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WORKING PEOPLE IN GERMANY

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I. The Incomplete Distinction Between Three Groups

In Germany, labor courts as well as legal scholars make some fundamental distinctions. First, an employee (*Arbeitnehmer*) is a person who is obliged to work in a relationship of "subordination," based on a private law contract. Defining this group is of crucial importance as labor law applies automatically to "employees" so defined.

The second group consists of the so-called employee-like persons (*Arbeitnehmerähnliche Personen*). They are formally independent contractors without any personal subordination, but are characterized by a position of economic dependence; they are regarded as needing protection similar to that of employees. Some labor law rules apply to them.

The third group are the really independent workers. Their status is governed by the civil code and the commercial code, as more fully fleshed out by some professional rules, *e.g.* for doctors, architects, etc. Only in very exceptional cases will a labor law rule be applied by analogy.

Finally, career public servants (*Beamte*), judges and soldiers are not classified as employees because they are engaged in a special relationship under public law. Special rules of public law also govern the work of convicts.

This picture is more or less adequate only if we consider exclusively gainful work. (Even then, moonlighting and illegal work traditionally neglected by labor lawyers is also usually excluded from this taxonomy. It remains to be seen whether or not it would be useful to develop special rules in relation to this group instead of treating its members as potentially one of the other three groups.) The above picture becomes really defective, however, once we look at the work done every day in the country: Housework (*i.e.* work within the fam-

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ily) and honorary (or volunteer) work, *e.g.* in churches, associations and the neighborhood which is of crucial importance for the survival of society, but scarcely treated by legal scholars: These kinds of informal work, normally done by women, are not paid, have a rather low social prestige and are rarely an object of legal research. The following contribution cannot fill this gap, but the fact deserves at least to be mentioned.

II. The Problem of Definition

There is no legal definition of the term "employee" in German labor law. Statutes use the term without giving any hint as to its contents. The employee-like person is defined in relation to the employee, so the uncertainty continues. The independent worker as such is not defined in statute law either. It is therefore up to the labor courts to decide the field of application of labor law. The question was raised whether this is in conformity with the German meaning of the "rule of law" which requires the action of the legislature in all matters of crucial importance for society. The Constitutional Court decided, however, that the considerable power given to the courts is not unconstitutional and that a certain degree of legal uncertainty is inherent in many legal norms.[1]

According to the Federal Labor Court, the term "employee" has the same meaning in all parts of labor law, but some statutes provide for exceptions.[2] Social security law requires an "employment relationship" (*Beschäftigungsverhältnis*) for integration into the social insurance scheme. Section 7 § 1 of the Social Security Code, Book IV, defines it as "dependant labor especially as an employee."[3] The wording makes it clear that the notion of employee is not defined and that non-employees may be included in social security. A recent law[4] has added a phrase to Section 7 § 1, providing that an activity under the authority of another person and the integration into an organization defined by the latter person gives "indications" for an employment

1. Federal Constitutional Court (*Bundesverfassungsgericht*), May 20, 1996, AP Nr. 82 zu § 611 BGB Abhängigkeit.

2. Federal Labor Court (*Bundesarbeitsgericht—BAG*) Mar. 25, 1992, AP Nr. 48 zu § 5 BetrVG 1972, referring especially to Section 5 of the Works Council Act, whose § 2 excludes family members of the employer from participation in the works council constitution, even if they are on the base of their activities employees.

3. "Beschäftigung ist die nichtselbständige Arbeit, insbesondere in einem Arbeitsverhältnis."

4. Act for the promotion of self-employed labor (*Gesetz zur Förderung der Selbständigkeit*), dated Dec. 20, 1999, Bundesgesetzblatt Part I, 2000, p.d.

relationship in the sense of the first phrase.[5] This is far from a definition. Interestingly, the Social Security Courts do not have to automatically follow the Labor Courts when they have to decide whether a person is an employee, but their position is quite similar.[6]

Taxation law has its own rules. The Federal Tax Court has decided recently that its notion of "employee" differs from that of the Labor and Social Security Courts: Personal subordination plays a minor role; instead, the lack of direct entrepreneurial risk is the most important factor.[7] The labor courts have accepted the different meaning of the same word in different fields of law.[8]

The notion of worker-like person is a genuine creation of labor law. Until the beginning of 1999, social security did not use this notion. The obvious reason was that in social security there is only a yes-or-no decision: A certain branch of insurance is applicable or not, whereas in labor law a more selective approach is possible.[9] The Act, "correcting provisions of social security and protecting workers' rights,"[10] introduced a new paragraph in Section 2 of the Social Security Code, Book VI, which included "worker-like self-employed" in pension insurance. This notion is, however, described differently than in labor law: The conditions are met if a person employs no other person (other than family members) and works only for one customer. This does not necessarily imply economic dependance and the need for protection akin to that provided all workers.[11] In taxation law, the worker-like person does not exist; instead, there is a strict dualism between salaried labor and independent activity.[12]

III. Who is a Worker?

A. *Description—Not Definition*

According to case law, the borderline between workers and the self-employed depends on the "degree of personal dependence."[13] A

5. "Anhaltspunkte für eine Beschäftigung sind eine Tätigkeit nach Weisungen und eine Eingliederung in die Arbeitsorganisation des Weisungsgebers."

6. *See* Reinecke ZIP 19, p. 583 (1998).

7. Federal Tax Court (*Bundesfinanzhof*), Dec. 2, 1998, DStR (=Deutsches Steuerrecht), p. 711 (1999).

8. BAG v. Sept. 30, 1998, AP Nr. 103 zu § 611 BGB Abhängigkeit; BAG v. May 26, 1999, AP Nr. 104 zu § 611 BGB Abhängigkeit.

9. For further details, *see infra* section IV.

10. Gesetz zu Korrekturen in der Sozialversicherung und zur Sicherung der Arbeitnehmerrechte, Dec. 19, 1998, BGB1 I 3843, Art. 4 Nr. 3.

11. *Cf.* Jacobs ZIP 20 (1999) 1549 ff., who precisely describes that different things are hidden behind the same expression.

12. Selbständige und Nichtselbständige Tätigkeit.

13. *See, e.g.*, BAG Mar. 25, 1992, AP Nr. 48 zu § 5 BetrVG 1972 Blatt 2 Rückseite ("*Grad der persönlichen Abhängigkeit*").

"worker" has to perform his or her services in a work organization whose structure has been determined by the other person.[14] This "integration" becomes evident if the worker has to follow instructions with regard to time, length, site and contents of the services.[15] The courts often refer to Section 84 § 1 of the Commercial Code, which defines a self-employed commercial representative as a person who is able to organize his activity and determine his working time. Despite the provision's narrow area of application, it expresses a general principle in the sense that people unable to organize their work and spend their time as they want are considered to be workers.[16]

The obligation to follow instructions with regard to time, length, location site, and contents of the service is not required to be "universal" in the sense that all aspects of work must be covered. The critical requirement is that one must be at the *disposal* of the employer during a certain period of time. So, for example, a chief doctor of a hospital is considered to be a worker despite the fact that he freely decides about the measures to be taken in his job.[17] Similarly, a person in charge of determining whether people pay their fees to public radio stations can have such a heavy workload that the lack of express time limitation on the work is of no importance.[18] The judge has to give a general evaluation of the situation[19] using all sorts of reasonable criteria. The fact that the individual has to perform the services personally is indicative of the existence of an employment relationship, but the right to send another person is not automatically incompatible with the status of a worker.[20] Nor do certain economic criteria play a role: The manner of payment, the risk taken by the employee or the lack of personal economic dependence on the partner is without any importance.[21] *I.e.*, an independently wealthy person would be treated as a worker if his activity fulfills the above-mentioned criteria. On the other hand, as a practical matter in the vast majority of cases, the worker loses his economic existence by losing his job.

According to case law, "worker" is what we call a "Typus" (type), not an exact notion. It is sufficient if some of the criteria are found; the absence of others is of no importance if—seen as a whole—the

14. BAG Mar. 25, 1992, loc.cit.; identical position *in* BAG Nov. 19, 1997, AP Nr. 90 zu § 611 BGB Abängigkeit Blatt 3; BAG May 6, 1998, AP Nr. 102 zu § 611 BGB Abängigkeit.
15. BAG Mar. 25, 1992, loc. cit.; identical position *in* BAG May 6, 1998, AP Nr. 102 zu § 611 BGB Abängigkeit; BAG May 26, 1999, AP Nr. 104 zu § 611 BGB Abängigkeit.
16. BAG Nov. 19, 1997, AP Nr. 90 zu § 611 BGB Abhängigkeit Blatt 3.
17. BAG July 27, 1961, AP Nr. 24 zu § 611 BGB Ärzte, Gehaltsansprüche.
18. BAG May 26, 1999, AP Nr. 104 zu § 611 BGB Abhängigkeit.
19. BAG May 26, 1999, loc.cit.
20. BAG Nov. 19, 1997, AP Nr. 90 zu § 611 BGB Abhängigkeit.
21. BAG Sept. 30, 1998, AP Nr. 103 zu § 611 BGB Abhängigkeit.

activity to be done is characteristic for a worker. The Federal Labour Court has clearly declared that there are no abstract criteria applicable to all employment relationships.[22]

What is the basis for judging whether a person has to follow instructions or fulfills other conditions of an employment relationship? The courts generally agree that the name of the contract is without importance. A worker cannot become a self-employed person merely by changing the heading of his contract.[23] Moreover, if there is a contradiction between the contract and the way services are actually being performed, the practice prevails. Thus, a clause providing for "voluntary performance" has to be put aside if the circumstances show that the worker may not refuse without losing the job.[24]

In its methodology of describing the worker, the Federal Social Security Court follows the Federal Labour Court; the results are more or less identical.[25] The Federal Tax Court takes the same approach in asking for an evaluation of all the circumstances of the concrete case,[26] but stresses much more the direct dependence on the market; the results are therefore often divergent.[27]

B. *Some Examples*

The number of court decisions dealing with the question whether a person is a worker has considerably increased recently. There are very different fields where the problem has been raised; one can give only a short overview.

The most controversial area concerns journalists who work for newspapers and radio stations. The Federal Labour Court, in some cases, has tried to find quite an easy solution. If the same activity is performed by workers, too, the journalist can ask to be an employee because it would infringe the general principle of equality to make such a distinction in status without any obvious justification.[28] If that

22. BAG Mar 25, 1992, AP Nr. 48 zu § 5 BetrVG 1972; BAG Nov. 19, 1997, AP Nr. 90 zu § 611 BGB Abhängigkeit.

23. BAG Mar. 25, 1992, AP Nr. 48 zu § 5 BetrVG 1972 Blatt 3; BAG Nov. 19, 1997, AP Nr. 90 zu § 611 BGB Abhängigkeit; BAG Sept. 30, 1998, AP Nr. 103 zu § 611 BGB Abhängigkeit.

24. *See* BAG Nov. 19, 1997, loc.cit.; BAG May 6, 1998, AP Nr. 102 zu § 611 BGB Abhängigkeit Blatt 2 Rückseite: Practice prevails over contract.

25. BSG Dec. 13, 1960, BSGE (Amtliche Sammlung des Bundessozialgerichts) 13, 196; BSG Mar. 29, 1962, BSGE 16, 289; BSG Oct. 31, 1972, BSGE 35, 20.

26. BFH Dec. 2, 1998, DStR 1999, 711.

27. *See id.*, where a person controlling whether people pay their fees for the public radio was considered to be a self-employed person, whereas the Federal Labour Court had treated the same kind of persons as workers if their activity was regulated by contract in an intensive manner (BAG May 26, 1999, AP Nr. 104 zu § 611 BGB Abhängigkeit).

28. BAG June 28, 1973, Oct. 3, 1975, Oct. 3, 1975, unf June 2, 1976, AP Nr. 10, 16, 17, und 20 zu § 611 BGB Abhängigkeit.

approach were not available, the Court has examined whether or not the person was free in organizing his or her work. On the one hand, a photographer who is only obliged to deliver a certain quantity of photos a month without being obliged to be present at certain moments was considered not to be a worker but rather a free lance.[29] On the other hand, a journalist who is entitled to refuse certain shifts was considered to be a worker because he was expected to accept the shift proposal by the director.[30] The same approach was taken with a contributor to the radio show "Deutsche Welle" which is broadcast worldwide with introductions in several languages. He had to collect information, draft a text and read it at 6 p.m. Despite the fact of being free to start working at his discretion—at, say, 9:00 or 11:00 a.m.—the actual constraint of working intensively was considered to be decisive.[31] Newspaper men are normally workers,[32] but a different result is possible if their workload is so heavy that it can only be done by several persons.[33]

Another important group are teachers. The Federal Labour Court classifies teachers at general state schools as workers, whereas teachers at adult educational centers are considered to be self-employed persons.[34] The reasoning does not seem to be very convincing. The activity in adult education centers is deemed to be essentially schematic such that the owner of the school gives no additional instructions about the instruction to be given. In addition, the teacher normally has the freedom to choose the time of the courses which he offers two times a week. In a recent decision, however, teachers doing vocational training were considered to be workers because the owner of the school determined the objects of the training, as well as the time and place of the teacher's activity.[35] Teachers in night schools (where one can study for the *Abitur*-BA) are workers for the same reasons.[36] However, a person who has to analyze social science publications and provide a short summary with some headwords was a free lancer because the contents of his work were carefully established in the labor contract by way of "directives" and because he was not obliged to be present at any specified times. The fact that a certain quantity of work had to be done during a fixed period of time had

29. BAG Jan. 29, 1992, Der Betrieb (DB) 45, p. 1781 (1992).
30. BAG Nov. 30, 1994, AP Nr. 74 zu § 611 BGB Abhängigkeit.
31. BAG Oct. 3, 1975, AP Nr. 15 zu § 611 BGB Abhängigkeit.
32. BAG Jan. 29, 1992, DB 45, p. 1429 (1992).
33. BAG July 16, 1997, AP Nr. 4 zu § 611 BGB Zeitungsausträger.
34. BAG June 24, 1992, AP Nr. 61 zu § 611 BGB Abhängigkeit.
35. BAG Nov. 19, 1997, AP Nr. 133 zu § 611 BGB Lehrer, Dozenten.
36. BAG Sept. 12, 1996, AP Nr. 122 zu § 611 BGB Lehrer, Dozenten.

minor importance as self-employed persons have to be in on time as well.[37] This decision was criticized, however, because "subordination" can be evidenced not only by concrete instructions, but also by a meticulous redaction of a labor contract.[38]

In the transport sector, truck drivers, who had worked under labor contracts, were transferred to self-employed persons as "common carriers." The Federal Labour Court accepted that contract if the driver had the right, practically and not only in theory, to secure work from other customers.[39] Obviously, this was not so when he was obliged to phone the employer every hour, morning and night, to learn whether there was a job to be done.[40] However, the fact that a driver worked only for one entrepreneur is not of essential importance because, in another case, his freedom to organize the work was judged sufficient to render him a free lancer.[41] The Federal Supreme Court (*Bundesgerichtshof*) came to the same conclusion when the driver had two trucks and employed a worker whom he could send in his place.[42] A customer service man was considered to be a worker because he had to work under general instructions of the owner and at a time and place the customers wanted.[43]

Some cases concern whether franchisees were self-employed persons or workers. Applying the general criteria, the regional labor courts came to different results;[44] the Federal Courts have never had to take a clear position.[45]

C. *Critique*

It is relatively easy to criticize the Courts' approach. One can never know in which cases the "evaluation of all the circumstances" will lead the judge to conclude that the person is a worker or self-employed. This kind of legal uncertainty vexes as it concerns the crucial question whether labor law is or is not applicable.

For employers, this situation is rather comfortable for two reasons. First, they can intentionally conclude contracts in the grey area of uncertain classification. Realistically, they can expect that the de-

37. BAG Mar. 25, 1992, AP Nr. 48 zu § 5 BetrVG 1972.
38. Otto, Anmerkung zu BAG, loc.cit.
39. BAG Nov. 19, 1997, DB 51, p. 624 (1998); BAG Sept. 30, 1998, DB 52, p. 436 (1999).
40. BAG Nov. 19, 1997, loc. cit.
41. BAG Sept. 30, 1998, loc. cit.
42. BGH (Bundesgerichtshof) Oct. 21, 1998, DB 52, p. 151 (1999).
43. BAG May 6, 1998, AP Nr. 102 zu § 611 BGB Abhängigkeit.
44. LAG (=Landesarbeitsgericht) Düsseldorf Oct. 20, 1987, DB 41, p. 293 (1988); LAG Rheinland-Pfalz LAGE (=Sammlung von Entscheidungen der Landesarbeitsgerichte) § 611 BGB Arbeitnehmerbegriff Nr. 32.
45. *See* BGH Nov. 4, 1998, DB 52, p. 152 (1999).

pendant person will not sue and so risk a loss of employment. Second, they can change the organization of the work in a way that the "dependant" will nevertheless, in his own interest, "function" according to the "partner's" desires. In this way, the employer's costs can be reduced considerably: A self-employed person has no right to continued payment of wages in case of illness (a worker is entitled to 6 weeks), has no annual paid holidays (for workers 4 weeks by statute and normally 2 weeks more by collective agreement), and cannot invoke protection against unjust dismissal (which is quite important for workers and leads normally to an agreement about compensation of half a month's salary for each year of service). Most important, social security normally covers only workers: Contributions amount to about 40 percent of the wages and are paid by both sides. If a worker earns $2,000 a month, the employer has to pay an additional $400 into the fund and the worker has the same amount deducted automatically from his wages. If an employer pays a non-worker "dependant" $2,000 monthly, both sides seem to be winners: The employer need not pay the additional $400 to the fund and the non-worker "dependent" takes home $400 more. Obviously, this practice evades labor and social security law. Accordingly, two attempts have been made to improve the situation.

D. *Alternatives*

1. The Elaboration of a New Definition

The first option lies in a redefinition of the concept of "worker." A legal scholar, Rolf Wank, tried to do it in a book,[46] which was followed by several other authors.[47] (His approach was followed in decisions of the regional labor court of Hannover[48] and the regional court of Cologne, the latter more clearly taking Wank's position even to distance itself from the Federal Labour Court's case law.)[49] Wank argued that the case law never connected the notion of a worker and the legal consequences of the application or non-application of labor law rules. This disjointure seems to contradict general methodological principles of legal interpretation which require that legal categories be defined according to the purpose of the rule.[50] Why, for example,

46. ROLF WANK, ARBEITNEHMER UND SELBSTÄNDIGE (1988).

47. Joerges AG (=Die Aktiengesellschaft) 1991, 325 ff.; Matthießen ZIP 1988, 1094 ff.; Schaub, Arbeitsrechts-Handbuch, 6. Aufl. 1987, § 36 I 4 g.

48. LAG Niedersachsen v. Sept. 6, 1989, LAGE § 611 BGB Arbeitnehmerbegriff Nr. 24.

49. LAG Köln June 30, 1995, LAGE § 611 BGB Arbeitnehmerbegriff Nr. 27.

50. The critique is nearly identical with that of Marc Linder in his contribution. *See* Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL'Y J. 187 (1999).

should the right to get payment in case of illness be connected to subordination and not to economic dependence?[51] Wank's alternative is a definition of the self-employed person: Only those who voluntarily assume an entrepreneurial risk are considered to be self-employed.[52] Risks and opportunities have to be balanced in order to prevent unilateral (and unjust) contracts. Persons who do not fulfill this condition are automatically workers. The worker-like person is thus omitted.

This new position was taken seriously. An empirical study organized by the Federal Labor Agency tried to find out how many people from the "grey zone" should be integrated into labor and social security law if either the Federal Labor Court's or Wank's position would be applied in that area. The result was less dramatic than one had expected: Under the Court's model, 461,000 self-employed were in reality workers, whereas under Wank's model, 636,000 persons were covered by labor and social security rules.[53] The total number of workers under social security is 27.2 million.[54] However, this figure does not include about 4 to 5 million people working on the basis of contracts of not more than 630 Marks of income per month and does not include the 2.4 million career public servants.[55] The dimensions become still clearer if we consider that only 3.6 million people are currently self-employed.[56] The dominating position of workers on the labor market is still uncontested, but the number of self-employed has increased in recent years.[57]

Suffice it to say, the proposal for a new definition of the worker has no chance of being adopted by the Federal Labour Court. Important judges of the Court refused to follow the position[58] and the Court itself continued the traditional case law despite prominent criticism of it. There are, perhaps, two reasons that explain the unwillingness to change. The first is tradition. The actual concept was developed by social security institutions at the end of the 19th century and taken by the Courts in the Weimar period and in the Federal Republic. It

51. A short version of Wank's position can be found in DB 45 (1992), p. 90 ff.

52. *See supra* note 46, at 125 ff.

53. IAB-Werkstattbericht Nr. 7 vom Nov. 25, 1996, summary in RdA 1997, 171 (IAB = Institut für Arbeitsmarkt—und Berufsforschung der Bundesanstalt für Arbeit = Research Institute About Labor Market Questions of the Federal Employment Agency).

54. STATISCHES JAHRBUCH (Statistical Yearbook) p. 112 (1999).

55. *Id.* at 104.

56. *Id.*

57. The number of self-employed went from 3.175 million in April, 1993 (*id.* at 110) to 3.334 million in April, 1998 (*id.* at 104). In most of the sectors, the increase is higher because the statistical figure comprises agriculture too, where the number of (normally self-employed) persons decreases continually.

58. Reinecke ZIP 19 (1998), p. 581 ff.; Schliemann RdA 50 (1997), p. 322 ff.

seems difficult to change it, despite the fact that in the continental legal order, courts are free to change their mind and establish quite innovative concepts. The second lies in the fact that express legal rules use the category of worker-like persons.[59] The legislature has expressed the intent to have three groups of persons; thus, it is not possible to eliminate one of them by interpretation.

More important, perhaps, the main objection to the traditional approach of the Court is the lack of legal certainty. But Wank's alternative presents similar problems: What does it mean that a risk is "voluntarily" assumed? When is the relation between risks and opportunities "balanced"? It would be quite difficult to foresee what the outcome of such a new approach would be. Judges are normally opposed to solutions whose consequences remain obscure and they will point out that their approach has been concretized by some 200 to 300 published decisions which give at least a certain orientation in many controversial fields.[60] Moreover, the traditional way of dealing with the problem has not led to socially unacceptable results: The "typological" method permits the integration of new phenomena into the traditional scheme. The Federal Constitutional Court itself declared that it is due to this method that the purpose of social security was realized (and circumvention prevented), despite social structural change during the last decade.[61]

2. Intervention of the Legislature?

A legislative modification of the situation in labor law is quite improbable. Because the former GDR had a complete labor code, the Unification Treaty obliges the legislature to codify the law on employment contracts. Two of the new "Länder"—Sachsen and Brandenburg—introduced a draft law on labor contract into the Federation Council, which took up the new concept of voluntary entrepreneurial risk.[62] There is, however, no real chance that Parliament will vote in favor of such a rule because significant segments of the unions and all employers' associations are against the codification of individual labor law.[63]

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59. *See infra* section IV.

60. *See, e.g.*, LAG Düsseldorf Sept. 4, 1996, LAGE § 611 BGB Abhängigkeit Nr. 33.

61. BverfG May 5, 1996, AP Nr. 82 zu § 611 BGB Abhängigkeit.

62. The draft law of Saxonia is published as "Bundesrats-Drucksache" (official document of the Federation Council) 293/95; the draft law of Brandenburg is published as Bundesrats-Drucksache 671/96; *cf.* Griese NZA (= Neue Zeitschrift für Arbeitsrecht) 13, p. 803 ff. (1996).

63. *See* Schlochauer, *in* ENTWICKLUNGEN IM ARBEITSRECHT UND ARBEITSSCHUTZRECHT, FESTSCHRIFT FÜR WLOTZKE, p. 121 ff. (Anzinger-Wank, ed., 1996); Däubler AuR (= Arbeit und Recht) 40, p. 129 ff. (1992).

In social security, the situation seems to be different. The new Government, which has been in office since October, 1998, had promised to fight against the so-called pretended self-employment (*Scheinselbständigkeit*) and introduced a bill correcting the notion of the employment relationship in Section 7 of the Social Security Code, Book IV. It was voted by Parliament and went into force in the beginning of 1999.[64] The new Section 7, § 4 focused on the "grey zone" and established a presumption in favor of an employment relationship if two among four criteria were met:

- no salaried person outside family members; persons with part-time contracts earning not more than 630 Marks per month were not counted;
- working regularly and mainly for one customer;
- performing services which are typical for workers;
- no direct contact with the market.

The first and second criteria especially were met by many individuals who considered themselves to be self-employed and who were not at all interested in paying contributions to the social security system. The new rules were even seen as an obstacle for young entrepreneurs in qualified activities (architects, software-developer, etc.) who, at the beginning of their careers, had only one major client and who could not employ other people. A number of legal experts massively criticized the new rules.[65]

As the rules raised a lot of unclear questions and seemed even to contain contradictions, the legislature intervened once more and enacted the so-called law to promote self-employment in December, 1999.[66] Despite its title, it is a return to the past. The traditional way of describing an employment relationship was underlined. Section 7 § 1 was amended by adding a second phrase, making clear that activity under instructions and integration into the work organization of another person are indicative of an employment relationship. The presumptions in § 4 were restricted to those cases in which the "employer" fails in his duty to collaborate with the social security organs and does not deliver to them all the information they need to ascertain whether a person is a worker or self-employed. The presumption requires that three of five criteria be met. Critics of the former legislation agree that, under these rules, persons who are not

64. *See supra* note 10.

65. *Cf. e.g.*, Bauer-Diller-Lorenzen NZA 16, p. 169 ff. (1999); Buchner DB 52, p. 146 ff. (1999); Hohmeister NZA 16, p. 337 ff. (1999).

66. Gesetz zur Förderung der Selbständigkeit vom Dec. 20, 1999, BGB1 I, p.2 (2000).

workers in the traditional sense are not to be integrated into the social security system.[67]

E. *Perspectives*

It would be deceptive to conclude from the picture drawn here that the legal result of it all is "business as usual." There are two ways in which Germany differs from many other countries and which may permit a certain optimism about change. The first is the role of the labor courts. Their case law is normally characterized by a realistic view of the situation under which contracts are concluded. Their approach, as inexact and even illogical as it may appear, holds the possibility of reacting adequately to unacceptable practices. The most important point is the courts' broad interpretation of "subordination." In a recent judgment, one reads that instructions that have the form of "desires" that can be refused, will render the recipient of them a worker if the employer expects that they will be followed.[68] In this way, economic constraints can be integrated into the concept "worker," and these constraints are the characteristic feature of all those working in the grey area between labor law and self-employment.

The second refers to the concept of the worker-like person. If an individual is not classified as a worker, he or she may nevertheless fall under some labor law rules. This may be deemed a "second-class" labor law, but it is still more than is provided by freedom of contract under civil code. This is more fully discussed below.

IV. The Worker-Like Person

A. *Description—No Definition*

As it was mentioned at the outset,[69] worker-like persons do not depend personally on an "employer." In contrast to other self-employed persons, they are characterized by two elements: They are economically dependant and are in similar need of social protection. Both features are generally recognized by the courts, despite the fact

67. *See* Gaul-Wisskirchen DB 52, p. 2466 ff. (1999); Reiserer BB (=Betriebs-Berater) 55, p. 94 ff. (2000).

68. BAG May 6, 1998, AP Nr. 102 zu § 611 BGB Abhängigkeit Blatt 3: "Schon ein 'freiwilliges' Eingehen auf 'Wünsche' des Vertragspartners, die mit deutlicher Erwartungshaltung vorgebracht werden, würde genügen, um dem Beschäftigten die für die freie Mitarbeit typische Entscheidungsfreiheit hinsichtlich des 'Ob', der Zeit und des Orts der Dienstleistung zu nehmen."

69. *See supra* section I.

that in some cases the legislature mentions only economic dependence in connection with this category.[70]

The two elements are not strictly defined. Once more, the judge has to consider all circumstances of the case, taking into account as well, the prevailing views among the citizenry.[71] The worker-like person is conceived as a "Typus," too. Economic dependence normally exists if the person receives his or her income from only one other person and has, in fact, no chance of undertaking other activities.[72] If the person is working for several enterprises, the condition will be fulfilled if one of them gives the most important part of the income and, therefore, provides the basis of his or her economic existence.[73] The level of remuneration plays no role in this context; neither does the right to conclude contracts on his own behalf.[74]

Whether the person needs social protection similar to a worker depends on different factors. On the one hand, having one's own organization with a second truck and one employed person precludes classifying a driver as a worker-like person.[75] On the other hand, a franchisee who has no possibility of earning an additional income is considered to be a worker-like person,[76] but there is a case of a franchisee which a regional labor court has denied the status of worker-like person.[77] Low income normally is a strong indication of the need for social protection.[78] However, a relatively high income does not prevent courts from treating someone as a worker-like person: The so-called trust-agency (*Treuhand*), whose mission was to liquidate or privatize the state-owned enterprises in the former German Democratic Republic, had contracted with a representative to dissolve different bankrupt enterprises in which he was nominated managing director. The fact that he got $10,000 US a month plus value added tax of 16% was without legal significance.[79] In some cases, however, one can find divergent decisions on similar contracts. One of the most well-known examples concerns representatives of pharmaceutical firms who visit doctors to give them advice as to new medications:

70. BAG July 6, 1995, NZA 12, p. 33 (1996); BAG Nov. 4, 1998, BB 54, p. 11 (1999).

71. BAG July 16, 1997, NZA 13, p. 1126 (1997): "Die gesamten Umstände des Einzelfalls, unter Berücksichtigung der Verkehrsanschauung."

72. BGH Nov. 4, 1998, BB 54, p. 11 (1999).

73. BAG July 25, 1996, NZA 13, p. 62 (1997); BAG Oct. 21, 1998, BB 54, p. 75 (1999).

74. BAG July 16, 1997, NZA 13, p. 1126 (1997), in the case of a franchisee.

75. BGH Oct. 21, 1998, BB 54, p. 73 (1999).

76. *See supra* note 74.

77. LAG Rheinland-Pfalz July 12, 1996, LAGE § 611 BGB Arbeitnehmerbegriff Nr. 32.

78. *See* BGH Nov. 4, 1998, *supra* note 72: The person had earned between $800 and $2,000 US per month without having paid taxes and contributions to social security.

79. BAG Dec. 29, 1997, DB 51, p. 1291 (1998).

The Regional Labour Court of Hamm[80] treated the person as a worker because he had to visit ten doctors every day and give a report every week, whereas the Labour Court of Munich[81] considered the same kind of individual as not being a worker, but rather a worker-like person because he could choose the ten doctors to visit from a long list. A nurse working for the Red Cross was classified neither as a worker nor worker-like person because the nurses form an association of their own; their rights as members seemed to be sufficient to protect their interests, so there was no need for social protection.[82]

B. *Applicable Rules*

To be a worker-like person does not automatically mean that a definite set of legal norms apply. Specific legislation exists for homeworkers and commercial representatives. These will be examined separately. All other worker-like persons are subject to some labor law statutes and principles, the number of which is, however, not always clear.

1. Homeworkers

a. The Group

The oldest group, whose social problems became notorious by the end of the nineteenth century, are homeworkers.[83] Their actual situation is regulated in the Homeworking Act,[84] and in a number of specific Labor Law Acts in which they are expressly included. They are assimilated to workers without completely reaching the same degree of social protection. The number of homeworkers nowadays is approximately 150,000.[85] They do not benefit from the expansion of telework; teleworkers are normally employees because of their integration into the employer's organization.[86] A homeworker is a person who, in a workplace of his or her own choosing, normally the home, undertakes paid work for traders who sell the products afterwards. Homeworkers have no direct contact with the market for goods, but they are not "workers" because they organize their work themselves,

80. Oct. 13, 1989, LAGE § 611 BGB Arbeitnehmerbegriff Nr. 14.

81. May 29, 1990, EzA (= Entscheidungssammlung zum Arbeitsrecht) § 611 BGB Arbeitnehmerbegriff Nr. 33.

82. BAG July 6, 1995, NZA 12, p. 36 (1996).

83. The historical development has been recently depicted by Hromadka NZA 13, p. 1249 ff. (1997).

84. Heimarbeitsgesetz, dated March 14, 1951 (BGB1 I, p. 191), last modification by Act of Dec. 16, 1997 (BGB1 I, p. 2942).

85. *See* KITTNER, ARBEITS-UND SOZIALORDNUNG, Aufl. 24, p. 810 (1999).

86. More details about teleworkers in DÄUBLER, DAS ARBEITSRECHT 2, Aufl. 11, No 2123 ff. (1998); WEDDE, TELEARBEIT, Aufl. 2 (1994).

though they may be helped by family members or not more than two non-family members. These workers (or homeworkers) are so-called *Hausgewerbetreibende*, persons carrying on a business from home. They are treated in an equal manner by the Homeworking Act (but not by other labor law rules).

Up to 1974, only typical blue-collar work could be the object of homeworking. This was changed, but until now it is still not quite clear whether all white-collar work is included or not. The customer has to be a "trader," which excludes the state and other public organs. In some cases, it is possible to equate certain persons or groups with homeworkers if their social situation is comparable.

b. Applicable Rules

The main rules governing the status of a homeworker are the following:

- Collective agreements for homemakers fixing minimum standards are virtually non-existent. Consequently, the legislature has provided for homeworking committees organized by the labor administration. These are normally composed of two union and two employers' representatives (a civil servant being chair) and can determine minimum wages and other working conditions for the branch where they exist.[87] Their determinations are binding for both sides involved, much as a collective agreement; wages and working conditions can thus only be improved above these levels in the individual contract. As homeworkers typically are in a quite weak position, Section 25 of the Act gives the labor administration the right to sue the "customer" without any special authorization; the judgment is valid for the homeworker. Both sets of rules respond to the special situation of this group; there are no comparable provisions in favor of other working people.
- The periods of notice which have to be respected by employers if they dismiss a worker also apply to homeworkers if they work mainly for one person. If a homework relationship is to be terminated, there is a danger that the employing person will allocate less work and so reduce the homeworker's income in the interim. The law provides that a certain minimum calculated on the basis of the last 24 weeks has to be paid automatically.
- The Homeworking Act provides for health protection so that homeworkers are excluded from the general rules otherwise obtaining

87. Sections 17 to 22 of the Act.

with respect to workers.[88] The Act on Maternity Protection is, however, applicable if the woman has to do physical work.[89] Homeworkers are also included in the Act on disabled workers with some slight modification.[90]

- Homeworkers are integrated in the works constitution of the enterprise they predominantly work for.[91] If they are elected members of the works council, they enjoy the full protection against dismissal which is given to work council members.[92]
- Homeworkers have a right to annual paid leave, like workers.[93] In case of illness, their remuneration has to continue at least for six weeks in a year.[94] In both fields, legal equality is realized.
- Homeworkers are included in all social security systems.[95]
- The only remaining difference of importance concerns the protection against dismissal. Under German law, the employer can only dismiss a worker if there is a "just ground" which makes the dismissal "socially acceptable." The ground can lie in the person itself, in the behavior of the worker or in economic circumstances. Details are regulated in the Act on protection against dismissals[96] which applies only to workers. However, the Federal Labour Court has begun to narrow this gap.[97] In a recent judgment, it refers to the case law of the Constitutional Court which derived a "minimum of protection against dismissals" from the freedom of occupation guaranteed in article 12 of the Constitution.[98] This minimum does not require a "just ground," but only a non-arbitrary behavior of the "employer" in case of selection between different persons; and, social criteria and the length of service must not be completely neglected. This principle was applied to homeworkers.[99]

2. Commercial Representatives

Commercial representatives are persons arranging or concluding transactions for one or more entrepreneurs. They are not workers;

88. *See* §§12 to 16a of the Homeworking Act and § 2 Abs. 2 N. 3 of the Act on health protection in the workplace, dated August 7, 1996 (BGB1 I, p. 1246).
89. Section 1 Number 2 of the Act (Mutterschutzgesetz).
90. Schwerbehindertengesetz (BGB1 1986 I, p. 1421).
91. Section 6 of the Works Constitution Act (Betriebsverfassungsgesetz).
92. Section 29a of the Homeworking Act. Works council member can only be dismissed for grave misconduct and with the consent of the Council, which can be replaced by the labor court.
93. Section 12 of the Annual Paid Leave Act (Bundesurlaubsgesetz).
94. Section 10 of the Act on Continued Payment of Wages (Entgeltfortzahlungsgesetz).
95. Section 12 of the Code on Social Security, Book IV.
96. Kündigungsschutzgesetz.
97. BAG Mar. 24, 1998, NZA 14, p. 1003 (1998).
98. BVerfG Jan. 27, 1998, NZA 14, p. 470 (1998). Comment by DÄUBLER, FESTSCHRIFT 50 JAHRE ARBEITSGERICHTSBARKEIT RHEINLAND-PFALZ, p. 271 ff. (1999).
99. *See supra* note 97.

indeed, their legal status is quite far from labor law rules even if they depend economically on another enterprise. They are governed by Sections 84ff of the Commercial Code; only very few labor law rules are applied by analogy. The Commercial Code contains the following salient features:

- Definition of the circumstances under which the representative earns a commission.
- Periods of notice which are different of those of workers. It is still unclear whether the minimum dismissal protection elaborated by the Constitutional Court, as applied to homeworkers by the Federal Labour Court,[100] can be invoked by commercial representatives.
- After the end of their job, representatives have a right to a compensation payment because the customers they had won for the enterprise will continue their contracts.[101] This is the only case in which German law provides for an automatic compensation in the end of a "labor relationship."
- Collective agreements cannot be concluded for commercial representatives. Section 12a § 4 of the Act on collective agreements[102] provides explicitly that collective agreements, which are possible for all kinds of worker-like persons,[103] are not allowed in this field.
- Unlike homeworkers and other worker-like persons, representatives can go to the labor courts only if they do not earn more than $1,000 US per month. In practice, this means that normally the ordinary courts will have jurisdiction.
- Section 92a of the Commercial Code authorizes the Minister of Justice to enact rules determining a minimum remuneration and other minimum standards for those representatives who work only for one firm. This provision has always been without any practical significance; because of the resistence of the organizations concerned, no minister has ever thought to use this authority.
- Section 2 of the Act on Annual Paid Leave gives a right to four weeks of vacation to all worker-like persons including those representatives who belong to that category.[104] The Courts admit that

100. *See supra* notes 97 and 98.

101. The so-called Ausgleichsanspruch according to Section 89b of the Commercial Code.

102. Tarifvertragsgesetz, dated Apr. 9, 1949, applied in the version of the Act of Aug. 25, 1969 (BGB1 I, p. 1323), last modification by Act of Oct. 29, 1974 (BGB1 I, p. 2879).

103. *See infra* c(1).

104. SCHAUB, ARBEITSRECHTS-HANDBUCH, § 11 II 3 (8th ed., 1996); DÄUBLER, ARBEITSRECHT 2, Rn 2115.

representatives have a right to the same kind of paid leave as workers.[105]

3. Worker-Like Persons in General

a. Applicable Rules

If a worker-like person is neither a homeworker nor a commercial representative, a set of labor law rules applies because of an explicit inclusion of this group of persons by certain laws.

- Worker-like persons have the same legal right as workers to four weeks of annual paid leave.[106]
- Worker-like persons are explicitly included in the general rules of health protection at the workplace.[107]
- The Act on the Prevention of Sexual Harassment at the workplace[108] explicitly mentions worker-like persons in Section 1 § 2 Nr. 1 as being included.
- Section 17 § 1, phrase 2 of the Act on Additional Occupational Pensions Schemes[109] provides that worker-like persons can be included in employer systems of old-age pensions and pensions in case of disability.
- Section 12a of the Act on Collective Agreements permits the conclusion of collective agreements for worker-like persons.[110] This is of considerable importance in state-owned radio and television stations where a lot of "freelances" are covered by collective agreements. In the private sector, nearly no agreements can be found.
- Section 5 § 1, phrase 2 of the Act on Labour Courts[111] extends the jurisdiction of the Labor Courts to all worker-like persons. (There is an exception only for the group of commercial representa-

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105. The labor law rule of Section 630 of the Civil Code applies per analogiam. *See* RAG (Reichsarbeitsgericht) JW 1936, 2664 and actual references at DÄUBLER, *in* KITTNER-DÄUBLER-ZQANZIGER, KÜNDIGUNGSSCHUTZRECHT § 630 BGB Rn. 5 (4th ed., 1999).

106. Section 2 of the Act on Annual Paid Leave.

107. Section 2 § 2 Nr. 3 of the Act on Health Protection at the Workplace (Arbeitsschutzgesetz). Recently, this provision was given a quite new interpretation by one commentator who pointed out that economic dependence is of no importance regarding the need for health protection. KOHTE, *in* KOLLMER, KOMMENTAR ZUM ARBEITSSCHUTZGESETZ, still unpublished. One should take into account whether the person works in an organization whose structure is defined by another person. The field of application of the rule would thus be very restricted because in most of the cases, the individuals concerned will be workers. In addition, the purpose of the rule would be in contradiction to the common way of handling the notion of a worker-like person.

108. Gesetz zum Schutz der Beschäftigten vor sexueller Belästigung am Arbeitsplatz (Beschäftigtenschutzgesetz) dated June 24, 1994, BGB1 I, p. 1406.

109. Gesetz zur Verbesserung der betrieblichen Alterversorgung, dated Dec. 19, 1974 (BGB1 I p. 3610) modified by the Act of Dec. 16, 1997 (BGB1 I, p. 2998).

110. As to the Act, *see supra* note 102.

111. Arbeitsgerichtsgesetz dated Sept. 3, 1953 (BGB1 I, p. 1267), last modification by Act of Aug. 31, 1998 (BGB1 I, p. 2600).

tives.[112]) This is of practical importance to the applications of other rules of labor law because ordinary courts would be much more inclined exclusively to use civil code provisions.

b. Non-Applicable Rules

The assimilation of labor law by persons who are not legally "workers" does not exist in two important fields. Worker-like persons do not participate in the works constitution; nearly all authors agree that the express inclusion of homeworkers operates to exclude other worker-like persons from integration into the system of the Works Constitution.[113] Further, the Act on Protection against Dismissals is limited to workers.[114]

c. Fields of Uncertainty

As to other rules of labor law, the situation is more or less unclear. The right to organize would probably be accepted by the courts because it is a precondition for concluding collective agreements.[115] The same would be so for the right to strike, but there are no court decisions on the subject. In a recent ruling, the Federal Labour Court has applied labor law rules governing covenants not to compete, which means that after the conclusion of the contract, such a restraint is permissible only if the person receives compensation of at least 50% of the salary he had as a worker and which restraint must not last more than two years.[116] The reasoning of the Court was quite strict in stressing the similar need of protection that exists related to worker-like persons. Whether this is a new approach or not cannot be seen for the moment. As to maximum working hours regulated by the Act on Working Time,[117] worker-like persons are generally excluded.[118] This is taken for granted because of the pure fact that the Act uses the term "worker." The discussion is underdeveloped in the field of maternity protection as well. The inclusion of most of the homeworkers is considered to be a sufficient reason not to apply the Act to all other

112. *See supra* section 2.

113. *See* Plander DB 52, p. 33O (1999) and *in* RECHT UND SOZIALE ARBEITSWELT, FESTSCHRIFT FÜR DÄUBLER, p. 272 ff. (Klebe-Wedde-Wolmerath, ed., 1999); Rost NZA 16, p. 113 (1999).

114. Kommentar zum Kündigungsschutzrecht (KR)—Rost, 5 ed. 1998, Arbeitnehmerâhnliche Personen Rn 34 with further references.

115. For references to the discussion, *see* DÄUBLER, ARBEITSRECHT 2, note 2122.

116. BAG DB 50, p. 1979 (1997).

117. Arbeitszeitgesetz dated June 6, 1994 (BGB1 I, p. 1170), last modification by Act of June 9, 1998 (BGB1 I, p. 1242).

118. NEUMANN-BIEBL, KOMMENTAR ZUM ARBEITSZEITGESETZ, § 2 Rn 16 (12th ed. 1995); BAECK-DEUTSCH, KOMMENTAR ZUM ARBEITSZEITGESETZ, § 2 Rn 82 ff. (1999).

worker-like persons.[119] As to youth employment protection, the relevant Act[120] includes workers, homeworkers and persons delivering services which are similar to those of workers and homeworkers. The decisive point is, therefore, the nature of the activity and not the economic dependence and the need for social protection. This is in contradiction to all the other rules on worker-like persons; some authors try to assimilate both concepts by including those young people who, by direct or by indirect economic need, are constrained to deliver certain services.[121]

d. Perspectives

Theoretically, one could apply all labor law rules to worker-like persons except those which presuppose the employer's right to give instructions. Until now, the Courts have not been willing to go so far. Some legal authors are more inclined to extend labor law rules.[122] They draw important support from the case law of the Constitutional Court. In different rulings, the Court has developed a duty of the legislature, derived from the self-determination principle of the Constitution, to protect the weaker party to a contract; the contract must not become an instrument of heteronomy. If the legislature remains inactive, the judge is obliged to fill that constitutional duty, normally by applying general rules of civil law.[123] The precondition for applying this principle is, however, not just that one party is "weaker." The Court requires that there must be such a structural inferiority on one side, such that the contents of the contract are obviously imbalanced to the disadvantage of the inferior party. In the case of a worker-like person, the first condition is normally met; indeed, the first decision of the Constitutional Court in the series "reforming contract law" concerned a commercial representative.[124] Whether a clause (or the absence of legal protection) will lead to an obviously imbalanced

119. *See* BUCHNER-BECKER, KOMMENTAR ZUM MUTTERSCHUTZGESETZ UND ZUM BUNDESERZIEHUNGSGELDGESETZ § 1 Rn 82 (6th ed., 1998), who criticize, however, that it is quite illogical on the one hand to give four weeks of paid leave to worker-like persons, but no maternity protection.

120. Act on Youth Employment Protection dated Apr. 12, 1996 (BGB1 I, p. 965), last modification by Act dated July 1, 1997 (BGB1 I, p. 1607).

121. MOLITOR-VOLMER-GERMELMANN, JUGENDARBEITSSCHUTZGESETZ, KOMMENTAR, § 1 Rn 45 (3rd ed., 1986).

122. In favor of an extension of labor law rules, *see* PFARR, *in* ARBEITSRECHT IN DER BEWÄHRUNG, FESTSCHRIFT FÜR KARL KEHRMANN, p. 75 ff. (Engelen-Kefer/Schoden/Zachert, eds., 1997); Appel-Frantzioch AuR 46, p. 93 ff. (1998); more restrictively advocating an analogy to the Homeworking Act, Hromadka NZA 14, p. 1249 (1998).

123. BVerfG Feb. 7, 1990, BVerfGE (Amtliche Sammlung des Bundesverfassungsgerichts) 81, 242, 254 ff.; BVerfG Oct. 19, 1993, BVerfGE 89, 214.

124. BVerfGE 81, 242, 254 ff.

situation has to be examined in concrete cases. The search for general criteria will probably be an object of extended discussion in the future.

V. Self-Employed Persons

Self-employed persons who do not meet the condition of a worker-like person conclude civil law contracts with their customers. For certain groups, there are specific rules to guarantee or facilitate a certain level of income. That is the case for farmers who can sell their products to state agencies getting prices that are fixed by the European Community. Taxi-drivers and other independent workers in the field of local traffic are protected by minimum prices. The so-called "free professions" like architects, doctors, lawyers, etc., are entitled to demand minimum fees from their clients.

If no such rules exist, there may be a desire to come to comparable conditions by contract concluded among (nearly) all members of the profession. Interpreters or independent authors want to have a minimum remuneration. Formal contracts of this nature are void because they are in violation of antitrust rules, but in reality there exist "recommendations" which have no binding character, but are generally followed. It will therefore be very difficult to get an English-German interpreter for less that $500 US a day; in addition, nobody will accept engagement if there is not a second person to take turns with him or her.

In general, labor law rules do not apply to the self-employed, with some few exceptions. Additional occupational pension schemes apply because Section 17 of the relevant Act includes all "non-workers."[125] Further, if a self-employed person works on the customer's premises, the latter has a duty of care of the prevention risks to health; Section 618 of the Civil Code aiming at workers is applied by analogy.[126] While Austria and France integrate all independent workers into the social security system, Germany does it only with some groups. Section 2 § 2 Nr. 3 Social Security Act, Book IV includes farmers, and Nr. 2 of the same provision includes disabled people working in a sheltered workshop. Others are only integrated in certain branches of the system. Thus, pension insurance covers craftsmen and independent teachers.[127] The insurance against accidents has the broadest field of

125. *See supra* section IV.

126. BGH June 15, 1971, BGHZ (Amtliche Sammlung des Bundesgerichtshofs) 56, 269 ffl, but it is possible to stipulate otherwise.

127. *See* Section 2 Social Security Code, Book VI.

application covering not only farmers, but all persons working similarly as a salaried person, even if it is an honorary activity.[128]

VI. Final Evaluation

The legal instruments to distinguish workers, worker-like persons and self-employed are obviously far from being perfect, but the existing rules can guarantee a sufficient level of protection for those who need it; the category of worker-like person especially gives a lot of flexibility to the legal structure. Despite their merits, however, the Courts do not always handle the principles in a satisfying way. But this is not the main point: As worker-like persons are in most cases exempt from social security, there is still an important incentive for employers to use worker-like persons instead of workers. As employers can structure the work process, in many cases they are able to give enough organizational autonomy to the working individual that he or she will not be covered by the social security system. This remains such a major problem.

A second object of criticism is the fact that, as a rule, persons working in the "grey area" between salaried work and self-employment do not go to court to claim their rights. If a union or state body could act in their place, it would be a big step forward in bringing reality better in line with the legal structure. On this, the rule on representation which currently applies only to the relatively small group of homeworkers could serve as a model for a broader approach.

128. *Id.* at Book VII.