Ivane Javakhishvili Tbilisi State University
Faculty of Law

Journal of Law

№2, 2020

უნივერსიტეტის
გამომცემლობა

Miranda Matcharadze*

Rationality of Revising the Notion of Employee Taking into Account Technological Progress

Fast development of innovative technologies resulted in spread of new, non-standard forms of employment, which mainly is managed by self-regulation, in the framework of freedom of contract, without any special legislative regulation.[1] However, atypical employees have so much in common with standard employees, that the court hardly can differentiate them, and this fairly creates query to give this category labor and other social guarantees, and therefore requires revision of the definition of employee.

Key words: *Employee, independent contractor, self-employed persons, "quazi – salaried" persons, atypical forms of employment, Gig Worker, Remote Work.*

1. Introduction

Determining notion of the employee plays significant role in the application process of labor law. This is linked to the spread of guarantees and rights given by the law to those employed under labor contract. In light of technological progress, the notion of employee does not fall under and exceeds traditional definition.

However, there was always a misunderstanding around legislative notion of employee, which does not ensure resolution of difficulties corresponding to reality. Development of new technologies and new ways of business organization, along with increasing qualification and skills of employees, made ambiguous difference between employees and independent contractors, which triggers legislator to replace old categories with new ones.[2] Great part of employment market segment was left outside regulation because of existence of traditional notions of employee and independent contractor.[3]

During years, following market requirements, when incapability of labor agreement to satisfy new requirements was detected, alongside to labor agreement various atypical, alternative constructions were created, which were inexpensive and convenient for employer and less stable for employee.[4] With this scenario, fixed-term contracts, agency work, on-call work takes place as intermediate category between employees and independent contractors.

How much is subordination a criterion, which is crucial for identification of labor relations and whether it responds to substantial changes in the area of market and industry. Understanding the

* Doctoral Student of Ivane Javakhishvili Tbilisi State University, Faculty of Law.

1 Some countries regulated similar categories of workers' rights, for instance Italy.

2 *Del Conte M., Gramano E.,* Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors under The Italian Legal System, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 580.

3 Ibid, 579.

4 Ibid, 581.

notion of employee gets particular importance, and its interpretation is the subject of judicial practice, as far as in most cases it is necessary to analyze particular situation and evaluate circumstances.

The purpose of this article is to through analyzing notions of employee and independent contractor based on studying legislations and judicial practice of various countries, demonstrating the problem and planning ways of its solution, which exists on labor market by way of numerous workers, who have no status of employee under legislation and therefore, can not exercise respective guarantees and social security. Is the mentioned category included in ranks of employees or it explicitly is an independent contractor? For widening notion of employee which particular recommendations may be suggested.

2. Notion of Employee

2.1. Traditional Definition of the Notion of Employee

Subordinated employment is the "traditional model", based on which legislator regulates rights and obligations of employee. Employees exercise maximum protection in this legislative framework.[5] According to scientists, exhaustive definition of the notion of employee would result in stagnation of judicial practice, which would bring negative outcome in terms of protecting rights of employees.[6]

Despite the fact that identifying features are several, in certain circumstances it is a very difficult task to classify relations. Especially taking into consideration increasing technological progress. Comparing to Italy, in Germany there were no legal definitions of employee and labor contract for a long period.[7] It was always considered that labor contract was sub-category of service contract (Dienstvertag), the definition of which is reflected in the Civil Code of Germany paragraph 611 (1).[8] In 2017 the German legislator introduced to the Civil Code a provision, that defines essence of labor contract and not a notion of employee. Despite the fact that there is no labor law in Germany, the central concept of labor law was determined. However, this definition may cause big misunderstanding during application of the law.

It is interesting that Italian legislator, in comparison to other contracts, has defined the notion of one of the participants, instead of defining a contract. This underlines significance of the notion of employee in labor relations. According to article 2094 of the Civil Code of Italy, employee is a person who performs intellectual and physical work for entrepreneur for remuneration under his/her subordination and with his/her instructions.[9]

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5 Labor Code of Georgia Commentaries, *Boroni A. (ed.)*, Tbilisi, 2016, 114 (in Georgian).

6 *Waas B.,* The New Legal Status of Independent Contractors: Some Comments from a German Perspective, Comparative Labor Law & Policy Journal, Vol. 39, Issue 3, 2018, 627-638, 633.

7 Ibid, 28.

8 *Kropholler I.,* Civil Code of Germany, *Darjania T., Tchetchelashvili Z.* (*trans.*), *Chachanidze E., Darjania T., Totladze L.* (*eds.*) 13th ed., Tbilisi, 2014, §611, 1 (in Georgian).

9 In Italy the Federal Supreme Court shows attempts to restrict formula envisaged in article 2094 of the Civil Code of Italy. Lawyers prove necessity to have full personal subordination towards employer while discussing subordination. See citation: Commentaries to the Labor Code of Georgia, *Boroni A. (ed.)*, Tbilisi, 2016, 116 (in Georgian).

2.2. Criteria Identifying Labor Relations Introduced by the ILO Recommendation №198

Based on analysis of legislations of various countries, criteria identifying labor relations are portrayed in Recommendation №198[10] of the International Labor Organization (ILO) (hereinafter – recommendation), which calls upon member states to elaborate national policy in a way, that effective protection of performers of work in the framework of labor relations is ensured, which will give interested parties possibility to effectively determine labor relations and differentiate employee and self-employed person.[11] For determining existence of labor relations it is necessary to study essence of relation and not how this relation is classified by one of the parties.[12] The court is not interested in the name of the contract.

According to recommendation, one of the important criteria for classifying labor relation is subordination. Moreover, whether the work is performed in line with instructions of employer and under his/her control.[13] However, for instance toward persons providing individual services, such as in case of general doctor, researcher and actors/actresses, there are no instructions given, as such types of workers define the substance of their work individually in each particular occasion).[14]

Integrating the performer of work into organization of employer[15] – for this criterion it is crucial how much is performer of the work involved in the activity of receiver of the work. Involvement may be determined through the fact how important is the work performed by an individual for the business of employer and whether organizational rules, procedures, work order and/or social benefit schemes that are used towards employees of the organization, are also applied to the performer of work.[16]

According to article 13 of the recommendation, indicator determining labor relation is periodically paying remuneration to the performer of work and this income represents major and only source for the performer of work. Paying in kind, such as providing food, living place and providing transportation is also considered in remuneration. During non-working hours and right to rest on holiday, as well as compensating transportation costs related to performance of work by the employer is one of the indicators of labor relations.[17]

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10 R198 – Employment Relationship Recommendation, 2006 (No.198), ILO.

11 Labor law of Georgia and International Labor Standards, *Bakakuri N., Todria T., Shvelidze Z. (eds.),* International Labor organization, 2017, 43 (in Georgian).

12 Ibid.

13 Regulating the employment relationship in Europe: A Guide to Recommendation No.198. ILO, 2013, 38, <https:// www.zora.uzh.ch/id/eprint/91131/1wcms_209280.pdf> [10.09.2020].

14 *Waas B.,* The New Legal Status of Independent Contractors: Some Comments from a German Perspective, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 630.

15 Compare Commentaries to the Labor Code of Georgia, *Boroni A. (ed.),* Tbilisi, 2016, 115. "Collaboration is the stable and systemic inclusion of employee into companies' organizational structure."

16 Labor Law of Georgia and International Labor Standards, *Bakakuri N., Todria T., Shvelidze Z.* (*eds.*), International Labor organization, 2017, 44 (in Georgian).

17 Regulating the employment relationship in Europe: A Guide to Recommendation No.198. ILO, 2013, 65, <https:// www.zora.uzh.ch/id/eprint/91131/1wcms_209280.pdf> [10.09.2020].

Labor relation does not exist when remuneration is paid based on the invoice presented by the performer of work or after person has performed work.[18]

According to article 13(a), one of the indicators of existence of labor relation, when the performer of work does this work only for the benefit of one employer. The named criterion aims at defining economic dependence of person on the employer. "Limitation of part-time working is justified deriving from competition between employers and from the principle of maintaining loyalty by the employee."[19]

Obligation to perform work personally – is an important criterion, which distinguished employee from contractor, comparing to previous versions, article 19 of the Labor Code of Georgia (herein after referred as LCG) only prescribes obligation to perform work personally.[20]

Article 13(a) of the Recommendation envisages, as criterion classifying labor relation, the performance of work during precise working hours, when the workplace is defined by the employer or is agreed with him/her. Traditionally, employment is linked to workplace, hence previously it was relatively easy to define status of employees.[21]

The financial risk of the performer of work – is very useful criterion for identifying labor relation. The right of the performer of work to get part from profit gained by the employer, and, on the other hand, liability in case of financial damage, represents strong indicator for determining status of employee.[22] Financial failure of employer is not reflected on the employee and he/she is obliged to pay salary. The named criterion must be distinguished from such structures of financial stimulation as, for instance, bonus or compensating commissions, which are often used in labor relations.[23]

Despite the fact, that continuous character of relation is one of the identifying criteria of labor contract, it is less useful, as in Georgia, for instance, possibility to stipulate contract for definite period of time is admitted.[24] Among identifying criteria, there is provision of necessary tools, materials and equipment for the work purposes by the offeror of work.

Bilateral obligations – is the additional criterion for judiciary to evaluate labor relations in some cases.[25] The mentioned implies obligation of the employee to perform work and obligation of the employer – to provide employee with work.[26]

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18 Labor law of Georgia and international labor standards, *Bakakuri N., Todria T., Shvelidze Z. (eds.),* International Labor organization, 2017, 44. See citation: Regulating the Employment Relationship in Europe: A Guide to Recommendation No.198, ILO, 41 (in Georgian).

19 *Shvelidze Z.,* Characteristics of legal status of employee envisaged under the Labor code of Georgia, Labor law, Compilation of articles, Book I, Tbilisi, 2011, 112 (in Georgian).

20 Compare Labor Code of Georgia edition 15.07.2020 – "Employee is obliged to perform work personally. Parties may agree on performance of work by third party for definite period." (Article 10).

21 *Hirsch J.M.,* Future Work, University of Illinois Law Review, Vol., 2020, 924.

22 There is not only economic risk on employer, but also he/she bears technical risk – when employee cannot perform work because of the technical problems and he/she is obliged to pay salary to employee; Personal risk – liability of employer for the action of employee; Social risk – employer compensates expenses while absence of employee due to illness or other personal reasons.

23 Labor Law of Georgia and International Labour standards, *Bakakuri N., Todria T., Shvelidze Z. (eds.),* International Labor Organization, 2017, 47 (in Georgian).

24 Labor Code of Georgia, LHG, 75, 27.12.2010, Article 12.

25 Test of bilateral obligations is particularly relevant with atypical employees, such as: home workers. Agency workers, zero-hours contract workers and casual workers.

3. Status of Independent Contractor

Self-employment always caused big doubt among legislators and scientists, as well as unrecognized presumption that long-term relations, where independent contractor directly and personally performs certain work for other person, always covers in itself element of subordination and depending relation – carries character of labor contract, where there is a strong party – employer, however, voluntarily hidden, in order to avoid expenses and lawful obligations.[27]

In some European countries, such as, for instance, Great Britain, generally there are two categories of performers – employed with special labor guarantees and self-employed (independent contractor) – characterized by substantial economic dependence and existence of labor law guarantees. Difference between them is based on the following: in exchange to subordination of employee, the prerogative employer is to ensure economic stability, contracted guaranteed for indefinite period of time, whereas an independent contractor takes risks deriving from economic activity on himself/herself in exchange to full autonomy.[28]

In USA in the case *Radio City Music Hall Corp. v. United States*,[29] in 1943 the court determined that some categories of actors/actresses (stage show performers) are independent contractors, as far as actions of producer directed to organization of the event implies only minimal control and interference.[30] In this category the following stage show performers are included – acrobats, representatives of comedy genre, singers, dancers and jugglers. However, afterwards the same court in case *Ringling Bros. – Barnum & Bailey Combined Shows v. Higgins*,[31] has stated that clowns and famous actors will be considered as persons employed in circus corporation. Performers continued permanent relations with the employer during whole season despite the fact that each phase of their activity required individualism and huge dose of artistry, the function of circus director was right to give basic instructions and control, and that was why performers were considered as employed persons.[32]

In following cases the court continued searching for balance between independence of performer and level of control from employer, and with this criterion it decided whether employee was

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26 Regulating the employment relationship in Europe: A Guide to Recommendation No.198. ILO, 2013, 50, <https:// www.zora.uzh.ch/id/eprint/91131/1wcms_209280.pdf> [10.09.2020].

27 *Del Conte M., Gramano E.,* Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors under The Italian Legal System, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 579.

28 Ibid, 580.

29 Radio City Music Hall Corp. v. United States, Circuit Court of Appeals, Second Circuit, 1943, <www. casetext.com> [07.09.2020].

30 *Attadgie S.,* Combating the Actors Sacrifice: How to Amend Federal Labour Law to Influence the Labour Practices of Theaters and Incentivize Actors to Fight for Their Rights, Cardozo Law Review, Vol. 40, 2018, 1071.

31 Ringling Bros. – Barnum & Bailey Combined Shows v. Higgins, United States Court of Appeals, Second Circuit, 1951, <www. casetext.com> [07.09.2020].

32 *Attadgie S.,* Combating the Actors Sacrifice: How to Amend Federal Labour Law to Influence the Labour Practices of Theaters and Incentivize Actors to Fight for their Rights, Cardozo Law Review, Vol. 40, 2018, 1071.

contractor or not. In the case *Club Hubba Hubba v. United States*, [33] the district court of Hawaii considered club dancers, who had 6 months contract and club provided them with living place and food, as employees. The decision was based on the fact, that activity of dancers was club's major and not secondary program. Moreover, the club provided dancers with flat and food, in addition to other types of security guarantees; The club controlled working hours and process of rehearsal during activities of dancers. They had no right to stop their performing activity in the period of contract term. Between these two activities there were similarities in terms of producers' obligations, but, in the case *Radio City Music Hall Corp. v. United States*, the court has stated earlier, that determining rehearsal hours, providing flat, defining number of performances by days – all these are insignificant factors for determining control right of the employer, however, in the case *Club Hubba Hubba v. United State,* the court took into consideration these factors when considering dancers as employees.[34]

In the case *Harrell v. Diamond A Entertainment, Inc*.,[35] the Appeals District Court of Florida ruled that exotic dancer was employee and not independent contractor, taking into account terms of contract, level of employer's control and evaluating full economic reality.[36] On this case the court stated that dancer has no important part of the business, in order to be considered as independent, separate economic object. From other criteria, contributions done by parties, dancer's qualification and initiative, possibility to receive and loose income, length of relation, were taken into consideration, as well as whether the program performed by dancer was major part of employer's business activity.[37] Each factor mentioned above indicates to economic dependence, which creates precondition for the court to consider dancer as employee.[38]

In Germany category of self-employees benefits from certain volume of labor guarantees. According to acting legislation, core protection guarantees are reflected in articles 134 and 138 of the Civil Code of Germany, according to which illegal and immoral agreements are void.[39] Some protection measure may derive from general principles. For instance, provisions, which contradict

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33 Club Hubba Hubba v. U.S, United States District Court, D. Hawai'i, 1965 <www. casetext.com> [07.09.2020].

34 *Attadgie S.,* Combating the Actors Sacrifice: How to Amend Federal Labour Law to Influence the Labour Practices of Theaters and Incentivize Actors to Fight for their Rights, Cardozo Law Review, Vol. 40, 2018, 1072.

35 Harrell v. Diamond A Entertainment, Inc., US District Court for the Middle District of Florida, 1997 <https://law.justia.com/cases/federal/district-courts/FSupp/992/1343/1456769/> [07.09.2020].

36 *Attadgie S.,* Combating the Actors Sacrifice: How to Amend Federal Labour Law to Influence the Labour Practices of Theaters and Incentivize Actors to Fight for their Rights, Cardozo Law Review, Vol. 40, 2018, 1072.

37 Ibid.

38 Ibid, 1075. As for the theaters, the management of theatre organized advertisement and ticket selling, and director and producer instruct actor/actress, determined schedule for rehearsal and defined repertoire of theatre. The director is practically interfering into activity of actor/actress, when during individual performance merges acting, choreographic and stage performance and in such a way leave to the actor less possibility to express individualism. Moreover the theatre is fully responsible for its income and takes on itself financial risks of failure.

39 *Waas B.,* The New Legal Status of Independent Contractors: Some Comments from a German Perspective, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 636.

with principle of good faith, puts one party in unjustified non-convenient situation, are void. Similar unjustified non-convenient situation is in place when core conditions are incompatible with legal regulation or it restricts general contractual rights and obligations, in a way that reaching the purpose of contract is at risk. (CCG §307). Ensuring protection of health in workplace and creating conditions for labor safety by the employer are regulated with §618 (1) of CCG. Person giving a job is obliged to ensure and have equipment, storage rooms and installations, which he/she must purchase for providing service and in such way he/she must manage the process of service provision, which is done by his/her management or supervision, in order to protect obliged person from danger existing to life and health, as far as it is possible considering the nature of service.[40]

As far as paragraph 618 is applied on any type of service provision, despite the character of legal relation, it is also applied on self-employed persons.[41]

The issue relates to two directions: enhancing protection guarantees for economically dependent self-employed persons or reasonableness to apply labor protection guarantees to "solo" employees. Correcting notion of employee causes serious changes to applicable norms. Using template rules for every category cannot be an outcome. It is necessary to define what could be the volume of protection guarantees to be suggested to certain categories and including them into the scheme guaranteed by labor legislation, considering their own specifics. As a result, there is a risk that the difference between employee and self-employed person, who need social protection,[42] will be erased and ambiguity created. However, in any case, the task of legislator is to ensure adequate protection.

And at last, there is no significance to name a contract, the content of contract is of utmost importance. Identification of contract is done based on its content.[43]

4. Atypical Forms of Employment

4.1. Persons Employed in Gig Economy[44]

The most important modern transformation is digital labor platform, which includes web-platforms, where working is possible by the group being geographically far ("crowd work") and applications attached to a place, which offer work to individuals in particular geographic location, as a

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40 *Kropholler I.,* Civil Code of Germany, *Darjania T., Tchetchelashvili Z. (translators), Chachanidze E., Darjania T., Totladze L. (eds.),* 13th ed., Tbilisi, 2014, §618 (in Georgian).

41 *Waas B.,* The New Legal Status of Independent Contractors: Some Comments from a German Perspective, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 636.

42 For ensuring pensions, it is important to classify gig economy workers as employees. See: *Secunda Paul M.,* Uber Retirement, University of Chicago, Legal Forum, 2017, 437.

43 *Waas B.,* The New Legal Status of Independent Contractors: Some Comments from a German Perspective, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 631.

44 For avoiding misunderstand, some authors suggest to call interim type workers as "independent worker". See *Harris S. D., Krueger A. B.,* A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The "Independent Worker", The Hamilton Project Discussion Paper, 2015, 27, <https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf> [16.10.2020].

rule, for implementing tasks focused on local service, such as transportation, delivery service or house cleaning service.

Gig workers are drivers, performers of delivery service, personal assistants, craftsmen, cleaners, cooks, nannies, as well as relatively more professional category such as nurse, doctor, teacher, programmer, journalist, marketing specialist and lawyer.[45]

Gig work includes risks that inadequate regulating system may appear.[46] Majority of this type employees depend of the good will of employer – level of their protection is low, they have no possibility to conduct negotiations and they are supervised and controlled without their permission.[47]

Such employees do not make use of protection from dismissal with the condition to prolong the contract stipulated for definite period, which may take place in unlimited number of cases; Working hours' restrictions do not apply on them; For instance, indefinite working hours of uber taxi drivers creates problem for their classification.[48] They do not have annual paid leave; collective contracts and rules on minimal remuneration do not apply to them.[49] According to existing test legislation does not give exact response to questions like, are drivers independent contractors for Uber business model or are they employees. The test is ineffective and each case must be evaluated individually.[50] For example, as far as in gig economy work performer or seasonally employed person are not economically dependent on the employer, using test of economic dependency towards them is dubious.[51]

Court decisions are also inconsistent. For instance, in case *Rajab Suliman v Rasier Pacific PTV LTD*, the court in Australia considered that Uber driver is an independent contractor, as far as employer does not exercise control over him/her in such a dose, which would be enough for considering him/her as an employee.[52] Contrary to the mentioned, in the case *Klooger v Foodora*

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45 *Lobel O.,* The Gig Economy and the Future of Employment and Labor Law, University of San Francisco Law Review, Forthcoming San Diego Legal Studies Paper No. 16-223, 2016, 8.

46 "In Georgia as well, employed in gig economy persons are in unclear situation. The most evident this situation is when these persons have to send notification to the company for vacation, or when they must receive work in a form, which is suggested by the company, in order to keep rating high or in case they receive salary." See citation: *Beilis R., Mikhelidze A.,* Legal Responses to the Rise of the On-Demand Economy in Georgia and the United States, Modern Law Journal, Book I, 1st ed., 2019, 97.

47 *Hirsch J. M.,* Future Work, University of Illinois Law Review, Vol. 2020, 924.

48 *Eisenbrey R., Mishel L.,* Uber Business Model Does not Justify a New "Independent Worker" Category, Economic Policy Institute, 2016, <https://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category> [11.10. 2020].

49 Commentaries to the Labor Code of Georgia, *Boroni A. (ed.),* Tbilisi, 2016, 120 (in Georgian).

50 *Bales R.A., Woo C. P.,* The Uber Million Dollar Question: Are Uber Drivers Employees or Independent Contractors? Mercer Law Rev., 463, 2017.

51 *Cunningham-Parmeter K.,* From Amazon to Uber: Defining Employment in the Modern Economy, 96 Boston University Law Rev., 2016, 1696.

52 The driver was employed using the application and he/she could turn off application and do other work, or use car for other application and provision of other service. See: *Duvenhage J.,* Rajab Suliman v Rasier Pacific PTV LTD: Employee or Independent Contractor? 21. U. Notre Dame Aust. L. Rev., 1.2019, 12.

Australia Ply Ltd. the same court considered the delivery service provider as unlawfully dismissed employee, because of the significant control over him/her from the side of company.[53]

4.2. Remote Work – Modern Method of Work Performance

Spread of distance work[54] removed basis of the idea, that subordinance at the same time entails giving instructions related to the workplace. For instance, in Germany there is no legislation in this regard.[55] However, according to European Law, the solution in this case is to apply principle of equal treatment. According to the principle of equal treatment in Labor Law (contracts with set term, by-work and part-time work) in Italy the legislator considered modernization of labor law in light of digitalization, and in Germany modernization in this regard is considered in direction of crowd work. Remote work rules must be enhanced and protection guarantees mut be applied to self-employees of this category (crowd workers).[56]

With the influence of modern technologies more popular becomes substitution of subordinate employment with remote work. Inexpensive information technologies make it possible to organize remote employment model effective in terms of expenses. The named model gives possibility to employees to perform work from any place acceptable for themselves, however, it must be noted that due to specifics of some works, it is impossible to manage it remotely and remote work is mostly widespread in office type works. Advantages and benefit of such model are important,[57] in numerous European countries flexible organizational models of remote work were developed, which may be successfully adjusted to various activities, in Italy there was necessity to regulate remote work on legislative level, in order to give possibility to companies use that tool officially, as one of the types of employment and apply labor law regulation towards it. For this purpose, by adoption of the Law N81 on 22 May 2017, the Parliament of Italy stipulated special regulation on rational employment, i.e. on

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53 Ibid.

54 Telework – Framework Agreement on Telework (2002) defines remote work (telework) as "form if organizing or implementing labor contact/relations using information technologies, when the work is performed, as a rule, outside the office of the employer" – Article 2.

55 Comp. *Vasilieva Y.V, Shuraleva S.V.,* The Content of the Remote Work Employment Contract: Theoretical Aspects, Perm University Herald Juridical Sciences, Vol. 28, 2015, 89; Article 49 paragraph 1 of the Labor Code of Russian Federation envisages particularities of legal regulation of remote work. The core term of the contract of remote work is the job description of employee (functions) and remuneration.

56 *Waas B.,* The New Legal Status of Independent Contractors: Some Comments from a German Perspective, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 635.

57 Significantly better outcomes of performance of work by employee, successful organization of working hours and family activities, saving the time and money for transportation to work, dealing with problem of absence at work, increasing productivity in terms of hourly work, decreasing expenses for office maintenance. The mentioned positively affects public life – traffic jams are decreased, pollution is decreased and expenses aimed at welfare of the society are used for vulnerable groups.

rational (flexible) work.[58] For the purpose of increasing competition and regulating employment and working hours, especially remarkable is the regulation of remuneration and insurance.

The abovementioned law defines rational employment as method of performing work in labor contract, which must be regulated by parties' agreement. For instance, the thing that differentiates rational from normal employment is the fact that time restrictions are not set (must be fitted in the time limit defined by the legislation), no obligation of having fixed working place, but rather duties may be performed outside the work. The law creates possibility to use modern technologies for employee to perform his/her work. It must be noted, that rational employment is not a new type of labor contract, but just a method of subordinated activity.[59]

The major characteristic of rational employment is the fact, which implies existence of regular labor contract, according to which employee is subordinated to employer, but performance of work is regulated based on terms defined by the agreement stipulated between parties, that must comply with the law.[60]

For rational work employer and employee must stipulate agreement in written form, which aims at regulating substantial issues. This agreement does not substitute labor contract, but represents its addition that envisages necessary particularities in the process of performing rational work.[61]

Article 18 of the Law N81 of 22 May 2017 envisages that at least minimal part of the work must be performed in company residence. The law does not require to determine the amount of this minimum and does not define any criteria in this regard, however, leaves possibility to parties to jointly define part of this activity.[62]

The law indicates that forms of performing work must be regulated by agreement (and not solely by the employer), when the mentioned is direct prerogative of the employer in classical labor contract, changing substantial term of the contract – element of subordination, which distinguishes it from self-employment.

Some scholars while interpreting this article state that there is a significant modification in traditional understanding of the notion of subordination in place, as far as it restricts employer to personally use right to give instructions in the working process.[63]

It may be said that the legislator approved specifics of rational work and "lessened" prerogative of the employer – to interfere in the working process in cases when part of the work is performed outside of company. The law recognizes necessity of having balance considering employer's primary

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58 "Agile work", see *Del Conte M., Gramano E.,* Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors under The Italian Legal System, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 594.

59 *Del Conte M., Gramano E.,* Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors under The Italian Legal System, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 594.

60 Ibid.

61 Ibid, 595.

62 Ibid.

63 Ibid.

position and the fact, that when work is performed outside of workplace, this may cause interference into personal life of employee.[64]

The law went further when determined regulating right of employer to control as a term of agreement toward those employees who perform work outside the workplace and prescribed restrictions for employers in usage of remote-control tools towards employees (such as GPS, camera, PCs and e-mail).

Deriving from the essence of labor relations, employee may not be in such position that he/she may force employer to limit his/her prerogatives. The agreement basically regulates issues such as which obligations derive from performance of work and therefore, which action must be controlled or disciplined.

The subject to agreement is working equipment, which employee uses in the working process. As far as the employer is obliged to equip employee with safe tools and the latter must be strictly delimited with the things in the private ownership of the employee, which he/she may use in work process.

And at last, the main purpose of the agreement is to regulate issue of working hours. Working time is placed in the framework of maximum time of work defined by the law and collective agreement.

The purpose of the agreement is to determine holiday period for employee and must precisely define those technical and organizational means, which indicates that employee must switch off working equipment.[65]

By the act on rational employment, Italian legislator renewed social-typical model of subordinated employment, by which the mentioned form became convenient for companies.

4.3. Quasi-Salaried Persons

In Germany there is a category of quasi-salaried employees, which is characterized with the element of subordination, quasi-salaried person has economic dependence.[66] Category similar to employees according to the act on collective contracts (article 12(1)) is: economically dependent person, who, alike employee, requires social protection, works, as a rule, based on the service contract and is obliged to perform work personally, without collaboration. In average, more than a half of their remuneration is paid by one person.[67]

By the Federal Court of Germany, the characteristics of the status of quasi-salaried employees are determined:

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64 Ibid.

65 *Del Conte M., Gramano E.,* Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors under The Italian Legal System, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 596.

66 "From legal perspective, subordination without considering fact of economic dependence is impossible and it derives exactly from this factual basis." See citation: Commentaries to the Labour Code of Georgia, *Boroni A. (ed.)*, Tbilisi, 2016, 133 (in Georgian).

67 *Waas B.,* The New Legal Status of Independent Contractors: Some Comments from a German Perspective, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 631.

Quasi-salaried person is self-employed. The element of subordination, which is characteristic to labor relations, is substituted with economic dependency element. Economic dependency arises when making living money depends on the income, which the person receives from contracting party as a result of realization of his labor.[68] Person similar to employee may work for several; people and take salary mostly for the work done for one contractor. Social status of economically dependent person is mostly equivalent to employee's protection guarantees in terms of necessity.[69]

Person having similar status as employee has annual paid leave, regulations on safe labor terms and anti-discrimination legislation are applicable to him/her. The next issue is whether they exercise limited liability, as it is according to practice in employee-employer relation. It must be noted, that they may participate in collective agreements.[70] For them, giving right to participate in collective agreements raises issue related to restrictions prescribed by antimonopoly legislation.[71] However, they do not have protection guarantees from dismissal from work, and also may not have claim for most right of employee. It may be stated that persons similar to employees cannot make use of the majority of benefits, that labor legislations suggest to employees. It is desirable to spread minimum wage guarantee on persons of such category.

5. Reform in Italy Directed to Enhance Category of Employees

The reform initiated in 2014, known as Italian "Jobs Act" was enacted in 2015-2017. The first achievement of the reform is encouraging employers for stipulating life-long contracts, in return to which the social and economic expenses were reduced for them.[72] As a result of the reform, several social insurance norms were spread on the category existing outside employees and independent contractors. These are persons, who personally perform continuous work exclusively for one provider of work, which organizes methods of work performance, including workplace and working hours.[73] Therefore a person, whose work is organized by employer, is protected alike employee, despite the fact that he/she does not satisfy other necessary prerequisites of the definition of employee.

From the other hand, in May 2017 the Law N81 entered into force, according to which the regulation on self-employed persons was developed and for the first time Italian legislator attained certain rights and protection guarantees to independent contractors. The category which was not

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68 *Waas B.,* The New Legal Status of Independent Contractors: Some Comments from a German Perspective, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 632.

69 Ibid.

70 Comp. *Fisk C.,* Hollywood Writers and the Gig Economy, 2017 U. Chi. Legal Forum, 2017, 178 – writers having career in Hollywood already for 80 years have collective agreement, despite the fact that they represent part of gig economy.

71 *Waas B.,* The New Legal Status of Independent Contractors: Some Comments from a German Perspective, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 632.

72 *Del Conte M., Gramano E.,* Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors Under The Italian Legal System, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 582.

73 Ibid.

touched upon, excluding the topic of taxation, is the direct addressee of legislative package, which equips them with special status in the labor law system.[74]

In Italy during years the category of employees doing project work was regulated, who have an autonomy with regard to provider of work, and purpose of their activity is focused on one particular outcome, or income. Such "coordinated collaboration" is legitimate in so much as in the conditions of particular project, person is focused on result, acts autonomously. Parties are required to formalize such relation. "Project" must not coincide with economic activity of principal, but rather it must be different and delimited from one another. Non-existence of project or existence of such project which was wide, general and related to main activity of principal, caused annulment of the contract and the court gave classification of labor relation to such intercourse.[75]

The reform of "Jobs Act" aimed at fill in or reduce gaps existing between labor relation and self-employment. In this regard the first step was taken towards repealing regulation of "project work", which was in force for long period.

Article 2 paragraph 1 of the Law N81 from 2015 stipulates package of protection guarantees for employees, who continuously collaborate with the employer, who organizes process of their activity, including working hours and workplace.[76]

From the one hand, contract type (project work), which previously created third category between independent contractor and employee, disappeared from system. On the other hand, it is also obvious that purpose of this provision is to enhance scope of application of labor law without introducing changes to the notion of employee envisaged in article 2094 of the Civil Code of Italy.

Moreover, this law established term "Smart Working", in particular, method of organized and subordinated work, which does not necessarily imply only one workplace and fixed working hours, but it aims that technologies needed for performance of work shall not be outside the installations of employer and there should be flexible schedule. [77]

Deriving from judicial practice, it appeared that for identification of labor relations and for proper determination whether person is employee or individual contractor, the character of work has no meaning, but – the method of work. However, judicial practice initially has stated through methodological approach "sussuntivo" that only such relation can be considered as labor relation, where all preconditions prescribed by the law are in place.[78]

However, during years court practice established additional criteria for identifying labor relation, such methodological approach was called "typological" – some elements often de facto characterize typical model of subordinate employee and may be taken into consideration in the process of identifying relation, in conditions where these criteria are not defined in the lawful version of the

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74 *Del Conte M., Gramano E.,* Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors Under The Italian Legal System, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 583.

75 Ibid, 589.

76 Ibid, 590.

77 Ibid, 583.

78 *Del Conte M., Gramano E.,* Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors Under The Italian Legal System, Comparative Labor Law & Policy Journal, Vol. 39, 2018, 584.

notion.[79] The mentioned does not exclude "metodo sussuntivo", which as stated above, implies existence of terms indicated only in law.[80]

6. Conclusion

Based on the analysis presented above, the notion of employee definitely needs reformation. While its description economic dependence, need for protection must be moved forward, instead of subordinate principle. Italian reform must be analyzed carefully. Criteria necessary for identification of labor relation: continuous collaboration, performance of work personally, implementing work obligations in organized way, which includes determination of workplace and working hours from the side of employer, definitely needs to be reviewed.

Despite the fact that in various countries they point out that problems do not exist, including in Georgia, similar to Italy, it is necessary to take particular steps to protect rights of interim, non-standard type workers. For this, the solution might be new, wider formulation of the notion of employee, which is less effective as it will cause equaling in rights between employee and work performer of non-standard type, and there might not be economic readiness in this regard, as far as it could be heavy obligation for business.[81]

Alternative suggestion is to introduce new regulations, where non-standard forms of employment will be defined and relatively modest protection guarantees will be suggested for the mentioned category, comparing to those existing for employees, however, considering specifics of their work, this amendment will significantly improve their legal condition.

The role of judicial practice shall be underlined in this regard. It must be noted, that in Georgia practically there is no judicial practice related to atypical employment, but in reality, such employment forms are wide spread, which will definitely cause wrecking of judicial practice in future. Courts must continue interpreting the notion of employee in light of the technological progress and must carefully ensure enhancement of this notion.

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79 Ibid, 586.

80 Ibid, Interpretation according to typological method introduced numerous misunderstandings, as far as several additional criteria were referencing to independent contractor as well. It was unclear which and how many additional criteria was enough for giving to relation the labor character.

81 Comp. *Dau-Schmidt K. G.,* The Impact of Emerging Information Technologies on the Employment Relationship: New Gigs for Labour and Employment Law, University of Chicago, Legal Forum, 2018, 64 <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1591&context=uclf>, [04.10.2020]; The author indicates, that it is time to abolish outdated notions of employee and independent contractor, and introduce common, universal notion for indicating performer of work.

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