RETHINKING THE BOUNDARIES OF LABOUR LAW REGARDING THE NEED OF REGULATION OF INDEPENDENT WORK. A PORTUGUESE LABOUR LAW PERSPECTIVE

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Abstract

The aim of this research is, based on the analysis of several articles of Portuguese Labour Code regarding independent work, in order to prevent fraudulent situations, to reflect about an eventual need of rethinking the boundaries of labour law in a double sense: *i)* whether the legal subordination must continue to be the normative axis of Labour Law, despite the changing forms of productive organization; *ii)* whether the scope of Labour Law should be extended to situations where there is no legal subordination but where there are other forms of dependence.

The urgency of the first issue comes from the fact that the legal subordination is a notion that comes already from the times of capitalist production. Outsourcing and the business networking organization enhanced by new technologies, implying a bigger segmentation of the attributes and responsibilities of the employer, changed the paradigm on which rested the legal subordination, either from the side of who holds the power of direction, as from the side of who must obey. The legal subordination presupposes a "dominant social type" which seems to be called into question, or at least changed, by new forms of business organization.

Although changes in the figures of the employer and the worker are impeding implementation and operationalization of that concept, we understand that it is endowed with sufficient elasticity to remain the distinctive element of the employment relationship.

Regarding the second question, we think the Labour Law does not provide adequate legal protection to independent work neither to economically dependent autonomous work, although we defend a specific regulation of these last two types of work.

1. The challenges that organizational changes puts to the Labour Law

Outsourcing and business network organization cause significant changes in the Fordist conception of the entrepreneur-employer and of the employee.

The employer constantly needs to adjust the number of employees to the market demand, so when they choose to employ subordinated workers, they prefer flexible contracting forms, such as fixed-term contracts.

It often happens that the entrepreneur, instead of hiring employees, prefers to run a small enterprise, contracting, when necessary, other enterprises or independent workers in order to carry out its productive activity. It is possible the existence of virtual companies that do not directly carry any productive activity, limiting themselves to coordinate the activities of its trading partners.

The conclusion of civil or commercial contracts with other companies or with self-employed people, allows entrepreneurs to take benefits from their activity without having labour costs.

In some cases, the legislator allows the entrepreneur to have employer's powers on other entrepreneurs' employees (*v.g.* the direction power at temporary work). In other cases, the employer's powers are not legally assigned to the entrepreneur, but, in fact, they exist, mainly because of the way the legal relationship develops itself. This may happen when the entrepreneur contracts another enterprise to do some task and he needs it to be performed in the premises of the first mentioned enterprise, by the employees of the second one. When the activities of subordinate employees of the employer are coordinated with the activities of the employees of the contracted company, it is natural that the place of work, the rules of operation and safety are identical and from here to the existence of certain guidelines (which are often barely distinguishable from orders of the employer), goes a short distance. If we combine this with the fact that often these companies and their collaborative organizations have common structures or belong to the same corporate group it becomes obvious that the new forms of business organization make difficult the task of determining the real employer.

The considerations we have just weaved for interenterprise cooperation apply, without the need for major adaptations, to the hiring of autonomous workers.

The desired labour flexibility is often achieved by escaping Labour Law, ie employers see autonomous work as a way to have a wanted advantage - labour - without labour costs.

A growing number of tasks can be performed autonomously or with legal subordination, so entrepreneurs can choose to celebrate a labour contact or a commercial or civil contract. The choice of one or other form of recruitment is even

more attractive given the disparity of protection that the Portuguese legislator gives to autonomous work and dependent work.

Note that the choice of autonomous work in detriment of dependent is not always the result of an unlawful or fraudulent conduct of the entrepreneur/employer. This finding, coupled with the idea that there are ways to provide autonomous work that, because of the state of economic dependence in which the subject is, need special protective measures, leads us once again, to the need of finding a way to draw such protection. The protection of autonomous work and of economically dependent autonomous work involves, in my opinion, the answer to a previous question, which is the boundaries of the Labour Law and its possible expansion. Being the employment relationship founded on the concept of legal subordination, the answer to that question implies, in turn, to inquire whether the legal subordination should continue to be the key concept of Labour Law.

2. The portuguese legal framework

Aware of the challenges caused by the different forms of business organization that currently coexist, the national legislator, particularly since 2003, chose to act in three ways.

On one hand, host legislatively new "types" of employer. So he created the labour contract with a *pluralidade de empregadores (artigo 101.º* of *Código do Trabalho*); reliefed situations where the employer has, with another commercial company, a relationship of reciprocal shareholdings, control or group [*artigo 6.º, n.º 1, al. b); artigo 12.º, n.º 4; artigo 101.º, n.º 1; artigo 106.º; artigo 143.º, n.º 1; artigo 148.º, n.º 5; artigo 289.º, n.º 1, al. b); artigo 334.º; artigo 415.º, n.º 4*] where, despite not having group relations with others companies, the employer has "common organizational structures" with them [*cfr. artigo 101.º, n.º 1; artigo 143.º, n.º 1; artigo 148.º, n.º 5, and artigo 289.º, n.º 1, al. b)*].

The Portuguese legislator also has sought to fight situations of fraud perpetrated by abusive use of the legal personality and / or formal amendment of the type of relationship between employee and recipient of the service. The legislator has set other measures to prevent situations of fraud. Now we mean those which are related to the nature of the legal link established between the employer/ beneficiary of the activity and the employee/provider of the activity:

i) *artigo* 143.º of *Código do Trabalho* (about the succession of fixed-term contracts: termination of fixed-term contract, by the employer´s iniciative, forbids the celebration, with the same or other employee, of another services' contract before one third of the total duration of the employment contract which was terminated has elapsed.

ii) *artigo* 148.º, n.º 5, of *Código do Trabalho* (concerning the calculation of the duration of the term: in Portugal, the maximum duration of fixed-term contracts is three years, counting to this term the duration of previous services contracts between the employee and the employer, for the same purpose

Finally, the Portuguese legislator tried to bring closer the subordinated work and the economically dependent autonomous work in terms of payment of social security contributions. Article 140.º of Código dos Regimes Contributivos determines that if the worker receives, in the same year, at least 80% of his total work income from a enterprise or from another person, this last one is responsible for the payment of 5% of social security contribution (*artigo* 168.º, n.º 7, of *Código dos Regimes Contributivos*)[1].

Autonomous workers who receive from a contracting entity at least 80% of their income are entitled to unemployment benefits (*artigo* 283.º of *Código dos Regimes Contributivos* and *DL n.º 65/2012, de 15 de março*[2]).

3. Rethinking Labour Law object

The sanction of fraudulent "flight to the Labour Law" only makes sense if we consider that the legal subordination is the anchor of the whole Labour Law. However, we can conclude that another criteria might be considered as reference for the intervention of Labour Law. In other way, the reflexion about the aptitude of legal subordination to be the main concept of Labour Law, is related with a second question which is if the Labour Law protection should be extended to situations in which there is no legal subordination.

[1] The social security contribution of self-employed people is 29,6% (*artigo* 168.º, n.º 1, of *Código dos Regimes Contributivos*).

[2] The *DL n.º* 12/2013, 25 of january, approved subventions for unemployment to cCompany directors and independent workers.

The foregoing considerations lead us therefore to question the boundaries of labour law in two ways[3]: *i)* whether, on the one hand, the notion of legal subordination must continue to be the normative axis of Labour Law, the defining element of the employment relationship, despite the changing forms of productive organization; *ii)* if, on the other hand, the scope of labour law should be extended to situations where there is no legal subordination, but there are other forms of dependence.

a. The value of legal subordination in the current context

Legal subordination is a notion that comes already from the fordism times of capitalist production in which "*la inmensa mayoría de los vinculos que se proponía abarcar se insertaba nitidamente dentro de sus fronteras o quedaba claramente fuera de ellas, sin que una u otra variante demandara esfuerzo calificatorio alguno*"[4]. The business network organization, enhanced by new technologies, led to the segmentation of employer' powers[5] and changed the paradigm on which rested the legal subordination, both on the side of those who have the command power, as on the side of those who have to obey. Changes experienced on both sides of the employment relationship (employee and employer) undoubtedly make harder the application of the concept. On the one hand, the outsourcing and business network organization caused an apparent targeting of attributes and responsibilities of the employer. On the other hand, the way as the employee works have also changed. We can point several reasons for this change: social changes, changes in the educational system and in the market itself (increased importance of the services, which made the work more intellectual than manual). We believe, however, that the main cause of this change lies in the development of new technologies and working methods that facilitates on line cooperation between companies and between companies and workers[6], and allow the

[3] WILFREDO SANGUINETI RAYMOND, *Contrato de Trabajo y Nuevos Sistemas Productivos*. *Un estudio sobre el concepto de subordinación jurídico-laboral y su aptitud para reflejar las transformaciones recientes de las formas de organización del trabajo*, ARA Editores, Perú, 1997, p. 57 and following.; ADRIÁN O. GOLDIN, «Las Fronteras de la Dependencia», *Relaciones Laborales*, volumen II, 2001, pp. 311-332, also available in www.udesa.edu.ar/files/img/Administracion/DTN17.PDF, accessed lastly 15/07/2007; FRANCISCO PÉREZ DE LOS COBOS ORIHUEL, «El trabajo subordinado como tipo contractual», Documentación Laboral, n.º 39, 1993, p. 44, and ALAIN SUPIOT, [*et al*.], *Transformações do Trabalho e Futuro do Direito do Trabalho na Europa*, Coimbra Editora, Coimbra, 2003, pp. 32-40.

[4] ADRIÁN O. GOLDIN, «Las Fronteras de la Dependencia», *cit.*, p. 313.

[5] ADRIÁN O. GOLDIN, «Las Fronteras de la Dependencia», *cit.*, p. 315.

[6] WILFREDO SANGUINETI RAYMOND, *Teletrabajo y globalización: en busca de respuestas al desafío de la transnacionalización del empleo*, Madrid, Ministerio del Trabajo y Asuntos Sociales, 2003,

use of new contractual figures which, in turn, altered the relationship between the provider of the activity and its beneficiary.

The proliferation of new ways of providing work - such as telework - as well as situations where, despite the absence of legal dependence, we can find ways of dependence very similar to those in which a traditionally subordinate employee was also subject – economically dependent autonomous work

Aware of these difficulties, some doctrine has been advocating the concept of alienability as a criterion to define the employment contract [7].

Legal subordination remains the best criterion for determining the scope of labour law, even in an economy based on enterprise networks and outsourcing. If we adopted alienability in the market as a limiting criterion, we would have to include under the Labour Law those who provide work with full autonomy, but that do not work for the open market, because they assign the result of their work to a single subject (client) [8]. This is the well known situation of economically dependent autonomous workers. However, we defend that they are out of the labour law precisely because they execute their activities with autonomy and without legal subordination. The Labour Law protection should not be extended to individuals who have the ability to organize how they work (which does not mean that we defend that the legal regulation of this relationship should be, as before, in the field of Civil Law). The definition of the activities that should be under Labour Law is made regarding on how they are done (autonomously or subordinated) [9], so the legal subordination still is the appropriate

p. 11, and «El Derecho del Trabajo frente al desafío de la transnacionalización del empleo: teletrabajo, nuevas tecnologías y *dumping* social», *Revista valenciana de economía y hacienda*, n.º 13, 2005, p. 109.

[7] M. R. ALARCÓN CARCUEL, «La ajenidad en el mercado: un critério definitório del contrato de trabajo», *Civitas, Revista española de Derecho del Trabajo*, n.º 25, 1986, pp. 495-544, and ANTÓNIO LOPES BATALHA, *A Alienabilidade no Direito Laboral*. *Trabalho no Domicílio e Teletrabalho*, Edições Universitárias Lusófonas, Lisboa, 2007. Many Spanish authors, though they understand the ajenidad as the only distinctive feature of the employment contract, point it at the side of the juridical subordination, as an essential element. In that way see ANTONIO MARTÍN VALVERDE, «El discreto retorno del arrendamiento de servicios», *Cuestiones Actuales de Derecho del Trabajo: estudios ofrecidos por los catedráticos españoles de Derecho del Trabajo al profesor Manuel Alonso Olea*, ALFREDO MONTOYA MELGAR, ANTONIO MARTÍN VALVERDE, FERMÍN RODRÍGUEZ-SAÑUDO MADRID [coordenadores], Ministerio de Trabajo y Seguridad Social, Madrid, 1990, p. 236, and ALEJANDRA SELMA PENALVA, «El trabajo autónomo dependiente en el siglo XXI», *Revista española de Derecho del Trabajo*, n.º 133, Thomson Civitas, Navarra, 2007, p. 163.

[8] For a more extensive critical analysis of various theories of alienability and their remoteness as a limiting criterion, see, among others,WILFREDO SANGUINETI RAYMOND, *Contrato de Trabajo y Nuevos Sistemas Productivos…,* cit., p. 41 and following.

[9] FRANCISCO PÉREZ DE LO COBOS ORIHUEL, «El trabajo subordinado como tipo contractual», *Documentación Laboral*, n.º 39, 1993, p. 34.

criterion to delimitate Labour Law. Legal subordination is a typological concept[10] which is concretized by indiciary method[11]. That characteristic turns legal subordination into a sufficiently open and flexible concept, which gives the judge and the jurist the necessary flexibility to properly apply the various settings that the employment relationship can take.

This idea, already advocated by BARASSI, reassumes now its place when the changes and adaptations of the economy and production to modern times seem to implicate the reinvention of everything, even new branches of law. But the inventions make sense only when necessary and this, as we shall see, it is not.

As WILFREDO SANGUINETI RAYMOND[12] says, the aptitude of the concept of legal subordination to continue to be the basis of labour law is not just because juridical dependency is not a formal legal concept invented by the jurist, but a factual reality that sociologists and economists have pointed out. Moreover, the juridical subordination elements are present in the majority of the proposals for its replacement. Lastly, the particular perspective from which this notion looks at reality in order to extract legal consequences explains why it continues to be the best criteria.

Regarding to teleworking, what is truly unique is the labour contract modality is the way and the place that the work is done: using the means of information and communication and outside the company (artcle 165.º of *Código do Trabalho*).

Telework will be inside or outside Labour Law whether the job is done with or without juridical subordination. If the beneficiary of the activity can determine how to perform the work and to control the outcome[13], then we are facing an employment

[10] Conceive the juridical subordination as a type rather than as a concept allows greater flexibility because "*las notas distintivas del tipo son abiertas, graduables y aisladamente no constituyen por sí mismas más que indicios que cobran sentido al apreciarse conjunta e interelacionadamente a través de un juicio de aproximación entre el tipo normativo y el caso concreto*". FRANCISCO PÉREZ DE LO COBOS ORIHUEL, «El trabajo subordinado como tipo contractual», *cit.*, p. 38.

[11] *Vide*, FRANCISCO PÉREZ DE LO COBOS ORIHUEL, «La subordinación jurídica frente a la innovación tecnológica», *Relaciones Laborales*, n.º 10, 2005, pp. 79, and JOSÉ ANDRADE MESQUITA, *Direito do Trabalho*, 2ª edição, AAFDL, Lisboa, 2004, pp. 357-379.

[12] WILFREDO SANGUINETI RAYMOND, *Contrato de Trabajo y Nuevos Sistemas Productivos…*, cit., p. 46.

[13] Pointing as a evidence of subordination "*la modalidad de inserción del trabajo en el sistema informático y telemático de la empresa*", see FRANCISCO PÉREZ DE LOS COBOS ORIHUEL, «El trabajo subordinado como tipo contractual», *cit.*, p. 45.

relationship. If not, that is, if we do not find evidence of legal subordination that, considered globally, allow us to affirm its existence, is autonomous work[14].

Aware that it is not possible or desirable, given what has already been said, to find a solution to the qualification of telework, we can indicate some facts that could constitute evidence of legal subordination or its absence. So: *i)* be relevant the type of connection established between the worker and the employer; if the work is performed online the employer can control the worker as if he was at the company; in fact, the control can be even more effective in this way; *ii*) the form of communication used for contacts between the employee and the employer and the frequency its use; *iii)* the ownership of the computer resources the employee uses, including software and tools: when they belong to the beneficiary of the services provided is evidence of legal subordination; *iv)* who is responsible for the decision to choose the software and tools: as a rule, in the employment contract that role falls to the employer; *v)* fixing a certain number of hours or period of availability is also evidence of the existence of legal subordination. To these is added the evidence traditionally highlighted by doctrine and jurisprudence in situations where there is no telework: the fact that the employee works for other employer (or not) and the enrollment in Social Security, among others.

As it turns out, telework and the use of new technologies do not question the value of juridical subordination as an operating concept. In fact, we can say that: "*ha cambiado la morfología de la subordinación pero, en la práctica, ésta puede ser tan intensa, si no más que en el pasado*"[15].

The contracts established between an employee and one or more enterprises will be under Labour Law protection if it can assert the legal subordination in relation to that which is his formal employer.

If an enterprise outsources some activities, the employees of the contracted enterprise have no juridical subordination with the outsourcer, even if the job is done on its premises.

In temporary work, the fact of the employee takes orders from whom is not his employer, does not precludes the existence of juridical subordination between the employee and the Temporary Work Agency.

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[14] See *Tribunal da Relação de Coimbra* at ruling from 21/10/2004 (Proc. N.º 2355/04). According to the Court, if the author does not prove the existence of legal subordination in the execution of telemarketing activity, it is not a telework contract.

[15] FRANCISCO PÉREZ DE LOS COBOS ORIHUEL, «La subordinación jurídica frente a la innovación tecnológica», *cit.*, 73.

The juridical subordination is an elastic and flexible concept which expresses the condition in which the worker finds himself seeing his performance conformed by the orders of the employer with the possibility of a disciplinary penalty if he disobeys .

The power of direction of the employer is always there, but the way it is exercised can switch according to several factors, such as, the will of the employer to exercise with greater or lesser intensity his power, the nature of the work performed, the employee's position in the hierarchy of the company and the manner of execution of work[16]. It is, therefore, a state of potential dependence[17].

At the end it is essential that the employee will find inserted "within the organization and under the authority of the person or persons to whom it provides its activity" (Article 11. º of *Código do Trabalho)*[18].

b. (Un) need to extend the scope of the Labour Law

At the beginning, the workers under the Labour Law protection were easily identified because they had similar characteristics. At the time we could talk about a "typical employee".

The economic, social and productive changes have affected the labour market. In fact, we now have two groups of workers: those who are protected by Labour Law and those who only can count on their bargaining power to determine the rules of its work. Moreover, there is a set of persons supplying work personally with legal autonomy (and therefore is outside the scope of the Labour Law), but with economic dependence on the beneficiary's.

This bipolarization of the labour market has adverse effects, enhancing situations of fraud to law and conflict: on one side those who try at all costs to obtain the qualification of their legal relationship as labour, on the other the proliferation of atypical forms of employment in order to evade the application of Labour Law.

The aforesaid separation makes all who have a labour contract to be treated the same way, even if they have a large freedom to organize their work, as is the case of senior management. On the other hand, causes the unprotection of an increasingly larger

[16] WILFREDO SANGUINETI RAYMOND, *Contrato de Trabajo y Nuevos Sistemas Productivos…,* cit., pp. 50-51.

[17] DE LA CUEVA, M., *Derecho Mexicano del Trabajo,* Ed. Porrúa, México, 1959, p. 497, e ANTÓNIO MONTEIRO FERNANDES, *Direito do Trabalho*, 12ª edição, Almedina, Coimbra, 2004, p. 137.

[18] The Labour Code of 2009 brought a new wording to the notion of the employment contract that clarifies the inclusion in the organizational structure as an element test for the existence of juridical subordination. This new legislative act has also enshrined the existence of a presumption of labour contract.

group of subjects who provide work independently, but with economic dependence. The complete legal defenselessness that self-employed are voted also deserves our censure because offends their rights as citizens and the proper functioning and affects balance of the labour market.

So it does not surprises that the natural vocation of Labour Law to protect[19] has determined that this branch of law has known, in almost all jurisdictions, a remarkable expansion of its subjective scope[20].

Also the Portuguese Labour Law extended the scope of some of their standards, making them applicable not only to all relations between employer and employee, but also those in which the subject works with legal autonomy but with economic dependence, ie, situations that are called "equivalent" to subordinate work (Article 10. º of the *Código do Trabalho*).

The alleged failure of the concept of juridical subordination made that part of the doctrine continues to defend the expansion of the Labour Law to frontier situations or even the creation of a new legal discipline that encompasses all forms of performing work[21].

Especially the issue of economically dependent autonomous work has already drawn the attention of some national legislatures[22]. It is possible to identify three guidelines regulating: *i)* an assimilation orientation, according to which it extends the application of Labour Law to some economically dependent autonomous workers; *ii)* a

[19] JESÚS CRUZ VILLALÓN, «El Proceso Evolutivo de Delimitación del Trabajo Subordinado», *Trabajo Subordinado y Trabajo Autónomo en la Delimitación de Fronteras del Derecho del Trabajo. Estudios en Homenaje al Profesor José Cabrera Bazán*, tecnos, Andalucía, 1999, p. 174.

[20] For a comprehensive analysis of the subject, ANTONIO MARTÍN VALVERDE, «El discreto retorno del arrendamiento de servicios», *cit.*, pp. 209-236.

[21] In this way, *vide* ALAIN SUPIOT, [*et. al.*], *Transformações do Trabalho e Futuro do Direito do Trabalho na Europa,* cit., p. 48. In Portugues doctrine, *vide* ANTÓNIO GARCIA PEREIRA, «As lições do grande Mestre Alonso Olea – A actualidade do conceito de alienabilidade no século XXI», *Estudos de Direito do Trabalho em Homenagem ao Professor Manuel Alonso Olea*, ANTÓNIO MONTEIRO FERNANDES [coordenação], Almedina, Coimbra, 2004, p. 62. Against this ideias, but defending a diferent solution: WILFREDO SANGUINETI RAYMOND, *Contrato de Trabajo y Nuevos Sistemas Productivos…*, cit., p. 78 e ss.; e FERNANDO VALDÉS DAL-RÉ, «La Externalización de Actividades Laborales: Un Fenómeno Complejo», *La Externalización de Actividades Laborales. Una Visión Interdisciplinar*, Abdón Pedradas Moreno [dirección], editorial Lex Nova, Valladolid, 2002, p. 45.

[22] To discuss of the subject from the perspective of comparative law *vide* ADALBERTO PERULLI, *Travail économiquement dépendant/parasubordination: les aspects juridiques, sociales et économiques*, Estudo para a Comissão Europeia, 2004, available in http://www.social-law.net/IMG/pdf/parasubordination_report_fr.pdf, accessed lastly 01/09/2009; e RAFAËLE DE LUCA-TAMAJO Y ADALBERTO PERULLI, *Descentralización Productiva*, cit., e EDUARDO MARTÍN PUEBLA, *El Trabajo Autónomo Económicamente Dependiente. Contexto europeo y régimen jurídico*, Tirant lo Blanch, Valencia, 2012.

selective extension of some labour standards; *iii)* guidance differentiating between the regimes of autonomous work and subordinate labour [23].

In Italy, the protection of workers' "parassubordinados" emerges as a concern in *legge 14 luglio 1958 n. 741*. Through this law, known as *legge Vigorelli*, the Italian parliament authorized the government to legislate in to provide general efficacy to some economic content of collective bargaining related to continuous collaborative relations[24]. Later, in 1973, *legge 11 agosto de 1973 n.* 533, codified at article 409.º of *Codice di Procedura Civile*, determined that the procedural provisions applied to relations "*… agenzia, di rappresentanza commerciale ed altri rapporti di collaborazione che si concretino in una prestazione di opera continuativa e coordinata, prevalentemente personale, anche se non a carattere subordinato*". I our days, *Decreto Legislativo 10 de Settembre 2003, n. 276*, establishes the figure of the *contratto a progetto* (article 61.º and following) which occurs when someone personally and without juridical subordination, develops a specific project, or phase of it, for a principal. This type of contract can not be signed by those providing the intellectual work (if they need to enrol on a professional/ association order) by the Public Administration nor retired (article 61, n.º 3, of *Decreto Legislativo 10 de Settembre 2003, n. 276*).

Formally, the *contratto a progetto* has to be written and to contain other formalities such as the activity duration (article 62 do *Decreto Legislativo 10 de Settembre 2003, n. 276*). Besides others, it includes aspects such as the inability of the employee to perform work that is forced by illness, accident, pregnancy (Article 66 of *Decreto Legislativo 10 de Settembre 2003, n. 276*) and termination of the contract (Article 67 of *Decreto Legislativo 10 de Settembre 2003, n. 276*). Also the social security laws contemplate such situations, providing for a total contribution of 42.72% (17% paid by the worker and 25.72% over the principal)[25] [26].

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[23] RAFAËLE DE LUCA-TAMAJO Y ADALBERTO PERULLI, distinguished only its first guidelines. RAFAËLE DE LUCA-TAMAJO Y ADALBERTO PERULLI, *Descentralización Productiva*, cit., p. 89.

[24] EDUARDO MARTÍN PUEBLA, *El Trabajo Autónomo Económicamente Dependiente…,* cit, pp. 33-34.

[25] www.inps.it/, accessed lastly in 12/05/2013.

[26] Further developments of this type of contract in, for instance, SANDRINE BEAUJOLIN e CHRISTIAN VACHER [coord.], *Le travail Économiquement dépendant en Europe. Rapports des voyages d'étude effectués du 15 au 19 mai 2006 en Irlande, Italie, Pologne et Portugal,* Institut National du Travail, de l'Emploi et de la Formation Professionnelle, Ministère de l'emploi, de la cohésion sociale et du logement, Marcy-l'Etoile, 2006, pp. 35-44, available em http://www.institut-formation.travail.gouv.fr/Pages/FicParu%5C2006_10%5C2006_voyage_iet_Trav_econ_dependant_europe.pdf, accessed lastly in 09/09/2010; e Raffaele De Luca Tamajo, *Dal lavoro parasubordinato al lavoro*

German law distinguishes between employees and "independent people who are treated as employees" (*arbeitnehmeränhliche personen*). These are working under a contract of service or a commercial contract, but for a major customer from whom they economically depend[27]. Some Labour rules are applied to these persons, such as rules concerning to collective bargaining, holidays and sexual harassment (see article 12a da *Tarifvertragsgesetz*).

In **Anglo-Saxon** law, the figure designates workers who, personally, undertake to perform a job or service to another who is not his client but with whom does not have a labour contract (article 230 (3) Employment Rights Act 1996). They benefit from some labour rules such as national minimum wage (*National Minimum Wage Act 1998, article 54(3)*), scaduals and holidays (*Working Time Regulations 1998*), non discrimination, part-time (*Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000***)** and protection of maternity and paternity[28].

In France there is no legal regulation of economically autonomous dependent work.[29]. However, article L4535-1 provides for the application of the Code du Travail standards on safety and health at work to the self-employed (1°, 2°, 3°, 5° et 6° do *article L. 4121-2, articles L. 4111-6, L. 4311-1, L. 4321-1, L. 4321-2, L. 4411-1 et L. 4411-6).* Similarly to what happens in the Portuguese legal system, French legal system has specific provisions for work performed at home without juridical subordination. But contrary to what happens in Portugal, these rules are in the *Code du Travail* (Article L7411-1).

In Portugal, as already noted, the legislature has chosen to extend the application of certain rules of the Labour Law to the self-employed, on the one hand, and regulate in a specific Act the work done at home. Article 10. º of *Código do Trabalho*, entitled "equivalent situations" commands the application, to workers who provide activity

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"a progetto", WP C.S.D.L.E. "Massimo D'Antona", n. 25/2003, available in http://db.formez.it/storicofontinor.nsf/8804ae899ac04f07c12569f40030aaca/51A257F1C3B62E66C1256DF7004B5CB0/$file/Dal%20lavoro%20subordinato%20al%20lavoro%20a%20progetto%20R.%20De%20Luca%20Tamajo.pdf, accessed lastly in 14/05/2013, and ALFREDO CASOTTI e MARIA ROSA GHEIDO, *Lavoro a progetto. Disciplina, progetto, formule, aspectti fiscale e previdenziale delle collaborazioni*, V edição, Gruppo Wolters Kluwer, Lavis, 2009.

[27] ALAIN SUPIOT [*et al*.], *Transformações do Trabalho e futuro do Direito do Trabalho na Europa*, cit., p. 25.

[28] ADALBERTO PERULLI, *Travail économiquement dépendant/parasubordination: les aspects juridiques, sociales et économiques*, cit., p. 70, e RAFAËLE DE LUCA-TAMAJO e ADALBERTO PERULLI, *Descentralización Productiva*, cit., p. 91.

[29] Se the Report of PAUL-HENRI ANTONMATTEI e JEAN-CHRISTOPHE SCIBERRAS *Le travailleur économiquement dépendent:quelle protection*, available in www.travail-solidarite.gouv.fr/...travail/.../Rapport-Antonmattei-Sciberras-07NOV08.pdf, *accessed lastly 14/05/2013.*

without juridical subordination but with economic dependence, the rules relating to personality rights, equality and non-discrimination and health and safety at work. The *Lei n.º* 101/2009, establishes the legal framework for work done at home without juridical subordination but with economic dependence, providing special rights and duties of the parties, rules on remuneration and termination of the contract, inter alia .

Spain adopted a completely different form of regulation of autonomous work and work economically dependent autonomous work. It is regulated mainly in two Acts *(Ley* n.º 20/2007, 11 of July and *Real Decreto n.º* 197/2009, 23 of february[30].

An Autonomous worker is a person who carries out the usual way, personally and directly, on their own and outside the organization and direction of another person under an economic activity profitable, whether or not having workers at his service (article 1. of *Ley n.º* 20/2007).

Economically dependent autonomous worker is the one who carries out an economic activity under lucrative, as usual, direct and personal way predominantly to a person or entity from whom he receives75% or more of his retribution (article 11. of *Ley* n.º 20/2007). The economically dependent autonomous worker may not subcontract their activity, nor have employees on his behalf. Must have productive infrastructure and equipment that enable him to perform the activity (articles 11., n.º 2, *Ley n.º* 20/2007, and 4. e 5. of *Real Decreto n.º* 197/2009). The Act also contains specific rules on working time, interruption of activity, termination of contracts, social protection, includes a new source of legal status of these workers - agreements of professional interest - and fixes the labour jurisdiction as competent to resolve disputes arising from the contractual relationship with the economically dependent autonomous workers (artcles 3., n.os 2, 13., 14., 15., 16., 17. and 23. and following of *Ley n.º* 20/2007).

[30] Sobre o tema vide, por exemplo, SALVADOR DEL REY GUANTER [director], *Comentarios al Estatuto del trabajo autónomo*, 1.ª edição, Lex Nova, Valladolid, 2007; ALBERTO VALDÉS ALONSO, «La regulación del trabajo autónomo económicamente dependiente en la Ley 20/2007: apuntes para un debate», *REVESCO: revista de estudios cooperativos*, n.º 96, 2008, pp. 133-173; IGNASI BELTRÁN DE HEREDIA RUIZ, «La extinción del contrato del autónomo dependiente: análisis (crítico) de su regulación jurídica (y propuestas de reforma)», *Aranzadi Social: Revista Doctrinal*, Vol. 1, n.º 4, 2008, pp. 89-110; MANUEL GARCÍA JIMÉNEZ y CRISTÓBAL MOLINA NAVARRETE, *El estatuto profesional del trabajo autónomo: diferenciando lo verdadero de lo falso*, Tecnos, Madrid, 2008; VICENTE ANTONIO MARTÍNEZ ABASCAL, «El Estatuto del Trabajo Autónomo: alcance protector y linderos del Derecho del Trabajo (I)», Aranzadi Social: Revista Doctrinal, Vol. 1, n.º 2, 2008, pp. 89-106; ANTONIO MARTÍN VALVERDE, «La Ley y el Reglamento del Estatuto del Trabajo autónomo: puntos críticos (1)», *Actualidad Laboral*, n.º 11, 2009, pp. 1252-1272; JOSÉ LUIS MONEREO PÉREZ, «El trabajo autónomo, entre autonomía y subordinación», *Aranzadi Social*, n.º 5, 2009, pp. 71-101.

Creating an *Employment Law* assumes greater relevance especially if we look to the current employment policies: they are directed not only to employees, but strongly focus autonomous work[31]. We think autonomous and subordinate work might have a separated regulation, because they are quite different.

The extension of the Labour Law to situations where there is no juridical subordination, although the undoubted advantage of protecting the subjects that provide work, has, in our view, difficulties and drawbacks that outweigh that advantage.

First, it is pointed out the inconvenience of loss of identity and unifying element of the Labour Law. By extending the application of Labour Law to situations where there is no juridical subordination we lose the referent of its legal institutions: the subordinated work. In other words, such an extension would call into question the dogmatic autonomy Labour Law [32]. We can add the difficulty of applying a rule to a reality other than that for which it was created.

4. Conclusion

We advocate the need of a legal regulation to the autonomous work and to the economically autonomous work, especially regarding certain aspects, particularly those related to constitutionally recognized rights of all working people, regardless of the type of contract. However, this regulation should be out of Labour Law. Those workers do not have the characteristics that determine the Labour Law's intervention: the personal subjection of employees. We believe that is justified the legislative intervention on social security, health and safety at work, working time and in terms of guarantees' recovery of claims arising from the legal relations between the self-employed and beneficiary.

We also believe that there is a group of autonomous needing qualified protection - economicaly dependent autonomous workers - precisely because the economic subordination that are subject puts them in a situation of greater fragility and defenselessness.

[31] *Vide* on spanish Labour Law, JOSÉ LUJÁN ALCARAZ, «Reflexiones sobre el papel del Derecho del Trabajo en la actual revitalización del trabajo Autónomo», *Aranzadi Social*, Volumen V, Tomo XI, Aranzadi Editorial, Navarra, 2001, pp. 229-231.

[32] See, about this subject, in the portuguese doctrine, MARIA DO ROSÁRIO PALMA RAMALHO, *Da Autonomia Dogmática do Direito do Trabalho*, Almedina, Coimbra, 2001.

From our point of view, the answer to the problem should not go through the flexibility of Labour Law in order to extend its scope to other realities[33], but by creating new ways to regulate the autonomous work due to the gap of regulationwhich may endanger human dignity constitutionally recognized.

When this activity is provided under specific constraint - with autonomy, but with economic dependence to the beneficiary - then it should be given special protection.

The economically dependent autonomous work puts the provider in a situation of greater fragility of imbalance when negotiating the terms of their obligation.

The reality of these people do not fit in Civil or Commercial - assuming equality of the parties - nor in Labour Law - which implies subjection to employer powers.

Moreover, in our days all activities can be done with autonomy or juridical dependence.

Being a different situation, requires a new legal solution, considering their specificities. This solution should not be envisaged from a strictly Labour Law viewpoint, but should not also be relegated to the pure field of contract law.

Try to ignore the problem is not definitely solution. Such an attitude only contributes to the worsening of tensions between dependent work, highly secure, and autonomous work, devoid of protection.

The segmentation of the legal status of the subjects covered by Labour Law leads, as WILFREDO SANGUINETI RAYMOND says, to degradation of the homogenizing and protective function of Labour Law[34].

[33] *Vide* JESÚS CRUZ VILLALÓN, «Propuestas para una Regulación del Trabajo Autónomo», *Documentación Laboral, revista de relaciones laborales, economía y sociología del trabajo y trabajo autónomo*, n.º 73, Vol. I, Ediciones Cinca, Madrid, 2005, pp. 18-19. With an oposite position, FAUSTINO CAVAS MARTÍNEZ, «Los Trabajadores Autónomos Dependientes: una Nueva Encrucijada para el Derecho del Trabajo», *Aranzadi Social*, Vol. V., Aranzadi editorial, Navarra, 2004.

[34] WILFREDO SANGUINETI RAYMOND, «Descentralización productiva», *cit.*.