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Outsiders looking at the field of labour law are likely to be perplexed by the fact that so much writing in the field focuses on the scope of labour regulations. One could have expected such a fundamental issue to be more-or-less resolved after so many years of academic struggling. Yet it appears to be the fate of the field that the question of its very application remains central in academic debates – indeed probably the single most important and debated question of labour law – and it is likely to remain so, perhaps perpetually. This new book by Nicola Countouris from the University of Reading is a useful and important contribution to the already rich literature on this topic.

Countouris starts from the common premise that there is sometimes mis-aligning between the group of people in need of labour laws’ protection and the actual group of people that labour laws (as legislated and interpreted) cover. Sometimes this mismatch is the result of changes in employment practices based on external business reasons. Other times the exclusion of some workers from the scope of protection results from direct evasion attempts by employers, i.e. changes in employment practices (or even just changes in titles or legal forms) designed specifically to escape employer responsibilities. Either way, the law must respond by clarifying who exactly should be covered by labour laws.

The book distinguishes between two major lines of legal response. The first is to redefine the boundaries of employment relations. Labour laws have traditionally applied to ‘employees’ (as opposed to self-employed independent contractors) in their relationship vis-à-vis ‘employers’, so exclusion of workers in need of protection could be attacked by clarifying or changing the definitions and tests used to identify an ‘employee’ or an ‘employer’. Another option along the same lines is to add a third (intermediate) category between employees and independent contractors and provide partial protection for this group. The second line of response is based on targeted protection for workers who have been excluded to one extent or another, i.e. adding specific regulations to address the rights of groups such as part-time, fixed-term or Temporary Employment Agency (TEA) workers. This last approach can be used either to provide full protection (similar to ‘traditional’ employees) for such workers, or alternatively to legitimise their inferior status – or any other solution in between.

The book provides a comprehensive review and analysis of developments on both fronts, in four countries (the United Kingdom, Germany, France and Italy) as well as the International and European levels (the International Labour Organization conventions and the European Community laws, respectively). Countouris is well aware of the difficulty with such a comparative analysis, citing warnings by Kahn-Freud and Lord Wedderburn, among others, that it is useless, and even misleading, to
compare laws of different countries without a deep understanding of the social, political and industrial relations context (pp. 10-11). Nonetheless, this appears to be the rare case in which an author is sufficiently familiar with four different legal systems (and capable of citing materials in four different languages) to avoid the risks of comparative analysis. Moreover, notwithstanding the necessary caveats, the particular topic of the scope of labour law is especially inviting for comparative research, given the fact that the economic incentives causing the mismatch between those protected and those in-need-of-protection are very similar everywhere.

Because the root causes of the problem are similar, solutions could also be similar (subject to adjustments that might be required by the differences in background rules and legal traditions). Thus, for example, the review of judicial efforts in the Continent to broaden the definition of ‘employee’ and make it more inclusive (Chapter 2) is a useful lesson to courts in the United Kingdom who have been much less creative in this respect. The response to the growing phenomenon of indirect employment – in particular employment for lengthy periods through TEAs (Chapter 3) – is yet another example for the potential usefulness of comparative insights (here too, the United Kingdom legislature and courts fared much worse than their Continental counterparts). In both cases, there is no fundamental reason that prevents British legislators or judges from adopting similar solutions. Exposing them to this possibility may not be enough, but it is certainly an important step.

Yet how do we know that the more inclusive approach is better? How do we go about deciding what should be the scope of labour law? A good starting point is the understanding that there is a complex relation between factual and legal employment relationships, which Countouris acknowledges (p. 2). While he does not fully develop this issue – focusing explicitly only on the legal dimension – the basic distinction is far from trivial and has certainly caused confusion. To explain this confusion it is useful to go back to the common premise with which we started. Assume that E asks W to perform work for her in return for remuneration. As a factual matter, the relationship between E and W has certain characteristics, in terms of duration, continuity, exclusivity, investment in tools, the level of autonomy or control and so on. As a legal matter, a legal system could maintain that given those characteristics (or others) – we can call them C1, C2, C3 etc. – the relationship between E and W is an employment relationship, and as a result, E must abide by labour laws’ requirements in his relationship vis-à-vis W.

But things could then change, in two main ways. First, E might decide that the business will benefit from diversifying and using other workers, or from organising the work differently, thus changing the characteristics of the relationship which the previous decision relied upon. It may be that the new characteristics of the relationship are, for example, C3, C4 and C5. In this case, the factual relationship has changed, and the question is whether the new characteristics of the relationship fall within the scope of labour law or not. Second, E might try to save the cost of labour laws by changing the appearance of the relationship. For example, she might require W to sign a contract determining that he is an independent contractor, that he controls his own work and can come and go as he pleases – even if this is not truly the case. In such a scenario, the factual relationship has not changed (except for some contractual terms that are not followed). So there is no reason to change the legal view of the
relationship either. Nonetheless, it is often difficult to determine whether the change has been real or merely an appearance (i.e. a sham arrangement).

This brief analysis reveals the two main challenges, in my view, for legal scholars struggling to clarify the scope of labour law. First, given the changes in employment practices – real factual changes in the characteristics of employment – it is crucial to consider which characteristics justify and require the application of labour law. In other words, the question is which set of Cs (C1, C2, C3 etc.) puts workers in need of protection and should accordingly trigger the application of labour laws. This is necessarily a *purposive* exercise – we have to understand the goals of labour laws in order to ascertain the characteristics that should trigger their application. Second, given the changes (in other cases) in the appearance of the relationship – the popularity of sham arrangements that do not change the real characteristics of employment – it is crucial to come up with methods to detect and prevent such evasion attempts. Or, more generally, we need to find tools that will allow us to detect the *real* Cs that characterise a given relationship, as opposed to those Cs that appear merely on paper.

With this framework in mind, it is difficult to accept the calls for dismantling the legal distinction between ‘employees’ and ‘independent contractors’ (see, e.g., Fudge, 2006). There is obviously a *factual* difference between different forms of work organisation that could justify differential treatment. For example, having control over one’s working time and business decisions, the ability to spread risks and so on – we can call those characteristics C6, C7 and C8 – puts one in a very different position vis-à-vis the one inviting and using the work. There is no justification for applying labour laws in such cases. Of course, there are likely to be cases that fall somewhere in the middle – for instance, a relationship with some characteristics of employment (C1, C2) and some characteristics of self-employment (C7, C8). For these cases an intermediate category becomes useful. If, for example, C1 and C2 could justify the ability to bargain collectively and strike, but C7 and C8 suggest that there is no reason to apply the Minimum Wage Act – or *vice versa* – an intermediate category could be used to determine that relationships characterised by C1 and C2 should trigger the application of certain specific labour laws but not others. Furthermore, it is entirely possible that some laws which are currently considered part of labour law should in fact be extended and apply to independent contractors as well, or even to some other broader group (pp. 81-83; and see Supiot, 2001; Freedland, 2006; Arup and Mitchell, 2006). But this does not change the fact that a group of regulations that can conveniently be termed labour law should apply to a group of workers characterised by certain Cs that can conveniently be called ‘employees’ (Davidov, 2006).

To be sure, there is plenty of room for discussion and disagreement *within* this basic structure. Personally I consider democratic deficits (subordination in a broad sense) and dependency on the specific relationship (economically and for social-psychological needs) to be the main Cs that justify labour law’s protection – with other Cs useful to identify these basic vulnerabilities (Davidov, 2002). Others may have different views.

Countouris does not deal directly with the questions of what Cs should justify the application of labour laws (or part of them) or what methods could be used to distinguish between real and sham Cs. He does, however, provide a very useful,
thorough and timely account of developments and debates revolving around these issues. The biggest strength of the book lies in its analytic approach to this review. It was already noted that the book separates between the approach of broadening the definitions of ‘employer’ or ‘employee’ to cover more workers, and legislation to protect (to one extent or another) atypical workers separately. Consider the first route for example. Countouris goes on to distinguish between ‘qualitative’ and ‘quantitative’ exclusion – the first based on the appearance of independence and the second on lack of sufficient continuity (p. 59); then focusing on qualitative exclusion he distinguishes between judicial intervention and statutory intervention (p. 60); then when focusing on statutory intervention (for example) he lists three types of interventions used by the different legal systems he surveys (pp. 63-68). Later, when dealing with regulation of ‘atypical’ work relations, he makes a distinction between five phases of legislation (p. 142): prohibition, conversion, encouragement/discouragement, normalisation with parity and normalisation without parity – phases which in turn have led to typification, tolerance, stabilisation, promotion and acceptance of atypical work. And so on – the book is filled with these analytic, systematic distinctions that help explain the wealth of often-disordered developments in this field.

So far I have concentrated mainly on the first line of response to the problem of the changing nature of the employment relationship. But it is the inclusion of the second line as part of this project which is perhaps the main conceptual contribution of the book. Debates on the issue of part-time or fixed-term workers are usually conducted separately from debates on the scope of labour law. Part-time workers, for example, are undoubtedly ‘employees’, so the issue of the application of labour law does not arise directly. Nonetheless, working part-time causes at least some exclusion from labour entitlements for various reasons, so Countouris is right to consider this part of the same problem. Regulations intended to provide equal treatment for part-time workers do not bring them into the scope of labour law – they are already included – but they certainly try to bring them into the full scope of labour rights and entitlements.

The focus on particular groups of workers that have been partially excluded is becoming increasingly important in recent years (even if, usually, not within the scope of labour law debates). The book pays much attention to part-time, fixed-term and TEA workers, but there are also other and more specific groups that have recently been the target of concern and even regulation. In the United States, for example, special attention has been given to workers in the apparel industry, who often work in sweatshop conditions. Innovative solutions that have been used to protect these workers include a combination of public and private pressure on the clients buying the products (rather than the direct employers) (Weil and Mallo, 2007). This has been done by targeting enforcement efforts to the specific sector, but also by new legislation aimed particularly at garment manufacturers (see the California Labor Code, as amended in 2000, section 2673.1). In Israel, to give another example, recent discussions focus on the plight of cleaning and security workers, who commonly encounter non-compliance with labour laws, and lack effective access to collective bargaining (Davidov, 2005). A Bill recently proposed by the government places responsibility in some circumstances on the clients towards workers in these particular sectors, in an effort to curb incentives for such abuse. In the United Kingdom as well, there is recently focus on ‘vulnerable workers’ and an attempt to
identify specific groups that require regulatory intervention or unique enforcement strategies (see BERR, 2008).

The quest for defining the scope of labour law and ensuring protection for all those in-need-of-protection is never ending. This should probably not surprise us, given the economic incentives for (short-sighted) employers to evade labour laws. But we should not be deterred either. The new book by Nicola Countouris is yet another important step in that bumpy road.

References


