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The previous step.  
Works which do not reach the labour contract

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1. Summary .....	2
2. Peripheral work .....	2
3. European peculiarities of irregular work .....	4
4. Character of the irregular work .....	7
5. Autonomous work with economic dependence .....	8
6. Minute works .....	10
7. Systematic means to solve the juridical condition of peripheral work .....	14
6. The position of the International Labour Organisation and the European Union .....	22
7. Conclusions .....	23

## 1. Summary

In this study I will analyse the efforts made by several European countries in ruling peripheral work, which is out of the work contract, by means of a ruling guidelines placed half a way Labour Law and Commercial Law ; as well as the efforts by the European Union and the International Work Organisation to avoid social dumping in this respect.

## 2. Peripheral work

As Brian Bercusson put it: 'the use of labour law tools to analyse the concept of the 'worker' has been challenged as never before by the disintegration of the standard employment relationship and the emergence of new forms of work. It is necessary to determine which elements of the contract of employment should be emphasised for different social purposes'<sup>1</sup>

For several decades the limits to labour contract have remained static, with the same doubts over the grey areas surrounding their borders and the same debates about fraud and contractual figure pretence. The debate was focused on applying the criteria for considering a work relation as labour; however, there was not, or there appeared not to be, a worry about the reactive strength of the employment contract wherever there were assumptions corresponding to its profile. Romagnoli put it clearly when he defined Labour Law as Border Law, continuously expanding towards new assumptions. It was talked about normal labour relation (*Normalearbeitsverhältnis*) and typical labour contract; these concepts reigned pacifically at least from Wagner Act (USA) of 1935. From the eighties onwards, with globalization and computerisation of work and atomization of companies, this safe and quiet field started suffering increasing shaking where the borders became blurring and specialists started to wonder where the Labour Law was leading to<sup>2</sup>. The labour contract, as a new Roman Empire, started suffering invasions in its borders; and some years afterwards, there emerged a new juridical geography where there could be noticed a contractual retreat and a wide surrounding strip of a doubtful adscription where a number of

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<sup>1</sup> BERCUSSON B., *European Labour Law*, Butterworths, London 1996, p. 419.

<sup>2</sup> See among others MARIUCCI L., "Where is Labour Law going? Collective and Individual Labour Relations", *Working Paper Centro Studi di Diritto del Lavoro Europeo Massimo d'Antona*, Catania 2002; CASTEL R., "Droit du travail: redéploiement ou refondation?", *Droit Social* 5 (1999), pp. 438 ff. Lpalomeque LOPEZ C., "El trabajo autónomo y las propuestas de refundación del Derecho del Trabajo", *Relaciones Laborales* 7/8 (2000), pp. 61 ff.

undetermined juridical situations fled around. Some authors started talking about the lack of work contracts to explain all the labour phenomena, and some others postulated the application of Labour Law to all types of personal work, or as they put it, the creation of a 'Labour Law with no adjectives'<sup>3</sup>.

The no man's land is influenced, to a certain extent, by known institutions for Labour Law, but in a variable intensity in accordance with several situations living in it. It is not only that ruling nuclei that are thought of for employment contract are applied sporadically for some cases, for instance an employees' responsibility regarding an accident for a third party with who the former does not have any contract link, therefore, a real praetercontractuality (beyond contract), but also they get as their own a ruling block of labour features in a stable way, like for example health and safety or social security. Of course the situations we are dealing with should be completely protected by Labour Law in many cases, since they are in fact real subordinated work relations.

An uncertain situation as the said one can be considered normal to a certain extent when some years have passed by unresolved. At that moment, some legislators came into action and tried to make it subject to common rules, although the rules are just a few, in its attempt to rule it by means of backing it with many studies. The peripheral work becomes subject to standard patterns which distance from and approach to the employment contract at the same time. However, the models range across countries as with respect to the situations being considered as concerning the rules included in the characterisation.

Let us see first the situations in which the peripheral work shows up in order to analyse the attempts to typify it in some countries, afterwards. Hence, Brian Bercusson talked about the so called 'new working ways' which covered part-time, casual, fixed-term, self-employment, independent work, or home labour, among others<sup>4</sup>.

The said peripheral work situations can be grouped together into three very heterogeneous groups:

- a) Minute work i.e. either fixed-term, or part-time, or due to other circumstances.
- b) Self-employment with economic dependence.
- c) Irregular work.

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<sup>3</sup> D'ANTONA M., "Diritto del lavoro di fine secolo: una crisi d'identità", *Rivista Giuridica del Lavoro e della Previdenza Sociale* 2 (1998), p. 322. Same author, "Limiti costituzionali alla disponibilità del tipo contrattuale nel diritto del lavoro", *Anuario di Diritto del Lavoro* 1 (1995), p. 8.

<sup>4</sup> See BERCUSSON B., *European Labour Law*, p. 419.

### 3. European peculiarities of irregular work

The 'Europe fortress' has always been renowned as a highly formalised space where many rules, above all labour ones, gave rigidity to trades with prejudice of their competitiveness. And, indeed, a simple method allows us to know to what extent the European countries have at their disposal an arsenal of labour rules which, however, do not exist in other continents. In this sense if we add the number of these rules being included in the legislative database of the International Labour Organisation (Natlex), group them into regions, and get the average of labour rules passed in the countries composing them, we get the following chart:

Western Europe	1.093
Eastern Europe	352
Anglo-Saxon America (USA, Canada and CARICOM)	320
Latin America	315
Oceania (Australia, New Zealand and archipelagos)	285
Africa	177
Asia	161
The Near and Middle East	114

In the case of Western Europe, the differences are also great across the countries, so much so that if we do not count city-states like, Monaco, San Marino, Liechtenstein and Andorra the average is much higher:

Country:	Ruling average:
France	3735
Belgium	2905
United Kingdom	2458
Sweden	1937
Low Countries	1767
Denmark	1687
Finland	1563
Spain	1319
Portugal	1016
Germany	911
Norway	909
Austria	896

Luxembourg	811
Italia	727
Ireland	626
Switzerland	543
Greece	359
Iceland	325
Malta	255
Monaco	158
Liechtenstein	122
San Marino	99
Andorra	11

No doubt the procedure is very simple since, for example the ruling tradition of some countries tends to dictate few but very basic rules, while some other countries can tend to pass official rules; but at least we get the idea of some and the other countries. The chart above, for example, furnishes us with surprises concerning the fame of some countries according to their level of interventionism or legislative abstentionism<sup>5</sup>.

Another some kind more sophisticated marker, percentages of irregular work could serve us to know the level of subjection to labour ruling, which is complementary to the said aspect, since having available a great quantity of rules does not mean we have subjected the active population to the rules. Likewise, and although the figures of irregular work vary greatly, the figures of irregular work in every country would report the degree of failure to compliance of its ruling. Wholly, Europe shows a low level of irregular work as compared to other regions such as Latin America and, above all, Asia. And it also presents high rate of the so called '*good informality*' addressed to solidarity with friends and neighbours the researchers talk about<sup>6</sup>.

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<sup>5</sup> It must be mentioned that in other regions the differences among countries are very deep. For instance in the Anglo-Saxon America , where United States offers an average of 1538 norms and Canada of 1838, although Jamaica shows 123 or Bahamas 58. At its turn, the most labour legislative in Asia is Japan, with an average of 578 norms, followed by China with 422. It must be beared in mind that the database of ILO depends of the diligence of every country in sending its norms. The norms count followed here is the one made in the ILO report *Métodos y prácticas en la solución de conflictos laborales: un estudio internacional (Methods and Practices in solving labour conflicts: an international study)*, Document n°. 13, ILO, Geneve 2007, pp. 59 ff.

<sup>6</sup> WILLIAMS C.C. and WILDEBANK J., *Informal Employment in the Advanced Economies*, Routledge, London 1998; PFAU-EFFINGER B., "Varieties of Undeclared

Coinciding with the different percentages according to the level of wealth, there is a widespread opinion that irregular work goes along the developing countries' economies and that it is disappearing for the benefit of legal work due to progressive modernisation. However, the markers point that the number of irregular workers have been increasing in Europe; and that it is not only due to immigrants, but also to a significant evolution of the productive model itself that Ulrich Beck has called, unfortunately I think, 'brazilianization' of European work contracts as a result of neoliberal policies<sup>7</sup>.

More and more workers each time get unstable jobs or rapid shifting from a job to another which Alan Hyde named 'high speed work trade' where strong shifting messed up the classical Labour Law and forced the creation of new types of trade unions, social security and rules against discrimination at work<sup>8</sup>. More and more workers each time do several unstable jobs at the same time in addition. And in all those cases the usual way to work does not comply with the minimum labour conditions on rests, salaries and hiring.

There could be talked about the fact that modernisation of the economic system carries a convergence between highly formalised and developed societies, and those which are not so much so. No doubt the future of Labour Law transforms the precarious work and illegal work into usual elements with which it has to live, so that we should not call the phenomenon a product of underdevelopment.

However, this area of shadows in Europe shows a feature concerning similar situations in other regions in the world: the State has available very piercing structures that are able to get deep inside the social relations. This is the reason why it could, if it would be willing to sort

Work in European Societies", *British Journal of Employment Relations* n° 47 (2009), p. 93. It become distinguished moreover two types: "moonlighting" (second job) and "poverty scape" (*ibidem*, pp. 84 ff.).

<sup>7</sup> BECK U., *Un nuevo mundo feliz. La precariedad del trabajo en la era de la globalización*, Paidós, Barcelona 2007.

<sup>8</sup> HYDE A., "Silicon Valley's High-Velocity Labour Market: When Labor Markets Work Like Information Markets", *Journal of Applied Corporate Finance* n° 2 (1998), pp. 28 ff.; same author, *Working in Silicon Valley: Economics and Legal Analysis of a High-Velocity Labor Market*, M.E. Sharpe Inc., Armonk (New York) 2003.

such underworld out, dictate specific rules for the latter or put some pressure on it with incentives and sanctions in a way that its wideness would decrease, and in the end, it would disappear or just a residue would remain. But, at the moment when the state was meditating whether to intervene, it faced a paradox: indeed it did not know the type of ruling to be applied so that that it started acting randomly. Let us see why.

#### **4. Character of the irregular work**

From a sociological point of view of what there is really in this informal scope, it is clear that productive relations among employers and employees 'in the shadow' prefer to keep a great contracting freedom to the extent that they obey some individual compromises, not many though. It is the empire of individual agreement which acts as if there was no public ruling in that trade. Even in countries where it would be easy for the irregular worker to go to the industrial relations commission or to the Judge, he would keep his status quo even though he knew he could claim a long list of legal and conventional rights.

In the light of such situation, the first attitude on subjecting a set of relations that are increasingly larger to the empire of the law is suffering a catharsis and it is becoming more thorough. Now the initial question will not be how to subject, but something more previous which is if it is convenient or not to subject, and in case of affirmative answer, to what extent and in what sense. Let us accompany the legislator for a moment in his worries in order to look at this world in the shadow closely.

Neither all the work done in informal economy is dependent work nor is it exclusively self-employment. Although it is true that the type of small self-employed corresponding with the hawker might win through in developing countries and that the worker that is linked to a company prevails in developed countries, there are also many in-the-middle situations in a flowing gradation which unfolds as a fan between both poles. There are up to three situations that could be differentiated, initially: the self-employed's, the subordinated's, and in the middle of both, the semi-self-employed or semi-independent which is the one that interests us the most following this trend of thought. We find ourselves, in this kind of work, in an ambiguous situation where there coexist false self-employed and real self-employed that, however, depend economically on an employer. Consequently the irregular work does not have a one-to-one nature and every kind of worker is due a different ruling: Commercial Law for the self-employed; Labour Law for the subordinate... ; and the doubts raise greatly when we get to the ambiguous work and try to give it a ruling order. *Quid iuris?*

In addition the issue gets more complicated, because sometimes, there are workers with no labour contract within the companies. The reason relies on the fact that the Legal system of the country does not consider them as employees for some reason, for example the short duration of the link. They are people who act in the formal or institutional economy although they do it off the Labour Law; and indeed, the 'horror vacui' of the law does not always end up by creating a labour presumption as you will see below.

### **5. Autonomous work with economic dependence**

It covers all variants in which a worker acts independently, but in fact, he works for just one person or some clients in a way that they know his requisites, demands, and price lists. Likewise the relations with the client or clients follow a repeatedly trodden path. There is no labour contract between both parties; and we can find in the multiplicity of the character: from the worker having a personal subordination and his productive activity is controlled by the client/s to that who is free in the way he carries out his jobs, although doing it for one or some clients causes him to be dependent economically on the clients.

The proliferation of the self-employed has provoked a friction area with Labour Law as regards to the independent 'collaborators', since their similarity with the subordinate workers gets to be so much that the former are considered 'functional substitutes' of the latter. A self-employed can do the same services than a dependent worker; and when he frequently works for one or few clients, his economical dependence on the main client make the client undertake almost the same role as an employer although the client lacks the control over the person that characterizes the directive power in the labour contract. There was a time, however, when the relative simplicity of the economical structure led the self-employed to be a real self-employed, and a company to try to cover the whole production cycle without reaching for other company owners. Nowadays the possibilities have come closer greatly; and an employer can, in many cases, assess the moment to hire, the most proper type of relation –labour or self-employment- according to his own interests. It is then, an *ex ante* option of the establishment of a contract link. In that cases, the employer decides the organizational and juridical type he prefers as long as he respects the principle of reality which does not mean much given the evolution I am talking about which is the reason why the jurisprudence has accepted sometimes minor disparities between the effective dependence situation and the type of contract

agreed formally by the parties<sup>9</sup>. Now, not even in the countries where there is no labour presumption, one can claim the willingness of the parties when the type of contract is clear; it would be like distorting the nature of the institutions; and in the same way that buying and selling cannot be named surrender of properties, placing goods cannot be called transportation contract, one cannot name consumption by the parties to the civil or commercial contract that is purely labour<sup>10</sup>. As the British case law stated in the Ferguson case: 'the relation between the parties of the contract, be it labour or not, is a juridical conclusion depending on the conferred rights and the obligations under the contract. If they are of a labour relation it will not be of any relevance that the parties declare otherwise'<sup>11</sup>.

Nonetheless, the social unrest has emerged from ex post conversions when the already established labour link has been intended to transmute to another one of a civil or trade character. Due to the proximity between the positions, the employer often tries to replace the general legal system that is less favourable to him by another more favourable one, causing a

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<sup>9</sup> See RODRIGUEZ-PIÑERO BRAVO-FERRER M., "La voluntad de las partes en la calificación del contrato de trabajo", *Relaciones Laborales II* (1996), 38ss.; MARTIN VALVERDE A., "El discreto retorno del arrendamiento de servicios" in VVAA (MONTAYA MELGAR, MARTÍN VALVERDE and RODRÍGUEZ-SAÑUDO coords), *Cuestiones Actuales de Derecho del Trabajo, Estudios ofrecidos por los catedráticos de Derecho del Trabajo al Profesor Manuel Alonso Olea*, Civitas, Madrid 1990, p. 232. The institutionalization of the optional feature of the type, *specie consensualis*, is found in the nationwide collective agreement for travel agencies and tourist guides 2004-2006, which states in its second Additional Disposition: 'For the purposes of assimilating professional levels for tourist guides, without prejudices of recognising the character of such profession in those cases in which the parties were subjected to labour obligation link exclusively, the salary level of the said Agreement to be applied would be the third, and the rest of the labour conditions (working time, timetable, breaks, shifts, etc) would be applied those that were agreed jointly or the prevailing uses and customs for the profession. The tourist guides or tourist groups' companions that keep a labour relation with the company will be covered under the benefits stated in article 40 of the said collective agreement on accidents' insurance'. DESDENTADO considered the option as a 'conventional delabourization', *op. cit.* page 451.

<sup>10</sup> This can be seen like in the British Law where the jurisprudence, when facing against 'the determining self-description of the relation by both parties' as CARBY-HALL J., calls it, it 'shows the tendency to intervene and to look at the reality of the relation before its way of deciding over the issue ('New frontiers of Labour Law: dependent and autonomous workers', in VVAA, *Du travail salarié au travail indépendant: permanences et mutations*, Cacucci, Bari 2003, pp. 258 ff., with indication to several judicial decisions).

<sup>11</sup> *Ferguson v. John Dawson and Partners (Contractors) Ltd* [1976] 3 All ER 817.

flight from the Labour Law that is well known and very much done in some Legal Systems. I would like to enhance, following Liso, that the flight is not produced by the cases<sup>12</sup>. The said interest is full with the worker's fear to lose his livelihood definitely, although it is also spurred by the insight of gaining more in some cases, as we will see below.

## 6. Minute works

The range of categories of employment contracts that are unusual or precarious and, especially those which are temporary and part-time, have always suffered a juridical alienation that has appeared in the special rules addressed to them in most countries. Perhaps the best evidence of discriminatory treatment can be found in collective agreements, in which trade unions which are mostly composed by full-time and permanent workers have reached an agreement on exclusions from the precarious in change of improvements for the affiliated. For example this was the usual practice for a long time in Spain till The Constitutional Court considered the clauses illegal against the equality principle at the end of the eighties<sup>13</sup>.

Several countries have available laws determining partial or total exclusion of these contracts from the Labour Law scope when their duration can be considered marginal. There should be taken into account that there is a high quantity of this kind of works feeding the business of temporary work companies<sup>14</sup>, and the great proportion of women so that their exclusion can arise, and in fact has produced, complaining due to causing indirect discrimination.

So for example, Germany has already a long record of slight regulation of *minijobs* (geringfügiger Beschäftigung) which has been undergoing several legislative reforms ever since their appearance due to the laws to foster employment from 1985 to 1996 by the conservative party. Generally speaking, protection against dismissal only came to be applied to companies with more than ten workers, and the dismissals on objective grounds got reduction of requirements. Concerning 'minimal' contracts with lower than 15 hours or 630 marks a week, as well as short-term fixed-term contracts (for less than 2 months or 50 days' work

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<sup>12</sup> LISO F., Speech in the seminar called *La grande fuga: chi, come e perchè scappa dalle regole del diritto del lavoro e dello Stato Sociale*, Roma 1992, which was reproduced afterwards in "La fuga dal diritto del lavoro", *Industria e Sindacato* 28 (1992), 3.

<sup>13</sup> Decisions 52/1987, of May 7<sup>th</sup>, and 136/1987, of July 22<sup>nd</sup>.

<sup>14</sup> Works lasting but a few days average, in any case less than a week's duration, as in the case of the Spanish Temp Recruitment Agencies.

a year), workers were freed to pay social security contributions while employers paid just 20%<sup>15</sup>. Under such circumstances these unprotected relations increased quickly and many abuses emerged, since usual contracts were transformed into these minijobs in order to avoid the contribution<sup>16</sup>, state Fischer and Thiel. At the end of the conservative period the minijobs amounted to 6.5 million workers<sup>17</sup>. Afterwards the Law on protection against unjustified dismissal of 1998 was applied again to companies with more than five workers. Both laws of 1998 and 2002 have improved slightly the treatment of these jobs in a way that, concerning the minijobs of which total amount is less than 400 euro a month, the worker does not pay social security contributions and the employer pays just a percentage, i.e. 28% of gross salary<sup>18</sup>; and concerning short-time fixed-term contracts (of less than 2 months) the workers are exempt from paying social security contributions.

There is a similar ruling on minijobs in Austria, although the economic limit is lower, i.e. 357.74 euro a month or 27.47 a day in the year 2009. The employer, who in these cases is called constituent (*Dienstgeber*), pays a general contribution of 17.8% due to work accidents, illnesses and pensions.

As for Denmark, the protection against abusive dismissal is not applied to jobs lasting less than three months: basically – affirms Numhäuser-Henning – the principle of contractual liberty prevails over justified causes of setting a term in the contract<sup>19</sup>. In Finland it is alike in the case

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<sup>15</sup> The works are “Versicherungsfrei”: The workers do not have to contribute either to the illness insurance or the unemployment insurance or the pension insurance.

<sup>16</sup> FISCHER N. and THIEL N., “Arbeitsrechtformen im Überblick”, apud SCHRAM and ZACHERT (eds.), *Arbeitsrecht – Personalpolitik – Wirklichkeit. Eine empirische Analyse zur betrieblichen Umsetzung von Arbeitsrechtsreformen*, Nomos, Baden-Baden 2005, p. 41. Also, DÄUBLER W., *Labour Law*, Ministry of Labour and Social Security, Madrid 1990, 870 ff.; SOWKA H.H. and KÖSTER H.W., *Teilzeitarbeit und geringfügige Beschäftigung*, Beck, Munich 1993, 18 ff.

<sup>17</sup> ROHMAN H., “Sozialpolitische Probleme flexibler Beschäftigung”, in KLEIN M. (ed.), *Nicht immer, aber immer öfter. Flexible Beschäftigung und ungeschützte Arbeitsverhältnisse*, Marburg 1993, p. 95.

<sup>18</sup> The employer must contribute to the illness insurance (13% of the salary) and to the pensions insurance (15% of the salary).

<sup>19</sup> NUMHÄUSER-HENNING A., “Fixed-Term Work in Nordic Labour Law”, en WAHLGREN P. (ed.), *Stability and Change in Nordic Labour Law*, Scandinavian Studies in Law, vol. 43, Stockholm 2002, p. 285.

of contracts that hire a long-term unemployed, i.e. inactive during more than a year<sup>20</sup>.

There are also several laws in United Kingdom setting a minimal period for 'continuous service', often of one or two years, which is particularly relevant for the purpose of excluding those who do not meet these requisites of pre-warning protection, justified dismissal, collective dismissal ruling and motherhood benefits. During the time the law of employment protection of 1978 was in force, a contract lasting less than sixteen hours a week (eight hours a week if the contract lasted five years at least), 'did not count'<sup>21</sup>. From a sentence and a law of 1995<sup>22</sup> such limits were derogated, and the transpositions of the Directives on part-time and fixed-term contracts allowed to endorse Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations of 2002, where temporary work is treated satisfactorily. However, there remains another conceptual requirement allowing the British courts to reject frequently the labour nature of some contracts: starting from the "consideration" general requirement, the judges have created *mutuality of obligation* requirement in the labour field which initially consists in offering a considerable amount of work and the willingness to fulfil it<sup>23</sup> –by the worker-. In the case of the workers that were hired for sporadic jobs, for example waiters in parties or feasts –the case of O'Kelly et al. v Trusthouse Forte plc- or workers who were hired by a temporary employment agency –the case of Wickens versus Champion Employment-, the court can invoke the lack of continuity to understand that it is not a dependent work relation, but about a self-employment one<sup>24</sup>. In two recent sentences, the British Court of Appeal stated lack of employment nature, since there was not sufficient "mutuality" in the case of a haulier of a company of Publications, with a company uniform, van which was

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<sup>20</sup> NUMHÄUSER-HENNING, *ibidem*, p. 287.

<sup>21</sup> CARBY-HALL J., "New frontiers of Labour Law: dependant and autonomus workers", in CHAUCHARD (ed.), *Du travail salarié au travail indépendant: permanences et mutations*, Cacucci, Bari 2003, p. 199.

<sup>22</sup> House of Lords, R. v Secretary of State for employment ex parte Equal Opportunities Commission and Another, [1995] 1 AC 1 (HL). And Employment Protection (Part-time employees) Regulations, 1995.

<sup>23</sup> It is the 'second level of obligations', over that corresponding to working and paying, as FREEDLAND M. states, *The contract of employment*, Clarendon Press, Oxford 1976, pp. 21-22. In the same line, DEAKIN S. and MORRIS G., *Labour Law*, Butterworths, London 1998, pp. 164-165.

<sup>24</sup> Industrial tribunal (currently Employment tribunal), case *O'Kelly et al. versus Trusthouse forte plc* [1983] IRLR 369 (CA); E.A.T., *Wickens versus Champion Employment case* [1984] ICR 365 (EAT).

provided by the company and route that was set beforehand – *Express and Echo Publications Ltd v Tanton* case<sup>25</sup>-, since a clause in the contract reported that the employee should provide a substitute in cases of absence, which was considered as incompatible with the worker status by the court. Something similar to this happened in *Carmichael and Another v National Power plc* case<sup>26</sup>. In another case, a nurse who was required to work by her hospital on the days she was needed -which is called *Kapovaz* by the Germans, “zero hour contract” by the British and “trabajo a llamada” by the Spaniards-, the court did not detect sufficient mutuality, despite the fact that in these cases the employer demands the worker to be prepared and available to work whenever the worker is called upon<sup>27</sup>.

As regards France, there emerges again certain employment policy and the equal opportunities motto in this country as foundation to set the first-job contract for a short span of time (*contrat première embauche*), by virtue of which the companies with less than twenty workers could employ under-26-years-old people who could be dismissed unjustifiably after the first two years (‘the consolidation period’). The workers would receive a compensation of 8% of the salary and 2% of social security contribution when being dismissed. This contract modality was replaced by another similar one soon<sup>28</sup>, the new job contract (*contrat nouvelles embauches*), although it was addressed to companies with less than 20 workers and unemployed people with no limit to age. Apparently it tried to foster employment among young people through this facility but it was not perceived this way by the doctrine which considered it a language abuse<sup>29</sup> and regression in practice<sup>30</sup> when introducing new elements of

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<sup>25</sup> E.A.T., case *Express and Echo Publications Ltd v Tanton* [1998] IRLR 301 (CA).

<sup>26</sup> House of Lords, case *Carmichael and Another v National Power plc* [2000] IRLR 43 (HL).

<sup>27</sup> Court of Appeal, *Clark v Oxfordshire Area Health Authority* case [1998] IRLR 125 (CA).

<sup>28</sup> Decree of 2nd August of 2005 and its ruling 2005-893. The doctrine talked about it as an abortion (Totgeborenes Kind): LE FRIANT M., “Neue Arbeitsverträge? Mittel im Kampf gegen Arbeitslosigkeit? Der ‘Contrat première embauche’, der ‘Contrat nouvelles embauches’ – Lektionen eines Misserfolges”, *Arbeit und Recht* n°. 12 (2006), p. 423.

<sup>29</sup> PELLISSIER J., “Contrats ‘nouvelles embauches’ et ‘premier embauche’ ou les abus de langage”, *Revue de droit du travail* n°. 6 (2006), p. 606; GOMEL B, “Contrat nouvelles embauches: un retour vers quel emploi?”, *Droit Social* n°. 12 (2005), p. 1130.

<sup>30</sup> SARAMITO F., “Une regression: le contrat nouvelles embauches”, *Droit Ouvrier* n° 691 (2005), p. 65.

precariousness in employment<sup>31</sup>. The French trade unions reported this contracting issue to ILO as threat against Agreement 158 on work completion demanding justified cause. However the French government keeps it while defending its capacity to create positions<sup>32</sup>.

## **7. Systematic means to solve the juridical condition of peripheral work**

Ruling incursions in the said peripheral work serve us to contemplate the multiple reasons that were employed to establish a treatment difference with respect to the two usual poles of personal work: 'free' contract for services and employment contract. Moreover they also serve us to see clearly the heterogeneity of the undertaken measures; their great political load, their constant going onwards and backwards by knitting and unknitting.

However, not all the attempts have been in a hurry as a result of subsequent economical crisis and of unemployment curves. Increasingly there have been raising some proposals and even more ambitious ruling constructions, with global ambitions which, in my point of view, have a great interest since they intend a sole and homogeneous solution for the no man's land placed between Labour Law and Commercial Law.

There are three types of systematic proposals. Firstly, that of those who defend to lead peripheral work to the usual bipolar classification. Secondly, those who defend to cancel bipolarity. Finally those who defend to create tertium genus which is half the way between work and trade.

### a) Renewal of bipolar classification

There still seems to be predominant, despite the feeling of crisis that impregnates the epistemology of Labour Law, the efforts to spread the whole work relations that are difficult to classify into either one or another side. In this task courts and most of legislators stay strict. In the attempt there is revealed up to four methods which are presented below:

1. Typological. The evidences on personal and economic subordination is the same across the European countries either from the subjection to instructions and employer's control to the existence of working time or salary, or not taking the risks due to missing the results. ILO also

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<sup>31</sup> SERRANO OLIVARES R., "El nuevo contrato de trabajo 'nouvelles embauches' (nuevas contrataciones) en el Derecho francés", *Iuslabor* n.º. 3 (2005), online magazine, page 1.

<sup>32</sup> FONDEUR Y., "Legality of new recruitment contract challenged", *Institute for Economic and Social Research (IRES)*, June 6<sup>th</sup> 2007.

considers the option, which in its Recommendation number 198 (2006), on work relations, advises the member States on the possibility to define, in their legislations, specific evidences that allow determining the existence of a work relation, citing up to twelve criteria (section II.13).

2. Professional. To be determined by law the juridical condition of a certain profession or professional area of an uncertain activity. Many countries establish what they call 'special work relations' in which a profession or branch are defined in a kind of specific statute which is different to the usual work relation in some respects. For example work at home, domestic service, sportsmen, middle-men, artists, workers of public administrations, etc, are ordered according to a line between self-worker and subordinate.

3. Institutional. The laws can consider that specific juridical institutions, like health and safety, are applied beyond the work relation or work contract. When doing it, they are keeping the bipolar classification since they need the classical duality.

4. Circular. This is the most blurring method since it consists in proclaiming the application of work rules to self-employed when needed, as certain times as through presumptions -the most usual presumption is employment relation- as finally, by means of a general principle like it is the primacy of reality or of facts<sup>33</sup>.

b) Suppression of bipolar classification.

Even when up to the moment the proposal has only a doctrinal seat in order to subject all the personal work or, as Mark Freedland put it, all the personal labour to a sole legislation, although it is well modulated and thorough it goes back in time at least to Wank studies in 1988<sup>34</sup> or to the theories on *lavoro senza aggettivi* of the so-cried D'Antona. The expert who studied the issue furtherer is professor Freedland<sup>35</sup>. He suggests a

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<sup>33</sup> Concerning the first assumption, the Spanish Workers Statute of 1994 says in its 1st Final Provision that 'the autonomous work will no be subject to labour law except for those aspects that it is expressly stated due to legal order' principle of primacy of reality is applied in many countries across the world: the *ILO in its report V. The scope of the employment relationship. International Labour Conference, 91st Meeting, Guinevere 2003*, names in a no-explicit way Germany, France, United Kingdom, Russia and other countries (page. 25, note 11).

<sup>34</sup> BECK R., *Arbeitnehmer und Selbständige*, C.H. Beck, Munich 1988.

<sup>35</sup> For instance, in *The Personal Employment Contract*, Oxford University Press, Oxford 2005; as well in "Application of labour and employment law beyond the contract of employment", *International Labour Review* n°. 146 (2007), pp. 3 ff.; or in FREEDLAND M. and DAVIES P.L., *Towards a flexible Labour Market – Labour Legislation and Regulation since the 1990s*, Oxford University Press, Oxford 2007;

joint ruling for employees, liberal professions, officials, the self-employed, casual workers, and contracts to enter the labour world. To this author: "binary division is one largely invented and imposed by legal systems of labour market administration"<sup>36</sup>, so that when trying to keep it we are taking the risk of autopoiesis. There should have, the author states, to analyze the relations among the range of forms of personal work and to follow as guidelines the proposals concerning the employment assumptions of ILO and on *flexicurity* of the European Union in order to lead again and update the Labour Law this way for the sake of maximizing the efficiency and the creative capacity of employments of the labour market.

In all cases it is an open thought in which the specialists suggest means and methods to approach a joint approach to the different ways to work and the contracts and situations expressing them legally.

c) Creation of a tertium genus between dependent work and self-employment. Four European examples.

In my opinion, the establishment of a 'middle world' with a basic ruling dealing with personal aspects of work has already raised some severe statements which should be taken into account despite the doctrine's reluctances. Maybe its greatest value comes from the very attempt to set a common space of rules for peripheral work as well as the criteria employed to define that space, since the rules with which they provide the relations included in the space with are very embryonic.

The countries where this middle concept emerged are: Germany, with quasi-worker (*Arbeitnehmerähnlichepersonen*); Italy, with parasubordinate (*parasubordinato*); Spain, with economically-dependent worker (*trade*); and United Kingdom, with worker in the broad sense of the word (*worker*).

1. Italy. One of the oldest trade rulings was located in the Italian Procedural Law of 1940, section 409.3 for coordinated and continuous collaboration relations which were mainly personal and did not have any

and in FREEDLAND M., "From the Contract of Employment to the Personal Work Nexus", *Industrial Law Journal* n°. 36 (2006), pp. 1 ff.

<sup>36</sup> FREEDLAND M., "Application of labour", cit., p. 5.

subordination link, the so called co.co.co to which the labour procedure was applied in the contentious one against the teller . In the same section it was stated the recognition of the same procedure ruling to the agents and to the trade representatives. The evolution of the treatment in Italy has had to wait more than sixty years when the Law 30/2003 and the Legislative Decree 276/2003 to develop the law appeared to recognise their contractual and insurance rights. It is a very wide legislation dealing with different aspects of work positions and of labour market, among which there can be enhanced the atypical contracts, and among the latter *lavoro a progetto contract* which is its new name. The rules of 2003 highlight wording a written contract in which it is included substantial elements such as: duration of contract, execution programme, compensation and payment modality, the way of coordinating with the teller who must respect the worker's autonomy, as well as measures to prevent health and safety. In addition, the compensation must be proportional to the work done and take into account the usual compensations in self-employment. No exclusive rights are granted except for the cases in which the rights are explicitly agreed between the parties although they have not to get the teller involved or spread his own information. Absences due to pregnancy, illness or accident are considered as contract suspension even when the two last cases do not entail prolongation of the contract for the period the redundancy lasted.

The most important rule in the Italian legislation is referred to contract extinction. The link ends when the project is completed; and it can be ended beforehand just for a fair cause or due to reasons that are included in the contract. The legislator gives a great freedom to the parties for them to give the possible reasons for contract extinction, since he considers valid even the simple forewarning as long as it is established so in the document. And in the practice most of work contracts use the forewarning as preferred formula. Otherwise the lack of project involves presumption of dependent work relation indefinitely.

The collective aspects, unionization, negotiation or strike are left aside. And the following are excluded from the new regulation which is another great flaw: collaboration agreements and sporadic collaboration lasting less than a month and a salary under 5.000€ a year with Public Administrations; professionals in Professional Associations; as well as market agents and representatives<sup>37</sup>.

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<sup>37</sup> See also the Legislative Decree 251/2004 and the circulars of the Ministry of Labour 1/2004 and 17/2006.

The new ruling has been considered by the doctrine in a fairly critical way. For Pedrazzoli it is a complication of the uselessness of a discipline which is: wrongly made, promises much more than what it can keep, and that it would have been better doing less<sup>38</sup>. Ghera highlights the lack of definition of the project, and the qualifying function of the element of the organisational risk<sup>39</sup>. Bortone recognises some advances although he discovers many incongruences in the legal text and predicts the contradiction that entails establishing a fixed-term contract with certain suspensive rules, and no need to talk about the undetermined concept of work to project predicting a significant increase of judiciary controversies<sup>40</sup>. Tiraboschi, who is direct disciple of the expert creating the reform, said sadly in this respect: 'Those who, on the spur moment and on their first reading, said negative words about Law 30/2003 and the corresponding development Decrees confirm today, with no rethinking linked to the first application phase, the need for a deep review if not for the pure and simple derogation of a controversial law (...) as a symbol of precariousness and commercialization of work"<sup>41</sup>.

2. Germany. The situation in Germany is much more fragmented than in Italy, for there is a lack of unifying ruling as that mentioned above. Starting from the simple definition of *Arbeitnehmerähnlichepersonen* as 'quasi-workers due to their economical dependence"<sup>42</sup> they are subject to the jurisdiction of labour courts and, above all, to the precepts of the Law of Health and safety<sup>43</sup>, with the exception of home delivery workers. Likewise they are under the same rules than subordinate workers concerning annual holidays, except for the said home delivery workers who are under a special ruling<sup>44</sup>, and are protected against gender

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<sup>38</sup> PEDRAZZOLI M., "Le complicazioni dell'inutilità: note critiche sul lavoro a progetto", in MARIUCCI L., (ed.), *Dopo la flessibilità, cosa? Le nuove politiche del lavoro*, Il Mulino, Bologna 2006, p. 119.

<sup>39</sup> GHERA E., *Il nuovo diritto del lavoro. Subordinazione e lavoro flessibile*, Giapichell, Torino 2006, p. 51.

<sup>40</sup> BORTONE R., "Il lavoro parasubordinato", apud BORTONE, DAMIANO and GOTTARDI, ed.), *Lavori e precarietà*, Editori Riuniti, Roma 2004, pp. 139 ff.

<sup>41</sup> TIRABOSCHI M., "A due anni dalla riforma Biagi del mercato di lavoro: quale bilancio?", in VVAA (MARIUCCI L., coord.), *Dopo la flessibilità*, cit., p. 358

<sup>42</sup> Art. 5.1 of Labour Procedure Law of 1979.

<sup>43</sup> Art. 2.2 of Arbeitsschutzgesetz of 1996.

<sup>44</sup> Arts. 2 and 12 of Mindesturlausbsgesetz für Arbeitnehmer of 1963.

discriminations at work, as well as the disabled are helped in work centres<sup>45</sup>.

Despite all this, the greatest legislative detail is on the collective negotiation issues through a long article, 12.a, in the Law on Collective Agreements of 1969. The article is addressed to 'people who are economically dependent and need social protection like subordinate workers' when they work for others on the basis of a contract for services, mainly without being in charge of other workers, and as long as their activity is basically focused on the same client or that more than half their gains come from the same client. Such average of gains is a third in the case of artists, writers and journalists.

3. Spain. In Spain labour legislation contained unfocused references to the self-employed at least from 1976 although one of the most important groups, home delivery workers, had already been included before in the concept of subordinate worker<sup>46</sup>, while other groups were left in a situation of partial assimilation thanks to the rules on special labour relations. Several rules, in addition, had established a close assimilation of the self-employed to the subordinates in health and safety and social security issues, and other kinds of convergence were debated by the doctrine like protection against objective dismissals or negotiation of agreements<sup>47</sup>.

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<sup>45</sup> Art. 2.2 of Beschäftigtenschutzgesetz of 1994, and art. 54.b of Schwerbehindertengesetz, composition of 1986.

<sup>46</sup> 'Home workers' in art. 6 of the Employment Contract Law of 1931. The statement was repeated in art. 6 of Employment Contract Law of 1944; and it affirmed in article 5 that the employers of such workers are: manufacturers, warehouse owners, traders, contractors, sub-contractors and pieceworker ordering work at home, paying a job or doing piecework, giving or not the materials and instruments of the jobs. The inclusion is confirmed again in Law of Employment Relationship of 1976 and in the Workers Statute, in force since 1980.

<sup>47</sup> For example, APILLUELO MARTIN M. developed the possibilities of breach of contract in article 1124 CC; and made reference to the future creation of a Fondo de Garantía Salarial (Earnings Warranty Fund) for the dependent self-employed as included in Law 53/2002 (*Los derechos sociales del trabajador autónomo*, Tirant lo Blanch, Valencia 2006, pp. 96 ff., where the term 'trade' was already used). Concerning collective agreements, some authors defended the possibility of ruling the work conditions of the dependent self-employed (RODRIGUEZ-PIÑERO M. and CASAS BAAMONDE M.E., "El trabajo autónomo y el Derecho del Trabajo", *Relaciones Laborales* 7/8 [2000], 11) while other authors denied it (CRUZ VILLALON J., "La tutela colectiva por los trabajadores autónomos de sus intereses profesionales", *Relaciones Laborales* nº. 7/8 [2000], p. 176; MARTINEZ

The Law 20/2007 of the Self-employment Statute devotes its central chapter to ruling economically dependent self-employed (acronym *trade*). The trade is defined as those whose incomes, at least 75%, come from an only main client (article 11). The trade must not hire subordinate workers, third parties cannot subcontract his task wholly or partly and, of course, he must undertake the risk resulting from the service he is engaged to provide. The law studies in detail the written contract which has to be recorded and only the condition of trade has to appear in it. The said contract can only be extinguished for justified reasons among which there can be found: 'the willingness of the client for justified reasons. The stipulated or in accordance with the uses and customs forewarning should be employed' (article 15). In case of unjustified extinction one can claim a compensation the amount of which will be established in the contract or otherwise by the social judge. There are also justified causes to suspend –not to extinguish– the contract for concrete reasons such as maternity, fatherhood or temporary disability. The Law also devotes several articles to self-employed associations, their representativeness and collective agreements under the Civil Code and that have to be accepted expressly by the self-employed person (articles 3 and 13). There are, to conclude with, other articles devoted to social security of the self-employed.

4. United Kingdom. Unlike the said three examples, the British case shows that the legislator and the doctrine made the ruling jointly; and may be because of that it is a somewhat ambiguous for the outsider. Indeed there emerges a distinction recognising just a few labour rights to workers, under the standard that was recognised to employees. In theory the worker is not equal to the other said cases of "parasubordinato", but he is considered someone within the sphere of subordinate employment as a subspecie or subcategory albeit the relation of groups included in the sphere match the most usual relations of the "parasubordinato": freelancers, fixed-term workers, temporary workers...<sup>48</sup>. They lack the

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BARROSO M., "Nuevas materias y temas pendientes en el contenido de los convenios colectivos", *Relaciones Laborales* n°. 23 [2001], p. 95).

<sup>48</sup> On the official web site of the British government "www.direct.gov.uk/en/employment/employees/employmentContractsAndCondi

main protection against abusive dismissal, maternity or fatherhood rest, etc. However they must be paid the minimum salary, ruling for working day and rests, non-discriminatory treatment, statutory sick pay, etc.

Two British cases set the distinction between both categories in a particularly remarkable way<sup>49</sup>. In *Byrne Brothers*, the court explains that the purpose of the said rules is 'clearly that of setting an intermediate protected worker type who, on the one hand, is not an employee but, on the other hand, can neither be considered as the owner of a business'. It adds that the purpose of this ruling would be recognising there are people who work for an employer and are not employees, but who are in the same economic and substantial position than employees: the basic effect of level 'b' is to avoid any misunderstanding, lowering the passing sign in a way that those who do not get to be qualified as employees for protection can do so as workers<sup>50</sup>. The court precises in *James vs. Redcats* that not all the people who can be described as self-employed run a company<sup>51</sup>.

A datum that can sign to what extent the distinction has taken root in the British scope: while the Directive on part-time work has been transferred for (all) workers, that on fixed-term contracts can only be applied to employees.

As A. C.L. Davies said, although the workers are better protected than the self-employed, they do not have the rights that are normally granted to employees<sup>52</sup>. The source of this distinction seems to be in the Seventies' legislation, Thatcher decade, when most of the laws considered that not all workers were protected by collective agreement,

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ons" it is stated that: "worker...is a broader category than 'employees' but normally excludes those who are self-employed. A worker is any individual who works for an employer, whether under a contract of employment, or any other contract where and individual undertakes to do or perform personally any work or services. Workers are entitled to core employment rights and protections".

<sup>49</sup> Sentences *Byrne Brothers (Formwork) Ltd v Baird & Ors* [2002] IRLR 96, and *James v Redcats (Brands) Ltd* [2007] ICR 2006.

<sup>50</sup> Sentence *Byrne Brothers*, paragraph 17.

<sup>51</sup> Sentence *James v Redcats*, paragraph 46.

<sup>52</sup> DAVIES A.C.L., *Perspectives on Labour Law*, Cambridge University Press, Cambridge 2004, p. 84.

so that a great gap between typical and atypical workers was opened<sup>53</sup>. The latter would be the group that currently matches the concept of 'worker'<sup>54</sup>. And although the distinction lacks the clear legal support of the German, Italian and Spanish examples, a difference is established with the sporadic support of some laws between the typical worker and that ring which is blurring between the worker and the collaborating person until the commercial self-employed is touched on a concrete moment.

## **6. The position of the International Labour Organisation and the European Union**

The worries of ILO and EU have followed divergent routes regarding the delimitation of peripheral work up to the moment. Thus while the former's main objective seems to be avoiding the abuse of irregular work and ambiguous names, the latter's aim is in the full employment, so it seems to have discovered a panacea to get it from 2004 in the flexisecurity icon.

The main document of ILO in this respect keeps on being Recommendation 1985 which was updated in 2006<sup>55</sup>. The Recommendation states in favour of ruling the evidence of labour relation by the laws in every State. Concerning the EU, the obsession for the whole work and flexisecurity stays untouched nowadays<sup>56</sup>, and it seems to be closely linked to the Strategy of Lisbon for the Growth and Employment. Otherwise, the task and effort to delimitate the concept of subordinate worker against self-employed and peripheral workers is relegated to the doctrine of the European Court of Justice which keeps on advancing case by case determining the location of certain professions and atypical jobs according to the traditional method for evidence. However there must be recognised the strong legislative limitations of the

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<sup>53</sup> However, neither all the laws of that decade were limited to the employed (Equal Pay Act 1970 or Race Relations Act 1976), nor laws restricted to the employees only stopped appearing later on (Trade Union and Labour Relations [Consolidation] Act 1992, or Employment Rights Act 1996). Cfr. CARBY-HALL J., *op. cit.*, pp. 248-249.

<sup>54</sup> Likewise DAVIES A.C.L., *Perspectives on Labour Law*, pp. 81 ss.

<sup>55</sup> It is the-said-above Recommendation 198 on labour relationship.

<sup>56</sup> See the Communication of the Commission to the European Parliament, to the Council, to the European Economic and Social Committee, and to the Regions Committee called "Towards the common principles of flexisecurity: more and better employment through flexibility and security", of June 27th 2007 [COM (2007) 359 final].

EU on the subject since the Treaty itself does not grant EU to have competencies in some important issues.

There is a need to enhance, however, the great effect of Community Directives of 1997 and 1999 on part-time jobs and on fixed-term contract on the legislation of member States. In some case the protection of atypical works has been produced by the influence of these Directives alone which obliged the States to apply the rights of typical workers to the atypical ones proportionally. And although with respect non-discrimination of gender The European Court of Justice together with the Community legislation agreed in backing the said limitations, because although the great majority of those working in minijobs are women, the complete inclusion of these work relations of minimal entity within the Labour Law would have driven to 'a proliferation of illegal forms of employment and increase in frauds<sup>57</sup>'. As regards to naming some ambiguous situations several sentences stated that the European concept for dependent work covers its statements with reduced hours<sup>58</sup> and it only allows excluding reduced activities that are presented as purely isolated and complementary<sup>59</sup>.

There remains, in any case, the effort to get a middle step between dependent work and self-employment. An effort that joins and clarifies the juridical regime of the range of work groups. It is difficult for this effort to make everyone happy, since to many specialists it has the contaminated effect of getting through the window a massive social dumping which allow company owners contracting as self-employed those who it contracted as subordinate yesterday, but that it is essential in a world where peripheral situations are more frequently each time.

## 7. Conclusions

There is a need to enhance two aspects of the short presentation. Firstly, the reductive load of some policies of employment fostering. The policies are based on a some kind risky equation to make the cost of employment cheaper, therefore thinking on increasing the number of (cheap) jobs. And secondly, the European Court's complaisant attitude concerning factual arguments not to be admitted in a court, since the doctrine points

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<sup>57</sup> European Court of Justice, sentence *Nolte* of December 14th 1995, C-317/93. Vid. SCHMIDT M., "Part-time work in Germany", in CARUSO B. and FUCHS M. (eds.), *Labour Law and Flexibility in Europe. The Cases of Germany and Italy*, Nomos and Giuffrè, Baden-Baden 2004, p. 95.

<sup>58</sup> European Court of Justice, sentences *Levin* of March 23rd 1982, C-53/81, and *Kempf* of June 3rd 1986, C-139/85. Vide ARRIGO G., *Il diritto del lavoro dell'Unione europea. Vol. I*, Giuffrè, Milano 1998, pp. 240-244.

<sup>59</sup> European Court of Justice, sentence *Bernini* of February 26th 1992, C-3/90.

just the opposite: tendency to fraud appears more easily when establishing a double step of requirements or of kinds of work that when it is attempted to be made situations that are basically identical homogeneous under the same rules.

Concerning *tertium genus*, which has been emerging in four countries, there is no typological coincidence among them, although the distances of the German, Italian and Spanish models are barely perceivable. The main feature of these models is that they are caused by the same phenomenon of typology dispersion and blurring as the new technological advances have allowed higher independency shares at work. Maybe the British model seems a little bit more distant from the others, since at the end of the day it mainly covers atypical jobs which in the other countries are placed within the Labour Law, although this is rather difficult. The British option for atypical works seems to have emerged from a terminological misunderstanding and from some theories, which are debated over by the best British specialists but that are at their height. The theories are *mutuality*, in the sense of engagement projection in the future, and *continuity in the service* as determinant of the worker's classification. The theories linked to an ambiguous enough distinction between work contract, which is usually called *contract of service* -in singular-, and hiring services called *contract for services* -in plural- make a worker who is doing a chain of successive tasks or even a small sporadic job to be considered self-employed.