kalwak* [2008] EWCA Civ. 430, 505 (I.R.L.R.).

<sup>8</sup> *Protectacoat Firthglow Ltd v. Szilagyi* [2009] 835 (I.C.R.), [2009] 365 (I.R.L.R.) [53] (emphasis added).

<sup>9</sup> *Autoclenz Ltd v. Belcher* [2011] 4 745 (All ER), [2011] 820 (I.R.L.R.) [29] (emphasis added).

<sup>10</sup> *Ibid.*, at [35].

<sup>11</sup> Following the Privy Council decision in *Montreal v. Montreal Locomotive Works Ltd* [1947] 1 (D.L.R.) 161. The four factors are control; ownership of the tools; chance of profit; risk of loss.

<sup>12</sup> *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992). (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), for the 13-factor test, and mentioning the

employment relationship lists 14 factors.<sup>13</sup> Some countries put most emphasis on “control”, while others refer to “integration” and yet others to “subordination”. But notwithstanding such variations, the tests are surprisingly similar across jurisdictions (For longer comparative reviews, see Davidov, 2002; Countouris, 2007, at 57-83). Courts in different countries ultimately ask two general questions. First, to what extent is the worker under the control of the employer (or: subordinated to the employer; or: integrated into the business of the employer). The stronger the signs of control/subordination/integration, the more one is likely to be considered an employee. Second, to what extent is there evidence that the worker operates through an independent business (or, conversely, is dependent on the specific employer). The stronger the signs of independence, the less likely is one to fall within the coverage of labor law. The various factors seem to be directed – even if usually not explicitly – at assisting these two general investigations. Most courts give more emphasis to the issue of control (integration, subordination). But the degree of economic dependence is also usually examined – if not explicitly, then at least implicitly. Indeed, over the years there has been some movement, in many countries, towards greater emphasis on this second test – at the very least in the sense of examining the investment in tools, the risk of loss and chance of profit, and similar indicia of economic independence.

But these commonalities aside, judiciaries in different legal systems will tend to assign to particular tests or indicia a greater weight. The tests themselves leave broad room for judicial discretion, so it is hardly surprising that there are significant variations in the way these tests have been applied in different countries. As recently noted by the Labor Court of Johannesburg, these tests are, perhaps inevitably,

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IRS 20-factor test). The 13 factors are: “In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.”

<sup>13</sup> Employment Relationship Recommendation (2006), Article 11(b): “Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include: (a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker’s availability; or involves the provision of tools, materials and machinery by the party requesting the work; (b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker’s sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.”

“qualitative rather than quantitative. [T]he nature of the relationship cannot be determined simply by comparing the number of indicators for and against the existence of an employment relationship [...] some indicators necessarily tell us far more about the substance of the relationship than others”.<sup>14</sup> So for instance in recent years UK court have somewhat favored the tests of “mutuality of obligations” and control over other tests such as the “integration test” or the “economic reality test”. In *Stephenson v Delphi Diesel Systems*, Elias J (as he then was) opined that “The significance of mutuality is that it determines whether there is a contract in existence at all. The significance of control is that it determines whether, if there is a contract in place, it can properly be classified as a contract of service, rather than some other kind of contract [...] The only question then is whether there is sufficient control to give rise to a conclusion that the contractual relationship which does exist is one of a contract of service or not”.<sup>15</sup>

These judicial attitudes are often the consequence of different legal and jurisprudential traditions, but this does not mean that the various legal systems are irremediably tied to a process of path dependence, and legal and doctrinal changes can often lead to significant path departures. For instance in 2012 Elias LJ (as he had now become), elaborated on his opinion in *Stephenson*, quoted above, noting that

“on reflection, it is clear that the [last sentence quoted above] is too sweeping. Control is not the only issue. Even where the work-wage relationship is established and there is substantial control, there may be other features of the relationship which will entitle a tribunal to conclude that there is no contract of employment in place even during an individual engagement. *O’Kelly* and *Ready Mixed* provide examples”.<sup>16</sup>

A further powerful example of both the ‘path-dependence’ and ‘path-departure’ dynamic, and the occasional influence of doctrinal developments, can be provided by a string of recent South African judgments. In 2004, Benjamin noted that a “seminal article written by Sir Otto-Kahn Freund, persuaded [South African courts] to reject the ‘control’ test and adopt the approach that an employee is someone who is part of the employer’s business... usually referred to as the ‘organization’ or ‘integration’ test” (Benjamin, 2004). As a consequence of this, ever since *Smit v Workmen’s Compensation Commissioners*, South African jurisprudence in this area of labor law had been effectively dominated by the so-called “dominant impression” test.<sup>17</sup> The

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<sup>14</sup> *Kambule v. Commission for Conciliation Mediation and Arbitration and Others* 2013 (721/10) ZALCJHB 11 (JR).

<sup>15</sup> [2003] 471 (I.C.R.) [11]-[14].

<sup>16</sup> *Stringfellows Restaurants Ltd v. Quashie* [2012] EWCA Civ. 1735, [2007] UKEAT 296 (I.R.L.R.) [14].

<sup>17</sup> *Smit v. Workmen’s Comp.*, App. Bd., 69 Cal.2d 814 (1979); more recently considered in *SA Broadcasting Corporation v. McKenzie* 1999 (20) ILJ 585 (LAC). and *Somerset West Society for the Aged v. Democratic Nursing Organisation of SA & others* 2001 (22) ILJ 919 (LC).

test invited adjudicators to consider all aspects of the contract, without limiting themselves to ascertaining the existence of a right of supervision or control, that was not seen as the conclusive element of the employee relationship. This test was strongly criticized by a number of academic authors, including Benjamin (*ibid* at 791) and Brassey (1990, at 919). More recent court decisions engaged with this line of scholarship with the Labor Court of Appeal expressly endorsing Benjamin's critical analysis<sup>18</sup> and suggesting that:

“[12] ... when a court determines the question of an employment relationship, it must work with three primary criteria:

1. An employer's right to supervision and control;
2. Whether the employee forms an integral part of the organisation with the employer; and
3. The extent to which the employee was economically dependent upon the employer.”<sup>19</sup>

As noted above though, these national variations do not result from any major distinctions in the tests themselves. It is mostly a difference of practice, not a difference in theory.

It is interesting to note that most courts usually refrain from direct reference to the law in other countries, and appear to develop the law independently of concurrent developments elsewhere. There is however a certain degree of explicit cross-fertilization between various common-law jurisdictions with strong historical and legal links to the law of England and Wales.<sup>20</sup> Also small countries may be more open to learning from the experience of other jurisdictions.<sup>21</sup> When reference to the law of other countries is made explicitly, the trend towards convergence is obviously expected.<sup>22</sup> But, to a certain extent, this trend appears to be strong even in the absence of direct references. In some cases, the adoption of lessons from other countries is mediated through academics: the South African Court, for example, relied on

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<sup>18</sup> *State Information Technology Agency (Pty) Ltd v. Commission for Conciliation, Mediation & Arbitration & others* 2008 (7) BLLR 611 (LAC) at para. 10-11.

<sup>19</sup> *Ibid.*, para. 12.

<sup>20</sup> See, e.g., the Indian Supreme Court judgment in *Workmen of Nilgiri Coop Mkt Society Ltd v. State of Tamil Nadu & Ors* (2002) 101 F.L.R. S.C 137 (2004); the Federal Court of Australia judgment in *Wilton & Cumberland v. Coal & Allied Operations Pty Ltd* (2007) 161 FCR 300; and the New Zealand Employment Court judgment in *McDonald v Ontrack Infrastructure Limited* [2010] NZEMPC 132.

<sup>21</sup> In Israel, the seminal National Labour Court case setting the tests for “who is an employee” relied on a broad comparative survey; see *Netanya Municipality v. Birger* 3 PDA 177 [2001] (Isr.).

<sup>22</sup> Cf. *Wilton & Cumberland v. Coal & Allied Operations Pty Ltd* (2007) 161 FCR 300.

Benjamin when shifting emphasis to economic dependency; Benjamin himself relied to some extent on the laws of other jurisdictions.

### III. Between Stagnation and Creativity: Responding to Evasion Attempts

Employers often try to evade the costs associated with labor laws. One common method of doing so is by misclassifying employees as independent contractors (or some other group that does not enjoy labor laws). This is a global problem (on misclassification in the US, for example, see the various reports cited in Rubinstein, 2012). However the extent of the problem – its severity – depends on the reaction from courts and legislatures. If the response is swift and decisive, the practice of misclassification will wither. Employers might turn to other methods in further attempting to evade costs (for example, employment through temporary employment agencies), but closing the specific route is surely meaningful. Arguably, it sends a strong message to employers and lowers the level of evasion.

The first line of defense when a new practice of evasion comes to light is usually the judiciary. In Israel, for example, labor courts have been quite successful in their efforts to curtail massive misclassification during the 1990s. Arguably they have been slow to realize the severity of the problem – the extent of the phenomenon. But once realized, some clear signals were sent to employers. It was made clear that the tests will not be applied formalistically and not much weight will be given to the written contract. In borderline cases the courts gave preference to the workers. And they gave remedies that made the price of misclassification (when averted) high.<sup>23</sup> French courts have policed extremely effectively the boundary of their domestic ‘binary divide’ between employment and self-employment, often expressly reclassifying work arrangements that all parties involved had long accepted as being of an autonomous and self-employed nature.<sup>24</sup>

Italian courts have also refined their jurisprudence on the concept of subordination in order to render it more inclusive and contrast some of the centrifugal tendencies produced by what Hugh Collins famously described as the vertical disintegration of employment protection laws (Collins, 1990). An example is the introduction of the notion of “*subordinazione attenuata*”, to contrast “the evolution of the systems of organization of labor, increasingly characterized by the tendency to outsource or

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<sup>23</sup> Specifically, Israeli courts award back wages and benefits and usually refuse to subtract benefits enjoyed because of the independent contractors status (for example tax benefits, sometime also higher wages). See, e.g., Issac case, above note 4. Admittedly, employers were quick to resort to alternative evasion methods, and this time the courts were much slower in responding, unfortunately.

<sup>24</sup> A good example is offered by the ‘Ile de la Tentation’ litigation, Cour de Cassation (Soc.), Arrêt n° 1159 du 3 juin 2009 (08-40.981 à 08-40.983 / 08-41.712 à 08-41.714). It should be noted that French law allows for a “requalification” of a contract for work even in the absence of the employer’s intention to “dissimulate” a contract of employment under the French Labor Code, CODE DU TRAVAIL [C. TRAV.] art. L. 8221-3 et L. 8221-5 (Fr.).



tertiarize whole sectors of the cycle of production or series of specific professional skills [where] subordination becomes less and less significant, because of the impossibility of exercising full and direct control over the different phases of the activity performed”.<sup>25</sup> The Italian Court of Cassation, in a more recent decision, noted that “every human activity is susceptible of being subsumed into both an autonomous employment relationship and a subordinate one ... [and that] some relationships present by their very nature an attenuated subordination [and] that subordination ... is not always visible with the same intensity or the same modality in all relationships”, eventually re-qualifying a freelance translator into a dependent employee.<sup>26</sup>

In a parallel trend, the Court of Justice of the European Union (CJEU) has become increasingly active in ensuring that the labor law protections bestowed to EU Member States’ workers by European directives were actually enjoyed by their addressees. Where it perceived that some national legal systems were in effect depriving some of their workers of these rights by misclassifying them as “self-employed” persons, or as workers employed under *sui generis* work relations, it has boldly asserted that “the formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of [EU law] if his independence is merely notional, thereby disguising an employment relationship”,<sup>27</sup> and that “the *sui generis* legal nature of the employment relationship under national law cannot have any consequence in regard to whether or not the person is a worker for the purposes of European Union law”.<sup>28</sup> In effect, in these cases, the CJEU, while refraining from labeling these domestic arrangements as “shams”, has superimposed an EU reclassification resulting in their falling within the protective coverage of EU employment protection laws. In some more recent judgments it went even further by suggesting that, even in those cases where it is ultimately for national referring courts to determine whether a domestic worker is also a worker for the purposes of EU law, “The Court may, however, mention to the referring court a number of principles and criteria which it *must take into account* in the course of its examination”.<sup>29</sup>

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<sup>25</sup> Cf. for instance Cour de Cassation, July 6, 2001, No. 9167 (Fr.), introducing the concept of ‘attenuated subordination’ to include within the scope of labor law a journalist.

<sup>26</sup> Cour de Cassation (Soc.), Mar. 3, 2009, Bull. civ. V, No. 5080 (Fr.).

<sup>27</sup> Case C-256/01 *Allonby v Accrington & Rossendale College* [2004] E.C.J. I-873, para. [71].

<sup>28</sup> Case C-428/09 *Union Syndicale Solidaires Isère v Premier ministre and Others* [2010] E.C.J. I-9961, para. [30].

<sup>29</sup> Case C-393/10 *O’Brien v Ministry of Justice* [2012] 2 C.M.L.R. 25, para. [43] (our emphasis). The application of these criteria resulted in the UK Supreme Court declaring that a UK part-time judge had to be considered a worker for the purposes of the UK Part-time Workers (Prevention of Less Favourable Treatment) Regulations, 2000, S.I 2000/1551, (U.K.), implementing EU Framework Agreement on Part-Time Work Directive 1997/81, 1997 O.J. (L 14) 9 (EC). Cf. *O’Brien v. Ministry of Justice* [2013] UKSC 6, [2008] EWCA Civ. 1448.

In other jurisdictions, courts have not acted decisively enough to curtail misclassification, though occasionally the legislature has stepped in. In the UK, the introduction of the “worker” category in labor laws since the 1990s – and most notably in the National Minimum Wage Act 1998 – was partly designed to extend the coverage of a number of employment laws beyond the traditional “employee” category, which courts had construed narrowly and in a way that excluded ‘for example, those working under certain agency arrangements, or individuals who, while not having a contract of employment with an employer, work exclusively for that employer over a period of time without the freedom to select another “customer” for their services – as they would be able to do if they were genuinely self-employed’ (Department of Trade and Industry, 1998). The goal of this new category was to bring the numerous excluded workers back into the scope of protection. It is not clear, however, whether this can be seen as a success, given the fact that courts have interpreted the new category quite narrowly as well. We discuss this further in the next part.

In other countries, however, both courts and legislatures have failed to respond to misclassification. Such stagnation of the law leads to further exacerbation of the problem. The law in the U.S. varies across States, but overall it appears that response has been quite muted (Rubinstein, 2012).

An important element associated with creative response to evasion appears to be the reliance on a purposive approach to interpreting the term “employee”. Some courts have explicitly mentioned the need to be mindful to the purpose of the law in this context. Interestingly, the US Supreme Court was perhaps the pioneer when adopting a purposive approach in this context in the 1940s, which led to the adoption of an “economic reality of dependence” test.<sup>30</sup> This test is still being used in the US in some contexts,<sup>31</sup> but the Supreme Court curiously backed away from the purposive approach, noting in the early 1990s that without contradictory direction it should be presumed that Congress intended to adopt the traditional “common law” test.<sup>32</sup> This makes it difficult to respond to evasion attempts. In contrast, courts in other countries are increasingly turning to the purposive approach, explaining that the term “employee” should be given a meaning that will best advance the goals of the law(s)

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<sup>30</sup> The “economic reality” test includes the following factors: (1) control as to the manner in which the work is to be performed; (2) opportunity for profit or loss; (3) investment in equipment or materials; (4) whether the service rendered requires a special skill; (5) the degree of permanency and duration of the working relationship; and (6) the extent to which the service rendered is an integral part of the employer’s business. See *United States v. Silk*, 331 U.S. 704, (1947); *Secretary of Labor v. Lauritzen*, 835 F.2d 1529, (7<sup>th</sup> Cir., 1988).

<sup>31</sup> The US courts use the “economic reality” test in the context of the Fair Labor Standards Act, 29 U.S.C. § 201 (1938); the “common law” (13-factor) test in interpreting the National Labor Relations Act, 29 U.S.C. § 152(3) (1935), as well as Title VII (workplace equality) cases; and sometime a “hybrid” test.

<sup>32</sup> *Nationwide Mutual Insurance*, above note 12.

using this term.<sup>33</sup> So far this has not led to any changes in the tests themselves, but it can certainly have an impact on the way they are being applied – generally in the direction of including more workers within the category of “employees”. For example, in Israel people holding elected office and receiving a salary from the State have been considered in the past not to be employees – but more recently as a result of purposive analysis courts have granted them at least *some* employment-related rights.<sup>34</sup> And in the UK, Clarke LJ of the Supreme Court recently rejected the position that denied workers their rights because of the written contract terms, adding that “[t]his may be described as a purposive approach to the problem. If so, I am content with that description.”<sup>35</sup>

The purposive approach appears to be helpful for courts interested in developing the law in light of new evasion techniques. It assists courts in realizing when the purpose of the legislation is frustrated and new solutions are needed, thus fostering creativity and preventing stagnation.

#### IV. The Courts-Legislature Dialogue

When legislatures use open-ended terms, designed to give courts broad room for discretion, it is hardly surprising that sometimes they will not like the result. In such cases it is perfectly legitimate for the legislature to amend the legislation in a way that will steer the courts in what it considers to be the right direction.

A dramatic example can be found in the Taft-Hartley Act of 1947, in which the US legislature reacted to a series of Supreme Court judgments from 1944 through 1947.<sup>36</sup> The judgments adopted an “economic reality of dependence” test instead of the “common-law agency” (control) test to ascertain employee status. The Republican-controlled Congress was not happy with this interpretation, which it considered an unwarranted expansion of the scope of labor laws.<sup>37</sup> The definition of “employee” in the National Labor Relations Act was amended to explicitly exclude “independent contractors”.<sup>38</sup> This was somewhat peculiar because the judgments in question clearly maintained the exclusion of independent contractors (Linder, 1989, at 191-2); however the obvious intention was to create a narrower scope for the concept of “employee”, and restore the emphasis on control, as opposed to economic

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<sup>33</sup> See, e.g., *Pointe-Claire (City) v Quebec* [1997] 1 S.C.R. 1015 (Can.) (Supreme Court of Canada); *Sarusi v. National Labor Court*, 52(4) PD 817 [1995] (Isr.) (Supreme Court of Israel); *Konrad v Victoria Police* (1999) 165 ALR 23 (Federal Court of Australia); *Autoclenz Ltd v. Belcher* [2011] 4 745 (All ER), [2011] 820 (I.R.L.R.) (Supreme Court of the UK).

<sup>34</sup> *Sarusi*, above note 33.

<sup>35</sup> *Autoclenz Ltd v. Belcher*, above note 9, at [35].

<sup>36</sup> Most notably see *NLRB v. Heart Publications Inc.*, 322 U.S. 111 (1944); *United States v. Silk*, 331 U.S. 704 (1947); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

<sup>37</sup> For a detailed and useful discussion see Linder, 1989, at 185-211.

<sup>38</sup> National Labor Relations Act, 29 U.S.C. § 152(3).

dependence.<sup>39</sup> Marc Linder has argued that the main reason for this amendment was to “confine the scope and power of unions”, quite apart from the specific issue at hand (Linder, 1989, at 201). Importantly, the same legislation also excluded “supervisors” from the definition of “employee”, thus further narrowing the protected group. Similar amendments were made during the same period in social security regulations (overriding a Presidential veto) (*Ibid*, at 203-8).

In principle, it has been legitimate for Congress to direct the Court at the time by amending the legislation. However this does not mean that the dialogue cannot continue. As times change, judges should rethink old interpretations, in light of new realities. Moreover, the intentions of some members of Congress during the 1940s do not say anything about the intentions of current members of Congress who choose to keep the law as it is. Courts would be wise to interpret the law in light of its general purpose, not in accordance with specific intentions of the historic legislature. It is unfortunate, therefore, that the U.S. Supreme Court neglects to continue this dialogue. Instead of rethinking old interpretations and adapting the law – something which Congress always has the ability to respond to – the Court expressed preference for a stagnant interpretation. Dramatic changes in labor markets and employment practices notwithstanding, the “common law of agency test” – in the same conservative form – remains the controlling test for setting the boundaries of protection.<sup>40</sup> This unfortunate conclusion ignores the fact that the legislation does not set specific detailed tests, but rather leaves broad room for discretion for the judiciary to develop tests – and implicitly, change them from time to time.

The clash between a progressive court and a conservative legislature described above is not very common. In the last few decades the U.S. Supreme Court has a much more conservative tilt. But legislatures can certainly be unhappy with judicial interpretations from the other direction as well. In the UK, for example, when New Labor came to power during the 1990s, it sought to introduce a limited number of new labor laws, such as the National Minimum Wage Act 1998 or the Working Time Regulations 1998, which were explicitly extended to all “workers”, a concept explicitly defined to be broader than “employee”. No less importantly, the personal scope of application of important areas of labor regulation such as anti-discrimination law has traditionally been broader than the one defined by reference to the subordinate “employee” concept. Reflecting a practice that dates back to the 1970s UK equality laws,<sup>41</sup> the Equality Act 2010 applies to “employment under a contract of employment, a contract of apprenticeship *or a contract personally to do work*” suggesting that equal-treatment protection ought to apply beyond the narrow confines

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<sup>39</sup> *NLRB v. United Insurance Co.*, 390 U.S. 246, 254 (1968).

<sup>40</sup> *Nationwide Mutual Insurance*, above note 12. And see Linder, 1999.

<sup>41</sup> Cf. For instance Equal Pay Act, 1970, c. 41, § 1(6) (U.K); Sex Discrimination Act, 1975, c. 65, § 82 (U.K).

of the “contract of employment”.<sup>42</sup> This is no doubt equally well reflected by supranational instruments such as EU Directive 2000/78, prohibiting discrimination in relation to “conditions for access to employment, *to self-employment or to occupation*, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion”.<sup>43</sup> Arguably, the reference to such broader concepts represents at least to some extent discontent with judicial interpretations setting a relatively narrow scope of protection.

A more radical attempt to pre-determine the scope of labor legislation involves setting specific detailed criteria – in effect, replacing the open-ended “standard” with a “rule”. This means that judicial discretion is significantly narrowed, and the problem of indeterminacy is minimized. The price, however, could be high, because a strict rule is easier to work around, and does not take into account new forms of employment that might emerge. This can perhaps explain why such attempts are not common. In Germany, between 1999 and 2002, there was an attempt to create a clear-cut list of indicia for the term employee in the social security context.<sup>44</sup> In Spain, a similarly prescriptive definition was introduced by Ley 20/2007, of 11 July 2007 for the newly introduced intermediate group of ‘*trabajadores autónomos económicamente dependientes*’ (self-employed but economically dependent workers, often referred to as “TRADEs”). Article 11 of the Law defines these workers by reference to a number of fairly detailed and prescriptive criteria, including, that of receiving from a single “client” at least 75 per cent of their income (Fudge, 2010; Sanchez Torres, 2010). However, according to the Spanish organization *Unión de Asociaciones de Trabajadores Autónomos y Emprendedores*, in 2012 only 2.5 per cent of all Spanish ‘TRADEs’ were covered by the fairly extensive protections afforded by the Law of 2007 (UATAE 2012).

Another way for legislatures to limit the discretion enjoyed by the judiciary in classifying employment relations is by laying down a number of – typically rebuttable – legislative presumptions for classifying as dependent workers (or anyway subject to the scope of application of employment law) a number of typologies of workers or work relations that may otherwise struggle to satisfy the standard indicia of subordination employed by judges. The best example of this strategy is arguably provided by the various “*présomption de salariat*” contained in the French Labor Code in respect of, for instance, journalists (Article L7112-1), performing artists (Article L7121-3), models (Article L7123-3), or door-to-door salespersons (Article

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<sup>42</sup> Though this initial ambition may have been diminished by the UK Supreme Court judgment in *Jivraj v. Hashwani*, [2011] UKSC 40, [2010] EWCA Civ. 712.

<sup>43</sup> Council Directive 2000/78, art. 3(1)(a), Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16 (EC). Our emphasis.

<sup>44</sup> Initiated with the adoption of Law N. 3843 of 28 December 1998. See the analysis by Däubler, 1999. On the changes of this definition, see the critical commentary in Wank, 2005.

L7313-1).<sup>45</sup> Another system that has experimented with legal presumptions is the Dutch one. The Flexibility and Security Act of 1998 modified Article 7:610a of the Dutch Civil Code and introduced the legal presumption whereby if a worker has worked on a regular basis for his or her employer for a period of three months (or at least 20 hours a month), then a contract of employment is automatically presumed (Frans, 2011). It should be noted that this highly effective method of dealing with the intricacies of classification has been endorsed and encouraged by the International Labor Organization,<sup>46</sup> though few systems appear to have embraced it (International Labor Organization, 2007, at 27-29).

Another way for legislatures to correct judicial mistakes – or respond to the problems of misclassification and indeterminacy concerning “employee” status – is by granting the government the power to make “corrections” in regulations. A number of countries have added such powers into labor laws. Usually the Minister in charge of the law is allowed to issue an order determining that a specific group of workers shall be *deemed* to be “employees”, even if they do not appear to share the regular characteristics. An example of this approach could be found in the Dutch regulation produced after the recent liberalization of postal services “which provides that the post companies must make use of a contract of employment for their workers, unless a collective agreement is made which satisfies the conditions mentioned in the regulation” (Frans, 2011). Unfortunately, however, it appears that such orders are rarely issued. In theory s. 23 of the UK Employment Relations Act 1999 confers a similar, and if anything broader, power to the Secretary of State to provide by order ‘that individuals are to be treated as parties to workers’ contracts or contracts of employment’. But after a short consultation in 2002 (Department of Trade and Industry, 2002) the Labor government decided not to avail itself of these powers.

## V. Breaking the Binary Divide: Intermediate Groups

A final important development which we wish to discuss here concerns the introduction of intermediate groups, in-between “employees” and “independent contractors”. In some countries – notably Germany, Italy, Sweden and Canada – an intermediate category has been in existence for decades (for comparative reviews see Davidov & Langille, 1999; Casale, 2011). Whether it is called “dependent contractor” (as in Sweden and Canada) or “employee-like” (as in Germany), or ‘para-subordinate’ (Italy) the idea is very similar: to allow for better refinement in the application of labor laws. Instead of an “all or nothing” approach, it is acknowledged in these legal systems that some workers present only *some* characteristics of “employees” but not others, and that it is justified to apply only *some* labor laws to them.

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<sup>45</sup> But see the adverse reading of these provisions given by the CJEU in Case C-255/04 *Commission v France* [2006] E.C.J. I-5251 para. [222].

<sup>46</sup> Employment Relationship Recommendation 2006.

The need for such an intermediate category has perhaps been greater in some countries, given local labor market practices. In Canada, for example, there is a large sector of trucking, and a significant number of truck drivers are owner-operators. These people do not fall into the definition of “employees” according to existing tests. However they often have only one client/employer, so they suffer from many of the same vulnerabilities as employees. Most Canadian jurisdictions have added “dependent contractor” provisions to allow such workers access to collective bargaining mechanisms (although they do not enjoy other labor rights) (Davidov & Langille, 1999). In more recent years the need for such a category has grown in other jurisdictions as well, resulting from the proliferation of new work arrangements. A growing number of people are not employees in the traditional sense but do not have an independent business in the traditional sense either. So it is hardly surprising that additional countries have added an intermediate category in recent years – most notably Spain – and this trend can be expected to continue.

Currently the intermediate groups are quite narrow in most countries, in two respects. First, in terms of the scope of the group, it is usually based mostly on economic dependence, but for some reason there is often insistence on a degree of subordination/control. Second, in terms of the rights enjoyed by this group, those are usually very minimal, mostly limited to collective bargaining, health and safety, social security and tax treatment (at most). Most employment standards do not apply. In both respects intermediate groups can be expected to further expand, at least from a purposive view. Indeed, an important report invited by the Canadian government recently advocated the granting of some additional rights to this group (Arthurs, 2006).<sup>47</sup>

The UK and, most notably, Spain appear to be an exception in this context. In the UK, the intermediate group introduced in the 1990s (the “worker” category) already allows access to various employment rights, including the minimum wage (Davidov, 2005). It seems, therefore, as if British law is more advanced and more progressive compared to the law in other countries in this respect. However, as already noted, the “employee” category in the UK has been narrowly construed by UK courts, and it could be argued that the “worker” category barely fills the gap left by an exceedingly tight notion of “contract of service”. As a result, the definition of the “worker” category resembles what in other countries is the definition of “employee” – and not the intermediate group. In Spain, TRADEs enjoy an extremely wide range of labor rights, including anti-discrimination rights<sup>48</sup> and even some protection against

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<sup>47</sup> Arthurs suggests a different name – “autonomous workers” – to assist in distinguishing between their (full) employment rights in the collective bargaining context (as “dependent contractors”) and their (partial) rights in the employment standard context.

<sup>48</sup> Article 6 of Ley 20/2007, de 11 de julio, del Estatuto del trabajo autónomo.

“contractual termination”.<sup>49</sup> However, as noted above, the practical impact of these accrued protections has been minimal.

It should also be pointed out that the idea of an intermediate category is not without its detractors. When the Luxembourg Government was prompted by the 2006 Commission Green Paper to take a stance in respect of the concept of “*economically dependent work*” (Commission of the European Communities, 2006, at 11), it forcefully argued that it found it artificial to suggest that there is a group of economically dependent workers that are neither employees nor self-employed. This was seen as a mere means for reducing the protection enjoyed by employees; the real problem being, in their view, the existence of sham self-employed that should be recognized as salaried workers.<sup>50</sup> There have been similar, and equally forceful critiques to the suggestion of introducing intermediate groups in countries like France, as well as in the other existing European regulatory regimes already recognizing “quasi-subordinate workers” (Garofalo, 2003; Hascöet, 2007; Pedrazzoli, 2006; Dalmaso, 2009). Surely when an intermediate category is considered, it should not be seen as a solution to misclassification (sham self-employment); rather, the goal should be to add some (partial) protection to people who are not (even without any sham) within the group of “employees”.

## VI. Conclusion

The fundamental, age-old problem of labor law is how to set the scope of the field – how to define who are (or should be) the subjects of labor law. In the current chapter we examine this problem from a comparative perspective. We started by showing that the tests and indicia used to identify “employees” are quite similar around the world, and the trend appears to be towards greater convergence. Nonetheless, there are some differences in the way these tests are being applied. We then considered three major issues which we feel are crucial to understanding the problem of setting labour law’s scope and how this problem has been addressed: the response to evasion attempts; the courts-legislature dialogue; and the introduction of intermediate categories. On all three fronts, a comparative review reveals similarities but at the same time differences. At the end of the day, the problems of evasion that drives a lot of the attempts to address the topic are similar across jurisdictions. So it is hardly surprising that courts in different countries are experimenting with similar solutions; that this is not always done in a satisfactory pace, which brings reaction from the legislature; and that similar difficulties with the binary divide often lead different legislatures to similar conclusions about the need to add a third, intermediate group.

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<sup>49</sup> Article 15.

<sup>50</sup> Contribution du Gouvernement du Grand-Duché de Luxembourg au LIVRE VERT « Moderniser le droit du travail pour relever les défis du XXI<sup>e</sup> siècle » (30 March 2007), 10. Available at [http://ec.europa.eu/employment\\_social/labour\\_law/answers/documents/1\\_2\\_fr.pdf](http://ec.europa.eu/employment_social/labour_law/answers/documents/1_2_fr.pdf).



There are still variations between the countries, and some take longer to reach the same conclusions, while other may exhibit a certain degree of aversion to particular solutions, as the example discussed in the final paragraphs of the last section suggests. But the trend towards convergence is assisted by international courts (such as the European Court of Justice) and perhaps also international instruments (such as the ILO Recommendation), and by academics exposing their courts to insights from other countries.

What can explain the greater convergence among some countries, but not others? Answering this question requires further research. We can speculate that perhaps the existence of an independent, specialized labor court leads to stronger efforts in fighting evasion attempts (including by way of adapting old tests). Also, legislative intervention – whether by way of adding an intermediate category or otherwise by legislating to change the results of judicial interpretation – requires political will and ability that are not always available (perhaps even: rarely available). It would be interesting to examine in future research what are the political conditions needed to allow reform in this area. Either way, when there is willingness to address the problem – whether among judges or at the legislature – a comparative analysis should prove useful to such efforts.

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