

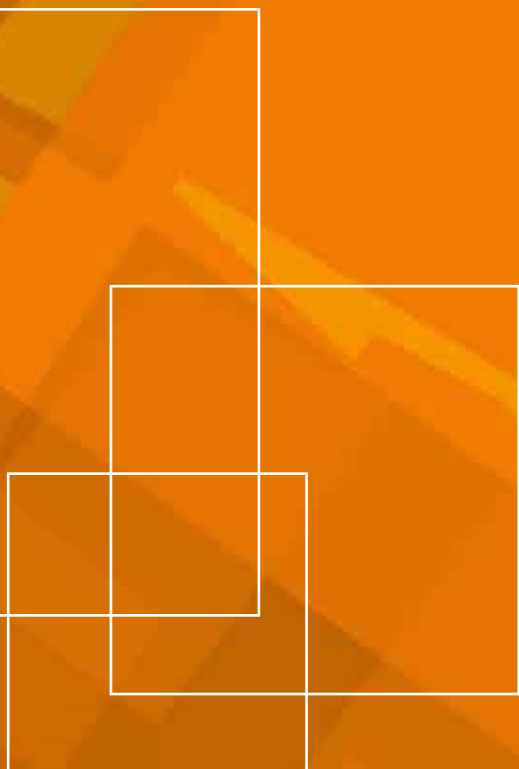


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Labour inspection and employment relationship

Renato Bignami, Giuseppe Casale, Mario Fasani



**Labour Administration and Inspection Programme
LAB/ADMIN**

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Renato Bignami, Giuseppe Casale, Mario Fasani

International Labour Organization – Geneva

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Preface

The protection of the employment relationship, placed within the contract of employment, has been at the heart of the International Labour Organization's agenda since the middle of the 1990's. The employment relationship is the natural evolution of what previously represented the master-and-servant model. The employment relationship within the contract model operates as a framework for both the protection of workers and the guaranteeing of the exercise of fundamental rights at work.

The Industrial Revolution laid the ground for the progress of the labour law doctrine in the sense that new inventions increased productivity, and modified the equilibrium of power within the workplace. This scenario provided many opportunities for new law regulations, aimed to protect workers from the asymmetry of power relations. In this context, labour inspectorates were created to guarantee the enforcement of labour legislation, rules and regulations.

Today, the globalization phenomenon has changed the world of work establishing innovative organizational systems of doing business. As a result, new forms of employment relationship have emerged. The concern among scholars and practitioners on the determination of criteria for the employment relationship is a key element of this new scenario. The strengthening of labour administrations and inspections in many countries goes hand in hand with the enforcement of the rights established within the employment relationship framework.

This paper aims at analyzing the connections between the employment relationship and the role of labour inspection as a governance tool to protect workers' rights.

I would like to thank Renato Bignami, Senior Labour Inspector of the Brazilian Labour Inspectorate, and Mario Fasani, Labour Administration and Inspection Officer at the ILO.

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1. Introduction

The employment relationship has been on the main International Labour Organization (ILO) considerations since at least 1997,¹ when a general discussion about the work contract took place on the agenda of the 85th International Labour Conference (ILC). Following that examination, a proposed Convention and a draft Recommendation concerning contract labour were prepared and released² by the International Labour Office to the governments of Member States within the frame of a report containing general aspects on the subject.³

During the 86th ILC, in 1998, the labour contract committee had several meetings in order to agree on aspects related to subordinate or dependant work. These meetings led to a resolution that basically recommended the Governing Body “to place these issues on the agenda of a future session of the ILC with a view to the possible adoption of a Convention supplemented by a Recommendation if such adoption is, according to the normal procedures, considered necessary by that Conference.”⁴ In addition to that, the resolution pointed out that a meeting of experts should take place in order to examine which workers were in need of protection, appropriate ways in which they could be protected, and how they could be defined, bearing in mind the different legal systems and languages that exist between countries.

By the year 2000, the tripartite meeting of experts in contract labour had occurred and despite many difficulties represented by linguistic, conceptual and definitional complexities of the subject, some premises were set up for the starting discussion.⁵ These premises were mainly connected to the facts that concealed or disguised employment relationships, excluded workers from protection and were increasingly verified at the workplace.

The challenge of redirecting the meaning of legislation and refocusing employment relationships is a fundamental mission of the ILO in these changing times. The concern over the growing unprotected labour market represented by many forms of work insecurity took place in many other debates. In the 90th ILC Session, in 2002, a further discussion about the extent of decent work provisions was set. As a result, a resolution concerning the informal market was published following broader discussions related to promoting decent

¹ Since the 1950s, the ILO has been demanded, especially by workers, to take appropriate action in order to correctly protect the employment relationship. See the Meeting of Experts on Workers in Situations Needing Protection (The employment relationship: Scope). Basic technical document, ILO, Geneva, 2000 (MEWNP/2000).

² ILO: *Contract Labour*, Report V(1), International Labour Conference, 86th Session, Geneva, 1998. See <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/rep-v.htm>.

³ ILO: *Contract Labour*, Report V(2A), International Labour Conference, 86th Session (Geneva, 1998). See <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/rep-v2a.htm>.

⁴ ILO: Resolution concerning the possible adoption of international instruments for the protection of workers in the situations identified by the Committee on Contract Labour, 86th Session, Geneva, 1998.

⁵ Meeting of Experts on Workers in Situations Needing Protection (The employment relationship: Scope). Basic technical document. ILO, Geneva, 2000 (MEWNP/2000).

work for all workers, regardless of their status. The resolution⁶ concluded that “the term informal economy refers to all economic activities by workers and economic units that are –in law or in practice– not covered or insufficiently covered by formal arrangements” and indicated that further action should take place in the Constituents, in order to properly address the decent work deficit represented by these forms of work insecurity. There are some similar terms used to express similar situations such as “work in the black market”, ‘informal market’, ‘undeclared work’, ‘non-declared work’, ‘illegal work’, ‘irregular work’, ‘underground work’, ‘clandestine work’ and other forms of terminology always related to unprotected work, but an important conclusion arises from this terminology variety: the labour administration approach varies according to the cultural role played by different nomenclatures.⁷

Following the meeting of experts in 2000, there were a series of debates and researches aimed at addressing the scope of the employment relationship. These happened during the 91st ILC Session, in 2003. One of the main conclusions achieved is related to the universal notion of employment relationship as “a legal link between a person, called the ‘employee’ (frequently referred to as ‘the worker’) with another person, called the ‘employer’, to whom she or he provides labour or services under certain conditions in return for remuneration.”⁸ Likewise, the notion of dependent work, as opposed to autonomous, independent, own-account or self-employed, should be the mainframe for any discussion regarding the employment relationship. Accordingly, dependent workers were facing an increasing lack of protection by reasons of one or a combination of these factors:⁹

- The scope of the law is too narrow or it is too narrowly interpreted;
- The law is poorly or ambiguously formulated so that its scope is unclear;
- The employment relationship is disguised;
- The relationship is objectively ambiguous, giving rise to doubt as to whether or not an employment relationship really exists;
- The employment relationship clearly exists but it is not clear who the employer is, what rights the worker has and who is responsible for them; and
- Lack of compliance and enforcement.

During the 91st ILC Session a general discussion took place within the tripartite Committee on the Employment Relationship, resulting in remarkable conclusions and outcomes. There was more consideration about the general causes and consequences of the lack of protection, the specific reasons why this protection is lacking, and how there should be appropriate action in order to develop and foster qualified labour administration and

⁶ Resolution concerning decent work and the informal economy.

See: <http://www.ilo.org/public/english/standards/reim/ilc/ilc90/pdf/pr-25res.pdf>.

⁷ J.L. Daza: “*Informal economy, undeclared work and labour administration*”, Paper No. 9 (Geneva, ILO, Social Dialogue, Labour Law and Labour Administration Branch, 2005), pp. 1-15.

⁸ ILO: *The scope of the employment relationship*, Fifth item of the agenda, Report V, International Labour Conference, 91st Session, Geneva, 2003, p. 2.

⁹ *Ibid*, p. 2.

labour inspection systems.¹⁰ For that specific matter, the Committee on the Employment Relationship pointed out that enforcement and compliance should take core relevance in the protection framework of the employment relationship and that “labour administrations and their services have a crucial role to play in monitoring the application of the law, collecting reliable data on labour market trends and changing work and employment patterns and combating disguised employment relationships.”¹¹ In addition to that, it was stated that ILO has a significant role to play in this matter and that “the Office should strengthen its assistance to national labour administrations, and in particular to labour inspectorates,” considering that compliance and enforcement are critical aspects of this question.¹² As a final result, the Conference noted that a Recommendation should be a correct international response in order to address these issues related to the employment relationship.

In the course of the 95th Session in 2006, the discussions about the employment relationship took place again with a proposed recommendation. At that time the employment relationship was definitively outlined by the constituents as the “legal notion widely used in countries around the world to refer to the relationship between a person called an employee (frequently referred to as a worker) and an employer for whom the employee performs work under certain conditions in return for remuneration.”¹³ Further, it was also clearly undertaken that ambiguous, disguised or triangular relationships¹⁴ should be appropriately tackled by the ILO,¹⁵ and that the principle of primacy of facts should play a definitive role on the determination of the employment relationship.¹⁶ Moreover, it was well-defined that enforcement should be one of the key points with which to provide protection in the workplace.¹⁷

The adoption of Recommendation No. 198, in 2006, together with the resolution that followed it, represented the first internationally based approach devoted to the employment relationship to be addressed to the constituents. It is notably the result of a great social dialogue effort and contributes to maintain the debate on the employment relationship, as

¹⁰ ILO: *Provision record* N. 21, Fifth item on the agenda, *The scope of the employment relationship* (general discussion), International Labour Conference 91st Session, Geneva, International Labour Office, 2003, pp. 9-14.

¹¹ *Ibid*, p. 54.

¹² *Ibid*, p. 56.

¹³ ILO: *The employment relationship*, Fifth item on the agenda, Report V(1), International Labour Office, 2005, p. 3.

¹⁴ There was some disagreement on what exactly should be addressed by the recommendation, in regard to triangular relationships. Some considerations were taken in the sense of the complete exclusion of the topic from the scope of discussions. There was a concern over the real threat of great potential to commercial agreements represented by the establishment of a general assumption of the existence of an employment relationship in triangular schemes. See International Labour Office, *Provision record*, No. 21, Fifth item on the agenda, *The scope of the employment relationship* (general discussion), International Labour Conference, 91st Session, Geneva, 2003, p. 72.

¹⁵ ILO: *The employment relationship*, Fifth item on the agenda, Report V(1), International Labour Office, 2005, pp. 11-14.

¹⁶ *Ibid*, pp. 7-8.

¹⁷ *Ibid*, pp. 16-17.

its core issue, the role of labour administration and labour inspection within a brand new globalized world, and the future pathways for labour law.

In addition to this fundamental process and also as a general outcome of it, labour inspectorates and labour administrations are once again being increasingly recognized as key instruments in achieving decent work conditions through a broader protection for all workers. Indeed, labour inspectorates were at the edge of creation of modern labour administration systems¹⁸ and from the very beginning were focused on translating the workplace's reality of facts into technical and comprehensive documents capable of describing the details of the real employment relationship and prescribing remedies as well as commands to improve the working conditions.¹⁹

Historically labour inspectorates were specially created to guarantee that the provisions of the then-recently developed labour law were obeyed.²⁰ Labour law enforcement has truly been one of the main labour inspectorates' duties²¹ since the very outset and labour inspectors have been the most adequate and sensitive officials to bridge an abstract labour regulation and the reality of facts shown by the workplace. Indeed, the urge for a labour oriented public controlling institution is at the essence of labour inspectorates and labour administration, as the reality at the workplace has been so many times a dramatic counterpoint to the provisions stated by the law.

Yet, as new forms of work arise and competition among enterprises is established at an unprecedented rate, many challenges and opportunities emerge. Labour inspectorates are the first line of discipline since the creation of the ILO²² and have been reintroduced from time to time as the main tool for good governance in any changing society. The claim for sound labour administration and inspection systems specifically regarding the protection of the employment relationship in the context of globalization is currently one of the main ILO concerns. It is duly stated by the ILO Declaration on Social Justice for a Fair Globalization, adopted by the ILC at its 97th session, in 2008, as a main contribution for the debate over the globalization and its impacts on the labour market. Moreover, the

¹⁸ The 1833 Factory Act, in England, also known as Lord Althorp's Act, and named after its main supporter, was the first regulation to intervene in the private labour relationship between an employer and an employee by creating a system of public labour inspection with powers to enter the workplace and impose fines.

¹⁹ Reports on working conditions provided by the first labour inspectors, during the XIX Century, illustrated the reality of the workplace and helped to redirect national policies towards the correct intervention and governance. See: Horner, Leonard; Howell, T. Jones; Kincaid, Captain; Saunders, R. J. *Reports of the inspectors of factories to her majesty's principal secretary of state for the home department, for the half-year ending 30 April 1851*. Presented to both houses of parliament by command of her majesty. London: W. Clowes & Sons, 1851.

²⁰ G. O. Price: *Administrations of labor laws and factory inspection in certain European countries*. Bulletin of the United States bureau of labor statistics. Whole number 142. Foreign Labour laws series: n. 1. Washington: Government Printing Office, 1914, p. 36.

²¹ The main missions destined to Labour Inspectorates are: 1) To secure the enforcement of the legal provisions in relation to the working conditions and the protection of the worker while engaged in work; 2) To supply technical information and advice to employers and workers concerning the most effective means of complying with the legal provisions; and, 3) To bring to the attention of the competent authority defects or abuses not specifically covered by existing legal provisions. See Convention 81, Art. 3.1, and Convention 129, Art. 6.1.

²² Treaty of Versailles. Art. 427. Ninth. Each State should make provision for a system of inspection in which women should take part, in order to ensure the enforcement of the laws and regulations for the protection of the employed.

international context represented by the threat of massive job losses starting in 2008, points out that labour inspectorates and labour administrations are more than ever necessary for the governance of labour markets. In such context, the ILO has a major role to play on strengthening these services, as provided by the ILO Global Jobs Pact, an initiative aimed at supporting the constituents towards a productive economic recovery based on investments, employment and social protection.

In April 2009, the creation of the Labour Administration and Inspection Programme (LAB/ADMIN) reassured the ILO commitment to address a renewed prospect for strengthening national labour administration and inspection systems. Ever since, LAB/ADMIN has been pursuing technical assistance and cooperation programmes to support ILO constituents with the best resources, based on several projects, events, meetings, best practices exchanges, publications and instructional material.²³

In the course of the 100th ILC, held in 2011, an item on labour administration and labour inspection was on the agenda, suggested by the Governing Body, during its 308th Session, in June 2010. The resolution concerning labour administration and labour inspection recognizes that these institutions are essential to achieve the decent work objectives through good governance at the service of ILO constituents. In addition to that, the resolution establishes a series of conclusions to the Office in order to properly strengthen the labour administration and labour inspectorates.²⁴ From those conclusions the following recommendation is one of the most relevant, regarding the labour inspectorate's activities in the frame of the employment relationship:

- Carry out researches and provide advisory services, linked to the wider knowledge management strategy of the ILO, in those selected areas of interest to labour administration and inspection and social partners as identified in the report of the Committee on Labour Administration of the 100th Session of the International Labour Conference, including:
 - Research on the use of government procurement in advancing compliance with labour standards;
 - Research around the challenges for effective labour inspection posed by increased outsourcing, subcontracting, disguised and triangular employment relationships and the means or methods to extend and enforce legislation to all workers in an employment relationship;
 - Research and evaluation of training methodology as well as training content to ensure that it addresses the labour administration and inspectorates' needs and objectives; and
 - Research on the risks and practices of the interface between labour administration and migration regulatory frameworks.

In this context researches on the impact of globalization on labour administration and labour inspection are definitive and must be undertaken in order to correctly address these

²³ For a complete assessment of the LAB/ADMIN assets, see: <http://www.ilo.org/labadmin/lang-en/index.htm>

²⁴ ILO, November 2011, *Resolution and Conclusions on labour administration and labour inspection*, International Labour Conference, 100th Session, Geneva, 2011. See: http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/meetingdocument/wcms_167749.pdf

matters. Additionally the potential resulting benefits from a good practices exchange approach points out to further studies on how labour inspectorates are dealing with the rising phenomenon of new forms of employment and the informal market. Fundamental rights at work are the main concept shaped to direct labour administration and labour inspection's activities within a globalized world.

2. Labour administration and labour inspection in a globalized world: a room for fundamental rights at work

Globalization, characterized by “the diffusion of new technologies, the flow of ideas, the exchange of goods and services, the increase in capital and financial flows, the internationalization of business and business processes and dialogue as well as the movement of persons, especially working women and men,”²⁵ is changing the way people and nations interact with each other, and is revolutionizing labour law in an unprecedented way.²⁶ If in the early nineteenth century there was a fertile ground for the birth of labour law, due to abuses committed under the *laissez-faire* doctrine, especially with excessive working hours, the employment of children and abused women to harmful safety and health conditions, in the beginning of this century much has changed. Economic globalization and the creation of new technologies, replacing labour with more productive machines, are demobilizing the unions as well as moving governments in order to avoid rising unemployment by enabling deep changes in labour law.²⁷ Such changes occur in many aspects of individual employment contracts, thrusting the traditional bilateral agreements into more flexible arrangements. That leads to a state of proliferation of more precarious contractual forms, with fixed, short-term, part-time, triangular and temporary being used more commonly and frequently than ever,²⁸ increasing the precariousness of work and shifting the risks and responsibilities from the employers to the workers.²⁹ The political changes that have occurred globally in the last 20 years are self-explanatory in their search for the State capacity of answering to new challenges in labour matters. Paradoxically, the well-studied decline of the Welfare State points to a nation oriented solution.³⁰

In addition, the boundaries between autonomous and subordinate work are less clear and more complex. Teleworking, telecommuting, home office, and an increasing mobility of labour, especially among those more specialized and technical professions, are at large influencing this transformation. For instance, there are classic examples of software factories developed at a distance, in India, to clients in Silicon Valley (USA). Other

²⁵ (2008) ILO Declaration on Social Justice for a Fair Globalization.
See: http://www.ilo.org/global/meetings-and-events/campaigns/voices-on-social-justice/WCMS_099766/lang--en/index.htm

²⁶ U. Romagnoli: *Il diritto del lavoro nell'età della globalizzazione*, in *Lavoro e diritto*, Anno XVII, N. 4, Bologna, Società Editrice Il Mulino, 2003, p. 573.

²⁷ T. Treu, *Compiti e strumenti delle relazioni industriali nel mercato globale*, in: *Lavoro e diritto*, Anno XIII, N. 2, Bologna, Il Mulino, 1999, pp. 191-208.

²⁸ N. Mannrich, *A modernização do contrato de trabalho*, São Paulo, LTr, 1998, p. 220.

²⁹ ILO: *From precarious work to decent work, Policies and regulations to combat precarious employment*. Geneva, International Labour organization, 2011. p 5.

³⁰ J. Habermas: *Tiempo de transiciones*, Madrid: Editorial Trotta, 2004, p. 101.

examples could be added and they all signify a change in the way national legislation and States should tackle the issue. Consequently, labour law adapts, modifying and reshaping its principles, and the fundamental rights at work become a ground onto which to fix the rules for a brand new globalized world, for all types of work, whether subordinate or not.³¹

At the international level, there is an increasing consciousness that market economies only work correctly if there are labour rights, albeit at minimum, to ensure human progress and social justice.³² The principles and rights contained in the 1998 ILO Declaration on Fundamental Principles and Rights at Work should be respected regardless of the ratification of these conventions³³ by Member States of the ILO. Because of its fundamental nature, and as a result of a freely jointed membership to the ILO, Member States adhere to principles and rights contained in the Declaration. These principles are coincident with the ILO Constitution and the Declaration of Philadelphia.

Therefore labour administrations and labour inspectorates have the opportunity to tackle the laborious question of atypical work, with special aim at enhancing the protection of all vulnerable workers. Labour inspectorates can adequately reach the essence of their mission in view of the fundamental rights at work and aiming at the broader protection provided by the employment relationship legal framework. Moreover, regardless of the multiple aspects of globalization,³⁴ labour administration is engaged in providing the society with the best standards of good labour market governance through the enforcement of labour regulation.

3. New employment relationship features and the international regulation

Globalization and the subsequent rise in competition between companies, new technologies and the increase of productivity, the decline of the Welfare State, these are all factors that have changed in the basic premises of the labour law foundation. The current crisis seems to reach a never before attained level. Additionally, the economic constraint has roots in the historical and political discourse, armed with the neo-liberal critique.³⁵

One of the first consequences of the changes in these premises is the production model splitting in many pieces connected to each other in an eternal and sometimes endless chain of a civil contract nature. The production decentralization helped in giving

³¹ R. Blanpain, M. Colucci: *The globalization of labour standards. The soft law track*, The Hague, Kluwer Law International, 2004, p. 6.

³² K. Tapiola: *Empresas multinacionais e os desafios sociais do século XXI*, Geneva, Organização Internacional do Trabalho, 1999, p. 21.

³³ The ILO considers C. 87, and C. 98 (freedom of association and the effective recognition of the right to collective bargaining); C. 29, and C. 105 (elimination of all forms of forced or compulsory labour); C. 138, and C. 182 (effective abolition of child labour); C. 100, and C. 111 (elimination of discrimination in respect of employment and occupation), as the fundamental conventions in regard to the Declaration.

³⁴ ILO: *A fair globalization: Creating opportunities for all*, Report of the World Commission on the Social Dimension of Globalization, Geneva, 2004, p. 24.
See: <http://www.ilo.org/public/english/wcsdg/docs/report.pdf>.

³⁵ R. Del Punta: Il diritto del lavoro tra valori e storicità, in *Lavoro e diritto*, N. 3/2002, Bologna, Società Editrice il Mulino, 2002, p. 350.

life to this new paradigm of the so-called business-networking enterprise.³⁶ This fractioning of the employment contract is enabling an entire rethinking of the traditional contractual typology and is largely responsible for major changes in the premises of the labour law foundation.

The tension between unity and fragmentation in the labour regulation has always been present since the creation of the labour law, but the crisis of the social democratic project gives rise to a crisis of its foundational values.³⁷ Neoliberalism as a result of the bankruptcy of the social democratic model, pleading for more *laissez-faire* within the employment relationship, eventually produced the greatest paradoxes of modernity. While proponents speak in modern times, demanding more autonomy within the work contract frameset, there is also a longing for a distant past in which the civil law regulated and determined the privacy of all citizens, without nuances or alternatives, in a bizarre bifurcation between reform and restoration.³⁸

Under a human resources and production management point of view, outsourced production is the main characteristic of modernity.³⁹ The implications for labour law are various. The business-networking company seems to change working class lives, causing a breakdown in the unitarian, subordinate, and dependant labour statute.⁴⁰

The detypification of the employment relationship, now split into several civil contracts and in many different non-standard types of employment arrangements, disrupts the uniformity of non-derogable normative protective values adjusted to work, and brings enormous challenges to jurists who attempt to assemble the puzzle formed by the current labour relations.⁴¹ Regulation at the ILO level works as an alternative to the *laissez-faire* and paves the road for a better protection of workers.

If, on the one hand, outsourcing seems to be one of the most attractive novelties under a business standpoint, on the other hand, this whole division of the production chain represents a risk of insecurity for the worker. Globalization increases the competitiveness among enterprises, forcing them to constantly search for specialized services. Both the increase of competition and the search for specialized services are the two major issues that surround the debate on outsourcing.

³⁶ F. Valdés Dal-Ré: *La descentralización productiva y la formación de un nuevo paradigma de empresa*, in Relaciones laborales. Revista crítica de teoría y práctica, N. 18, Septiembre 2001, Las Rozas (Madrid), La Ley-Actualidad, S.A., 2001, p. 6.

³⁷ R. Del Punta, *Op. Cit.* p. 351.

³⁸ *Ibid*, pp. 349-350.

³⁹ U. Romagnoli: Il patto per il lavoro: quale lavoro? in Lavoro e diritto, Ancora sul lavoro autonomo, Anno XI, N. 3, Bologna, Il mulino, 1997, pp. 459-464.

⁴⁰ F. Valdés Dal-Ré, E. Casas Baamonde: *Diversidad y precariedad de la contratación laboral en España*, in Relaciones laborales. Revista crítica de teoría y práctica, N. I. 1989, Las Rozas (Madrid), La Ley-Actualidad, S.A., 1989, p. 240.

⁴¹ R. Castel: *Les métamorphoses de la question sociale. Une chronique du salariat*, Paris, Editions Fayard, 1995, pp. 472-473.

The considerable business paradigm shift in the last two decades addresses the path to be taken. Traditionally, the ordinary organizational model could be explained by these three business management pillars:⁴²

- 1) Control of the entire goods and services production cycle (vertical integration);
- 2) Autonomy of each company in its relations with others;
- 3) Hierarchically oriented management.

In 15 years, this model has been replaced by another with structural features of opposite signs:⁴³

- a) Productive cycle fragmentation (horizontal integration);
- b) Dependency, coordination and articulation within the business-relationships;
- c) 'Functional autonomy' oriented management.

As a result of this huge change an extreme individualization of the labour dispute is observed resulting in demands for more freedom to the employment relationship. As another major outcome, the return to the discussion embodied in Roman law about the differences between the *locatio conductio operis* and the *locatio conductio operarum* is visibly threatening the workforce to be reduced once more to a mere commodity, to be bought and sold according only to the rules of the market.⁴⁴

The employment contract, as the maximum expression of the employment relationship, undergoes some changes in order to adapt to modern times.⁴⁵ Subordination and dependency features are overriding parameters that can still be clearly relied on to trace the framework of an employment relationship. The primacy of facts as a major principle and the labour inspectorates as leading organizations to enforce the labour regulation are the most significant facets of notable discussions about the employment relationship carried by the ILO Recommendation No. 198.

4. The ILO Recommendation No. 198

New forms of atypical work⁴⁶ are undoubtedly one of the greatest challenges of today's labour markets.⁴⁷ In addition to that, the enormous social costs of the informal

⁴² F. Valdés Dal-Ré, *Op. Cit.* p. 5.

⁴³ *Ibid*, p. 5.

⁴⁴ J. M. Galiana Moreno: *Crisis del contrato de trabajo*, in *Revista de derecho social*, N. 2, Abril-Junio 1998, Albacete, Ediciones Bomarzo, S.L., 1998, p. 48.

⁴⁵ A. Supiot: *Les notions de contrat de travail et de relation de travail en Europe*, Rapport pour la Commission des Communautés Européennes, Luxembourg, Office des publications officielles des Communautés Européennes, 1992, pp. 71-88.

⁴⁶ Here understood as any kind of contract of work which is not the traditional bilateral employment agreement, under permanent, full time and for a non-fixed term.

⁴⁷ S. Bertoldi: *Tipico-atipico: tendenze del mercato dei lavori*, in *Aggiornamenti sociali*, Anno 54, N. 4, Aprile 2003, Milano, San Fedele Edizioni, 2003, p. 297.

sector and undeclared work should be taken into account, particularly in the developing world but also increasingly in developed countries. Both atypical and informal arrangements are part of a vast scenario of job insecurity that ultimately differentiates those front-line workers with permanent employment contracts, salaries, vacations/holidays, bonuses, health and safety, social security and other benefits guaranteed by law and collective bargaining, from those second-class workers, with none or few rights. At the end, social cohesion is under risk and should be improved.⁴⁸

Non-standard contracts are related to unusual arrangements that could even affect the worker's personal life,⁴⁹ and there are indicators that many occupations are currently contracted under this kind of settlement.⁵⁰ The three basic elements of these non-standard agreements –flexible, precarious, and atypical work⁵¹– indicate that a modernization of the notion of juridical subordination should be considered.⁵² Within this typical and atypical employment relationship's concept, the formation of labour law doctrine was developed in the most innovative tradition: the independence from the civil law and the subsequent adoption by the State to protect not only the workers but their own labour energy.⁵³ The concept developed the notion that any work performed under the worker's subordination to someone economically stronger should be regarded as an employment contract protected by some minimum statutory rights, regardless of the way in which this contract is externalized.

The greatest asset provided by this legal construction resides precisely in the fact that labour law “does not protect the agreements as such, but the energy of human labour,”⁵⁴ enabling a great advance in social relations and prioritizing the reality of the facts rather than the merely contractual arrangements. Ever since, the reality of facts is attributed to be at the very essence of the employment relationship because reality cannot be denied simply by a declaration.⁵⁵ It is in the interest of any legal system to protect the real facts in the way in which these are expressed. It could be argued that a 1938 text no longer reflects current reality and needs, but this would be a misconception of the idea grounded on that notion. The 21st century represents a big challenge for governments and social agents who have to confront growing internationalized markets and outsourced production as a main pattern. Some wealthy and powerful corporation's budgets sometimes surpass the limits imposed by various countries, and their capillarity throughout the world normally operate without major obstacles, while labour law is entirely related to one nation's sovereignty and

⁴⁸ E. Casas Baamonde: *Las transformaciones del derecho del trabajo y el futuro del derecho del trabajo*, in F. Valdés Dal-Ré, A. Valdés Alonso (coord.): *El trabajo autónomo dependiente*, Madrid, Comunidad Autónoma de Madrid, Consejería de Trabajo, 2003, p. 98.

⁴⁹ U. Romagnoli: *Lettera aperta ai giuristi del lavoro*, in *Lavoro e diritto*, N. 3/2002, Bologna, Società Editrice il Mulino, 2002, p. 373.

⁵⁰ G. Altieri, C. Oteri: *Il lavoro atípico: tendenze e ruolo nell'occupazione italiana*, in *Rassegna sindacale*, Anno XLVI, N. 35, Roma, Stabilimento Grafico Editoriale, 2000, p. 15.

⁵¹ S. Bertoldi, *Op. Cit.* p. 297.

⁵² P. G. Allea: *I lavori atipici: pericolo od opportunità?* in *Revista giuridica del lavoro e della previdenza sociale*, Anno LI, N. 3, Roma, EDIESSE s.r.l., 2000, p. 515.

⁵³ J. M. Galiano Moreno, *Op. Cit.* p. 49.

⁵⁴ M. De La Cueva: *El nuevo derecho mexicano del trabajo*, 4^a edición, México, D.F., Editorial Porrúa, S.A., 1977, pp. 194-195

⁵⁵ *Ibid.* p. 195.

restricted to its boundaries. One approach to this reality is to foster soft regulation based on international standards and reflected in the international organizations recommendations, guidelines, codes of conduct, notices, reports, statements, instructions, programmes, and projects.⁵⁶ Some of these current expressions of law are not legally binding, however they represent an undeniable moral and ethical character,⁵⁷ as they are shaped by the social actors in a dynamic and broader democratic participation. Still concomitantly to this ideally democratic, modern and self-regulated world, there are extremely archaic and grotesque forms of servitude, as well as a huge grey area in which workers are trying to escape from being used as a mere commodity in a market oriented system.

The ILO Recommendation No. 198 of 2006, regarding the employment relationship, follows the current trend on setting international standards for global questions. It is inserted in a larger context with respect to decent work, and is a true manifestation of soft law indicating the paths that different Member States must gently follow to ensure the enforcement of labour protection. Its main objectives are:⁵⁸

- a) To solve uncertainties about the relationship;
- b) To ensure compliance and effective implementation of the employment relationship regulation;
- c) To combat disguised employment relationships that conceal their true legal status through contractual false forms named as autonomous; and,
- d) To provide guidance on the most effective ways to determine the existence of an employment relationship.

As reported before, this international labour law instrument is, in reality, the most recent and finished version and is related to a discussion started in the early 1990's, in the context of the ILO, which has already passed through debates about outsourced production, cooperative work, migration, telecommuting, child labour, undeclared work and triangular relationships.⁵⁹ Its great merit is to elevate the principle of the primacy of facts to the level of international labour standards, in its purest and most traditional version.⁶⁰ Here, a special role in protecting the workers and the enforcement of labour law is guaranteed by the labour inspectorates.⁶¹ This is the current international trend: the extension of fundamental rights and decent work for all workers, and the dedication of the labour inspection as a major governance institution.

The subject of employment relationship has been debated at the international level for a number of years. The issue of who is or is not in an employment relationship, and what

⁵⁶ F. Valdés Dal-Ré: *Soft law, derecho del trabajo y orden económico globalizado*, in Relaciones laborales. Revista crítica de teoría y práctica, N. 4, Febrero 2005, Las Rozas, Madrid, La Ley-Actualidad, S.A., 2005, p. 2.

⁵⁷ R. Blanpain, M. Colucci, *Op. cit.* p. 122.

⁵⁸ M. Rodríguez-Piñero: *La determinación de la relación de trabajo*, in Relaciones laborales. Revista crítica de teoría y práctica, N. 20, Octubre 2006, Las Rozas, Madrid, La Ley-Actualidad, S.A., 2006, p. 9.

⁵⁹ OIT: *El ámbito de la relación de trabajo*, Oficina Internacional del Trabajo, Ginebra, 2003, p. 5.

⁶⁰ ILO Recommendation No. 198, para. 9.

⁶¹ ILO Recommendation No. 198, para. 15-16.

rights and protections flow from that status, has become problematic in recent decades as a result of major changes in work organization and the adequacy of legal regulation in adapting to those changes. Such changes have accelerated due to the process of globalization, characterized by rapid economic integration among countries driven by the liberalization of trade, investment and capital flows, as well as rapid technological change.⁶²

The impacts of globalization are quite uneven in terms of the degree to which they benefit countries, enterprises and their workers. Globalization has frequently been preceded or accompanied by legislative and institutional reforms. The nature and pace of changes occurring in the world of work, and particularly in the labour markets, have given rise to new forms of the employment relationship which do not always fit within the traditional parameters. Patterns of employment are becoming more and more complex as the range and variety of work arrangements expand, leading to opportunities as well as risks. As a result, traditional concepts and certainties are being challenged. While these changes have increased labour market flexibility, they have also led to a growing number of workers whose employment status is unclear and who are consequently outside the scope of the protection normally associated with the employment relationship. Job security and the protection which has been built around the employment relationship are being affected. This can also adversely impact the competitiveness and viability of enterprises. These developments are on the increase worldwide and challenge the relevance of labour laws which for many countries have been an instrument for the orderly organization of the relationships between major labour market players, i.e. employers and workers.

A major feature of the employment relationship, one that can be found in different countries and legal traditions, is the hierarchical power of employers over employees. The hierarchical power consists mainly of three related elements: (i) the power to assign tasks and to give orders and directives to employees (directional power); (ii) the power to monitor both the performance of such tasks and the compliance with same orders and directives (control power); (iii) the power to sanction both the improper or negligent performance of the assigned tasks and disobedience to given orders and directives (disciplinary power).

Significant problems of classification therefore emerged with reference to the growing number of working activities in which directional power and hierarchical organization were loosened, or in which at least they displayed new features. The risk was either an exclusion of working relationships deserving the legal protection afforded to employees by the legislator from the scope of the employment, or an inclusion in the same scope of workers that did not deserve such protection. Neither exclusion nor inclusion could be determined taking into account the mere written or oral declaration of the parties, since courts –in the majority of jurisdictions– must rely principally on the factual circumstances and characteristics of the relevant relationship. As we will see in the following chapters, in order to avoid a borderless expansion of the scope of employment, labour courts initially adopted a rigorous and narrow approach whereby directional –and accordingly, hierarchical– power was deemed present only where the worker was subject to directional, organizational and disciplinary control of the relevant employer, this being shown by the issue of specific orders and by the exertion of an assiduous monitoring and control of the working activity. Yet this approach carried the risk of excluding from the scope of the employment relationship and from the relevant legal protection a wide range

⁶² See ILO, Country studies on the social impact of globalization: Final report, Working Party on the Social Dimensions of the Liberalization of International Trade, doc. GB.276/WP/SDL/1, 276th Session, Geneva, November 1999, para. 2. This document contains the results of a survey carried out in seven countries to collect information on the effects of globalization and trade liberalization on the attainment of the ILO social objectives.

of working activities that –due to the abovementioned changes in the production system– did not display such stringent characteristics yet nonetheless deserved such a legal protection on the basis of a systematic construction of labour regulations. Over the years and in order to address such problems, the judicial approach in a good number of countries became more flexible when dealing with working activities displaying forms of hierarchical power differing from traditional ones. According to the ensuing rulings, hierarchical power, and therefore employment, is also present when a person performs her working activities –on a continuous, loyal and diligent basis– following the general directives issued by such a subject according to programmes and purposes of the relevant firm. Nonetheless, new working activities are still challenging legal categories: in most of the European jurisdictions a growing number of workers are in a grey area between employment and self-employment, their working relationships only partially fulfilling the requirements of employment under the relevant laws. The problem is becoming a serious one not only in Europe, but also in Latin America, Asia and Africa, as is testified by the following contributions to this volume. In a good number of countries there is no protection –or at least no significant protection– for self-employees, who operate in an empirical grey area that is not covered by any legal structure, with no ‘median’ legal category covering the area between employment and self-employment.

At the same time, it should be noted that under the post-Fordist system, a material amount of production stages are now contracted out which are more and more significant in the production cycle. Activities as important as accounting, marketing and client care are entrusted to third parties. This has been defined as ‘horizontal’ outsourcing. The reasons for this business practice are multifaceted. On the one hand, firms may have recourse to third parties in search of specialized suppliers of delicate and high-skilled activities. In this respect they may turn to a supplier that performs a business activity better than they could do, both with regard to the quality of the relevant output and on the relevant cost, related for instance to the experience curve effect: this may also be in order to acquire a competitive advantage vis-à-vis their competitors.

In this context, contracting out is also driven by business strategies aimed at reducing workforce costs. By way of example, firms might use suppliers whose overall labour cost is lower than their own, because the relevant workers are non-unionized or in any event receive lower wages. Workers’ protection has traditionally been centred on the universal notion of the employment relationship, based on a distinction between dependent and independent work. The employment relationship has historically proven to be a key point through which labour law rights and benefits are rendered to both employers and workers.

The presence of hierarchical power in a working relationship has been traditionally established –either statutorily or by case law– as the distinctive element of employment in contrast to self-employment, and accordingly as an access key to the wide range of regulations set out to protect employees in the different jurisdictions. The abovementioned reduction of hierarchy and parcelization of work has materially changed the way in which the working activity is performed. Together with the spread of new activities in the service sector and the growing use of information technology in business, these developments have challenged traditional legal categories of working relationships based on such models as the blue-collar employee working in an assembly line of a big, bureaucratic and vertically integrated firm. New working practices came to lawyers’ attention that did not easily fit into either employment or self-employment. In particular, they embodied new forms of integration of work in business enterprises whereby the coordination exerted.

The employment relationship is a legal notion widely used in countries around the world to refer to the relationship between an employee (frequently referred to as a ‘worker’) and an employer for whom the employee performs work under certain conditions, in return for remuneration. It is through the employment relationship, however

defined, that reciprocal rights and obligations are created between the employer and the worker.⁶³

Despite the changes currently taking place in the global labour market, there is strong evidence that the employment relationship continues to be the predominant pattern of work arrangement in many countries around the world. The legal framework governing the employment relationship is an important component for managing these changes. The failure to adapt labour laws, however, can result in the perpetuation of regulations that are ill-suited to the new realities of the contemporary global labour market.⁶⁴ The debates over the future of the employment relationship and its legal framework are gaining momentum at both national and international levels, and the ILO was at the forefront of these debates.

4.1. The employment relationship: a debated issue

As mentioned above, the issue of who is or is not in an employment relationship has become more and more problematic in recent decades. From a comparative point of view, there is increasing difficulty in establishing whether or not an employment relationship exists in situations where: a) the respective rights and obligations of the parties concerned are not clear; or b) where there has been an attempt to disguise the employment relationship; or c) where inadequacies or gaps exist in the legal framework, or in its interpretation or application. Contractual arrangements can have the effect of depriving employees of the protections they are due. Moreover, vulnerable workers appear to suffer more from such arrangements. More and more, ILO member States and their social partners have emphasized that the globalized economy has increased workers' need for protection, at least against circumvention of national laws by contractual and/or other legal arrangements.

In the framework of the transitional provision of services, it is also important to establish who is considered a worker in an employment relationship, what rights the worker has, and who is the employer. This is the background against which the ILO and its constituents worked, reaching an outcome which was the adoption of the Employment Relationship Recommendation No. 198 (2006).

The analysis below will focus on major elements of the discussions and studies leading to the adoption of Recommendation No. 198, which consists of three major components: national policy of protection for workers in an employment relationship; determination of the existence of an employment relationship; monitoring and implementation.

⁶³ ILO: *The employment relationship*, Report VI(1), International Labour Conference, 95th Session, Geneva, 2006.

⁶⁴ 'In my view labour law has to show a greater capacity of adaptation if it wants to continue to play a significant role in the new social and economic environment. The changed environment is challenging the very essence of the classic model: namely the idea that national law –and similarly collective bargaining– can regulate with “imperative” effects and through unitary rules all the major contents of labour relations. Flexibility is the key word, which goes against imperative and rigid labour law’: T. Treu, “Labour law and social change”, public lecture, Geneva, International Labour Office, November 2002.

4.2. National Policy Protecting Workers in an Employment Relationship

The employment relationship is a universal concept with common elements which can be found in countries with different legal systems and cultures as well as different economic and social environments. Nevertheless, its evolution and the laws and practices governing it vary from country to country, as do the problems associated with it. The national authorities, in cooperation with the social partners, should lead the search for appropriate and viable solutions.

Already in the technical document submitted by the ILO for discussion at the Meeting of Experts 2000, attention was drawn to the importance of establishing a principle which would commit Member States to tackling the problem of legal uncertainty affecting the scope of the employment relationship by means of a systematic policy based on common but flexible premises. That principle would lead to the formulation and application of a national policy aimed at the continuing clarification and adjustment of the scope of labour legislation, based on observation of the evolution of employment relationships. This process would require a dynamic policy on the part of the competent authorities to monitor the form in which employment relationships are evolving and the timely introduction of necessary changes in standards.⁶⁵ The Meeting agreed that the elements of a national policy might include but not be limited to:

- providing workers and employers with clear guidance concerning employment relationships, in particular the distinction between dependent workers and self-employed persons;
- combating disguised employment which has the effect of depriving dependent workers of proper legal protection;
- not interfering with genuine commercial or genuine independent contracting;
- providing access to appropriate resolution mechanisms to determine the status of workers.⁶⁶

As stated in the conclusions concerning the employment relationship adopted during the International Labour Conference 2003 (ILC) general discussion,⁶⁷ the collection of statistical data and the undertaking of research and periodic reviews of changes in the structure and patterns of work at national and sectoral levels should be part of this national policy framework. The methodology for the collection of data and for undertaking the research and review should be determined after a process of social dialogue. All data collected should be disaggregated according to sex, and the national and sectoral level research and reviews should explicitly incorporate the gender dimension of this question and should take into account other aspects of diversity. National labour administrations and

⁶⁵ See ILO, Meeting of Experts on Workers in Situations Needing Protection (The employment relationship: Scope). Basic technical document. MEWNP/2000, International Labour Office, Geneva, para. 205, 206, 212.

⁶⁶ See ILO, Report of the Meeting of Experts on Workers in Situations Needing Protection, doc MEWNP/2000/4(Rev), appended to doc. GB.279/2, 279th Session, Geneva, November 2000, pp. 38-39.

⁶⁷ See ILO, Provisional Record No. 21, International Labour Conference, 95th Session, Geneva, 2006, Fifth item on the agenda: The employment relationship (single discussion), Report of the Committee on the Employment Relationship pp. 21, 55.

their associated services should regularly monitor their enforcement programmes and processes. This should include identifying those sectors and occupational groups with high levels of disguised employment and adopting a strategic approach to enforcement. Special attention should be paid to those occupations and sectors with a high proportion of women workers. Innovative programmes of information and education and outreach strategies and services should be developed. The social partners should be involved in developing and implementing these initiatives.

4.3. Determination of the Existence of an Employment Relationship

The existence of an employment relationship depends on the existence of objective conditions, i.e. on the form in which the worker and the employer have established their respective positions, rights and obligations. This is to say that for the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in an contrary arrangement that may have been agreed between the parties.

The issue of the determination of an employment relationship was central throughout the employment relationship debate at the ILO, including the 1997-98 ILC discussions on contract labour,⁶⁸ and as can be seen from the contributions to this volume, the general rules applicable to the determination of an employment relationship derives from case law and statutory provisions. If we look at such a circumstance from an employment relationship viewpoint, in order to speak of employment, there must be some hierarchical power relationship –even if it is only negligible. As mentioned above, hierarchical power allows the working activities of employees to be moulded and directed according to firms' aims and requirements, without any need to obtain the relevant consent, whereas the counterpart's consent is normally required in order to amend the activities to be performed in other types of contracts. This juridical feature of the contract of employment corresponds to its socio-economic function of providing employers with flexible working capacity. This applies also to working relationships whereby the employee is endowed with a material degree of executive autonomy and broadened discretion. As we will see in the following pages, the problems that Italian courts have had to face in dealing with working activities in which hierarchical power has taken forms different from the traditional ones. Even in such cases, we have seen, the courts have maintained that hierarchical power is in any case essential to the employment relationship. That is to say that no employment relationship can exist in the absence of hierarchical power, the latter also being –taking into account the relevant factual circumstances– the power to issue general directives, according to the programmes and purposes of the firm, to a person who is bound to perform his/her working activities on a continuous, loyal and diligent basis.

With regard to the duty of loyalty, it is worth noting that some students have construed it under a broad meaning, namely as a duty to be available to perform any activity the employer may require on the basis of its different business need, if no demotion occurs. Therefore it could be said that the aforementioned basic juridical feature of the contract of employment, together with the relevant socio-economic function, recurs also when the employment relationship is carried out in loose hierarchy conditions and/or environments.

⁶⁸ ILO: *Contract Labour*, Report VI (1), International Labour Conference, 85th Session, Geneva, 1997, pp. 26-33.

Until now, whilst speaking generally of hierarchical power and highlighting its flexibility content, we have principally seen just one of its three main elements: the power to assign tasks and to give orders and directives to employees, namely directional power. But the other two elements thereof are also of use in achieving flexibility and ultimately in reducing what are defined to be ‘transaction costs’. The control power affords employers with the possibility of monitoring how working activities are discharged, thus eventually allowing them also to adjust such activities if needed, also by making recourse to directional power. At the same time, there are types of contracts where the power to check how the counterparts’ duties are discharged is usually exerted at the end and not during the period of the performance. This results in a quicker and at the end of the day, more flexible way to coordinate the activities of different subjects in the firm: this also because of the third hierarchical element, namely the disciplinary power. On closer inspection, then, disciplinary power is a mighty instrument of flexibility and transaction costs reduction. As to the former, disciplinary power allows employers to sanction activities deviating from their orders and directives. In this sense, it provides a powerful means for enforcing same orders and directives. Moreover, since it is exerted on a private basis –as it is not necessary to take legal proceedings in order to make use of it– it is a swift means of enforcement. Accordingly, disciplinary power is a means of both deterrence and sanction against non-compliance when firms must rapidly adjust their activities to contingent and unpredictable needs through new orders and directives.

With regard to transaction costs reduction, as complying with employer’s orders and directions is an employee’s contractual duty, sanctioning any non-compliance will result in enforcing the contract of employment without a need to resort to the courts: this materially cuts the contract’s enforcement costs and therefore reduces transaction costs as a whole. Furthermore, disciplinary power also fosters the flexibility of firms because it allows them to graduate sanctions to the relevant breaches. Most notably, and almost uniquely in the field of contracts, it makes it possible to lawfully sanction a breach of contract without terminating it. This allows enforcing internal rules without the need of entering into a new relationship and bearing the relevant transaction costs.

Thus far, we have shown some of the features of the employment relationship that render it an important device for business organization, as it provides employers with a great deal of flexibility. Accordingly it should follow that the internalization of activities – of which the employment contract is a central tool– allows businesses to be run in a more flexible way and ultimately also enables them to take advantage of the hierarchy as a way to reduce transaction costs. Nonetheless, we should notice that under the post-Fordism system, firms look principally for flexibility and also that the number of outsourced activities has increased, in comparison with Fordism. From the above, it seems that this reasoning is inconsistent. It is therefore convenient to examine the second facet of the costs trade-off mentioned above, namely ‘organization costs’. The latter are the costs any organization faces in carrying out an activity on its own, such as dispersion of resources, arrangement of methods and devices of coordination and hierarchy, as well as some costs related to limitation of hierarchy within the organization. In this regard, the determination of an employment relationship has traditionally gone together with a growing set of regulations afforded by the law and by industrial relation devices in order to protect one of the parties of the relationship, namely the employee. As we have seen above, the definition of employment has traditionally had a legal-technical basis rather than a socio-economic one, the key element of employment being hierarchical power and not economic dependence on the employer, or at least at the very beginning. From a legal viewpoint, the hierarchical/coordination power is at the centre of the employment relationship; that is, the regulatory protection of employees has traditionally focused on hierarchical power in order to reduce it. In this sense such protection has provided for measures such as reduction of working hours, regulation of overtime, limitations on employers’ control power, impediments to demotion and most notably the possibility for employees to organize and bargain collectively.

Collective organization not only allows for reducing competition among workers in order to bargain for better working condition. It also entails a reduction of hierarchical power of employers. Hierarchical power allows employers to organize their business. However, such an organization activity is rarely carried out on an individual basis. Since organization implies the coordination of different parts and outputs, it is commonly exerted on a plural and collective basis. As for work organization, orders and directives are normally issued with regard not to a single worker but rather towards teams, line stages or establishments.

This gives rise to a shift between the level at which hierarchical power is exerted – which is plural– and the individual worker who is subject to hierarchical power. It has been underlined that collective organization allows employees to participate on a plural and collective basis, and therefore to place themselves on the same level with their employers. This results in a limitation of hierarchical power, which is confronted with another plural power, that of the collective organization. When, for instance, employees collectively bargain to regulate working time or output audits or working environment conditions at a shop or plant level, they control and limit the firm’s hierarchical power.

This is true also for regulation governing the mere individual employment relationship, such as statutory rules establishing disciplinary procedures, forbidding demotion, regulating transfers of workers or providing redress against unfair dismissal. As to the latter, it is usually perceived as a gross impediment of flexibility, as it –depending on the remedies afforded to the relevant employee– could hinder the possibility of the firm to adjust the size of its workforce to the contingent business situation.

In light of the above, employers see the set of employment protections as limiting their hierarchical power and therefore ultimately causing a reduction of flexibility for the whole business. Such a reduction is perceived as a cost for the firm, notably as an organization cost. Said costs are the other side of the coin with respect to internalizing working activities as a means of reducing transaction costs. Accordingly, in deciding whether to carry out a production phase on an internal basis or to outsource it, firms will also take into account the trade-off between organization costs and transaction costs.

Moreover, some other circumstances must be taken into account in trying to draw an analysis about the reasons that cause firms to have recourse to either internal or contracted-out production.

First, the employment contract is not the sole device through which firms can afford themselves flexibility by means of a hierarchical relationship, whereby they can adjust terms and condition of the counterpart’s performance to their business needs, avoiding or limiting transaction costs. Second, the employment contract is not a monolithic type of contract, as there are very different forms of employment. With regard to the first consideration, it is worth mentioning a species of contractual relationship which in recent decades has increasingly come to the attention of lawyers and economists, namely ‘relational contracts’. The main features of relational contracts are their incompleteness and their extension in time. Actually, the latter feature could be deemed to be the cause of the former. Given the impossibility for parties to take into account every circumstance that will occur throughout the relevant relationship –this being due to unpredictability, bounded rationality of the parties or prohibitive transaction costs– same parties decide to leave unspecified many parts of the contract’s terms and conditions, so as to be able to determine them during the same relationship. As a consequence, they draft what could be said to be a framework agreement setting out just the basic rules governing their business relationship, such as criteria of determining the relevant compensations, the minimum or maximum entity of the supply, and reasons for or notice of termination. Other terms of the contract (e.g. the actual entity of the supply, the number or frequency of orders) are therefore left to the parties’ future determination. This allows for adapting the performance of the parties to

non-hierarchical market relationships between them, thus cooperating on a parity and not on a hierarchy basis.

Asymmetrical cluster firms have recently experienced increasing attention from economists, sociologists and, obviously, lawyers and legislators.

In this context, certain acts of legislation aim at avoiding excesses in terms of incompleteness of contract, as a way to counter abusive business practices. Accordingly, they render null and void clauses whereby one party can unilaterally amend terms and conditions of a contract or terminate a contract without reasonable notice. It follows that parties must determine or set criteria for determining their activities under the contract. Most notably, such an approach forbids the abuse of the other parties' economic dependence and sets out that economic dependence must be ascertained taking into account as well the parties' opportunities to find business alternatives. The rationale of such rules is therefore aimed at reducing the possibilities of misusing a business position by means of relational contracts. Such contracts are relevant in the employment relationship, since the latter assumes a variety of forms, including the so-called 'non-standard forms of employment' that are perceived by firms as more flexible than the standard. One of the main causes of such flexibility is found in their temporality. Although not all non-standard forms of employment are on a fixed-term basis (e.g. part-time employment could be permanent), nevertheless this is usually a common feature. Temporality affords flexibility to the same extent that it allows firms to plan the duration of working relationships in order to adjust the size of their workforce to the contingent business needs. On the other hand, temporary forms of work are also more rigid than the standard employment relationship in some aspects. We will now look at developments in the case law.

4.4. Case Law

The mutual rights and obligations of the parties became the focus for the definition of the nature of work relationships. The fundamental term of a contract of employment was the performance of work under the employer's supervision and control in exchange for wages. Non-compliance with the employer's reasonable demands was a fundamental breach of the contract entitling the employer to terminate the contract. Therefore, the case law indicator of 'subordination and control' became all-important in the characterization of an employment relationship. Initially, this indicator was simply understood as direct control exercised by an employer over the work performed by the worker. However, with technological and organizational changes, many employers could no longer directly supervise and control their more highly trained or specialized workers. As a result, the indicator of actual exercise of subordination and control was supplemented by a number of other indicators, including the 'business' indicator (whether the worker is in business on his or her own account) and the 'integration' indicator (whether the worker performs the duties as an integral part of the business of the user enterprise). Further developments in work organization, increased specialization of production and the growing diversity of contractual arrangements brought to the existence a number of other indicators including, inter alia, the following:

- the extent to which the user enterprise determines when and how work should be performed, including instructions on where and how to do the work, working time and other conditions of work;
- the extent of supervisory authority and control of the user enterprise with respect to the work performed, including disciplinary authority;
- whether the work is performed on a regular and continuous basis;

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- whether the worker does the same work as that normally performed by the regular employees of the user enterprise;
 - whether the work performed is contractually stipulated as an activity or as a result ('final product');
 - the extent to which the work performed is integrated into the normal activities of the user enterprise;
 - whether the user enterprise pays the amounts due to the worker periodically and according to pre-established criteria;
 - whether the worker performs work exclusively for a particular user enterprise;
 - the extent to which the user enterprise makes investments and provides tools, materials and machinery, among other things, to perform the work concerned;
 - whether the worker undertakes any risk in the business sense or, alternatively, has any expectations of profits associated with the delivery of his or her services as distinct from a fixed commission;
 - who pays fiscal and social security contributions –the user enterprise or the worker; and
 - whether the user enterprise trains the worker.

In practice, no single indicator is decisive per se, but it is a combination, usually, of two or more of these indicators that determines whether or not there is a genuine employment relationship. It is possible to discern that the 'subordination and control' indicator is frequently given a high priority, which in most legal regimes is considered to be the hallmark of an employment relationship. However, some experts are sceptical of the efficiency of this kind of multi-indicator review. They assert that under such a test the relationship itself remains largely undefined as a legal concept, since the relevance of different criteria may vary according to the circumstances. Therefore, it is believed that various formulations of indicators are no more than a determination of the degree of dependency (or independence), for which there is no exclusive measure. It has been emphasized that various factors are not exclusive or inclusive but are merely extensions along the same continuum of dependency, which certainly includes subordination and control, and therefore the distinction between an independent contracting and an employment relationship lies in facts, not in law.

In the so-called ‘triangular’ relationship,⁶⁹ the identification of an employer is of crucial importance. In order to resolve the issue, the judiciary determines whether it is the user enterprise that exercises the requisite control and economic domination over the workers concerned or whether it is the enterprise that provides these workers. Decisions are normally grounded in employment legislation. In jurisdictions that provide for recognition of two or more employers as a common employer, the courts recognize both enterprises as employers.

4.5. Statutory Regulation

Where legislative policy seeks to determine an employment relationship, various statutory techniques are used for this purpose, including the following:

- providing for definitions of ‘contract of employment’ or ‘employment relationship’ and spelling out certain indicators, many originally developed by the judiciary, according to which a contract or a relationship is defined as a contract of employment or an employment relationship;
- determination of specific types of contractual arrangements in which the workers concerned are regarded either as employees or as self-employed;
- easing the burden of proof for the workers concerned; and
- removing incentives to disguise an employment relationship.

Many national labour laws contain provisions on the employment relationship, particularly with regard to its scope. Some provisions deal with the regulation of the employment contract as a specific contract (whereby a worker agrees to perform certain work for and under the authority of an employer, who in turn undertakes to provide the necessary conditions for this work and to pay remuneration), its definition, the parties and their respective obligations. Other provisions are intended to facilitate recognition of the existence of an employment relationship and to prescribe administrative and judicial mechanisms for monitoring compliance and enforcing these laws.⁷⁰

⁶⁹ Normally, an employment relationship involves two parties: the employer and the employee. There are, however, more complex situations whereby one or more third parties are involved, in what is sometimes termed a ‘triangular’ employment relationship. Such a relationship occurs when the employee of an enterprise is made available by his or her employer to another enterprise to perform certain work or provide certain services. Such situations can be beneficial to all concerned. A wide variety of civil (commercial) law contracts can be used to formalize an agreement for the provision of work or services. Such contracts can have beneficial effects for the provider’s employees in terms of employment opportunities, experience and professional challenges. From a legal standpoint, however, such contracts may present a technical difficulty as the workers concerned may find themselves interacting with two (or more) interlocutors, each of which assumes certain functions of a traditional employer. Whereas a ‘triangular’ employment relationship normally presupposes a civil or commercial contract between a provider and user enterprises, it is possible that no such contract exists and that the provider is not a proper enterprise, but an intermediary that does not undertake any employer responsibility vis-à-vis the workers concerned.

⁷⁰ See ILO: *The employment relationship*, Report VI(1), International Labour Conference, 95th Session, Geneva, 2006, pp. 19-38.

4.6. Definitions

In many countries, the legislation contains a substantive definition of a contract of employment, worded in such a way as to establish what conditions constitute such a contract and hence what distinguishes it from other contracts; in other countries, however, the legislation is less detailed and the task of determining the existence of an employment contract is largely left to case law. The description of the conditions for determining whether work is being performed under an employment contract varies in wording and level of detail from one country to another. Thus, the most commonly used terms are 'dependency', 'subordination', 'supervision', 'direction', 'control', 'authority' of the employer, or the latter's 'orders' or 'instructions' or for the 'employer's account'. Some legal systems use the terms 'subordination' and 'dependency' as alternatives or together, either with different meanings or as synonyms. Sometimes, the law assigns a different meaning to each word, and each is accompanied by a different qualifier: 'legal subordination' and 'economic dependency'. 'Legal subordination' is understood to mean that the employer or his or her representatives direct or are likely to direct the performance of the work. There is deemed to be 'economic dependency' where the sums received by the worker constitute his or her only or main source of income, where such sums are paid by a person or enterprise as a result of the worker's activity, and where the worker does not enjoy economic autonomy and is economically linked to the sphere of activity in which the person or enterprise that may be considered as the employer operates. It is interesting to note that in case of doubt, 'economic dependency' may be used as a factor for determining whether there is an employment relationship.

In this regard, it is possible to see that some labour laws define not only the employment contract but also the employment relationship, understood to mean the fact of performing a service, irrespective of the nature of the agreement under which it is performed, placing the employment contract in the broader context of the employment relationship.

In some other jurisdictions, the employment contract is simply described as a contract between an employer and an employee, without referring to the abovementioned conditions characterizing it as an employment contract. However, the legislation of these countries may have provisions giving a clear idea of the conditions in which the parties are bound by such an employment relationship. For example, provisions governing a worker's duties often include the obligation to respect the employer's orders and instructions—which is an important indicator for determining the existence of an employment contract.

4.7. Determination by Law

In some legal systems, labour laws describe certain potentially ambiguous or controversial situations as employment relationships, either in general or under certain conditions, or at least presume they are employment relationships (for example, professional athletes and artists, models, professional journalists, sales representatives, travelling salespersons, insurance salespersons, sales promoters and various public transport workers (drivers, operators, conductors, etc.). In other cases, labour legislation specifies whether a given type of work is excluded from its scope or whether or not it gives rise to a contract of employment, depending on the conditions under which it is performed, for example, when home work is deemed to be employment if it is neither discontinuous nor sporadic. On the other hand, work done by persons performing work or services directly for the public, or home work that is performed discontinuously or sporadically, is not deemed to give rise to an employment contract, and neither is work done by a student or graduate of higher education or secondary vocational and technical education for a specified period to fulfil a practical work requirement, even if the enterprise where this work is done provides food, transportation or an allowance in lieu of such benefits.

Conversely, legislation may specify that certain work relationships are not employment relationships, or exclude certain categories of workers from their scope, while other laws authorize the government to make such exclusions. The most common is the total or partial exclusion of public servants and similar workers and, less frequently, public sector workers. In some other countries, labour legislation authorizes the government to adapt the scope of employment legislation to include in it certain categories of workers as parties to contracts of employment.

4.8. Burden of Proof

In cases of determination of an employment relationship, the application of the general rule of contract law, whereby the burden of proof rests on the complainant, could make it very difficult or sometimes impossible for the worker to show that he or she is in an employment relationship with the plaintiff. In an employment relationship, it is the employer who has the upper hand, particularly because he or she controls the sources of information. That is why labour laws in many countries have provided certain measures to ease for the workers concerned the burden of proof of the existence of an employment relationship.

It is common for labour legislation to expressly provide that the employment relationship may be proved by any of the usual means, or by any means permitted by law. In some instances, the law may provide that contracts of employment are consensual, i.e. concluded merely by the consent of the parties without further formalities. In other instances, however, the law may require that the contract be in writing for various reasons relating to compliance or to evidence; or it may proceed from the assumption that the employment relationship exists based on the fact that services are provided. An important element of certainty, which also makes it easier to prove the existence of an employment contract, is the obligation on the part of the employer to inform employees of the conditions applicable to the contract by providing a written contract, a letter of engagement or other documents indicating the essential aspects of the employment contract or relationship. Non-compliance with this obligation may cause the worker to question his or her employee status. Conversely, having the written information in question makes it easier for the worker to prove that status.

With the same aim of easing the burden of proof, some laws provide for a presumption of the existence of an employment relationship. This presumption might be considered either as ‘substantive’ or as ‘procedural’. The ‘substantive’ presumption implies that under certain conditions spelled out in legislation, the relationship is deemed to be an employment relationship. The ‘procedural’ presumption means that if certain indicators are present, the relationship is deemed to be an employment relationship, unless the alleged employer proves otherwise or unless it is evident that the parties entered into a different kind of contract.

During the international debate at the ILO, together with the role of case law and statutory regulation in the determination of the existence of an employment relationship, other important issues were highlighted. These included:

- effective access to justice in accordance with national law and practice;
- the role of collective bargaining and social dialogue as a means of finding solutions to questions related to the scope of the employment relationship;
- respect for and implementation of laws and regulations concerning the employment relationship through labour administration services, including labour inspection and their collaboration with the social security administration and the tax authorities; and

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- removing incentives to disguise an employment relationship.

As a matter of curiosity, in the replies to the questionnaire contained in Report V(1), the question concerning the indicators of the existence of an employment relationship proved to be of considerable interest to governments. For example, 41 governments mentioned indicators that could be included in the proposed Recommendation; several endorsed those mentioned in the questionnaire. One government preferred the 'common law' approach. Another considered that indicators were not relevant to determining the existence of an employment relationship. One indicated that such indicators should be derived from law and jurisprudence. Another stated that they should be defined by national law and practice, that their inclusion in the instrument could be interpreted as implying an exhaustive list, and that some indicators might not be universally recognized. Finally, one government considered that, given the diversity of employment relationships, it was virtually impossible to cite all valid indicators.

Whereas the trade union replies were supportive with regard to the question concerning indicators of the existence of an employment relationship, the employers' organizations stated that these factors should be defined not in the instrument but by the national authorities, as they were based on different concepts in different countries. According to the employers' organizations, an instrument containing a list of such factors would not be useful and, according to one organization, would be at variance with the agreement that the Recommendation should not universally define the content of the employment relationship. On the other hand, one employers' organization recalled that national legislation and practice may not provide for measures of protection in the case of disguised employment relationships, and consequently the instrument should set out clear provisions in this area. At the same time, employers' organizations opposed the very idea of an international definition of the employment relationship. They argued that the definition and scope of that relationship depended on a wide range of national characteristics and that any attempt to introduce the concept of common indicators would only lead to disagreements and dissatisfaction among the social partners.

4.9. Monitoring and Implementation

Reviewing changes in the labour market and in the organization of work as well as advising governments on the implementation of national policy concerning the employment relationship are among the major issues addressed in the debates in the ILO concerning the employment relationship. The monitoring of employment relationships is a major political and technical challenge for governments. To address this, it is suggested that a consensus-building tripartite mechanism be devised as a focal point for common observation and analysis of the developments in the labour markets and organization of work, with the specific task of identifying the functional and dysfunctional trends emerging in employment relationships. The body responsible for monitoring employment relationships could suggest corrective measures to fine-tune relevant legal provisions or their application, as well as economic and social initiatives to correct the dysfunctional trends, including initiatives to ensure that necessary statistics are collected on a regular and systematic basis. Respectively, the following points were proposed to the experts for discussion:

- Periodic review of law and practice;
- Creation of a tripartite mechanism to facilitate the formulation and application of the national policy concerning the employment relationship;
- Practical guidelines for governments on specific ways of developing and implementing the national policy.

Such a policy should be reviewed at appropriate intervals and if necessary, clarify or adapt the scope of the regulation of the employment relationship in the country's legislation in line with current employment realities. The review should be conducted in a transparent manner with participation by the social partners.⁷¹

4.10. Follow-up Resolution

At the end of the ILC 2006 discussion, a number of government delegates proposed a resolution to instruct the Director-General of the Office to help all ILO constituents to better understand and address the difficulties encountered by workers in certain employment relationships. Noting that Paragraphs 19-22 of the newly adopted instrument recommend that the ILO Members establish and maintain monitoring and implementing national policy mechanisms, the resolution's objective was to ensure and reinforce assistance for such mechanisms, the collection of up-to-date information and comparative studies, and the promotion of good practice.

The adopted resolution invites the Office to:

- assist constituents in monitoring and implementing mechanisms for the national policy as set out in Recommendation No. 198;
- maintain up-to-date information and undertake comparative studies on changes in the patterns and structure of work globally, in order to:
 - improve the quality of information on and understanding of employment relationships and related issues;
 - help better understand and assess these phenomena and adopt appropriate measures for the protection of workers;
 - promote good practices at the national and international levels concerning the determination and use of employment relationships; and
 - undertake surveys of legal systems to ascertain what criteria are used nationally to determine the existence of an employment relationship and make the results available to ILO Members to guide them, where this need exists, in developing their own national approach to the issue.⁷²

5. Integrated reports addressing the growing concern over the employment relationship

Workers in need of protection have been the leading subject of researches and concerns of the ILO for the last years. Under this topic many situations of precariousness

⁷¹ See ILO, Report of the Meeting of Experts on Workers in Situations Needing Protection, doc. MEWNP/2000/4(Rev), appended to doc GB.279/2, 279th Session, Geneva, November 2000, pp. 38-39.

⁷² For the text of the adopted resolution, see International Labour Conference (95th Session) ILO, Provisional Record No. 21, Geneva, 2006, 21/80 at www.ilo.org/public/english/standards/reln/ilc/ilc95/pdf/pr-21.pdf. See also *The Employment Relationship: An Annotated Guide to ILO Recommendation No. 198*, Paper No. 18, Geneva, ILO, 2008.

and unfavourable circumstances are tackled: atypical contracts of work, disguised or ambiguous relationships, undeclared work, and triangular relationships are examples of how vulnerable workers can be. It seems some groups are more exposed to these unstable and insecure forms of labour relationship than others. Migrants, women, children, ethnic minorities, indigenous, unqualified workers and others are likely to experience precarious work during their working lives.

Yet the employment relationship is normally related to better conditions, decent work, more rights and protection. National social security systems are focused on regular and formal employment relationships in order to keep their right budgetary balances. In addition to that, it is important to note that national financial systems are normally based on the notion of the employment relationship for the concession and assurance of other rights and benefits like bank mortgages, loans, etc. Modern societies are based on the notion of security given by the typical non-fixed-term employment relationship as one of the main basis for the functioning of its institutions.

The employment relationship has been a synonym of a wider protection for the worker over the last century. Other forms of work⁷³ also have the potential to guarantee the proper social dimension required by some types of activities, but only the employment relationship is able to provide the employee with all the necessary means to achieve decent work while supplying the enterprise with the best provision of preserved and productive work in order to fulfil its corporate targets.

A number of studies aiming to counter the transformations suffered by the employment contract over the years have been undertaken, in different contexts, as it results to be a growing matter everywhere. Three of these studies' reports have become internationally known, as they have in common the same target: to tackle the future of labour law by studying the transformations that have occurred due to globalization. Although one of them, the Dunlop Commission Final Report, has been developed in an American context, and the other two, the Supiot Report and the Green Paper on Modernizing Labour Law, have been taken under a European framework, they all represent high valuable reflections on the challenges presented to modern labour law and the possible paths to be taken, specifically in relation to the employment relationship.

The Commission on the Future of Worker-Management Relations, which took the name of its chairman, former US Secretary of Labour John T. Dunlop, was launched on 24 of March, 1993, in the United States, with a specific mandate to answer the following questions:⁷⁴

1. What (if any) new methods or institutions should be encouraged, or required, to enhance work-place productivity through labour-management cooperation and employee participation?
2. What (if any) changes should be made in the present legal framework and practices of collective bargaining to enhance cooperative behaviour, improve productivity, and reduce conflict and delay?

⁷³ Here intended to refer to autonomous work or semi-autonomous work.

⁷⁴ Commission on the Future of Worker-Management Relations, U.S. "The Dunlop Commission on the Future of Worker-Management Relations - Final Report" (1994), Federal Publications, Paper 2, p. 3. See: http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key_workplace

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3. What (if anything) should be done to increase the extent to which work-place problems are directly resolved by the parties themselves, rather than through recourse to state and federal courts and government regulatory bodies?

Regardless of its industrial relations conflict-prevention oriented approach, the Dunlop Commission pointed out many aspects and recommendations related to the employment relationship. It recognized that the 21st century American workplace needed more flexibility for fast-changing market conditions⁷⁵ and gave suggestions on how the contingent work⁷⁶ could be efficiently assessed. Admitting that “contingent arrangements may be introduced simply to reduce the amount of compensation paid by the firm for the same amount and value of work, which raises some serious social questions”,⁷⁷ and that “the federal government loses billions of dollars to underpayment of taxes by workers misclassified as independent contractors,”⁷⁸ the Commission adopted a double way assessment –legal definition reform of both employers and employees– to the topic, emphasizing that:⁷⁹

1. The definition of employee in labour, employment, and tax law should be modernized, simplified, and standardized. Instead of the control test borrowed from the old common law of master and servant, the definition should be based on the economic realities underlying the relationship between the worker and the party benefiting from the worker's services;
2. The definition of employer should also be standardized and grounded in the economic realities of the employment relationship. The Congress and the National Labour Relations Board (NLRB) should remove the incentives that now exist for firms to use variations in corporate form to avoid responsibility for the people who do their work.

According to this two-way approach, employer and employee definitions are unclear in the US due to many different concepts provided by either statutory or common law. The Dunlop Commission thus proposed a regulation improvement in order to reduce to one single federal statute the definition of an employer and an employee. Furthermore, it recommended that the existence of an employment relationship should rely rather on the economic dependence than on whether there is an immediate control over the employee.⁸⁰ Regarding the administrative procedures applied to the enforcement of employment standards, the Commission recommended the United States Department of Labour to provide clearer guidance to both workers and employers, as a way to diffuse proper information on how to comply with the law.⁸¹ As a major contribution to the debate around the employment relationship the Dunlop Commission strongly demonstrated the link

⁷⁵ *Ibid*, p. 13.

⁷⁶ Dunlop Commission refers to contingent work as the use of independent contractors and part-time, temporary, seasonal, and leased workers. See Commission on the Future of Worker-Management Relations, U.S., “The Dunlop Commission on the Future of Worker-Management Relations - Final Report” (1994), Federal Publications, Paper 2, p. 61.

⁷⁷ *Ibid*, p. 61.

⁷⁸ *Ibid*, p. 62.

⁷⁹ *Ibid*, p. 63.

⁸⁰ *Ibid*, p. 66.

⁸¹ *Ibid*, p. 81.

between disguised labour agreements and tax evasion, advocating for a revenue authority oriented control to correct eventual misclassifications along with law reforms.

The European Commission, for instance, organized in 1997 a group of lawyers, sociologists and economists chaired by Alain Supiot to compile national approaches from several European countries about the present and the future of labour law and the employment relationship. The Supiot Report, issued in 1998, was one of the most complete assessments toward a comprehensive reference of the employment relationship paths in Europe under a globalized market. It was originally assigned “to conduct a prospective and constructive survey on the future of work and labour law within a Community-wide, intercultural and inter-disciplinary framework, culminating in a conference and subsequent report on the subject,”⁸² while many other conclusions and recommendations are part of the report.

The final report analyzed topics such as the relationship between work and private power, work and employment status, work and time, labour and collective organization, and labour and public authorities, all split in five different chapters. As one of the first conclusions presented by the commission there was a slight trend to power dispersion within the labour environment represented by the end of the fordist model. From a legal perspective, this decay is basically represented by:⁸³

- Fostering or development of self-employment as opposed to waged employment;
- Evolution of the principle of subordination which defines the nature of the employment contract;
- Labour outsourcing or sub-contracting to economically dependent enterprises.

A major result related to this power deconcentration, also outlined by the report, lays the ground for a third of labour relationship category recognition: a figure represented by an economically dependent self-employed worker who is neither a classical employee nor an entrepreneur.⁸⁴ Some European legal systems have already perceived the existence of this category by regulating its activity.⁸⁵ It is the case of Italy (lavoratore

⁸² A. Supiot (general rapporteur): *Transformation of labour and future of Labour law in Europe*, Final report, June 1998, p. 1.

⁸³ *Ibid*, p. 9.

⁸⁴ *Ibid*, p. 13.

⁸⁵ A. Perulli: *Subordinate, Autonomous and Economically Dependent Work: A Comparative Analysis of Selected European Countries*, in G. Casale (Ed.): *The employment relationship. A comparative overview*, Geneva, International Labour Organization, 2011, pp. 137-188.

parasubordinato),⁸⁶ Germany (arbeitsnehmerähnliche Personen)⁸⁷, or Spain (trabajador autónomo economicamente dependiente).⁸⁸

Moreover, power deconcentration in the workplace signifies a change in the notion of subordination. While for one group of workers, namely the economically dependent self-employed, there are advances in greater on-the-job independence, for another group, represented by casual employment,⁸⁹ a growing weight of subordination seems to prevail.⁹⁰ In addition, a tendency to increase the strength of the employer's directive power is noticed, even for non-casual workers. This trend is caused by a shift in the creation of jobs from big companies to small and medium sized businesses. The Supiot Report attributes this inclination to a "rising incidence of the business networking model, whereby firms are interrelated by means of sub-contracting or outsourcing arrangements."⁹¹

The tendency in case law studies seems to express an increasing broadening of the legal subordination concept in order to characterize an employment relationship. The Commission emphasized that the legal notion of subordination "is no longer defined only in terms of submission to orders in the performance of work itself, but also of workers' integration in a collective organizational scheme designed by and for others,"⁹² and retained a particular attention to the "indication clustering" method (*méthode du faisceau d'indices*) as a general labour law tool to establish the existence of an employment relationship in contrast with other legal figures. Under this technique, a logical inference from several indicators takes place in order to converge to a sustainable conclusion over an argument. The method is particularly useful for disguised and ambivalent relationships as it does not rely only on evidence and proof, but on a set of indicators which may clarify the true nature of the established connection.

It is interesting to note that, according to the Supiot Report, by "replacing the concept of legal subordination with that of integration in someone else's company"⁹³ it became possible to convert a great number of jobs into wage-earning positions. Moreover, by revisiting the traditional notion of subordination and dependency, now covered with new features and a broadening concept related to the notion of the so-called network-enterprise, Labour law could keep serving as it was intended to be from the outset: a tool for social cohesion. For that matter, labour law has to be as much adaptable as to cover new

⁸⁶ A. Perulli: *Economically dependent/quasi-subordinate (parasubordinate) employment: legal, social and economic aspects*, Study prepared for the European Commission, Directorate-General for Employment and Social Affairs, 2003, pp. 76-82.

⁸⁷ *Ibid*, pp. 82-85.

⁸⁸ D. M. C. Barreto: *Acerca de la denominada crisis del contrato de trabajo tradicional y la aportación española: el estatuto del trabajo autónomo*, Gaceta Laboral, ago. 2008, vol.14, no.2, pp. 193-219.

⁸⁹ Here intended as any sort of atypical contract, as previously mentioned.

⁹⁰ A. Supiot (general rapporteur), *Op. Cit.* p. 16.

⁹¹ *Ibid*, p. 16.

⁹² *Ibid*, pp. 17-18.

⁹³ *Ibid*, p. 18.

developments in the way labour is organized and refrain from only protecting traditional subordinate employees, according to the report's conclusions.⁹⁴

Another important document was provided by the European Union, more recently, in 2006, the Green Paper - Modernizing labour law to meet the challenges of the 21st century, and was aimed at launching "a public debate in the European Union (EU) on how labour law can evolve to support the Lisbon Strategy's objective of achieving sustainable growth with more and better jobs."⁹⁵ The EU's common objectives of full employment, labour productivity and social cohesion are at the background of the paper as it stands for everlasting general European principles to be achieved. The paper recognized that the drive for flexibility in the labour market "has given rise to increasingly diverse contractual forms of employment, which can differ significantly from the standard contractual model in terms of the degree of employment and income security,"⁹⁶ giving an opportunity for the EU to foster flexicurity policies throughout the Union. Flexicurity is a neologism for more flexibility together with more security for the labour market. For instance, it happens to be the key element of the Green Paper, and for that it seeks:⁹⁷

- To identify key challenges which have not yet yielded an adequate response and which reflect a clear deficit between the existing legal and contractual framework, on one hand and the realities of the world of work on the other;
- To engage Member States' governments, the social partners and other relevant stakeholders in an open debate about how labour law can assist in promoting flexibility combined with employment security, independently of the form of contract;
- To stimulate discussion on how different types of contractual relations, together with employment rights applicable to all workers, could facilitate job creation and assist both workers and enterprises by easing labour market transitions, assisting life-long learning and fostering the creativity of the whole workforce; and,
- To contribute to the better regulation agenda by promoting the modernization of labour law.

Once again, globalization and technological changes are at the backdrop of the urge for labour market reforms. As flexible arrangements are an asset sought after like never before within the European labour market, new forms of employment agreements emerge deconstructing labour law premises and requiring new approaches from governments and social partners.⁹⁸ From another point of view, security needs to be improved in order to guarantee social cohesion and the ambition for full employment.

⁹⁴ *Ibid*, p. 25.

⁹⁵ Commission of the European Communities. *Green Paper. Modernizing Labour law to meet the challenges of the 21st century*, Brussels, 22.11.2006, COM (2006) 708 final, p. 3.

⁹⁶ *Ibid*, p. 3.

⁹⁷ *Idem. Ibidem*, p. 4.

⁹⁸ *Ibid*, p. 7.

The proliferation of non-standard work arrangements is behind the need for new regulation and action to be taken against disguised relationships or undeclared work.⁹⁹ In addition, triangular relationship protection and quasi-employees regulation are also mentioned in the paper, as related to the provision of broader protections at the same time as flexibility.¹⁰⁰ In any case, national experiences could be fostered to add value to this debate by adapting the legal provision to the current reality of the workplace. The Green Paper, rather than showing any novelty regarding the matter, brought the debate of the Nordic success of flexicurity to the European Union. It does not rely on any traditional community law formula but on the open method of coordination, based on the trinomial “benchmarking –policy making– best practices,”¹⁰¹ to serve as a main orientation for the search of new approaches toward innovative forms of employment.

6. Assessment of the employment relationship by Labour Inspectorates: selected case studies

In addition to the studies and suggestions brought by experts’ commissions, national experiences in confronting the assessment of the employment relationship by the labour inspectorate and labour administration are paramount when establishing a basic common action line for intervention. National approaches to the assessment of the employment relationship may vary from one country to another, as much as their labour laws and labour inspection systems do. In some instances there are national systems that are more tax evading oriented, while in other places the systems rely rather on labour administration as a governance tool. Nevertheless, in most systems, the reality of the facts, economic dependence and subordination are common principles and indicators of an employment relationship.

In some countries the economic burden caused by tax evasion has effectively revealed methods and indicators of an employment relationship. In this case, the main objective is to minimize misclassification and consequently tax avoidance. In these cases, a multidisciplinary approach has been implemented in different contexts and inspections are carried out not only for labour purposes, but also as a tool to reduce tax evasion and other frauds.

Most of the developed countries have adopted a multifaceted approach to tackle the growing phenomenon of undeclared work, disguised relationships and atypical work. An integrated enforcement action with the participation of different agencies, improvement in legislation, announcement campaigns and tripartite meetings are among the most used tools used to solve the problem. Highlighting criteria in order to establish the existence of a true employment relationship, based on the reality of facts assessed in the workplace, is also a common tool for inspectors found in most developed countries. Developing nations have also established strategies to address the growing problem of unprotected work.

Argentina

Argentina launched in 2003 the National Plan for the Regularization of Work (*Plan Nacional de Regularización del Trabajo – PNRT*), aimed at tackling unregistered work,

⁹⁹ *Ibid*, p. 10/11.

¹⁰⁰ *Ibid*, p. 12.

¹⁰¹ C. La Porte: *Is the open method of coordination appropriate for organizing activities at European level in sensitive policy areas?* In *European Law Journal*, Vol. 8, Aix-en-Provence, C. Joerges and F. Snyder, 2002, pp. 46-58.

verifying the conditions and fundamental rights at work, providing social protection in order to encourage voluntary regularization, and promoting awareness of unregistered work related problems.¹⁰² PNRT is an integrated effort supported by the Nation's Ministry of Labour, Employment, and Social Security (*Ministerio de Trabajo, Empleo y Seguridad Social*), Federal Administration of Public Revenue (*Administración Federal de Ingresos Públicos - AFIP*), and provincial labour authorities, under the Federal Labour Council (*Consejo Federal del Trabajo*), and is part of the Argentinean strategies to tackle the "21st century labour inspection challenges."¹⁰³ As a matter of fact, undeclared work is certainly part of the problem of precariousness at work, targeted by Recommendation No. 198, whenever a risk of unprotected relationship occurs.

In fact, undeclared work is a major problem in developing countries and much of the flexibility at work is provided by denying basic fundamental rights through social costs cuts in the informal market.¹⁰⁴ The Argentinean labour force is deeply affected by undeclared work which currently makes its assessment a great priority.¹⁰⁵ Decent work is the main target to be reached through public policies by diversifying strategies on how to tackle the problem, including non-labour measures, considering the diversity of factors related to the causes of informality.¹⁰⁶ In that context, labour inspection develops an important role by representing a State policy and by being responsible for the implementation of the PNRT.¹⁰⁷

PNRT is based in an integrated effort of different agencies, both federal and provincial. Once a complaint is registered, a competence rule is placed and the inspection must be ordered within 24 hours.¹⁰⁸ Planned inspections also occur, based on previous

¹⁰² Subsecretaría de Fiscalización del Trabajo y Seguridad Social. *Instructivo de procedimiento. Plan Nacional de Regularización del Trabajo*. Versión 1.0. Buenos Aires: Ministerio de Trabajo, Empleo y Seguridad Social, Enero 2011. p. 3, and also Secretaria de trabajo, *La Inspección del Trabajo en la Argentina 2003-2012, Acciones y resultados*, Ministerio de Trabajo, Empleo y Seguridad Social, Buenos Aires, 2013.

¹⁰³ P. A. Topet: *La inspección del trabajo en la República Argentina: un informe general y algunas reflexiones particulares*, in *Revista Latino-Americana de Derecho Social*, Núm. 6, Enero-Junio 2008, México, Instituto de Investigaciones Jurídicas, 2008, p. 181.

¹⁰⁴ L. Ronconi: *Informalidad laboral e inspección del trabajo en Argentina. Un enfoque institucional*, Documento 46, Marzo de 2001, pp. 1-27.
See <http://faculty.udes.edu.ar/tommasi/cedi/dts/dt46.PDF>

¹⁰⁵ C. Tomada: *Prólogo. Aportes a una visión de la informalidad laboral en la Argentina*, 1^a. ed. Buenos Aires, Banco Mundial, Ministerio de Trabajo, Empleo y Seguridad Social, 2008, p. 7.

¹⁰⁶ M. Novick, X. Mazorra, D. Schleser: *Un nuevo esquema de políticas públicas para la reducción de la informalidad laboral*, in *Aportes a una visión de la informalidad laboral en la Argentina*. 1a. ed. Buenos Aires, Banco Mundial, Ministerio de Trabajo, Empleo y Seguridad Social, 2008, p. 26.

¹⁰⁷ *Ibid*, p. 32.

¹⁰⁸ Subsecretaría de Fiscalización del Trabajo y Seguridad Social, *Instructivo de procedimiento. Plan Nacional de Regularización del Trabajo*, Versión 1.0, Buenos Aires, Ministerio de Trabajo, Empleo y Seguridad Social, Enero 2011, p. 5.

database analysis.¹⁰⁹ In order to proceed to the inspection of the employment relationship itself, inspectors are advised to follow some steps, once in the workplace.¹¹⁰

1. Identify themselves, with the proper credentials, asking to talk to the responsible agent;
2. Count the workers in an initial visual overview, in order to roughly acknowledge the average quantity of workers who are available to receive orders; if possible, collect the individual timesheets, in order to check the amount of workers actually existing in the workplace; inspectors need to explain the reason of the visit, pointing out that its main objective is to inspect the regularity of the Social Security registers and thus all workers need to be interviewed; this initial explanation should be brief, in order to keep all workers around and prevent them from spreading or missing in the workplace; in addition, it is very important to talk about the PNRT, explaining its targets, scope, and actions for both, managers and workers;
3. Then inspectors need to interview all workers, and start to collect data about them, to be opposed with the information provided by AFIP – inspectors carry a netbook connected to the AFIP database in order to verify the proper register information of every worker,¹¹¹ the first question to the worker should be if he/she works for the inspected employer, in order to clarify whether the worker is the inspected firm's employee or a contractor's one; as a suggestion, inspectors could ask who pays the worker's wages as in many cases the answer reveals who the real employer is;
4. If the worker self declares him/herself as independent, his/her data still needs to be collected and an observation will be noted;
5. The worker needs to identify him/herself with a valid ID;
6. In case the worker declares to be the owner, a partner, one of the owner's parents or children, or even the spouse, there is no need to formalize his/her declaration, if there is an identification proving such a situation; otherwise the formalization will take place and the person can later provide evidence of his/her situation directly to the public administration;
7. Once all the clearly visible workers are checked with the AFIP database, inspectors must proceed to look for more possible employees in hidden areas, such as changing/locker rooms, kitchens, toilettes/bathrooms, resting areas, patios, machinery rooms, stock rooms, etc., always followed by the firm's representative; if access is denied, inspectors must mention the coverage of Art. 8, Annex II, Law No. 25.212, giving a deadline to the employer to permit access; if the employer denies access once again, an obstruction note form must be filled and given to him/her;

¹⁰⁹ *Ibid*, pp. 9-11.

¹¹⁰ *Ibid*, pp. 16-18.

¹¹¹ This proceeding, namely "digital inspector" (*inspector digital*), was recently introduced in order to streamline the whole inspection procedure, eliminate the forms and save some administrative steps.

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8. Once the inspection is complete with all names and data, inspectors must penalize those employers whose workers were not properly registered, issuing a notice of infringement (*acta de infracción*) against the company.

These guidelines are meant to provide labour inspectors with the most accurate tools in order to correctly address the matter of the informal sector in Argentina. As an asset to facilitate the control over the workplace and governance of the labour market, a certificate of registered work (*certificado de trabajo registrado*) can also be required, if the company depends on public financing or if it is going to contract with the Public Administration, either federal, provincial, or municipal. Resolution No. 774/2008, from the Labour Secretariat, provides that any employer can apply for a certificate of registered work to the local labour authority that will proceed to inspect all the applicant's establishments, under the PNRT, in order to verify if all workers are properly registered. The certificate is only issued if the employer keeps all workers duly registered, or liquidates the eventual fines and debts with the Social Security, whenever undeclared work is found. In any case, the certificate expires after 60 days of release and needs to be renewed, if the employer is required, for some reason, to provide another one.

Brazil

Brazil has a well established labour inspection planning structure and originality has been applied to tackle subjects like employment in the informal sector (*setor informal*),¹¹² fraudulent subcontracting (*terceirização irregular*), and many others related to the correct balance between persuasion and punishment, in order to achieve compliance with decent work provisions.¹¹³ Regardless, legislation is still deficient to deal with many of the current controversial labour relations topics, like the establishment of the employment relationship within triangular schemes and subcontracting. While the Legislature still debates many of the aspects related to the protection of workers in such schemes, case law and administrative ordinances fill the void in an effort to ensure social rights through the establishment of the employment relationship.

The Consolidation of Labour Laws (*Consolidação das Leis do Trabalho - CLT*) is the legal framework that protects the employment relationship and contains some statements concerning its characterization,¹¹⁴ as well as the nullity of any actions aimed at misinterpreting or perverting its application.¹¹⁵ Despite this protective criterion, the law does not describe what these fraudulent actions are. Another important provision refers to subcontracted work, especially in the construction field.¹¹⁶ Notwithstanding, a proper regulation to organize outsourcing schemes and subcontracting has been requested by both

¹¹² C. H. L. Corseuil, R. Almeida, P. Carneiro: *Inspeção do trabalho e evolução do emprego formal no Brasil*, 1688 texto para discussão, Brasília, Instituto de Pesquisa Econômica Aplicada - IPEA, 2012, pp. 7-27.

¹¹³ R. Pires: *Promoting sustainable compliance: Styles of labour inspection and compliance outcomes in Brazil*, in *International Labour Review*, Volume 147, Issue 2-3, June/September 2008, Geneva, International Labour Organization, 2008, pp. 199-229.

¹¹⁴ Consolidation of Labour Laws, Arts. 2 and 3 establishes that any person with a permanent work, earning a salary, and working under the subordination of an employer, is an employee.

¹¹⁵ Consolidation of Labour Laws, Art. 9, states that any fraud against the employment relationship should be considered as *ipso juri* null.

¹¹⁶ Consolidation of Labour Laws, Art. 455, determines the application of the subsidiarity principle when dealing with subcontracting within the construction field.

employers and workers' organizations and some proposals are currently being analyzed by the Congress.

While regulation is not published, jurisprudence has been playing a major role on the definition of some aspects related to triangular relationships, subcontracting and the employment relationship. The Superior Labour Court (*Tribunal Superior do Trabalho*) published, in 1997, the well known Precedent 331 (*Súmula 331*), recently reformed, as an evolution of the previous Precedent 256, published in 1986. In short, Precedent 331 determines that:

- Subcontracting is illegal in any situation, except:
 - For temporary jobs (Law No. 6.019/74);
 - For cleaning and private security jobs (Law No. 7.102/83);
 - For any other specialized job related to the means to pursue a certain activity, and never connected to its core business, provided that subordination and a personal basis (*intuitu personae*) liaison are inexistent between the subcontractor's employees and the contractor.
- When an irregular subcontract exists, the employment relationship should be established directly between the employee and the contractor, ignoring the subcontractor figure;
- Whenever subcontracting, there is a subsidiary responsibility between contractor and subcontractor, provided that both are part of the same judicial procedure;
- Public administration can only recruit by public tenure and, therefore, irregular subcontracting does not ensure the establishment of an employment relationship between the Administration and the employee.

Based on Precedent 331, the Department of Labour Inspection (*Secretaria de Inspeção do Trabalho*) published, as well, normative Ordinance No. 3 (*Instrução Normativa n. 03*), 1 September 1997, in order to guide the labour inspectors' activities, in case a triangular relationship is established. The ordinance's main aspects are:

- Commercial relationships between two or more companies should be based on the civil law;
- Labour relationship between employees and employers should be based on the Labour law;
- Depending on their nature, activities could be performed either at the contractor's premises or elsewhere;
- The subcontractor's employees are not subordinated to the contractor's directive, technical, and disciplinary power;
- The contractor and subcontractor should develop different activities and pursue distinct targets;
- The contractor cannot keep a worker in a different activity other than the one he/she was recruited for;
- Irregular subcontracting does not result in the establishment of an employment relationship in the case of a contract involving the public administration;

- The employee's files and timesheets should be kept in the workplace, regardless who the employer is, for inspection control;
- The subcontractor's employees' activities cannot coincide with those performed by the contractor, otherwise the inspector should verify such anomaly in order to prevent irregular subcontracting;
- The contractor's and subcontractor's core businesses cannot coincide and the inspector should verify such abnormality in order to prevent irregular subcontracting;
- The inspector should verify the nature of the agreement between contractor and subcontractor, in order to prevent deviation from what has been established in the agreement and what is being required of the workers and performed by them;
- If the inspector recognizes the employment relationship characteristics between the subcontractor's employees and the contractor, he/she should elaborate and issue a notice of infringement unfavourable to the latter, based on the violation of the Consolidation of Labour Laws, Art. 41;
- The contractor should monitor the value chain regarding undeclared work, correct payment of wages, regularity of collective bargaining benefits, and deviation of the subcontractor's employees' activities;
- The contractor should also retain and deposit the social security share of the entire value chain.

Chile

Chile experienced a recent law reform which included an outsourced work regulation (*régimen de subcontratación*) into the Labour Code (*Código del Trabajo*).¹¹⁷ The same law has given the Labour Department (*Dirección del Trabajo*) and labour inspection a fundamental role in controlling compliance with the law. Ever since, the labour inspectorate has been pursuing an intervention model, based on the respect to decent work and the reality of facts as the main principles underpinning its activities. More regulation of outsourcing practices, though, resulted in an increase in judicial conflicts involving employers and the labour administration. In Chile there are several judicial decisions denying the labour inspectorates' competence in determining the existence or not of an employment relationship.

Law reform stimulated the labour administration on the regulation of the intervention promoted by the labour inspectorate. Ordinance No. 141/05, 10 January 2007 (*Dictamen n. 141/05*) establishes the meaning and the extent of Arts. 183-A, 183-B, 183-C, and 183-D, from the Labour Code, about outsourcing and triangular relationships. According to this ordinance, outsourced work legally exists if:

- 1) The employee works for an employer, contractor or subcontractor, under an employment contract;
- 2) The contracting company owns the work, the company, or the task to be performed under the outsourced contract;

¹¹⁷ Law No. 20.123, 16 October 2006, introduced a new chapter in the Labour Code, regulating triangular outsourced relationships and temporary jobs agencies.

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- 3) There is a contract between the contracting company and the contractor/subcontractor, stating that the latter is obliged to perform for the previous some tasks or works, under its own risk and account;
 - 4) Works or tasks are performed by the contractor/subcontractor with their own dependent employees.

These prerequisites are part of the legislator's attention to protection whenever considering an existing triangular linkage. One of the first conclusions deriving from these precepts, concerns the centrality of the employment relationship as the mainframe for the exercise of private autonomy. According to the ordinance, legitimate outsourcing may only occur if all four prerequisites exist in the relationship. Moreover, the ordinance establishes that a legitimate outsourcing agreement exists if subordination and dependency occur only between contractor and employee. Whenever employees are directly submitted to a hierarchical and directive power by the contracting company, instead of the contractor, or even concurrently, an illegal work supply has happened, and is penalized by law.

From a preventive approach, Decree No. 319, 20 January 2007, approves the regulation of article 183-C, of Labour Code, about the certification of the labour and social security obligations. Under that provision, the contracting company has a right of information regarding the fulfilment of labour and social security legislation by the contractor and/or subcontractor. Labour inspectorates are responsible for elaborating and publishing the certificates, concurrently with private evaluators, under the labour administration supervision. In the same direction, Decree No. 76, 18 January 2007, approves the regulation of Art. 66^{bis}, of Law No. 16.744, 1 February 1968, with regard to the establishment of health and safety management systems in triangular relationships.

Despite of the formal regulation detailing obligations on triangular relationships, and giving the labour inspectorate a crucial role on controlling compliance with the law, some tensions have occurred recently between the labour administrative authority and the judicial system, undermining the administrative intervention. These strains are related to prevailing jurisprudence in Chile, constantly declaring the labour inspectorate's lack of attributions, denying their authority to qualify or interpret the legal nature of a private agreement that has not been formally drawn up to produce labour related effects.¹¹⁸ Ultimately, the Chilean courts' decisions end up restraining the labour inspectorate's activity and reducing it to "as nothing" inspection¹¹⁹ that could only take place in relation to determinate, precise, clear, and objective infringements. In other incidences, dealing with conflicts between the parties, only jurisdiction is accredited to take action.

France

France has a very detailed legislation and well-established policies against fraudulent contracts and illegal work.¹²⁰ The Labour Code describes in a detailed and clear way a few

¹¹⁸ See Resolution 11914, 3rd Chamber, Supreme Court. Rol 887/2008, CODELCO vs. Dirección del Trabajo.

¹¹⁹ J. L. U. Cataldo: Inspección del trabajo en Chile: vicisitudes y desafíos, in *Revista latinoamericana de derecho social*, Núm. 6, Enero-junio de 2008, México, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, 2008, p. 199.

¹²⁰ French legislation determines that illegal work is a collection of major frauds to the social and economic public order provided by the Labour Code. The term was legally established in Law No. 2005-882, 2 August 2005.

provisions about illegal work (*travail illégal*).¹²¹ National policies have been laid out in order to counter the growing concerns over the reassurance of the employment relationship.¹²² These concerns are related to illegal work which, according to French legislation, is regarded as any infringement of the labour legislation related to different forms of:

- Dissimulated work;
- Trafficking of workers;
- Illicit supply of work;
- Employment of foreigners without work permit;
- Illicit accumulation of employment relation;
- Fraud or false declaration to the provisions of Labour Code arts. L. 5124-1, L. 5135-1, and L. 5429-1.

This well-established classification provided by the law facilitates the performance of the labour inspectorate's task of controlling the employment relationship. Indeed, a clearer legislation about fraudulent forms of the employment relationship is paramount to establish a satisfactory and effective labour inspectorate's response. In order to better describe the various forms of illegal work, the General Department of Labour (*Direction Générale du Travail - DGT*) published brochures in which further considerations are laid out in order to elucidate the extent of the provisions of law:¹²³

- 1) Dissimulated work (*travail dissimulé*) would happen according to three basic fraudulent situations:
 - a) Intentional dissimulation of self-employed work, causing social, tax, and commercial violations - particularly represented either by unregistered trade register acts or undeclared tax and social duties;
 - b) Partial or complete intentional dissimulation of employment relationship - mostly represented by undeclared work or salary;
 - c) False independent work - mainly employed by employers who conceal a true employment relationship behind an apparent commercial liaison.
- 2) Trafficking of workers (*marchandage*) comes about with the concurrence of three main instances:
 - a) Own workers' allocation at a different employer at the cost of reduction in social rights - occurs in case the only purpose is to reduce social rights and, therefore, general costs, by diverting part of the (or the entire) production to a

¹²¹ Labour Code, Art. L-8211-1.

¹²² The National Plan to Fight Against Illegal Work was firstly established in 2004, for the following biennium. It has been renewed ever since, with the same duration. Before that, Decree n. 90-656, 25 July 1990, established some regulation regarding clandestine work, undeclared work, and illegal subcontracting. In 1997, Decree No. 97-213, 11 March 1997, repealed the previous decree in order to set up coordination among the ministries to tackle illegal work.

¹²³ See <http://www.travail-emploi-sante.gouv.fr/IMG/pdf/TRANSPARENCE1doc.pdf>

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- different employer/set of employers; it is different from legitimate contracting-out, which implies a structured business with its own means and technique;
- b) Financial gain purpose - represented by a clear purpose of financial gain, at the expense of the workers' rights, based on the reduction in social costs;
 - c) Decrease of social rights - expressed by the unambiguous loss of rights suffered by the trafficked worker, which is the main purpose of the operation itself, for its costs cutback potential.
- 3) Illicit supply of workers (*prêt illicite de main d'oeuvre*) occurs in the two following situations:
- a) Own workers' allocation at a different employer - similar to the first instance of the trafficking of workers, nevertheless it rests properly characterized even if the reduction of social rights is not cleared as present;
 - b) Financial gain purpose - represented by the purpose of financial gain at the expense of the workers' rights.
- 4) Employment of foreigners without work permit (*Emploi d'étrangers sans titre de travail*) may encompass two situations:
- a) Introduction of a foreign worker in France illegally - it implies that any foreign worker not holding a European Union citizenship can only be recruited and hired through the public employment system, if living abroad;
 - b) Hiring of a foreign worker without a valid work permit - it means that every foreign worker not holding a European Union citizenship can only be hired if possessing a valid work permit, and while living in France.
- 5) Illicit accumulation of employment relations (*formes illicites de cumul d'emplois*) may occur in two situations:
- a) Two or more employment relationships – mostly represented by the accumulation of more than one employment or job, implying that the overall working hours exceed 48 hours per week;
 - b) One employment relationship and another self-employed relationship – occurs in “exclusive only” activities, according to the law, like temporary jobs and some types of managerial jobs.
- 6) Fraud or false declaration to the provisions of Labour Code arts. L. 5124-1, L. 5135-1, and L. 5429-1 (*Fraude ou fausse déclaration prévue aux articles L. 5124-1, L. 5135-1 et L. 5429-1*) includes three main forms of deceit:
- a) Perception of undue social benefits – happens whenever a false Position Reclassification Leave for Paraprofessionals takes place, and after a termination for economic reason occurs;
 - b) Unfair reception of “back to work” bonus – takes place with a forged “return to work” condition just to receive an additional benefit;
 - c) Unjust payment of unemployment benefit– occurs in various fraudulent forms of deceiving the public administration in order to obtain payment for unemployment.

Labour inspectorate is a key element in the struggle against fraud and in favour of the employment relationship.¹²⁴ In order to bring administrative activity into life, DGT has been publishing a series of acts mostly in the last decade. These acts are in response to a broad government determination to institute a National Plan to Fight Against Illegal Work (*Plan National de Lutte Contre le Travail Illégal*).¹²⁵ The main objectives expressed in the national plan are:¹²⁶

- a) To reinforce partnership;
- b) To reinforce the fight against undeclared work;
- c) To guarantee the regular transfer of workers by foreign companies;
- d) To develop good practices in terms of contracting-out schemes;
- e) To prevent the employment of undocumented foreign workers, and
- f) To assure the right to legal conditions represented by genuine and proper statutes (internship, fixed-term, autonomous, etc.).

A national commission (*Comission Nationale de Lutte Contre le Travail Illégal*) was created to establish targets and deadlines. Labour inspectors, courts, police, *gendarmérie*, Social Security and Family Allowance Contribution Collection Offices (*Unions de Recouvrement des Cotisations de Sécurité Sociale et d'Allocations Familiales - URSSAF*), and tax authorities act together in order to tackle fraudulent activities by setting up a comprehensive package of sanctions, remedies, preventive measures, and information for the entire population.

Another large contribution to the establishment of the employment relationship comes from the French courts: the elaboration of the “indication clustering” technique (*méthode du faisceau d'indices*). This method is used to verify the facts that characterize an employment relationship according to a sequence of evidences (indicators) to be analyzed and evaluated in order to ascertain the legal qualification of a specific relation. It was developed and firstly used to resolve the nature –whether public or private– of the service provided by an agent working for the public sector. It has since, been extended to other fields, notably the labour law, especially to help define the legal framework, whether labour or not, in which the relationship should be placed for examination.¹²⁷

The technique is largely used by French labour inspectors and it consists of sustaining an argument with the support of a set of coherent and converging factual evidences, analyzed in order to establish the qualification of a legal relation, namely a contract of work. The method is applied and verified based on concrete elements, by inspectors qualified to impose sanctions against deceit. The inspectors examine factual working conditions, especially regarding subordination, and forge conviction according to the concurrent presence of several concordant evidences.

¹²⁴ Ministère du Travail, de l'Emploi et de la Santé: *L'inspection du travail en France en 2010*, Bilans et rapports, Paris, Ministère du Travail, de l'Emploi et de la Santé, 2011, p. 174.

¹²⁵ See http://www.travail-emploi-sante.gouv.fr/IMG/pdf/20040618_dossier-presentation.pdf.

¹²⁶ See http://www.solidarite.gouv.fr/IMG/pdf/DP_CNILTI_mars_07.pdf.

¹²⁷ *Ecole des Roches v. M. Barrat*, 1983, Plenary Assembly (*Arrêt Barrat*).

Proven subordination¹²⁸ applied to the “indication clustering” method, therefore, is regarded as the technique to verify the existence of an employment relationship by the combination of sorted evidence:

- Submission to a work schedule and at a certain workplace;
- Worker’s own personal absence;
- Working tools provided by the employer;
- Employer’s exclusive own profit;
- Remuneration.

Case law has been clearly defining the borders between autonomous and dependent work.¹²⁹ Fraudulent subcontracting, false autonomous work, dissimulated managers, disguised interns, and other deceitful schemes to conceal an employment relation are amongst the main considerations of the labour inspectorate in France.

Ireland

In a similar approach Ireland launched in 2000 the “Programme for prosperity and fairness”, as a social dialogue’s main outgrowth.¹³⁰ Ever since the Employment Status Group formed under the programme mandate,¹³¹ it has been working in setting criteria to establish an employment relationship. The criteria were organized taking into account statutory and case law, and gathered under a preliminary Code of Practice which was later updated.

In 2006, the Programme was rebranded under the “Towards 2016 - Ten-Year Framework Social Partners agreement 2006-2015,” with a main target to develop “a dynamic, internationalized and participatory society and economy, founded on commitment to social justice and economic development that is both environmentally sustainable and internationally competitive.”¹³² The agreement recognized a key role for the labour inspectorate to tackle non-compliance with employment rights and suggests the creation of Joint Investigation Units (JIU) composed of some different public agencies to

¹²⁸ J. Mouly: *Droit du travail*, 4e Édition actualisée, Paris, Editions Bréal, 2008, pp. 34-35.

¹²⁹ See: http://www.courdecassation.fr/publications_cour_26/bulletin_droit_travail_2230/bulletin_droit_travail_2008_2779/travail_3_2963/

¹³⁰

http://www.taoiseach.gov.ie/attached_files/Pdf%20files/ProgrammeForProsperityAndFairness.pdf

¹³¹ The group consists of representatives from the following organizations: Irish Congress of Trade Unions, Irish Business and Employers Confederation, Revenue Commissioners, Department of Social, Community and Family Affairs, Department of Enterprise, Trade and Employment, and Department of Finance. See www.revenue.ie/en/practitioner/tech-guide/ppfrep.pdf

¹³² Department of Taoiseach. *Towards 2016, Ten-Year Framework Social Partners Agreement 2006-2015*, Dublin, Stationary Office, 2006, p. 5. See http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Towards2016PartnershipAgreement.pdf

work together on the theme.¹³³ Furthermore the Agreement settled the basis for executive action taken by the Hidden Economy Monitoring Group.¹³⁴

In 2007, the Hidden Economy Monitoring Group published the updated “Code of Practice for Determining Employment or Self-Employment Status of Individuals.” Aimed “to eliminate misconceptions and provide clarity,” within an employment relationship,¹³⁵ the Code establishes a series of criteria to distinguish a true employee from a self-employed worker. These criteria were collected based on case law and gathered according to the group’s provisions:

Criteria on whether an individual is an employee	Criteria on whether an individual is self-employed
<p>While all of the following factors may not apply, an individual would normally be an employee if he or she:</p> <ul style="list-style-type: none"> - is under the control of another person who directs as to how, when and where the work is to be carried out; - supplies labour only; - receives a fixed hourly/weekly/monthly wage; - cannot sub-contract the work. If the work can be subcontracted and paid on by the person subcontracting the work, the employer/employee relationship may simply be transferred on; - does not supply materials for the job; - does not provide equipment other than the small tools of the trade. The provision of tools or equipment might not have a significant bearing on coming to a conclusion that employment status may be appropriate having regard to all the circumstances of a particular case; - is not exposed to personal financial risk in carrying out the work; - does not assume any responsibility for investment and management in the business; - does not have the opportunity to profit from sound management in the scheduling of engagements or in the performance of tasks arising from the engagements; - works set hours or a given number of hours per week or month; - works for one person or for one business; - receives expense payments to cover subsistence and/or travel expenses; - is entitled to extra pay or time off for overtime. <p>Additional factors to be considered:</p> <ul style="list-style-type: none"> - an individual could have considerable freedom and independence in carrying out work and still remain an employee; - an employee with specialist knowledge may not be directed as to how the work is carried out; 	<p>While all of the following factors may not apply to the job, an individual would normally be self-employed if he or she:</p> <ul style="list-style-type: none"> - owns his or her own business; - is exposed to financial risk, by having to bear the cost of making good faulty or substandard work carried out under the contract; - assumes responsibility for investment and management in the enterprise; - has the opportunity to profit from sound management in the scheduling and performance of engagements and tasks; - has control over what is done, how it is done, when and where it is done and whether he or she does it personally; - is free to hire other people, on his or her terms, to do the work which has been agreed to be undertaken; - can provide the same services to more than one person or business at the same time; - provides the materials for the job; - provides equipment and machinery necessary for the job, other than the small tools of the trade or equipment which in an overall context would not be an indicator of a person in business on their own account; - has a fixed place of business where materials equipment etc. can be stored; - costs and agrees a price for the job; - provides his or her own insurance cover e.g. public liability cover, etc.; - controls the hours of work in fulfilling the job obligations. <p>Additional factors to be considered:</p> <ul style="list-style-type: none"> - generally an individual should satisfy the self-employed guidelines above, otherwise he or she will normally be an employee; - the fact that an individual has registered for self-assessment or VAT under the principles of self-assessment does not automatically mean that he or she is self-employed;

¹³³ *Idem. Ibidem.* pp. 93-94.

¹³⁴ The Hidden economy monitoring group is made up of representatives of Ireland’s tax authorities, the Office of the Revenue Commissioners, the Department of Social and Family Affairs, the Irish Congress of Trade Unions (ICTU), the Irish Business and Employers’ Confederation (IBEC), the Small Firms’ Association (SFA) and the Construction Industry Federation (CIF). See <http://www.eurofound.europa.eu/areas/labourmarket/tackling/cases/ie001.htm>

¹³⁵ See <http://www.welfare.ie/EN/Publications/Documents/code-of-practice-on-employment-status%5B1%5D.pdf>

<ul style="list-style-type: none"> - an individual who is paid by commission, by share, or by piecework, or in some other atypical fashion may still be regarded as an employee; - some employees work for more than one employer at the same time; - some employees do not work on the employer's premises; - there are special PRSI rules for the employment of family members; - statements in contracts considered by the Supreme Court in the 'Denny' case, such as "<i>You are deemed to be an independent contractor</i>", "<i>It shall be your duty to pay and discharge such taxes and charges as may be payable out of such fees to the Revenue Commissioners or otherwise</i>", "<i>It is agreed that the provisions of the Unfair Dismissals Act 1977 shall not apply etc.</i>", "<i>You will not be an employee of this company</i>", "<i>You will be responsible for your own tax affairs</i>" are not contractual terms and have little or no contractual validity. While they may express an opinion of the contacting parties, they are of minimal value in coming to a conclusion as to the work status of the person engaged. 	<ul style="list-style-type: none"> - an office holder, such as a company director, will be taxed under the PAYE system. However, the terms and conditions may have to be examined by the Scope Section of Department of Social and Family Affairs to decide on the appropriate PRSI Class; - it should be noted that a person who is a self-employed contractor in one job is not necessarily self-employed in the next job. It is also possible to be employed and self-employed at the same time in different jobs; - in the construction sector, for health and safety reasons, all individuals are under the direction of the site foreman/overseer. The self-employed individual controls the method to be employed in carrying out the work.
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The National Employment Rights Authority (NERA) is the responsible unit for enforcing Labour law in Ireland. It was established under the "Towards 2016" Social Agreement and has as one of its mandate "to secure compliance with employment rights legislation and to foster a culture of compliance in Ireland."¹³⁶ In 2008, the Employment Law Compliance Bill was published in order to secure better compliance with the employment regulation by reforming the legal provisions with the purpose of strengthening inspection and enforcement powers.¹³⁷

The labour inspection system in Ireland has undergone significant changes in recent years and at the time of writing is continuing to evolve. The existing labour inspection agency is NERA which was established in 2007. This development emerged from the changing circumstances in the early to mid-2000s when Ireland experienced an unprecedented economic boom and almost full employment. One consequence was a significant increase in economic immigration (immigration resulted in a 16.8 per cent increase in the population of Ireland between 1996 and 2006). Traditionally Ireland was more used to emigration. The trade union movement in particular became concerned that some employers might use the situation to take advantage of vulnerable workers (particularly immigrant workers) who might not be aware of their employment rights and entitlements in Ireland.

Over time ICTU and individual Trade Unions lobbied through the Social Partnership process for more effective policy responses. This ultimately resulted in an agreement in 2006 between, inter alia, Government, Trade Union and Employer Representatives as part of the 10-year Framework Social Partnership Agreement 2006-2015 "Towards 2016", to establish NERA. It was subsequently established on an interim basis, pending enactment of appropriate legislation in February 2007 and is currently in the process of being subsumed into a new Workplace Relations Commission. The objective in establishing NERA was to enhance and expand the existing Labour Inspectorate of the then Department of Enterprise Trade and Employment in order to develop "a comprehensive and responsive system of compliance and enforcement."

¹³⁶ See <http://www.employmentrights.ie/en/aboutnera/>.

¹³⁷ See <http://www.oireachtas.ie/documents/bills28/bills/2008/1808/b1808d.pdf>.

The draft legislation to establish NERA on a statutory basis was the Employment Law Compliance Bill which was initiated in the Irish Parliament (Dáil Éireann) in 2008. The purpose of the Bill was to secure better compliance with employment legislation in accordance with provisions of Part 2, Sections 11 to 16 of the “Towards 2016” Social Partnership agreement .

The main provisions of this Bill were:

- to establish a new statutory office dedicated to employment rights compliance, and with a tripartite Advisory Board;
- to strengthen inspection and enforcement powers and make other necessary provisions to secure compliance with employment legislation;
- to specify the statutory employment records to be kept by employers for all employees and the high penalties for failure to do so or for other breaches of employment legislation;
- to foster increased co-operation at workplace level to safeguard employment rights;
- to support and enhance monitoring and inspection activity in relation to compliance with the REA in the electrical contracting industry;
- to provide for exchanges of information between statutory enforcement authorities so as to facilitate joint investigations of employers suspected of contravening the law;
- to strengthen the powers of the Minister for Enterprise, Trade and Employment to initiate investigations and publish the outcomes in cases of public interest;
- to provide for involvement of labour inspectors, for the first time, in the enforcement of provisions of the Employment Permits Acts 2003 and 2006 and to strengthen those Acts as regards records and other obligations of employers.

Although the Employment Law Compliance Bill was never progressed into law, legislative work continued until the dissolution of the Dáil in 2011. The new Government decided to undertake a fundamental review of the existing employment law and industrial relations infrastructure by initiating a Workplace Relations Reform Programme designed to deliver a world-class workplace relations service and employment rights framework by merging the activities of NERA, the Labour Relations Commission, the Equality Tribunal and the first instance functions of the Labour Court and the Employment Appeals Tribunal into a new body of first instance - the Workplace Relations Commission (WRC). The existing appellate functions of the Employment Appeals Tribunal were to be incorporated into an expanded Labour Court. The intention from the labour inspection perspective was that NERA would be responsible for promoting maximum compliance with employment law.

At the time of writing the legislative programme was still on-going. The Minister for Jobs, Enterprise and Innovation had indicated his commitment to the early enactment of the legislation with a view to having the proposed new Workplace Relations structures in place during 2013.

The functions undertaken to date by NERA in promoting a culture of compliance with employment legislation will be continued by a proposed Compliance Service of the new WRC. Officers previously referred to as Labour Inspectors or NERA Inspectors will be re-named as Compliance Officers. Compliance Officers will deal with underpayment of

national minimum wage; rates of pay due under REAs; rates of pay due under EROs; failure to provide a pay slip contrary to the Payment of Wages Act; failure to detail all deductions from gross pay on a pay slip; unlawful deductions from pay contrary to the Payment of Wages Act; illegal methods of payment; failure to keep records mandated by the Payment of Wages Act; failure to issue a statement of terms and conditions of employment/accurate statement or to amend a statement as required by the Terms of Employment (Information) Acts; various breaches of the Protection of Young Persons (Employment) Act; working without a valid employment permit or employing somebody without a permit where one is required under the Employment Permits Acts 2003 and 2006. Where the enactment in question is EU derived and provides for the potential award of compensation over and above mere restitution of an underpayment (as for example the Organization of Working Time Act in respect of annual leave), the Compliance Officer should be able to award restitution but a complainant should in the alternative be able seek compensation at a hearing before an Adjudication Officer. Compliance Officers may also be able to use Compliance Notices as a form of statutory notice or direction to an employer to rectify suspected non-compliance with employment legislation. Compliance Officers should also be empowered to issue Fixed Charge Notices in respect of the following examples of non-compliance with employment legislation should the employer in question fail to rectify his or her non-compliance within 14 days of having been advised in writing to do so by a Compliance Officer:

- Failing or refusing to provide an employee with written terms and conditions of employment;
- Failing or refusing to provide an employee with a payslip;
- Failing or refusing to record deductions on a payslip;
- Failing to maintain or produce employment records for a Compliance Officer.

In addition, Compliance Officers will continue to engage with employers and their representative organizations and will continue to inspect individual employers' employment records with a focus of achieving voluntary compliance in the first instance where non-compliance is detected. It is proposed that existing statutory powers of Labour/NERA inspectors will be enhanced by introducing new mechanisms designed to be effective instruments in fostering a culture of compliance. It is expected that the changes, particularly in the area of compliance, will enhance the powers of Compliance Officers.

Italy

Italy is one of the countries to have recently experienced a deep reform in the labour market.¹³⁸ The Legislative-Decree No. 276, 10 September 2003, under the mandate established by Law No. 30, 2 February 2003, aims basically at providing the Italian labour market with more contractual types than previously existed, and, consequently, more flexibility.¹³⁹ The reform has also opened the gates to a wider restructuring within the

¹³⁸ Referred here as Biagi Reform, named after its main mastermind, Prof. Marco Biagi, from University of Modena and Reggio-Emilia, consultant, advisor and Labour law expert for the Italian Ministry of Labour.

¹³⁹ Ministero del Lavoro e delle Politiche Sociali: *La riforma Biagi: Il lavoro atipico e flessibile*, Roma, Istituto per lo sviluppo della formazione professionale dei lavoratori, 2004, p. 6. See http://www.lavoro.gov.it/nr/rdonlyres/d61c6e85-928b-41a7-97c4-37b4e6feadb6/0/10_riforma_biagi_lavoro_atipico.pdf

labour inspection services, redirecting them to current concerns over the employment relationship.

The administrative reform that followed the Biagi Law represented a substantial gain for the labour inspectorate by recognizing it as the most appropriate institution capable of promoting good working practices, while preventing fraud and fighting against irregular forms of work.¹⁴⁰ Although there is no single legal definition of what constitutes “irregular work” according to the Italian labour system, there are some indicators established by sparse legislation¹⁴¹ delegating the task of controlling fraud and work misclassification to the country’s General Department of Work (*Direzione Generale del Lavoro - DGL*).

Based on that definition, legislation has been created and implemented in order to revise labour inspection targets. Legislative Decree No. 124, 23 April 2004, aims at rationalizing social security and labour inspectorates’ functions and establishes¹⁴² a central commission to coordinate inspection activity, especially when dealing with underground and irregular work. In the same direction, DGL has been issuing some administrative acts in order to regulate the labour inspectorate’s activity in regard to the recognition of an employment relationship, especially in the case of underground work (*lavoro sommerso*) and contract work (*contratto di appalto*).

For instance, a Directive of 9 September 2008, from the Ministry of Labour, Health and Social Policies, has established patterns and standards to follow in order to carry out inspections, according to the new regulation. The planning strategy, the right balance between prevention and repression, dealing with the management of complaints and conciliation, flexible jobs, working hours, contract, undeclared and fraudulent contracts are among the topics included in the orientation. Another referential administrative instrument is the Ministry of Labour and Social Policies’ Circular No. 38, 12 November 2010. This administrative act regulates the establishment of the so-called “maxi-sanction” (*maxisanzione*), which was implanted by the law¹⁴³ in order to improve the tools to counter undeclared work. “Maxi-sanction” assures that all the applicable penalties will be issued, cumulatively, including a punishment for every undeclared working day for every worker, and that a very high sanction will be applied to the employer. Under these directions, “maxi-sanction” is triggered when the evidence of undeclared work arises due to an employer’s failure to inform about new employees to the local employment centre.

One of the most characteristic and intriguing feature of current labour law challenges are the triangular relationships. In Italy, contracting-out (*contratto di appalto*) is regulated by law,¹⁴⁴ and further ordinance has been established to coordinate the inspection

¹⁴⁰ M. Fasani: *Labour inspection in Italy*, LAB/ADMIN, Working document No. 11, March 2011, Geneva, International Labour Organization, 2011, pp. 10-13.

¹⁴¹ In the Italian legal system one of the first attempts in conceptualizing these atypical figures appeared in Law No. 73, 23 April 2002, establishing that the employment of dependent workers unregistered in the company’s accounting books should be penalized; Law No. 248, 28 July 2006, reformed the previous legislation to extend the concept to all workers, not only dependent ones.

¹⁴² Legislative Decree No. 124, 23 April 2004, Art. 3.

¹⁴³ Law No. 163/2010, Art. 4, reformed previous legislation, art. 36-bis, c. 7, “a”, Law No. 248, 8 August, 2006, which established the maxi-sanction for the first time.

¹⁴⁴ Art. 1665, and subsequent, Civil Code; art. 29, Legislative Decree No. 276/2003; Art. 118, Legislative Decree No. 163/2006; Art. 35, c. 28, Decree Law No. 223/2006.

activity.¹⁴⁵ Administrative regulation acts to clarify the difference between legitimate contracting and illegal subcontracting. For that, some revealing evidence (*indici rivelatori*) and criteria were established to assist inspectors in their activity. Legitimate contracting would be in course if a contractor displays:

- Own organizational consistency;
- Specialized know-how;
- Assumption of entrepreneurial risk, related to:
 - Habitual activity;
 - Own productive activity performed in a proven way;
 - Possession of a mix of different customers, either simultaneously or in the course of an elapsed time.

If an inspector reaches the conclusion that an illicit contract took effect, a sanction must be placed and a mandatory injunction must be released (*prescrizione obbligatoria*), in order to provide the immediate stoppage of the fraudulent activity as well as the employees absorption by the contracting party. Further orientation is also given to provide guidance for health and safety standards, social security contributions retrieval (in case of fraud), solidarity clause, and certification procedure, which is further described ahead.

Another consequence of the Biagi Reform was the surge of new forms of preventive control over the contract of employment, especially established to avoid and prevent potential conflicts within triangular relationships and new contractual types surged thereby. One of these new forms of preventive control is the use of certification, an administrative process that testifies, under the employment relationship parties' request, that the intended contract respects the provisions of the law. It is a voluntary procedure aimed at granting consultative assistance to the employment relationship parties and implies in the selection of a certifier institution. According to legislation,¹⁴⁶ certifier institutions are:

- Bilateral entities;
- Provincial Labour Departments and Provinces;
- Universities;
- Ministry of Labour and Social Policies (whenever the employer has its headquarters in two or more provinces).

The procedure starts with the proper manifestation of the parties and concludes within 30 days. The request must express the exact effects the certification is intended for, whether for administrative, civil, social security or tax purposes. Based on the documents presented, the certifier institution must verify the adequacy of the chosen contract and propose modifications, if necessary. A hearing with the parties to clarify the purposes of the certification may be a part of the procedures. The institution can certify many types of relationship:

¹⁴⁵ Ministry of Labour and Social Policies' Circular No 5, February 2nd 2011.

¹⁴⁶ Legislative Decree No. 251, 6 October 2004.

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- Employment contract (Art. 75, Legislative Decree No. 276/2003), aiming at securing the qualification of the employment relationship;
 - Contracting-out (Art. 84, Legislative Decree No. 276/2003), aiming at distinguishing between a true contract-out from an illegal subcontracting;
 - Internal rules of a cooperative, aiming at analysing the nature of work to be done by the associates in a future job to be performed (Art. 83, Legislative Decree No. 276/2003);
 - Transaction and renunciation in regard to a project cooperation (Art. 68, Legislative Decree No. 276/2003), aiming at rendering these acts non opposable, *ex vi* Art. 2113 Civil Code;
 - Transaction and renunciation in reference to the rights upraised from an employment relationship aiming at rendering these acts non opposable, *ex art.* 2113 Civil Code (art. 82, Legislative Decree No. 276/2003);
 - Assisting and consulting the parties, particularly in reference to the exact contract qualification and the alienable rights (Art. 81, Legislative Decree No. 276/2003);
 - Voluntary conciliation attempting, (art. 410, Civil Procedure Code, Art. 31 Law No. 183/2010);
 - Mandatory certification of the arbitration clause (Art. 808, 412 and 412 quarter, Civil Procedure Code, as Art. 31, c. 10, Law 183/2010);
 - Assisting and consulting the parties on just cause matters in regard to the individual employment contracts;
 - Arbitration chamber institution (Art. 31, c. 12, Law No. 183/2010);
 - Conciliation attempting in case of judicial action against the employment contract certification (c. 4, Art. 80 Legislative Decree No. 276/2003);
 - Organizational model and enterprise management, including occupational health and safety in the workplace.

Flexible arrangements¹⁴⁷ need to be inspected according to administrative rules published by the Ministry of Labour and Social Policies, which established standards for the labour inspectorate, as well.¹⁴⁸ These rules are based on the notion that certificates generate the assumption of a contract regularity that can only be challenged in the case of a proven breach.¹⁴⁹

A current experience based on social dialogue, in Italy, regards the search of an index that determines accurately the existing labour intensity, in certain activities. Congruence indexes (*Indici di congruità*) are scales of measurement of the workforce intensity, with

¹⁴⁷ Here understood as fixed term, part-time, on-call and occasional jobs, as referred to in the Ministry of Labour, Health, and Social Policies' Directive of 2008, 18 September which establishes that labour inspectorate should only focus on uncertified relationships. Same procedure should be applied to contract-out jobs, and triangular relationships.

¹⁴⁸ Ministry of Labour and Social Policies Circular No. 48, 15 December 2004.

¹⁴⁹ See sentence no. 2647, 22 June 2009, Labour Section, Court of Milan.

regard to a certain activity, and were introduced by law,¹⁵⁰ in the Italian regulation. The intention was to avoid social dumping and unrealistic values, based on the denial of the workers' rights. These indexes apply to every contract-out scheme and whenever a presented value is so low that it displays incongruence, triggering an assumption of incongruity and halting the issuance of a social security certification, thus paving the way for further investigations. Congruence indexes were elaborated as a result of the social dialogue, between the most representative organizations of both employers and employees, under the organization and supervision of the Ministry of Labour and Social Policies. It is still under probation, according to the agreement reached among the social agents and it will be fully applicable from 2013.

In June 2012, Parliament enacted a law, (known as "Legge Fornero" after Mrs Elsa Fornero, the former government Minister of Labour), which has completely reformed the labour market in Italy.

The Reform has amended Art. 18 of the "Statuto dei Lavoratori" (Law 300/1970), providing different sanctions arising from unlawful dismissals in workplaces with more than 15 employees. Whilst the previous legislation provided reinstatement and complete back pay in all cases for the months between termination and reinstatement, the Reform lists the following sanctions:

- i. Termination based on discrimination or similar cases: due to the employee getting married, violating the maternity/paternity protection, due to a reason against public policy - or a void termination (i.e. oral termination notice). In these cases, the sanctions remain the same as prior to July 2012: reinstatement and total back pay, although the employee now has a right to opt for a 15-month allowance by the employer instead of reinstatement;
- ii. Termination based on breach of contract, followed by a lawsuit in which the employee proves that he/she did not breach the contract or the Court assesses that the conduct that caused the termination is among the list of cases prescribed in collective bargain as a reason for a conservative sanction only. These cases receive the same sanction as cases of termination where the employee is dismissed for a reorganization or collective lay off and can demonstrate that the real motivation of termination was instead an alleged misconduct; in all the hypothesis mentioned in this point, the employee is reinstated with back pay, but with a maximum of twelve months, in the event the trial lasts longer;
- iii. In all other cases of termination for cause or for economic reasons that Courts deems wrongful, for any reason other than the ones stated in the paragraph above. In these cases, there is no reinstatement and the employee is awarded an allowance equal to 12-24 monthly compensation payments, depending on a vast array of criteria including seniority, size of the firm, behaviour of the parties etc.;
- iv. Terminations that are challenged for reasons relating to the procedure (i.e. absence of motivation of the just cause, insufficient time for the employee to respond to the employer notice of misconduct etc.). In these cases reinstatement is not admitted and back pay is limited to between six and 12 monthly salary payments, according to the above mentioned criteria.

As for the Independent Contractor Agreements, the Reform aims to discourage relationships that differ from employment contracts (i.e. project labour, labour

¹⁵⁰ Law No. 296, 27 December 2006, Art. 1, cc. 1173 and 1174.

partnerships, independent contractor agreements). Various constraints and sanctions have therefore been enacted, as follows:

- a) Independent project contractor agreements have to refer to a specific project dedicated to a clearly defined final result. They can no longer relate to a part of a wider project; neither to the corporate activity of the principal; nor to merely executive or iterative works (unless they are agreed by collective bargaining agreements). Failing the foregoing, an independent contractor agreement providing for collaboration on a regular basis is regarded as a permanent employment contract by operation of law, since the date of its coming into force. This new provision has resolved some discrepancies in the case law under the previous rule. Hence, today, the determination of the specific project is a precondition of an independent project contractor agreement; no other evidence can be submitted to Court by the principal of the independence of the contractor. Furthermore, if the independent project contractor performs its contractual activity in a way similar to that of the employees of the principal, then the independent project contractor agreement is regarded as a permanent employment contract. However, in this case, the principal is admitted to give evidence regarding the independence of the contractor. The foregoing assumption does not apply in the case of highly professional activities, to the extent that such activities are agreed by collective bargaining agreements.
- b) The Reform also regulates the activities performed by independent contractors holding a VAT position. The relevant relationship is regarded as a contract providing for collaboration on a regular basis whenever at least two of the following conditions occur:
 - i. The duration of the relationship is in excess of eight months for two consecutive years;
 - ii. The consideration is in excess of 80 per cent of the overall annual earnings of the contractor for two consecutive years;
 - iii. The contractor has a dedicated working desk at the principal's facilities.

This assumption is skipped in three cases only:

1. The contractor renders a professional activity the performance of which requires admission to registers or rolls;
2. The contractor gains an annual income as an independent contractor (regardless whether from one or more principals) below 1.25 times the minimum national insurance contribution base;
3. The contractor renders a highly-specialized activity with skills acquired through substantial education or practice.

The burden of proof of the independence of the contractor lies upon the principal. Failing any evidence, the relationship is regarded as a contract providing for collaboration on a regular basis and the latter is in turn regarded as a permanent employment contract by operation of law if no specific related project can be evidenced.

As for the labour partnership, according to the Reform no more than three partners can be dedicated to the same activity (except for relatives or kindreds). Failing this, the relationship with all further partners is regarded as a permanent employment contract. In any case, the relationship with a partner is regarded as a permanent employment contract when:

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- a) The partner has not benefited from the earnings of the partnership or of a concerned business;
 - b) No accounting reports have been submitted to the partner;
 - c) The partner performs a scarcely specialized activity.

The Reform intervenes also on temporary work as follows:

- a) In future, no specific reason (i.e. organization, production, technical, substitution) is required to enter into a temporary employment contract for the first time provided that the duration of the contract is not in excess of 12 months. The same rule applies when agreed by means of collective bargaining agreements, or when the employee is hired within peculiar production activities (i.e. new activities, launch of a new product or service) or within the first appointment of a temporary administering contract;
- b) The legislator has extended the maximum time limit upon expiration of which a temporary employment contract is regarded as a permanent employment contract; such limit applies also in case a temporary employment contract undergoes one or more extensions. However, where the duration of a temporary contract is extended, the employer is obliged to inform the local labour authority, by communicating the length of the extension. The term after which a new temporary employment contract is regarded as a permanent employment contract has been prolonged from 10 to 60 days (if the duration of original temporary employment contract was not in excess of six months) and from 20 to 90 days (if the duration of original temporary employment contract was in excess of six months);
- c) Thirty six months is the maximum duration of a temporary employment contract after which the contract is regarded as a permanent employment contract and must be calculated including the appointments within a temporary administering contract, whether temporary or permanent, between the same parties and for the same activities.

Spain

The labour inspectorate in Spain has long been dealing with undeclared work and disguised relationships. In 2005, the Tax Authority (*Agencia Tributaria*) launched the Plan to Prevent Tax Fraud (*Plan de Prevención del Fraude Fiscal*). It was updated in 2008 to adapt to the new economic circumstances, with the creation of the Fraud Observatory (*Observatorio del Fraude*). The Observatory is formed by the General Treasury of the Social Security (*Tesorería General de la Seguridad Social*) and by the Labour Inspectorate (*Inspección de Trabajo y de la Seguridad Social*) and it has, as main objectives:¹⁵¹

- To permanently update the fraud conduct directory and the sector risk profile as well as to elaborate a risk assessment;
- To establish action protocols, aimed at orienting the investigations of deceptive conduct;

¹⁵¹ Plan Integral de Prevención y Corrección del Fraude Fiscal, Laboral y a la Seguridad Social. p. 13. See http://www.aeat.es/static_files/AEAT/Contenidos_Comunes/La_Agencia_Tributaria/Sala_de_Prensa/Plan_int_prev_corr_fraude.pdf.

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- To extensively and intensively prospect the database of the General Treasury of the Social Security using IT tools; and,
 - To propose the improvement of management and the updating of normative in order to increase the efficiency and effectiveness of the struggle against fraud.

Undeclared work and the irregular economy have been main targets for the Spanish labour inspectorate since 2005, following an immigrant's regularization plan launched in the same year. Moreover, labour inspection performance in Spain is totally based on a crossing-data cooperative basis. Different tools and approaches are relevant to accomplish better results and aside from the field inspections, it is important to mention that campaigns, lectures, discussions and tripartite meetings are paramount.

Alongside with undeclared work and irregular economy, triangular and disguised relationships are also targets of a major strategy to tackle the multifaceted problem of precarious work that deteriorated as a result of the 2008 global crisis.¹⁵² Specifically with regard to the approach adopted by Spain, focus has been given to certain sectors and activities. Legislation itself has been updated to regulate new forms of autonomous work¹⁵³ and other forms of control have been assigned to the labour inspectorate in order to regulate contracting-out within the construction sector.¹⁵⁴

The employment relationship has a "statutory assumption" status in Spain as the Statute of Labourers (*Estatuto de los Trabajadores*) establishes that there is an employment relationship every time work is performed under someone else's direction, organization and account, for remuneration.¹⁵⁵ Jurisprudence, for instance, has been setting the framework for the exercise of this organizational employer's power. Thus, working for someone else's, under dependency, for remuneration, and the insertion on the directive and organizational entrepreneurs' circle, are some of the employment relationship characteristics shaped by jurisprudence in Spain.¹⁵⁶ Since the Spanish labour inspectorate is also responsible for inspecting and retrieving the social security quotas,¹⁵⁷ one of its duties is to correctly assess the relationship occurring under a contract of work, and establish whether it is an employment relationship or an autonomous work.

¹⁵² M.-L. Vega Ruíz: *The global economic and social crisis and its impact on labour inspection systems Social Dialogue Sector*, Geneva, International Labour Organization, 2009, pp. 8-13. See http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/--lab_admin/documents/publication/wcms_123770.pdf.

¹⁵³ See Law 20, 11 July 2007, called Autonomous Work Statute, and Royal Decree 197, February 23th, 2009, which develops the concept of economically dependent autonomous worker (*trabajador autónomo económicamente dependiente - TRADE*).

¹⁵⁴ See Law 32, 18 October 2006, which regulates contracting-out within the construction sector, and Royal Decree 1109, 24 August 2007, which develops the law. Both instruments create the Certified Firms Register (*Registro de Empresas Acreditadas*), related to the Regional Labour Authority. Whenever a fraud is detected the certificate is cancelled and the subcontractor is penalised by the labour inspectorate.

¹⁵⁵ *Estatuto de los Trabajadores*, Art. 8.1.

¹⁵⁶ See, among others, Supreme Tribunal decisions TS ATS 3940/2008, TS ATS 11374/2007, and TS STS 8532/1999.

¹⁵⁷ Law 42, 14 November 1997, Art. 3. 1.3.1.

Likewise, in order to correctly determine the undergoing relationship, labour inspectorate issued some ordinances to guide the labour inspector's work. Instruction 8/2009, 29 July, is intended to tackle the false autonomous work phenomenon and defines some indicators that establish if there is a fraudulent operation leading to further investigation of the worker:¹⁵⁸

- Time proximity: to preferably select cases in which a small time-lapse between disconnection from the general social security system and enrolment in the autonomous work social security system occurs;
- Economic sectors: to preferably select industry and transportation, in which annual targets are far from accomplishment;
- Ambulant vending: ambulant vendors will not be selected as they are part of the reform imposed by Law 2/2008;
- Sectorial coincidence: to preferably select cases where there is a coincidence between the workers' and the companies' National Code of Economic Activities national code (*Código Nacional de Actividad Económica - CNAE*).

Furthermore, the ordinance also establishes some criteria to determine whether there is an employment relationship. Thus, regardless of the legally formal aspect of the relationship, if a considerable amount of the following characteristics occur, there is a true employee, rather than an autonomous worker.¹⁵⁹

Dependency or subordination signs exist:

- a) If the worker develops his/her work under the company's (or any of its officers) direction, vigilance, and orders;
- b) If the worker is submitted to technical or organizational orientation, and under the company's command power;
- c) If the worker obeys the contractual orders about his/her tasks;
- d) If the worker performs similar tasks compared to the other regular plant's employees;
- e) If the worker has similar hours of work compared to the other regular plant's employees;
- f) If the worker has previously operated with the same company as an employee it is especially interesting to determine whether the current activity is different from that performed under an employment contract;
- g) "Working for someone else" signs exist;

¹⁵⁸ See instruction no. 8/2009, about crackdown NS0033 tackling false autonomous workers, General Department of Labour Inspection (*Instrucción n. 8/2009 sobre campaña NS0033 de trabajadores falsamente autónomos, de la Dirección General de la Inspección de Trabajo y Seguridad Social*).

¹⁵⁹ *Ibid.*

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- h) If the entrepreneur appropriates the fruits of labour directly and from the beginning, as they were produced, instead of waiting for the final outcome;
 - i) If the worker commits to an activity oriented obligation, leaving the result obligation to a second level;
 - j) No risk to the worker. The remuneration earned by the worker is not affected by the risk of deterioration, destruction, or failed operation which cannot be attributed to him/her. The entrepreneur must take all the risks, not the worker;
 - k) If the worker earns a retribution based on time (per hour, *per diem*, per week or per month), or on partial units of the entire work instead of a total amount, paid after the conclusion of the work;
 - l) If the worker does not use his/her own tools, materials, and machinery, aside from the most simple and useful ones specifically related to some professions. The worker just uses his/her own physical and intellectual capacity;
 - m) “Own organization” signs exist;
 - n) If the worker does not perform his/her own and individualized activity, regardless the fact that he/she is enrolled as an autonomous worker in the social security system;
 - o) If the worker does not possess the factors attributed to denote organized and “own activity,” like working in his/her own establishment (building, office, workshop, etc.) separated from his/her private residence, sufficient machinery to perform the tasks, or the means of transportation to realize the activity.

On another direction, towards a sectorial approach, technical criterion 79/2009 (*Criterio Técnico 79/2009*), relates to the social security regimen applicable to the private health sector workers. It has some guidelines directing labour inspectors on how to recognize a true employment relationship in the private health system. Under this ordinance, there are six main factors based on jurisprudence to be addressed in order to determine whether there is an employment relationship:¹⁶⁰

1. The qualification of the contract does not depend on how it was determined by the parties but by the effective configuration expressed in the obligations accepted under the agreement and its performance - “primacy of facts” principle (STS 11 December 1989, STS 29 December 1999, among many);
2. The provisions of the Civil Code (contract of service) are not discrepant in regard to the employment relationship, as the latter is a type of the first, improved by a legislative evolution (STS 7 June 1986): under the Civil Code (contract of service) regime, there is a generic “obligation-and-work” exchange scheme compensated by an amount of remuneration for the services, whereas under an employment contract this scheme consists of an obligation to perform dependent work for retribution;
3. Characterization of the “note of dependency” within the health sector, according to jurisprudence:

¹⁶⁰ See technical criterion no. 79/2009, about the social security regime applicable to health professionals in the private sector (*Criterio Técnico Número 79/2009 sobre régimen de seguridad social aplicable a los profesionales sanitarios de los establecimientos sanitarios privados*).

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- a) **Task organization:** If the health professional is integrated to the establishment's professional board which is provided by all the organizational elements to provide the services;
 - b) **Clientele:** Whether the establishment's or the health professional/worker's own;
 - c) **Personal provision of services:** Health professionals are obliged to provide personal services;
 - d) **Workplace, premises, and working teams:** A health professional working for a society of doctors is usually considered to be in an employment relationship;
 - e) **Working methods:** Dependency is explicit whenever determined by the health company, but it is important to notice that a certain level of technical independence is expected as a characteristic of medical and other liberal professions;
 - f) **Working hours:** A strict working hour regime is not necessary as the doctor is submitted to work during the clinic opening hours under the organizational and directional power of the health establishment;
 - g) **Replacements:** Even when occasional substitutions are directly decided by the health professional that is going to be substituted, an employment relationship exists if the existing contractual provisions about the substitution are the exception and not the rule under the main agreement signed by the parties.
4. Characterization of the note of "working for someone else" note characterization within the health sector, according to jurisprudence:
 - a) **Fruits of labour:** Should be transferred to the establishment from the beginning, and not to the medical and nursery personnel;
 - b) **Marketing and public relationship:** Pricing policy, clientele selection, persons to be seen, are powers that characterize the entrepreneur's activities. If these powers are denied to any entrepreneur, it is likely that an employment relationship exists;
 - c) **Retribution:** Both a fixed or periodic retribution, and a correlation between the tasks and the amount of money earned, are evidence of an employment relationship.
 5. Evaluation of the characterization of the notes of "employment relationship":

Relationships set in a health sector establishment are varied but the common characterization of the notes of "employment relationship" applied to any other employment relationship is also valid to determine the existence of an employment contract. Peculiarities related to the health sector may arise, though. In any case, as indicated by the Supreme Tribunal, there must be examined whether:

- a) There is voluntarily agreed *intuitu personae* work;
- b) There is "work developed for someone else", as the fruits of labour are appropriated from the beginning by an entrepreneur in exchange for retribution;

-
- c) There is work performed under the directional and organizational power of someone else;
 - d) There is the perception of habitual retribution.

The Supreme Tribunal sentence of 7 November 2007, established a method to select criteria in regard to the employment relationship. According to this sentence the first step to be taken is to analyze the most usual common evidence of dependency. Thereafter it is necessary to apply the evidence system to the controversial relationship being examined, based in the real facts, with an eye on the characterization of the medical activity, highlighting the usual technical independence enjoyed by health professionals.

- 6. Consequences of the existence of the notes of characterization of the employment relationship:

Labour inspectors should automatically enrol the health professional within the general social security regimen and provide the correct amount of payment owed, from the beginning of the relationship.

According to Spanish legislation,¹⁶¹ whenever the labour inspectorate declares the existence of an employment relationship in contrast to an originally alleged autonomous work, the interested part is able to contest the administrative remedies (*actas de infracción* and *actas de liquidación*) judicially. Once the judicial procedure is settled, the administrative procedure is suspended until a final judicial decision is published.

United States

The rise of non-standard arrangements in North America has followed the economic opening represented by the North American Free Trade Agreement (NAFTA), in 1994.¹⁶² Ever since, the United States Internal Revenue Service (USIRS) has been implementing methods and guidelines for both workers and entrepreneurs aimed at helping both parties to recognize a truly employment relationship and to avoid misclassification. One of the first initiatives was to establish guidelines addressing the employment relationship's indicators, in order to orient the taxpayer on how to adequately identify the real condition of the service realized. The "20 factors" test, also known as "right-to-control" test, served as a simplified indicators script, shaped to delimit the differences between an employee and a contractor, under a common law perspective.

¹⁶¹ Law 36/2011, 10 October Art. 148.

¹⁶² J. Sack, E. Phillips, H. Leal-Neri: *Protecting workers in a changing workworld: the growth of precarious employment in Canada, the United States and Mexico*, in G. Casale (editor): *The employment relationship. A comparative overview*, Geneva, International Labour Office, 2011, pp. 233-285.

The “20 factors” indicating whether an individual is an employee or an independent contractor are:¹⁶³
Instructions An employee must comply with instructions about when, where and how to work. Even if no instructions are given, the control factor is present if the employer has the right to control how the work results are achieved.
Training An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods and receive no training from the purchasers of their services.
Integration An employee’s services are usually integrated into the business operations because the services are important to the success or continuation of the business. This shows that the employee is subject to direction and control.
Services rendered personally An employee renders services personally. This shows that the employer is interested in the methods as well as the results.
Hiring assistants An employee works for an employer who hires, supervises and pays workers. An independent contractor can hire, supervise and pay assistants under a contract that requires him or her to provide materials and labour and to be responsible only for the result.
Continuing relationship An employee has a continuing relationship with an employer. A continuing relationship may exist even if work is performed at recurring although irregular intervals.
Set hours of work An employee usually has set hours of work established by an employer. An independent contractor generally can set his or her own work hours.
Full-time required An employee may be required to work or be available full-time. This indicates control by the employer. An independent contractor can work when and for whom he chooses.
Work done on premises An employee usually works on the premises of an employer, or works on a route or at a location designated by an employer.
Order or sequence set An employee may be required to perform services in the order or sequence set by an employer. This shows that the employee is subject to direction and control.
Reports An employee may be required to submit reports to an employer. This shows that the employer maintains a degree of control.
Payments An employee is paid by the hour, week or month. An independent contractor is usually paid by the job or on a straight commission.
Expenses An employee’s business and travel expenses are generally paid by an employer. This shows that the employee is subject to regulation and control.
Tools and materials An employee is normally furnished significant tools, materials and other equipment by an employer.
Investment An independent contractor has a significant investment in the facilities he or she uses in performing services for someone else.
Profit or loss An independent contractor can make a profit or suffer a loss.
Works for more than one person or firm An independent contractor is generally free to provide his or her services to two or more unrelated persons or firms at the same time.

¹⁶³ Department of Treasury. Internal Revenue Service. Employment taxes. Publication 937. (Rev. Nov. 94). Cat. No. 93126N. pp. 4/5. See <http://www.unclefed.com/IRS-Forms/1996/P937.PDF>

Offers services to the general public

An independent contractor makes his or her services available to the general public.

Right to fire

An employee can be fired by an employer. An independent contractor cannot be fired so long as he or she produces a result that meets the specifications of the contract.

Right to quit

An employee can quit his or her job at any time without incurring liability. An independent contractor usually agrees to complete a specific job and is responsible for its satisfactory completion, or is legally obligated to make good for failure to complete it.

Despite the possibilities and applicability of the test, some concerns emerged as it became a very popular try-out during the 1990's. If from one perspective it was helpful for common citizens to achieve a better understanding about the employment relationship elements, from another point of view it was too simplistic and apart from other factors which should be applied, like if the worker is protected by a statute or only by common law rules, for instance.¹⁶⁴

Another analysis notes that under common law rulings the factors must be measured differently, because not all factors apply in each case or have the same weight.¹⁶⁵ From another point of view, some could say that these guidelines would rather help bad taxpayers to be sharper at the moment of defining the type of relationship to declare to American authorities. In any case, USIRS has recently developed a form to be filled by anyone willing to have an official position about the legal framework applicable to the reality.¹⁶⁶

From a more labour oriented perspective the United States Department of Labour (USDOL) has recently started a joint project with the U.S. Treasury in order to address the "worker misclassification" problem. Worker misclassification means "the practice of treating a worker who is an employee under the law as something other than an employee, thus depriving the employee of rights and benefits to which they are entitled."¹⁶⁷ While USIRS has long issued guidelines to differentiate real employees from independent contractors, USDOL has been pursuing an integrated model in order to enforce the statutes under its responsibility.

Enforcement realized by USDOL is related to some specific federal labour regulation¹⁶⁸ and agencies within the USDOL own administrative structure. Wage and

¹⁶⁴ M. P. Burchett: *Employees vs. Independent Contractors (1990)*, William & Mary Annual Tax Conference, Paper 217, pp. 6-12. See <http://scholarship.law.wm.edu/tax/217>.

¹⁶⁵ A. R. Sumutka: *Employee or independent contractor: are the IRS's 20 factors useful or even needed?* in *The CPA Journal*, April 1992, New York, The New York State Society of Certified Public Accountants, 1992, pp. 48-55.

¹⁶⁶ The form SS-8 is a voluntary way to have an official referral from IRS about the employment relationship contrasting with the independent contract. See <http://www.irs.gov/pub/irs-pdf/fss8.pdf>.

¹⁶⁷ S. D. Harris (DOL Deputy Secretary), Statement before the Committee on Health, Education, Labor, and Pensions, U.S. Senate, 17 June 2010. See http://www.dol.gov/_sec/media/congress/20100617_Harris.htm.

¹⁶⁸ Notably federal labour regulation such as the Fair Labour Standards Act, the Family and Medical Leave Act, the Migrant and Seasonal Agricultural Worker Protection Act, worker protections provided in several temporary visa programs, the prevailing wage requirements of the Davis-Bacon and Related Acts, the Service Contract Act, the Employee Retirement Income Security Act, the Occupational Safety and Health Act, and numerous whistleblower provisions of federal statutes.

Hour Division (WHD) is one of the agencies responsible for enforcing labour law and stands among the main USDOL agencies involved in the task force oriented of tackling the worker misclassification issue.

As an initial contribution of USDOL's efforts to create a joint Labour-Treasury misclassification initiative focused on detecting, investigating, and prosecuting employers with misclassified workers, USDOL published some guidelines other than the common law indicators summed at the USIRS "20 factors" test. In fact, these additional guidelines take into consideration the economic reality established within the relationship as a major jurisprudence input for the determination of the employment relationship.¹⁶⁹ In the same direction, the Supreme Court consolidated some criteria resembling the economic reality test, which should drive the contextual analysis carried out by the judges. These are:¹⁷⁰

- The extent to which the services rendered are an integral part of the employer's business (examples: Does the worker play an integral role in the business by performing the primary type of work that the employer performs for his customers or clients? Does the worker perform a discrete job that is one part of the business' overall process of production? Does the worker supervise any of the company's employees?);
- The permanency of the relationship (example: How long has the worker worked for the same company?);
- The amount of the worker's investment in facilities and equipment (examples: Is the worker reimbursed for any purchases of materials, supplies, etc.? Does the worker use his or her own tools or equipment?);
- The nature and degree of control by the employer (examples: Who decides on how many hours are to be worked? Who is responsible for quality control? Does the worker work for any other company(s)? Who sets the pay rate?);
- The worker's opportunities for profit and loss (examples: Does the worker make any investments such as insurance or bonding? Can the worker earn a profit by performing the job more efficiently or exercising managerial skill or suffer a loss of capital investment?);
- The amount of initiative, judgment, or foresight in open market competition with others required for success of the claimed independent enterprise (example: Does the worker perform routine tasks requiring little training? Does the worker advertise independently via yellow pages, business cards, etc.? Does the worker have a separate business site, etc.?).

The Field Operations Handbooks – FOH,¹⁷¹ published by USDOL, explain in further details how do the "right-to-control" and the "economic reality" tests should be applied by

¹⁶⁹ The US Supreme Court has been analyzing the applicability of some statutes depending on the status of the worker. One of the first cases that attributed to economic reality a major role on determining the employment relationship is *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728, 67 S.Ct. 1473 (1947).

¹⁷⁰ See <http://www.dol.gov/elaws/esa/flsa/docs/contractors.asp>.

¹⁷¹ Operations manual provides Wage and Hour Division (WHD) investigators and staff with interpretations of statutory provisions, procedures for conducting investigations and general administrative guidance. See <http://www.dol.gov/whd/FOH/index.htm>.

WHD investigators, in order to establish whether a worker is an independent contractor or an employee.¹⁷²

Improving legislation¹⁷³ and increasing control over the workplace¹⁷⁴ are also some of the ways to tackle the matter.

7. Assessing the employment relationship at the workplace: a task for inspectors

The respect for the fundamental rights at work is the most important feature of modern challenges faced by labour administrations throughout the world, and it sets up the framework for the intervention exercised by labour inspectorates. Those rights, as stated by the Declaration, need to be guaranteed, regardless or not the ratification of certain basic and fundamental standards. Labour inspectors are the public agents who are in charge of the enforcement of fundamental rights at work. That is why the Declaration is a central document to guide national labour policies in respect to those rights under any system. Additionally it is important to note that the establishment of the employment relationship is crucial, in most systems, to guarantee the exercise and fulfilment of most of these rights.

The reassurance of labour inspection playing a key role in the assessment of the employment relationship is part of a global strategy to strengthen labour administrations in order to guarantee good governance and compliance with the law.¹⁷⁵ Changing roles in labour institutions are related to the increasing economic competition throughout the world. Globalization has put companies under unprecedented levels of competition and threatened the certainty conquered by labour institutions during the 20th century.¹⁷⁶

Labour inspection systems have a mandate provided by both Conventions Nos. 81 and 129. These conventions, together with Recommendations Nos. 81 and 133 are fundamental documents supporting States on the implementation of good governance schemes. Unprotected work is the main fertile ground for Labour Inspectorate's action because it undermines a desirable social cohesion in the constituent States. However, unprotected work is too wide a concept that includes different precarious situations such as undeclared work, triangular relationships, quasi-employees, and disguised relationships, therefore it is absolutely necessary to understand the various different approaches presented by different labour inspectorates.

¹⁷² See http://www.dol.gov/whd/FOH/FOH_Ch10.pdf.

¹⁷³ See the bill text for the Employee Misclassification Prevention Act at <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.3178>.

¹⁷⁴ See <http://www.dol.gov/whd/workers/misclassification/>.

¹⁷⁵ G. Casale, A. Sivananthiran: *Fundamentals of labour administration*, Geneva, International Labour Office, 2010, pp. 43-53.

¹⁷⁶ G. Arrigo, G. Casale, M. Fasani: *A guide to selected labour inspection systems (with special reference to OSH)*, LAB/ADMIN, Working document No. 10, Geneva, International Labour Organization, 2011, pp. 3-6.

Triangular, disguised, subcontracted, undeclared and other atypical labour-related relationships represent an enormous challenge to many different countries.¹⁷⁷ Agricultural work is subject to subcontracting practices in most countries, as the agricultural sector was one of the last to be regulated in terms of labour, and thus is still related to ancient legal practices. The evolution of agribusinesses has produced many more complex, professional, and specialized practices, requiring new approaches to be implemented, as the outsourcing phenomenon appears as a great protagonist within the sector. Working conditions, on the other hand, could still be very hazardous, and good governance is essential to guarantee a safe workplace.

In urban areas, industries and services are increasingly demanding higher productivity at lower costs. Competition is driving companies to search for outsourced forms of work, and alternative ways of having the product of work without having to pay for it. Industries are tempted to spread their production between several different plants, while services are similarly split between many multiple offices, not to mention the return of the domestic system of work, very much related to the service sector, and to some extent, also the manufacturing sector.

Labour inspectors do not regularly determine whether there is or not an employment relationship because this is normally a task reserved to national judicial systems. Rather than declaring the existence of a pact, what labour inspectors do, in most systems, is recognize, assess and gather evidence on how the reality of the facts is expressed within the workplace. For that, labour inspectorates should rely on enough statutory prerogatives and remedies in order to apply them to real situations. In most systems, labour inspectorates deliver notices, reports and other administrative remedies to foster more adequate, private conducts. Labour inspectors' administrative acts correspond to the official analysis about a determined relationship, in order to properly verify if there is a real and concrete independent work or a disguised relationship in need of protection.

The labour inspection represents a government's official statement about a certain and determined workplace. It is also the bridge between the reality of the facts that happen within the workplace and the letter of the law. Labour inspection observations and reports are very useful when describing what the inspector witnessed and perceived in the workplace, therefore a detailed description of the circumstances and facts the inspector has seen is essential for the correct assessment and framing of the employment relationship.¹⁷⁸

As established in Recommendation No. 198, the reality of the facts should drive the analysis to be done and the inspection itself. Although documents like a written contract or job agreements are necessary for a good inspection and may be required as proof of the existence of an employment agreement for most of the labour relationship systems, the facts observed in the workplace play a definitive role in determining the employment relationship, rather than what is written on a piece of paper.

The doctrine of the reality of facts, currently enshrined in Recommendation No. 198, is largely known and used in most systems. It slowly made its way into the jurisprudence at the end of the 19th and beginning of the 20th centuries, and definitively shaped to its current format in 1930, by Mexican jurist Mario de la Cueva. The doctrine was developed with the anti-contractualist overtones and represents the essence of this particular law branch.

¹⁷⁷ M.-L. Vega Ruíz: *La inspección de trabajo en Europa: retos y logros en algunos países seleccionados aún en tiempos de crisis*, LAB/ADMIN, Documento de trabajo n. 3, Ginebra, Organización Internacional del Trabajo, 2009, pp. 32-35.

¹⁷⁸ ILO: *Guide for labour inspectors*, Studies and reports, New series, no. 41, Geneva, International Labour Office, 1955, pp. 16-17.

Moreover, the reality of facts is at the core of the existence of any possible agreement between the worker and the entrepreneur, and simply cannot be denied, insofar as reality itself cannot be denied by any formal declaration,¹⁷⁹ as previously asserted.

Since labour inspection deals with the reality of facts that happen within the workplace on a daily basis, it is the best placed stakeholder to assess the employment relationship. In fact, the origin of the word “inspector” itself seems to be related to a true and complete scrutiny of a subject.¹⁸⁰ That is the major essence of labour inspectorates, specifically with regard to the employment relationship assessment: to collect evidence and publish an official statement over the reality of the facts revealed by the labour inspection. It is an important contribution to the realization of decent work practices and the protection of fundamental rights at work, for the benefit of the social development in any country.¹⁸¹ As a matter of fact, it is not uncommon to find a disguised labour relationship underneath formalized civil agreements made between enterprises and service providers/contractors.

Regardless the established position asserted by the ILO,¹⁸² constant judicial decisions in some places are placing administrative activities, represented by labour inspectorates, under risk, and most of the time these decisions reflect a complete lack of understanding of both the ILO and the nature of its activities. Other decisions, in contrast, even when they show a reasonable knowledge of labour inspectorate premises and prerogatives established by Convention Nos. 81 and 129, represent a historical paradox comparable to the exegesis debate established in the 18th century, on whether judicial activity interprets the legislation or only applies the legislator’s will.¹⁸³ According to this current jurisprudence approach, labour inspectorates are considered mere executors of the law, with no power to interpret legislation and private deals of a different nature than labour, even if they are only destined to disguise the provisions of the law. This position could threaten the overall capacity of the labour administration to promote decent work through the control of the working conditions. Furthermore, in the long-term it could result in a steep rise of conflicting situations, as the preventive role of labour inspectorates in promoting the adequacy of the employment relationship would be considerably diminished.

¹⁷⁹ M. De La Cueva, *Op. Cit.*, p. 195.

¹⁸⁰ *Inspectio, ōnis, f. inspicio, I. a looking into, inspection (post-Aug.). I. Lit. In gen.: “ager prima inspectione neque vitia, neque virtutes abditas ostendit,” Col. 1, 4, 1: “speculi non tam possessio culpatur quam inspectio,” App. Mag. 13, p. 282, 4.— In partic., a looking through, examination: “tabularum,” Quint. 5, 5, 2; Dig. 29, 3, 2, para. 5: rationum, Trajan. ap. Plin. Ep. 10, 57, 1.— II. Trop., consideration, investigation, contemplation; hence theory, in opposition to practice, Quint. 2, 18, 3; 2, 17, 42; Dig. 41, 1, 63, para. 3; 45, 1, 91, para. 4. See: <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.04.0059%3Aentry%3Dinspectio>*

¹⁸¹ R. Pires: *Labour inspection and development: some reflections*, LAB/ADMIN, Working document number 9, Geneva, International Labour Organization, 2011, pp. 2-7.

¹⁸² See several decisions of the Committee of Experts on the Application of Conventions and Recommendations.

¹⁸³ “But as we have already observed, the national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour” (*mais les juges de la nation ne sont, comme nous avons dit, que la bouche qui prononce les paroles de la loi; des êtres inanimés qui n’en peuvent modérer ni la force ni la rigueur*), as Montesquieu declared in his famous work “The spirit of the laws”, reaffirming the debate over the nature of a judge’s decision in contrast with the legislative authority and will. See C. de Montesquieu: *De l’esprit des lois*, Tome premier, Paris, P. Pourrat Fres, Éditeurs, 1834, pp. 305-306.

8. Hierarchical power as the mainframe for labour inspectorates' assessment

The recognition of the existence of an employment relationship should be guided by the facts of what was actually agreed and performed by the parties, and not by the denomination given to the contract.¹⁸⁴ That is why the existence of an employment relationship depends on the existence of certain objective conditions (the manner in which the worker and the employer have established their respective positions, rights and obligations, and the actual services to be provided), and not on how, either individually or both of the parties, formally describe the relationship. This is known in law as the principle of the “primacy of fact”, which is explicitly enshrined in some national legal systems. This principle might also be applied by judges in the absence of an expressed rule.¹⁸⁵

Non-compliance with the law is the biggest concern among ILO constituents. The problem is particularly widespread in developing countries, but it also occurs in industrialized nations.¹⁸⁶ Commonly, labour inspectorates are poorly provided with sufficient statutory powers, tools or mechanisms to identify disguised labour relationships.¹⁸⁷ Regardless the importance of the employment relationship to provide decent work, the mechanisms and procedures for determining the existence of an employment agreement and establishing exactly the parties involved, are generally insufficient to prevent infringements of labour law or safeguard the workers' rights¹⁸⁸. The development and use of technical guidelines, administrative ordinances, tools, checklists, training modules, and other instruments, is essential for labour inspectorates to properly tackle the growing problem of precarious and vulnerable work, mostly represented by the avoidance of the employment relationship framework.

Traditionally, the employment relationship is defined by the hierarchical power of employers over employees.¹⁸⁹ In fact, the workers' subordination to the employer is the common core characteristic of all European legal systems.¹⁹⁰ This power encompasses three main elements, which are part of the whole hierarchical power applied on the employee:

- Direction;
- Control;
- Discipline.

¹⁸⁴ See ILO Employment Relationship Recommendation n. 198, 2006, Art. 9.

¹⁸⁵ ILO: *The scope of the employment relationship*, Fifth item of the agenda, Report V, International Labour Conference, 91st Session, Geneva, International Labour Office, 2003, p. 23.

¹⁸⁶ *Ibid*, p. 34.

¹⁸⁷ *Ibid*, pp. 34-35.

¹⁸⁸ *Ibid*, p. 34.

¹⁸⁹ A. Montoya Melgar: *La nueva configuración del poder de dirección del empresario*, in L. E. De La Villa Gil (coord.): *Reforma de la legislación laboral. Estudios dedicados al Prof. Manuel Alonso Garcia*, Madrid, Asociación Española de Derecho del Trabajo y de la Seguridad Social, Marcial Pons, Ediciones Jurídicas, S.A., 1995, p. 190.

¹⁹⁰ A. Supiot: *Critique du droit du travail*, Paris, Presses Universitaires de France, 1994, p. 113.

Directive power is evidenced by the faculty an employer has to assign tasks and to give orders to employees; controlling power is related to the ability an employer shows in order to monitor both the performance of tasks and compliance with given orders and directions; finally, disciplinary power is expressed by the capacity an employer demonstrates to penalize both the improper or negligent performance of assigned tasks, and disobedience to given orders and directions.¹⁹¹ With the evolution of the new enterprise feature, expressed by the paradigm of the network enterprise, directive power is also adapted to encompass its new multifaceted character.¹⁹²

The indication clustering technique (*méthode du faisceau d'indices*), applied to labour Inspectorate's performances, could be helpful to establish the existence of a true employment relationship in the frame of a contractual agreement, whatever its formal nature is. Under this technique, legal operators research through different indicators that could be applied to the specific agreement to be analyzed, seeking to clarify the nature of the presented relationship. As expressed before, it is an investigation method mostly used in French courts by judges, to determine whether there is an employment relationship or an autonomous work. The method works in order to help legal operators define certain typical signs of specific legal arrangements, especially in the absence of precision in the law.¹⁹³ The technique requires the evidence to be shared and divided into different major generic groups, related to the signs (indicators/evidences) that reveal the existence of an employment relationship. Then legal operators match the indicators extracted from the investigation to the different generic signs. National legislations, jurisprudences or practices normally determine major signs to be used as clusters on which legal operators should match the evidences of the employment relationship. At the end of the process a conclusion arises indicating whether there is or not a true employment relationship.

In order to launch the process and to understand the flowing of orders and directions within the established contractual relationship, inspectors should interview both the workers and managers, as well as middlemen, contractors, suppliers, buyers, companies' representatives and other relevant stakeholders. The analysis of documented evidence, such as internal orders, guidelines, codes of conduct, which are indicative of directive power, or penalties, punishment measures, constraints, which are indicative of disciplinary power, is also of particular importance. Increasingly, orders given to employees are hidden in between other commandments, notably those of a commercial nature that could be arguably represented by the interposition of many multiples subcontracting layers. It is part of the inspection process to adequately address the proper characterization of the employment relationship, shaping the general frame of a certain liaison.

Evidence of hierarchical power should be collected by labour inspectors, during the inspection visit, according to the range of facts that characterize an employment relationship. The technique also classifies criteria in two different categories, represented by either essential or subsidiary indicators. Essential indicators are associated with the exercise of hierarchical power and subsidiary evidences are connected to additional information that could support a further and more complete analysis. The following table aims to assist labour inspectors in their employment relationship recognition task, according to the indication clustering technique:

¹⁹¹ See G. Casale: *The employment relationship. A comparative overview*, Oxford, Hart Publishing, ILO, Geneva, 2011.

¹⁹² F. Valdés Dal-Ré: *Poder directivo, contrato de trabajo y ordenamiento laboral*, in *Relaciones laborales. Revista crítica de teoría y práctica*, N. I. 1993, Las Rozas, Madrid, La Ley-Actualidad, S.A., 1993, p. 29.

¹⁹³ J. Mouly, *Op. Cit*, p. 34.

Employment relationship assessment – subordinate work establishment criteria

Essential Criteria – hierarchical power – intensity generic signs			
Direction		Control	Discipline
1	Direct orders;	Direct organization;	Direct punishment;
2	Specific verbal and/or written determinations;	Determination of working hours;	verbal and/or written warnings and reprimands;
3	Assignment of detailed and/or fragmented orders;	Position occupied within the company structure and/or in contrast with other employees;	Determination of disciplinary suspension of work;
4	Comprehensive instructions given;	Place where the work is to be performed;	Just cause termination;
5	Instruction of tasks and/or duties;	Orientation of the scope and/or object of the work;	Benefit loss and/or wage discount caused by disciplinary reasons;
Subsidiary Criteria – additional power – intensity specific signs			
6	Work is executed continuously within the client premises and/or with the client own tools;		
7	Retribution is paid based on the amount of time worked, not on the result achieved, and/or according to a specific periodicity of time;		
8	Schedule control limited by the client and there is an obligation to notify the client in any absence necessity;		
9	The contract object is always for work to be provided and never a specific result to be obtained;		
10	There is no risk to be absorbed by the worker, risk is totally managed by the client;		
Autonomy Criteria – Self-employment indication – distinction factors			
11	Contract normally conditioned by a fixed term agreed by both parties;		
12	Self-employed worker performs the tasks and his/her own activity with a consistent amount of autonomy limited only by the contractual arrangements;		
13	No schedule control at all;		
14	Retribution is freely settled by both parties and it follows no previous rules.		

If a line is traced between the authentic and pure self-employed worker and the typical subordinate employee, utilizing the table above, the closer to essential criteria the relationship is the nearer to the usual subordinate work it gets, establishing an authentic employment relationship. In order to properly address the indication clustering technique, a questionnaire should be elaborated and utilized by labour inspectors. The most common questions to direct the intervention are:

- Is the contractor's employee directed in any matter by the client (example, directions, organization, discipline, etc.)?
- Does the contractor provide proper training for his/her own employees?
- Is the scope of the services to be provided by a contractor different from that of the clients' core business?
- Does the contractor possess own material and intellectual means to provide the arranged work?
- Is the retribution paid according to the whole service provided or remunerated by worked hours?
- Who provides the tools, the client or the contractor?

Basically, the questions above intend to spot the existence of a true employment relationship. Two main questions are inherent to this entire verification process and should direct the inquiry: Who is the employee? Who is (are) the employer(s)?

Occasionally, the answer is not simple, and further examination should be undertaken. Especially in subcontracting schemes, wherein atypical and triangular relationships frequently occur, and with much more complex network structures, workers are inserted within these polyhedral configurations accordingly. In such cases the inspection, aside from assessing the real and/or immediate employer, should focus on perceiving the existing complete network, formed by several potential or concrete

employers. Some case law approaches are tackling this new feature by proposing an innovative doctrine, based on the notion of the network enterprise¹⁹⁴ and new forms of legal subordination.¹⁹⁵ Most European systems already deal with network connections within the value chain, instituting in legislation the legal element of solidarity among the firms. Other approaches suggest that economic dependency should drive any analysis,¹⁹⁶ despite of the intense debate established since the foundation of labour law regarding this topic.¹⁹⁷ That could be an indication on how labour inspectorates could actually build the bridge between the reality of facts and the letter of law, as previously exposed. The use of injunction power to enforce the law is the main tool to put into effect the preventive role of labour inspectorates.

The main purpose of this assessment is to provide indication on how labour inspectorates can fulfil the ILO's governance conventions mandate - to enforce labour law provisions, to advise employers and workers, and to find and highlight loopholes in regulation with a view of updating it. As an underlying purpose, there is a concrete potential to cooperate with the judicial system in order to gather evidence of the true nature of an employment relationship.

The mandate expressed on both Convention Nos. 81 and 129 is related to a complete enforcement of labour provisions, by both compliance orders and information, and also to contribute as a labour law modernizing factor, by reporting gaps, loopholes and inadequacies of the law to the legislative branch. The current paper intends to foster and promote the enforcement of the employment law, but labour inspectorates are strongly encouraged to work closer to legislative branches, in order to support the innovation of labour regulations, whenever and wherever required. That would be the case of Member States where intermediary figures, between autonomous work and subordinate work, does not exist, under valid legislation. That would also be the case of Member States where

¹⁹⁴ This concept was forged by Castells, by analyzing the effects of the new feature of businesses inserted within the global network society. See M. Castells: *The rise of the network society. The information age: economy, society, and culture*, Volume I, Second edition, Malden (MA), Wiley-Blackwell, 2010. pp. 163-215.

¹⁹⁵ In Brazil, for instance, case law has been innovating jurisprudential doctrine in order to better integrate the letter of law in contrast with this new feature. In this respect structural or reticular subordination has been increasingly applied to labour controversies related to the determination of an employment relationship existing under polyhedric liaisons in regard with the real and concrete employer. According to the judicial precept, "the concept of subordination must be examined in light of the worker's insertion within the dynamic of the contractor of services, indicating the so-called structural subordination, a theory that aims to solve the cases in which the classical concept of subordination is innocuous" (*o conceito de subordinação deve ser examinado à luz da inserção do trabalhador na dinâmica do tomador de serviços, configurando a denominada subordinação estrutural, teoria que se adianta como solução para os casos em que o conceito clássico de subordinação se apresenta inócuo*).

See: TST RR - 44100-13.2009.5.03.0003, of 23/06/2010, available at: <http://aplicacao5.tst.jus.br/consultaunificada2/inteiroTeor.do?action=printInteiroTeor&highlight=true&numeroFormatado=RR - 44100-13.2009.5.03.0003&base=acordao&numProcInt=91365&anoProcInt=2010&dataPublicacao=13/08/2010 07:00:00&query=>.

¹⁹⁶ N. Countouris: *The employment relationship: a comparative analysis of national judicial approaches*, in G. Casale: *The employment relationship. A comparative overview*, Oxford, Hart Publishing, ILO, Geneva, 2011, pp. 60-65.

¹⁹⁷ M. E. Casas, J. de Munck, P. Hanau, A. L. Johansson, P. Meadows, E. Mingione, R. Salais, A. Supiot, P. V. Der Heijden: *Trabajo y empleo. Transformaciones del trabajo y futuro del derecho del trabajo. Informe para la Comisión Europea*, Valencia, Tirant lo Blanch, 1999, pp. 52-53.

triangular schemes are not fully regulated and protected. Finally that is the case of Member States where disguised relationships are not tackled and prevented properly.

9. The employment relationship, undeclared work and labour inspection

One of the phenomenon within the determination of employment relationship is undeclared work. The fight against undeclared work has become a key concern since the 1990s and is even more relevant today in view of the effects of the economic crisis.¹⁹⁸ Apart from an increase in unemployment and labour turnover, there has also been a rapid and progressive change in certain indicators that have a direct influence on the work of labour inspectorates (both their work and the working conditions they are required to inspect) and consequently, on their ability to guarantee social stability through the protection of workers and proper application of the law.

Most undeclared work involves small enterprises, or at least those with fewer than 50 workers, and sectors such as the construction industry, small-scale retail, agriculture, hospitality and transport. In the Green Paper on “Modernizing labour law to meet the challenges of the 21st century,” the prevention and fight against undeclared work was one of the key items for the future development of labour law in the EU. In fact, undeclared work is seen as a particularly worrying and persistent feature of European labour markets which affects the Member States’ economies and the financial sustainability of the European social model by constraining economic growth and budgetary and social policies and in particular for lowering work quality standards, creating risks for health and safety of workers, putting at risk the financial sustainability of social protection systems, undermining the competitive environment for businesses and feeding social segmentation and poverty.

In 2013, Eurofound published some macroeconomic estimates pertaining to undeclared work among Member States. According to this study, the average size of the undeclared economy across the EU27 was equivalent to 18.4 per cent of GDP, although with large regional differences. In some European countries such as Bulgaria (32,3 per cent), Cyprus (25,8 per cent), Latvia (26,5 per cent), Lithuania (29 per cent), Poland (25 per cent) and Romania (29,5 per cent), the size of undeclared work is, in terms of the GDP, higher than in other European Union countries, like Austria (7,9 per cent), Belgium (17 per cent), France (13 per cent), Germany (13,5 per cent), Ireland (11 per cent), Italy (19,4 per cent), the Netherlands (9,8 per cent) and Spain (17,6 per cent).¹⁹⁹ Most of the Member States with relatively large undeclared economies in 2012 are either east central European or southern European Member States. Those with below-average undeclared economies, meanwhile, are largely west European and Nordic Member States. This signals a clear north–south and east–west divide within the EU concerning the relative size of the undeclared economy.

Although this data remain valid overall, the strong impulse to create new jobs seen in recent years has resulted in a decrease of this phenomenon in certain new Member States.

¹⁹⁸ A recent OECD report (Jutting and Laiglesia, 2009) finds that out of a global working population of some 3 billion, around two-thirds (1.8 billion) work in the undeclared economy. Such work, therefore, is far from being a small residual realm. It is a prominent feature of the contemporary global economy.

¹⁹⁹ Eurofound (2013), Tackling undeclared work in 27 European Union Member States and Norway: Approaches and measures since 2008, Eurofound, Dublin.

These figures also apply to other European countries affected by similar economic and social problems.²⁰⁰

The main reasons for undeclared work²⁰¹ in Europe involve the following conditions:

- Enterprises and individuals operating in the labour market without being declared to the authorities, especially social security, insurance and tax administration;
- Enterprises declaring only part of their activities. Some experiences report of practices such as using undeclared workers during night shifts;
- Enterprises using undeclared workers for suppliers and subcontractors in their premises or production in substitution of their direct workforce, as a way of avoiding the payment of taxes, costs with occupational safety and health requirements and obtaining contractual flexibility;
- Businesses having part of their workers registered and part undeclared or falsely declared as part time workers, interns or self-employed workers;
- Serious forms of exploitation as a result of human trafficking, usually involving irregular migrant workers;
- Workers employed in enterprises while receiving social benefits for sickness, maternity, unemployment or other causes;
- Emergence of unregistered temporary work agencies or agencies using fraudulent practices, which are difficult to detect and to act upon due to the volatility of the entrepreneurship, use of complex contracting chains, and apparent financial profits for all parties involved;
- Bogus self-employment, quite significant in some sectors. For instance, the Dutch federation of Contractors stated, in 2012, that the total number of the self-employed in the building industry was estimated at 73,000, representing around 70 per cent of all alleged self-employed people;
- Misuse of extraterritorial cost arrangements, where part of the payment of a foreign employee can be used for tax-free allowances for costs of housing, transport or other costs resulting from working abroad;
- Under-declaration of wages, most commonly not declaring overtime work, declaring only the minimum wage and paying the rest under the counter or by not declaring the value of payments in housing and food benefits, false part-time where only a percentage of the real worked hours is declared, disguise of remuneration under apparent fringe benefits (use of car, credit card), false per diem, etc.;

²⁰⁰ There are a number of recent factors which seem to favour undeclared work and ultimately, informal labour: the increased demand for domestic services and assistance owing to the socio-demographic changes; the appearance of labour relations that have a less hierarchical structure and more flexible remuneration systems; the boom in self-employment, subcontracting, flexible contracts and ad hoc work; the simplification of the process for establishing cross-border businesses.

²⁰¹ This refers to labour that is illegal under the provisions of labour law, and not to criminal activities *per se*.

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- Fraudulent or fictitious employment declared to obtain social benefits, where the enterprise creates disguised employment relationships, declaring the worker to social security, paying contributions for a short period and reporting afterwards false leaves that entitle workers to social benefits, who in turn will pay a price to the employer.

There is no doubt that these issues relate to the activities of the inspectorate and that effective programmes to overcome this fundamental problem are being sought. Thus, in certain countries, the existence of illegal work has resulted in administrative structures designed to combat it. Austria, France and Germany, for instance, established a single body to the fight against undeclared work while in Belgium, the Czech Republic, Italy, Lithuania, Luxembourg, and Slovenia, a central coordinating committee is responsible for ensuring coordinated action by the multifarious departments that have a stake in tackling undeclared work.²⁰²

²⁰² In Austria, in the field of undeclared or illegal work a special unit of the border administration, the KIAB (Control of Illegal Employment of Workers), was given the task of checking work permits and, ultimately, the employment of foreign workers. The results of these controls are sent to the relevant competent authorities, who include administrative authorities responsible for imposing sanctions, the monitoring body for industry, the employment services and the labour inspectorate, ensure that they are subject to the relevant procedure. In Belgium, a number of initiatives have been taken to counter UDW. Because so many agencies, ministries and inspections are involved in the fight against social and fiscal fraud, on 29 April 2008, a Central Committee for the struggle against fiscal and social fraud was founded in which all ministers that are involved in the combat against fraud are seated. At the same time, the Council (college) against fiscal and social fraud was formed. In this Council, presided by the secretary of state responsible for the coordination of tackling fraud, the directors of all agencies involved are seated (social, fiscal, juridical, police). Every year, the Committee and Council should draw up an integrated action plan against fraud. France created in 1997 the Délégation interministérielle à la lutte contre le travail illégal (DILTI) which is an inter-ministerial mechanism to fight illegal work and is part of the Délégation nationale à la lutte contre la fraude (DNLF) with responsibility for tackling every aspect of the undeclared economy. In July 2003, the German federal government decided to reorganize the administrative competences for detecting and combating undeclared work with the institution of Finanzkontrolle Schwarzarbeit (FKS) to target all types of UDW. In Italy, a National Committee for the Formalization of Non-Registered Labour was created in 1998 with the aim to gaining knowledge on the informal economy. The main objectives of the initiative include: creating an institutional network between the central government and regional authorities, with the aim to gain knowledge about the qualitative and quantitative characteristics of the informal economy and to propose formalization policies, encouraging commitment among workers and employers to be tax compliant, and fighting undeclared work. The Committee coordinates the bulk of policy initiatives in Italy and also stimulates research into UDW. In addition, various structural and legislative measures were implemented under the Legislative Decree No. 124/2004, the Minister of Labour's Directive of 18 Sept 2008 and Law No. 183/2010. The measures focused on strengthening the powers of the Ministry for Labour and Social Policy in the fight against clandestine labour and undeclared work, and emphasized the key role played by the labour inspectors as part of the mechanisms set up for this purpose. In Lithuania, a central Coordination Group was established in 2001. This group analyses and highlights the prevalence of undeclared work in the country, to predict and approve measures for control implementation and to decrease the volume of undeclared work. In Luxembourg, the Inter-administrative Unit for Combating Illegal Work (CIALTI) was established in 2000. It is an informal unit intended to coordinate unannounced inspections in various fields of economic activity. The main party involved is the Labour and Mines Inspectorate (Inspection du Travail et des Mines - ITM), which is responsible for the unit's coordination. Finland in 2011 replaced the VIRKE project by establishing the Grey Economy Information Unit (Harmaan talouden selvitysyksikkö). The Grey Economy Investigation Unit is a specialized unit, which, at the request of other enterprises, investigates specific enterprises and persons suspected of engaging in undeclared work. It contributes to tackling the grey economy by producing and distributing information on the grey economy and action against it. The unit also prepares reports concerning business entities to other authorities for purposes laid down in the law. In Ireland, the National Employment Rights Authority (NERA) is the body responsible for tackling all types of undeclared work. It aims to secure compliance with employment rights legislation and to foster a culture of compliance in Ireland through five main functions: information, inspection, enforcement, prosecution and protection of young persons. In the United Kingdom, the fight against undeclared work is coordinated on a local level through Joint Shadow Economy Teams (JoSET's). Officers from the department for Work and Pensions, The Majesty's Revenue and Customs and Employment Agency Jobcentre Plus work together in these teams. The attention of the teams is focused on construction and building services, taxis and couriers, catering and hotel and guest houses.

Priorities of many labour inspectorates are focusing on industries using migrant workers as the main or significant workforce. Special attention is being given to employment and temporary agencies and all forms of recruitment with the use of intermediaries, construction and seasonal work where illegal migrants are more probable to be found. The main challenge, though, is to separate the function of labour inspection from the application of laws regulating the entrance and stay of foreigners.

Many labour inspectorates are also focusing on high risk sectors, which are commonly the construction industry, agriculture, cleaning, retail, temporary employment agencies, hospitality and seasonal industries related with tourism and industries relying on peak labour periods, low skilled workers and labour intensive. Priorities are defined according to risks of non-compliance. The accuracy of the chosen strategies depends on the access to reliable, complete and updated sources of information on enterprises, sectors, workers, previous inspection visits, imposed sanctions and interventions from other authorities. Political options, academic studies, official statistics and complaints received from trade unions, workers or other interested parties are also considered as indicators on which to base future action.

In many countries, labour inspectorates have increased and strengthened their cooperation with social security institutions, public insurance agencies, tax authorities, municipalities, immigration authorities, the police and public prosecution offices.

In order to address the challenges of undeclared work, public authorities have taken various steps to facilitate the work of the labour inspectorate. In some cases, such measures have focused on preparatory and preventive activities, such as those carried out by the National Committee for the Formalization of Irregular Work in Italy or the Hidden Economy Monitoring Group in Ireland.

Labour inspectorates are using a combined set of accommodative methods and punitive approaches to prevent and fight against undeclared work. Among the preventive action information campaigns, hotlines, and call centres are the most usual tools. Repression is based on the imposition of sanctions of administrative or criminal nature and increasingly on negative publicity given to enterprises using undeclared work. Information and dissemination campaigns have also taken place. In Sweden, the ID06 project in the construction sector took a similar approach and proved to be an effective monitoring tool to address undeclared work, with a requirement for all building site workers to register and carry identity cards. Similar measures have been introduced in Finland, Italy and Norway.

In a similar vein, section 52a was introduced in the Finnish Occupational Safety and Health Act in February 2006 requiring those directing or overseeing a construction site to ensure that every person working on the site possesses and displays photographic identification. Other measures of this kind aimed at vulnerable groups (although focused solely on safety and health) exist in New Zealand, which issues a “Passport to safety” to workers in the 15-24 age bracket, who are deemed vulnerable. This covers both safety and contractual protection. Australia has also introduced this programme, which is similar to the Canadian Safe Communities model. In Switzerland, the Federal Act of 17 June 2005 on measures to combat undeclared work, in force since 1 January 2008, has increased the workload of the labour inspectorates in every canton with regard to undeclared work (9,000 checks had already been carried out by July 2010). The Act established a new cantonal labour inspection body with new investigative powers. At the same time, a new set of fines have been implemented, providing for both a higher financial penalty and the exclusion of guilty enterprises from tendering for public contracts or receiving subsidies. The names of non-compliant enterprises are also published on the Internet. This new body operates in parallel with the traditional safety, health and working conditions inspectorate. The new inspection agency plays a key role in coordinating with other public agencies (the

police, employment offices, social security, customs and tax authorities) to combat undeclared work.

In the Netherlands, the labour inspectorate, the Social Intelligence and Investigation Service and the Inspection Service for Work and Income were brought together in March 2010 under the supervision of an Inspector General within the Ministry of Social Affairs and Employment. This measure is the result of changes in the monitoring of undeclared work since 2003, which have been hastened by the current state of the economy. The collation and use of statistical data is a common strategy in the fight against illegal work. In Belgium, a set of merged databases have proven invaluable in detecting, preventing and combating undeclared work. Since the total number of labour inspectors may often be limited, new integrated methods have been formulated to detect undeclared work using information gathered from other sources or by other administrative bodies not obviously connected with labour issues. To this end, certain countries are developing indicators to compare and verify information compiled from various databases, in addition to other information resources. Spain, for example, has devised a creative technique to identify undeclared seasonal work during the orange and grape harvests: labour inspectors compare the area of agricultural land with the number of hours worked during the previous year's harvest and the number of workers registered each month in the database of the social security institution. If a discrepancy is found between the figures, employers may be asked to provide additional documentation, including labour contracts. If this does not resolve the problem, an inspection may be carried out or the employer called to a meeting at the labour inspectorate.

Plans and campaigns to regularize undeclared workers have been initiated in certain Latin American countries. In Argentina, the National Labour Regularization Plan (PNRT) mentioned above is run jointly by the Ministry of Labour, Employment and Social Security, the Federal Administration of Public Revenue (AFIP) and the labour authorities of the provincial governments, with the involvement of the Federal Labour Council. Established in 2003, the plan seeks to ensure proper working conditions and to enhance detection and corrective measures in the event of non-compliance with labour and social security regulations. Its objectives include social security registration of previously excluded workers, and ensuring that employers carry out registration on a voluntary basis. It also raises awareness of the problems arising from undeclared work and the benefits of regularization. The results have been positive: since 2002, there has been a 64 per cent increase in registration of private sector employees (between the second quarters of 2002 and 2009). In 2009, a new regulatory framework was defined in response to the crisis, involving state subsidization of employers' contributions and facilities for regularizing workers. Since 2008, the "Plan Reto" programme in Peru has been seeking to regularize undeclared workers through a combination of raising public awareness and inspection of certain types of labour activities where irregular employment is a risk. One objective of the programme is to transfer workers to an electronic payroll system. The work programmes of some inspectorates are based on an undeclared work strategy and/or policy. In Bulgaria, the labour inspectorate incorporated undeclared work into its 2008-10 Strategic Action Plan. In other countries, such as France, Hungary, Italy, Lithuania, Poland and Portugal, undeclared work is increasingly being mainstreamed into annual plans and programmes of inspection activity. In Belgium, quantitative inspection targets are laid down for each inspector, with a priority focus on undeclared work. In addition, a national strategy has been prepared to combat social and tax fraud. In parallel, it has proven essential for inspectors to work with the social partners, both through partnership agreements in specific sectors with a high incidence of undeclared work (for example, Belgium, Estonia, France, Germany, Ireland and Italy) and through joint information and awareness-raising campaigns on undeclared work (for example, Denmark and Portugal). The social partners are involved in the design of programmes and activities concerning undeclared work, as well as the preparation of inspection plans. This is the case in Lithuania, where the social

partners participate at national level in the planning of measures to combat undeclared work through consultations within the National Tripartite Council.

In Europe, some countries have established specific forms of collaboration between the inspectorate and the judicial authorities to cooperate to the maximum extent possible with a view to ensuring the effectiveness of inspection interventions, as well as the enforcement of the labour law through prosecutorial action. In Belgium, for instance, there is extensive formal collaboration between the inspectorate and judiciary in prosecuting cases of undeclared work. Social inspection services and the Judicial Federal Police cooperate in a new social entity, the so called mixt cell unit support, which was created in 2011 and that operates in the fight against serious and organized social fraud. In France, a monitoring agency has been established within the General Labour Directorate to monitor legal proceedings arising from the inspectorate's actions. It not only collates information pertaining to administrative and criminal proceedings, but also manages the collaboration process with the Ministry of Justice, in order to ensure a better follow-up of each case. In certain countries, the judicial and administrative systems are integrated. In Austria, for example, alongside administrative proceedings, which rely on ad hoc tribunals and involve the inspectorate, parallel proceedings also exist to deal with violations of the criminal code. Through this process, proceedings are instituted when a labour inspector submits documents and reports to the Department of Criminal Investigations or the Department of the Public Prosecutor. In any case, the courts must inform the inspectorate services of the termination or completion of any proceedings, though not necessarily of the court's decision. In Portugal, there are different means of informal collaboration based on common training, joint publications and meetings, or the use of shared facilities. In other countries such as Greece, inspectors have the authority to prosecute violators in a criminal court for serious offences. However, because of delays in the court system, inspectors often prefer to impose fines instead. In other EU countries, inspectors are called as witnesses, though not as legal experts, whereas both these roles are recognized in Spain.

Labour inspectorates are also cooperating at cross-border level. The main aim of collaboration consist usually on the exchange of information about enterprises and workers from one country operating in the other, but also on capacity building by sharing views, experiences and tools. Manuals and checklists are exchanged or commonly produced providing information on applicable laws and regulations, exemplifying the models used for official mandatory documents to be consulted by inspectors. Besides informal networks and contacts, bilateral agreements have been signed, some in the frame of larger agreements signed between ministries of labour. Administrative cooperation concerning application of Directive 96/71 on posting of workers in the framework of the provision of services is a major reason for these arrangements. Agreements were also signed in the context of Regulations 1408/71 and 883/2004 on coordination of social security schemes. Such cooperation is common for neighbouring countries or countries sharing cultural identities or with expressive workforce flows. Cooperation exists also with Europol for exchange of data. At EU level, the use of common platforms such as the KSS on occupational safety and health has not yet found a match when talking about undeclared work, mainly because of the limits imposed by protection of privacy of individual data. Various European countries have also organized campaigns to regularize undeclared workers calling for administrative sanctions and involving the supervision of the inspectorate, something that has had a significant impact in terms of new registrations and the formalization process. Several initiatives were also adopted to strengthen administrative cooperation between labour inspectorates to fight against undeclared work, as for instance ICENUW (Implementing Cooperation in a European Network against Undeclared Work) which ended up with the signature of the Brussels Chart, where participating authorities committed to increase efforts in the fight against transnational social fraud, the Committee of Experts on the Posting of Workers on the application of Directive 96/71 and Project Cibeles focusing on mutual assistance between European labour inspectorates.

Labour inspectors are often asked to cooperate with law enforcement or immigration authorities to monitor the situation of foreign and migrant workers. Such cooperation should be carried out cautiously, bearing in mind that the main objective of the labour inspection system is to protect the rights and interests of all workers and to improve their working conditions.

Conclusions

The role of labour inspection in the enforcement of labour legislation and hence in the determination of an employment relationship is becoming increasingly important. In this regard, the ILO's Recommendation No. 198 sets up the structure in which national policies should rely on in order to determine the criteria for the determination of an employment relationship. The supremacy of facts functions becomes the backbone of the employment relationship and should be considered as a basic principle under a legal system. Labour inspectors deal with the reality of facts in workplaces on a daily basis, and every time an inspection visit is carried out and they are considered the most accurate governance tool to adequately address the growing concern on the variety of forms of employment contracts.

As globalization marches forward and entrenches, new challenges are likely to arise. Original, creative and adaptable inspection approaches are needed in order to guarantee decent working conditions and fundamental rights in any workplace.

From the above, we should recognise that the employment relationship remains one of the most challenging issues in law and practice. The question of whether an employment relationship exists is of crucial importance especially when considering the access to social security by workers. From a comparative viewpoint, the trend towards more flexible working arrangements generated to a great extent by globalization has affected the employment relationship debate. It is no longer a matter of purely academic interest, but it touches the day-to-day life of workers and employers in the world of work. Whereas many countries have already adopted measures to deal with this issue, many others are in the process of finding a sound approach to such an issue.

In several countries, the ILO Recommendation No. 198 serves the purpose of guiding the major labour market players recognized to address the issue of the employment relationship in a conscious manner while providing adequate legislative protection.

At the same time, the complexity of the problem continues to be there, and this is proved by the various experiences that labour inspectorates have when dealing with the determination of an employment relationship. This issue will continue to be under the scrutiny of labour lawyers, judiciaries, and policy-makers in the coming years.

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