

Professionalità studi

*Trimestrale on-line di studi su
formazione, lavoro, transizioni occupazionali*

In questo numero

Nuove tutele, capacità e competenze nei mercati transizionali del lavoro

- nuovi confini tra subordinazione e autonomia
- mercati transizionali del lavoro
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Editoriale

Qualificazione del lavoro, transizioni occupazionali, capacità delle persone: spunti da un confronto interdisciplinare sul valore del lavoro, oggi

*Lilli Casano**

Il fascicolo qui presentato apre la terza annualità del nuovo corso di questa rivista, avviato nel 2017 grazie alla collaborazione tra Studium e ADAPT University Press, al fine di promuovere un ciclo di riflessioni e approfondimenti intorno a un concetto, quello di *professionalità*, che i promotori dell'iniziativa hanno voluto cogliere nella sua più ampia accezione, quale «dimensione necessaria, non sempre riconosciuta e tutelata, per l'esplicazione di qualsiasi lavoro, sia autonomo che subordinato nelle imprese» ⁽¹⁾, e come «chiave per una moderna organizzazione del lavoro e leva per una sua adeguata valorizzazione e per il suo riconoscimento, superando i tradizionali steccati tra mercati interni e mercati esterni del lavoro per entrare nel cuore di una nuova grande trasformazione» ⁽²⁾.

I contributi raccolti in questo numero testimoniano come cresca, all'interno di diversi ambiti disciplinari, la consapevolezza della centralità dei temi e della prospettiva abbracciati dalla rivista, confermando la sempre maggiore utilità e importanza di un vero dialogo interdisciplinare su questi temi, che la rivista intende promuovere.

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⁽¹⁾ M. NAPOLI, *La professionalità*, in *Il diritto del lavoro tra conferme e sviluppi*, Giappichelli Editore, 2006, p. 490.

⁽²⁾ G. BERTAGNA, R. RIZZA, G. SCARATTI, M. TIRABOSCHI, *Le ragioni di una nuova rivista sul lavoro che cambia*, in *Professionalità studi*, 2017, n. 1, 1-3.

La sezione *Ricerche*, intitolata *Nuove tutele, capacità e competenze nei mercati transizionali del lavoro*, raccoglie una selezione dei contributi presentati al Convegno internazionale promosso da ADAPT in collaborazione con l'International Labour Organisation (ILO) "*Il lavoro non è una merce*" oggi. *Il valore del lavoro e le sue regole tra innovazione e tradizione* tenutosi a Bergamo dal 28 al 30 novembre 2019. Il Convegno, traendo ispirazione dal Rapporto "*Work for a brighter future*" curato dalla *Global Commission on the future of work* dell'ILO e pubblicato nel gennaio 2019, ha messo in evidenza le sfide da affrontare per costruire un futuro del lavoro equo e giusto e per accompagnare le persone nella transizione dal vecchio al nuovo mondo del lavoro: una assunzione collettiva di responsabilità nel quadro di un nuovo patto sociale che garantisca a tutti i lavoratori una giusta quota della ricchezza prodotta, offrendo altresì il rispetto dei loro diritti e una rete di sicurezze sociali in cambio del loro continuo contributo alla economia; la necessità di andare "oltre" il lavoro subordinato, garantendo a tutti i lavoratori, a prescindere da tipo di contratto o status professionale, di godere dei diritti fondamentali del lavoro (retribuzione e orari adeguati, protezione/promozione della salute/sicurezza sul lavoro); l'importanza di investire sulle "capacità" delle persone (nel senso attribuito al termine da Amartya Sen), sostenere le istituzioni del mercato del lavoro a partire dalla rappresentanza, promuovere forme di lavoro decente.

Questo fascicolo raccoglie, in particolare, alcuni dei contributi che sono stati presentati nell'ambito dei *workshop* tematici dedicati ai temi della qualificazione e classificazione del lavoro, degli attori e strumenti per il governo delle transizioni occupazionali, della formazione e dello sviluppo professionale. Tre ambiti di riflessione strettamente connessi tra di loro e cruciali per comprendere le trasformazioni in atto nel mondo del lavoro, che è necessario affrontare in chiave sistemica al fine di cogliere le connessioni utili a comprendere le evoluzioni che interessano ciascun ambito.

Il tema della qualificazione e classificazione del lavoro emerge in tutta la sua attualità di fronte al superamento dei rigidi confini tra subordinazione e autonomia, connesso tanto alla diffusione di modalità di esecuzione del lavoro difficili da inquadrare nell'una o nell'altra

categoria, quanto all'aumento del numero di lavoratori che svolgono la loro prestazione in autonomia e in situazioni di forte responsabilizzazione anche dentro l'impresa, quanto infine all'emergere di "nuove professioni" aventi prevalentemente contenuto intellettuale e svolte in condizioni di autonomia e indipendenza, tanto nella forma del lavoro autonomo, quanto nella forma del lavoro subordinato.

Tali fenomeni vanno letti in parallelo con l'evoluzione dei percorsi di carriera, sempre più caratterizzati da frequenti transizioni occupazionali, all'interno di una stessa impresa come nel mercato, che si intrecciano a transizioni biografiche legate al ciclo di vita o ad eventi critici, tendenza che fa emergere importanti interrogativi, a partire dalla opportunità di spostare il baricentro delle tutele dei lavoratori dalla specifica modalità contrattuale alla *persona* del lavoratore, al fine di preservarne e accrescerne la capacità di agire in tutte le sfere sociali, a partire dal lavoro.

In quest'ottica, pare centrale rilanciare la riflessione sulle regole e gli strumenti idonei a governare i cosiddetti *mercati del lavoro transizionali*, superando un modello di regolazione del lavoro pensato per i mercati interni e dunque incentrato sulla tutela della stabilità del posto di lavoro e su strumenti di protezione articolati all'interno di specifiche realtà organizzative e nei confronti di una specifica figura di lavoratore.

Ed è in questa cornice che si collocano i contributi raccolti nella prima parte della sezione *Ricerche* di questo fascicolo, affrontando da diversi ambiti disciplinari i temi delle nuove sfide interpretative legate alla qualificazione e classificazione del lavoro, all'emergere dei mercati transizionali del lavoro, al tema delle *capabilities* e del loro sviluppo in specifici contesti, alle politiche e agli strumenti da promuovere per fronteggiare i rischi connessi alle trasformazioni in atto, tra cui rivestono un ruolo centrale i dispositivi volti a promuovere l'apprendimento permanente.

Al cuore del dibattito sulla dicotomia subordinazione/autonomia si colloca il contributo di Lisa Rodgers, che esplora il concetto di autonomia nel diritto del lavoro suggerendo la necessità di adottare una prospettiva relazionale maggiormente in grado di resituire centralità alla persona. L'interrogativo sui livelli di protezione garantiti e da

garantire ai lavoratori autonomi è al centro della riflessione proposta da Alexander Stöhr. Francesca della Ratta-Rinaldi e Alessia Sabbatini offrono un contributo a questa riflessione analizzando i più recenti trend occupazionali alla luce della nuova classificazione ILO degli status occupazionali, che reinterpreta i confini tra lavoratori subordinati e autonomi identificando la nuova categoria dei *dependent contractors*.

Lo studio di Lincaru, Pirciog, Grigorescu, partendo dal framework teorico della *transitional labour market theory*, e con il fine di contribuire alle riflessioni sui nuovi modelli di tutela che si ispirano a tale approccio, presenta una mappatura dei processi di cambiamento che nell'ultimo decennio hanno interessato la stabilità dell'impiego e la durata media della disoccupazione in Europa, elaborando modelli differenziati per genere ed età.

Si colloca invece sul solco delle recenti elaborazioni che hanno utilizzato e ampliato il framework teorico delle *capabilities*, sviluppato da A. Sen, la riflessione di Giuditta Alessandrini che riguarda il contributo che la formazione professionale iniziale e continua può offrire non solo al *lifelong learning* ma anche alle strategie di promozione della cittadinanza attiva. Andrea Sitzia indaga alla luce dello stesso paradigma il tema della capacitazione delle persone in condizioni di vulnerabilità attraverso adeguati interventi di sviluppo delle capacità professionali, approfondendo nello specifico il caso dei detenuti.

Il tema della attivazione e degli strumenti di contrasto alla esclusione dei giovani dal mercato del lavoro è affrontato da Ewa Staszewska nell'ambito dell'analisi dei tirocini per i disoccupati in Polonia. Sempre nell'ambito delle politiche di contrasto alla disoccupazione si colloca il contributo di Philip, Lieuw Kie Song, Tsukamoto, Overbeck, che presenta una analisi dei programmi di creazione diretta della occupazione nel settore pubblico, evidenziandone tuttavia il ruolo potenziale non solo sul fronte della lotta alla disoccupazione, ma più in generale su quello della creazione di forme di lavoro *community-driven* che contribuiscano alla costruzione di beni comuni indispensabili per affrontare le sfide in atto.

Ricerche

**Nuove tutele, capacità e competenze
nei mercati transizionali del lavoro**

**Recognising the Person at Work:
The Case for a Relational Approach to Autonomy**

Lisa Rodgers *

Summary: **1.** Introduction. – **2.** Autonomy and the liberal legal subject – **3.** Labour is not a commodity and the normative instinct. – **4.** Different versions of autonomy and labour law. – **5.** The critique of vulnerability theory and relational approaches to autonomy. – **6.** Employment status: moving towards relational approaches to autonomy. – **7.** Moving towards a socialisation of employment status. – **8.** Conclusions.

1. Introduction

Personal autonomy forms the beginning and the end of the story of labour law ⁽¹⁾. Through the regulation of employment relationships we recognise the difference between employment contracts on the one hand and commercial contracts on the other. The latter contracts are made freely by parties with equal status and the equal opportunity to set the terms of the bargain. The former contracts are made between parties who experience an inequality of bargaining power ⁽²⁾. This inequality of bargaining power leads to the subordination of workers and a working relationship which is controlled by the employer. This control threatens the personal autonomy of workers; through their subjection to

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⁽¹⁾ This article does not deal with the important topic of collective autonomy and its status in labour law, as this is beyond its scope. More information on this topic can be found in A. BOGG, “*Individualism*” and “*Collectivism*” in *Collective Labour Law*, in *Industrial Law Journal*, 2017, n. 4, 72-108.

⁽²⁾ Cfr. P. DAVIES, M FREEDLAND, *Kahn-Freund’s Labour and the Law*, Stevens, 1983, 5.

the will of the employer, employees are not able to pursue their own independently designed life plan. The subordination of employees to employers reduces individuals to objects, whose whole purpose is to follow the direction of another. This is wrong. At the heart of the employment relationship is a human being, a person with their own needs, wants and desires and their own view about how life should proceed. The role of labour law is to step in to release the humanity of workers from the talons of capitalist employer oppression. Workers must be emancipated from the subordination of the work relationship in order to achieve the end of labour law: the elevation of the worker to a point at which the worker can attain personal autonomy.

The separation between commercial contracts and employment contracts also feeds into the distinction made in labour law between employees or workers on the one hand and the self-employed on the other. The self-employed are viewed as entrepreneurs, commercial agents possessing a high level of autonomy in the relationships they make and the activities they pursue. As autonomous economic agents they do not suffer from the subordination experienced by workers, and are therefore not deserving of labour law protection in the same way⁽³⁾. At the same time, the status of self-employment implies a series of rewards. The first set of rewards is economic. The lack of subordination of self-employed persons implies they are exposed to a greater amount of economic risk, but this is compensated for by the possibility of retaining all profit generated by the business⁽⁴⁾. Moreover, the recognition of the self-employed as autonomous has normative significance. This kind of (personal) autonomy means that self-employed agents are entitled to respect, and it also means that these agents should be protected *against* interference and intervention from the state, and from other private parties⁽⁵⁾. Self-employment is the site of maximum personal autonomy and hence the end to which labour subjects should (and do) aspire⁽⁶⁾.

⁽³⁾ Case 268/99 *Jany and Others* [2001] ECR I-8615, para 35.

⁽⁴⁾ Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] Opinion of Advocate General Wahl ECLI:EU:C:2014:2214 [45]

⁽⁵⁾ Cfr. J. HOLROYD, *Relational Autonomy and Paternalistic Interventions*, in *Res Publica*, 2009, 321-335, 321.

⁽⁶⁾ Cfr. K. CRUZ, K. HARDY, T. SANDERS, *False Self-Employment, Autonomy and Regulating for Decent Work: Improving Working Conditions in the UK Stripping Industry*, in *British Journal of Industrial Relations*, 2017, n. 2, 274-294, 276.

The centrality of autonomy at the heart of labour law is so deeply engrained that it is rarely analysed in its own right ⁽⁷⁾. However, it is the argument in this article that it is crucial that this value is exposed and its implications analysed. First, it is crucial from the point of view of labour law theory. Second, this analysis is crucial from a practical point of view. One area which will be analysed in particular in this article is the implications of the autonomy view for our status classifications. There has long been dissatisfaction amongst labour law scholars about the rigidity of the binary divisions of employee versus self-employed status ⁽⁸⁾. This dissatisfaction has only been accelerated by changes in the organisation of work. These changes have blurred the boundaries of the employee/self-employed dichotomy to the extent that it is losing its utility as an analytical category. Intermediate categorisations appear at best a partial and temporary solution, avoiding the real questions at hand and the real problems that arise ⁽⁹⁾. A more fundamental re-examination is required.

This article proceeds by first setting the dominant perspective on the nature and function of the notion of “autonomy”. This is a liberal view and one which tends to crowd out other visions of autonomy. The next section identifies how this dominant vision of autonomy has infiltrated our traditional narrative of labour law, particularly through the notion of «labour is not a commodity». Section four identifies how the dominant vision of autonomy exists alongside other, more socialised versions of autonomy in the labour law narrative. In section five, there is an analysis of the value of the vulnerability critique to our understanding of autonomy in labour law. The final section (section 6) provides a detailed practical example of the problems of the autonomy approach adopted in labour law through an analysis of the problems of the relationship between autonomy and status in labour law. In section

⁽⁷⁾ Cfr. M. A. FINEMAN, *The Autonomy Myth: A Theory of Dependency*, The New Press, 2005.

⁽⁸⁾ Cfr. M. CHERRY, *Beyond Misclassification: The Digital Transformation of Work*, in *Comparative Labor Law and Policy Journal*, 2016, 544-577, 577; R. SPRAGUE, *Worker (Mis) Classification in the Sharing Economy: Square Pegs Trying to Fit in Round Holes*, in *American Bar Association Journal of Labour and Employment Law* 2015, n. 1, 58-72.

⁽⁹⁾ Cfr. L. RATTI, *Online Platforms and Crowdswork in Europe: A Two-Step Approach to Expanding Agency Work Provisions*, in *Comparative Labor Law and Policy Journal*, 2017, 477-511, 488.

7, the value of a more socialised or relational approach to autonomy is discussed. In particular, it is argued that if labour law is to recognise the importance of human potential at work, these more relational notions of autonomy must replace the hegemonic individualistic account of personal autonomy as the beginning and end of labour law ⁽¹⁰⁾.

2. Autonomy and the liberal legal subject

It is suggested that the notion of “individual autonomy” is one of the foundational myths of liberal society and law ⁽¹¹⁾. In liberal democratic societies, the rhetorical consistency surrounding personal autonomy means that it is an extremely powerful tool in political discourse. This consistency enhances the mythical character of autonomy as a value, and therefore enhances the perception that the values and personal attributes presented by the myth are stable, legitimate and stand irrespective of changing circumstances or different personal positions ⁽¹²⁾. However, the power of the individual autonomy myth does have certain negative effects in terms of discourse. It implies that other ways of viewing autonomy which do not correspond to the foundational myth tend to be crowded out. Also, as a foundational myth the particular nature of “individual autonomy” presented by liberal rhetoric tends to evade self-conscious consideration, and hence its potentially oppressive effects go unexamined or unnoticed.

The liberal ideology of individual autonomy describes the ability of a person to follow their own life course, unhindered by excessive interference from outside ⁽¹³⁾. At its heart lies the rational and reasonable individual agent who is able to assess the relative value of the choices presented and to decide on the optimal choice according to their own life plan ⁽¹⁴⁾. The liberal notion of individual autonomy is

⁽¹⁰⁾ This is the aspiration for labour law set out in the Ilo’s Future of Work programme. See Commission Modiale Sur L’Avenir Du Travail, *Travailler pour bâtir un avenir meilleur*, ILO, 2019, 11.

⁽¹¹⁾ Cfr. M. A. FINEMAN, *op. cit.*, 7, 26.

⁽¹²⁾ Cfr. M. A. FINEMAN, *op. cit.*, 12.

⁽¹³⁾ Cfr. Y. BRAUDO-BAHAT, *Towards a Relational Conceptualization of the Right to Personal Autonomy*, in *Journal of Gender, Social Policy and the Law*, 2017, n. 2, 114-136.

⁽¹⁴⁾ Cfr. Y. BRAUDO-BAHAT, *op. cit.*, 115.

heavily associated with the value of independence and holds that independence in the highest esteem. Individuals who are independent are able to develop important attributes, including reasoned opinions, innovation and enterprise⁽¹⁵⁾. They are also able to achieve self-sufficiency and responsibility for their own actions and choices. Hence personal autonomy has come to describe the perfect liberal citizen. That citizen is independent and self-sufficient and not reliant on the state for support. In turn that citizen is rewarded for their independence and self-sufficiency by the granting of further independence by the system. Autonomous citizens are both freed from regulatory governmental action as a reward for their ideal (economic) status. They are also freed through governmental structures from interference by other private actions⁽¹⁶⁾. Autonomy is therefore self-fulfilling. Autonomous agents earn autonomy and thereby gain further independence, and the possibility for even greater self-sufficiency and creativity.

There is of course a deep irony here. The whole myth of liberal autonomy relies on self-sufficiency and non-interference by the state and/or law in the lives of autonomous citizens. At the same time, individual autonomy lies at the heart of the design of public policy and law. Indeed, the subject of law is precisely the autonomous rational agent described in the individual autonomy myth. To understand this connection and its implications it is necessary to search deep into the foundations of liberal scholarship, and consider in particular the work of Immanuel Kant. For Kant, all humans are imbued with autonomy as a result of their capacity for rational thought⁽¹⁷⁾. This rationality has moral implications, because it marks humans out as worthy of particular respect. Kant describes the moral imperative which derives from human autonomy and rationality as the need to treat all human beings with “dignity” or as ends in themselves⁽¹⁸⁾. This imperative ensures that humans cannot be reduced to a “price” and used purely to as a means to an end rather than an end in themselves⁽¹⁹⁾. It is this imperative which then guides the formation of laws. Personal

⁽¹⁵⁾ Cfr. J. MILL, *On Liberty*, 1863, 17.

⁽¹⁶⁾ Cfr. M. A. FINEMAN, *op. cit.*, 7, 12.

⁽¹⁷⁾ Cfr. I. KANT, *Groundwork of The Metaphysics of Morals*, Mary Gregor (transl.), Cambridge University Press, 1996, 4:440.

⁽¹⁸⁾ Cfr. I. KANT, *op. cit.*, 4:434.

⁽¹⁹⁾ Cfr. I. KANT, *Groundwork of The Metaphysics of Morals*, *op. cit.*, 4:435.

autonomy means that individuals have the freedom to make their own laws. However, it also means that those laws are universal because they allow for the respect of others as independent rational beings. It is this quality which means that there can be common rules which can be followed and which will be accepted by all on the basis of rationality⁽²⁰⁾.

The Kantian analysis underlines the pervasiveness of the notion of individual autonomy at the heart of liberal law. This notion is present in the rationale for law and its moral force (individuals are worthy of protection because they are autonomous) and defines the very subject of the law (the autonomous, rational, independent individual). The notion of autonomy also defines legal aspiration, in that the aim of all law is to enhance autonomy to create a society of ideal legal citizens: independent self-reliant enterprising individuals who are able to assess the relative value of the choices presented to them to decide on the optimal choice according to their own life plan⁽²¹⁾. A good example of the centrality of autonomy in liberal legal discourse is provided by the design and operation of contract law. According to traditional contractual doctrine, the law promotes individual autonomy through certain «rules of just conduct»⁽²²⁾. These rules define a protected domain for each individual to use their own information and knowledge to formulate their own plans with respect to the market and other market actors. Contract law provides a co-ordinating function for the actions of autonomous economic agents and hence is autonomy enhancing. There is thus a virtuous relationship between individual autonomy, the action of the law and freedom⁽²³⁾.

By contrast, the autonomy enhancing function of contract law is not necessarily understood to extend to labour law. On some views, labour law is market correcting and serves a redistributive function which has no economic benefit. As such labour law does not enhance the autonomy and freedom of its subjects⁽²⁴⁾. A number of legal and economic theorists have pointed to the negative relationship between

⁽²⁰⁾ Cfr. I. KANT, *op. cit.*, 4:435

⁽²¹⁾ Cfr. J. RAZ, *Morality of Freedom*, OUP, 1986, 156.

⁽²²⁾ F. A. HAYEK, *Rules and Order*, Routledge 1973, 85.

⁽²³⁾ Cfr. S. DEAKIN, F WILKINSON, *The Law of the Labour Market*, OUP, 2005, 281.

⁽²⁴⁾ Cfr. R. H. COASE, *The Firm the Market and the Law*, in R. H. COASE, *The Firm the Market and the Law*, University of Chicago Press, 1988, 1.

labour law and autonomy. For example, Hayek has argued that labour law interferes in the spontaneous order of the market by trying to disrupt information and power asymmetries to the benefit of one of the parties only⁽²⁵⁾. He argues that this tends to reduce autonomy by removing incentives for individuals to rely on their own skill and knowledge and to invest in their own efforts. Labour law blocks the processes of competition which allow individually held information and knowledge to be put to use⁽²⁶⁾. Other theorists have specifically pointed to the threat to company autonomy which is at work in the design of labour law. Under this theorisation, labour law acts as a constraint to stifle innovation and prevent companies exploiting market opportunities when they arise⁽²⁷⁾. The result is an overall reduction in economic functioning to the disadvantage of all contractual parties. Labour lawyers tend to take issue with the presentation of a negative relationship between autonomy and labour law. Many have argued that power imbalances in labour markets and individual employment contracts act to undermine the autonomy of working individuals in practice⁽²⁸⁾. Economic structures allow workers to become commodified and treated as things rather than as human beings. The outcome is that “normal” rules regulating contracts under liberal law need to be modified when it comes to labour. There needs to be a set of constraints on the actions of employers in order that there is some equalisation of power between employees and employers. It is only in this way that the humanity of workers can be released from the shackles of subordination, exploitation and alienation⁽²⁹⁾. The normative instinct and the implications for autonomy are discussed more fully in the next section.

⁽²⁵⁾ Cfr. F. A. HAYEK, *The Mirage of Social Justice*, University of Chicago Press, 1978, 128

⁽²⁶⁾ Cfr. F. A. HAYEK, *op. cit.*, 51

⁽²⁷⁾ This is evident in the way that labour law was “blamed” for the financial crisis of 2008. See S. MARSHALL, *Shifting Responsibility: How the Burden of the European Financial Crisis Shifted Away from the Financial Sector and onto Labor*, in *Comparative Labor Law and Policy Journal*, 2014, 3, 449-478.

⁽²⁸⁾ See the discussion in M. FREEDLAND, N. COUNTOURIS, *The Legal Construction of Personal Work Relations*, OUP, 2011, 370.

⁽²⁹⁾ Cfr. B. LANGILLE, *Labour Law’s Theory of Justice*, in G. DAVIDOV, B. LANGILLE, *The Idea of Labour Law*, OUP, 2011, 102.

3. Labour is not a commodity and the normative instinct

The idea that labour is not a commodity is a “basic instinct” of labour law which stands alongside the idea of an «inequality of bargaining power» between employers and employees under the capitalist system of production⁽³⁰⁾. The argument is that labour has a human quality and so should not be reduced to merely a “good” to be traded on the market and exploited for profit. This idea is an extremely important part of the labour law narrative, as it allows labour law to set itself apart from economic accounts which appear to disregard the separateness of labour and hence the need for labour law at all⁽³¹⁾. On these accounts, if labour law is a commodity, it is simply an economic abstraction and so can be bought and sold according to the rules of commerce. As long as these commercial, contractual rules are engaged, employers are free to exploit employees to maximise their economic advantage, and ensure the maximisation of their profit. However, fundamental to the dominant narrative of labour law is the understanding that this reductive view of labour is unacceptable. It is unacceptable from the point of view of empirical reality, and it is unacceptable from the point of view of morality. Labour in reality is much more complex than other types of commodity. Labour embodies «the human agent, his human needs, human nature and human feelings»⁽³²⁾. It is this “human” element of labour which set up the moral imperative within labour law. Labour has a non-market dimension which rests in the person. That person is worthy of respect, of dignity. Labour law is a necessary «step to the realisation of human dignity for a person in relation to his labour»⁽³³⁾.

The moral connection at work in the «labour is not a commodity» narrative rests on Kantian foundations. Kant’s work is explicitly referenced by Hugo Sinzheimer, one of the founding fathers of labour law, when he talked about the threat to autonomy and dignity which results from the commodification of labour. Following Kant, he recognised that a fundamental part of what it means to be human is the

⁽³⁰⁾ Cfr. F. HENDRICKX, *Foundations and Functions of Contemporary Labour Law*, in *European Labour Law Journal*, 2012, 2, 108-129, 110.

⁽³¹⁾ Cfr. F. HENDRICKX, *op. cit.*, 112

⁽³²⁾ J. K. INGRAM, *Work and the workman: an address to the Trades Union Congress*, in *Journal of the Statistical and Social Inquiry Society of Ireland*, 1880-1, 106, 109.

⁽³³⁾ F. HENDRICKX, *op. cit.*, 30, 114.

possession of individual purpose and direction, which is independent of the direction of another ⁽³⁴⁾. Individual autonomy is critical to humanity, but that autonomy is compromised by the capitalist system. The capitalist system attempts to reduce workers to things which have a price: they serve the ends of others, and can be replaced at any time with equivalent value. However workers are, in fact, elements of “dignity”, “spiritual beings” who cannot be reduced to commodities bearing a “price” and who are «not designed to serve the ends of others» ⁽³⁵⁾. Hence labour law must step in to address the moral problem of the treatment of individuals under the capitalist mode of production.

The Kantian foundations of labour law are viewed as extremely important, because they attach labour law to certain core legal principles and aims ⁽³⁶⁾. Labour law can use and adapt the overarching moral principles of liberal law (for example “dignity”) to explain its own action and create its own legitimacy ⁽³⁷⁾. It is able to latch on to other successful liberal discourses in order to explain its own action and increase its influence ⁽³⁸⁾. However, at the same time, it is recognised that the application of liberal discourses and law to the employment relationship is insufficient to address labour’s problems. Sinzheimer explains this by exposing the limitations of the liberal law of contract when it comes to the employment relationship ⁽³⁹⁾. Certainly, the application of contractual regulation in the labour market was a civilising moment because it meant a move away from defining workers as the “property” of their employers’ as occurred under feudal

⁽³⁴⁾ Sinzheimer specifically references Kant in his work. See H. SINZHEIMER, *Grundzüge des Arbeitsrechts* in H. SINZHEIMER, *Arbeitsrecht und Rechtssoziologie: gesammelte Aufsätze und Reden*, Otto Brenner Stiftung, 1976, 8.

⁽³⁵⁾ *Ibidem*.

⁽³⁶⁾ For example the UN Charter of Human Rights (1945) and the Universal Declaration of Human Rights (1948).

⁽³⁷⁾ P. GILBERT, *Dignity at Work*, in H. COLLINS, G LESTER, V MANTOUVALOU, *Philosophies of Labour Law*, OUP, 2018.

⁽³⁸⁾ V. MANTOUVALOU, *Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation*, in *Human Rights Law Review*, 2013, 3, 529-555.

⁽³⁹⁾ Cfr. For a detailed analysis of this exposition see R. DUKES, *The Labour Constitution*, 2014, OUP, 14-18.

systems⁽⁴⁰⁾ Workers were now recognised as more than “things”; they had a legal personhood defined by a recognition of their innate freedom, autonomy and rights. The problem was that contractual regulation was insufficient. Without any recognition of the social position of labour, contract law simply acted to reinforce and strengthen the inequalities at work in the capitalist system. Labour law was necessary to fill this gap: it allowed the application of social justice to employment relationships⁽⁴¹⁾. The role of labour law was to supplement private law and limit its application, so that the power of employers over employees was restricted⁽⁴²⁾.

It is at this point that a Marxist analysis of the injuries to workers involved in the capitalist system of production becomes important. For example, Sinzheimer started his theory of “dependent labour” from an explanation of the personal value of work prior to the onset of capitalist relationships of production⁽⁴³⁾. He identified that in the original position, work and activity fulfilled a personal and social function for workers. Workers were able to exercise control over their work and use work to pursue their own autonomous ends. However, with the advent of capitalism, labour became dependent on others for work; workers were directed in their work activities by capitalist entrepreneurs solely interested in their own profit-making. In Marxist terms, workers were “alienated” both from the process of working and the fruits of their work, and hence the essential tie between personal autonomy and work became lost⁽⁴⁴⁾. Capital became the “material basis” of human life, but was external to workers and ultimately outside of their control⁽⁴⁵⁾. This process was exploitative because the externalisation of worker value meant that workers themselves were objectified. They lost a sense of their value going beyond the objectification of the interests of capital. Hence the exploitation that workers experienced through the capitalist system went beyond a threat to physical integrity: this exploitation was

⁽⁴⁰⁾ Cfr. H. SINZHEIMER, *Demokratisierung des Arbeitsverhältnisses*, in H. SINZHEIMER, *Arbeitsrecht und Rechtssoziologie: gesammelte Aufsätze und Reden*, Frankfurt, Germany, 1976, 115.

⁽⁴¹⁾ Cfr. H. SINZHEIMER, *Demokratisierung des Arbeitsverhältnisses*, cit., 124.

⁽⁴²⁾ Cfr. R. DUKES, *op. cit.*, 17.

⁽⁴³⁾ Cfr. H. SINZHEIMER, *Demokratisierung des Arbeitsverhältnisses*, cit., 34, 8-10.

⁽⁴⁴⁾ Cfr. K. MARX, *Economic and Philosophic Manuscripts of 1844*, 1871-2.

⁽⁴⁵⁾ Cfr. K. MARX, *Das Kapital: A Critique of Political Economy*, Pacifica Publishing Studio, 2010, 84.

a threat to humanity in the deepest Kantian sense ⁽⁴⁶⁾. The insertion of workers into a capitalist system of production meant that they were separated from their own “spiritual” existence because of the loss of autonomy they faced. This meant that not only their physical integrity but also their moral dignity was compromised.

This theorisation has been supplemented by the specific injury involved in the subordination of employees to employers under the capitalist mode of production ⁽⁴⁷⁾. This was the particular narrative adopted by Otto Kahn Freund, Sinzheimer’s one-time pupil, who brought many of Sinzheimer’s ideas to play in the context of the UK system of labour law. Kahn-Freund was particularly concerned that there was very little freedom at work in the employment relationship as a result of subordination ⁽⁴⁸⁾. As workers who entered into a work relationship suffered from an imbalance of bargaining power stemming from the privileged position of employers under the capitalist system, they had in reality almost no possibility to negotiate terms to their own advantage ⁽⁴⁹⁾. Instead, employers had to accept the terms laid down by employers in order to ensure the fulfilment of their subsistence needs. The purpose of labour law was to step in to provide a «countervailing force to counteract the inequality of bargaining power» between employers and workers ⁽⁵⁰⁾. Through policies which recognised the social position of workers, labour law could serve to make the employment relationship more equal and temper the employer’s power of command over the employee ⁽⁵¹⁾. This process of equalisation would allow workers more power, and hence allow them space to give expression to their own needs, wants and values. It would release the personal autonomy and dignity of workers and allow humanity to flourish.

⁽⁴⁶⁾ Cfr. E. ROSENSTOCK, E. MAY, M. GRUNBERG, *Werkstattaussiedlung: Untersuchungen über den Lebensraum des Industriearbeiters*, Springer Verlag, 2013, 17.

⁽⁴⁷⁾ Cfr. G. DAVIDOV, *Subordination vs Domination: Exploring the Differences*, in *International Journal of Comparative Labour Law and Industrial Relations*, 2017, 3, 365-389, 371.

⁽⁴⁸⁾ Cfr. P. DAVIES, M FREEDLAND, *op. cit.*, 2, 25.

⁽⁴⁹⁾ Cfr. P. DAVIES, M FREEDLAND, *op. cit.*, 17.

⁽⁵⁰⁾ P. DAVIES, M FREEDLAND, *op. cit.*, 18.

⁽⁵¹⁾ Cfr. P. DAVIES, M. FREEDLAND, *op. cit.*, 14.

As a narrative, the inequality of bargaining power plus commodification story has been extremely influential in labour law. At the same time, its value and relevance have been criticised on a number of grounds, and this criticism has only increased in the context in modern changes in the organisation of work (⁵²). One particularly persistent critique has been around the notion of subordination, both as a theoretical concept and as a practical tool to describe the actual experience of workers in modern employment relationships (⁵³). This article builds on these critiques, and concentrates on the difficulties this narrative poses for the theorisation of autonomy and work, and the knock-on effects this has for the design and application of labour law. In particular, it is argued that there is a fundamental tension within the normative design of labour law between a fixed (contractual) version of autonomy on the one hand, and more socialised or relational versions. This is played out for example in the very restrictive way in which autonomy is viewed in relation to employment status, which can be distinguished from the understanding of autonomy as justification in other areas of employment law. The nature of the contradiction and the choices involved will be discussed in the next section. The particular implications will be discussed in section 5.

4. Different versions of autonomy and labour law

It is clear from the analysis of the traditional narrative of labour law that there is a commitment to the Kantian idea of humanity as autonomy and rationality. This is the start of labour law because the

(⁵²) Cfr. A. TODOLI-SIGNES, *The “gig economy”: employee, self-employed or the need for a special employment regulation?*, in *Transfer*, 2017, 2, 193-205; B. RODGERS, *Employment Rights in the Platform Economy: Getting Back to Basics*, in *Harvard Law and Policy Review*, 2016, 479; A. AIOISI, *Commoditized Workers. Case Study Research on Labour Law Issues Arising from a set of On Demand/Gig Economy Platforms*, in *Comparative Labor Law and Policy Journal*, 2016, 3, 653-690, 663. Of course, it is possible to exaggerate the “differences” the gig economy poses for the regulation of work, and there is also evidence that “subordination” does exist in these modern forms of work, possibly more so. See A. TODOLI-SIGNES, *The End of the Subordinate Worker? The On-Demand Economy, the Gig Economy and the Need for Protection for Crowdworkers*, in *Revue internationale de droit comparé du travail et des relations professionnelles*, 2018, 2, 241-268.

(⁵³) Cfr. M. FREEDLAND, N. COUNTOURIS, *op. cit.*, 28, 370.

humanity of workers is the reason labour law exists. It is also the end of labour law. The commitment to the Kantian legal person sets up the moral imperative towards the protection of individuals in employment relationships. The end of labour law is the recognition and release of the humanity of workers through laws which allow them to achieve autonomy and dignity. On the Kantian narrative, the notion of “autonomy” is fixed and complete; it is necessary to detect the existence of autonomy in order to set up the moral imperative towards the protection of individuals in employment relationships. Furthermore, on the Kantian narrative, personal autonomy is inherently desirable and a valid aspiration in the application of all law (including employment law). Individuals released from dependence through law become active citizens able to participate fully in social life, and in turn become agents in the production of further law. Personal autonomy is a kind of utopia, under which individuals achieve freedom from acts of will emanating from the outside⁽⁵⁴⁾.

In his work *The Metaphysics of Morals*, Kant argues that there is an inverse relationship between personal autonomy and dependence in employment relationships. Indeed, in *The Metaphysics of Morals*, Kant makes a distinction between «active» and «passive» citizens based on their level of independence at work. Kant explains that «active» citizens are those who have the right to vote and to create law (which he refers to as «civil personality»)⁽⁵⁵⁾. They have these rights because they are not dependent on the will of other private persons for their decisions. This freedom from other private wills means that these citizens can vote in accordance with their innate right and in the interests of others, and therefore can adequately represent the general will. By contrast, «passive» citizens do not have the right to become involved in the management of the state. They do not have this right because they «do not owe their existence and preservation» to «their own rights and powers»⁽⁵⁶⁾. They therefore are unable to participate directly in the making of law and remain «passive». He suggests that the autonomy of active citizenship only exists where there is a sufficient level of independence of will. Individuals in dependent

⁽⁵⁴⁾ Cfr. D. KNIGHTS, H. WILLMOTT, *Autonomy as Utopia or Dystopia*, in *Sociological Review*, 2002, 59.

⁽⁵⁵⁾ Cfr. I. KANT, *op. cit.*, 6:314.

⁽⁵⁶⁾ I. KANT, *op. cit.*, 6:314.

employment relationships do not possess this autonomy. Hence, an apprentice and a domestic servant, as well as the «woodcutter I hire to work in my yard» are passive citizens because they lack the level of independence required for civil personality⁽⁵⁷⁾. Likewise, private tutors and tenant farmers are «mere underlings of the commonwealth» because they have to be under the direction and protection of other individuals. Conversely, the «carpenter or blacksmith who can put up the products of his work up as goods for sale to the public», school teachers, civil servants and leasehold farmers have sufficient levels of independence from private wills to achieve active citizenship status.

The suggestion in this narrative is that there is a role for law which releases workers from dependence and enables them to become «active» citizens. The application of just rules of conduct will allow individuals to find and reassert their autonomy as against their employers. However, as we have seen, this has always been considered an insufficient narrative for labour law. This is because there are systemic factors which labour law must internalise in order to achieve justice. Here is the value of the Marxist narrative, under which there is a recognition that “dependence” in employment relationships is not just individually created. It is a direct result of the operation of the capitalist system of production which structures all economic relationships. Furthermore, capitalist structures of production are not purely economic because the class of people who own the means of production and direct employment relationships also have the key to controlling other social institutions: religion, politics and the law⁽⁵⁸⁾. This implies that those institutions (including the law) can be manipulated to serve the ends of the ruling class⁽⁵⁹⁾. Hence, there should be real scepticism about the usefulness of fixed legal values and concepts, and their ability to achieve justice for workers. These legal values tend to be fixed to the extent that they serve to reinforce existing patterns of advantage and disadvantage in the economic and social order⁽⁶⁰⁾.

⁽⁵⁷⁾ *Ibidem*.

⁽⁵⁸⁾ K. MARX, *The German Ideology*, International Publishers Co, 1970, 64.

⁽⁵⁹⁾ Cfr. K. MARX, *The German Ideology*, op. cit., 65

⁽⁶⁰⁾ Cfr. A. GIDDENS, *Capitalism and Modern Social Theory: An Analysis of the Writings of Marx, Durkheim and Weber*, Cambridge University Press, 1971, 41.

Indeed, Marx was specifically sceptical about the liberal, bourgeois idealisation of personal autonomy. Marx was not a proponent of a universal, fixed human nature⁽⁶¹⁾ His theory suggested that the “natural” attributes of humans could themselves be socially created and used to instigate a particular type of regulation which might not be in everyone’s interest⁽⁶²⁾. This was the case for the concept and the goal of personal autonomy. As a concept, personal autonomy was too thin to represent all that was involved in the path to self-realisation. As a goal, personal autonomy was insufficiently aspirational. It was an «invitation to squander value, wasting one’s days on second and third-best pursuits»⁽⁶³⁾. Furthermore, Marx saw autonomy, work and the law as in a constant, ever-shifting relationship with each other. Indeed, for Marx, autonomy and work were didactically interrelated. Marx saw the labour process as transformative, in that labour subjects were changed by their engagement with the labour process⁽⁶⁴⁾ That transformative process could produce very negative consequences for workers, commodified under the capitalist system of production. Work could be the site of alienation, oppression and exploitation. However, work was also a site through which autonomy of workers could be built and sustained⁽⁶⁵⁾ Work could allow the expression of creative energy and be a source of satisfaction for workers. It was just that under conditions of real subordination work was specifically structured to ensure that work’s creative functions could not be fulfilled, and workers remained subservient to their employers⁽⁶⁶⁾

The traditional narrative of labour law suggests that both Kantian and Marxist narratives can exist side by side. Indeed, this is the autonomy of labour law: the ability to be at once inside the canons of liberal law, whilst at the same time recognising its limitations and flaws. Labour law is able to achieve social justice through the modification of liberal rules to suit labour’s ends. Therefore, on this narrative it is not seen as

⁽⁶¹⁾ Cfr. R. A. BELLOTI, *Marxist Jurisprudence: Historical Necessity and Radical Contingency*, in *Canadian Journal of Law and Jurisprudence*, 1991, 145, 157.

⁽⁶²⁾ *Ibidem*.

⁽⁶³⁾ J. GARDNER, *The Contractualisation of Labour Law*, in H. COLLINS, G. LESTER, V. MANTOUVALOU, *op. cit.*, 47.

⁽⁶⁴⁾ Cfr. K. MARX, *Das Kapital*, *op. cit.*, 45, 84.

⁽⁶⁵⁾ Cfr. R. HYMAN, *Marxist Thought and the Analysis of Work*, in M. KORCZYNSKI (ed.), *Social Theory at Work*, OUP, 2006, 49.

⁽⁶⁶⁾ Cfr. R. HYMAN, *op. cit.*, 37.

problematic that some areas of labour law take and apply liberal legal rules and ideology as their starting point, or even maintain the value of liberal aspirations, as long as the workers in need of protection achieve social justice. For example, it is recognised that the status of employees is necessarily determined by the terms of the employment contract⁽⁶⁷⁾. This analytical starting point respects the (Kantian) *apriori* autonomy of the parties to an employment relationship, and also determines whether modification of those terms is necessary in order to achieve social justice. The courts are expected to be complicit in this regard, tasked with taking a “purposive” approach to the interpretation of (contractual) legal rules in disputes over contracts of employment⁽⁶⁸⁾. Where the requisite inequality of bargaining power is determined, existing contractual terms can be modified to ensure a fair outcome for the weaker party⁽⁶⁹⁾. Indeed, this modification and interference is also necessary to allow workers to achieve autonomy⁽⁷⁰⁾. The achievement of the optimisation of autonomy requires that social life is constructed so as to allow opportunities for all to pursue activities which allow individuals to construct meaning for their lives⁽⁷¹⁾. That meaning can be constructed through the exercise of decent and fulfilling work⁽⁷²⁾. Hence, on this labour law narrative, there is a virtuous relationship between both Kantian and Marxist notions of autonomy and their

⁽⁶⁷⁾ Kahn Freund accepted the fundamental distinction between commercial contracts and “employment contracts” for the purpose of regulation. He stated that «Businessmen do not generally expect the law to direct their normal behaviour. What they want to know from the court is what they can claim and what they must expect to pay if things have gone contrary to expectations. Employers and workers however must expect the law to play a part in regulating their mutual obligations and rights. The difference between the role played by the law in individual commercial and in individual industrial relations reflects the difference in the expectations society attaches to the law in different spheres of life» (P. DAVIES, M FREEDLAND, *op. cit.*, 2. 35).

⁽⁶⁸⁾ Cfr. J. MCLELLAND, *A Purposive Approach to Employment Protection or a Missed Opportunity*, in *Modern Law Review*, 2012, 3, 427.

⁽⁶⁹⁾ *Autoclenz v Belcher* [2011] ICR 1157.

⁽⁷⁰⁾ Cfr. B. WEBB, *Women and the Factory Acts* (1896) reproduced in S. ALEXANDER, *Women’s Fabian Tracts*, Routledge, 2010, 17. In this essay Webb remarks (at 30) that «Far from diminishing personal freedom, Factory legislation positively increases the individual liberty and economic independence of the workers subject to it».

⁽⁷¹⁾ Cfr. J. RAZ, *op. cit.*, 21, 370.

⁽⁷²⁾ Cfr. H. COLLINS, *Justice in Dismissal: The Law of the Termination of Employment*, Clarendon Press, Oxford, 1992.

achievement through the application of reasonable and sensible rules at work.

This is not to suggest that the tensions involved in this framework have gone completely unrecognised. There is a wealth of literature pointing out the difficulties in modifying contractual rules, the difficulties involved in determining the recipients of labour law and the outdated nature of the concepts in operation ⁽⁷³⁾. However, the essentially pluralist tradition is extremely strong in labour law, and is continually renewed ⁽⁷⁴⁾. In the next section, this article uses the analysis of vulnerability theory to suggest that there is more conflict between the different modes of autonomy presented in the labour law narrative than is often suggested. Indeed, despite the foundational nature of the Kantian discourse on autonomy, the direct assumption of this model at the heart of labour law is actually damaging for its subjects. Whilst that model of autonomy exists, forming a “gateway” to the access of other employment rights, there can only be a limited acceptance of more socialised models of autonomy, which will enable all workers to achieve justice in practice. There needs to be a move towards the socialisation of autonomy both at the start, the middle and the end of labour law. It is only in this way that autonomy will have meaning for workers and that labour law can be a mechanism for the recognition of human potential at work.

⁽⁷³⁾ See the contributions in G. DAVIDOV (ed.), *The Idea of Labour Law*, OUP, 2011.

⁽⁷⁴⁾ A good example is provided by the neo-pluralist “capabilities” approach adopted by DEAKIN and WILKINSON, *The Law of the Labour Market*, OUP, 2005, 22. The starting point is that labour markets are sites of inequality because the “capabilities” and “resource endowments” of labour market participants are unfairly distributed. Whilst some labour market participants might enter a virtuous cycle involving ample resource endowments, labour market advantage, improved economic functioning and hence increased resource endowments, others find that their lack of initial resource endowments means that they are not able to gain the capabilities which lead to efficient economic functioning and hence self-sufficiency and autonomy. Deakin and Wilkinson argue that social rights must be embedded in labour markets in order to address their endemic structural inequalities. They argue that embedding social rights in this way will allow all labour market participants to develop capabilities which allow them to effectively mobilize the resources at their disposal and hence achieve economic self-sufficiency.

5. The critique of vulnerability theory and relational approaches to autonomy

Vulnerability theory is broadly a theory of social justice which challenges the premises of liberal law ⁽⁷⁵⁾. Its introduction has often been credited to the work of Martha Fineman, who in a number of articles discussed the problems involved in basing law on liberal notions of liberty, autonomy and equality ⁽⁷⁶⁾. She was particularly concerned with the injustices involved in the construction of law around the Kantian liberal legal subject: the rational independent, autonomous individual. She argued that the liberal subject at the heart of law did not reflect the reality of the human condition, and so the application of the law was necessarily under-inclusive and divisive. It was under-inclusive because it recognised human attributes and experience only in terms of the characteristics displayed by the liberal legal subject: namely autonomy, rationality and independence. Moreover, those attributes had already been achieved by the ideal liberal citizen, and hence that citizen was not in need of legal protection. As a result, the application of the law was only necessary for those that were “vulnerable”: dependent, weak and lacking in self-reliance. Furthermore, vulnerability itself is understood in narrow terms. That vulnerability must be “deserving” in the sense of being developmental or biological dependency. Vulnerability which is derivative or socially created is ignored or outside the boundaries of state intervention ⁽⁷⁷⁾. Individuals have a responsibility to address the latter kind of vulnerability themselves, through taking on (as far as possible) the attributes of the ideal liberal legal citizen.

The analysis of the liberal legal subject under the vulnerability approach suggests that the very thin Kantian view of humanity that the liberal legal subject supports is damaging. This view of humanity is confined to ideas of individual rationality, autonomy and independence, separate from the messiness of human “animality” and vulnerability.

⁽⁷⁵⁾ Cfr. M. FINEMAN, *Vulnerability and Inevitable Inequality*, in *Oslo Law Journal*, 2017, 3, 133-149, 141.

⁽⁷⁶⁾ Cfr. M. FINEMAN, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, in *Yale Law Journal of Law and Feminism*, 2008, 1, 1-20; M. FINEMAN, *The Vulnerable Subject and the Responsive State*, in *Emory Law Journal*, 2010, 251-275.

⁽⁷⁷⁾ Cfr. M. FINEMAN, *The Vulnerable subject*, cit., 76, 264.

This allows the law to maintain a veneer of impartiality, universality and neutrality, which underlies its hegemonic status. However, it has been argued that this excision of the body, of vulnerability, from the liberal legal project is neither impartial nor neutral in either design or effect. For example, Grear argues that the liberal legal subject was specifically selected as the foundation of law in order to reflect and maintain certain social interests. This social interest was that of the «male, white, property-owning, natural man», and as such the subject of law came to embody these interests ⁽⁷⁸⁾. At the same time, the autonomous rational legal subject is «hardly human at all» ⁽⁷⁹⁾. Rather, Grear argues that the disembodied, decontextualized autonomous construct of the liberal legal subject is actually «far more like the corporation than it is like the living human being» ⁽⁸⁰⁾. Ultimately, this sets up an ideal which best serves capital's end: the corporation as person is the «very personification of capital itself» ⁽⁸¹⁾.

Grear does not specifically cite Marx in her work, but the analogy to the Marxist analysis of the interests of capital in the design of the law are plain to see. Indeed, Nussbaum specifically uses a Marxist analysis to underscore the fact that the use of Kantian rationality, autonomy and dignity in legal discourse encourages blindness to the fullness of human existence. She argues for example that the commitment to Kantian dignity is «extremely problematic» because it fails to recognise that dignity is not static and rarefied but is relational and political. Indeed, the acceptance of the rarefied Kantian notion of dignity (and autonomy) means that the law cannot properly serve a role in human development; it cannot promote «truly human flourishing» in the Marxian sense ⁽⁸²⁾. In order for that to happen, there must be an acceptance of the central position of human need and vulnerability in the structures of politics and law.

Hence the vulnerability approach suggests that there are real problems with the liberal legal subject, and that these problems are profound. The

⁽⁷⁸⁾ A. GREAR, *Vulnerability, Advanced Global Capitalism, Co-symptomatic Injustice: Locating the Vulnerable Subject*, in M. A. FINEMAN, A. GREAR (eds.), *Vulnerability: Reflections on a New Ethical Foundation for Law and Ethics*, Routledge, 2013, 41

⁽⁷⁹⁾ A. GREAR, *op. cit.*, 43

⁽⁸⁰⁾ *Ibidem*.

⁽⁸¹⁾ A. GREAR, *op. cit.*, 44.

⁽⁸²⁾ Cfr. M. NUSSBAUM, *Frontiers of Justice: Disability, Nationality, Species Membership*, Harvard University Press, 2006, 131.

suggestion is that these problems cannot be corrected ad hoc by the recognition of social position after the application of the law. Rather legal concepts themselves need to change in order to better recognise the truly human characteristics of the subjects of law⁽⁸³⁾. Fineman suggests that the liberal legal subject should be replaced by the «vulnerable subject»: a complex multi-dimensional actor within a complex multi-disciplinary institutional space. This vulnerable subject has (at least) two aspects. The first is that of embodiment or ontological vulnerability. This recognises the fact that each and every person is susceptible to harm, injury and misfortune, and many of the events that condition those harms are outside of human control. The second aspect is institutional vulnerability. This recognises that, although each person is ontologically vulnerable, the actual experience of vulnerability varies according to an individual's economic and social relationships. On Fineman's vulnerability approach, the state has a responsibility to step in to build resilience through responding to vulnerability, recognising at the same time its own institutional vulnerability. More recently, this vulnerability approach has been supplemented by calls to celebrate vulnerability, and capture the positive elements of this very human experience⁽⁸⁴⁾.

Nussbaum favours a theory of capabilities, which combines a list of capabilities or «basic political entitlements», combined with the idea of a life worthy of people's inalienable human dignity⁽⁸⁵⁾. In some ways, this account of capabilities is compatible with vulnerability theory.

⁽⁸³⁾ On this point, the relational approach goes beyond Marxist approaches. Marx is ambivalent to the power of law to influence the development of autonomy amongst individuals, given how intertwined it is with dominant modes of social production. See R. HYMAN, *op. cit.*, 65, 49.

⁽⁸⁴⁾ Cfr. M. A. FINEMAN, «Elderly» as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, in *Elder Law Journal*, 2012, 101-120, 116.

⁽⁸⁵⁾ Cfr. M. A. NUSSBAUM, *Labor Law and the Capabilities Approach*, in B. LANGILLE (ed.), *The Capabilities Approach to Labour Law*, OUP, 2019, 62. A capabilities approach is not necessarily incompatible with the vulnerability approach. However there are now a wide variety of approaches to the theory of capabilities. Some of these approaches are more sympathetic to the vulnerability agenda than others, particularly in the way that they reflect on the nature of personhood and its involvement in the law. Compare for example S. DEAKIN, *The Capability Approach and the Economics of Labour law*, in B. LANGILLE (ed.), *The Capabilities Approach to Labour Law*, OUP, 2019, and B. ARCHIBALD, *Capabilities Approaches and Labour Law through a Relational Lens*, in B. LANGILLE (ed.), *op. cit.*

Nussbaum refers to the richness of capability; that capabilities does not just inhere in the “innate” material of persons, but also in “internal capabilities” (the developed abilities of persons thanks to maturing and social care) and “combined capabilities” (internal capabilities plus a socio-political environment that makes choice a live possibilities) ⁽⁸⁶⁾. Thus her capabilities approach relies on a wider understanding of the constitution of self than other approaches to capability and to regulatory action more generally. At the same time however, her capabilities scheme does not have exactly the same aspirations as pursued by a number of vulnerability theorists. On Nussbaum’s approach, the government is asked to interfere only on a narrow range of core political entitlements, upon which «a lot of statutory law» does not bear ⁽⁸⁷⁾. She is herself sceptical of the extent to which aspects of labour law inhere in the very idea of a life worthy of dignity. Hence, in order to truly enact the insights regarding the liberal approach to autonomy and dignity (in the context of labour law), an alternative path needs to be taken.

It is suggested in this article that this path lies in embedding the law with a relational approach to autonomy. There are 3 aspects to this approach. First, this approach recognises the importance of autonomy in both individual aspiration and legal provision ⁽⁸⁸⁾. To this extent there is a certain consensus with the liberal position that a degree of self-determination is essential for leading a fulfilling life. However, the second element moves beyond the individualism which is associated with some liberal and libertarian approaches to autonomy. Rather, the relational autonomy method suggests that the development and sustained exercise of the capacity for self-determination is deeply embedded in a range of interpersonal, social and institutional relationships. Those relations may support the development of autonomy, or they may act to thwart its development and exercise. Third, the state has an obligation to create the conditions which foster the autonomy of its citizens and citizen autonomy in the broadest sense. These conditions are social and political, but they are legal too. There is

⁽⁸⁶⁾ Cfr. M. A. NUSSBAUM, *op. cit.*, 85, 67.

⁽⁸⁷⁾ Cfr. M. A. NUSSBAUM, *op. cit.*, 69.

⁽⁸⁸⁾ Cfr. C. MACKENZIE, *The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability*, in C. MACKENZIE, W. ROGERS, S. DODDS (eds.), *Vulnerability: New Essays in Ethics and Feminist Philosophy*, 2014, OUP, 42.

a duty to consider how our legal institutions variously develop or restrict autonomy, and the action that can be taken to instil relational autonomy at the heart of our law.

Under the relational approach to autonomy, theorists are keen to point out that it is mistake to view regulation as *either* for the protection of autonomy *or* the protection of vulnerability. They reject the idea that autonomy and vulnerability are polar opposites, and that regulation which supports autonomy is unconcerned with vulnerability or regulation which aims to limit vulnerability will be damaging for autonomy⁽⁸⁹⁾. They argue that these views of regulatory effect rely on static notions of both vulnerability and autonomy which are unhelpful, and in any event do not represent the reality of lived experience. For relational theorists of autonomy both vulnerability and autonomy are dynamic features of human existence. They are both socially, environmentally and legally constituted. This is important because neither of these features are beyond regulation, and regulative action which seeks to encourage autonomy can directly address elements most often connected with the theorisation of vulnerability: domination, oppression and exclusion. Moreover, it allows regulation which seeks to address vulnerability to be seen in a positive light. On the relational scheme, vulnerability is *part of* autonomy. This is because although vulnerability can be limiting, it can also be enabling. It endows us all with certain capacities in a relational sense: the «ability to fall in love, to learn to take pleasure and find comfort in the presence of others»⁽⁹⁰⁾. Vulnerability is essential to relationship building which in turn is central to human flourishing⁽⁹¹⁾.

It is argued in this article that this approach is particularly important in the context of labour law, which is concerned both with autonomy and the protection of vulnerability. The next section will investigate one area of labour law to illustrate how this relational approach might be helpful in understanding the limitations of the current approach and opportunities going forward.

⁽⁸⁹⁾ Cfr. J. ANDERSON, *Autonomy and Vulnerability Intertwined*, in C. MACKENZIE, W. ROGERS, S DODDS, *op. cit.*, 135.

⁽⁹⁰⁾ E. GILSON, *Vulnerability, Ignorance and Oppression*, in *Hypatia*, 2011, 308-310.

⁽⁹¹⁾ Cfr. J. HERRING, *Defining Vulnerability* in J. HERRING (ed.), *Vulnerable Adults and the Law*, OUP, 2016, 30.

6. Employment status: moving towards relational approaches to autonomy

In this section, there is an attempt to apply the theoretical criticism above to one area of labour law: that of employment status. This area is chosen in particular for a number of reasons. First, this is one area where the dangers of the adoption of the traditional liberal legal approach to autonomy appear most prevalent. Second, the law on employment status reflects artificial separation between the employment contract on the one hand, and the application of legal rules to modify contractual rules on the other. It appears that this approach does not work well because there is always a conflict between fixed approaches to legal values on the one hand (Kantian autonomy) and the recognition that those fixed approaches are unsuitable for labour on the other (Marxist autonomy). Third, the area of employment status has been deeply affected by economic and social change, which in any event have brought into question its rationale and its effectiveness. It is suggested that considering the notion of relational autonomy in this context may help us out of this impasse.

In labour law, it is generally accepted that there is a need to separate “employees” on the one hand from the “self” employed on the other⁽⁹²⁾. According to this normative framework, the contract of employment presupposes a relationship of subordination of the employee to the employer. This subordination can be understood in a number of different ways but in this context usually refers to the existence of command and control by a specific employer over its employees driven by the inequality of bargaining power between the parties. This subordination is problematic because the fact that an employee has to follow the orders of a boss infringes on the employee’s autonomy and freedom⁽⁹³⁾. The law needs to step in to equalise the bargaining power and allow employees to regain their autonomy and

⁽⁹²⁾ Indeed, to a certain extent this separation was captured in the worker of Kahn Freund and Sinzheimer. See P. DAVIES, M FREEDLAND, *op. cit.*, 27, 35; H. SINZHEIMER, *Grundzüge des Arbeitsrechts*, *op. cit.* 34, 8-10. Sinzheimer distinguishes between *Arbeitsnehmer* (workers) and the larger group of *Arbeiter* (a group which included the self-employed)

⁽⁹³⁾ Cfr. G. DAVIDOV, *Subordination vs Domination: Exploring the Differences*, *cit.*, 373.

ability to pursue their own goals (through work). On the other hand, self-employed persons do not suffer from subordination in their working relationships. They already have autonomy in the way in which they can select assignments and manage their work. They are not subject to the control that employees are and are not in need of statutory protection. On this model, the self-employed are analogous to businessmen who do not generally expect the law to direct their normal behaviour. Rather, they expect the law only to direct what they can claim and what they must expect to pay if things have gone contrary to expectations⁽⁹⁴⁾. They are in this sense fundamentally different from employees.

There are some fundamental characteristics which distinguish the self-employed from wage employees. In particular they are distinguished by the mode of regulation. The earnings of the self-employed represent a return on capital as well as labour entrepreneurial skill and risk-taking, whereas the wage employee receives a payment for his or her labour. Unlike most employees, the self-employed person, generally has a considerable degree of independence, controls labour time and use, is responsible for the range of economic and financial decisions and bears a major share of the risks of failure⁽⁹⁵⁾.

The binary divide represents two versions of autonomy. On the one hand, there is the Kantian, fixed notion of autonomy represented by the characterisation of an individual who is self-employed. The autonomy here is complete, a virtue which allows the self-employed person to reach the ideal of the liberal legal citizen: a person who is economically, socially and legally independent and self-reliant. Moreover, this independence is self-fulfilling because it allows persons to develop skills which ensure that their independence continues even where they are subject to market risk. Examples of such skills include the development of reasoned opinions, innovation and enterprise⁽⁹⁶⁾. On the other hand, the version of autonomy represented in the notion of employee status is different. This is more Marxist or even relational in the sense that it recognises that autonomy can be manipulated by social forces and is thus constantly in a state of flux. However, it is argued in this article that the legal response to employee status cannot be

⁽⁹⁴⁾ Cfr. P. DAVIES, M FREEDLAND, *op. cit.*, 2, 30.

⁽⁹⁵⁾ *Record of Proceedings*, ILC, III (Conference Agenda) 77th Session 1990) 32/16.

⁽⁹⁶⁾ Cfr. J. MILL, *op. cit.*, 15, 17-18.

described as adopting the relational approach. The language around the employee delimitation focuses on protection of vulnerability following the compromise of autonomy. This is both a negative projection of vulnerability and autonomy. Furthermore, it creates a pressure towards the finding of self-employment status because this status is altogether more desirable. There is no vulnerability here only the exercise of autonomy in the liberal utopian sense.

It is argued in this article that the pressure to self-employment status that the binary divide presents is damaging for workers, and damaging for labour law. It is argued that this is damaging first because it sets up a series of aspirations which simply cannot be achieved (either by “self-employed” workers or by anyone else). This is because no human can in fact be disembodied and decontextualized in the manner suggested by the ideal of self-employment. Rather, the model of self-employment, of the ideal liberal citizen, is much more a corporate form than it is human: Kantian versions of autonomy and humanity have been recognised as «hardly human at all». This means that labour’s aspiration (towards self-employment) is not only undesirable, it is also unachievable for sentient, human, workers. Second, it tends to lead to attempts to use the existence of “autonomy” to negate a finding of employee or worker status. This has been a particular problem in the context of a number of modern work relationships in which workers are viewed as more “autonomous” and hence not in need of protection. However, it turns out that autonomy is merely more fractured than previously and although in some areas it may have increased, in others it has often declined. For example, it might be argued that individuals working in the gig economy have considerably more time autonomy than was possible under previous modes of work organisation. That said, a gain in time autonomy does not necessarily represent a gain in autonomy overall. There is considerable evidence that the mechanisms of control exercised by app-owners in the gig economy can be just as damaging to autonomy as direct on-site supervision⁽⁹⁷⁾. For example, the management of individuals through tracking software can greatly facilitate the exercise of power, whilst the use of algorithms to manage behaviour can be extremely draconian. The pressure towards the self-

⁽⁹⁷⁾ Cfr. M. IVANOVA, J. BRONOWIKA, E. KOCHER, A. DEGNER, *The App as Boss? Control and Autonomy in Application-Based Management*, 2018; available at: <https://bit.ly/2UXrvNp>, last accessed 30 march 2020.

employment model means that it is very difficult to separate different aspects of autonomy, and hence can lead to a finding of autonomy despite vast areas of control. Finally, the pressure to self-employment in the binary divide promotes a very negative view of labour law. The self-employed ideal does not involve legal regulation but instead freedom from all areas of such control. This is damaging for the labour law project because the pressure is always towards deregulation and the end of constraint⁽⁹⁸⁾.

Moreover, intermediate categories tend to support and legitimate the model of self-employment⁽⁹⁹⁾. The worker categorisation in the UK is a case in point. The rationale behind the introduction of this model was stated at the time to enhance employment protection through the extension of that protection to a larger class of individuals⁽¹⁰⁰⁾. The idea was to make sure that employees who could not mean the extensive tests of employee status would nonetheless be entitled to (basic) protections under employment law. However, over time, the worker categorisation has come to be the favoured mode of litigation for working individuals, even where arguably “employee-type” characteristics are present in practice⁽¹⁰¹⁾. This has decreased the relevance of the employee categorisation and hence the enhanced protections attached to this status as a matter of employment law. At the same time, the worker categorisation has come to be associated more strongly with self-employment such that it legitimises the aspiration towards this model. This can be seen in the comment made by Baroness Hale in the case of *Bates van Winkelhof* that: «While subordination may sometimes be an aid to distinguishing workers from

⁽⁹⁸⁾ This approach is evident in the following: WORLD BANK, *Doing Business 2008*, 2007, 19.

⁽⁹⁹⁾ Cfr. G. DAVIDOV, *A Purposive Approach to Labour Law*, 2016, OUP, UK, 136.

⁽¹⁰⁰⁾ Cfr. National Minimum Wage Bill HC Deb 16 December 1997 vol 303 cc 162; J. LOURIE, *National Minimum Wage Bill*, Research Paper 97/133, 4 December 1997 available at <file:///C:/Users/Ian/Downloads/RP97-133.pdf>, last accessed 3 November 2019.

⁽¹⁰¹⁾ *Uber v Aslam* [2018] ICR 453, para 121; *Addison Lee Limited v Mr M Lange, Mr M Olszewski, Mr M Morahan* [2018] WLR 05929292.

other self-employed people, it is not a freestanding and universal characteristic of being a worker» ⁽¹⁰²⁾.

7. Moving towards a socialisation of employment status

The question arises whether a more socialised concept of autonomy at the heart of labour law could move the project forward. This is assessed in a number of different ways. First, this section will discuss the potential for the relational autonomy project for revitalising the employee/ worker status category. It is suggested that on the relational approach, it is possible to develop an argument for recognising the existence of autonomy (in some forms) and also then need for regulation. Second, the section will challenge the aspiration towards self-employment which exists as a part of our interpretation of the law in this area. It will be argued, that self-employment is not of a different order to other kinds of relationship in terms of autonomy. Self-employment may be autonomy-enhancing, but there are many who experience self-employment as profoundly limiting in terms of the autonomy ideal. Third, there will be a commentary on the inclusivity of this approach, and its ability to expand rights across our current status bands. It is argued that a relational approach to autonomy leads necessarily towards a single status approach, as supported in other recent writing on this topic ⁽¹⁰³⁾.

The application of labour law on the binary divide consistently relies on a finding of subordination suffered by employees/workers at the hands of their employers. This subordination is a negative experience for workers and deprives them of the experience of autonomy (in the Marxist sense) and also the aspiration of autonomy (in the Kantian sense). It is this element of subordination or control combined with the loss of autonomy which enables labour law to step in to equalise the bargaining power between the parties and allow employees to regain their autonomy. This analysis is incomplete. First, employer-employee

⁽¹⁰²⁾ *Bates van Winklehof v Clyde and Co LLP* (2014) 1 WLR 2047 para 39 (my emphasis). See commentary in J. PRASSL, *Who is a Worker*, in *Law Quarterly Review*, 2017, vol. 133 (Jul), 366.

⁽¹⁰³⁾ Cf. J. HENDY, K. EWING, C. JONES, *Rolling Out the Manifesto for Labour Law*, IER, 2019; *Labour Law Manifesto: A Fair Deal for Work*, 2019; available at <https://labour.org.uk/manifesto/fair-deal-work/> last accessed 11 April 2019.

relationships can be autonomy enhancing. Certainly, in a number of employment relationships, employee/worker autonomy may be extremely marginal. However in a number of other employment relationships, the experience of autonomy is high, there is a high level of trust between employees and their employers and as a result employees gain a great deal of satisfaction from work⁽¹⁰⁴⁾. Of course, that experience of autonomy may be limited, as ultimately employers hold the power to dismiss if employer and employee ends diverge significantly⁽¹⁰⁵⁾. But *for the time of the conduct of the work relationship*, the experience is autonomy-enhancing rather than detrimental to autonomy. Second, the aspiration of autonomy in the Kantian sense as necessary for employee status is damaging. As we have seen, this aspiration is totally chimeric and unachievable. It follows that the tests for autonomy loss as function of employee status will also be meaningless because they can neither be broad enough nor narrow enough to meet the aspiration. The result is that individual in high status, high trust roles who do enjoy significant discretion in their work are able to deny the existence of autonomy just as successfully as those where the level of control by an employer is draconian⁽¹⁰⁶⁾.

In a similar fashion, all the evidence points to a wide variety of experience of autonomy amongst self-employed workers. In practice, many self-employed people find that their autonomy is limited, either by market forces or in the way in which contracts are designed. Indeed, a “new class” of self-employed persons have been identified who do not meet the traditional profile of the self-employed worker at all⁽¹⁰⁷⁾. They do not aim to grow a business or employ others in the future, and are much less independent and financially stable than the traditionally

⁽¹⁰⁴⁾ Cfr. A. FOX, *Beyond Contract: Work, Power and Trust Relations*, Faber and Faber, 1974.

⁽¹⁰⁵⁾ Cfr. H. COLLINS, *Is the Contract of Employment Illiberal*, in H. COLLINS, G. LESTER, V. MANTOUVALOU, *op. cit.*, 54.

⁽¹⁰⁶⁾ Compare for example the case of C-47/14 *Holterman Ferho Exploitatie BV v Friedrich Leopold Freiherr Spies von Bullesheim* (autonomy was not present for a shareholder of the company-employer where his ability to influence the administrative body was negligible) with *Independent Workers Union of Great Britain v Rooffoods Limited (t/a Deliveroo)* [2018] EWHC 1939 (Admin) (the existence of a “genuine” substitution clause meant that the Deliveroo drivers had a level of autonomy which negated a finding of “worker” status).

⁽¹⁰⁷⁾ V. DASKALOVA, *Regulating the New Self-Employed in the Uber Economy: What Role for EU Competition Law*, in *German Law Journal*, 2018, 461.

self-employed. In this context, self-employment is not a result of the assertion of autonomy, but rather individuals are forced into it as a result of a lack of alternative options. Indeed, in some cases, this self-employment status turns out to have been constructed in the interests of employers, and to represent a false or bogus picture of the actual relationship between the parties ⁽¹⁰⁸⁾. This “false self employment” has been a significant concern at EU and ILO level for some time ⁽¹⁰⁹⁾.

The relational approach to autonomy suggests that whilst individual autonomy is a valid aspiration, it can never be achieved in the Kantian sense. Autonomy is a social and socialised process, and therefore exists across all employment relationships as a result of their socialised nature. Some aspects of employment relationships develop autonomy, and make employment relationships a positive experience. Others are detrimental for autonomy. What is important is that there is institutional recognition of this variation and the differential experience between and amongst employment relationships in this regard. Furthermore, autonomy is not enhanced by leaving individuals to their own devices: freedom in the negative sense. Rather, all institutions, and particularly those with a role in developing the law have a responsibility to encourage regulation which fosters and develops autonomy for all. Employment status should not be divisive, but must function in a positive sense to recognise the need for resilience amongst all participants in the labour market.

⁽¹⁰⁸⁾ Indeed, in the *Uber* case, the courts were scathing about the actions of the platform company in attempting to disguise the true nature of the relationship. The Tribunal found that *Uber* went to considerable lengths to distort the relationship, «resorting in its documentation to fictions, twisted language and even brand new terminology» in order to avoid a finding that they owed employment rights to the platform workers. See *Uber v Aslam* [2017] IRLR 4, para 87

⁽¹⁰⁹⁾ At Ilo level see R198 *Employment Relationship Recommendation* (2006) para 4. At Eu level see EUROFOUND, *Exploring Self-employment in the European Union*, Publications Office of the European Union, Luxembourg, 2017 and the comments of the Court in *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014], cit., 5 offering instructions to referring courts on how to deal with “false self-employed” workers.

8. Conclusion

It is clear from the analysis in this article that the notion of autonomy forms a central part of the functions, aims and aspirations of labour law. It is argued in this article that more consideration needs to be given to the form of autonomy at the foundations of our labour law and how that particular form serves to define the functions of labour law. At base there are (at least) two notions of autonomy at work. The first is a Kantian notion of autonomy, under which autonomy is an a priori characteristic of humanity. On this understanding, autonomy is little affected by work as such, although autonomy can be compromised in certain employment relationships as a function of dependency and the subjection of the will of the employee to the will of the employer. In this instance, those in (very) dependent relations suffer from a reduction in citizenship which, it can be universally agreed, needs to be addressed as a matter of law. Humanity must be “released” from the shackles of dependence and the person at the heart of the work relationship must be recognised. On the other hand, there is a more socialised understanding of autonomy at work in labour law. This is the recognition, complicit with a Marxist analysis, that autonomy is fundamentally susceptible to variation according to the character of political, legal and other institutions. Autonomy is neither fixed, nor universal. Work can build autonomy just as it can reduce it. Capitalist systems of production tend to affect worker autonomy in a negative way through alienation, domination and subordination. Legal systems, which are under the control of the dominant class, tend to reinforce these patterns of domination and oppression, with negative consequences for workers.

It is argued in this article that both of these views of autonomy are deficient in the context of labour and labour law. The Kantian notion of autonomy is deficient as it is insufficiently socialised, and is connected to a very narrow version of humanity. This very narrow version prevents the full extent of individual personality and personhood from being recognised at work. It also significantly restrains the aspirations of autonomy and the relationship of those aspirations to law. Autonomy is seen as existing outside of dependency and so tends to set up an aspiration towards self-employment rather than improving the lives of those at work. The Marxist view of autonomy is constrained by a negative view of the social operation of economic system which serves

to reduce and restrain worker autonomy. It is also constrained by a negative view of the functioning of law in improving the lives of workers. This negativity means that there must be scepticism about the ability of these theories in really promoting autonomy in work.

The suggestion in this article is that the conceptualisation of autonomy at work in labour law needs to be reassessed and re-examined. This is necessary in the theoretical sense of capturing the autonomy *of* labour law. Certainly, labour law should seek to modify liberal law when it comes to the particular position of (all) workers. However, labour law should be ambitious in this regard, reconsidering not only the law, but also the legal ideology and legal categorisations lying behind that law⁽¹¹⁰⁾. It is also necessary in the more practical sense of responding to the real experiences of individuals at work. It appears that in the context of modern work relationships, it is possible to see a level of autonomy existing alongside extremely draconian methods of work management. It needs to be recognised that autonomy is a very fractured concept, and ultimately that it is fundamentally affected by relationships in both positive and negative ways. Indeed, this presents a positive outlook for the labour law project, because it suggests that law can be central in influencing the experience of autonomy and autonomy can be encouraged in all types of relationship across the employment spectrum.

Abstract

Recognising the Person at Work: the Case for a Relational Approach to Autonomy

Purpose: *The purpose of this article is to examine the notion of personal autonomy at the heart of employment law, and the implications for the design of employment status.* **Methodology:** *This article reviews legal theories of autonomy as they relate to employment and discusses case law pertaining to employment status.* **Findings:** *Current modes of the designation of employment status do not work because they are underpinned by unsuitable models of personal autonomy.* **Research limitations/implications:** *This article suggests failings in current models of employment status.* **Originality:** *The article is original as it investigates the literature*

⁽¹¹⁰⁾ See for example J. PRASSL, *Autonomous Concepts in Labour Law? The Complexities of the Employing Enterprise Revisited* in A. BOGG, C. COSTELLO, A. DAVIES, J. PRASSL (eds.), *The Autonomy of Labour Law*, Hart, 2015, 151.

on personal autonomy and applies it in a novel way to employment status. It also suggests a new model upon which employment status should be based.

Keywords: *employment status, autonomy, vulnerability, relational approach, personhood.*

Riconoscere la persona al lavoro: la necessità di un approccio relazionale all'autonomia

Obiettivi: *lo scopo di questo articolo è esaminare la nozione di autonomia personale alla base del diritto del lavoro e le implicazioni per la definizione dello status occupazionale. Metodologia:* *l'articolo esamina le teorie legali sull'autonomia nel lavoro e discute la giurisprudenza relativa allo status occupazionale. Risultati:* *le attuali modalità di determinazione dello status occupazionale non funzionano perché sono sostenute da modelli inadatti di autonomia personale. Limiti e implicazioni:* *il contributo evidenzia le lacune degli attuali modelli di definizione dello status occupazionale. Originalità:* *l'articolo è originale in quanto indaga la letteratura sull'autonomia personale e la applica in modo innovativo allo status occupazionale. Suggestisce inoltre un nuovo modello su cui basare la determinazione dello status occupazionale.*

Parole chiave: *status occupazionale, autonomia, vulnerabilità, approccio relazionale, personalità.*

The Inclusion of Self-Employed Workers into the Beneficial Scope of Labour Law

Alexander Stöhr*

Summary: **1.** Introduction. – **1.1.** Focusing of labour law on employees. – **1.2.** Forms of employment relations and their consequences for the application of labour law. – **2.** Fundamental considerations: necessity and limitation of the inclusion of self-employed workers into the scope of labour law. – **2.1.** The constitutional principle of equal treatment. – **2.2.** Economic considerations. – **2.3.** Distributive justice. – **3.** Current regulations. – **3.1.** International Labour Organization. – **3.2.** European Union. – **3.3.** EU Member States. – **3.3.1.** Italy. – **3.3.2.** United Kingdom. – **3.3.3.** Germany. – **4.** Approaches to solutions regarding the scope of labour law. – **4.1.** Complete redesign of labour law. – **4.1.1.** Inclusion of all workers who have contracted to render personal service. – **4.1.2.** Reference to the transaction. – **4.1.3.** Reference to the employer. – **4.2.** Inclusion of all economically dependent workers. – **4.3.** Selected application of labour law to a middle category. – **4.3.1.** Definition. – **4.3.2.** Possible protective measures. – **4.4.** Protection of specific occupational groups and forms of work.

1. Introduction

1.1. Focusing of labour law on employees

The regulation of the employment relationship goes back to the nineteenth century, when factory workers in industrializing countries were exploited by working 11 hours a day in unsafe and unhealthy conditions ⁽¹⁾. This protection was limited to workers in a formal

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⁽¹⁾ P. DAVIES /M. FREEDLAND, *Employees, Workers and the Autonomy of Labour Law*, in H. COLLINS/M. DAVIES/R. RIDEOUT (eds.), *The Legal Regulation of the Employment Relation*, Kluwer Law International, London, 2000, 267.

employment relationship. Self-employed persons and informal workers are not entitled to the advantages of labour law. Currently, in most legal systems, workers are divided into two major categories: conventional employees with an employment contract or employment relationship and the self-employed workers without such a contract/relationship⁽²⁾. Workers in the first category are protected by labour law; those in the second are not. According to Olaf Deinert, the definition of employees marks the keyhole through which every worker must fit in order to enjoy the protection of labour law⁽³⁾. An employment relationship usually exists when the following conditions are met: work, remuneration, personal dependence or subordination respectively, and personal performance⁽⁴⁾. In some countries a certain duration or continuity is required; in other countries it is possible to have an employment relationship for one day⁽⁵⁾. The required subordination has two aspects: (1) the will of the employee to work under the direction and control of the employer and (2) the authority of the employer to instruct the worker, control the work and take disciplinary measures if the work is not performed according to the instructions. The employer can also give instructions regarding the internal organization of the enterprise⁽⁶⁾.

The research question of this paper is to what extent self-employed workers are or should be included into the beneficial scope of labour law. This paper does not address disguised employment relationships or false self-employment respectively, which are unquestionable subject to labour law. Neither does the paper deal with small business exemptions as a means of protection for small businesses with employees. The exemption of small businesses from the burdensome

⁽²⁾ C. BOSSE/F. PENNING, in F. PENNING/ C. BOSSE (eds.), *The Protection of Working Relationships*, Kluwer Law International, Bedfordshire, 2011, 1 (2); U. ZACHERT, *Legitimation arbeitsrechtlicher Regelungen aus historischer und aktueller Sicht*, in *Recht der Arbeit*, 2004, 1 ff.

⁽³⁾ O. DEINERT, *Soloselbständige zwischen Arbeitsrecht und Wirtschaftsrecht*, Nomos, Baden-Baden, 2015, 9.

⁽⁴⁾ C. BOSSE, in F. PENNING/ C. BOSSE (supra note 2), 15 (23).

⁽⁵⁾ C. BOSSE, in F. PENNING/ C. BOSSE (supra note 2), 15 (23).

⁽⁶⁾ C. BOSSE, in F. PENNING/ C. BOSSE (supra note 2), 15.

scope of labour law via thresholds is the counterpart of the inclusion into the beneficial scope of labour law ⁽⁷⁾.

1.2. Forms of employment relations and their consequences for the application of labour law

Despite the traditional dichotomy between employer and employees, in recent years, modern forms of work relationships like temporary employment, on-call work and cross-border subcontracting emerged. This trend is boosted by the digitalisation, which has created new forms of work like crowd work or platform work respectively ⁽⁸⁾. New forms of labour often represent a mix of dependent and independent work. This creates a “grey area” outside the building of labour law, in which it is not clear whether the worker should be classified as an employee or as a self-employed worker ⁽⁹⁾. This uncertainty gradually diminishes the existence of labour law ⁽¹⁰⁾. Companies may adopt such forms of labour to specifically undermine it ⁽¹¹⁾. Judy Fudge speaks of a «conceptual crisis of labour law» ⁽¹²⁾. According to the former spokesman of the International Labour Organization, Ibrahim Patel, «the erosion of the employment relationship and the failure of labour

⁽⁷⁾ On this subject see A. STÖHR, *Small Business Exemptions in Labor Law: Necessity, Economic Analysis and Legal Structure*, in *Labour Law Journal*, 2018, 101-111.

⁽⁸⁾ GERMAN FEDERAL MINISTRY OF LABOUR AND SOCIAL AFFAIRS, *White Paper “Arbeiten 4.0”*, 2016, 176.

⁽⁹⁾ H. COLLINS, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, in *Oxford Journal of Legal Studies*, 1990, 353-380; R. WALTERMANN, *Welche arbeits- und sozialrechtlichen Regelungen empfehlen sich im Hinblick auf die Zunahme Kleiner Selbständigkeit?*, in *Recht der Arbeit*, 2010, 162 (164); R. WANK, *Die personellen Grenzen des Europäischen Arbeitsrechts: Arbeitsrecht für Nicht-Arbeitnehmer?*, in *Europäische Zeitschrift für Arbeitsrecht*, 2008, 172 (189).

⁽¹⁰⁾ C. BOSSE/F. PENNING, in F. PENNING/ C. BOSSE (supra note 2), 1 (2).

⁽¹¹⁾ R WANK, *Abschied vom Normalarbeitsverhältnis?*, in *Recht der Arbeit*, 2010, 193 (203 f.).

⁽¹²⁾ J. FUDGE, *Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation*, in *Osgoode Hall Law Journal*, 2006, 609 (610).

law to keep pace with evolving labour market issues is the most important industrial relation issue of our time». ⁽¹³⁾

According to Paul Davies and Mark Freedland, «[there is] a level of employment relations within the enterprise which cannot satisfactorily be characterized in terms of simple subordination and dependency. This thereby erodes, at a deep and subtle level, not just the simple bipolar antithesis between “the employer” and “the worker”, but also, and no less momentously, the simple binary distinction between employees and independent contractors. All of this tends to de-legitimate the use of that distinction as a basis for drawing the boundaries of employment rights». ⁽¹⁴⁾

With regard to the criteria of personal and economic dependence, Davies and Freedland divided the several forms of work into four categories ⁽¹⁵⁾:

	Status	Characteristics
Group 1	Employees	obligation to personal service; personally dependent or subordinated respectively
Group 2	Self-employed	obligation to personal service; not in a position of legal subordination, but highly dependent economically upon one, or small number of, employers
Group 3	Self-employed	obligation to personal service; but working for a range of employers (or “clients”)
Group 4	Self-employed	Not contracted to render a personal service at all, but simply to produce a result (whether as a consequence of their own efforts or of others employed by them or of sub-contractors or a

⁽¹³⁾ I. PATEL, ILO, *Provisional Record* 26, 2003, 26.

⁽¹⁴⁾ P. DAVIES/M. FREEDLAND, *The Complexities of the Employing Enterprise*, in G. Davidov/B. Langille (eds.), *Boundaries and Frontiers of Labour Law*, Hart Publishing, Oxford, 2006, 273 (283).

⁽¹⁵⁾ P. DAVIES /M. FREEDLAND, *Employees, Workers and the Autonomy of Labour Law* (supra note 1), 267 (273 f.).

mixture of all three)

2. Fundamental considerations: necessity and limitation of the inclusion of self-employed workers into the scope of labour law

2.1. The constitutional principle of equal treatment

It is a general principle of a constitutional state that a number of fundamental rights are guaranteed, among them the right of equality. At European level, this right is anchored in Article 20 of the Charter of Fundamental Rights of the European Union. The principle of equality prohibits the arbitrary unequal treatment of what is essentially equal. Hence, self-employed workers have to be treated the same as employees insofar as they are essentially equal. If self-employed workers are economically dependent, because they work for one, or small number of, employers, they are essentially equal as employees with regard to economic dependence, not with regard to personal dependence. Employees are typically, albeit not always, economically dependent. An exception might be chief physicians or top football players⁽¹⁶⁾. By providing their manpower in the interests and according to the instructions of the employer, they forego other income opportunities and rely on a certain continuity of the income⁽¹⁷⁾. According to Freedland, economically dependent self-employed workers are «working people who, although deemed independent, are, in reality, at least semi-dependent upon employing enterprises, and as vulnerable to exploitation as workers in the “employee” category»⁽¹⁸⁾. Therefore, labour law rules should apply to all economically dependent workers except those which presuppose the employer’s right to give instructions⁽¹⁹⁾. For example, the following regulations do not need to

⁽¹⁶⁾ R. WANK, *Der Arbeitnehmer-Begriff im neuen § 611a BGB*, in *Arbeit und Recht*, 2017, 140 (145).

⁽¹⁷⁾ R. REBHAIN, *Arbeitnehmerähnliche Personen – Rechtsvergleich und Regelungsperspektive*, in *Recht der Arbeit*, 2009, 236 (241, 243).

⁽¹⁸⁾ M. FREEDLAND, *From the Contract of Employment to the Personal Work Nexus*, in *Industrial Law Journal*, 2006, 1 (28 f.); see also R. CARLSON, *Why the Law Still Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying*, *Berkeley Journal of Employment & Labor Law*, 2001, 295 (300).

⁽¹⁹⁾ W. DÄUBLER, in F. Pennings/ C. Bosse (supra note 2), 127 (142).

apply, because they aim at the subordination of employees: the restriction of working time, which protects against the execution of the right to give instructions ⁽²⁰⁾; the continued remuneration, which can be seen as an insurance for workers as a return for the personal dependence ⁽²¹⁾; and the industrial safety and health protection, because the personal dependence enhances the occupational risks ⁽²²⁾. Naturally, the fact that a regulation does not need to apply does not mean that the legislator is not allowed to apply it anyway. For example, in German law, and the industrial safety and health protection also includes economically dependent self-employed, section 2 subsection 2 no. 3 German Act on the Implementation of Measures of Occupational safety and Health.

2.2. Economic considerations

The protection of self-employed workers would enhance the costs for the employers (or clients, respectively), unless the level of protection is reduced. This would reduce the attractiveness of the business location concerned. However, the costs could be compensated to a certain extent through economic benefits. According to Adalberto Perulli, the protection of self-employed workers could promote the development of self-employment and entrepreneurship, particularly in weak areas and for weak individuals ⁽²³⁾. However, since the economic benefits of own-account workers, who do not create jobs, are limited. Against this background, the costs of their protection outweigh the potential benefits. An exact forecast of the costs is difficult. Hence, from an economic point of view, self-employed workers should be included into the scope of labour law with restraint.

⁽²⁰⁾ R. REBHahn, *Arbeitnehmerähnliche Personen* (supra note 17), 236 (242).

⁽²¹⁾ S. DEAKIN, *The Comparative Evolution of the Employment Relationship*, in G. Davidov/B. Langille (supra note 14), 89 (101, 104).

⁽²²⁾ R. REBHahn, *Arbeitnehmerähnliche Personen* (supra note 17), 236 (242); see also D. POTTSCHMIDT, *Arbeitnehmerähnliche Personen in Europa*, Nomos, Baden-Baden, 2006, 209.

⁽²³⁾ A. PERULLI, *Study on Economically Dependent Work/Parasubordinate (Quasi-subordinate) work*, 2002, 117; see also J. FUDGE, *Fragmenting Work and Fragmenting Organizations* (supra note 12), 609 (647 f.).

2.3. Distributive justice

With regard to their social background, own-account workers are in need for protection. According to empirical data, a lot of own-account workers earn no more than employees. In contrast to employees, self-employed workers have to bear the social security contributions themselves, so their average net earnings are even lower than those of employees⁽²⁴⁾. The average earning per hour of own-account workers is 13 Euro before tax and social security. 24 percent of the own-account workers earn less than 8.50 Euro per hour⁽²⁵⁾, and 11 percent earn less than 500 Euro per month⁽²⁶⁾. This suggests that entrepreneurship does not pay. One explanation why such own-account workers remain in self-employment, besides being their own boss, could be that they are not aware of their lower incomes because they compare monthly not hourly incomes. Or they may feel forced to remain self-employed due to a lack of alternatives in wage employment⁽²⁷⁾. Against this background, a redistribution of wealth in favour of own-account workers seems to be justified. Whether the inclusion into labour law is an adequate means to this end is a complex question which cannot be explored in depth here⁽²⁸⁾.

⁽²⁴⁾ A. SORGNER/M. FRITSCH/A. KRITIKOS, *Do Entrepreneurs Really Earn Less?*, in *IZA Discussion Paper No. 8651*, 2014.

⁽²⁵⁾ T. KLEBE, *Crowdwork: Faire Arbeit im Netz?*, in *Arbeit und Recht*, 2016, 277-280.

⁽²⁶⁾ GERMAN FEDERAL STATISTICAL OFFICE, *Wirtschaft und Statistik 2013*, S. 482, 495; on this O. DEINERT, *Soloselbständige zwischen Arbeitsrecht und Wirtschaftsrecht* (supra note 3), 18.

⁽²⁷⁾ A. SORGNER/M. FRITSCH/A. KRITIKOS, *Do Entrepreneurs Really Earn Less?* (supra note 24), 19.

⁽²⁸⁾ On this subject see S. ARNOLD, *Vertrag und Verteilung*, Mohr Siebeck, Tübingen, 2014; A. STÖHR, *Kleine Unternehmen: Schutz und Interessenausgleich im Machtgefüge zwischen Arbeitnehmern, Verbrauchern und Großunternehmen*, Mohr Siebeck, Tübingen, 2019, 221 ff.

3. Current regulation

3.1. Distributive justice

The undermining of labour law with the appearance of new employment relationships was addressed by the International Labour Organization (ILO). In 2003, the committee adopted a resolution concerning the employment relationship. The main conclusions are.

- self-employment and independent work based on commercial and civil contractual arrangements are by definition beyond the scope of the employment relationship;
- the criteria for determining whether or not an employment relationship exists may vary but in many countries common notions such as dependency or subordination are found;
- due to changes in the structure of the labour market, the organization of work and the inadequate application of the law, a growing number of workers who are in fact employees, find themselves without the protection of an employment relationship;
- it is in the interest of all labour market actors to ensure that the wide variety of working arrangements be put within an appropriate legal framework.

The committee concluded that a recommendation would be an appropriate instrument⁽²⁹⁾. In 2005, the ILO Office distributed a report on law and practice in more than sixty Member States, including a questionnaire on the employment relationship⁽³⁰⁾. After several formal and informal meetings, the Committee adopted a Recommendation with 329 votes in favour, ninety-four votes against and forty abstentions. However, there was no consensus on the Recommendation as a whole. According to Section 4, the national policy should at least include measures to ensure standards applicable to all forms of contractual arrangements, including those involving multiple parties. In the ILO Declaration on Social Justice for a Fair Globalisation, adopted by the International Labour Conference on 10 June 2006, representatives of governments, employers' and workers' organisations from all over the world agreed that «the importance of the employment

⁽²⁹⁾ INTERNATIONAL LABOUR ORGANIZATION, *Provisional Record* 21, 21/57, 2003, para. 25.

⁽³⁰⁾ C. BOSSE, in F. PENNINGIS/ C. BOSSE (supra note 2), 15 (21).

relationship should be recognized as a means of providing legal protection to workers».

This conclusion provides virtually no improvement of knowledge.

3.2. European Union

The European Union has also recognised this problem ⁽³¹⁾. In order to prepare legal steps, several studies were conducted. The first milestone in the discussion was the report by a group of experts presided by Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (1999). Supiot stressed the need for an intermediate legal category between employee and entrepreneur ⁽³²⁾.

In 2002, the Commission published a study by Perulli, in which the developments in respect of the employment relationship in the Member States were compared ⁽³³⁾. Perulli is in favour of creating a “hard core” of social rights, which are applicable to all work contracts irrespective of their formal qualification in terms of autonomy (self-employment) or subordination. The regulation should concern the form of the contract (it should be in writing), the object of the contract (the contract should state the professional objective, indicate the characteristics of the autonomy of the performance), rules on remuneration (the contract should indicate the criteria for determining the remuneration). It should also mention the time when payments are due (sanctions for late payments); it should regulate the effects of maternity, sickness, accident, serious family reasons; it has to regulate the termination of the contract, deal with training and the right to organize and to participate in trade union activities ⁽³⁴⁾. The Perulli report was discussed in the European Parliament in June 2003. This did not lead to particular choices for the solutions to be followed.

In 2006, the Commission published the Green Paper *Modernising Labour Law to meet the Challenges of the 21st Century* ⁽³⁵⁾. The paper argues that the emergence of diverse forms of non-standard work has

⁽³¹⁾ See P. PENNINGS, in F. PENNINGS/ C. BOSSE (supra note 2), 29.

⁽³²⁾ A. SUPIOT, *Beyond Employment*, 2001, 219.

⁽³³⁾ A. PERULLI, *Study on Economically Dependent Work* (supra note 23), 97.

⁽³⁴⁾ A. PERULLI, *Study on Economically Dependent Work* (supra note 23), 116.

⁽³⁵⁾ COM (2006) 708 final.

made the boundaries between labour law and commercial law less clear. As a result, the traditional dichotomie between employees and self-employed is no longer an adequate depiction of the economic and social reality of work. The concept of “economically dependent work” covers situations which fall between the two established concepts of subordinate employment and independent self-employment ⁽³⁶⁾. However, the Green Paper did not contain any specific proposals and was not pursued further.

3.3. European Union

In the following, selected regulations from several Member States are presented

3.3.1. Italy

The Italian law recognizes the “collaboratori coordinati e continuativi” as a sub-category of self-employed workers, which are similar to employees and are therefore called “parasubordinati”. The legislator has included those parasubordinati into the social insurance and the labour jurisdiction which have a coordinated and continuous working relationship with an employer (collaborazione coordinata e continuativa). Relevant is the obligation to perform personal work, not the economic dependence. Only few labour law regulations apply to parasubordinati, for example industrial safety and health protection, law on employee’s inventions, parental leave, and an employment prohibition for pregnant women ⁽³⁷⁾.

⁽³⁶⁾ COM (2006) 708 final, 11.

⁽³⁷⁾ In depth A. STEFANESCU, *Die arbeitnehmerähnliche Person im italienischen Recht*, Nomos, Baden-Baden, 2013.

3.3.2. United Kingdom

The British Law recognises the categories “employee” and “workers”⁽³⁸⁾. The term “employee” is defined in s.295(1) of the Trade Union and Labour Relations Act 1992 and in section 230 of the Employment Rights Act 1996, such that “employee” means an individual who has entered into or works under a contract of employment. According to section 296(1) of the Trade Union and Labour Relations Act 1992, the broader category of worker means an individual regarded in whichever (if any) of the following capacities is applicable to him, that is to say, as a person who works or normally works or seeks to work – (a) under a contract of employment, or (b) under any other contract (whether express or implied, and, if express, whether oral or in writing) whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his; or (c) in employment under or for the purposes of a government department (otherwise than as a member of the naval, military or air forces of the Crown) in so far as any such employment not fall within paragraph (a) or (b) above. By focusing on the obligation to perform personal work, the category of workers contains workers from groups 2 and 3. Workers enjoy a limited protection of the Health and Safety at Work Act 1974, protection from discrimination, minimum wage and working time regulation.

3.3.3. Germany

The German Law recognizes the employee-like persons as a middle category. These persons are formally independent contractors without any personal subordination, but are characterized by a position of economic dependence; they are regarded as needing protection similar to that of employees⁽³⁹⁾. However, only a small set of labour law norms apply to employee-like persons. They have the same legal right as employees to four weeks of annual paid leave (Section 2 of the Act of Annual Paid Leave); they are explicitly included in the general rules of health protection at the workplace (Section 2 of the Act on Health

⁽³⁸⁾ C. NEAL, in F. Pennings/ C. Bosse (supra note 2), 143.

⁽³⁹⁾ W. DÄUBLER, in F. Pennings/ C. Bosse (supra note 2), 127 (139).

Protection); the Antidiscrimination Act explicitly includes employee-like persons (Section 6 of the Act on Equal Treatment); Section 12a of the Act on Collective Agreements permits the conclusion of collective agreements for employee-like persons and, according to Section 5 of the Act on Labour Courts, they have access to the labour courts. Other important regulations do not apply to employee-like persons, for example the co-determination rights of the works council and the protection against dismissals ⁽⁴⁰⁾.

4. Approaches to solutions regarding the scope of labour law

Attempts to include self-employed workers into the beneficial scope of labour law regularly meet hefty resistance, since they question the traditional understanding of the scope and normative value of labour law ⁽⁴¹⁾. In Australia, for example, a legislative proposal on the protection of self-employed workers failed and was replaced by a law which retains the traditional scope of labour law ⁽⁴²⁾. Freedland locates a downright fear which he describes as follows: «The anxiety [...] is one which has attended, in some degree, much of the recent debate about the personal scope of employment law. It is a fear that, as one extends the frontiers of labour law to include contracts or relationships formerly regarded as outside the territory, because they are more in the nature of business contracts or relationships with independent contractors, so one risks foregoing the normative claim for labour law to constitute an autonomous legal domain within which inequality of bargaining power between worker and employer may be taken for granted, and where protection of the worker against unfair exploitation is therefore a paramount and systemic rationale for law-making and for adjudication. This fear has, however, generally been a rather muted one, if only because the discussion has mainly concentrated upon

⁽⁴⁰⁾ W. DÄUBLER, in F. Pennings/ C. Bosse (supra note 2), 127 (141 f.).

⁽⁴¹⁾ J. FUDGE, *Fragmenting Work and Fragmenting Organizations* (supra note 12), 609 (646 f.); B. LANGILLE, *Labour Law's Theory of Justice*, in G. DAVIDOV/B. LANGILLE (eds.), *The Idea of Labour Law*, Oxford University Press, Oxford, 2011, 101 (107).

⁽⁴²⁾ On this J. RILEY, *A Fair Deal for the Entrepreneurial Worker? Self-employment and Independent Contracting Post Work Choices*, in *Australian Journal of Labour Law*, 2007, 246-261.

modest or intermediate extensions of the personal scope of employment law, which can be envisaged as reaching out to working people who, although deemed independent, are, in reality, at least semi-dependent upon employing enterprises, and as vulnerable to exploitation as workers in the “employee” category. This muted anxiety becomes the more strident as we further extend the personal scope of employment law [...]. It becomes hard to see how the normative edge of labour law can fail to be blunted [...]. Two alternative particular dangers present themselves, Scylla and Charybdis or a rock and a hard place, between which it is hard to discern a path which can be steered. Either the worker-protective envelope of labour law will fail to “stick” at the entrepreneurial margins [...] or, on the other hand, the inclusionary category will prevail but at the cost of a normatively crippling compromise with the economic and social neutrality of general private contract and commercial law»⁽⁴³⁾.

According to Fudge, in order to justify the expansion of labour law, one has to confront three deeply rooted ideologies that have shaped modern labor law: The first is that independent contractors are entrepreneurs who are able to self-insure and who take profits for risk. The aforementioned empirical evidence demonstrates that there is no necessary correlation between forms of employment and the rewards that workers enjoy and and the risks that they bear. Limiting the scope of labour law to employees can only be understood as the outcome of a historical process that was contingent and contested, and not as an inevitable feature of a natural legal order⁽⁴⁴⁾. The second ideology that one must confront is that the private law of contract, property, and tort are the best methods of regulating every market, including the labour market. Even commercial law is no longer a realm of private law unsullied by other forms of regulation; consumer protection and franchise regulations combined with the common law development of good faith add normative pluralism to market regulation⁽⁴⁵⁾. The third ideology derives from company law, in which the limited liability

⁽⁴³⁾ M FREEDLAND, *From the Contract of Employment to the Personal Work Nexus* (supra note 18), 1 (28 f.).

⁽⁴⁴⁾ J. FUDGE, *Fragmenting Work and Fragmenting Organizations* (supra note 12), 609 (647 f.).

⁽⁴⁵⁾ J. FUDGE, *Fragmenting Work and Fragmenting Organizations* (supra note 12), 609 (647 f.).

company is asserted to be the «exact and full equivalent of the human employer»⁽⁴⁶⁾. Separate legal personality and limited liability for corporations were not emanations from a natural legal order, but were granted in exchange for the corporation's willingness to undertake a range of social responsibilities⁽⁴⁷⁾.

4.1. Complete redesign of labour law

There are several approaches aiming at a complete redesign of labour law.

4.1.1. Inclusion of all workers who have contracted to render personal service

Some authors argue that labour law should be extended to all workers who have contracted to render personal service⁽⁴⁸⁾. He stresses that the traditional purpose of labour law is not sufficient to meet the challenges of the modern working world. The traditional purpose is described as follows: «The relationship between an employer and an isolated employee is typically a relationship between a bearer of power and one who is not a bearer of power. [...] The main object of labour law has always been, and we venture to say always will be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship»⁽⁴⁹⁾.

Freedland and Nicola Kountouris developed a solution in which they offer a way out of the Skylla-Charybdis problem. They believe that

⁽⁴⁶⁾ P. DAVIES/M. FREEDLAND, *The Complexities of the Employing Enterprise* (supra note 14) 273 (276).

⁽⁴⁷⁾ J. FUDGE, *Fragmenting Work and Fragmenting Organizations* (supra note 12), 609 (648).

⁽⁴⁸⁾ M. FREEDLAND, *Application of labour and employment law beyond the contract of employment*, in *International Labour Review*, 2007, 3 ff; M. FREEDLAND/N. KOUNTOURIS, *The Legal Construction of Personal Work Relations*, Oxford University Press, Oxford, 2011, 371.

⁽⁴⁹⁾ P. DAVIES/M. FREEDLAND, *Kahn-Freund's Labour and the Law*, Hamlyn lectures, London, 3th edition 1983, 18; SUPREME COURT OF CANADA, *Slaight Communications v. Davidson*, 1989, 1 SCR 1038, per Dickson CJC, 1051 f.

they can redraw and expand the boundaries of the field, replace the familiar conceptual apparatus which made legal sense of that narrower domain with a broader set of concepts, «without throwing the normative law baby out with the old empirical/conceptual labour law bath water»⁽⁵⁰⁾. The new scope of labour law is now captured by the idea of Personal Work Relations⁽⁵¹⁾. According to Freedland and Kountouris, the traditional basis of labour law – compensating for inequality of bargaining power in employment contracts – is inadequate to the task the world now sets for labour law. They stress the idea of Personality in Work, a “set of values”⁽⁵²⁾. A benefit of this approach is supposed to consist of its capacity to create an enhanced responsiveness to the convergences and divergences between different kinds of personal work contracts. The looser more multi-dimensional personal work contract framework shall make it easier to recognize convergences between the regulation of contracts of employment and of other personal work contracts, that is to say norms or modes of regulation which are suitable both to contracts of employment and to other personal work contracts⁽⁵³⁾.

This approach, albeit quite astute, will hardly reach a consensus in continental Europe. The inclusion of all workers who have contracted to render personal service into the beneficial scope of labour law would generate excessive costs, since the whole body of labour law would apply to many self-employed workers. This is particularly true for countries with a high level of protection. In Germany, for example, the Protection Against Dismissal Act (Kündigungsschutzgesetz) requires a just cause for the termination of the employment relationship of an employee who has been employed for more than six months in an establishment with more than ten employees. In general, protection

⁽⁵⁰⁾ M. FREEDLAND/N. KOUNTOURIS, *The Legal Construction of Personal Work Relations* (supra note 48); on this B. LANGILLE, *A Question of Balance in The Legal Construction of Personal Work Regulations*, in *Jerusalem Review of Legal Studies*, 2013, 99 (104).

⁽⁵¹⁾ M. Freedland, *From the Contract of Employment to the Personal Work Nexus* (supra note 18), 1 (3 ff.); in depth M. Freedland/N. Kountouris, *The Legal Construction of Personal Work Relations* (supra note 48).

⁽⁵²⁾ M. FREEDLAND/N. KOUNTOURIS, *The Legal Construction of Personal Work Relations* (supra note 48), 371.

⁽⁵³⁾ M. FREEDLAND, *From the Contract of Employment to the Personal Work Nexus* (supra note 18), 1 (20).

against dismissals causes high costs for the employer ⁽⁵⁴⁾. Many authors argue that it has a negative effect on the productivity ⁽⁵⁵⁾. Furthermore, this solution neglects the difference of need of protection resulting from personal dependence, economic dependence or the obligation to render personal service. An equal treatment of all workers from groups 1 – 3 is not appropriate ⁽⁵⁶⁾.

4.1.2. Reference to the transaction

Richard Carlson proposes an approach to statutory coverage based on the character of the transaction between the parties instead of the status of the parties ⁽⁵⁷⁾. He argues that economically dependent self-employed workers are just as worthy of protection as employees. The status of an employee is only important because the labour has made it important ⁽⁵⁸⁾. Moreover, the very existence of a multi-factor analysis for determining what is an “employee” leads to the conclusion that there is nothing inherent in the character of either employees or independent contractors that makes one group more or less deserving of protection than the other ⁽⁵⁹⁾. Carlson proposes an approach to statutory coverage based on the character of the transactions between the parties instead of the status of the parties. Hence, labour law should regulate compensation for services rather than “employee” wages, workplaces rather than places where “employees” work, and discrimination against “employees” ⁽⁶⁰⁾. However, the reference to the transaction would

⁽⁵⁴⁾ G. DAVIDOV, *A Purposive Approach to Labour Law*, Oxford University Press, Oxford, 2016, 108.

⁽⁵⁵⁾ T. BAUER/S. BENDER/H. BONIN, *Dismissal Protection and Worker Flows in Small Establishments*, IZA discussion paper Nr. 1105, 2004, 2 ff.; in depth R. EPSTEIN, *In Defense of the Contract at Will*, in *University of Chicago Law Review*, 1984, 947 ff.

⁽⁵⁶⁾ O. DEINERT, *Soloselbständige zwischen Arbeitsrecht und Wirtschaftsrecht* (supra note 3), 14 f.

⁽⁵⁷⁾ R. CARLSON, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying* (supra note 18), 295, 301 ff.

⁽⁵⁸⁾ R. CARLSON, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying* (supra note 18), 295 (368).

⁽⁵⁹⁾ R. CARLSON, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying* (supra note 18), 295 (300).

⁽⁶⁰⁾ R. CARLSON, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying* (supra note 18), 295 (301).

potentially include all self-employed workers and therefore create excessively high costs. The proposed restriction to economically dependent self-employed can hardly be realized through referring to the transaction. On the contrary, this restriction suggests that ultimately it is the working person that matters, not the transaction.

4.1.3. Reference to the employer

Other authors suggest that labour law should refer to the employer instead of the employee⁽⁶¹⁾. Simon Deakin has developed a functional approach to identifying the subject of labour law. An employer is characterized by managing or coordination the productive process. The employer also functions, through the taxation and social insurance system, as a mechanism for absorbing and spreading certain economic and social risks, such as those of unemployment, interruption of income, and work-related injury or disease⁽⁶²⁾. On that basis, an employee can be defined as person that is subjected to employer functions from the client, for example the determination of the actual beginning and end of the working time, the acceptance and use of the work results or the supply of work and remuneration⁽⁶³⁾.

4.2. Inclusion of all economically dependent workers

A simple solution would be the extension of the whole labour law to all economically dependent workers⁽⁶⁴⁾. According to Davies and Freedland, the criterion of economic dependence in itself already justifies the application of labour law: «No doubt, for most workers

⁽⁶¹⁾ S. DEAKIN, *The Changing Concept of "Employer" in Labour Law*, in *Industrial Law Journal*, 2001, 72, 81 f.; J. FUDGE, *Fragmenting Work and Fragmenting Organizations* (supra note 12), 609, 622 f.

⁽⁶²⁾ S. DEAKIN, *The Changing Concept of "Employer" in Labour Law* (supra note 61); 72 (81 f.); on that J. FUDGE, *Fragmenting Work and Fragmenting Organizations* (supra note 12), 609, 622 f.

⁽⁶³⁾ In favour of that J. PRASSL/M. RISAK, *Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdswork*, in *Oxford Legal Studies Research Paper No. 8*, 2016, 16 ff.

⁽⁶⁴⁾ In favour of this G. DAVIDOV, *Who is a Worker?*, in *Industrial Law Journal*, 2005, 57 ff.

their subordination to the power of the employer is a reflection of their economic dependence, but the control of abuse of power seems equally justified when, as with our worker of independent means, it is, usually, a reflection of a particular employer's monopoly over a means of self-development. So we would conclude that economic dependence is a sufficient reason to give a worker the protection of labour law, but it is not the exclusive reason»⁽⁶⁵⁾.

It was shown above that the economic dependence is the apparent similarity between employees and employee-like persons. Furthermore, an equal treatment of employees and employee-like persons would eliminate the complex discussions about the conception of employees⁽⁶⁶⁾. Not an appropriate solution would be the sole reference of labour law to economic dependence. This would exclude workers that are currently covered by labour law⁽⁶⁷⁾. A classical, personally dependent employee would be excluded if he does not depend on his employer economically, for example because he has an independent income besides his wage⁽⁶⁸⁾. This consequence can only be avoided if the economic dependence may be substituted by personal dependence. However, this solution would also create excessive costs for the employers⁽⁶⁹⁾. This is illustrated by the following example: A German company hires an independent cleaner. Since the cleaner works exclusively for the company, he economically depends on this company and is protected by the aforementioned German protection against dismissals. If the cleaner becomes alcoholic and his performance decreases, the company cannot terminate the legal relationship in order to replace the cleaner by a sober worker unless the strict requirements of the Protection Against Dismissal Act.

⁽⁶⁵⁾ P. DAVIES /M. FREEDLAND, *Employees, Workers and the Autonomy of Labour Law* (supra note 1), 267 (282).

⁽⁶⁶⁾ W. DÄUBLER, in F. Pennings/ C. Bosse (supra note 2), 127 (142).

⁽⁶⁷⁾ P. DAVIES /M. FREEDLAND, *Employees, Workers and the Autonomy of Labour Law* (supra note 1), 267 (282).

⁽⁶⁸⁾ P. DAVIES /M. FREEDLAND, *Employees, Workers and the Autonomy of Labour Law* (supra note 1), 267 (282).

⁽⁶⁹⁾ H. BUCHNER, *Das Recht der Arbeitnehmer, der Arbeitnehmerähnlichen und der Selbständigen – jedem das Gleiche oder jedem das Seine?*, in *Neue Zeitschrift für Arbeitsrecht*, 1998, 1144 (1151); R. REBHACHN, *Arbeitnehmerähnliche Personen* (supra note 17), 236 (245).

4.3. Selected application of labour law to a middle category

A restrained solution would be the selected application of labour law to a middle category of self-employed workers; apart from that, the general civil or commercial law would continue to be applicable. This approach is pursued, for example, by Supiot⁽⁷⁰⁾, Perulli⁽⁷¹⁾ and the EU Commission's Green Paper⁽⁷²⁾. In Austria and Germany, this approach also meets approval of several authors⁽⁷³⁾. Furthermore, this solution enables a gradual extension of labour law, since it concerns only selected norms which can be increased step by step. In contrast, the extension of the whole labour law to a certain group of workers does not allow any differentiations, whether the respective norm is appropriate for self-employed workers or not.

4.3.1. Definition

A middle category has to be defined. In conformity with the German law, it seems appropriate to focus on the economic dependence⁽⁷⁴⁾. Section 12a subsection 1 of the German Act on Collective Bargaining Agreements, which could serve as a model, reads as follows: «Employee-like persons are persons who are economically dependent and in need of social protection comparable to an employee [...], work on the basis of a contract of service or a contract for work and services for other persons, perform the services they are obliged to perform personally and essentially without collaboration with employees and a) predominantly work for one person or b) on average, more than half of

⁽⁷⁰⁾ A. SUPIOT, *Beyond Employment*, 2001.

⁽⁷¹⁾ A. PERULLI, *Study on Economically Dependent Work* (supra note 23).

⁽⁷²⁾ COM (2006) 708 final of 22.11.2006, 12 ff.

⁽⁷³⁾ Concerning German law see H. BUCHNER (supra note 69), 1144 (1150); a transnational presentation is found in R. REBHACHN, *Arbeitnehmerähnliche Personen* (supra note 17), 236 (248).

⁽⁷⁴⁾ In favour of that F. PENNINGS, in F. PENNINGS/ C. BOSSE (supra note 2), 29 (40).

the total remuneration they are entitled to for the performance of work is paid by one person»⁽⁷⁵⁾.

This solution is supported by the aforementioned principle of equal treatment, since the economic dependence is shared by employees.

4.3.2. Possible protective measures

It remains to be discussed which of the labour standards shall apply to this category. On this, there are already many suggestions. According to the failed ILO Convention of 1997, economically dependent self-employed workers should be protected in the following areas: collective bargaining, protection from discrimination, age restriction, occupational safety and health protection and social security. In addition, Frans Pennings and Claire Bosse call for a restriction of working time, annual vacation with pay, minimum wage and maternity leave⁽⁷⁶⁾. According to Perulli, the regulation must cover payment times, providing for a financial penalty for late payment that is stiffer than that prescribed in civil or commercial law (e.g. default of a creditor). The regulation should make provision for the right to suspend the relationship in the event of maternity, sickness, accident or serious family reasons. The regulation should further cover termination, making it compulsory that notice be given or the principal provide a justified reason for terminating the contract early (e.g. in the event of serious breaches of the contract, of failure of the relationship of trust with the service provider, or in the event of the post no longer being economically viable). Finally, basic trade union rights should be guaranteed, in particular, the right to organize and to join trade unions⁽⁷⁷⁾. Some of those rules already apply to self-employed workers, for example the protection from discrimination according to section 3 subsection 1a) of the Directive 2000/78/EC. As mentioned above, in general, labour law rules should apply to all economically dependent workers except those which presuppose the employer's right to give

⁽⁷⁵⁾ Translation provided by J. BECKMANN, *The Legal Status of Crowdworkers under German Law*, in *HIS – Meeting Amsterdam “The Gig Economy – Challenges for Labour Law”*, 29 September 2017.

⁽⁷⁶⁾ F. PENNING/C. BOSSE, in F. PENNING/C. BOSSE (supra note 2), 173 (190).

⁽⁷⁷⁾ A. PERULLI, *Study on Economically Dependent Work* (supra note 23), 119.

instructions⁽⁷⁸⁾. Also desirable would be a compulsory membership in social security and a period of notice.

It must be taken into account that a minimum wage law has to be regulated at European level. A national regulation would violate the freedom to provide services: according to the European Court of Justice, the law of the host country must not impose further administrative or financial burdens which may prevent or obstruct services from foreign companies or made them less attractive⁽⁷⁹⁾. A statutory minimum wage would eliminate competitive advantages of foreign companies resulting from their ability to provide their services cheaper than a domestic company due to the economic and working conditions in their home country⁽⁸⁰⁾.

4.4. Protection of specific occupational groups and forms of work

The most flexible solution would be special regulations for specific occupational groups and forms of work⁽⁸¹⁾. An existing example is the protection of commercial agents provided by the Directive 86/653/EEC, a much-discussed example is the protection of crowd-workers or platform-workers respectively⁽⁸²⁾. Since this solution provides individual protection instead of general protection, the specific needs of the respective occupational groups and forms of work can be taken into account. The main disadvantage of this solution is the fact that the legislator may not always keep up with the new developments, so there will most likely always be occupational groups and forms of work without specific protection⁽⁸³⁾. Hence, special regulations should

⁽⁷⁸⁾ W. DÄUBLER, in F. Pennings/ C. Bosse (supra note 2), 127 (142).

⁽⁷⁹⁾ EUROPEAN COURT OF JUSTICE of 3 December 1997 – 33/74, point 26 – van Binsbergen.

⁽⁸⁰⁾ F. BAYREUTHER, *Entgeltsicherung Selbständiger*, in *Neue Juristische Wochenschrift*, 2017, 357 (360).

⁽⁸¹⁾ In favour of that F. PENNING/C. BOSSE, in F. PENNING/C. BOSSE (supra note 2), 173 (192).

⁽⁸²⁾ On this see B. WAAS, *Introduction, Crowdwork in Germany, Summary*, in B. WAAS ET AL (eds.), *Crowdwork – A Comparative Law Perspective*, Bund-Verlag, Berlin, 2017, 17 f.

⁽⁸³⁾ This concede F. PENNING/C. BOSSE, in F. PENNING/C. BOSSE (supra note 2), 173 (192).

only complement the general protection of self-employed workers instead of replacing it.

Abstract

The Inclusion of Self-Employed Workers into the Beneficial Scope of Labour Law

Purpose: The purpose of this paper is to examine whether self-employed workers can be included into the beneficial scope of labour law under current rules or *de lege ferenda*. **Methodology:** The paper explores the constitutional and economic background of the topic and adopt a comparative approach. **Findings:** Preferable is the application of selected norms to a middle category defined by economic dependence. In general, labour law rules should apply to all economically dependent workers except those which presuppose the employer's right to give instructions. **Originality:** The key findings of the paper are the consequences of the constitutional right of equal treatment. This right prohibits the arbitrary unequal treatment of what is essentially equal. Self-employed workers and employees are essentially equal with regard to their economic dependence.

Keywords: self-employed workers, labour law (scope), middle category, employee-like workers.

L'inclusione dei lavoratori autonomi nel campo di applicazione del diritto del lavoro

Obiettivi: Obiettivo dell'articolo è indagare se il lavoro autonomo possa rientrare nel campo di applicazione del diritto di lavoro nel quadro legislativo vigente o *de lege ferenda*. **Metodologia:** il contributo esplora il quadro costituzionale ed economico del tema e adotta un approccio comparato. **Risultati:** è preferibile l'applicazione selettiva di norme esistenti a una categoria intermedia definita in base al criterio della dipendenza economica. In generale, le norme di diritto del lavoro dovrebbero applicarsi a tutti i lavoratori economicamente dipendenti, ad eccezione di quelli che presuppongono il diritto del datore di lavoro di impartire istruzioni. **Originalità:** i principali risultati del contributo riguardano l'individuazione delle ricadute del diritto costituzionale alla parità di trattamento. Questo diritto proibisce la disparità arbitraria di trattamento nei confronti di ciò che è essenzialmente uguale. I lavoratori autonomi e i dipendenti sono sostanzialmente uguali per quanto riguarda la loro dipendenza economica.

Parole chiave: lavoratori autonomi, ambito di applicazione del diritto del lavoro, categoria intermedia, lavoratori parasubordinati.

The Line between Self-Employment and Salaried Employment and the ILO's New Classification of Employment Status

*Francesca della Ratta-Rinaldi**, *Alessia Sabbatini***

Sommario: **1.** Recent trends of self-employed - with and without employees - in the EU. – **2.** Self-employed persons in Italy: profiles and changes in the last years. – **3.** Dependent contractor: the grey area of self-employment. – **4.** Dependent contractors: socio-demographic characteristics. – **5.** Context and work characteristics of dependent contractors. – **6.** Job satisfaction. – **7.** Concluding remarks.

1. Recent trends of self-employed - with and without employees - in the EU

In 2018, there were 33 million self-employed persons in the European Union, with and without employees. Besides, there were around 2.2 million family workers (1.0%).

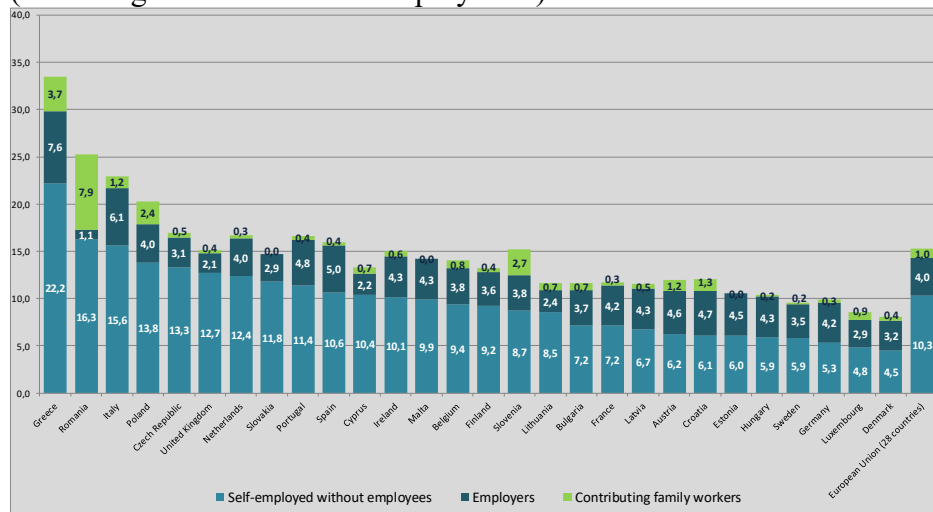
The rate of self-employment on total employment differs consistently from country to country for reasons of both structural factors – due to the prevailing sectors of economic activity and the average size of the enterprises –, and the different backgrounds and trends that resulted from the regulations of national labour markets. Italy ranks third, after Greece and Romania, with a very high share of self-employed exceeding 20% of the total employed. In Denmark, Luxembourg, Sweden and Germany, the share does not reach 10% (Figure 1). The differences between the EU countries mainly concern the component of

* *ISTAT. The opinions expressed originate on a personal level and do not involve Istat.*

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self-employed workers without employees, which in Greece, Romania and Italy represent 22.2, 16.3 and 15.6% respectively, and in countries such as Denmark and Luxembourg 4.5 and 4.8%.

Figure 1- Self-employed aged 15 and over in Europe - 2018 (Percentages values on total employment)



Source: Eurostat, Labour force survey

Employers – i.e. the self-employed with employees – are a well-defined branch of self-employment and show a rather more balanced distribution across European countries, with fairly homogeneous features ⁽¹⁾: the prevailing male component and the generally older average age. In 2018, they contributed 4.0% of total employment in EU countries (9.2 million persons), with peaks in Greece and Italy (around 7-6%) and minimums in Romania and the United Kingdom (1-2%). In countries such as Greece and Italy, the higher number of employers can be partially ascribed to the typical productive structure, which is characterised by a low concentration of large companies (in 2016 in

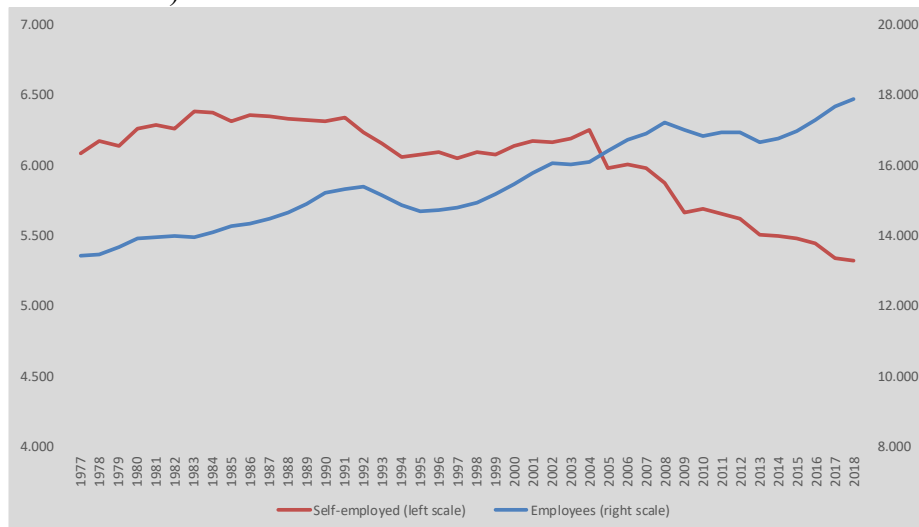
⁽¹⁾ For a more detailed analysis at European level see DE GREGORIO, DELLA RATTA, ERCOLANI, RIZZI, SABBATINI, *L'occupazione indipendente alla luce delle fonti integrate: eterogeneità, dinamica e trasformazioni*, in MINISTERO DEL LAVORO, ISTAT, INPS, INAIL, ANPAL (eds), *Il mercato del lavoro. Verso una lettura integrata*, 2017.

Italy 0.1% above 249 employees) and by the presence of a business environment based on micro and small enterprises (94.8% of companies have less than 10 employees).

2. Self-employed persons in Italy: profiles and changes in the last years

In 2018 in Italy it is estimated that the number of self-employed workers is 5 million (21.7% of employed), to which we have to add 280 thousand family workers. The size of the aggregate has fallen markedly during the crisis that broke out in 2008, with a decreasing trend that had already emerged during the 1990s (Figure 2).

Figure 2 – Trend of self-employed and employees - 1977-2018 (Values in thousands)



Source: Istat, Rilevazione sulle forze di lavoro

More specifically, in the period 2008-2018 self-employed decreased by 9.5% (-558 thousand, including -116 thousand of family workers and

member of producers cooperatives) ⁽²⁾; in the same period, the number of employees increased by 4.0% (+682 thousand).

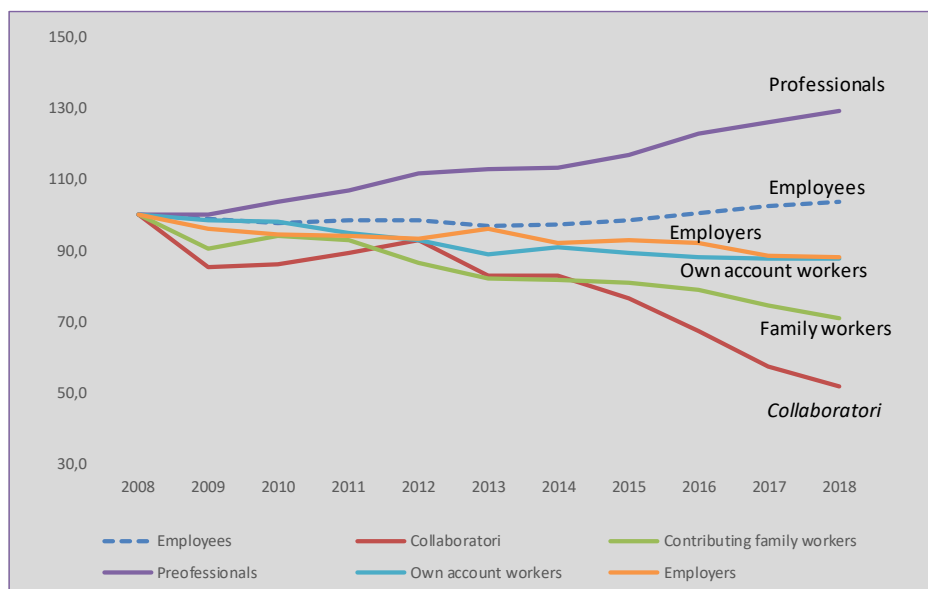
The trend in self-employment synthesizes different performances among the categories that compose the group (Figure 3): the significant reduction in the number of *collaborator* ⁽³⁾ and family workers (-48.4 and -28.9% between 2008 and 2018), the more limited loss in the number of own-account workers without employees and employers (-12.3 and -11.8%) and the steady growth in the number of professionals without employees (+29.3%, 277 thousand people). The last ones are confirmed as the most dynamic component of the independent workers.

If between 2008 and 2018 the composition by gender remained basically unchanged (+0.3 percentage points of women out of the total number of self-employed persons, 30.8%), the incidence of women rose by 6.5 percentage points among professionals without employees and by 2.9 points among employers. The self-employed are also affected by the general ageing of the employed population, especially in the employers' component. The rate of young people aged 15-34 among the self-employed in 2018 falls to 16.6% (it is the 23.9% among employees), 6.6 points lower than ten years before. Higher rate of young people is spread out between self-employed without employees, especially among *collaboratori*, family workers and professionals.

Figure 3 - Trend of the various profiles of self-employed - Index numbers (2008=100)

⁽²⁾ Non-employee cooperative members are a very small-sized group, made up of 32,000 people on average for the two quarters of 2019. To facilitate exposure, members are here assimilated to family workers with whom they share most of the paths in the questionnaire.

⁽³⁾ *Collaboratori* are a specific Italian group of self-employed without employees that share many characteristics with employees, like social security paid by employer and some organisational constraints. For an analysis of this group in the Italian labour market. See G. ALTIERI, D. CARRIERI (eds), *Il popolo del 10%. Il boom del lavoro atipico*, Donzelli, Roma, 2000; A. PERULLI, *Lavoro autonomo e dipendenza economica oggi*, in *Rivista Giuridica Del Lavoro e Della Previdenza Sociale*, 2003, 2, 221-221.



Source: Istat, Rilevazione sulle forze di lavoro

By the second quarter of 2018, self-employed had returned to growth: +0.6, +1.0 and +0.2% on an annual basis in the last three quarters of 2018, and +1,0% in the first quarter of 2019.

However, they decreased again in the second and third quarters of 2019 (-0.4% and -0.7%), reflecting a recovery not fully confirmed⁽⁴⁾. In the average of the first three quarters of 2019, the reduction affected the component with employees (-1.4%, concentrated in the components of professionals and employers), while the number of self-employed without employees increased (+0.5%). In the average of the first three quarters, in the aggregate, the increase in contributing family workers and professionals (+10.4 and +0.6%) is associated with the persistent reduction in *collaboratori* (-6.7%) and the slight decrease in own accounts workers (-0.2%)⁽⁵⁾.

⁽⁴⁾ For recent trends on self-employment see also REYNERI, *Lavoro indipendente sul viale del tramonto?*, in *lavoce.info*, 31.10.2017, <https://www.lavoce.info/archives/49280/lavoro-sempre-meno-indipendente/>.

⁽⁵⁾ For more a deeper analysis see F. DELLA RATTA, A. SABBATINI, *Verso una nuova tipologia di lavoro autonomo*, in MINISTERO DEL LAVORO, ISTAT, INPS, INAIL, ANPAL (eds), *op. cit.*, 81-91.

3. Dependent contractor: the grey area of self-employment

As already noted, the distinction between employees and self-employed workers has long been inadequate for a proper study of the labour market. In the statistical aggregate of self-employment it is possible, in fact, to identify a wide range of professional profiles and work cultures that can rely, in some cases, on a very large level of autonomy (this is the case of entrepreneurs) or, in some other, face workers who experience only formal autonomy, involved in relations with clients/customers much closer to subordinate interactions ⁽⁶⁾.

The most typical example is the group of *collaboratori*, especially when they have only one client. These profiles can be placed along a line ranging from the maximum of autonomy to the maximum of subordination, bordering or even overlapping to employees. The grey area of self-employment is ambiguous, and it is not easy to grasp its real terms and connotations univocally. Besides the relatively more homogeneous component of “employers” (self-employed with employees), it is not easy to identify univocally the traits distinguishing “genuine” self-employed from forms of employment characterised by lower levels of autonomy. The deregulation of the labour market and the resultant diffusion of parasubordinate employment contracts contributed to get the picture more complex and multiply the hybrid figures on the border between employees and self-employed.

The debate has been going on for some time ⁽⁷⁾, so that the ILO (International Labour Organization), within the 20th International Conference of Labour Statisticians held in Geneva in October 2018 approved a new classification of employment status (ICSE18) that

⁽⁶⁾ A detailed analysis of the importance of self-employment in Italy is conducted by C. RANCI (ed), *Partite Iva. Il lavoro autonomo nella crisi italiana*, il Mulino, 2012.

⁽⁷⁾ See U. MUEHLBERGER, *Dependent self-employment. Workers on the border between employment and self-employment* Palgrave Macmillan, New York, 2007; D. HUNTER, *Status of work on the International Classification of Status in Employment, Expert Group Meeting on Inter-national Statistical Classifications*, New York, 2013, 13-15 May; ILO, *Non-standard employment around the world. Understanding challenges, shaping prospects*, Ginevra, 2016, November.

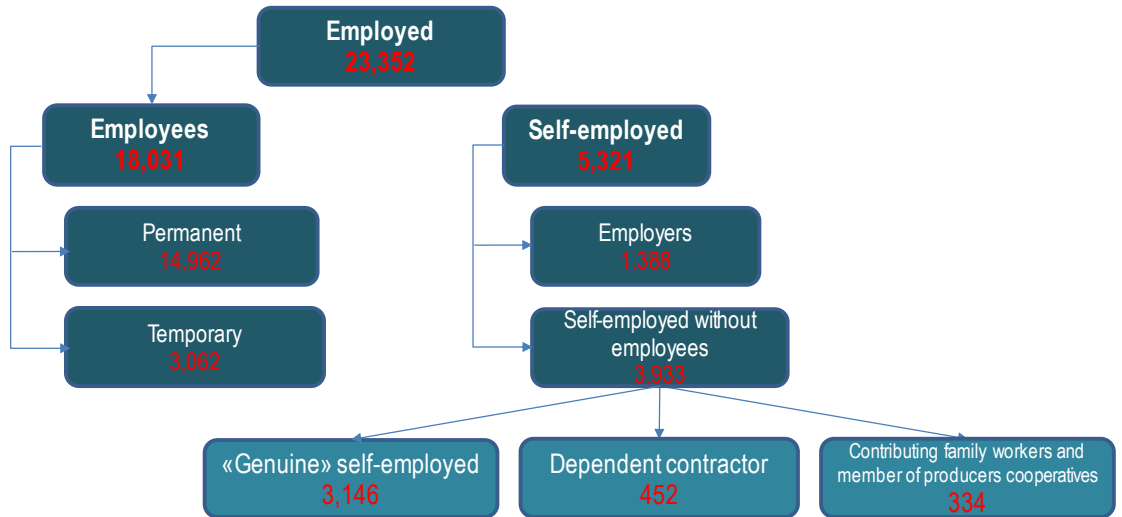
revises the boundaries between employees and independent workers, identifying, in the context of dependent workers, the dependent contractors, i.e. formally self-employed who are, however, de facto constrained by dependency relationships with another economic unit (customer or client), which restricts their access to the market and organizational autonomy, for example by setting the fees for work or by holding the tools needed to carry out the activities ⁽⁸⁾.

The operational definition that identifies dependent contractors defines them as self-employed without employees whose fees are set by customers or a third party. The definition will undoubtedly be improved in the future, and this will engage the official statistics in the coming years. On an experimental level, starting in 2018, the Labour Force Survey included the question suggested by the ILO, measuring the share of self-employed without employees who do not have free access to the market. In the average of the first three quarters of 2019, 452,000 self-employed were in this position, 11.5% of self-employed without employees ⁽⁹⁾. Compared to the first three quarters of 2018, the group remains substantially stable.

Chart 1 – Employed aged 15 and over by group – I-III quarters 2019
(Values in thousands)

⁽⁸⁾ The new classification adopted in October 2018 is available at the link: https://www.ilo.org/global/statistics-and-databases/meetings-and-events/international-conference-of-labour-statisticians/20/WCMS_648693/lang--en/index.htm.

⁽⁹⁾ See ILO [ICLS/20/2018/Room document 10](#) on *Testing of proposals for a revised International Classification of Status in Employment*, referred to the Italian case.



Source: Istat, Rilevazione sulle forze di lavoro

4. Dependent contractors: socio-demographic characteristics

The socio-demographic characteristics of dependent contractors confirm the thesis on the specificity of the aggregate compared to the whole group of self-employed, both with and without employees. Among employers and “genuine” self-employed workers, men are predominant, while among dependent contractors the presence of women is higher (39.1% compared to 25.9 and 31.2% of two main groups of self-employed). Among dependent contractors (and also among family) there are also higher shares of young people aged 15-34 (26.4% compared to 10.0% among employees and 15.8% of the genuine self-employed) and lower shares of people who have passed only compulsory schooling (21.7% compared to 34,0 among employees and 31.3% of the genuine self-employed). The group is mainly spread in the Central and Northern regions (Table 1).

Table 1 - Self-employed aged 15 and over by group and demographic characteristics - I-III quarters 2019 (Values in thousands and percentage values)

	Employers		Genuine self-employed		Contributing family workers (a)		Dependent contractors		Total self-employed	
	values	%	values	%	values	%	values	%	values	%
SEX										
Males	1.028	74,1	2.165	68,8	157	47,0	275	60,9	3.626	68,1
Females	360	25,9	981	31,2	177	53,0	177	39,1	1.695	31,9
AGE										
15-34 years old	139	10,0	496	15,8	93	27,9	119	26,4	848	15,9
35-49 years old	542	39,0	1.308	41,6	107	31,9	159	35,1	2.115	39,8
50 years old and more	707	51,0	1.342	42,6	134	40,2	174	38,6	2.358	44,3
EDUCATION										
Low	472	34,0	985	31,3	146	43,8	98	21,7	1.702	32,0
Medium	633	45,6	1.203	38,2	160	48,0	205	45,4	2.201	41,4
High	283	20,4	958	30,5	28	8,3	149	32,9	1.418	26,7
CITIZENSHIP										
National	1.313	94,6	2.945	93,6	312	93,3	428	94,7	4.998	93,9
Non-national	75	5,4	202	6,4	22	6,7	24	5,3	322	6,1
GEOGRAPHICAL AREA										
North	717	51,7	1.504	47,8	193	57,7	241	53,2	2.655	49,9
Center	301	21,7	684	21,7	54	16,2	111	24,6	1.150	21,6
South and Islands	369	26,6	959	30,5	87	26,1	100	22,2	1.516	28,5
Totale	1.388	100,0	3.146	100,0	334	100,0	452	100,0	5.321	100,0

(a) Including member of producers cooperatives.

Source: Istat, Rilevazione sulle forze di lavoro

A quarter of dependent contractors are composed by *collaboratori*, 37.2% are own-account workers, and 37.3% are professionals, so the aggregate is rather cross-cutting between the three groups of self-employed without employees.

The distribution of these workers by sector of economic activity (Table 2) shows even more clearly the peculiarity of the group, whose largest concentrations are in wholesale, health and social work, financial and insurance activities, education, transport and storage. On the other hand, employers and genuine self-employed are more likely employed in industry and in particular in construction, employers in accommodation and food service activities and genuine self-employed in business activities, while family workers are mostly involved in agriculture and wholesale.

Among occupations, higher shares of dependent contractors are found among the qualified and technical ones (managers, professionals and technicians) and among the group of clerks and service workers and shop and market sales workers. The analytical study of occupations help for more specific profiles to be drawn: the most common are commercial agents or representatives, insurance agents, home salesmen, financial management technicians, trainers in non-

competitive sports, teachers of artistic or literary disciplines, nursing and midwifery occupation and rehabilitative health care, real estate agents, delivery personnel, truck drivers, taxi drivers or drivers of cars or vans, demonstrators and similar occupations, information officers in call centers.

Table 2 - Self-employed aged 15 and over by group, economic activity and occupation - I-III quarters 2019 (Values in thousands and percentage values)

	Employers		Genuine self-employed		Contributing family workers (a)		Dependent contractors		Total self-employed	
	values	%	values	%	values	%	values	%	values	%
NACE 07										
AGRICULTURE	87	6,2	239	7,6	62	18,4	30	6,7	418	7,9
INDUSTRY	367	26,4	526	16,7	66	19,8	36	8,0	995	18,7
Industry excluding construction	226	16,3	193	6,1	41	12,2	22	4,8	481	9,0
Construction	141	10,2	333	10,6	26	7,6	15	3,2	514	9,7
SERVICES	934	67,3	2381	75,7	206	61,7	386	85,3	3.907	73,4
Wholesale	317	22,8	658	20,9	98	29,4	118	26,0	1.190	22,4
Accommodation and food service activities	205	14,7	142	4,5	54	16,2	12	2,7	414	7,8
Transportation and storage	32	2,3	69	2,2	11	3,3	16	3,6	129	2,4
Information and communication	24	1,7	89	2,8	1	0,3	11	2,4	124	2,3
Financial and insurance activities	29	2,1	52	1,7	3	0,9	32	7,0	116	2,2
Business activities (I to n)	171	12,3	848	26,9	16	4,6	92	20,3	1.126	21,2
Public administration and defence compulsory social security, education	8	0,6	56	1,8	3	0,9	24	5,3	91	1,7
Health and social work	56	4,0	201	6,4	4	1,3	47	10,4	308	5,8
Activities of households as employers	..		5	0,2	..		1	0,2	6	0,1
Other personal and public services	93	6,7	262	8,3	16	4,9	33	7,4	404	7,6
OCCUPATION (b)										
Managers, professionals and technicians	611	44,0	1512	48,1	48	14,3	284	62,8	2.454	46,1
Clerks and service workers and shop and market sales workers	431	31,1	660	21,0	153	45,8	90	19,9	1.335	25,1
Blue collars and craft and related trades workers	331	23,8	840	26,7	107	32,1	60	13,4	1.338	25,2
Elementary	15	1,1	134	4,3	26	7,8	18	3,9	194	3,6
Totale	1.388	100,0	3.146	100,0	334	100,0	452	100,0	5.321	100,0

(a) Including members of producers cooperatives.

(b) Excluding armed forces.

Source: Istat, Rilevazione sulle forze di lavoro

The peculiarity of dependent contractors with respect to genuine self-employed also appears when considering the methods used to find the current job: genuine self-employed and employers refer having started

an activity like a self-employed (in more than 70% of cases) or having used the family network (especially employers, who often pursue the family business). Dependent contractors have started an activity as a self-employment in 44.0% of cases, and to find a job they use more often methods similar to those of employees: the personal network of friends and colleagues (20.0%), contacting directly an employer (9.2%) or having gained previous work experience with the employer/customer (5.5%). Also, the proportion of dependent contractors who claim to be looking for a new job is closer to that of temporary employees (8.5 and 9.6% respectively) than to that of “pure” self-employed and employers (3.0% and 0.5%, respectively).

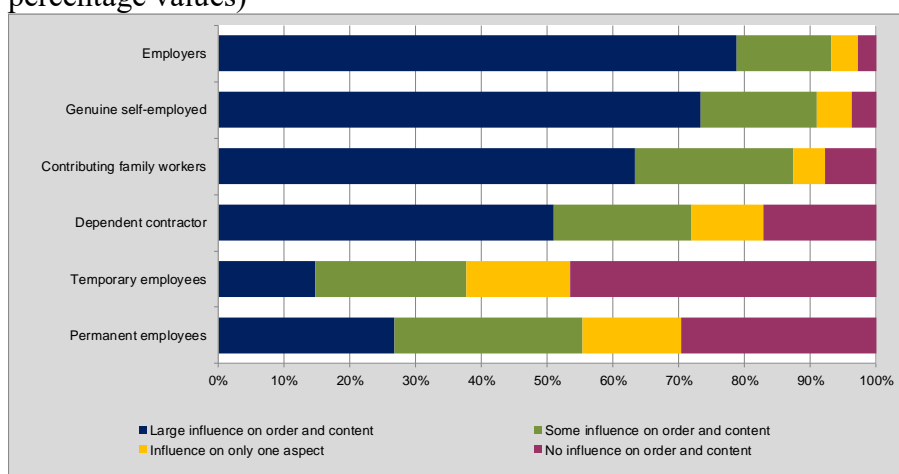
5. Context and work characteristics of dependent contractors

Autonomy in performing the job is a basic discriminant between employees and self-employed. The 2019 Labour Force Survey questionnaire contains two questions, one about the influence in the sequence in which work activities are carried out, the other about the influence in shaping the content of one’s work ⁽¹⁰⁾. The indicator obtained from the combination of the questions provides a powerful indication of the degree of autonomy enjoyed by the different types of worker. It proceeds from a maximum degree of autonomy of the entrepreneurs to a minimum of temporary employees (Figure 4), with the dependent contractors who are placed in an intermediate, borderline position, between the self-employed and employees. In particular, the share of those who claim to have broad autonomy in deciding the sequence of tasks and the type of content ranges from 78.8% among employers to 14.8% for temporary employees (35.6% in total). Among self-employed, dependent contractors are those who complain of less autonomy (about a half of those who can decide both order and content of work). It is interesting to note that between genuine self-employed

⁽¹⁰⁾ The questions relate to the 2019 ad hoc module on the organisation and flexibility of working time. All the ad hoc modules and questions are administered only to a part of the sample (the second wave) and should be analysed on an annual average. However, given the interest of the question, here is the partial (and therefore provisional) result of the first nine months of 2019 referring only to the second wave.

without employees and employers, the differences are foggier than those that distinguish between permanent and temporary employees.

Figure 4 – Employed aged 15 and over by group and influence on order and content of work (a) - I-III quarters 2019 (Values in thousands and percentage values)



(a) Data referred only to the second wave of the sample.

Source: Istat, Rilevazione sulle forze di lavoro

If we narrow the comparison down to dependent contractors and genuine self-employed without employees, adjacent groups in terms of work characteristics, we can observe how the economic dependency from a main client is a distinctive feature of dependent contractors: almost 50% of the total say they work for a single client, compared to 15.3% of genuine self-employed (Figure 5). Moreover, dependent contractors are more often subject to organisational constraints, such as working at the customer/client workplace and tied to working time constraints. 33.4% of dependent contractors and 7.0% of genuine self-employed declared at the same time constraints for both these aspects. On the other hand, 32.0% of dependent contractors report autonomy both in the choice of the workplace and in the determination of the working time timetable, less than half of genuine self-employed (65.9%). The dependent contractors with only one client that also have constraints in workplace and working time are 22.2%, the genuine self-employed 2.5%.

Figure 5 – Self-employed without employees aged 15 and over by groups and number of clients and organisational constraints - I-quarters 2019 (Percentage values)



Source: Istat, Rilevazione sulle forze di lavoro

If we look at the occupation while considering the number of clients, dependent contractors who have more than one client most often perform qualified jobs (65.8%, compared to 56.2% with single client). On the other hand, 5.6% of dependent contractors with one client work in the group of non-qualified jobs/elementary occupations, compared with 2.2% for multi-client dependent contractors.

The number of hours worked also helps to distinguish this group from other self-employed workers: 20.4% of dependent contractors work up to 20 hours a week, compared to only 11.0% and 3.8% of genuine self-employed and employers. As a result, 29.5% of dependent contractors work part-time (with a rate of involuntary part-time due to lack of work of 65.2%)⁽¹⁾. These percentages are more similar to those of employees than to other self-employed workers, for whom part-time concerns 14.6% of genuine self-employed without employees and 4.4% of employers, with a much more limited rate of involuntary part-time. There are no significant differences in the reasons why people work part-time, even if employers report more often that they work fewer hours to have more free time and dependent contractors report more than others working part-time because of their studies or vocational training. The working hours of the self-employed are more pervasive

⁽¹⁾ Among self-employed, part time jobs refer to a self-assessment: if the interviewees declare they work less than the average person who does a similar job is treated as part time employed. Therefore, involuntary part time should be intended as a limited activity carried out for lack of full-time employment opportunities.

than those of the employees: for all categories, evening work and work on Saturdays and Sundays are more widespread than that of the employees (especially when they are permanent). A characteristic of dependent contractors is that evening and weekend work is more frequent even among those who claim to work part-time.

6. Job satisfaction

All employed in Italy generally declare a good level of job satisfaction: in the first half of 2019, 57.0% expressed great satisfaction, and 37.1% were fairly satisfied. In the EU average in 2017 (latest available data)⁽¹²⁾, 42.2% were very satisfied, and 46.3% fairly satisfied.

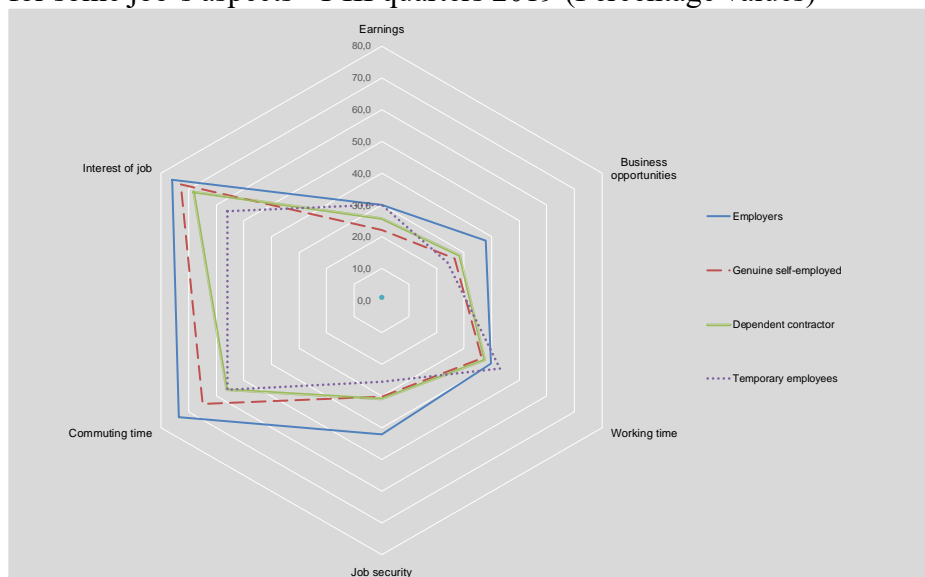
In our country, employers and permanent employees are the most satisfied (62.6% and 58.2% respectively have high satisfaction). The lowest percentages of high satisfaction can be found among temporary employees and dependent contractors (51.0 and 53.1% respectively). The dependent contractors, together with the genuine self-employed, also have the highest percentages of those who say they are little or no satisfied (5.8 and 5.2%, compared to 3.6% of permanent employees and 4.5% of employers).

In addition to general satisfaction, the Italian questionnaire also includes questions on satisfaction concerning different aspects of work. The analyses proposed below are carried out on the quota of those who assigned the maximum score to the diverse areas, i.e. between 8 and 10. Employers are the most satisfied for all aspects considered, with the only exception of the working time in which the rates of very satisfied is very similar to those of the other self-employed. The aspects that employers are most satisfied with are above all the interest in work and commuting times, two dimensions that are very much linked to the high degree of autonomy with which it is possible organising the job and deciding the workplace (Figure 6). Genuine self-employed and dependent contractors show more similar profiles for working times, job security, and earnings, with percentages systematically lower than employers. However, dependent contractors are less satisfied with the

⁽¹²⁾ The data on job satisfaction in the EU countries is only collected in a few ad hoc modules. The last one in which it was collected is 2017. See Eurostat, Self-employment statistics, *Statistics Explained*, Luxembourg, 2018, 11 December.

interest of the work and, to a greater extent, with the commuting times, probably because of stricter constraints that they have to respect, which bring them closer to temporary employees.

Figure 6 - Employed aged 15 and over by group and high satisfaction for some job's aspects - I-III quarters 2019 (Percentage values)



(a) Excluding permanent employees, contributing family workers and member of producers cooperatives.

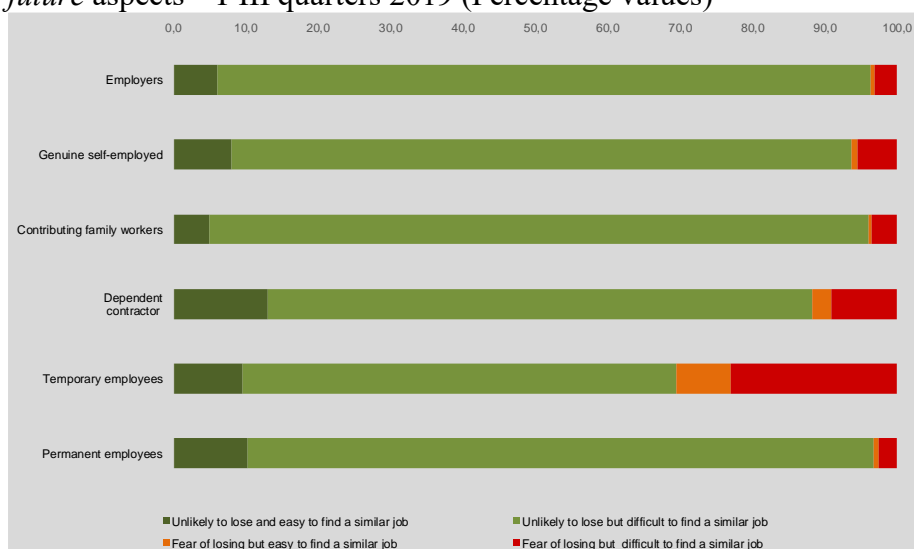
Source: Istat, Rilevazione sulle forze di lavoro

If we consider the indicator on the perception of job insecurity, included in the framework of the indicators of fair and sustainable well-being ⁽¹³⁾, we find a condition of widespread uncertainty first of all among temporary employees and, to a lesser extent, among dependent contractors. Among the latter, the percentage of those who are afraid of losing their jobs and doubt that it will be easy to find a similar one is 9.0%, compared with 3.1% of employers and 5.3% of the genuine self-

⁽¹³⁾ The indicator (collected from 2013) combines two questions from the Labour Force Survey, in which the respondent's opinion on the probability of losing the job/processing the activity in the following two months and on the ease of finding a similar job is deepened, and provides information on the respondents' perception of security in relation to the solidity and stability of their work. See https://www.istat.it/it/files//2014/06/03_Lavoro-conciliazione-tempi-vita-Bes2014.pdf.

employed. At the same time, the number of dependent contractors who consider unlikely to lose their jobs but easy to find a similar one is higher than that of other types of workers (13.0%, compared to employers and genuine self-employed, respectively 6.1 and 8.0%).

Figure 7 - Employed aged 15 and over by group and *uncertainty for the future* aspects – I-III quarters 2019 (Percentage values)



Source: Istat, Rilevazione sulle forze di lavoro

7. Concluding remarks

The tripartition used in this work, which is still in an experimental and evolving field, enabled us to distinguish the complex world of the self-employed. The analysis of the three groups shows the presence (and the consistency), alongside the traditional figures, of a group of self-employed with an ambiguous professional identity, who are closer in some dimensions to dependent work than to independent one. The differences that systematically emerge for dependent contractors compared to the other two groups of self-employed confirm the relevance of the analysis, which can be further refined over time, when the indications contained in the new ILO classification of employment status will be systematised and incorporated into official statistics.

The analysis highlights some peculiarities of the three groups, such as the weight, between the dependent contractors of the female component and younger workers, two categories traditionally vulnerable in the labour market. Similarly, among dependent contractors, there are high educational levels and the main incidence of both unskilled and qualified and technical occupations.

This leads us to believe that these workers are, to some extent, in the early stages of their working careers, and that therefore some of them are in a path of improving their professional status, towards more robust forms of self-employment - as is more evident for multi-client ones - or in transition to dependent work, for example for the technical occupations done for a single client.

However, for a significant proportion of dependent contractors, the condition of fragility in the market is not a transitional step but a distinctive feature of their work ⁽¹⁴⁾.

As noted, the most frequent occupations among dependent contractors are not those typical - if not in rare cases - of self-employment, but rather constitute a request for outsourced work of marginal or collateral functions of production, and it shifts onto these workers part of the business risks (call center operators, home sellers, delivery workers, truck drivers). These jobs will, therefore, be “bad”, at least until they are defined and protected ⁽¹⁵⁾.

The group of dependent contractors seems to be only partially comparable to that defined in 2017, in all EU countries, as a result of the ad hoc module included in the Labour Force Survey ⁽¹⁶⁾. In that case, the grey area of self-employment was identified through the aggregate of “dependent self-employed”, i.e. the self-employed without employees who in the last 12 months had only one customer/client (from whom they obtained at least 75% of the proceeds) that fixes the starting and ending working times. This estimate of the grey area of self-employment, differently from that proposed by the ILO, focuses on

⁽¹⁴⁾ Recent changes in the regulation of self-employed occupation would have some effects in this group. See M. LEONARDI, A. DILI, *Con la flat tax crescerà il popolo dei (finti) autonomi*, in *lavoce.info*, 2018, <https://www.lavoce.info/archives/54852/con-la-flat-tax-crescera-il-popolo-delle-partite-iva> (accessed September).

⁽¹⁵⁾ A. ACCORNERO, *Era il secolo del Lavoro. Più interessanti ma meno tutelati i lavori del futuro?* Bologna, il Mulino, 1997, p. 126-127.

⁽¹⁶⁾ EUROSTAT, Labour Force Survey (LFS) ad-hoc module 2017 on the self-employed persons, *Assessment report*, 2018..

organisational autonomy rather than economic risk ⁽¹⁷⁾. As always, there is no univocal approach to identifying a condition of reduced autonomy and the resulting detection of those who are in an intermediate location between salaried and self-employment.

This issues necessarily involves a multidimensional approach: in fact, the two classifications have wide margins of overlap, even if the group of dependent self-employed (218,000 in the second quarter of 2017, 6.0% of the self-employed without employees), even if numerically more restricted seems to be more circumscribed and even closer to the condition of employees.

Abstract

The Line between Self-Employment and Salaried Employment and the ILO's New Classification of Employment Status

Purpose: *the paper analyses characteristics and trend of self-employed workers in Italy. In 2018 they were 5 million, 21.7% of employed persons. The crisis of 2008 reinforced a long-term downward trend began in the 1990s that in the period 2008-2018 has resulted in a decrease of the aggregate by 9.5% (558 thousand fewer). Despite this, Italy ranks third in Europe for the share of self-employed workers, after Greece and Romania, mainly due to the high presence of the component without employees. The statistical aggregate of self-employment includes a very wide range of professional identities sometimes characterized from wide margins of autonomy, in others with very stringent limitations and constraints in relations with clients/customers. Here we focus on the peculiarities of a new statistical aggregate, the dependent contractors. Methodology: at the 20th International Conference of Labour Statisticians the ILO (International Labour Organization) approved a new classification of employment status that revises the boundaries between employees*

⁽¹⁷⁾ The group identified in 2017 also allows for comparison at European level. The EU average in 2017 was estimated at DSE 1.1 million, 4.7% of self-employed without employees. The geographical differences are notable: the highest shares of DSE are observed in Slovakia (12.6%), Cyprus (8.9%), United Kingdom (8.0%), Czech Republic and Denmark (7.2 and 7.1%), while percentages below 1% are observed in Greece, Bulgaria, Estonia, Croatia, Latvia, Lithuania, Luxembourg and Malta. Italy ranks 9th, with DSE incidence exceeding the European average. For more details on the results for 2017 see F. DELLA RATTA-RINALDI, A. SABBATINI, *Una lettura del lavoro autonomo in chiave territoriale*, in *Quaderni di Rassegna sindacale*, Ediesse, Roma, 2019, 2, 147-172; ISTAT, *I lavoratori indipendenti*, *Statistica Focus*, 5 novembre, 2018; Istat, *Il ruolo delle reti nel lavoro autonomo*, in *Rapporto annuale 2018 - la situazione del Paese*, 2018, 115-121.

and independents, identifying the new figure of dependent contractors: employed formally autonomous but in fact bound by subordination relationships with another economic unit (client or client) that limits their access to the market (prices, tariffs, etc.) and organizational autonomy. Following the indications of the ILO, in 2019 the Labour Force Survey included the questions to define this new aggregate. **Findings:** in the average of the first three quarters of 2019 dependent contractors were estimated to be 452,000, 11.5% of self-employed without employees. A quarter were collaborators, 37.2% own-account workers and 37.3% of professionals and, compared to the other self-employed, are characterized by a greater presence of women and young people between 15 and 34 years of age. The dependent contractors with only one client are 50% and are more subject to organisational constraints. The article examines these and other differences that systematically emerge for dependent contractors compared to the other two groups of independents, employers and the "pure" self-employed. **Research limitations/implications:** the definition of dependent contractors will be improved in the future, and this will engage the official statistics in the coming years. **Originality:** the paper presents the very first results of the operational definition of dependent contractors.

Keywords: dependent contractors, boundaries between employees and self-employed, International classification of status in employment (ICSE1 8).

Il confine tra autonomi e subordinati e la nuova classificazione dello status occupazionale dell'ILO

Purpose: Il lavoro analizza la dinamica del lavoro indipendente in Italia. Nel 2018 I lavoratori indipendenti erano circa 5 milioni, il 21,7% del totale degli occupati. La crisi del 2008 ha aggravato un trend in calo che era iniziato già nella metà degli anni '90: nel periodo 2008-2018 l'aggregato si è ridotto del 9,5% (-558 mila). Nonostante ciò in Italia la quota degli indipendenti è tra le più elevate in Europa, dopo Grecia e Romania, soprattutto per la componente degli indipendenti senza dipendenti. L'aggregato statistico degli indipendenti comprende diverse figure professionali, caratterizzate da diversi livelli di autonomia. In questo lavoro ci si sofferma sul nuovo aggregato dei dependent contractors, proposto dall'Ilo nel 2018, che consente di definire gli indipendenti che presentano vincoli più stringenti nello svolgimento del loro lavoro. **Metodologia:** Alla 20th International Conference of Labour Statisticians the ILO (International Labour Organization) ha approvato una nuova classificazione dello status occupazionale che rivede i confini tra dipendenti e indipendenti, identificando la nuova figura dei dependent contractor: occupati formalmente autonomi ma di fatto vincolati da rapporti di subordinazione con un'altra unità economica (cliente o committente) che ne limita l'accesso al mercato (prezzi, tariffe, ecc.) e l'autonomia organizzativa. Seguendo le indicazioni dell'ILO, nel 2019 l'Indagine sulle forze di lavoro ha incluso le domande per definire questo nuovo aggregato. **Risultati:** Nella media dei primi tre trimestri del 2019 i collaboratori dipendenti sono stati stimati in 452.000, l'11,5% dei lavoratori autonomi senza dipendenti. Un quarto sono collaboratori, il 37,2% lavoratori in proprio e il 37,3% di

liberi professionisti, rispetto agli altri lavoratori autonomi, sono caratterizzati da una maggiore presenza di donne e giovani tra i 15 e i 34 anni. I dependent contractor con un solo cliente sono il 50% e più soggetti a vincoli organizzativi. L'articolo esamina queste e altre differenze che emergono sistematicamente per tra questi e gli altri due gruppi di indipendenti, i datori di lavoro e i lavoratori autonomi "puri".
Limiti/implicazioni della ricerca: *La definizione di dependent contractor sarà migliorata in futuro, e questo sforzo coinvolgerà le statistiche ufficiali nei prossimi anni.*
Originalità: *Il documento presenta i primissimi risultati della operazionalizzazione della definizione di dependent contractor.*

Parole chiave: *dependent contractor, distinzione tra dipendenti e lavoratori autonomi, Classificazione internazionale dello stato in occupazione (ICSEI 8).*

Mapping Transitional Labour Markets Models in Europe

Cristina Lincaru^{*}, *Speranța Pîrciog*^{**}, *Adriana Grigorescu*^{***}

Sommario: 1. Introduction. – 2. Literature review. – 3. Data and Methodology. – 4. Inputs. – 5. Results. – 5.1. Job tenure change patterns identification. – 5.2. Unemployment incidence change by duration patterns identification. – 6. Discussions and Conclusion.

1. Introduction

Disruptive factors (population ageing, migration, globalisation, digitisation & digitalisation transformation, artificial intelligence, knowledge economy, climate changes, carbon emission) radically change the world of work. Europe’s new paradigm “Social Investment” is centred on individual and focused on improving employability, the fact that indicate the restoring of a long-term perspective. In the context of the globalised economy and technological progress is manifesting the spatial labour market segmentation & specialisation at the same time with increasing demand for flexibility. Before 2008, flexicurity was the main labour market policy paradigm, the key to success in the

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new global economy. Bredgaard and Madsen ⁽¹⁾ revised the flexicurity concept after the crises, pointing the institutional complementarities between flexibility and security are fragile and need to adapt to new challenges. Schmidt ⁽²⁾ show that Transitional Labour Markets (TLM) is a conceptual system emphasising labour market transitions during the lifetime. Integration and adaption are the new topics for the labour market policy reform Schmid, and Gazier ⁽³⁾ under the TLM approaches. Gazier and Gautié ⁽⁴⁾ found that TLM comes from «diverse theories of the labour market and organisations, and are integrated into a systemic perspective», with the European labour markets, collective and structured version of the “social investment” paradigm. Brzinsky-Fay ⁽⁵⁾ improve the concept in theoretical and methodological terms. Gazier ⁽⁶⁾ expands the flexicurity at the global scale and considers the transitional labour markets as the dynamic adaptation policy of labour markets to the globalised world. Schmid ⁽⁷⁾ enriches the TLM with «transitions from one employment status to the other, including combinations of work and education or work and unpaid care», from a dynamic perspective. In this context, the TLM policies go beyond the flexicurity policies.

⁽¹⁾ T. BREDGAARD, P.K. MADSEN, *Farewell Flexicurity? Danish Flexicurity and the Crisis*, in *Transfer: European Review of Labour and Research*, 2018, vol.24, n. 4, 375-386.

⁽²⁾ G. SCHMID, *Transitional Labour Markets, from Theory to Policy Application. Transitional Labour Markets and Flexicurity: Managing Social Risks over the Lifecourse*, in *Documents de travail du Centre d’Economie de la Sorbonne*, 2009, 27.

⁽³⁾ G. SCHMID, B. GAZIER, *The Dynamics of Full Employment*, Business & Economics, Edward Elgar Publishing, Cheltenham, UK and Northampton, MA, USA, 2002.

⁽⁴⁾ B. GAZIER, J. GAUTIE, *The “Transitional Labour Markets” Approach: Theory, History and Future Research Agenda*, in *Documents de travail du Centre d’Economie de la Sorbonne*, 2009, 22.

⁽⁵⁾ C. BRZINSKY-FAY, *The Concept of Transitional Labour Markets. A Theoretical and Methodological Inventory*, in *Social Science Research Center Berlin (WZB)*, 2010, 32.

⁽⁶⁾ B. GAZIER, *The European Employment Strategy in the tempest: Restoring a long-term perspective*, Paper presented at the Symposium Good-by Flexicurity, Welcome Transitional Labour Markets, in 2010 IIRA European Congress, Copenhagen, Denmark, April 2010.

⁽⁷⁾ G. SCHMID, *Transitional Labour Markets: Theoretical Foundations and Policy Strategies*, in *The New Palgrave Dictionary of Economics*, ed. by Palgrave Macmillan, London, UK, 2017.

After the crisis, the dualization of the labour market increases, the job duration decreases, and the inter job periods increases in frequency and duration. The paradigm of Transitional Labour Markets (TLM), proposed by Schmid, offers a conceptual system to manage the labour market transitions during the lifetime. Integration and adaption are the new topics for the labour market policy reform TLM approach, regarding the dynamic adaptation policy of labour markets to the globalised world.

The purpose of our work is to map models by clusters of the changes in job tenure intervals (average tenure) and average duration of unemployment for European labour force by age and gender in the last decade. In Arc Gis Pro 2.3, we run the tool Mapping Clusters via K Means algorithm using OECD aggregate data at NUTS0 level. The analysis could further improve by running the tools with other TLM fundamental indicators: the working time profile, the incidence of the profile of involuntary employment with an incomplete program.

2. Literature review

Schmid ⁽⁸⁾ defines “transition labour markets” as institutional responses to critical events in labour markets. TLM includes successively or simultaneously working arrangements during transition periods between: I. employment: fixed-term and open end, part-time and full-time, dependent and self-employment; II. Unemployment and employment; III. Education/LLL and employment; IV. Domestic / self-employed and occupation activities; V. occupation and retirement. Specific forms of “temporary employment” are short-term / fixed-term work, temporary part-time work, vocational training and retraining, sabbatical, parental leave or career development (Schmid, 1998, p.2.)⁹. Other concepts in TLM theory are the lifecycle stages and transient labour market. Author points that lifecycle stages manifests on labour market in “transition jobs”, where work time deviates substantially

⁽⁸⁾ G. SCHMID, *Transitional Labour Markets. A New European Employment Strategy*, in *Discussion Paper FS I 98 -206*, Wissenschaftszentrum Berlin für Sozialforschung 1998, 57.

⁽⁹⁾ G. SCHMID, *Transitional Labour Markets. A New European Employment Strategy*, in *Discussion Paper FS I 98 -206*, Wissenschaftszentrum Berlin für Sozialforschung 1998, 57.

from the new 30-hour / week standard. In this context, the institutional arrangements that allow such intermediate phases will be called “transient labour markets”⁽¹⁰⁾.

The cause of transitions are the shocks that expose the labour markets. These shocks changes behaviours of workers / employers. Actor’s new behaviours, in a short period of time, mirrors the adaptation processes. The response to a stress factor requests also a learning process. Giddens⁽¹¹⁾ notes the prevalence of internal shocks against external shocks. Among the internal shocks are: positive or negative demographic events, major health problems, family breaks or the need to follow a partner in another region. Among usual external shocks there are: rapid changes in actual demand or technological change.

Labour markets are institutions and not commodity markets according to Schmid & Schomann⁽¹²⁾ and Solow⁽¹³⁾. The ability to adjust to internal and external shocks is limited. The classic mechanism of labour market adjustment is salary. Salary has adjusted limits imposed by social status and human dignity. The higher the shock is, the longer the adaptation period and the need for adjustment is greater - a situation described by the TLMs. Salary is highly correlated with productivity. The higher is the productivity, so is the absorption of the new, acceptance of the new technologies, production processes and organisation patterns. Each quantity of new request learning processes demands time. The learning duration is counted neither as working time nor as inactive time either.

Van der Laan⁽¹⁴⁾ concludes that on the societal change at a supranational scale, the new resources of the knowledge economy and transitional labour can be matched, especially at regional level as the

⁽¹⁰⁾ G. SCHMID, *Transitional Labour Markets. A New European Employment Strategy*, in *Discussion Paper FS I 98 -206*, Wissenschaftszentrum Berlin für Sozialforschung 1998, 57.

⁽¹¹⁾ A. GIDDENS, *Politics, Sociology and Social Theory: Encounters with Classical and Contemporary Social Thought*, Stanford University Press, Stanford, California, 1995, 4.

⁽¹²⁾ G. SCHMID, K. SCHOMANN, *Labor Market Institutions in Europe: A Socioeconomic Evaluation of Performance*, M.E. Sharpe, Armonk, New York and London, England, 1994.

⁽¹³⁾ R. M. SOLOW, *The Labor Market as a Social Institution*, Blackwell, Oxford, 1990.

⁽¹⁴⁾ L. VAN DER LAAN, *Labour Markets in Europe at the Edge of a New Century: Knowledge Economy and Transitional Labour*, in *Tijdschrift Voor Economische En Sociale Geografie*, 1999, vol. 90, n. 4, 427-431.

new engine. Saha & Rowley⁽¹⁵⁾ point the efficiency as the knowledge economy value. Major changes in labour supply, like, ageing, feminisation, individualism, migration, create a new life style. The projection of the new life style in the map of labour market, generates new trajectories, different from the standard one. These new paths are composed functions on TLM of different activities like “working, learning, retirement or care”. ADB⁽¹⁶⁾ warns that «developing countries that fail to transform effectively into knowledge-based economies (KE) will fall further behind more advanced countries». The knowledge economy works in a global economy in both dimensions’ competition and cooperation. Specific for KE is to use information & communication technologies and infrastructure, talents/creative workers, dynamic research and innovation programs, and supportive regulatory environment. The spatial distribution of demand and supply changes the family’s models, different from the large farm family models and urban family. New “hinterland”/peri-urban social buffers for transitional reflects new spatial specialised patterns of TLM.

TLM are linked with labour market segmentation. Cazes & Varga in Deakin⁽¹⁷⁾ emphasize that «Segmentation may arise from particularities of labour market institutions, such as contractual arrangements (permanent versus temporary employment), their enforcement (and the resulting informality), as well as types of workers concerned (such as migrant, domestic, or dispatch workers) [...] Moreover, segmentation implies limited transitions to better jobs. The consequences of segmentation also have macroeconomic implications, such as lower productivity and higher employment volatility».

Deakin⁽¹⁸⁾ stresses that «labour market segmentation is problematic because of its links to poor job quality, inequality and discrimination,

⁽¹⁵⁾ J. MUKHERJEE SAHA, C. ROWLEY, *Changing HR Landscapes across the Region*, in *The Changing Role of the Human Resource Profession in the Asia Pacific Region*, Elsevier, 2015, 73-86.

⁽¹⁶⁾ ADB, *Moving Toward Knowledge-Based Economies: Asian Experiences*, in *Asian Development Bank*, 2007, 67.

⁽¹⁷⁾ S. DEAKIN, *Addressing Labour Market Segmentation: The Role of Labour Law*, in *Governance and Tripartism Department International Labour Office - Geneva, Working Paper No. 52*, 2013, 27.

⁽¹⁸⁾ S. DEAKIN, *Addressing Labour Market Segmentation: The Role of Labour Law*, in *Governance and Tripartism Department International Labour Office - Geneva, Working Paper No. 52*, 2013, 27.

on the one hand, and inefficiency in resource allocations, on the other. Segmentation is the result of contractual ordering which is often privately efficient but socially sub-optimal».

TLM manifestation are different from individual to large groups. Hartenstein & Waugh ⁽¹⁹⁾ and Schlossberg ⁽²⁰⁾ consider the loss of work a critical event for the individual exposed to a major risk of social exclusion.

The spatial concentration and accumulation of problem groups in the labour market, under the presence of shocks shift, expand and diversify the segmentation on labour market. Fischer & Njikamp ⁽²¹⁾ and Morrison ⁽²²⁾ argues that segmentation theory and the operation of local labour markets, request rigour in the conceptual distinction between “local”, “regional” and “spatial”, especially in the large context of “spatial division of labour”. Raagma ⁽²³⁾ applies the Centre – Periphery theory explaining the regional development of the informational and transitional society. Huws ⁽²⁴⁾ points the emergence of the *extreme flexible and transitional forms of work identity*. The labour force supply is still embedded in national frameworks but the effect of globalisation is increasing. So is announced a new worker category «highly dynamic and pro-active employees were identified, with flexible and transitional forms of work identity, who were able to anticipate and internalise the requirements for continuous adjustment and changes at work» ⁽²⁵⁾.

⁽¹⁹⁾ A.A. HARTENSTEIN, D.A. WAUGH, *Toward a Transitional Society: A Situational Approach to Full Employment*, in *The Journal of Socio-Economics*, 1994, vol. 23, n. 1-2, 33-59.

⁽²⁰⁾ N.K. SCHLOSSBERG, *Counseling Adults in Transition: Linking Practice with Theory*, 2nd ed. edition, Springer Publishing Company, New York, 1995.

⁽²¹⁾ M.M FISCHER, P. NIJKAMP, *Spatial Labour Market Analysis: Relevance and Scope*, in M.M. FISCHER, P. NIJKAMP (Editors), *Regional Labour Markets. Analytical Contributions and Cross-National Comparisons*, Elsevier Science, North-Holland, 1987, 34.

⁽²²⁾ P. MORRISON, *Segmentation Theory Applied to Local, Regional and Spatial Labour Markets*, in *Progress in Human Geography*, 1990, vol. 14, 488-528.

⁽²³⁾ G. RAAGMA, *Centre-Periphery Model Explaining the Regional Development of the Informational and Transitional Society*, Paper presented at the *ERSA Conference*, Jyväskylä, Finland, August 2003.

⁽²⁴⁾ U. HUWS, *The Transformation of Work in a Global Knowledge Economy: Towards a Conceptual Framework*, in *Works - Changes in Work*, 2006, 246.

⁽²⁵⁾ U. HUWS, *The Transformation of Work in a Global Knowledge Economy: Towards a Conceptual Framework*, in *Works - Changes in Work*, 2006, 246.

Their work identity is highly individualised, primarily based on their personal skills, capacity for continuous learning and a project-oriented work attitude. Flexible and transient work identities were typically found among the higher qualified and the lower qualified who were holding temporary, short-term employment contracts.

Schmid & Gazier⁽²⁶⁾ argues for the maintenance of a universal system of mutually supportive social protection and employment policy. Authors claim the «extension of conventional unemployment insurance into a broader system of employment insurance which encourage people to assume the income risks of flexible employment relationships».

Average job tenure and unemployment rates are analysed in the context of EPL by Rogowski⁽²⁷⁾ who explains that average tenure of the job is a criteria of job satisfaction (p. 337), next to employment security and job quality (p.334); is also a dimension of job security (p. 303) a measure for wage increase and for training investments (p. 331); a degree of labour market flexibility if is analysed in its distribution of tenure in short and long time employment (p. 337).

A low incidence of long-time unemployment (+6 /youth and 12+ months) as a percentage of total unemployment was illustrated by the Danish flexicurity model. This ration ideally indicate the ALMP accelerating support toward a new employment in the shortest time⁽²⁸⁾. Bena, Giraudom, Loembuni and Costa⁽²⁹⁾ found that flexibility increases push the individuals to change jobs more frequently than in the past and career fragmentation accentuates. Workers find themselves more and more in the “high injury risk” period. Injury risk is negatively correlated with experience, youth are likely exposed to this risk.

On this background our research question is: What are the patterns of job tenure change and unemployment incidence change across Europe

⁽²⁶⁾ G. SCHMID, B. GAZIER, *The Dynamics of Full Employment*, Bussiness & Economics, Edward Elgar Publishing, Cheltenham, UK and Northampton, MA, USA, 2002.

⁽²⁷⁾ R. ROGOWSKI, *The European Social Model and Transitional Labour Markets: Law and Policy*, Ashgate Publishing, England, 2008.

⁽²⁸⁾ R. ROGOWSKI, *The European Social Model and Transitional Labour Markets: Law and Policy*, Ashgate Publishing, England, 2008.

⁽²⁹⁾ A. BENA, M. GIRAUDOM, R. LOEMBUNI, G. COSTA, *Job Tenure and Work Injuries: A Multivariate Analysis of the Relation with Previous Experience and Differences by Age*, in *BMC Public Health*, 2013, vol. 13, n. 1, 9.

for main target LMP's policies groups of youth, adults and old workers by gender? *This question is made in the background of TLM shift in knowledge economy KE more and more manifestation. The adoption of the new at the organisation level, an especially the radical new request training in view to acquire new adequate skills.⁽³⁰⁾ The need for training is increasing in view to minimise the skill mismatch. But this process increases the frequencies of transitions working-unemployment, or in other words changes the job tenure and unemployment duration ore and more.*

3. Data and Methodology

Labour Force Statistics (LFS) survey is the main source that provide data which are used to compile the statistics on employment and unemployment in OECD.stat. In view, to look at the pattern work and searching for work we use the indicators job tenure and unemployment incidence provided by the mentioned source. According to the metadata, Job tenure «is measured by the length of time workers have been in their current or main job or with their current employer and are expressed in numbers of years. They can be converted in months by multiplying by a factor of 12 (months). This information is valuable for estimating the degree of fluidity in the labour market and in identifying the areas of economic activity where the turnover of labour is rapid or otherwise» ⁽³¹⁾. Job duration uses the “Employment average tenure interval” from OECD.Stat. The Job tenure interval are: < 1 month; 1 to <6 months; > 6 month and < 1 year; and 10 years and over. Job tenure is detailed in the four duration interval by two gender and tree age groups in 24 variable.

Unemployment duration definition states that the «duration is the minimum between the duration of job search and the duration of joblessness. Category “Less than one month” refers to the duration of unemployment during the previous four weeks, including the survey

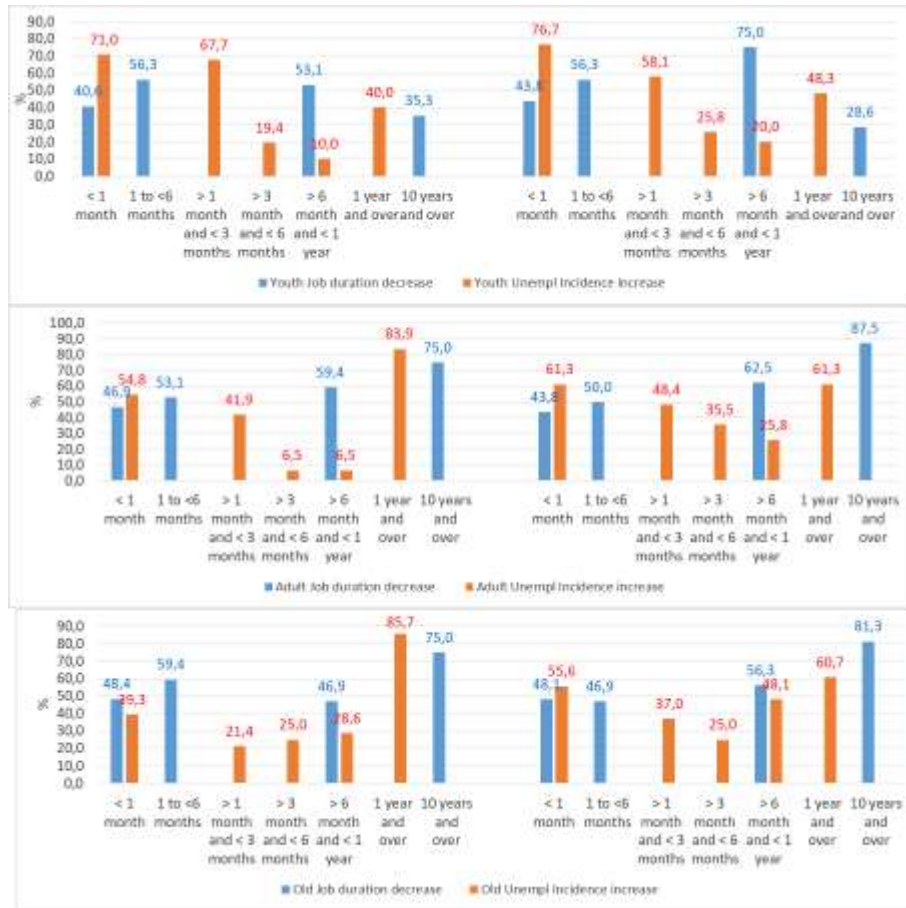
⁽³⁰⁾ L. RAINIE, J. ANDERSON, *Experts on the Future of Work, Jobs Training and Skills*, Pew Research Center: Internet, Science & Tech, 2017 <https://www.pewresearch.org/internet/2017/05/03/the-future-of-jobs-and-jobs-training/> (accessed November 19, 2019).

⁽³¹⁾ OECD.Stat, *Metadata for Dataset: Employment by job tenure intervals - average tenure*, OECD, 2019, <https://stats.oecd.org/>, (accessed November 1st, 2019).

reference week». Unemployment duration uses the “Incidence of unemployment by duration” from OECD.Stat, which covers over 30 countries. It contains data on the share of the five durations - less than 1 month, >1 month and < 3 months, >3 months and <6 months, >6 months and <1 year, 1 year and over - of unemployment among total unemployment by sex and by standardised age groups (15-24, 20-24, 25-54, 55+). Unemployment duration change is detailed in the five-duration interval by two gender and three age groups in 30 variables, as a difference between levels in 2018 and 2009. Cases with missing are excluded.

According to European Labour Force Survey Austria, Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Slovenia, Spain, United Kingdom, and Estonia the working time exclude explicitly the training time «apprentices, trainees and other persons in vocational training are asked to exclude the time spent in school or other special training centres».

Figure 1 – The shares of the countries with Job duration decrease and Unemployment incidence increase during 2009-2018 by duration interval, gender and age (left-males, right-females)



Note: Dataset: Employment by job tenure intervals - average tenure, Data extracted on 01 Nov 2019 21:10 UTC (GMT) from OECD.Stat and Dataset: Incidence of unemployment by duration, Data extracted on 14 Nov 2019 13:56 UTC (GMT) from OECD.Stat

		Males							Females						
		< 1 month	1 to < 6 months	> 1 month and < 3 months	> 3 months and < 6 months	> 6 months and < 1 year	1 year and over	10 years and over	< 1 month	1 to < 6 months	> 1 month and < 3 months	> 3 months and < 6 months	> 6 months and < 1 year	1 year and over	10 years and over
Youth	No of countries with data Job duration	32	32			32		17	32	32				32	14
	No of countries that register Job duration decrease	13	18			17		6	14	18				24	4
	No of countries with data Unempl Incidence	31		31	31	30	30		30		31	31	30	29	
Adult	No of countries that register Unempl Incidence increase	22		21	6	3	12		23		18	8	6	14	
	No of countries with data Job duration	32	32			32		32	32	32				32	32
	No of countries that register Job duration decrease	15	17			19		24	14	16				20	28
Old	No of countries with data Unempl Incidence	31		31	31	31	31		31		31	31	31	31	
	No of countries that register Unempl Incidence increase	17		13	2	2	26		19		15	11	8	19	
	No of countries with data Job duration	31	32			32		32	27	32				32	32
Old	No of countries that register Job duration decrease	15	19			15		24	13	15				18	26
	No of countries with data Unempl Incidence	28		28	28	28	28		27		27	28	27	28	
	No of countries that register Unempl Incidence increase	11		6	7	8	24		15		10	7	13	17	

*Denmark, Ireland and Portugal missing data for old people
Source: Graphics made by authors

Michaelides, Economakis, & Lagos ⁽³²⁾ uses Multivariate Clustering Analysis for employment and regional planning in Greece. Bena et al. ⁽³³⁾ applies this tool to analyse the job tenure and work injuries in relation with previous experience and age difference. Tatarczak & Boichuk ⁽³⁴⁾⁽³⁵⁾ applies multivariate methods and explore the nature of youth unemployment and unemployment in Poland in more precise detail using dendograms.

We use Multivariate Clustering Analysis (MCA) tool allow to «organise, group, differentiate and catalogue» the European transitional labour markets. The objective is to create clusters as similar as possible by transitional labour market features similarity for the main groups across European countries (called here features).

MCA Method

The R2 value reflects how much of the variation in the original TestScores data was retained after the clustering process, so the larger the R2 value is for a particular variable, the better that variable is at discriminating among your features ⁽³⁶⁾.

$$R2 = (TSS - ESS) / TSS$$

were TSS is the total sum of squares and ESS is the explained sum of squares.

⁽³²⁾ P. MICHAELIDES, G. ECONOMAKIS, D. LAGOS, *Clustering Analysis Methodology for Employment and Regional Planning in Greece*, MPRA Paper No. 74468, 2006, 9.

⁽³³⁾ A. BENA, M. GIRAUDOM, R. LOEMBUNI, G. COSTA, *Job Tenure and Work Injuries: A Multivariate Analysis of the Relation with Previous Experience and Differences by Age*, in *BMC Public Health*, 2013, vol. 13, n. 1, 9.

⁽³⁴⁾ A. TATARCZAK, O. BOICHUK, *The Use of Multivariate Techniques for Youth Unemployment Analysis in Poland*, Working Papers 130/2017, Institute of Economic Research, 2017.

⁽³⁵⁾ A. TATARCZAK, O. BOICHUK, *The Multivariate Techniques in Evaluation of Unemployment Analysis of Polish Regions*, in *Oeconomia Copernicana*, 2018, vol. 9 n. 3, 361-380.

⁽³⁶⁾ PRO.ARCGIS.COM, *How Multivariate Clustering works*, ESRI, 2019, <https://pro.arcgis.com/en/pro-app/tool-reference/spatial-statistics/how-multivariate-clustering-works.htm> (accessed August 20, 2019).

Number of cluster k MCA clustering effectiveness is measured using a ratio reflecting within-group similarity and between-group difference, called:

$$\text{Calinski-Harabasz pseudo F-statistic } z = \frac{\frac{R^2}{n_c - 1}}{\frac{1 - R^2}{n - n_c}}$$

Where:

$$R^2 = \frac{SST - SSE}{SST}$$

SST – reflects between-cluster differences

SSE – reflects within-cluster differences

$$SST = \sum_{i=1}^{n_c} \sum_{j=1}^{n_i} \sum_{k=1}^{n_v} (V_{ij}^k - V'^k)^2$$

$$SSE = \sum_{i=1}^{n_c} \sum_{j=1}^{n_i} \sum_{k=1}^{n_v} (V_{ij}^k - V'_t{}^k)^2$$

n = the number of features

n_i = the number of features in cluster i

n_c = the number of classes (clusters)

n_v = the number of variables used to cluster features

V_{ij}^k = the value of the k^{th} variable of the j^{th} feature in i^{th} cluster

V'^k = the mean value for the k^{th} variable

$V'_t{}^k$ = the mean value for the k^{th} variable in the cluster i

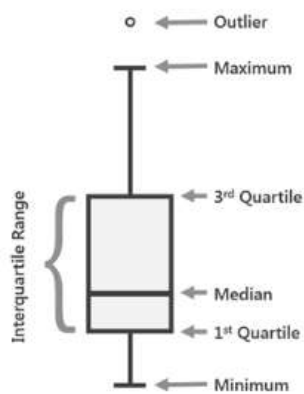
Evaluating Number Clusters, a chart will be created showing the pseudo F-statistic values calculated. The highest peak on the graph is the largest F-statistic, indicating how many clusters will be most effective at distinguishing the features and variables you specified. Based on pseudo F-statistic chart we select the best k and run again the tool. Among results, next to the cluster map are the number of features per clusters.

Clustering Method

The Multivariate Clustering tool uses the K Means algorithm by default. The goal of the K Means algorithm is to partition features so

the differences among the features in a cluster, over all clusters, are minimized. Because the algorithm is NP-hard, a greedy heuristic is employed to cluster features. The greedy algorithm will always converge to a local minimum, but will not always find the global (most optimal) minimum. The K Means algorithm works by first identifying seeds used to grow each cluster. Consequently, the number of seeds will always match the Number of Clusters. The first seed is selected randomly. Selection of remaining seeds, however, while still employing a random component, applies a weighting that favours selection of subsequent seeds farthest in data space from the existing set of seed features (this part of the algorithm is called K Means ++). Because of the random component in finding seeds whenever you select Optimized seed locations or Random seed locations for the Initialization Method, you might get variations in clustering results from one run of the tool to the next.

Outputs



Box plots are used to show information about both the characteristics of each cluster as well as characteristics of each variable used in the analysis. The graphic below shows you how to interpret box plots and their summary values for each Analysis Field and cluster created: minimum data value, 1st quartile, global median, 3rd quartile, maximum data value, and data outliers (values smaller or larger than 1.5 times the interquartile range). Hover over the box plot on the

chart to see these values as well as the interquartile range value. Any point marks falling outside the minimum or maximum (upper or lower whisker) represent data outliers.

The default parallel box plot chart summarizes both the clusters and the variables within them.

Each node of the mean lines points the cluster's average value for each Analysis Field ⁽³⁷⁾.

We expand the EU28 countries at the all European countries provided by the OECD.stat source in view to reach the 30, the minimum number of features for MCA. The main six groups are youth, adults and old people by gender, men or women. Each of the six groups are analysed by their similarities that reflects changes in job duration, resulting six spatial patterns typologies. Another six spatial pattern result from the analysis of the same groups changes in unemployment incidence.

Each group is analysed by four job duration variables and by five unemployment duration variables (Table No. 1).

«The values of the Analysis Fields are standardized by the tool because variables with large variances (where data values are very spread out around the mean) tend to have a larger influence on the clusters than variables with small variances. Standardization of the attribute values involves a z-transform, where the mean for all values is subtracted from each value and divided by the standard deviation for all values. Standardization puts all the attributes on the same scale» ⁽³⁸⁾.

Spatial unit is NUTS 0, respectively country level and the software is ARC GIS Pro. Multivariate clustering analysis (MCA) tool uses K-Means algorithm ⁽³⁹⁾. The natural clusters are identified directly from the data, MCA is an unsupervised machine learning method. Data are grouped in clusters «where all the features within each cluster are as similar as possible, and all the clusters themselves are as different as possible» ⁽⁴⁰⁾. MCA is not a spatial tool, but produces a spatial pattern of transitional labour markets by gender and age.

⁽³⁷⁾ PRO.ARCGIS.COM, *How Multivariate Clustering works*, ESRI, 2019, <https://pro.arcgis.com/en/pro-app/tool-reference/spatial-statistics/how-multivariate-clustering-works.htm> (accessed August 20, 2019).

⁽³⁸⁾ PRO.ARCGIS.COM, *How Multivariate Clustering works*, ESRI, 2019, <https://pro.arcgis.com/en/pro-app/tool-reference/spatial-statistics/how-multivariate-clustering-works.htm> (accessed August 20, 2019).

⁽³⁹⁾ PRO.ARCGIS.COM, *How Multivariate Clustering works*, ESRI, 2019, <https://pro.arcgis.com/en/pro-app/tool-reference/spatial-statistics/how-multivariate-clustering-works.htm> (accessed August 20, 2019).

⁽⁴⁰⁾ PRO.ARCGIS.COM, *How Multivariate Clustering works*, ESRI, 2019, <https://pro.arcgis.com/en/pro-app/tool-reference/spatial-statistics/how-multivariate-clustering-works.htm> (accessed August 20, 2019).

4. Inputs

Change in job duration and unemployment duration characterise some transitional regimes, different by age and gender. Post crises a new dynamic challenge the access to labour protection. The transition from school to work is specific for 15-24 years old, while the transition from work to pension is a process during 55-64 years old. Therefore, we look for the 2009-2018 period at males and females by age groups. The age groups are concerning standard age groups youth (15-24 years old), adults (25-54 years old) and aged / old (55-64 years old). The distribution of responses by variable is mentioned in the note Figure 1.

Youth unemployment duration increases and youth job tenure decreases for a duration less than a month, both for males and females. Youth female unemployment incidence increase for less than one month duration in 76.7% valid cases, and in 71% cases for youth males. In the same time the job duration also less than a month decreases in 43.8% of the valid cases for youth female, while in the youth males case decreases in 40.6% cases.

Adult unemployment duration increases for more than 10 years and adult job tenure decreases for more than 12 months, both for males and females. Adult female unemployment incidence increases for one year and over duration in 61.3% valid cases, and in 83.9% cases for youth males. In the same time the job duration for 10 years and over decreases in 87.5% of the valid cases for adult female, while in the adult male's case decreases in 75% cases.

Adult unemployment incidence by duration increases in the same time with job tenure decrease especially for long term durations – over one year and over 10 years. The distribution follows the adult trend.

5. Results

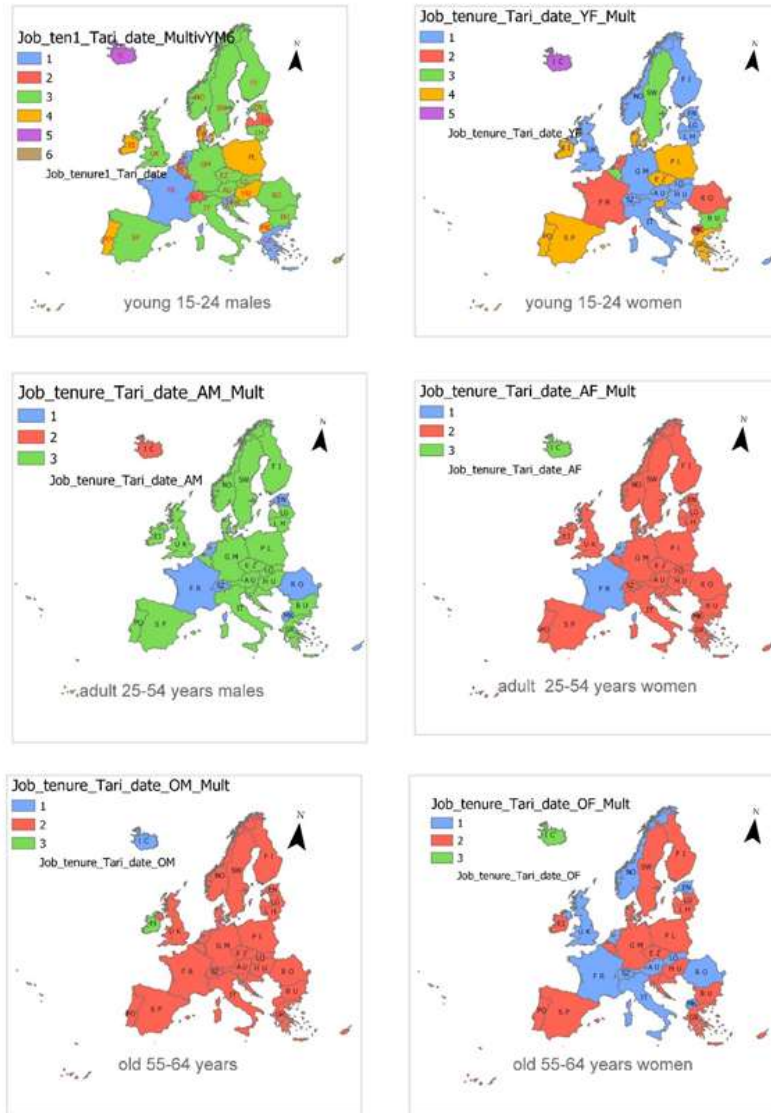
5.1. Job tenure change patterns identification

Youth males presents a pattern broken in 6 clusters YMs6 (Figure 2). The green cluster counts 15 countries and presents no variation for the job tenure changes in the last decade regardless the job tenure interval. The orange cluster, the sixth, counts 6 countries: Portugal, Poland,

Macedonia, Ireland, Denmark and Hungary. This cluster indicates a decrease of the tract for the job duration over 10 years. The red cluster counts 3 countries (Latvia, Luxembourg and Swiss) indicating, in average the highest decrease of the change in job duration less than one month (YMsd1). The first cluster, the blue one presents a positive tract above average job duration less than 1 month (YMsd1). This counts 5 countries: Greece, France, Nederland, and Slovenia. Iceland is an outlier; data are not provided for 2018.

Youth females presents a pattern broken in 5 clusters YWs5 (Figure 2). The blue cluster counts 15 countries and presents no variation for the job tenure changes in the last decade, regardless the job tenure interval. The orange cluster, the fourth, counts 8 countries: Portugal, Spain, Poland, Czech Republic, Greece, Ireland, Denmark and Slovenia. This cluster indicates a decrease of the tract for the average job duration over 10 years. The red cluster counts 4 countries (France, Nederland, Romania and Macedonia) indicating, in average an increase of the positive change in job duration less than one month (YWsd1). The third cluster, the green one presents a positive tract above average job duration over 10 years (YWsd4). This counts 3 countries: Sweden, Bulgaria and Belgium. Iceland is an outlier, data are not provided for 2018.

Figure 2 – Clusters for job duration changes during 2009-2018 by gender and age, at country level, for European states, resulted from multivariate analysis (k means), OECD data, ESRI Ro shape files



Note: Island Outlier, no data in 2018. Data for job tenure 10 years and over are not applicable for Youth.

FIPS_CNTRY	AU	BE	BJ	CY	DA	EI	EN	EZ	FI	FR	GM	GR	HR	HU	IC	IT
CNTRY_NAME	Austria	Belgium	Bulgaria	Cyprus	Denmark	Ireland	Estonia	Czech Republic	Finland	France	Germany	Greece	Croatia	Hungary	Iceland	Italy
FIPS_CNTRY	LG	LH	LO	LU	MK	MT	NL	NO	PL	PO	RO	SI	SP	SW	SZ	UK
CNTRY_NAME	Latvia	Lithuania	Slovakia	Luxembourg	Macedonia	Malta	Netherlands	Norway	Poland	Portugal	Romania	Slovenia	Spain	Sweden	Switzerland	United Kingdom

Source: Maps made by the authors, data OECD.stat, Arc Gis Pro

Adult males presents a pattern broken in 3 clusters AMs3 (Figure 2). The green cluster counts 23 countries presents no variation for the job tenure changes in the last decade regardless the job tenure interval. The blue cluster counts 7 countries: France, Suisse, Netherland, Macedonia, Romania, Cyprus and Estonia. Iceland is an outlier, data are not provided for 2018. This cluster is differentiated, in average, by an increase of the positive change in job duration less than one month (AMsd1).

Adult females presents a pattern broken in 3 clusters AWFs3 (Figure 2). The green cluster counts 26 countries presents no variation for the job tenure changes in the last decade regardless the job tenure interval. The blue cluster counts 4 countries: France, Netherland, Malta and Luxembourg. This cluster is differentiated, in average by an increase of the positive change in job duration less than one month (AWsd1).

Iceland is an outlier, data are not provided for 2018.

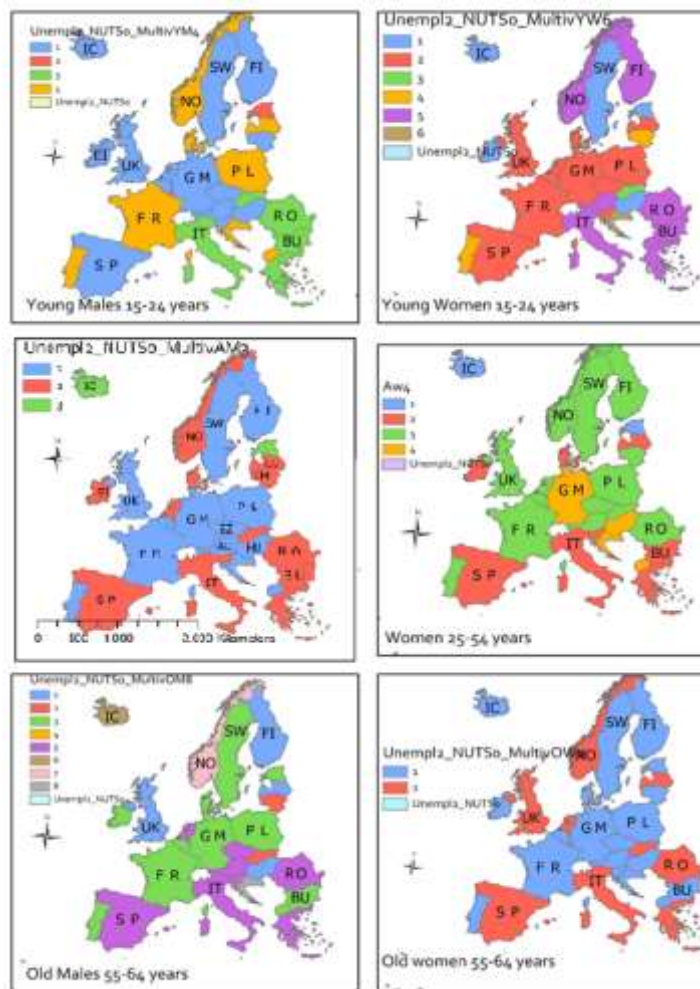
Old males (OMs3) and old females OFs3 has not enough data (less than 30 features), clusters are not reliable (Figure 2).

5.2. Unemployment incidence change by duration patterns identification

Youth males presents a pattern broken in 4 clusters YM4 (Figure 3). The blue cluster counts 14 countries Iceland, Spain, Ireland, United Kingdom, Belgium, Netherlands, Germany, Sweden, Austria, Hungary, Slovenia, Czech Republic, Finland. The average of this cluster is close to median. The second maximum positive change of unemployment incidence with a duration up to a month is the mark of this cluster. The Orange cluster counts 8 countries: Portugal, France, Poland, Norway, Denmark, Latvia, Croatia and Macedonia. The average cluster is the second minimum negative change of unemployment incidence with a duration less than a month and has the maximum for the average of positive change of unemployment incidence with a duration tree to six months and six to twelve months. The green cluster counts 5 countries: Slovakia, Romania, Bulgaria, Greece, Italy. The average cluster is the minimum negative change of unemployment incidence with a duration

less than a month and for the duration three to six month. Also, it has the maximum for the average of positive change of unemployment incidence with a duration over 12 months. The red cluster counts 3 countries: Estonia, Luxembourg and Malta provide a high distinctive cluster.

Figure 3 – Clusters for unemployment incidence changes during 2009-2018 by gender and age, at country level, for European states, resulted from multivariate analysis (k means), OECD data, ESRI Ro shape files



Note: Maps for Old (men and women) are not reliable, see note from Figure 1. Island Outlier, no data in 2018

<i>RIPS_CNTRY</i>	AU	BE	BJ	CY	DA	EI	EN	EZ	FI	FR	GM	GR	HR	HU	IC	IT
<i>CNTRY_NAME</i>	Austria	Belgium	Bulgaria	Cyprus	Denmark	Ireland	Estonia	Czech Republic	Finland	France	Germany	Greece	Croatia	Hungary	Iceland	Italy
<i>RIPS_CNTRY</i>	LG	LH	LO	LU	MK	MT	NL	NO	PL	PO	RO	SI	SP	SW	SZ	UK
<i>CNTRY_NAME</i>	Latvia	Lithuania	Slovakia	Luxembourg	Macedonia	Malta	Netherlands	Norway	Poland	Portugal	Romania	Slovenia	Spain	Sweden	Switzerland	United Kingdom

Source: Maps made by the authors, data OECD.stat, Arc Gis Pro

The average cluster are the maximum for positive change of unemployment incidence with a duration up to a month and one to three months. The average cluster are the minimum for negative change of unemployment incidence with a duration over six months (all 3 intervals studied).

Youth females presents a pattern broken in 6 clusters YW6 (Figure 3). The red cluster counts 11 countries presents no variation for the unemployment incidence change in the last decade regardless the unemployment duration interval. The magenta cluster counts 8 countries (Norway, Austria, Italy, Romania, Bulgaria, Finland, Macedonia and Greece). The average cluster is the minimum negative change of unemployment incidence with a duration of three to six months and the maximum positive change of unemployment incidence with a duration over 12 months. The blue cluster counts 7 countries (Hungary, Iceland, Estonia, Ireland, Sweden, Malta and Luxembourg). The average cluster is the maximum positive change of unemployment incidence with a duration up to one month and the minimum negative change of unemployment incidence with a duration of three to six months. The orange cluster counts 2 countries Lithuania and Portugal. The cluster average value is maximum for the positive change of unemployment incidence with a duration one to three months. The last cluster is the brown one, with Slovakia. This cluster includes the maximum average for the positive change of unemployment incidence with a duration of three to six months and the minimum negative change of unemployment incidence with a period over 12 months.

Adult males presents a pattern broken in 3 clusters AM3 (Figure 3). The blue cluster counts 14 countries: Portugal, France, Belgium, United Kingdom, Germany, Poland, Czech Republic, Austria, Hungary, Croatia, Sweden, Finland, Luxembourg and Macedonia. The cluster average value is the maximum for the positive change of unemployment incidence with a period of three to 12 months. The red cluster counts 13 countries: Spain, Ireland, Netherland, Denmark, Norway, Latvia, Lithuania, Slovakia, Slovenia, Romania, Bulgaria, Italy and Greece. The average cluster is the minimum negative change

of unemployment incidence with a duration up to three months, for both intervals. The cluster average value is maximum for the positive change of unemployment incidence with a span over 12 months. The green cluster counts 3 countries: Iceland, Estonia and Malta. The cluster average value is maximum for the positive change of unemployment incidence with a duration of one to three months and for three to six months. The average cluster is the minimum negative change of unemployment incidence with a duration over six months, for all 3 intervals studied.

Adult females presents a pattern broken in 4 clusters AW4 (Figure 3) The green cluster counts 15 countries and presents no variation for the change of unemployment incidence in the last decade regardless the unemployment interval. The red cluster counts 8 countries: Spain, Ireland, Italy, Denmark, Bulgaria, Greece, Latvia and Slovenia. The average cluster is the minimum negative change of unemployment incidence with a duration from one to three months and for six to 12 months. The cluster average value is maximum for the positive change of unemployment incidence with a duration over 12 months. The orange cluster counts 4 countries: Germany, Hungary, Croatia and Macedonia. The cluster average value is the maximum for the positive change of unemployment incidence with an extent of three to 12 months (2 intervals). The average cluster is the minimum negative change of unemployment incidence with a duration over 12 months. The blue cluster counts 3 countries. Iceland, Estonia and Malta. The cluster average value is maximum for the positive change of unemployment incidence with a duration up to three months. The average cluster is the minimum negative change of unemployment incidence with a duration from six to 12 months.

Old males (OM8) and Old females (Ow2) has not enough data (less than 30 features), clusters are not reliable (Figures 3).

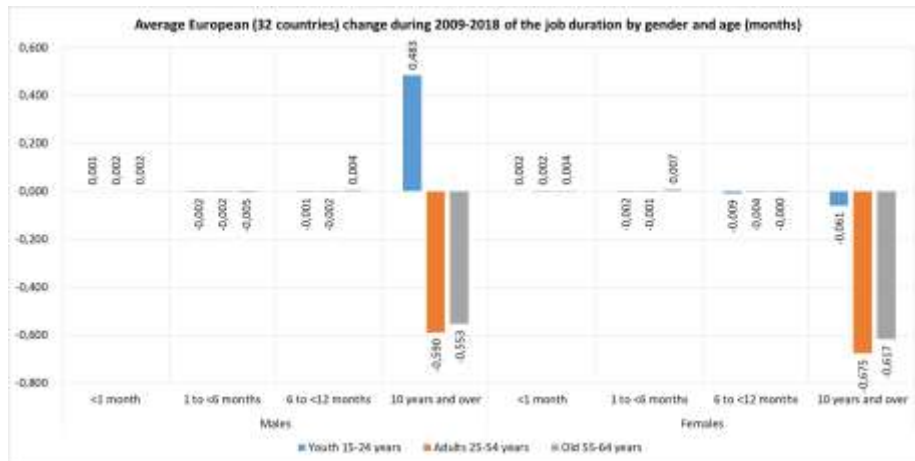
6. Discussions and Conclusion

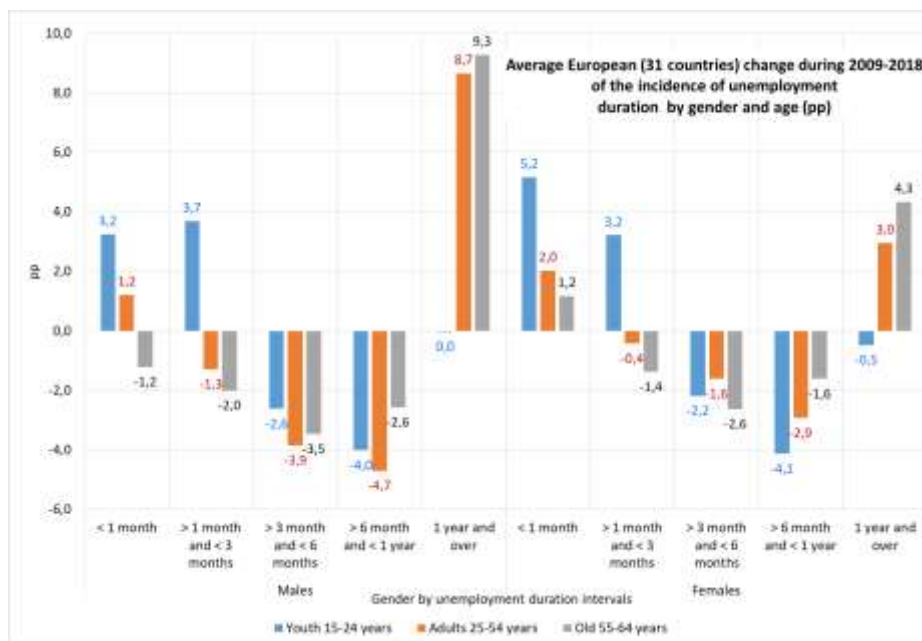
During 2009-2018, the average European job tenure of 10 years and over decreased in average for adult men with 0.6 months/10 years and for women with 0.7months/ 10 years. (Figure 4) The average European adult men long term unemployment (unemployment duration over 12 months) incidence increased with 8.7pp and for women with 3pp. Next

to job tenure decreasing, another mark of increasing flexibility is the short-term unemployment increasing.

The average European youth men less than one-month unemployment incidence increased with 3.2pp and for youth women with 5.2pp. The same indicator increases for the youth men more than one-month a less than three months unemployment incidence increased with 3.7pp and for youth women with 3.2pp.

Figure 4





Note: In average calculation, missing are excluded
 Source: Graphics made by the authors, data OECD.stat

The European average for up to one-month unemployment incidence increase also for adult males with 1.2pp and for women with 2pp. The increasing entrance in unemployment for short term exposes the worker to risk of losing the eligibility for unemployment benefit based on unemployment contribution assurance. The high short-term flexibility, reflects the high risk, especially for the youth to enter in the poverty cycle: incomplete stage to unemployment insurance, low access to training alt the job place, low probability to increase their income from work and not lees, low probability to build a career.

On the other side, the job tenure shrinking coupled with unemployment duration (long term) increases reflects profound restructuring process in the respective economies. This fact is provoked by the radical innovation that requests inter- sectorial reallocation of the labour force, and especially in new sectors from the destroyed old ones.

MCA pictures the similarities and dissimilarities across target groups (youth, adults and old by gender) from the point of view of the job tenure change and unemployment incidence change in the mentioned period. The change in job tenure across Europe is more homogenous for adults than for youth, in three clusters only for both male and

females. (Figure 2) Adults job tenure variation is significant different for France and Netherland, both for males and females. The average value is maximum for the positive change of job tenure for up to one-month duration.

The change in job duration is more heterogeneous for youth males than for youth females. The first group of Youth male blue cluster is comparable to green youth female cluster, covering Central Europe, Italy plus from North Sweden and South East Bulgaria. These are the clusters with no significant variation of the change of job tenure regardless the duration. France is the only country with youth males and youth females included in clusters that have the maximum for the positive change of job tenure for up to one-month duration. *Sweden and Bulgaria are the only countries with youth males and females included in clusters that have the maximum for the positive change of job tenure over ten years.* Portugal, Poland, Denmark and Ireland are the countries with youth males and females included in clusters that have the minimum for the negative change of job tenure over ten years – the highest shrinking of long-term job tenure.

The patterns of change of job tenure is more similar across adult males and adult females' groups, and less similar across youth males, respectively the highest heterogeneity is for youth females. The lack of data for old person makes impossible this analyse.

The pattern of average unemployment incidence is similar to youth men (magenta –Cluster 5), youth women (green –Cluster 3), adult men (red –cluster 2) and adult women (red –Cluster 2) in Italy, Romania, Bulgaria and Greece. For all these clusters, the average is the maximum positive change of unemployment incidence has a duration over 12 months and the minimum negative change of unemployment incidence with a period of one to three months. In other words, in these countries decreases the entrance in unemployment and increases the long-term unemployment. This pattern is expandable both for men and adults in Spain, Ireland, Denmark and Latvia. Another similar pattern both for adult males (green cluster 3) and adult females (blue cluster 1) for the countries: Iceland, Estonia and Malta. The cluster average value is maximum for the positive change of unemployment incidence with a duration one to three months and for three to six months. The average cluster is the minimum negative change of unemployment incidence with a duration over six months, for all 3 studied intervals. In these countries the flow of unemployment is efficient, indicating fast

entrance on unemployment coupled with fast exits from unemployment.

The shrinking of job tenure is visible in 10 years and over tacks for adults (25-54 years old) with an average European decrease of 0.59 months/ 10 years for males and with 0.68 months / 10 years form females.

The increase of the unemployment's duration incidence for one year and over is visible in average with 8.7pp for adult males and with 3.2pp for adult females. The second trend, is for youth. It is visible, in average, in the increase of the incidence of unemployment duration for less than a month for youth males with 3.2pp and for females with 5.2 pp, also.

The differences in the identified clusters by job tenure identified could be explained through the radical innovation adoption versus incremental innovation adoption. Greenan & Guellec ⁽⁴¹⁾ «Innovating firms and sectors create jobs more than others over the medium run (5 years). Process innovation is more about job creation than product innovation at the firm level, but the converse is true at the sector level. This paradox is probably due to substitution effects (creative destruction)». Kleinknecht, van Schaik, & Zhou ⁽⁴²⁾ demonstrate that firms with long job tenure, as firm with historically accumulated knowledge base, stimulate innovation. As a confirmation, Griffith & Macartney ⁽⁴³⁾ establish that «a higher share of multinational enterprise innovative activity in countries with high EPL is technologically advanced». On the other side, short job tenure could signal the adverse effect of that could have on health ⁽⁴⁴⁾.

⁽⁴¹⁾ N. GREENAN, D. GUELLEC, *Technological Innovation and Employment Reallocation*, in *Labour*, 2000, vol. 14, n.4, 547-590.

⁽⁴²⁾ A. KLEINKNECHT, F. N. VAN SCHAİK, AND H. ZHOU, *Is Flexible Labour Good for Innovation? Evidence from Firm-Level Data*, in *Cambridge Journal of Economics*, 2014, vol. 38, n. 5, 1207-1219.

⁽⁴³⁾ R. GRIFFITH, G. MACARTNEY, *Employment Protection Legislation, Multinational Firms, and Innovation*, in *Review of Economics and Statistics*, 2014, vol. 96, n. 1, 135-150.

⁽⁴⁴⁾ E. MILITARU, D. VASILESCU, A. CRISTESCU, M-E. POPESCU, *The Relationship between Self-Perceived Health and Labour Market Outcomes in Romania*, in *Economic Computation And Economic Cybernetics Studies and Research*, 2018, vol. 52, n. 4, 177-191.

The differences in the unemployment duration could be explained through the unemployment protection and employment protection regimes. Filippetti & Guy ⁽⁴⁵⁾ concludes that: «Unemployment protection (UP) encourages diversity by reducing the risk burden of a broad range of learning, or human capital investment; for that reason, UP fosters innovation. Employment protection (EP) reduces the risk burden of a much narrower range of learning; for this reason, it will not enhance diversity to the extent UP does, and it may actually depress overall diversity and innovation».

Lamo, Messina, and Wasmer ⁽⁴⁶⁾ prove that «specialized education reduces workers' mobility and hence their ability to cope with economic changes. Traditional labour market institutions (wage rigidity and employment protection) lead to an increase of the unemployment gap, but to a lesser extent».

Our analysis is focused on change of job tenure by different intervals as well as by the mirror image in unemployment duration in intervals, as it possible comparable. On the background of the knowledge economy presence we emphasize the tendency of shrinking the job tenure coupled with increasing unemployment spells. These processes are in the same time and cover a unique market – EU market. Also, in the last decade the European Labour market start to function and more the clusters identified are more heterogeneous for adult persons than for youth for old worker if we look at the job tenure. Geographical reallocation of the labour force works, an especially for adults reflects that the efficiency of its engine.

Patterns are more differentiated by target groups than by traditional labour market models. The clusters identified for youth are different than for adults, and more fragmented for females than for men.

This is only a snap shot of TLM patterns in Europe covering only job tenure and unemployment duration (with a proxy), without any measure for the learning time / learning spells / learning tenure. The life learning could be identified in active measures in unemployment spell, in individual development, at job place, under a work contract but not

⁽⁴⁵⁾ A. FILIPPETTI, F. GUY, *Labor Market Regulation, the Diversity of Knowledge and Skill, and National Innovation Performance*, in *Research Policy*, 2020, vol. 49, n. 1, 103867.

⁽⁴⁶⁾ A. LAMO, J. MESSINA, E. WASMER, *Are Specific Skills an Obstacle to Labor Market Adjustment?*, in *Labour Economics*, 2011, vol. 18, n. 2, 240-256.

as employment activity / working time. TLM assures a specific stage in transitions for learning, but this dimension even is tremendously important in KE and is difficult to be measured in the absence of harmonised TLM indicators.

So, one important conclusion of our paper is that job tenure and unemployment duration different regimes reflect the life span of sectors driven by their capacity to innovate in both strategies: incremental and radical. Firms shape the demand of incremental innovation driven training. Dostie (2014) ⁽⁴⁷⁾ finds that job training «has a positive impact on firm-level productivity through improved process innovation». Acquiring incremental skills to manage the small pieces of new, workers are managed in an intra-sector reallocation process. When the substitution effect in terms of added value is created by another new sector more competitive based on a radical innovation, the old sector's incremental innovation is useless. While the knowledge economy works in a global framework and pushes the technological progress in a faster dynamic. The transition to a new radical innovation sector demands a huge quantity of new skills and, consequently, a long training duration. In this case, the old sector is destroyed and the new one employed the workers with appropriate skills. So, it happens the inter-sectorial reallocation of work force processes. The work force (in our case the adult one) needs up skills. The technology from the old sector is used with an old set of skills that usually are not adequate anymore to use the new radical technology. The inter-sectorial reallocation processes are another TLM case, extremely important in the perspective of automatization & AI takes time, as long as it is necessary to acquire new and adequate skills for the new sector, being the case of long-term unemployment. Workers reintegration on labour market is the consequence of upskilling from active measures. This new upskilling is made outside the firm, ALMP's shape the demand of radical innovation driven training.

⁽⁴⁷⁾ B. DOSTIE, *Innovation, Productivity, and Training*, IZA Discussion Paper No. 8506, 2014.

Abstract

Mapping Transitional Labour Markets Models in Europe

Purpose: to identify the patterns of job tenure change and unemployment incidence change across Europe for main target LMP's policies groups of youth, adults and old workers by gender. The TLM Models are shaped in the presence of knowledge and innovation economy. The adoption of the new at the organisation level, an especially radical new, requests training in view to acquire new adequate skills. The need for training is increasing in view to minimise the skill mismatch. But this process increases the frequencies of transitions working- unemployment, or in other words, changes the job tenure and unemployment duration ore and more. **Methodology:** We use Multivariate Clustering Analysis (MCA) tool allow to «organise, group, differentiate and catalogue» the European transitional labour markets. The objective is to create clusters as similar as possible by transitional labour market features similarity for the main groups across European countries. **Findings:** the job tenure shrinking coupled with unemployment duration (long term) increases reflects profound restructuring process in the respective economies. This fact is provoked by the radical innovation that requests inter- sectorial reallocation of the labour force, and especially in new sectors from the destroyed old ones. Firm shape the demand of incremental innovation driven training and, ALMP's shape the demand of radical innovation driven training, outside the firm. **Research limitations/implications:** MCA request at least 30 countries, more than Eu28. Limitations are the data missing and over simplifying the national legal frame work for labour markets. **Originality:** Spatial perspective of TLM in Europe function in knowledge and innovation economy, focused on LMP's target groups.

Keywords: disruptive factors, knowledge economy, transitional labour markets, shock, adaptation, employability, job tenure.

Una mappatura dei modelli di mercati transizionali del lavoro in Europa

Obiettivo: identificare i trend di cambiamento della durata della occupazione e della incidenza della disoccupazione in Europa, con riferimento alle principali categorie verso le quali si orientano le politiche del mercato del lavoro (giovani, adulti, lavoratori anziani), evidenziando eventuali diversità tra uomini e donne. I modelli transizionali prendono forma in presenza dell'economia della conoscenza e dell'innovazione. Adottare delle novità a livello organizzativo, tanto più se si tratta di novità radicale, richiede sempre un periodo di formazione finalizzato ad acquisire nuove skills. La necessità di formazione sta aumentando anche allo scopo di ridurre il problema dello skill mismatch. Ma questo processo accresce la frequenza di transizioni dal lavoro alla disoccupazione o, in altre parole, incide sempre di più sulla job tenure e sul tasso di disoccupazione. **Metodologia:** usiamo uno strumento di Multivariate Clustering Analysis (MCA) che permette di «organizzare, raggruppare, differenziare e catalogare» i mercati del lavoro transizionali in Europa. L'obiettivo è

*quello di costruire dei cluster il più possibile simili tra loro, sulla base delle comuni caratteristiche dei TLM dei diversi Paesi europei con riguardo alle principali categorie di lavoratori. **Risultati:** La riduzione della stabilità occupazionale e l'aumento della durata media dei periodi di disoccupazione riflettono il profondo processo di ristrutturazione delle rispettive economie. Ciò è dovuto al radicale processo di innovazione in atto, che comporta una riallocazione settoriale della forza lavoro, in particolare dai settori tradizionali "disrupti" a quelli emergenti. Le imprese alimentano una domanda di formazione orientata alla innovazione incrementale, le politiche attive del lavoro alimentano una domanda di formazione orientata all'innovazione radicale, fuori dalle imprese. **Limiti e implicazioni della ricerca:** Il metodo MCA richiede almeno 30 paesi, un numero maggiore dei Paesi dell'Unione Europea. Ulteriori limitazioni sono dovute alla mancanza di dati e alla eccessiva semplificazione del quadro giuridico nazionale di ciascun mercato del lavoro. **Originalità:** La prospettiva spaziale dei mercati transizionali in Europa in riferimento all'economia della conoscenza e dell'innovazione, focalizzata sui gruppi target delle politiche del mercato del lavoro.*

Parole chiave: *fattori disruptivi, economia della conoscenza, mercati transizionali del lavoro, shock, adattamento, occupabilità, stabilità dell'occupazione.*

Developing Capacitation: Civic Engagement and Prospect for VET Development

*Giuditta Alessandrini**

Summary: **1.** Introduction. – **2.** Human Development and people well-being. – **3.** Capabilities as essential rights. – **4.** The role of “agency”. – **5.** Freedom and capabilities measures. – **6.** A new role of VET for inclusion. – **7.** Civic Engagement. – **8.** Conclusive remarks.

1. Introduction

This paper debates on the issue of the Capability Approach paradigm and the relationship between education and development in reference to education in VET Sector and the issue of civic engagement. This paper also points to the relevance of the notion of “human development” as explored by Martha Nussbaum, professor of Politics and Philosophy at the University of Chicago, and Amartya Sen, awarded the Nobel Prize in Economics. It ends with a reflection on a welfare model supported by people empowerment that enhances individual capabilities related also to the problem of increasing level of low skilled adults in Europe. The argument put forward is that major shortcomings can be found in welfare systems in terms not only of employability but also of equality and social justice.

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2. Human Development and people well-being

Human development can be examined from many perspectives other than those including quantitative analysis – based on a merely functional approach on economic growth – which might also investigate the issue referring to aspects such as social life as a whole. According to Martha Nussbaum, profit is the means intended to support human existence, yet «the aim of global development, as well as that of effective national politics, is to allow people to live a purposeful and creative life, developing their potential and organizing a meaningful life in line with their dignity» ⁽¹⁾. In Sen and Nussbaum's terminology, capability is the real potential upon which “human flourishing” is built ⁽²⁾.

People's wellbeing goes far beyond their wealth, for it involves the opportunity to *develop their life plan in accordance with their capabilities*. Hence the reference to a new economy, concerning human development, which should promote either personal growth or wellbeing and support the sett-up of active policies intended to further such development. One might dare to talk of “hermeneutics of practice” ⁽³⁾. Practice does not rest upon theories worked out beforehand, but it is dependent on the ability to interpret ever-changing reality, a task which is only possible through everyday experience.

Far from being granted at once, *such capability is the result of ongoing interpretation and “contextualisation”*; this is the main essence of thinking, which thus starts from experiences made by people.

By developing “educational capital”, people empowerment is the first step towards “substantial freedom” that is – to use Sen's words – «a kind of freedom which involves the capability to convert available goods and resources into freedom to pursue one's objectives and goals, conduct alternative lifestyles and develop one's life plan according to individual values» ⁽⁴⁾.

⁽¹⁾ M.C. NUSSBAUM, *Non per il profitto*, Il Mulino, Bologna, 2010, 175.

⁽²⁾ M.C. NUSSBAUM, *op. cit.*

⁽³⁾ L. MORTARI, *Apprendere dall'esperienza. Il pensare riflessivo nella formazione*, Carocci, Roma, 2003.

⁽⁴⁾ A similar approach can be found in the OECD, *Job Strategy and in the EU Employment Strategy*, Paris, 2019a. See also A. SEN, *Lo sviluppo è libertà. Perché non c'è crescita senza democrazia*, Mondadori, Milano, 2000; UNPD, *Rapporto sullo*

3. Capabilities as essential rights

Capabilities are thus essential rights that need to be safeguarded and granted although differently, to all citizens. The theoretical framework underlying the capability approach has already been formulated by Sen in the mid-1980s. Recently, the original frame of reference was expanded by a number of authors to consider such aspects as public policy and to investigate issues such as law and ethics from different perspectives (among others, Robeyns in 2005) ⁽⁵⁾.

Protecting human dignity calls for higher levels of capabilities on the part of citizens. According to Nussbaum, ten capabilities are needed to accomplish social justice, which can be classified in internal capabilities (personal traits, intellectual and emotional capabilities, capabilities in terms of perception and movement) and combined capabilities (resulting from interaction with environmental factors) and might result in certain “functionings”.

4. The role of “agency”

“Agency” is another important concept in Nussbaum’s capability approach, for it clarifies the process intended to change values and objectives. By way of example, let us imagine a high-school professor which needs to provide his young students with some theoretical insights on sustainability ⁽⁶⁾. To do so, he might refer to relevant literature and reports. This state of play represents a set of values. However, whereas the same professor commits himself to implement these values – e.g. for instance, by developing innovative items in the academic programmes and supporting research groups which set up

Sviluppo Umano 2010. La vera ricchezza delle nazioni: Vie dello sviluppo umano, 20th Anniversary Edition, 2010.

⁽⁵⁾ *The Human Development Capability Association* (HDCA) has been established in 2004 to gather experts and scholars who are interested in the topics of human development and capability approach. The HDCA carries out interdisciplinary research on the foregoing subjects related to quality of life, poverty, justice, gender studies, and environment. Further areas of research are economics, philosophy, political theory, sociology and development studies.

⁽⁶⁾ ONU, *Trasformare il nostro mondo: l’Agenda 2030 per lo Sviluppo Sostenibile*, Risoluzione dell’Assemblea Generale, 25 settembre 2015.

out-of-school initiatives (through the Internet, web communities and so forth) – he prompts his students to develop a number of agents, for he sets some objectives in order to endorse certain values. A just society should be accomplished throughout the realization of equality concerning the capabilities of its members. Consequently, it is not utility that should be pursued – e.g. to redistribute primary goods – but to develop new capabilities to utilize such goods, in order to convert them into standards of living.

5. Freedom and capabilities measures

One major point is that the range of capabilities measures one's freedom. Investing in education *can translate into increased productivity*. Yet the essential component of a just society lies in the link between education and the right to choose the way to live one's life. Safeguarding this right results in effective freedom. The main goal of a just society should be that of providing its members with the same range of capabilities.

A just society needs to acknowledge the individuals' potential and combine it with other aspects such as merit and talent. Merit should serve as a means to diversify the outcomes and single out outstanding qualities. Thus it is within the work environment that talents should be nurtured and honed, for here workers' abilities should be free of social and cultural influences. It is against this background that the shift from employability to capability originates. This aspect is a relevant one for it provides an innovative perspective through which the educational processes, and the relationship between education and training, more generally, are discussed ⁽⁷⁾. Social justice and equality are new given new momentum. Yet a question arises about the structural factors which enhance social inclusion and the freedom to fully develop individual potential.

According to Sen, three elements need to be considered in order to appreciate the role of capabilities: (a) the direct relationship with human wellbeing and freedom, the indirect impact of capabilities on social changes, and the indirect effect that capabilities have on

⁽⁷⁾ G. ALESSANDRINI, *La pedagogia di Martha Nussbaum. Approccio alle capacità e sfide educative*, FrancoAngeli, Milano, 2014.

economic production. In Sen's terminology "the welfare of capabilities" allows individuals to demand the exercise of their own rights, first of all learning ⁽⁸⁾. This right is a lifetime one and relates on important aspects linked to the right to citizenship; (b) the validity and forward-thinking which characterize "lifelong learning" should be given more significance and form the basis of new welfare. There is a need of developing political awareness on the issue. This includes widening the right to education through life, devising a system of skills certification and validation to ensure full active participation to social life. To do so, people should be helped to familiarize themselves with such an evolutionary approach, focusing on capabilities through "lifelong guidance"; (c) the key aspect of development as freedom lies in the idea of economic growth combined as democratic development arising out of everyone's participation – thus not only of the elite on an exclusive basis – to opportunities in terms of people's capabilities, for they improve themselves through education and training.

6. A new role of VET for inclusion

I think that we have to rethink the conceptual frame of VET with the *Life Long learning* paradigm and the increasing of the rate of *low skilled* and *low educated* adult in many country in Europe; the risk of increasing of dis-equality can create more implication for all societies also at level of social cohesion and civic engagement; the workshop demonstrates that the role of education and training (VET) for low educated adults – as a political issue –, is the basic element to create a good quality of life for all. This means that a new responsibility for VET researcher will design the future of landscape of the academic debate about VET processes.

VET research is one of the more relevant topics of pedagogy of work ⁽⁹⁾, among others like the issue of dual systems and the transition from

⁽⁸⁾ A. SEN, *op. cit.*

⁽⁹⁾ Cfr. G. ALESSANDRINI, *Manuale per l'esperto dei processi formativi*, Carocci, Roma, 2016; ID., *Atlante di Pedagogia del Lavoro*, FrancoAngeli, Milano, 2017; ID., *Lavorare nelle risorse umane. Competenze e formazione 4.0*, Armando, Roma, 2019a; Z. BAUMAN, *Modernità liquida*, Laterza, Roma-Bari, 2002; U. BECK, *Il lavoro nell'epoca della fine del lavoro*, Einaudi, Torino, 2000; M. COSTA, *Pedagogia del lavoro e contesti di innovazione*, FrancoAngeli, Milano, 2011; P. DONATI, *Il lavoro*

school to work. Other subjects are “how-to-solve” the problem of NEET, the comprehension of future skills (Industry 4.0) ⁽¹⁰⁾, talents promotion and new professional needs, the empirical research for a professional identity/competence, etc. One of the main issues in this landscape is the problem of cooperation between companies and schools, the concept of competence for VET education, the professional education for VET teachers, “career change” through VET training. The OECD survey *Sintesi del Rapporto Italia (Italian Report Summary)* has outlined a proposal of re-launching VET role in our national context. This perspective aims to overcome an articulate vision on VET as a second chance for students ⁽¹¹⁾. A reading of vocational training in this sense is consistent with the need to improve the training courses to work, not only as an opportunity of placement but also as a value orientation to the working dimension. Recent data show that the employability of VET students is better than that for students from other sectors. International research ⁽¹²⁾ does not show a “best way” in

che emerge. Prospettive del lavoro come relazione sociale in un'economia dopo moderna, Bollati Boringhieri, Torino, 2001; G. FRIEDMANN, P. NAVILLE, *Trattato di sociologia del lavoro*, Comunità, Milano, 1963; M. PELLERREY, *Le competenze individuali e il portfolio*, La Nuova Italia, Firenze, 2004; R. SENNETT, *Continuano a chiamarla flessibilità*, in AA.VV., *10 idee per convivere con il lavoro che cambia*, Feltrinelli, Milano, 2017.

⁽¹⁰⁾ E. BRYNJOLFSSON, A. MCAFEE, *La nuova rivoluzione delle macchine*, Feltrinelli, Milano, 2015.

⁽¹¹⁾ Cfr. OECD, *Strategia per le competenze dell'OCSE Italia 2017*, Paris, 2017; ID., *The future of education and skills. Education 2030*, Paris, 2018; ID., *Education at a Glance 2018. OECD Indicators*, Paris, 2019b.

⁽¹²⁾ AA.VV., *The future of work. White Paper from the employment & recruitment Industry*, september 2016; ANPAL, *XVIII Rapporto sulla Formazione Continua*, Biblioteca ANPAL, Roma, 2018; ID., *PIAAC-Formazione & competenze online nei centri per l'impiego. I risultati della sperimentazione*, Biblioteca ANPAL, Roma, 2019; BCE, *Rapporto annuale 2017*, Francoforte, 2017; CEDEFOP, *The changing nature and role of vocational education and training in Europe*, Publications Office of the European Union, Luxembourg, 2017; ID., *Scarso livello delle competenze: l'apprendimento permanente quale strategia di prevenzione*, Publications Office of the European Union, Luxembourg, 2019; EUROPEAN COMMISSION, *A New Skills Agenda for Europe. Working together to strengthen human capital, employability and competitiveness*, Bruxelles, 2016; A. FORTI (Eds), *Adult learning in Italy. What role for joint Interprofessional Found*, Paris, 2018; ILO, *Global employment trends for youth. Paths to a better working future*, International Labour Office, Geneva, 2017; WEF, *Towards a Reskilling Revolution Industry-Led Action for the Future of Work*, Geneva, 2019.

VET: there are substantial approaches' differences in Europe and therefore the need for a mutual comparison for the researcher. The fundamental theme is how to interpret the *concept of "professional knowledge"*, even at the level of theoretical frameworks. According to some lines of research, this knowledge is contextual and holistic: it identifies itself in a complex of "physicality", intellectual comprehension skills, values, imitative skills, but above all integration of experience with individual thought (see Billet and Engstrom) ⁽¹³⁾. Hope is that in Italy the interest in VET studies will be renewed according to approaches also linked to the epistemological dimensions of *learning from practice* and according to the comparative logic between the models and the good research practices in Europe ⁽¹⁴⁾.

7. Civic Engagement

The persistence of low rate of adults participation to educational opportunities offered in our and other country is very critical. Such criticality is mainly due to the fact that the level of mastery in literacy and numeracy skills and about the use of digital resources are the origin of poor ability to act one's own competence and the difficulty to mobilizing own competences (see the model of competence of Le Boterf) ⁽¹⁵⁾, and also to the lack of confidence in the profitability of investment in training or in reentering in the education circuits ⁽¹⁶⁾.

⁽¹³⁾ S. BILLET, *Situated learning. A workplace experience*, in *Australian Journal of Adult and Community Education*, 1994, n. 2, 112-130; Y. ENGSTRÖM, *Learning by Expanding: An Activity-theoretic Approach to Developmental Research*, Orianta-Kunsultit, Helsinki, 1987.

⁽¹⁴⁾ G. ALESSANDRINI, *Challenges of Pedagogy of Work and VET Research: a Theoretical Perspective*, in F. MARHUENDA, M.J. CHISVERT-TARAZONA (Eds.), *Pedagogical concerns and market demands in VET. Proceedings of the 3rd Crossing Boundaries in VET conference*, Vocational Education and Training Network (VETNET), 2019b; M. GESSLER, C. NÄGELE, B.E. STALDER, M. MILANA (Eds), *VET for all – skills for life. Report on the VETNET & ESREA research workshop during the fourth European Vocational Skills Week in Helsinki*, 2019, <https://doi.org/10.5281/zenodo.3489723> (accessed November 20, 2019).

⁽¹⁵⁾ G. LE BOTERF, *Construire les compétences individuelles et collectives*, Les éditions d'organisation, Paris, 2001.

⁽¹⁶⁾ See about this issue Report of *Upskilling pathways implementation in Italy. Taking stock of existing adult learning policies measures and resources*, 2019.

“Active citizenship” is defined from European Commission «to concern the possible participation of citizen in all spheres of social and economic life, opportunities of which they benefit and the risk that all this implies, trying to determine to what extent the feel they belong to the society in which they live have a voice in it»⁽¹⁷⁾. Social cohesion can be pursued through educational policies promoting individuals. The level of educational attainment is stronger related to the opportunities of individuals’ civic engagement.

The Council Recommendation on *Pathways to improve the skills on the adult population* (2019) focused on the strategy of three steps as the basis to implement opportunities: personalization of learning, assessment and a modular formative offering in distance learning.

8. Conclusive remarks

Our discussion about the actuality of Capability Approach enhances new awareness on the role of education to create for individuals and social context a new opportunity to implement the *civic engagement* beyond the output of social cohesion and social justice. The capability approach focusing on *the anthropological issues* such as individuals’ wellbeing, freedom and development of their potential rather than productivity and economy and concentrating on *a formative welfare* concerned not only with the conditions for employability, but also the defence and promotion of the individual’s opportunities for development. The new relevant question are: how to promote and strengthen the paradigm of lifelong learning to empowering many actors and context in front of the need of new the role of civic agency and engagement in a society; how to implement educational levels also for a population of low skilled adults (reskilling and upskilling); how – also within a legislative framework – to implement strategies of lifelong learning in connection and benefit with labor market and social policies; how to rethink VET solutions to give new chances of employability and social inclusion to people.

⁽¹⁷⁾ EUROPEAN COMMISSION, *Raccomandazione UE 2017/761 della Commissione del 26 aprile 2017 sul pilastro europeo dei diritti sociali*, Bruxelles 2018; ID., *Council Recommendation on Upskilling Pathways: New Opportunities for Adults Taking stock of implementation measures*, Commission Staff Working Document, Bruxelles, 2019.

Abstract

Developing Capacitation: Civic Engagement and Prospect for VET Development

Purpose: This paper intend to analyse the relevance of the notion of human development as explored by Amartya Sen and Martha Nussbaum with the issue about “how implement” the civic engagement for the young people to generate cohesion and social justice. **Methodology:** The paper made use of a theoretical research work carried out through a desk analysis and research on the OECD, ILO and CEDEFOP Reports and pedagogical/philosophical literature. **Findings:** The discussion about the actuality of capability approach enhances new awareness on the role of education, such to create a new opportunity for individuals and social contexts to implement civic engagement (for example the role of the notion of agency). **Research limitations/implications:** The paper will address particularly two dimensions: the relationship between the training of capabilities and the “civic engagement” for the younger generations; accompanying the transitions between training and work with particular regard to the prospects of VET development as inclusive educational context. **Originality:** This paper can reflect about some very relevant issues: how to implement educational levels also for a population of low skilled adults (reskilling and upskilling); how – also within a legislative framework – to implement strategies of lifelong learning in connection and benefit with labour market and social policies; how to rethink VET solutions to give new chances of employability and social inclusion to people.

Keywords: capabilities, agency, civic engagement, VET education.

Sviluppare Capacitazione: Impegno Civico e prospettive per lo sviluppo della formazione professionale

Obiettivi: Il contributo si propone di analizzare la rilevanza della nozione di sviluppo umano nella visione di Amartya Sen e Martha Nussbaum rispetto al tema di come implementare l’impegno civico dei giovani per generare coesione e giustizia sociale. **Metodologia:** Il contributo si basa su un lavoro di ricerca teorico basato sulla analisi di materiale documentale e di ricerca sui rapporti OCSE, ILO, CEDEFOP e sulla letteratura pedagogica e filosofica. **Risultati:** la riflessione sull’attualità dell’approccio delle capabilities migliora la consapevolezza del ruolo dell’educazione diretta a creare nuove opportunità di sviluppo dell’impegno civico per gli individui ed i contesti (ad esempio il ruolo della nozione di agency). **Limiti e implicazioni:** il contributo si concentra in particolare su due dimensioni: la relazione tra la formazione delle capabilities e l’impegno civico per le giovani generazioni; la modalità per agevolare le transizioni tra formazione e lavoro con particolare riguardo alle prospettive di sviluppo dell’IFP come contesto educativo inclusivo. **Originalità:** il contributo consente di riflettere su alcune questioni molto rilevanti: come implementare i livelli di istruzione anche per una popolazione di adulti

scarsamente qualificati (reskilling ed upskilling); come - anche sul piano legislativo - attuare strategie di apprendimento permanente a vantaggio delle politiche sociali e del mercato del lavoro; come ripensare i percorsi di IFP per offrire nuove possibilità di occupabilità e inclusione sociale alle persone.

Parole chiave: capabilities, agency, impegno civico, formazione professionale.

Peoples’ “Decent Work” and “Capacitation” in the Detention System

*Andrea Sitzia**

Summary: 1. Introductory Remarks: Detention, “Decent Work” and People’s Capacitation. – 2. Detention, Vulnerability and Poverty. – 3. Detention, Forced or Compulsory Work and “Decent Work”. – 4. Detention and “Capability Approach”: Problematical Aspects. – 5. Inmates’ Work, “Capability Approach” and Enterprise.

1. Introductory Remarks: Detention, “Decent Work” and People’s Capacitation

The World Commission Report *Work for a Brighter Future*, promoted by the ILO, makes no explicit reference to inmates’ labour and its discipline.

However, the document highlights the new technologies, climate change and demographics challenges and calls for a collective global response to their impact on the world of work.

The Commission outlines a person-centred plan based on investment in human potential, labour market institutions and decent and sustainable work. The plan consists of three pillars of action that aim to drive growth, equity and sustainability.

The pillars are:

(1) increasing investment in people’s capabilities, moving beyond the concept of human capital to broader dimensions of the development and advancement of living standards;

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- (2) increasing investment in institutions for workers, establishing a universal labour charter, and ensuring respect for fundamental rights (such as the right to work itself), adequate subsistence wages, maximum time limits, health and safety;
- (3) increasing investment in decent and sustainable work in line with the UN Agenda 2030.

The point about investment in people's skills expressly refers to Sen ⁽¹⁾ and Nussbaum ⁽²⁾ studies and opens by stating that «investing in people's capabilities will provide them with the opportunity to realize their full potential and to achieve the lives that they have reason to value».

A further point of immediate contact between "work" and the "capability approach" is found in the 2015 Human Development Report, titled *Work for Human Development*, in Goal 8 of the ILO Agenda 2030, which aims to promote sustained, inclusive, and sustainable economic growth, full and productive employment, and decentralised work for all ⁽³⁾.

Also, the Goal 8 of Agenda 2030 fails to expressly refer to persons detained or interned or who, in any case, are in a state of conditional freedom.

The only passages that can -to some extent- open up a conceptual relationship with the field of detention are in Goals 8.5 and 8.7.

Goal 8.5 expressly includes persons with disabilities among the target persons («By 2030, achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value»).

Goal 8.7 takes a different approach, calling for measures to eliminate forced labour («Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour,

⁽¹⁾ A. SEN, *Development as freedom*, Anchor Books, New York, 1999.

⁽²⁾ M.C. NUSSBAUM, *Human Capabilities, Female Human Beings*, in M.C. NUSSBAUM, G. GLOVER (eds.), *Women, Culture, and Development: A Study of Human Capabilities*, Oxford University Press, Oxford, 1995, 495-542; M.C. NUSSBAUM, *Women and human development: The capabilities approach*, Cambridge University Press, Cambridge, 2000.

⁽³⁾ About this topic see B. LANGILLE (eds.), *The Capability Approach to Labour Law*, Oxford University Press, Oxford, 2019.

including recruitment and use of child soldiers, and by 2025 end child labour in all its forms»).

The category of condemned prisoners, therefore, is never expressly mentioned, nor are objectives or operational indications related to the specific needs of the work of prisoners.

Nevertheless, it cannot be assumed that prisoners should be excluded from the horizon of internationally promoted investment plans. This can be taken for granted as long as the specific procedures required by “detention” from the point of view of “decent work” are not investigated.

About this point it is necessary to take into consideration the ILO Centenary Declaration on the Future of Work, adopted in Geneva on 21 June 2019.

The Declaration strongly insists on strengthening the capacity for all to benefit from the opportunities of a changing world of work in particular by means of effective measures to help people through the transitions «they will face throughout their working lives» (Article III. A. iv).

Even the Centenary Declaration does not mention the detainment sector. However, the extreme breadth of the reference (relating to the promotion of decent work) to all would seem to extend to inmates as well. If we interpret the Declaration in broad and general terms, it is necessary to reflect on the enhancement of “skills” in relationship to ensuring equal opportunities and treatment in the world of work not only for persons with disabilities, as is strictly intended, but also for persons «in vulnerable situations» (Article II. A. viii).

Therefore, the first issue that needs to be investigated concerns the concepts of vulnerability and poverty to verify how detention assumes importance from the perspective of the centenary declaration: the need for inmates’ “rehabilitation” can be qualified in terms of promotion and management of a very particular form of employment transition.

It should not be forgotten that imprisonment puts the detainee in a situation of prolonged and dissonant interruption of the experience of external life ⁽⁴⁾, causing increased hostility to others, social introversion and upheaval of family structures ⁽⁵⁾.

⁽⁴⁾ D. CLEMMER, *The Prison Community*, The Christopher Publishing House, Boston, 1941.

⁽⁵⁾ R. MAERAN, M. MENEGATTO, A. ZAMPERINI, *Il lavoro in carcere: significato psicologico*, in M.G. MATTAROLO, A. SITZIA (eds.), *Il lavoro dei detenuti*. Padova

In any case, the general low level of education, the previous low level of regular employment or the sporadic nature of previous work experience, together with the personal criminal history, make obtaining a stable job when an inmate is released from prison extremely difficult and complex ⁽⁶⁾.

Sen suggested that poverty means a lack of opportunities: poverty is considered in the juxtaposition of the detainee with the other members of the community in determining a positive change of prisoners (who are considered transgressors) and of their fundamental behaviours, in transition from a state of poverty towards a reintegration into society and their families, «so that they can once again function as a proper union» ⁽⁷⁾.

Labour enters into this dynamic as a «complete human activity» ⁽⁸⁾.

The discipline of inmates' labour maintains, at least as far as Italy is concerned, a significant difference (now partly blunted by the elimination of the reference to work as an obligation for prisoners) between work for the prison administration and work for private parties.

University Press, Padova, 2017, 149-159, Available at <http://www.padovauniversitypress.it/publications/9788869381027> (Accessed: 23 March 2020); H. STRYDOM, *Psychological Needs of the Children of Incarcerated Parents*, in *Acta Criminologica: South African Journal of Criminology*, 2009, Vol. 22, n. 2, 99-117; C. HANEY, *The Psychological Impact of Incarceration: Implication for Post-Prison Adjustment in Prisoners Once Removed: The Impact of Incarceration and Re-entry on Children, Families and Communities*, Urban Institute Press, Washington DC, 2003.

⁽⁶⁾ T. SCOTT, *Offender perceptions on the value of employment*, in *Journal of Correctional Education*, 2010, Vol. 61, n. 1, 46-67; P. AUVERGNON, *Le travail en prison en l'absence d'un droit substantiel: la situation française*, in M.G. MATTAROLO, A. SITZIA (eds.), *Il lavoro dei detenuti*, supra note 5, 235-257 (Accessed: 23 March 2020).

⁽⁷⁾ M.N. KHWELA, *A Need to Re-integrate Prisoners to the Community: A Case of Polokwane Medium B Prison, South Africa*, in *Athens Journal of Social Sciences*, 2014, vol. 1, n. 2, 145-156.

⁽⁸⁾ P. CARNITI, *La risacca. Il lavoro senza lavoro*, Altrimedia, Matera, 2013; G. DE SIMONE, *La dignità del lavoro tra legge e contratto*, paper, Giornate di Studio AIDLASS, Udine, 13-14 June 2019. Available at <https://www.aidlass.it/giornate-di-studio-aidlass-2019-relazione-prof-ssa-gisella-de-simone/> (Accessed: 23 March 2020); A. Vallebona, *Lavoro e vita*, in *Mass. Giur. Lav.*, 2016, n. 6, 330-333.

Thus, it is necessary to verify whether and to what extent the recent reform of the Italian prison system (“ordinamento penitenziario”, hereinafter “o.p.”) has intervened effectively in “rehabilitation”.

From a literal point of view, the Legislative Decree 123/2018 has modified Art. 13 of the o.p. to state that «prison treatment must respond to the particular needs of the personality of each subject, encourage attitudes and enhance the skills that can be of support for social reintegration».

This statement is, as we will see, a clear sign of a “capacitational” approach.

The question is whether this principle translates into effective measures or whether it can have effective interpretative consequences.

2. Detention, Vulnerability and Poverty

As noted, the ILO Declaration for the Centenary aims to ensure «equal opportunities and treatment in the world of work» for people with disabilities and, equally, for other people who find themselves «in vulnerable situations».

The concept of “vulnerability” has been the subject of philosophical and legal analysis for some years and tends to be used «with reference to prevention, support and protection measures aimed at individuals and groups, susceptible to offense, damage, discrimination, unjustified inequality of treatment. It is understood now as a universal condition, now as a characteristic of specific categories of subjects»⁽⁹⁾.

The ILO Declaration does not define the term “vulnerability” either formally (there being no reference to selected categories of subjects) or substantially (there being no identification of the abstract characteristics that subjects or groups of persons must possess to be considered “vulnerable”).

Therefore, the category is used in open terms, with an expansive function with respect to a single given parameter, disability, with which, evidently, vulnerability has been conceptually associated in the specific context of the “future of work”. The purely defining aspect, considering that the Centenary Declaration is not a normative act with direct legal effects, is not of crucial importance.

⁽⁹⁾ B. PASTORE, *Introduzione*, in *Ars Interpretandi*, 2019, Vol. VII, n. 2, 7-11.

However, it is interesting that the notion of "vulnerability" lacks a specific definition, both in the European Convention on Human Rights (ECHR) and in the case law of the Court of Justice of the European Union⁽¹⁰⁾, which also often attributes importance to the vulnerability of individuals or groups of individuals⁽¹¹⁾.

The absence of a strict definition of vulnerability is likely intended to avoid the double risk of under- and over-inclusion. A "stereotyping" regulatory would penalise the need to ensure an individualised assessment of each person's capabilities and needs to achieve a greater or lesser level of protection⁽¹²⁾.

With regard to the specific problem of detention, the ECtHR has often considered detainees vulnerable and weak and has even admitted that detention itself is a vulnerability factor, dependent (unlike other risk factors) on legal regulation. In the Court's reasoning, detention (as well as any other vulnerability factor) is valued for verifying whether each Member State takes account of a specific vulnerability, dependent on being disadvantaged in relationship to others, in the context in which a higher level of protection is required by the appellant (see, in particular, ECtHR, 29 May 2012, app. no. 16563/08, *Julin c. Estonia*).

Regarding the case of inmates, the Court tends to consider that a condition of vulnerability exists because of the possible violation of certain rights (in particular in relationship to Article 3 of the Convention, to clarify the meaning of the terms "torture" and "inhuman or degrading treatment or punishment").

In the Centenary Declaration, which identifies a line of development of global labour policies in the context of "decent work", the reference to vulnerability takes on a somewhat different relevance.

It is not a question, in fact, of setting up a protection model against the possible violation of the subject's specific rights, but of emphasising that from the perspective of the valorisation of individual

⁽¹⁰⁾ S. BESSON, *La Vulnérabilité et la structure des droits de l'homme. L'exemple de la jurisprudence de la Cour européenne des droits de l'homme*, in L. BURGORGUE LARSEN (dir.), *La vulnérabilité saisie par les juges en Europe*, éd. Pedone, Paris, 2014, 59-85.

⁽¹¹⁾ E. DICIOTTI, *La vulnerabilità nelle sentenze della Corte europea dei diritti dell'uomo*, in *Ars Interpretandi*, 2019, Vol. VII, n. 2, 13-34.

⁽¹²⁾ R. CHENAL, *La definizione della nozione di vulnerabilità e la tutela dei diritti fondamentali*, in *Ars Interpretandi*, 2019, Vol. VII, n. 2, 35-55.

competencies/skills, it is necessary to take into account the generic situation of disadvantage represented by disability and vulnerability.

These two factors of disadvantage, which exist in a mutual relationship of genus (vulnerability) to species (disability), must be taken into account by the political decision-maker for elaborating and implementing employment policies.

Thus, the Centenary Declaration draws heavily on the normative version of the Capability Approach⁽¹³⁾, valuing the part relating to «control of one's own material environment»⁽¹⁴⁾ that includes «the right to seek work on an equal basis with others» and «to be able to work in a way worthy of a human being».

Work does not play a central role in the theory of Sen and Nussbaum⁽¹⁵⁾, unlike issues such as disability and poverty.

This last observation, however, makes it possible to connect the Centenary Declaration to the subject of detention.

The Capability Approach concerns how to address the needs of detainees to better prepare them for possible release, as a step towards improving the negative effects of detention.

Detention can be linked to poverty.

Two terms are used in the literature to define poverty: “absolute poverty” and “relative poverty”.

Absolute poverty was considered primary poverty until 1995 (World Summit for Social Development in Copenhagen). Absolute poverty exists independently of any target group⁽¹⁶⁾.

⁽¹³⁾ M. TIRABOSCHI, *Mercati, regole, valori*, paper, Giornate di Studio AIDLASS, Udine, 13-14 June 2019. Available at <https://www.aidlass.it/giornate-di-studio-aidlass-2019-relazione-prof-tiraboschi/> (Accessed: 23 March 2020) and ID, *Persona e lavoro tra tutele e mercato. Per una nuova ontologia del lavoro nel discorso giuslavoristico*, Adapt University Press, 2019; B. LANGILLE (eds.), *The Capability Approach to Labour Law*, *supra* note 3.

⁽¹⁴⁾ M.C. NUSSBAUM, *Creating capabilities: The human development approach*. Harvard University Press, Cambridge, 2013.

⁽¹⁵⁾ A. PERULLI, *Valori e diritto del lavoro*, in M. Tremolada, A. Topo (eds.), *Le tutele del lavoro nelle trasformazioni dell'impresa. Liber amicorum Carlo Cester*, Cacucci, Bari, 2019, 747-76; B. LANGILLE (eds.), *The Capability Approach to Labour Law*, *supra* note 3.

⁽¹⁶⁾ M. NOBLE, A. RATCLIFFE, G. WRIGHT, *Conceptualizing, Defining and Measuring Poverty in South Africa: An Argument for a Consensual Approach*, Oxford University Press, Oxford, 2004.

Another part of the doctrine argues that inadequate income alone does not adequately describe poverty. Hence, the most recent definition of poverty is based on lack of opportunity.

Thus, poverty is not understood exclusively in terms of lack of adequate income and basic human needs; rather, it is considered to be the tacit/factual denial of opportunities that push people into unemployment, with consequent loss of income and, finally, the inability to satisfy basic needs⁽¹⁷⁾.

"Relative poverty" means that individuals, families and groups are considered poor when they lack the resources that other families or groups of the same population are able to obtain. Poverty is, therefore, the consequence of the non-functioning (or failure) of some basic capabilities.

This perspective highlights the capacity-based approach, which works first of all to evaluate which basic capacities are relevant in relationship to the concept of relative poverty.

Nussbaum⁽¹⁸⁾ identifies ten basic skills that should be supported by all democracies, among which is the worker's freedom to choose between "alternative lives"⁽¹⁹⁾.

Human abilities exert a moral claim⁽²⁰⁾ that should act as a pretence on society to develop those abilities. Regarding prisoners, we have to consider the Nussbaum's⁽²¹⁾ central idea «of the human being as a free and dignified being who forms his own life».

Although inmates are not necessarily free beings in the traditional sense, they could be free within the prison, their current "environment and context"⁽²²⁾.

Therefore, the "imprisoned", despite having violated certain criminal proscriptions, remain human beings and thus retain their dignity, need for care and moral claim to develop their abilities⁽²³⁾.

Relative poverty and detention are intertwined because imprisonment not only concerns prisoners individually, but also affects «the children of people who are locked up and their families; it affects community

⁽¹⁷⁾ A. SEN, *Development as freedom*, *supra* note 1.

⁽¹⁸⁾ M.C. NUSSBAUM, *Women and human development*, *supra* note 2.

⁽¹⁹⁾ B. LANGILLE (eds.), *The Capability Approach to Labour Law*, *supra* note 3.

⁽²⁰⁾ M.C. NUSSBAUM, *Women and human development*, *supra* note 2.

⁽²¹⁾ M.C. NUSSBAUM, *Human Capabilities, Female Human Beings*, *supra* note 2.

⁽²²⁾ *Ibidem*.

⁽²³⁾ M.C. NUSSBAUM, *Women and human development*, *supra* note 2.

infrastructure – the relations among people in the communities and the capacity of a community to be a good place to live, work, and raise children – and it affects how to safe a community is to live in»⁽²⁴⁾.

If we want to take this approach into account, as a consequence, we must consider rehabilitation in terms of bringing about a positive change to offenders and their fundamental behaviour.

3. Detention, Forced or Compulsory Work and “Decent Work”

At this point, further consideration must be given to the absence of any reference to detention in the Report *Work for a Brighter Future*, in the international documentation cited at the beginning of this essay and in the ILO Declaration of the Centenary. The simplest (and probably most necessary) conclusion is that prisoners should be considered subjects who must be included among the beneficiaries of the social policy targets outlined by the ILO.

The target group is not the workers themselves, whether they are free or in prison, but people in general.

Thus, prisoners can be counted among the vulnerable, which helps justify a broad and all-encompassing reading of the indications from the ILO.

The corresponding absence in the 1950 European Convention on Human Rights of an explicit reference to the status of a “person deprived of his liberty” as a beneficiary of specific protection also helps.

The doctrine points out that «the original intuition not to devote a specific rule to the prisoners, but to consider them as potential holders of all the rights laid down in the treaty, has had a significant effect, that is, it has not ghettoised the prisoners within the penitentiary framework. The detainees have not been confined to a kind of protected and excluding normative subset»⁽²⁵⁾.

⁽²⁴⁾ T.R. CLEAR, *The Effects of High Imprisonment Rates on Communities*, in *Crime and Justice*, 2008, Vol. 37, n. 1, 97-132; M.N. KHWELA, *A Need to Re-integrate Prisoners to the Community*, *supra* note 7; R. MAERAN, M. MENEGATTO, A. ZAMPERINI, *Il lavoro in carcere*, *supra* note 5.

⁽²⁵⁾ P. GONNELLA, *I diritti dei detenuti (diversi dalle condizioni di detenzione) ancora non riconosciuti*, in F. BUFFA, M.G. CIVININI (eds.), *La Corte di Strasburgo*, Quaderni

In any case, however, detention as a vulnerability factor has never been linked to the subject of labour, not even by the case law of the ECtHR.

The reason for this silence is likely found in Article 4(3)(a) of the ECHR, which states that the expression "forced or compulsory" labour (subject to prohibition under paragraph 2 of the same Article) does not include «work required to be done in the ordinary course of detention» (under the conditions laid down in Article 5 of the Convention for defining the legislation in question; see ECtHR, Grand Chamber, judgement of 7 July 2011, *Stummer v. Austria*, Application No 37452/02) or during conditional release from such detention.

In order to determine which activities are regarded as «work required to be done in the ordinary course of detention», the Court takes account of the prevailing criteria in the Member States, including the aim of reintegration into society (cf. ECtHR, Grand Chamber, *Stummer c. Austria*, quoted above, § 121⁽²⁶⁾).

About the subject of compulsory work, the ILO's approach is similar to that of the ECHR (which is chronologically subsequent), with a peculiarity that may be stressed.

Article 2(2)(c) of ILO Convention No 29 of 1930 on Forced and Compulsory Labour (subsequently followed by the ECHR and by ILO Convention No 105 of 1957) allows forced or compulsory labour when it is required of a person «as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority».

Thus, conventional international law makes it possible to believe that the scope of Goal 8.7 of Agenda 2030 (which, it should be remembered, requires the adoption of «immediate and effective measures to eradicate forced labour») implicitly excludes the work of prisoners employed by the prison administration.

It is more difficult to understand whether this specific sector of employment, characterised by the peculiarity of the employer, may also

di *Questione Giustizia*, 2009, 504-508. Available at <http://questionegiustizia.it/speciale/2019-1> (Accessed: 23 March 2020).

⁽²⁶⁾ On this topic, D. HARRIS, M. O'BOYLE, E. BATES, C. BUCKLEY, *Law of the European Convention on Human Rights*, Oxford University Press, Oxford, 2014; C. Favilli, *Articolo 4*, in S. BARTOLE, P. DE SENA, V. ZAGREBELSKY (eds.), *Commentario breve alla Convenzione europea dei diritti dell'uomo*, Cedam, Padova, 2012, 89-106; F.G. JACOBS, R. WHITE, C. OVEY, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2010.

be excluded from the scope of Goal 8.5, which aims at achieving «full and productive employment and decent work for all women and men». The residual space of admissibility of forced labour in the system of international conventions is limited to what can be called “ordinary” in the context of rehabilitation policies because it aims at helping the prisoner reintegrate into society (ECtHR, plenary session, judgement 18 June 1971, *De Wilde, Ooms and Versyp v. Belgio*, Application No 2832/66, 2835/66 and 2899/66, § 90).

This is a serious question.

Goal 8.5 uses three adjectives (two related to the noun “employment” and one to the noun “work”) that have a problematic relationship with the concrete reality of the work of prisoners employed by the prison administration.

“Full”, “productive” and “decent” are qualifications for a job typically characterised by entrepreneurship, and they do not fit a job (in particular the one performed for the prison administration) in which «the administration does not set itself either profits or gains, it makes use of unorganised workforce, sometimes unqualified, uneven, variable for punishments and transfers from prison to prison; the products are not always cared for and always finished; they, most of the time, are sold below cost» (Italian Constitutional Court, judgement 30 November 1988, No 1087).

Generally, in this dynamic, the condemned person, «far from being subjectively involved in a business project with strategic objectives of production, budget, becomes objectively included, because it is absolutely fungible, in a closed mechanism, like a welfare type»⁽²⁷⁾.

It is work, therefore, that actually is not “full”, considering the endemic scarcity of opportunities for employment, is not “productive” and is not

⁽²⁷⁾ A. BERARDI, *La funzione del lavoro dei detenuti*, in in M.G. MATTAROLO, A. SITZIA (eds.), *Il lavoro dei detenuti*, *supra* note 5, 23-28 (Accessed: 23 March 2020). The doctrine underscores that for prisoners, it is the experience of “real work” to be “transformative”, since it «allows inmates to interact on a regular basis with conventional others»: cf., on this point, *inter alia*, M. Warr, *Life-course transitions and desistance from crime*, in *Criminology*, 1998, Vol. 36, n. 2, 183-216; G. PERA, *Aspetti giuridici del lavoro carcerario*, *Foro it.*, 1971, V, 53-68; G. NEPPI MODONA *La storia infinita del non lavoro carcerario*, 2015. Available at <http://guardiamocidentro.compagniadisanpaolo.it/wp-content/uploads/2015/03/Carceri-2015-storia-infinita-non-lavoro-1.pdf> (Accessed: 23 March 2020).

“decent” if we consider a job an occupation «that meets people’s basic aspirations, not only for income, but for security for themselves and their families, without discrimination or harassment, and providing equal treatment for women and men»⁽²⁸⁾.

However, there are no serious legal reasons for excluding the work of prisoners, even if we exclude that part of it that is admitted under the mandatory regime from the horizon of the “decent work”.

Thus, such work, although characterised by elements of strong specificity as far as the convicted subjects are concerned, is always part of a treatment process, within which it must be considered an educational and therapeutic tool⁽²⁹⁾.

The same case law of the ECtHR, which interprets Article 4, paragraph 2 of the Convention about (compulsory) work to encourage the prisoner to reintegrate into society, leads to the exclusion from the horizon of compulsory lawful work a job that is not “productive” and “decent”.

Nevertheless, the general objective set by the ILO should be coordinated with the concrete complexity of inmates’ work.

Therefore, the concepts the ILO uses are oversimplified.

Indeed, in literature it has been recently underscored the need to deepen those areas of work «characterised by weakness, precariousness and fragility when placed outside of wage-earning and productive work and that is, the traditional perimeter of labour law»⁽³⁰⁾.

The work of inmates, especially when employed by the prison administration, is inevitably outside the ordinary perimeter of waged and productive work and should be taken seriously in relationship to that part of it that is “market-free” or otherwise devoid of a “market value”⁽³¹⁾.

Only partially similar considerations can be made about the work of inmates employed by private parties.

⁽²⁸⁾ J. SOMAVIA, *ILO Director-General highlights need for “Decent Work”*, ILO Press release, 2000. Available at https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_007916/lang--en/index.htm (Accessed: 23 March 2020).

⁽²⁹⁾ Cf. R. MAERAN, M. MENEGATTO, A. ZAMPERINI, *Il lavoro in carcere*, *supra* note 5; R. SCOGNAMIGLIO, *Il lavoro carcerario*, in *Arg. Dir. Lav.*, 2007, n. 1, I, 16-40.

⁽³⁰⁾ See M. TIRABOSCHI, *Mercati, regole, valori*, *supra* note 13, and ID, *Persona e lavoro tra tutele e mercato*, *supra* note 13, by framing the specific (and possibly special) protections or recognitions that are necessary.

⁽³¹⁾ For these concepts, M. TIRABOSCHI, *ibidem*.

ILO Convention No 29 of 1930, in much more precise terms than the ECHR, makes the exclusion from the prohibition of forced or compulsory labour conditional upon the person «not hired to or placed at the disposal of private individuals, companies or associations» (Article 2(2)(c)).

This profile has central importance because it requires the work of convicted prisoners employed by private individuals to be considered free labour.

Therefore, forced/mandatory labour is partially admitted by international labour law, and this explains why – consistently – the ECtHR does not recognise «the normalization of labour as a binding principle deriving from Article 4 of the Convention and of the European prison rules, but only as a standard adopted by the majority of the legislations of the States»⁽³²⁾.

The reason for this reading of the conventional system is the systemic diversity with which inmates' work is considered according to the legal nature of the employer's counterpart.

The ILO Committee of Experts on the Application of the Conventions (CEARC) has repeatedly stressed that «the employment of prisoners by private employers is compatible with the Convention only in the case of a free employment relationship, i.e. not only with the agreement of the person concerned, but also where there are certain guarantees, in particular as regards the payment of a normal wage»⁽³³⁾.

⁽³²⁾ G. CAPUTO, F. MARINELLI, *Dagli stati generali dell'esecuzione penale al varo della legge delega per la riforma dell'ordinamento penitenziario: quale futuro per il lavoro carcerario?*, in *La legislazione penale*, 29 Jan. 2019. Available at <http://www.lalegislazionepenale.eu/wp-content/uploads/2018/01/Caputo-Marinelli.-Dagli-stati-generalis-dellesecuzione-penale-al-varo-della-legge-delega-per-la-riforma-dell-ordinamento-penitenziario.pdf> (Accessed: 23 March 2020); A. TOPO, *Obbligo di lavoro e libertà di lavoro: quando lavorare è un dovere "sociale"*, in M. BROLLO, L. MENGHINI, C. CESTER (eds.), *Legalità e rapporti di lavoro. Incentivi e sanzioni*, Edizioni Università di Trieste, Trieste, 2016, 177-203. Available at <https://www.openstarts.units.it/handle/10077/13078> (Accessed 23 March 2020).

⁽³³⁾ See the CEARC reports about the application of Convention No 29 in France for 2011, 2012 and 2014; examination of a 2018 report on France in relationship to this issue is still on the agenda for 2020 and 2023. On this issue, see P. AUVERGNON, *Le travail en prison en l'absence d'un droit substantial*, *supra* note 6. Unlike France, Italy received only one comment in 1990

Therefore, it follows that the work of prisoners employed by private subjects (inside or outside prisons) certainly falls under the goals of Agenda 2030.

The systems of the states adhering to the ILO are required to increase their investments in the capacities of the people ("people's capabilities"), taking into account the subjective vulnerabilities, among which detention falls.

4. Detention and Capability Approach': Problematical Aspects

The ILO provisions translate into a very general guideline, with a systematic meaning that does not provide any precise and sectorial comment regarding inmates' work as a specific sector of the labour market. The specificities of inmates' work are manifold.

It is a sector in which work participates in the treatment function both in the case in which it is provided to the prison administration and to a private employer.

Therefore, it is not sufficient to consider it, *sic et simpliciter*, free work, just as it is not sufficient to equate, conceptually, the labour market of prisoners with that of free work.

Such a liquid equalisation would even collide with the ILO comments if it resulted in not recognising adequate relevance to the peculiar situation of vulnerability that characterises the detention factor.

Detention inevitably affects the labour market of prisoners, and the challenges posed by new technologies, climate change and demographics (to use the language of the ILO Report) have a particular impact on prison and the world of prison⁽³⁴⁾.

Data on prisoner employment show that this is, in fact, a «market without market» (as described by Tiraboschi⁽³⁵⁾), and the law cannot fail to take this into account.

The Capability Approach can certainly play an important role by drawing attention to the subjective peculiarities of inmate-workers and the underlying problem that characterises the detention sector, requiring

⁽³⁴⁾ P. AUVERGNON, *Le travail en prison en l'absence d'un droit substantial*, *supra* note 6.

⁽³⁵⁾ M. TIRABOSCHI, *Mercati, regole, valori*, *supra* note 13.

taking into account the specific poverty that characterises the subjective profile of prisoner-workers.

The Capability theory can also contribute to considering work part of a path of “re-education” within a perspective of “employability” and of «a path of integral growth and development of the person through that action [...] that helps to mature awareness of who we are and what we want, our potential and our talents as our limits and gaps in the relationship with others»⁽³⁶⁾.

On the other hand, the theory of capabilities, in its fundamental declination of enhancement of the pure freedom of the subject, risks entering into conflict with the counter-interest, the object of the traditional balancing by labour law, represented «by the interest of the company/organization, which is a hierarchical structure governed by an authority whose economic function [...] basically excludes the freedom of the worker to choose between “alternative lives” (combinations of operations). Such a freedom, translated into terms of alternatives of functioning in the context of the employment relationship, would be tantamount to handing over the governance of the enterprise to the workers, while labour law could, at best, condition the power of organization from the outside [...] to make it compatible with human freedom/dignity»⁽³⁷⁾.

All this must be taken into account not only in the interpretation of supranational standards, but also in the interpretation of national laws.

A very relevant example is the recent reform of the Italian penitentiary system (Legislative Decree No 123 of 2018), which includes numerous indications of the conceptual implementation of an idea of “rehabilitation” strongly inspired by the “capability approach”.

From a literal point of view, the legislature has modified Article 13 of the o.p., introducing the principle that «prison treatment must respond to the particular needs of the personality of each individual, encourage attitudes and enhance the skills that can be of support for social reintegration».

This statement is clear evidence of a “capacitational” approach that seems to imply the awareness of a vulnerability sub-layer that must be taken into account and from which the intervention of the legislature must move.

⁽³⁶⁾ *Ibidem.*

⁽³⁷⁾ A. PERULLI, *Valori e diritto del lavoro*, *supra* note 15.

An immediate corollary of the reform of Article 13 of the o.p. is the suppression of the obligation, for the inmate, to work.

In this way, the implicit declaration of the prisoner's freedom «to seek work on an equal basis with others» (to use Nussbaum's lexicon) seems to emerge ⁽³⁸⁾.

Instead, the Italian legal system preserves, in Article 15, paragraph 2, o.p., the obligation of the penitentiary administration to ensure work through the stipulation of «appropriate employment agreements with public or private subjects or social cooperatives interested in providing employment opportunities to prisoners or internees» (as expressed in Article 20, paragraph 8, o.p., in the amended text).

The removal of any reference to the obligatory nature of prisoners' work was anticipated by a broad reflection on the subject by the *General States on Criminal Execution*, which concluded their work by proposing to replace the rule of mandatory work with that of "opportunity".

"Providing job opportunities" is the way the Italian legislator has implemented the constraint of "capacitational" politics and social justice deriving from supra-national sources.

5. Inmates' Work, Capability Approach' and Enterprise

According to the new Art. 13 Italian o.p., «prison treatment» must, among other things, «encourage attitudes and enhance the skills that can be of support for social reintegration».

Work, in the capacity perspective, is only one of the elements to which recourse is possible; Art. 15 of the o.p. in fact combines work with education, religion, cultural, recreational and sporting activities, and, following the 2018 reform, professional training and participation in public utility projects ⁽³⁹⁾.

Prison treatment, according to the express provision of Article 1, par. 2, o.p. (which is essentially unchanged from the past), «tends, also

⁽³⁸⁾ The obligation to work was expressed, in the previous Italian text of the Law, in the third paragraph of Article 20 of the o.p.; on this topic see A. TOPO, *Obbligo di lavoro e libertà di lavoro*, supra note 32.

⁽³⁹⁾ Cf. A. MARCIANÒ, *Dignità e tutele del lavoro dei detenuti alle dipendenze dell'amministrazione penitenziaria*, in *Lav. pubbliche amministrazioni*, 2019, n. 3, 39-70; M. VITALI, *Il lavoro penitenziario*, Giuffrè, Milano, 2001.

through contacts with the external environment, to social reintegration and is implemented according to a criterion of individualisation in relation to the specific conditions of the persons concerned».

In any case, work within the treatment system plays a central and prominent role, given that the second paragraph of Article 15 of the o.p. still expressly states that «for the purposes of rehabilitation treatment, except in cases of impossibility, to the convicted person and to the interned is ensured work».

Articles 1, 13 and 15 of the o.p. represent the logical and legal prerequisite of the legal prescription according to which «in prisons and facilities where custodial measures are carried out, the destination of prisoners and internees to work must be favoured in any way» (Article 20).

Despite the repeal of the obligatory nature of work for convicted persons, it remains that «the central and territorial bodies of the prison administration shall enter into special employment agreements with public or private subjects or social cooperatives interested in providing employment opportunities to prisoners or internees» (new paragraph 8 of Article 20 of the o.p. ⁽⁴⁰⁾).

The overall picture has not changed significantly.

The adaptation of the legal framework, carried out in 2018, is very limited: the removal of any reference to the compulsory nature of work for prisoners has not been followed by the elimination of the obligation for the prison administration to ensure work, which has retained centrality in the perspective of treatment, albeit with a renewed focus on the “capacitational” aspect.

Labour, therefore, in the prison system, has not been degraded to a mere eventual opportunity to be offered to the condemned person.

We are no longer in the presence of a mandatory treatment ⁽⁴¹⁾, but work must be considered (in compliance, moreover, with the perspective of Art. 4 Italian Constitution) a right and a duty, even for the detainee ⁽⁴²⁾, with the consequent maintenance, in the overall

⁽⁴⁰⁾ G. DE LUCA, *Lavoro dei detenuti ed incentive contributivi e fiscali*, in M.G. MATTAROLO, A. SITZIA (eds.), *Il lavoro dei detenuti*, supra note 5, 127-139 (Accessed: 23 March 2020).

⁽⁴¹⁾ G. DE SIMONE, *La dignità del lavoro tra legge e contratto*, supra note 8.

⁽⁴²⁾ D. CHINNI, *Il diritto al lavoro nell'esecuzione penale. Principi costituzionali e sviluppi legislativi*, in *Diritto penale contemporaneo*, 15 July 2019. Available at

system of the o.p., of the disciplinary sanctions that can be imposed in the event of voluntary non-fulfilment of work obligations (see Art. 77, paragraph 1, no. 3, o.p.).

In this perspective is crucial the role of the enterprise.

It is significant that in referring to enterprises (including social enterprises), the legislation continues to use the phrase «interested in providing employment opportunities».

The "Smuraglia Law" (Law No. 193 of 2000) is concerned with identifying the instruments that can encourage companies to meet the world of prison and compensate for the critical issues arising from the entry into the world of treatment/capacity dynamics⁽⁴³⁾.

The persistent specialty of the employment relationship of prisoners, and in particular of those employed by private entrepreneurs, is demonstrated by the caution with which the law takes into account the enterprise.

The Law grasps how there should be an interest of the company in providing job opportunities, i.e. to enter into the dynamics of treatment and how this interest requires the company to adhere to a treatment project that goes beyond the ordinary course of work relationships, with a conceptual proximity of the work treatment more with apprenticeship than with ordinary work.

In fact, the employment relationship with prisoners presents very different complexities compared to those normally faced by the company with free work.

The employer is required here to interact with the prison administration, combining entrepreneurship and sociality⁽⁴⁴⁾.

To date, this task has been taken on by the social enterprise and not by the world of for-profit enterprises (the figure is confirmed by statistics data).

Prisoners often lack a work culture and sometimes the same work experience (to say nothing of the lack of linguistic and cultural knowledge and cultural and anthropological heterogeneity), all factors

<https://archivioppc.dirittopenaleuomo.org/d/6778-il-diritto-al-lavoro-nell-esecuzione-penale-principi-costituzionali-e-sviluppi-legislativi> (Accessed: 23 March 2020).

⁽⁴³⁾ G. DE LUCA, *Lavoro dei detenuti*, *supra* note 40.

⁽⁴⁴⁾ See M. BARBERA, *Lavoro carcerario*, in *Dig. Priv., sez. comm.*, Torino, 1992, VIII, 212-225

that make it necessary to build paths that, in addition to work, include other “re-educational” activities.

The conceptual assimilation of “criminal” work to free work, which assumes such importance in the recognition of the nature of the right to freedom of work, must be completed through the recognition of the profiles of specialties that are also “empirical” of the phenomenon (it must be, in fact, not whatever a job, but a job that is “responsible”, which is placed in the pole of teleological work oriented to the promotion of the person and his ability).

Naturally, in entering into the agreement referred to in Article 20, paragraph 8, of the Criminal Code, the enterprise (also a social enterprise) is required to agree with the prison administration about «the object and conditions of carrying out the work activity, training and salary treatment».

This is a central point of the Italian model; the convention can (and must) also regulate and limit the flexibility of the contractual form that is chosen.

The convention, as a contract, is the moment of negotiating the balance between the different needs (and the different interests) that are encountered in the system of prisoners’ work. Within the convention of job insertion of prisoners or interned is realised a sort of adhesion of the enterprise to a system in which the job serves as a re-educational paradigm.

The great difficulty can be grasped only if one takes into account the general context, in which the paradigm of free labour (the connotations of which, in terms of organisation and working methods, must be reflected in the work) is changed with respect to the past.

The flexibility of the organisation and the methods of free labour can only have repercussions on the dynamics of «participation-alienation in work in prison», widely described by the sector psychological literature⁽⁴⁵⁾.

Part of the doctrine has long noted the criticalities of a legal model in which the penitentiary administration remains the person appointed to take charge of the job search on behalf of the prisoners and to manage their release.

⁽⁴⁵⁾ See, in particular, R. MAERAN, M. MENEGATTO, A. ZAMPERINI, *Il lavoro in carcere*, *supra* note 5.

In this way, labour work as a selective and discriminatory factor, since «the availability of a job selects the convicts considered less dangerous that are destined to alternative measures, while its absence forces the condemned to prison unemployed»⁽⁴⁶⁾.

The new perspective, which sees work as an opportunity, with the maintenance of the company as a subject interested in offering opportunities for work and prison administration as a custodian promoting the capacity of the detainees, suffers the persistent (and inevitable) absence of a managerial approach and a productive culture in the public administration that is charged with this complex and multifaceted role.

The "capacitational" model, to be effective, cannot be limited to a petition of principle and cannot decline to take into account the characteristics of the current labour market, characterised by the advent of the so called "risk society", in which individuals are required to be the main authors of their personal biographies, to build their work careers and to compete in the market without being able to rely on traditional social institutions⁽⁴⁷⁾.

The emphasis currently placed both on individual autonomy and on the idea of self-enterprise⁽⁴⁸⁾ makes difficult to guarantee the effectiveness of a social reintegration of prisoners' model based on work, as well as to put into practice concrete interventions for the realisation of a social justice model oriented to overcoming a peculiar and complex condition of vulnerability such as the detention.

Abstract

Peoples' "Decent Work" and "Capacitation" in the Detention System

Purpose: *The purpose of the paper is to assess if the "capacitational" approach, which supposedly the recent reform of the Italian prison system, actually translates into effective measures or, at least, it can have effective interpretative consequences with special reference to inmates' labour.* **Methodology:** *The analysis of inmates'*

⁽⁴⁶⁾ G. CAPUTO, *Welfare state e lavoro dei condannati*, in M.G. MATTAROLO, A. SITZIA (eds.), *Il lavoro dei detenuti*, supra note 5, 79-126. (Accessed: 23 March 2020).

⁽⁴⁷⁾ *Ibidem*.

⁽⁴⁸⁾ See C. Cordella, *Il lavoro in proprio nelle carceri*, in M.G. MATTAROLO, A. SITZIA (eds.), *Il lavoro dei detenuti*, supra note 5, 63-78.

*labour in the Italian legal context takes place within the ILO's "decent work" context and builds on the capability theory and its application to labour law. **Findings:** The analysis shows positives and negatives of inmates' labour in Italy in the prism of capability and the difficulties faced by the implementation of the practices. **Originality:** While the use of the capability approach in labour law is not new, the declination of analysis focused on inmates' labour and framed in the context of ILO decent work principle allows casting a new light on the penitentiary reform.*

Keywords: inmate labour, employment, capability, labour law.

“Lavoro decente” e “Capacitazione” delle persone nel Sistema di detenzione

Obiettivi: L'obiettivo del contributo è verificare se l'approccio delle “capacitazioni”, che sembra aver ispirato la recente riforma dell'ordinamento penitenziario italiano, si traduca in misure effettive o se, quanto meno, possa avere effettive conseguenze sul piano interpretativo, con particolare riferimento al lavoro dei detenuti. **Metodologia:** l'analisi del lavoro dei detenuti nel contesto giuridico italiano è collocata nell'ambito della riflessione sul “lavoro decente” proposta dall'ILO e si basa sulla teoria delle capabilities e sulla sua applicazione nel campo del diritto del lavoro. **Risultati:** l'analisi evidenzia aspetti positivi e negativi del lavoro dei detenuti in Italia nel prisma delle capabilities e le difficoltà emerse sul piano della implementazione concreta. **Originalità:** mentre l'utilizzo dell'approccio delle capabilities non è una novità nell'ambito del diritto del lavoro, la declinazione dell'analisi sul fronte specifico del lavoro dei detenuti e il riferimento al principio di “lavoro decente” dell'ILO consente di gettare nuova luce sulla riforma penitenziaria.

Keywords: lavoro dei detenuti, occupazione, capability, diritto del lavoro.

Internship for Unemployed: An Instrument for Vocational Activation of Young People that Prevents Them from Being Excluded from the Labour Market. The Polish Experience

*Ewa Staszewska**

Summary: 1. Introduction. – 2. Organisation and conditions of internships for the unemployed. – 3. Internship voucher. – 4. Conclusion.

1. Introduction

In Poland, unemployment of young people is a serious problem on the labour market. Employers are reluctant to employ young people without experience. Although the total unemployment rate is low and currently amounts to around 5%⁽¹⁾, it mainly affects young people. At the end of June 2019 unemployed persons below 30 years old accounted for 25%, below 25 years of age – 11,3% of the total number of the unemployed⁽²⁾. It is worth considering what the reason is for this situation. Finding employment is the most important challenge for young people after leaving education. Among many reasons for the difficult situation of young people on the labour market the following should be mentioned: lack of skills and work experience, which can make young people less attractive employees for employers; discrepancy between skills and job requirements; too high ambitions

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⁽¹⁾ Unemployment rate in September 2019 amounts 5,1% (Data from the Central Statistical Office of Poland available at www.stat.gov.pl).

⁽²⁾ Registered unemployment I-II quarter 2019. Statistics Poland, Warsaw 2019, 9.

and expectations regarding working conditions; failure to adapt the educational offer to the needs of the labour market⁽³⁾.

Being out of work results in exclusion from the labour market, which, according to data, particularly affects young people. Unemployment of young people (especially long-term) leads to passivity, decreased motivation and giving up intensive job seeking. For this reason, it is necessary to develop effective instruments that prevent exclusion of young people from the labour market. We need instruments to support smooth transition from unemployment to employment. Ideally from education to employment – which often is not possible.

In its Recommendation of 22 April 2013 on establishing a Youth Guarantee⁽⁴⁾ the Council of the European Union recommends that member states ensure that all young people under the age of 25 years receive a good-quality offer of employment, continued education, apprenticeship or traineeship within four months after becoming unemployed or leaving formal education⁽⁵⁾.

In Poland, the implementation of the above-mentioned Recommendation is Art. 50 of the Act of 20 April 2004 on Employment Promotion and Labour Market Institutions⁽⁶⁾, in terms of which the unemployed under 25 years of age within 4 months after the date of registration should be given by the county labour office an offer of employment, other gainful work, training, internship, vocational training for adults, employment as part of intervention or public works or other forms of assistance specified in the Act. Moreover, in Art. 49 paragraph 1 of the Employment Promotion Act, the unemployed up to 30 years of age are recognised as being in a special situation on the labour market. This means that the Polish legislator has envisaged many labour market instruments targeted at young unemployed.

One of the more popular instruments eagerly used by young unemployed is internship, which is the subject of this article.

⁽³⁾ B. JAKIMIUK, *Unemployment Among Young Poles and Its Dynamics*, *Annales Universitatis Marie Curie-Skłodowska Lublin-Polonia* vol. XXX, 4 Section J 2017, 196.

⁽⁴⁾ Council Recommendation 2013/C 120/01 of 22 Apr. 2013 on Establishing a Youth Guarantee, OJ C 120, 26.4.2013, 1-6.

⁽⁵⁾ A. ROSIN, *Precariousness of Trainees Working in the Framework of a Traineeship Agreement*. *The International Journal of Comparative Labour Law and Industrial Relations* 32, no. 2 (2016) Kluwer Law International BV, The Netherlands, 131-160.

⁽⁶⁾ Consolidated text of 2019, item 1482, further herein the promotion act.

Statistical data show that in 2018 interns accounted for 47,46% of all participants in basic forms of activation (well over half of the participants are young people). For comparison, 15,76% participated in intervention works, 12,64% in trainings, and 10,96% benefited from one-off funds for starting a business⁽⁷⁾. This raises the question about the reason for so much interest in this instrument, both among the unemployed themselves and the employers. Is it really such an effective instrument for vocational activation or rather a source of free workforce for employers?

2. Organisation and conditions of internships for the unemployed

Internships for the unemployed have been standardised in Art. 53 of the Employment Promotion Act and in the Minister of Labour and Social Policy's Regulation of 20 August 2009 on the specific conditions of internship for the unemployed⁽⁸⁾. In terms of Art. 2 clause 1 paragraph 34 of the Employment Promotion Act, internship helps the unemployed to acquire practical working skills by performing tasks in the workplace without establishing an employment relationship with the employer.

Internships are conducted on the basis of a contract concluded between the county governor and the internship organiser. To conclude it, an authorised entity (internship organiser) should submit to the county governor an application containing the elements specified in Section 1 of the Regulation. In order to start the internship, an unemployed must be referred by the county governor. The legislator has laid down the timeframe for internship. The maximum duration of internship depends on the age bracket of the unemployed. And so, all the unemployed can be sent to do internships for up to six months, while the unemployed up to 30 years of age - for up to twelve months. The extended duration of internship appears to be justified in the case of young unemployed, for whom internship, more often than not, is the opportunity to gain first work experience in real conditions of the workplace and specific

⁽⁷⁾ MINISTRY OF FAMILY, LABOUR AND SOCIAL POLICY. Department of Funds, *Effectiveness of Basic Forms of Vocational Activation Implemented as Part of the Programmes for Promotion of Employment and Mitigation of Unemployment, and Vocational Activation in 2018*, Warsaw 2019, 11.

⁽⁸⁾ OJ of 2009. Item 142, No. 1160, further herein the Regulation

practical skills. It is worth noting that the legislator in Section 1 para. 1 item 5 of the Regulation has also specified that the minimum internship duration is three months⁽⁹⁾.

The legal internship relationship involves three parties, the first one being the unemployed person who is the beneficiary of internship as an instrument of vocational activation. Therefore, one internship eligibility criterion is the unemployed status granted once the statutory requirements specified in Art. 2 clause 1 paragraph 2 of the Promotion Act have been met. This is a set of positive factors, i.e. those that enable one to obtain (retain) this status, and a set of negative factors, i.e. the circumstances that prevent one from obtaining (retaining) this status⁽¹⁰⁾. There are quite restrictive conditions for obtaining this status in Poland. For example, you cannot be employed on any legal basis, both in employee and non-employee forms of employment, such as civil law contracts. The person cannot be in part-time employment, either.

The second party involved in the internship is the internship organiser, to whom the unemployed is referred by the county governor. Internship organisers make up a fairly diverse group of entities that have been authorised by the legislator to act in this role. First of all, the internship organiser can be an employer understood as an organisational unit, even if it does not have legal personality, as well as a natural person, if they employ at least one employee (Article 2 (1) paragraph 25 of the Employment Promotion Act). Additionally, interns may be sought to be admitted by agricultural production cooperatives or adult natural persons residing and doing business in the Republic of Poland, personally and on their own, in the area of plant or animal production, including horticulture, fruit farming, beekeeping and fish farming, in their agricultural farm covering an area of agricultural land exceeding 2 reference hectares or operating a special agricultural production referred to in the Act of 20.12.1990 on social insurance for farmers. Also, in terms of Art. 53 section 8 of the Employment Promotion Act, interns may also be admitted by non-governmental organisations.

Finally, the third party appearing in the legal internship relationship is the county governor, who is equipped with specific powers in respect

⁽⁹⁾ E. STASZEWSKA, in Z. GÓRAL (ed.), *The Act on Employment Promotion and Labour Market Institutions. Commentary*, Wolters Kluwer 2016, 550 and following.

⁽¹⁰⁾ More Z. GÓRAL in Z. GÓRAL (ed.) *The Act on Employment Promotion*, cit., 57.

of both the unemployed and internship organisers. These powers extend to all phases of the legal internship relationship, starting from internship organisation and implementation, through its termination⁽¹¹⁾. Hence, in the legal internship relationship we deal with three specifically interrelated entities. The relations between the county governor and the internship organiser are clear - they sign a contract to organise an internship. All issues regarding the establishment, termination and reciprocal obligations of the parties to this contract should be resolved on the basis of the provisions of the Civil Code⁽¹²⁾ (of course, excluding those regulated in the Employment Promotion Act and the ministerial Regulation). This is confirmed by the relevant judicial decisions. The judgment of the Supreme Administrative Court in Warsaw of 17.1.2014 r.⁽¹³⁾ stated that issues related to admission of the unemployed to an internship are at the discretion of the parties to the contract, i.e. the county governor and the employer. The internship agreement is a kind of civil law agreement. If so, it should be assumed that all matters related to the conclusion of the contract, its performance or termination, cannot be heard by an administrative court⁽¹⁴⁾.

Also, no doubts are raised about the relationship between the intern and the county governor. In terms of Art. 53 section 5 of the Employment Promotion Act, the county governor supervises the internship. He is authorised to terminate the internship agreement with the organiser. Pursuant to Section 9 of the Regulation, the county governor, either at the request of the unemployed undergoing internship or *ex officio*, may terminate the internship contract with the organiser, if the latter fails to deliver the internship programme or fails to comply with its conditions, after hearing the internship organiser. Additionally, the county

⁽¹¹⁾ E. STASZEWSKA, *Internships* in K.W. Baran, M. Włodarzick (ed.), *The Labour Law System. Vol. VIII. The Labour Market Law*, Warsaw 2018, 1052.

⁽¹²⁾ M. SKAPSKI, *Non-workers Employment on Foot of Work Experience or Internship Contract* in K.W. BARAN (ed.) *The Labour Law System. Vol. VII. Non-workers Employment*, Warsaw, 239 and following. Cfr. D. WASIK, *Administrative Proceedings in Matters of Unemployment and Employment Promotion*, Warsaw 2011, 143.

⁽¹³⁾ I OSK 135/13, *Legalis*.

⁽¹⁴⁾ A similar viewpoint was expressed in the decision issued by the Regional Administrative Court in Kielce on 11.4.2008, case number II SA/Ke 38/08, not published – an internship contract and all procedures related thereto and in particular pertinent to the definition of the unemployed persons who are referred to do an internship or its possible extension are beyond the remit of public administration. Hence, they cannot be controlled by administrative courts.

governor, either at the request of the organiser or *ex officio*, after consulting the organiser and hearing the unemployed, may deprive the unemployed of the possibility of continuing the internship in the event of: unexcused absence for more than one day of the internship; breach of the basic obligations set out in the work regulations, in particular appearing for the internship under the influence of alcohol, drugs or psychotropic substances or drinking alcohol, taking drugs or psychotropic substances in the workplace; or excused absence which, however, prevents the completion of the internship programme.

On the other hand, less clear are the relations between the unemployed and the internship organiser. They do not enter into any agreement or any other legal transaction between them, let alone an employment relationship⁽¹⁵⁾. The legislator explicitly expressed this in the very definition of internship within Art. 2 clause 1 paragraph 34 of the Promotion Act, indicating that internship helps the unemployed to acquire practical working skills by performing tasks in the workplace without establishing an employment relationship with the employer. However, it cannot be assumed that there is no legal relationship between the intern and the internship organiser, because they have been provided with specific rights and obligations, the shape of which is determined both by the provisions of the Employment Promotion Act and the regulation on the terms and conditions of internship. It appears that we are dealing with an extremely complex legal relationship of a heterogeneous nature, which could be treated as a “vocational activation employment”, referring not only to the sectoral criterion, but also paying attention to the purpose and specification of work⁽¹⁶⁾. In the case of internships, the aim is for the unemployed to acquire practical working skills, which is to lead to employment in the future – whether with the same or another employer. It is worth noting here that the internship agreement which the county governor concludes with the internship organiser commits the organiser to employ the unemployed on employment contract after the internship, which will be discussed later.

⁽¹⁵⁾ M. SKAPSKI, *Non-workers Employment*, cit., 241.

⁽¹⁶⁾ Compare K.W. BARAN, *The Notion and Taxonomy of Non-workers Employment*, in K.W. Baran (ed.), *The Labour Law System. Vol. VII. Non-workers Employment*, Warsaw 2015, 23.

Although the intern does not enter into an employment relationship with the internship organiser, the obligations imposed on him are characteristic of employee employment (quasi-employee). In terms of Section 6 para. 2 of the Regulation the duties of the unemployed who is referred for an internship include: compliance with the working time schedule set by the organiser, diligent and careful performance of tasks covered by the internship programme, compliance with the instructions of the organiser and guardian, if they are not contrary to the law, compliance with the organiser's rules and principles, in particular work regulations, confidentiality rules, health and safety rules and fire regulations.

An unemployed person doing an internship has also been awarded many rights. Although the intern does not remain in the employment relationship with the internship organiser, which means that he will not be entitled to remuneration for work, the legislator has guaranteed the unemployed the right to a grant paid by the county governor during the internship. The grant amount is determined in Art. 53 section 6 of the Promotion Act in the amount of 120% of unemployment benefit, referred to in Art. 72 section 1 point 1 of the Employment Promotion Act. The intern also retains the right to the grant for the period of documented incapacity for work, for which employees retain the right to remuneration (Article 80 of the Promotion Act). In terms of Art. 79 of the Employment Promotion Act, the grant receiving period is included in the period of work required to acquire or retain employee rights and contributory periods within the meaning of the provisions on pensions from the Social Insurance Fund. It is also worth noting that persons receiving grants during their internship are covered by compulsory retirement and disability insurance as well as accident and health insurance⁽¹⁷⁾.

At the request of the unemployed doing an internship, the employer is obliged to grant two days off per each 30 calendar days of internship. This is a kind of equivalent of holiday leave for employees. Some intern rights are to be exercised in accordance with the rules applying to employees, which means that we will apply appropriate labour law regulations. This group of entitlements includes the right to rest (Section 7 of the Regulation), safe and hygienic conditions of

⁽¹⁷⁾ E. STASZEWKSA, *Internships* M. Włodarczyk (ed.), *The Labour Law System*, in *The Labour Market Law, Vol. VIII*, Warsaw 2018, 1062.

internship (Section 6 (1) (3) of the Regulation), preventive health protection (Section 6 (1) (4) of the Regulation), the right to equal treatment (Section 8 of the Regulation).

3. Internship voucher

Recently (in 2015)⁽¹⁸⁾, a new solution for the unemployed under 30 was introduced in Poland – an internship voucher. This is also an internship, however, organised on slightly different terms than the “ordinary internship” discussed above. The internship voucher is regulated in Art. 66l of the Employment Promotion Act and constitutes a guarantee of referral for an internship with the employer selected by the unemployed for a period of 6 months, provided that the employer undertakes to employ the unemployed for a period of 6 months after the end of the internship. The employer who employs the unemployed for the declared period is paid a bonus by the county governor during the internship. In the case of an internship voucher, the internship initiator is the young unemployed, whose task is to find an employer who will accept him for an internship and employ him for a period of at least 6 months.

The internship voucher gives an unemployed person greater leeway, as they can choose the employer with whom they will do the internship and then be employed. It should be emphasised that this is employment within the meaning of Art. 2 clause 1 paragraph 43 of the Employment Promotion Act, i.e. performing work on the basis of an employment relationship, service relationship and work at home contract. The employer’s obligation may not apply to the conclusion of civil law contracts with the unemployed after completing an internship. This solution should be assessed as very favourable. Admitting a new employee to work is a decision that has many legal and economic consequences for the employer. Inappropriate decisions in this regard may result in negative consequences in both these spheres. Not infrequently, employers exclude in advance the possibility of employing people with specific sociodemographic features, which - according to employing entities - reduce the value of given individuals

⁽¹⁸⁾ Act of 14 March 2014 amending the act on promotion and labour market institutions and certain other acts. OJ of 2014. Item 598.

as employees. It goes without saying that employing a young, inexperienced employee can generate such fears. In my opinion, the internship voucher mechanism is an excellent solution that largely minimises the employer's personal risk and at the same time encourages employment of young people. For 6 months, the employer has the option of introducing a young employee to work without incurring financial consequences (the unemployed receives a grant at the same time as for an internship organised on general terms and conditions). Only after this time does he employ the unemployed in paid employment. An additional advantage of the internship voucher is the fact that after its conclusion the parties enter into employment relationship. This is undoubtedly conducive to a sense of certainty as to the fate of the unemployed person after completing the six-month internship, who will be more motivated to show their best to their future employer. In addition to the specific conditions of referral for the internship voucher (i.e. the choice of the employer by the unemployed and the obligation of the employer to employ the unemployed after completing the internship), the provisions of the "ordinary internship" apply to the internship based on the voucher (cf. Article 66l (9) of the Employment Promotion Act).

However, this formula is not very popular, because the unemployed person has to find a potential employer himself. In 2018, 115.627 unemployed started the traditional internships and only 684 obtained the internship vouchers⁽¹⁹⁾.

4. Conclusion

In my view internship is an instrument that complements the shortages of the vocational education system, which in a very narrow scope provides interns with the necessary vocational skills, knowledge of the realities of work and the ability to work independently. The primary purpose of the instrument is to acquire practical skills to do the job. Employers who do not want to hire young people for fear of personal risks associated with the admission of this group, thanks to this instrument can for a period from at least 3 to 12 months become

⁽¹⁹⁾MINISTRY OF FAMILY, LABOUR AND SOCIAL POLICY. Labour Market Department, *Structural Statistics September 2019*.

familiar with the skills of the referred unemployed, observe them in a specific work conditions and finally take a decision on continuing employment in the future. During internship the employer has also an opportunity to train the intern so as to suit his own needs, and then – by establishing the employment relationship – he gains a qualified employee.

Statistical data show that in 2018 post-internship employment effectiveness was 83,64%. While in the case of training it was 65,46%. Only intervention works and funds for starting a business have higher employment efficiency – around 90%⁽²⁰⁾.

Employment effectiveness is measured by the number of employment relationships concluded during internship or within 3 months after the end of internship and performed for at least 30 days. It should be emphasized that employment effectiveness is understood not only as employment under a contract of employment, but also on the basis of civil law contracts or starting a business. However, this does not change the fact that vocational activation does take place. And this is very important in the process of searching for a permanent job. Benefits of the instrument are also obtained by the unemployed who are not employed by the employer after completing the internship. It should be pointed out that there is an increased chance of finding a stable employment with another employer by gaining some work experience. Internship gives the unemployed an opportunity to acquire new contacts with people and to experience the reality of the workplace.

On the other hand, internships are not completely free from any disadvantages. Employers take advantage of performing certain tasks by the unemployed, almost as if from the work of an employee, without the obligation to pay this person any allowance. It is not entirely convincing to completely exempt the employer from the obligation to bear the costs of employing a young unemployed person who in fact provides full-time work for him. In a sense, internships may be a way for employers to bypass costs related to employment. There is no doubt that some employers use the internship scheme for this purpose. Interns

⁽²⁰⁾ MINISTRY OF FAMILY, LABOUR AND SOCIAL POLICY. Department of Funds, *Effectiveness of Basic Forms of Vocational Activation Implemented as Part of the Programmes for Promotion of Employment and Mitigation of Unemployment, and Vocational Activation in 2018*, Warsaw 2019, 15.

thus become a free work force, an inferior quasi-employee category. Job centres, however, try to eliminate such behaviours. They try to oblige the employer in the contract to employ the interns after completing their internship for a period of, e.g. 3 months. This issue arouses a lot of emotions, because such an obligation does not result directly from the act. It should be remembered, however, that county governors are required to make sure that the unemployed are primarily referred to employers who employ interns after completing their internship, or with those whose internship gives a good chance of employment elsewhere. Anyway, after the internship period and e.g. 3-month obligatory period of employment, employers may no longer continue employment. Still a young person can at least show documents confirming the work experience to another employer.

To conclude, I am of the opinion that internships are a good solution for young people, and I think that due to their large-scale organization, one should regard internship as a non-employee form of employment for the unemployed persons. Despite some disadvantages associated with the unclear status of interns, and the potential exploitation of interns by employers, a significant proportion of young people have a chance to find a permanent job – either with the same employer who offered them the internship opportunity or another.

Studies carried out at the request of the Polish Ministry of Labour⁽²¹⁾ show that interns are satisfied with internships. They indicate the opportunity to improve their own qualifications, acquire new competences, and increase employability. And most importantly, the unemployed are activated. Of course, it would be better for young people to have a career in employment. But for those for whom this is not possible, internship may prove to be a good solution against exclusion from the labour market. Internship can indeed be a bridge to employment for young people, even if not always permanent.

⁽²¹⁾ A. JANISZEWSKI, D. PIECHOCINSKI, *Job Centres' Performance in Respect of Internships for the Unemployed. Identifying Good Practices. Summary Survey Report*, Warsaw 2012, 8.

Abstract

Internship for Unemployed: An Instrument for Vocational Activation of Young People that Prevents Them from Being Excluded from the Labour Market. The Polish Experience

Purpose: In Poland, the unemployment of young people is a serious problem on the labour market. Employers are reluctant to employ young people without experience. Although the total unemployment rate is low and currently amounts to around 5%, it mainly affects young people. Lack of work results in exclusion from the labour market, which particularly affects young people. For this reason, it is necessary to construct labour market instruments that prevent the exclusion of young people from the labour market. The article is focused on the internship for the unemployed, which is one of the most popular forms of professional activation of young unemployed people in Poland. **Methodology:** The article analyzes the legal regulations in force in Poland regarding the internship for the unemployed, as well as statistical data. **Findings:** Internship for the unemployed is the instrument that complements the shortages of the vocational education system, which in a very narrow scope provides trainees with the necessary professional skills, knowledge of the realities of work and the ability to work independently. The primary purpose of the instrument is to acquire practical skills to do the job. Employers who do not want to hire young people, fearing the personal risk associated with the admission of this group, thanks to this instrument can for a period from at least 3 to 12 months become familiar with the skills of the directed unemployed, observe them in a specific workplace and finally take a decision on continuing employment in the future. Internship gives the unemployed an opportunity to acquire new contacts with people and to experience a reality of the workplace. On the other hand, employers take advantage of performing certain tasks by the unemployed, almost as if from the work of an employee, without the obligation to pay this person any allowance. It is not entirely convincing to completely free the employer from the obligation to bear the costs of employing a young unemployed person who in fact provides full-time work for him. **Research/limitations/implications:** In a sense, internships may be a way for employers to bypass costs related to employment. In spite of these doubts, I would like to put forward a thesis, that an internship can be a bridge to the permanent employment for young people and can prevent them from being excluded from the labour market. **Originality:** The issue of organizing an internship for the unemployed is rather rarely addressed in literary studies. Due to the mass scale of organizing internships for the unemployed, it is necessary to examine thoroughly the legal status of the intern.

Keywords: Internship; unemployed up to 30 years of age; labour market instruments

Tirocini per i disoccupati: uno strumento per l'attivazione professionale dei giovani che ne previene l'esclusione dal mercato del lavoro. L'esperienza polacca

Obiettivi: in Polonia la disoccupazione giovanile rappresenta un grave problema nel mercato del lavoro. I datori di lavoro sono riluttanti ad assumere giovani senza esperienza. Sebbene il tasso di disoccupazione totale sia basso e attualmente ammonti a circa il 5%, colpisce soprattutto i giovani. La mancanza di lavoro comporta l'esclusione dal mercato del lavoro, che colpisce in particolare i giovani. Per questo motivo, è necessario costruire strumenti del mercato del lavoro che impediscano l'esclusione dei giovani dal mercato del lavoro. L'articolo si concentra sullo stage per i disoccupati, che è una delle forme più popolari di attivazione professionale dei giovani disoccupati in Polonia. **Metodologia:** l'articolo analizza il quadro legale in vigore in Polonia relativo ai tirocini per i disoccupati, nonché i dati statistici. **Risultati:** il tirocinio per i disoccupati è lo strumento che completa le carenze del sistema di istruzione professionale, che fornisce ai tirocinanti le competenze professionali specialistiche necessarie, la conoscenza delle realtà del lavoro e la capacità di lavorare in modo indipendente. Lo scopo principale dello strumento è acquisire competenze pratiche per svolgere il lavoro. I datori di lavoro che non vogliono assumere giovani, grazie a questo strumento possono acquisire familiarità con le competenze dei giovani disoccupati per un periodo da 3 a 12 mesi in un posto di lavoro specifico e, infine, prendere una decisione sulla prosecuzione del rapporto di lavoro in futuro. Lo stage offre ai disoccupati l'opportunità di acquisire nuovi contatti con le persone e di sperimentare la realtà del lavoro. D'altro canto, i datori di lavoro traggono vantaggio dall'esecuzione di determinati compiti da parte dei disoccupati, quasi come dal lavoro di un dipendente, senza l'obbligo di versare alcuna indennità. Non è del tutto convincente liberare completamente il datore di lavoro dall'obbligo di sostenere i costi di assunzione di un giovane disoccupato che, di fatto, gli fornisce un lavoro a tempo pieno. **Limiti e implicazioni:** in un certo senso, i tirocini possono essere un modo per i datori di lavoro di aggirare i costi relativi all'assunzione dei lavoratori. Nonostante questi dubbi, la tesi che si intende sostenere è che uno stage può costituire un ponte verso l'occupazione permanente per i giovani e impedire loro di essere esclusi dal mercato del lavoro. **Originalità:** il tema affrontato è raramente trattato in letteratura. A causa della diffusione su vasta scala di tirocini per disoccupati, è necessario esaminare a fondo lo status giuridico del tirocinante.

Parole chiave: tirocini, disoccupati under 30, strumenti del mercato del lavoro.

Employment Matters Too Much to Society to Leave to Markets Alone

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Summary: **1.** Introduction. – **2.** Full employment and the social contract for the future of work. – **2.1.** Global commitments to full employment. – **2.2.** Shifting responsibilities: from society to the individual. – **2.3.** The state as employer of last resort. – **2.4.** Full employment and the social contract. – **3.** Re-imagining Public Employment Programmes (PEPs) as part of the future of work. – **3.1.** The evolution of PEPs as a policy instrument. – **3.2.** Ending – or reducing – Involuntary unemployment. – **3.4.** PEPs and social protection. – **3.5.** PEPs, UBI and jobs guarantees. – **3.6.** PEPs, ALMPS and support to transitions. – **3.7.** PEPs and the Climate Agenda. – **3.8.** Displacement, conflict and peace building. – **3.9.** New forms of work from a more diverse skills base. – **3.10.** Support to livelihoods and social enterprise. – **3.11.** Placemaking and (re)building the commons. – **4.** Conclusions.

1. Introduction

«The changes associated with digital technology [...] the changes that might yet lie ahead as we wait fretfully for the robot overlords, are continuing to transform society. The benefits are unevenly distributed; the transformation can only be glimpsed through current statistics; the cautious evidence-based policy consensus is palpably inadequate; and the rage against the elite is widespread»⁽¹⁾.

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⁽¹⁾ D. COYLE, *Lies, Damned Lies, and AI*, in Project Syndicate, 11 December 2018, <https://www.project-syndicate.org/commentary/ai-algorithms-reinforce-social-biases-by-diane-coyle-2018-12> (accessed February 19, 2010).

It's a turbulent world. The future of work looks set to exacerbate this turbulence, with a range of forces pulling the future in different directions. Technological change is exponential. Emerging technologies are disrupting how value is created, without new systems for its distribution having yet emerged. In some quarters, "automation anxiety" feeds fears of a dystopian future in which the robots take over the jobs; in which wealth can be created without workers, massively exacerbating inequality.

Yet for others, this is scaremongering. Instead, this same disruption represents potential freedom from the shackles of unfulfilling work. No more drudgery, no more hard physical labour, no more routine tasks. Technological change will create as many if not more jobs as it displaces, on better terms. Working hours will drop, making space for creativity and lifelong learning. Societies will be better places, with more wealth available to meet social needs.

In practice, elements of both versions may hold true: but for different people, in different parts of the world – or different parts of the same city or neighbourhood, with an exponential rise in inequality a serious risk.

There is, however, nothing inexorable about the outcomes. They will be determined, to a significant extent, by political economy, social agency and the role of governance in shaping the way technology impacts on societies in a context in which technology is not neutral.

«technologies are solutions, products and implementations that are developed through social processes, stand in and for people and institutions, and contain within them a whole set of assumptions, values and principles that in turn can (and do) affect power, structure and status in society» ⁽²⁾.

So, as in the past, the current technological revolution holds new levels of promise along with new levels of risk.

⁽²⁾ K. SHWAB, *Shaping the future of the fourth industrial revolution*. Penguin Random House, United Kingdom, 2018.

While analysts debate future scenarios, elements of many of these are happening already. In the industrialised world, labour markets are “hollowing out”, with a concentration of high-education, high-wage occupations at one end of the spectrum, and low-education, low-wage manual occupations on the other ⁽³⁾ Erosion of job quality is common, with increased outsourcing, insecurity, casualization, the rise of the gig economy and the destruction of many key labour standards. In the developing world, informality remains a norm, with serious decent work deficits. The role of collective organisation in asserting rights at work has declined, not least because the jobs and sectors in which labour has traditionally been strongest are often those worst affected by off-shoring and job displacement.

The challenges posed by technology are compounded by other drivers of change. Environmental degradation and climate change are predicted to have widespread job destruction effects, including from natural disasters and desertification. Yet mitigation and adaptation to climate change have the potential to create new jobs at scale, too – not least through technological innovation. This is one of the more hopeful synchronicities to emerge from the noise of sometimes widely divergent projections for the future ⁽⁴⁾.

Demographic trends also differ significantly across the world, creating differing incentives in relation to the scale of automation considered socially desirable. Current trends may, however, be disrupted by mass displacements of people arising from conflict and from climate change – with the latter potentially fuelling the former. These dynamics all interact systemically, with nothing linear about the march of progress into the future.

⁽³⁾ D. AUTOR, A. LI & M. NOTOWIDIGDO, *Preparing for the Work of the Future*, Abdul-Latif Jameel Poverty Action Lab (J-PAL), 2019, <https://www.povertyactionlab.org/sites/default/files/documents/work-of-the-future-literature-review-4.2.19.pdf> (accessed 2 April 2020)

⁽⁴⁾ T. BALLIESTRER, A. ELSHEIKHI, *The Future of Work: A Literature Review*, ILO Research Department, Geneva, 2018, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_625866.pdf (accessed 2 April 2020).

All these effects are likely to be uneven across the globe, with the highest levels of job destruction from both technological change and from climate change projected to take place in the developing world. As a consequence, the traditional trajectory of structural transformation, which entails a shift from low wage agricultural activity to higher-wage manufacturing jobs in urban areas, may no longer be plausible. As a result, in some contexts and societies, the future of work is likely to share key elements with the present: with large swathes of underemployment, unemployment and working poverty – potentially compounded by displacement and conflict.

Our inability to take decisive action in relation to these challenges in the present may not augur well for our ability to do so in the future.

«But without decisive action we will be sleepwalking into a world that widens inequality, increases uncertainty and reinforces exclusion, with destructive political, social and economic repercussions»⁽⁵⁾.

What form should such decisive action take? This question is already urgent.

2. Full employment and the social contract for the future of work

2.1. Global commitments to full employment

The social and economic costs of unemployment and underemployment ripple through households and communities, exacerbating poverty and inequality and impacting on society as a whole. Recognition of these costs have informed repeated commitments to full employment as a goal in global agreements, as part of the social contract.

Article 55 of the Charter of the United Nations defines full employment as a necessary condition for stability and well-being, and commits all members to use their policy powers to ensure it. The 1944 Philadelphia

⁽⁵⁾ GLOBAL COMMISSION ON THE FUTURE OF WORK, *Work for a brighter future*, ILO, 2019, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_662410.pdf (accessed 2 April 2020).

Declaration of the International Labour Organisation (ILO) places an obligation on the ILO to further full employment as one of its core goals, and Convention 122 on Employment Policy (1964) states that each ILO Member «should declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment». The commitment to full employment and decent work is also one of the 2030 Social Development Goals (SDGs).

2.2. Shifting responsibilities: from society to the individual

From the post war period up until the mid-1970's, maintaining full employment was an overriding goal of economic policy in the developed world and unemployment was largely held below two percent. When unemployment threatened to increase, government intervened by stimulating aggregate demand⁽⁶⁾. Yet today, commitments to full employment are more likely to be honoured in the breach, with it rarely having primacy as a macro-economic policy goal any longer.

«This framework [full employment] has been systematically abandoned in most OECD countries over the last 30 years. The overriding priority of macroeconomic policy has shifted towards keeping inflation low and suppressing the stabilisation functions of fiscal policy. As a consequence, the insights gained from the writings of Keynes, Marx and Kalecki into how deficient demand in macroeconomic systems constrains employment opportunities and forces some individuals into involuntary unemployment have been discarded».

«The concept of systemic failure has been replaced by sheeting the responsibility for economic outcomes onto the individual. Accordingly, anyone who is unemployed has chosen to be in that state either because they didn't invest in appropriate skills; haven't searched for available

⁽⁶⁾ W. MITCHELL, J. MUYSKEN, *Full employment abandoned: shifting sands and policy failures*, Edward Elgar, 2008.

opportunities with sufficient effort or rigour; or have become either “work shy” or too selective in the jobs they would accept. Governments are seen to have bolstered this individual lethargy through providing excessively generous income support payments and restrictive hiring and firing regulations»⁽⁷⁾.

Mitchell and Muysken characterize this as a shift from acceptance of full employment as the responsibility of society and the basis of macro-economic policy, to a focus on full *employability*, with much of the onus for this shifting to the individual, regardless of levels of demand for labour in the wider economy – or of the conditions of work on offer. Alternatively, the poor are expected to self-employ their way out of poverty on market terms. Certainly, entrepreneurship can create jobs; it’s just not usually unemployed people who are best placed to take on these risks.

The role of the state shifted to focus on creating an enabling environment for market development, mostly by getting out of the way. Instead of a market-shaping agenda, the focus was on Active Labour Market Policies (ALMPs), to enhance “employability” at the individual level - as if the constraint on employment is purely a function of the characteristics of the work-seeker rather than of a lack of labour demand.

Certainly, there are contexts in which a skills mismatch between the demand and supply of labour may need to be addressed, or forms of exclusion that affect access to labour markets. But too often, ALMPS simply confer advantages on ALMP participants relative to others in the labour market, allowing them to “jump the queue”, with no increase in the number of jobs – just a change in who gets them. Yet addressing the more fundamental problem of labour demand remains a limited part of this discourse.

In the process, primacy is given to market processes in determining employment outcomes. Yet labour markets – like all markets – are social constructs, with the rules of the game set by societies. In some, a

⁽⁷⁾ Ibidem.

blind eye is still turned to slavery and child labour. The right to work all too often means the right to be part of the working poor. Even where genuinely decent labour standards have been achieved, these remain contested. While the commodification of labour is decried, people often have no real choice but to compete to sell their labour on the market at the lowest price, even where this represents working poverty. This reality is an outcome of social and political choices, rooted in power relations that determine what societies are willing to tolerate, with this also a function of power relations between societies, as the history of conquest, colonialism and other forms of extraction illustrate.

2.3. The state as employer of last resort

The state has many instruments with which to influence employment outcomes at a systemic level. These include not only fiscal and macro-economic policy, but also industrial policy, public investment in social and economic infrastructure, incentives to the private sector and forms of demand-side stimulus. They also include direct investment in employment creation, in public employment programmes (also called public works programmes) that operate outside the normal public service, employing people to undertake work that creates public value and contributes to the public good.

Historically, such direct investment in employment has typically been time-bound and targeted, with participation rates determined by the scale of budgets allocated. Yet, as Hyman Minsky argued in the 1960s, the state can instead act as employer of last resort: guaranteeing employment to all those willing and able to work, in the process ending involuntary unemployment in society and fulfilling commitments to full employment – with government the only player able to create an infinitely elastic demand for labour⁽⁸⁾.

⁽⁸⁾L. WRAY, *The employer of last resort programme, Could it work for developing countries?* Economic and Labour Market Papers, ILO, Geneva, 2007, https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_elm/---analysis/documents/publication/wcms_113904.pdf (accessed 2 April 2020)

Minsky argued that strategies to raise aggregate demand are often a blunt instrument, easily falling foul of the structure of a given economy, reinforcing existing patterns of distribution in ways that may never reach the poorest. Instead, he argued that spending should be targeted directly at the unemployed, taking workers “as they are”, providing jobs that fit their existing skills, and allowing the impacts of such a stimulus to “bubble up” into the wider economy ⁽⁹⁾.

With the Mahatma Gandhi National Rural Employment Guarantee Act, India became the first country to test an employment guarantee approach at a national scale. While the guarantee is not universal – it guarantees every rural household that registers 100 days of employment per annum, paid at a minimum wage – it is nevertheless the first rights-based employment guarantee, reaching over 70 million participants and 52 million households in 2018/19 ⁽¹⁰⁾.

Yet India is still the outlier. All too often, this policy terrain is ceded, with markets left to determine employment outcomes, and people left at the mercy of these markets, even where the social need is dire. In the aftermath of the 2008 financial crisis, for example, many states were quick to act as lenders of last resort to bail out the banks – at huge and enduring social and economic cost – but failed to act as employers of last resort, despite social desperation caused by the jobs crisis. Finding instruments to avoid a repetition of this in the future is an important challenge to policymakers.

2.4. Full employment and the social contract

While few things are certain about the future of work, high levels of job displacement and associated social disruption are certainly anticipated, with unemployment and underemployment likely realities in many parts of the world.

It is in this context that calls for a new social contract to address the social impacts of the future of work are being made, including in the

⁽⁹⁾ *Ibidem*.

⁽¹⁰⁾ www.nrega.nic.in (accessed 2 April 2020).

Report of the ILO's Global Commission on the Future of Work, (henceforth ILO FOW), and also by the World Bank's World Development Report 2019, *The Changing Nature of Work* (henceforth WDR 2019).

While there are of course differences between them, there is an emphasis in both on the need for significant investment in human capital development to enable people to secure the jobs of the future, on the need to support transitions into new opportunities for those whose current forms of work are likely to be destroyed and the need for social protection for those who have no work or are unable to make such transitions.

Of course human capital development matters. Social protection matters too; but while provisions for minimum income are a crucial first line of defence against poverty, few people aspire to live on minimum incomes for long spells of their working-age lives. The question left unanswered is how, in a context of disruption, societies ensure that those willing and able to work have the opportunity to do so? The issue of full employment is absent as a goal in WDR 2019. While ILO FOW commits to it, the instruments proposed focus on public investment in social and economic infrastructure. Yet the levers available to the state and public policy to shape the scale and composition of labour demand go far further than this, including the scope for an employment guarantee to remove involuntary employment from the equation – or for other forms of public employment to significantly reduce it.

The challenge – and opportunity – is to adjust their design to optimise their impacts in the emerging context of the future of work. The next section explore what this could mean.

3. Re-imagining Public Employment Programmes (PEPs) as part of the future of work

3.1. The evolution of PEPs as a policy instrument

It's true. The track record of public employment programmes is not always a good one. Too often, short-term work opportunities translate

into limited poverty impacts. Stipends instead of decent wages devalue the benefits of participation in work. The quality of assets has often been poor. Sometimes the work undertaken is not meaningful. But these outcomes are not intrinsic to public employment programmes; they are an outcome of poor policy and design choices. In the same way that critiques of social welfare in the past have delivered improved forms of social protection, critiques of public employment programmes have performed a challenge function that has driven innovation and improved outcomes – and needs to continue to do so if they are to be relevant to the future of work.

One of the most significant innovations has been the introduction India's MGNREGA. Certainly, the massive rollout of this programme has not been seamless. Its requirements challenged local state capabilities – as any development programme at this level of scale will do. Yet year by year, evaluation, critique and the development of new capabilities have enabled stronger outcomes. And while MGNREGA is in the forefront in terms of scale and the use of a rights based approach – large scale programmes are also in place in countries as diverse as Mexico, South Africa, Peru, Ethiopia, Tanzania, Rwanda, Nepal and Indonesia. This is in addition to many smaller scale programmes across the developed and developing world⁽¹¹⁾.

Over the same period, there has also been a stronger emphasis on the role of PEPs in contributing to the climate agenda, through work focused on implementing mitigation and adaptation strategies and augmenting existing government efforts in these regards. In addition, work in the social sector and in services have opened new opportunities for social impact, in ways that enable new forms of participation for women. This has included emphasis on Early Childhood Development (ECD) and on community-based care. These contribute to important social policy priorities, while also providing pathways to recognition for informal, unrecognised and unpaid work, mainly undertaken by women. So, for example, in South Africa, workers involved in such work in PEPs are entitled to a minimum wage, access to unemployment insurance and workplace compensation provisions.

⁽¹¹⁾ Information on all of these can be found on www.socialprotection.org.

Efforts to target youth have led to the introduction of forms of work involving digital and internet technologies, in recognition that the notion of “public goods and services” now also extends into these domains.

This section considers some of the ways in which PEPs could contribute to some of the specific challenges anticipated as part of the future of work.

3.2. Ending – or reducing - Involuntary unemployment

Any social contract for the future of work must surely address the needs of those involuntarily excluded from work. This needs to go further than simply a commitment to some form of minimum income, important as this is. In the first instance, this requires the state to use all the means at its disposal to stimulate market-based employment. But where the market response is inadequate, PEPs provide a policy instrument to close the gap.

Desirable as it would be to test a universal employment guarantee, none yet exists. MGNREGA does however illustrate that employment guarantees do not have to be universal to make a significant difference. They can instead target stubborn problems within a labour market. These could be spatial, or seasonal, or relate to a constituency such as youth, with the concept of a “guarantee” meaning that everyone who qualifies against the criteria has a right to participate, instead of participation being rationed by targeting or a fixed budget.

Even where public employment does not take the form of a guarantee, its effect is still to reduce involuntary unemployment or underemployment. This will continue to make it a vital part of the policy toolbox.

3.3. Creating a labour market floor to support a Universal Labour Guarantee

While minimum and living wage laws have historically been implemented to place a floor in the labour market, they have proved hard to enforce, especially in contexts of high informality. A job guarantee provides an alternative instrument for achieving this aim, functioning as a de facto floor in the labour market, greatly increasing the bargaining position of workers throughout the economy. By guaranteeing work at what is considered the lowest acceptable level, an employment guarantee scheme or PEP operating at sufficient scale can have systemic effects on the labour standards floor, pushing up wages and working conditions more widely.

The scope for even a partial guarantee to do so has been illustrated by the impact of MGNREGA on labour standards in rural India, where payment of a minimum wage has pushed up local agricultural wages. It has also made significant gains in closing the gender wage gap – by paying equal wages, setting new local norms and expectations in this regard⁽¹²⁾.

PEPs can also play a role in limiting precarious forms of work, such as protecting the rights of workers subject to the vagaries of the gig and platform economies. Access to an alternative that offers a minimum level of hours of predictable work could significantly increase the bargaining power of workers to negotiate better terms, minimum hours and greater predictability – also giving them an alternative when such negotiations fail, removing desperation from the power dynamic at the bargaining table.

This potential of course only applies where the PEP itself has decent labour standards. But the scope exists for the deliberate use of a PEP to set a labour standards floor, within a specific sector or more broadly.

⁽¹²⁾ R. BREITKREUTZ, C. STANTON, N. BRADY, J. PATTISON-WILLIAMS, *The Mahatma Gandhi National Rural Employment Guarantee Scheme: A Policy Solution to Rural Poverty in India?*, in *Development Policy Review*, 2017, vol. 35 n. 3, 397-417.

3.4. PEPs and social protection

PEPs contribute to the income security dimension of the ILO's Social Protection Floor and often, this is part of their purpose. The more universal and rights-based the scheme, the greater this social protection effect is likely to be.

Yet, even in the context of an employment guarantee, there are likely to be coverage gaps that social protection interventions need to address, such as for people who are unable to work. So even where an employment guarantee exists, its role should be seen as reducing the burden on social protection rather than replacing the need for it.

This is particularly clear where – as is most commonly the case – PEPs do not take the form of a guarantee. Certainly, the larger their scale, the longer the duration of work, and the better the wages and working conditions, the more they will have anti-poverty effects – which will in turn reduce the stress on social protection systems. This is a positive synergy within an integrated anti-poverty strategy.

The main problem that arises in this debate is when PEPs are understood as an *alternative* form of social protection, with a trade-off presented between, for example, resourcing a cash transfer versus a PEP. Where this happens, it is typically framed within a discourse that sees cash transfers as creating dependency, with PEPs as an alternative to “handouts”. The political economy context often makes PEPs the preferred alternative. Yet all too often, the PEPs that are then designed are on a relatively small scale, with a limited duration of work and often, low wages justified as “stipends” – on the basis that this is social protection not “real” employment and hence minimum labour standards do not apply. These factors result in reduced social protection effects, undermine many of the benefits of participation in work and often lead to an inadequate emphasis on the quality of assets and services delivered. In the process, social protection is not delivered – and PEPs are discredited as a development instrument.

When the primary purpose of PEPs is income transfer, then there are arguably more efficient ways of achieving this. PEPs add value where the employment and public goods dimensions of their role add value

over and above the aim of income transfers. If their purpose is reduced to the latter, then their ability to deliver these other dimensions tends to be undermined. This risk arises particularly where they are defined as an instrument of social protection, measured solely in relation to income effects.

For these reasons, the approach taken here is that PEPs are primarily an instrument of inclusive employment policy aimed at full employment. As with all forms of decent work, this has positive anti-poverty effects that reduce the pressures on social protection systems. This should enable synergy and policy complementarity rather than creating a binary choice between instruments; yet the latter is often the direction the discourse takes.

3.5. PEPs, UBI and jobs guarantees

These issues have come into renewed focus in the context of debate on the future of work. In the public discourse, when big tech innovators from Silicon Valley like Elon Musk say that the risk of the robots taking our jobs is real, this tends to have more traction than when economists say that the robots won't. It has been against the backdrop of such concerns that the concept of Universal Basic Income (UBI) has re-emerged, capturing some of the public and policy imagination. With strong proponents and critics, the debate can be fierce.

Amongst the divergent rationales for supporting UBI, the most powerful is surely the idea that it offers a simple means of ensuring an end to poverty, that contributes to redistribution of wealth in a world in which inequality is an affront to social justice. By using the fiscus to claw back the payment from the non-poor, it avoids costly and inaccurate means-testing and reaches everyone. In this narrative, UBI is placed at the heart of the new social contract.

Every element of that rationale is, however, disputed. Concerns have, for example, been raised that in some contexts, UBI risks eroding hard-

won gains in other areas of social protection, leaving some of the poor in society poorer as a result⁽¹³⁾.

This applies also to the proposed funding mechanism. In much of the developing world, high levels of informality mean there is little or no scope to claw back transfers made to the non-poor through the tax system. This can make the UBI approach a highly regressive and expensive approach to achieving a minimum income unless it is accompanied by a radical restructuring of the tax code and collection system. UBI's quest for a simple solution overlooks a reality of complexity.

In the context of the discussion of UBI, debate has contrasted the relative merits of UBI versus guaranteed employment. It is largely an unhelpful debate often based on false premises. So, for example, the possible weaknesses of a UBI do not in themselves invalidate the importance of other forms of minimum income policies in societies. At the same time, dismissing employment guarantees for making workfare a condition of social support, as Guy Standing does, is simply inaccurate⁽¹⁴⁾. Arguments for workfare come out of a very different tradition:

«What distinguishes this tradition [workfare] is its grounding in the belief that jobless individuals are at fault for their own joblessness. Advocacy of the right to work is and always has been premised on the opposite assumption – that the reason jobless individuals lack work is because the economy has failed to make work available to them. Rather than supporting the use of labour as a disciplinary measure to put pressure on the poor to cure their own joblessness by reforming their attitudes and behaviour, right to work advocates have argued that job creation initiatives are

⁽¹³⁾ I. ORTIZ, C. BEHRENDT, A. ACUÑA-ULATE, Q. ANH NUHYEN, *Universal Basic Income Proposals in light of ILO standards: Key issues and global costing*, Working Paper No. 62, Social Protection Department, ILO Geneva, 2018, <https://socialprotection-humanrights.org/wp-content/uploads/2018/07/55171.pdf> (accessed 2 April 2020).

⁽¹⁴⁾ G. STANDING, *Why a basic income is necessary for a right to work*, in *Basic Income Studies*, 2013, Vol. 7 n. 2, 19–40.

needed to remedy the failure of the market to create enough jobs to eliminate involuntary employment»⁽¹⁵⁾.

The goal of an employment guarantee is to ensure that everyone who wants paid employment is able to obtain it; there is no necessary imposition of a duty to work. That said, it is also true that in the absence of minimum income support, people may have little choice. There is therefore an inherent danger in seeing these two instruments as representing a binary choice, rather than looking at how they may be synergistically designed as part of an integrated anti--- poverty strategy that recognises the multi-dimensional nature of poverty and that does indeed enhance choices.

Ensuring income security is a vital starting point. But few people aspire to satisfy only their basic needs. If market opportunities for economic participation and advancement are limited, if the returns from self-employment are poor and if access to labour markets is highly constrained, then societies need alternatives that allow people to improve their conditions of life as well as benefit from the non-income impacts of economic participation.

Rather than being stuck in a paradigm of binary, competing models, there is a need therefore to look at how the right to income and the right to work can be addressed in synergistic and complementary ways, that allow people to combine these options as their needs change, in ways that enhance and diversify their pathways into social and economic inclusion.

3.6. PEPs, ALMPS and support to transitions

In the future, assuming that the kinds of jobs that are displaced are indeed replaced with new ones, the most desirable transition cycle is one in which workers move straight from job-loss into relevant training, from where they transition directly into a new work

⁽¹⁵⁾ P. HARVEY, *The Right to Work and Basic Income Guarantees: Competing or Complementary Goals?*, in *Rutgers Journal of Law & Urban Policy*, 2005, Vol. 2 n. 1, 8-59.

opportunity. Under these circumstances, there is no role for PEPs. Yet the track record of re-training programmes is not always good and even where transitions are achieved, it is likely that in many instances, there will be a time-gap between job loss and the start of appropriate training, and between the conclusion of such training and securing a new job. PEPs can provide a transitional form of activation in such contexts that keeps people in the labour market during these gaps. This can pre-empt the on-set of the negative social impacts and societal costs of unemployment. It also maintains work habits and capabilities, offsetting the erosion of these associated with long-term unemployment and means that people are work-ready when work opportunities arise. For those who have never worked before, it builds these capabilities in a context in which work experience is often an important factor influencing employer hiring strategies.

The scale at which PEP participants can transition out of the PEP into other opportunities largely depends on the scale of labour demand in the wider economy. But it also depends on targeting strategy in the PEP. If priority is given to the most vulnerable or the long-term unemployed, then these participants are likely to find it harder to exit the programme than someone unemployed for a short time. And while this is often the policy, this is rarely taken into consideration when the success of PEPs in graduating participants is compared to ALMPs, which may have been targeting people closer to the labour market in the first place.

The role of a PEP is also likely to change over the life-cycle of a crisis. If PEPs can go to scale quickly, they provide a form of activation that can limit the decline of work skills and of productivity in the economy. They can provide a transition from social assistance into more regular work, enabling labour market re-integration. As recovery begins, the interface with other ALMPS becomes increasingly relevant. If, however, long-term unemployment sets in before the PEP begins, then their focus is on *rebuilding* work readiness.

It should also be noted that in contexts of deep structural unemployment or underemployment, there may be no crisis-related cycle. The role of PEPs may be to make an ongoing contribution to

livelihoods that complements other activities, potentially also de-risking engagement in income generating activity.

3.7. PEPs and the Climate Agenda

The transition to a lower carbon economy and also the impacts of climate change are expected to destroy jobs, but there is also an expectation of significant job creation from “green jobs” associated with both. While most jobs in relation to adaptation are expected to be in the private sector, many aspects of mitigation require public investment in the environment as a public good, with the mobilisation of different forms of delivery. While some lend themselves to national programmes, others would form part of locally-driven environmental action and adaptation plans. Some of these would be mainstreamed into the public service; others lend themselves to delivery through PEPs, which already play this role. The need is, however, only likely to grow.

This includes a wide range of activities, including fire prevention, land restoration, removal of invasive alien species, reforestation, river catchment rehabilitation, coastal protection, building of flood barriers, mangrove restoration, dyke maintenance, greening initiatives and much more. Often, the work required is labour intensive and infrastructural by nature.

The developing world is expected to suffer most from job losses related to technological change, climate change and conflict. Unskilled workers will be most affected, with local prospects for skills transitions likely to be limited. The adaptation agenda provides a crucial opportunity to create PEP jobs at scale, to off-set the significantly negative social impacts of such job loss.

3.8. Displacement, conflict and peace-building

Conflict, climate change and natural disasters may lead to ever-higher numbers of displaced people. PEPs can provide such people with income security as well as with structure, access to new networks, social interaction and application of their skills, which can off-- set

psychological stress and promote social inclusion – all part of peace-building also. The work undertaken can focus on meeting some of the immediate social and infrastructural needs of such groups – or contributing to these in the wider society.

The role of PEPs in relation to peace-building is under-researched. However, a recent study into seven communities in South Africa has explored the role of the Community Work Programme (CWP) in building peace locally – even though this is not an explicit aim of the programme. This research was triggered by prior research into outbreaks of xenophobic violence that had wracked communities in Gauteng in 2008, that sought to understand why one community in particular – a small largely-informal settlement called Bokfontein - had managed to avoid this form of violence. The community attributed this to the community-building processes associated with the advent of the CWP, which was identified as “a turning point” that had brought peace and stability (¹⁶). While the seven communities since researched all had different histories, the CWP was found to have contributed to community safety in all of them:

A notable innovation of the CWP is the way that it has bridged competing demands for addressing basic income needs with immediate safety concerns, presenting them as inextricably linked and mutually reinforcing. Rooting the programme in two essential livelihood demands of local communities (employment and safety) provides a critical opportunity to strengthen local initiatives (¹⁷).

According to Van der Merwe & Langa, *The CWP could be viewed as a new peace architecture in the making*. They argue that this is because, *inter alia*, it operates in all municipalities in the country, it prioritises local concerns and can do so in community driven ways, it responds to concerns of violence in a way that addresses both the immediate and

(¹⁶) M. LANGA, K. VON HOLDT, Insurgent citizenship, class formation and the dual nature of a community protest: a case study of “Kungcatsha”, in M. DAWSON, L. SINWEL (eds), *Contesting Transformation: Popular Resistance in Twenty-First-Century South Africa*, Pluto Press, 2012, 80-100.

(¹⁷) H. VAN DER MERWE, M. LANGA, *South Africa’s Community Work Programme: Local Peacebuilding Innovation within a National Development Architecture*, in *Journal of Peacebuilding and Development*, vol 14 n. 1, 49-62

underlying causes, it draws participants from diverse sections of the community into joint activities and is able to build linkages between residents and state agencies that are often seen as remote and unresponsive⁽¹⁸⁾.

PEPs are also being used in support of refugees. For example, the ILO in partnership with KfW has supported programmes for Syrian refugees and their host communities in Jordan, Lebanon, Turkey and Egypt. In these programmes, refugee men and women work side by side with people from their host communities. This requires partnerships with the relevant governments to enable access to work permits for refugees. The aim is to support governments to create immediate job opportunities and to improve local infrastructure and the environment. This has included a range of activities including strengthening water catchment, terracing, rural road construction, classroom construction and more. The interventions are fully aligned with the United Nations Regional Refugee Response and Resilience Plan for Syria and its decent work agenda.

In Greece, public employment programmes have been used to employ local people to address the urgent needs of refugees passing through the country.

What scope is there for innovation in the use of PEPs to support the needs of refugees – and to address the challenges faced in host communities? This creates key design choices, over the mix of employment opportunities for refugees and locals – and over the nature of public goods and services prioritised. To what extent does the work undertaken prioritise the needs of refugees – or involve refugees in contributing to the wider public good in host communities? In what ways can such programmes be designed to promote social inclusion, as well as pathways into other forms of employment – or entrepreneurship – that optimise the skills contribution many refugees can make?

⁽¹⁸⁾ Ibidem.

3.9. New forms of work from a more diverse skills base

PEPs have traditionally targeted unskilled work. In the future, with a more educated demographic and many jobs lost from the “missing middle”, there will be a need to think differently about the scope of work that is possible and on offer. The opportunities in this regard were illustrated by the experience of Kinofelis, the Greek public employment programme.

In Greece, not only unskilled workers were affected by the crisis. This created an opportunity to broaden the scope of work undertaken. The following projects were initiated by municipalities:

- Psychologists providing counseling to people in stressed and depressed communities
- Integration of the Roma into the education system, coupled with health visits and an information campaign
- Archaeologists, historians and computer scientists created an interactive local history programme, attracting many viewers
- Physiotherapists provided services to the elderly in poor neighbourhood
- Environmental scientists gave lectures at schools
- Translation of local tourism guides
- Extension of cycling and walking trails on some islands
- Digitisation of archives
- Support to municipalities to cope with the refugee crisis
- Veterinarians neutering stray animals
- Support to community and mobile libraries ⁽¹⁹⁾

There are also new forms of digital and platform-based public services to which PEPs could contribute. These are particularly attractive to youth and create skills in areas of relatively high labour demand. For example:

- Tablet-based local economic and social surveys.

⁽¹⁹⁾ ILO, *Getting Back to Work: A Study of the Social Impacts of Kinofelis*, ILO, Geneva, 2018, https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_623960.pdf (Accessed 2 April 2020)

- Geo-coding public services and facilities
- Assisting the public to access and use internet-based public services
- Local social histories and the creation of associated media products.

Through this process, PEPs can also support exploration of a number of critical questions regarding the future of work. How might the involvement of stakeholders, including the unemployed themselves, results in an ever-wider range of work that has social value? How might a wider lens on what constitutes “useful work” open opportunities for new forms of work in the public interest? What are the auxiliary services which PEPs can provide to complement those provide through the normal civil service? What shifts might there be in how work is valued – and what work is valued? Will certain forms of work that can be automated be valued less; and might forms of work that cannot be automated and that are in the public interest be valued more?

3.10. Support to livelihoods and social enterprise

In contexts of deep structural unemployment or underemployment, PEPs may need to make an ongoing contribution to livelihoods that complements other activities, potentially also de-risking engagement in income generating or enterprise activity. This role has been evident, for example, in South Africa’s Community Work Programme, where part-time work provides access to regular and predictable income and structure, while also enabling experimentation with enterprise activity. PEPs can also provide initial incubation for social enterprises, assisting in mitigating the early risks and providing a form of social capital investment.

3.11. Placemaking and (re)building the commons

The future of work will be socially disruptive with new forms of social isolation. In this context, new social instruments and institutions are needed to build civic capital, with new spaces, places and purposes needed to bring people together. Without this, there is a risk that the future of work erodes networks, reciprocity, solidarity and social

cohesion, enabling new forms of division, polarisation, individualism and inequality. This requires new forms of structured opportunity for engagement and new ways of building “the commons”. PEPs can provide a catalyst for this, able to operationalize and implement ideas that arise, with a quick turn-around from the generation of ideas to their implementation. This can assist in unlocking community agency. PEPs also unlock the social value of labour, illustrating that even where labour has no market value, it has – and it can create – social value.

4. Conclusions

Core to the future of work is the future of labour markets. In envisaging the future of work there is an opportunity to more intentionally shape these; to identify the levers able to give effect to global policies and to make full employment on decent terms a reality. That means using the full breadth of instruments that states have available to them; including acting as employer of last resort through direct investment in employment creation. As the phrase “last resort” makes explicit, every other instrument in the policy toolbox should be used, to enable market-based outcomes. But when their combined effects still fail to close the gap between the demand and supply of labour, there should be no hesitation in stepping in as employer of last resort – in a context in which “last resort” does not mean “least priority”, but rather “leave no one behind”.

Nor, actually, is there a need to wait in this regard. There are no societies in which the demand and supply of labour are in a happy equilibrium. Even where employment levels are ostensibly at “full employment”, such as in the USA right now, this is a function of averages. It masks underemployment, precarious work, working poverty and spatial, racial and gender inequalities in employment outcomes. These are the things that markets, left to their own devices, do not solve. So this is where the role of the state comes in: protecting society from what the ILO’s Global Commission on the Future of Work calls “the inherent vicissitudes of the market”. Employment guarantees and forms of public employment are development tools with which involuntary unemployment and working poverty can be addressed.

Instead of keeping these in the back pocket in case of emergency – at which point they tend to be rolled out hurriedly with sub-optimal outcomes – let such approaches rather be institutionalised as an ongoing part of the employment landscape; providing employment on a counter-cyclical but predictable basis, that can be scaled up rapidly if and when the need arises. This also provides a context for experimentation. In relation to employment guarantees, concerns are often expressed that there will be insufficient work to absorb everyone, with inefficient forms of make-work as a consequence. Arguably, such concerns show a lack of imagination about the scale and range of forms of public value that such an instrument could create, with the range of options arising from a community brainstorm on placemaking in above illustrating the range and scope that is possible. Critical to avoiding the make-work scenario is, however, also sufficient investment in tools, materials and quality management – with training a desirable add-on also.

Minimum income policies and PEPs are both social instruments through which markets can be shaped – and through which the primacy of markets in shaping people’s lives can be tempered. Using them is a political choice about the role of the state in shaping such markets and about the social construction of labour markets on terms that limit its commoditisation. In the process, desperation can be taken off the table and alternatives to working poverty provided.

At the same time, the social value of labour can be unlocked: utilising labour for the social good, rather than having its use and its value so closely tied to market demand – and all too often under-utilised in the absence of such demand. This has the further advantage of at least partly de-linking the need for employment creation to the requirement for economic growth, in a context in which perpetual growth is not sustainable as part of more environmentally-sustainable economic systems needed in the future.

If the future of work entails new forms of value creation, it will also require new forms of distribution for the value so created. While a failure to grapple effectively with this challenge is already exacerbating inequality, the opportunity exists for new models of value distribution to emerge. This cannot look only at enabling the consumption side of

the equation, but needs also to include new mechanisms for creating public value. Forms of public employment – with the state as employer of last resort – are a key instrument in relation to this goal.

While employment guarantees provide the most systemic-level response to the challenges outlined, more limited forms of public employment can also play a role, with their scale and degree of universality informing the extent to which systemic impacts can be achieved. The point, however, is to start experimenting and testing improved approaches; taking on the critiques of the past and innovating to adapt this versatile policy instrument to the challenges of the future, giving serious consideration to design, institutional arrangements, and long-term resourcing commitments, as well as to more rigorous evaluations of the full range of PEP impacts. This experimentation needs to include the scope for synergy and complementarity between PEPs and minimum income policies.

The bottom line is that employment matters too much to societies to leave to markets alone. There is therefore a need to ensure that minimum levels of income security are complemented by pathways to participation in work, with the state acting as employer of last resort to ensure this outcome – with this an essential feature of the new social contract, and a necessary condition for meeting commitments to full employment in a context of significant change in the world of work.

Abstract

Employment Matters Too Much to Society to Leave to Markets Alone

Purpose: To explore the role of Public Employment Programmes, including job guarantees, in reshaping labour markets and creating new forms of public value as part of the future of work. **Methodology:** Literature review coupled with lessons from development implementation as a basis to reflect on policy implications **Findings:** PEPs are a versatile development instrument that can be used to contribute to full employment, to shape labour markets in ways that promote decent work and to create new forms of public value. **Research limitations/implications:** There is a need for increased research on the qualitative outcomes of PEPs and Jobs Guarantees **Originality:** There is limited in-depth literature exploring the role of public employment as part of the future of work.

Keywords: *Public Employment Programmes, Job Guarantees, Future of Work, Public Works Programmes, Employer of Last Resort.*

L'occupazione è troppo importante per la società per affidarla solo al mercato

Obiettivi: *Esplorare il ruolo dei programmi di creazione diretta dell'occupazione nel settore pubblico, inclusi quelli di job guarantees, nella trasformazione dei mercati del lavoro e nella creazione di nuovi valori comuni per il futuro del lavoro. Metodologia:* *Literature review associata a considerazioni sugli sviluppi delle esperienze realizzate come base per riflettere sulle implicazioni di policy. Risultati:* *I programmi di creazione diretta dell'occupazione nel settore pubblico sono uno strumento di sviluppo versatile che può essere utilizzato per contribuire all'obiettivo della piena occupazione, e per trasformare i mercati del lavoro in modo da promuovere il lavoro decente e promuovere valori comuni. Limiti e implicazioni:* *Emerge il bisogno di nuove indagini qualitative per esplorare i risultati dei programmi di creazione diretta dell'occupazione nel settore pubblico e di job guarantees. Originalità:* *Pochi contributi letteratura analizzano in profondità il ruolo di questi programmi come parte del futuro del lavoro.*

Parole chiave: *dei programmi di creazione diretta dell'occupazione nel settore pubblico, job guarantees, futuro del lavoro, datore di lavoro di ultima istanza.*

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