Hans Böckler Stiftung
Mitbestimmung · Forschung · Stipendien

WORKING PAPER FORSCHUNGSFÖRDERUNG

Number 113, December 2018

Rethinking the concept of the "employee" in the age of digitalisation

A New Relationship Between Work and Legal Protection

Ulrich Mückenberger

F
FORSCHUNGS-
FÖRDERUNG

The Author:
Ulrich Mückenberger, born in 1944, is a legal theorist, political scientist and Professor Emeritus of Labour and Social Law in the Faculty of Social Economics at the University of Hamburg and a Research Professor at the Center of European Law and Politics at the University of Bremen.

This Publication:
The world of work will fundamentally change in the coming one to two decades. At the initiative of the Hans Böckler Foundation, the "Work of the Future" commission investigated the challenges and perspectives for structuring the world of work. The commission published its final report, "Let's transform Work!", in summer 2017 to inform debates in politics, unions and businesses.
This working paper is part of a series of papers written by members of the "Work of the Future" commission in parallel to the commission's work. This publication was first published in German as "Der Arbeitnehmerbegriff – aus arbeitspolitischer Perspektive". The text has been revised by the author for translation.

© 2018 by Hans-Böckler-Stiftung
Hans-Böckler-Straße 39, 40476 Düsseldorf
www.boeckler.de

"Rethinking the concept of the 'employee' in the age of digitalisation"
von Ulrich Mückenberger ist lizenziert unter

Creative Commons Attribution 4.0 (BY).

Diese Lizenz erlaubt unter Voraussetzung der Namensnennung des Urhebers die Bearbeitung, Vervielfältigung und Verbreitung des Materials in jedem Format oder Medium für beliebige Zwecke, auch kommerziell.
(Lizenztext: https://creativecommons.org/licenses/by/4.0/de/legalcode)

Die Bedingungen der Creative-Commons-Lizenz gelten nur für Originalmaterial. Die Wiederverwendung von Material aus anderen Quellen (gekennzeichnet mit Quellenangabe) wie z. B. von Schaubildern, Abbildungen, Fotos und Textauszügen erfordert ggf. weitere Nutzungsgenehmigungen durch den jeweiligen Rechteinhaber.

ISSN 2509-2359

Contents

Abstract.....4

1. "Breaking up the organisation".....7

2. Status and contract in the employment relationship.....8

    2.1 Contract and status under labour law.....8

    2.2 What is deregulation—and does it still exist?.....9

        2.2.1 (Active) direct deregulation.....9

        2.2.2 (Active) indirect deregulation.....10

        2.2.3 Passive deregulation.....10

3. Elements of the traditional concept of the "employee".....12

    3.1 Definition in labour law.....12

    3.2 Expansion in social law.....13

    3.3 The concept of the "employee" has long been a topic of discussion.....15

4. Rethinking the concept of the "employee" in the age of digitalisation.....18

5. The four-ring model of labour protection: The concept of "employee" in terms of legal policy.....27

    5.1 The model: A new diversity.....28

    5.2 Two avenues for modernising the legal concept of "employee".....29

    5.3 Extending intermediate categories between employees and the self-employed.....31

    5.4 Expanding areas of labour and social law in which protection of work is not linked to the individual "employment" relationship.....32

    5.5 Creating citizens' rights that apply to the work context regardless of an individual's employee status.....34

6. Solidarity.....36

References.....38

Abstract

The purpose of this paper is not to address the concept of the "employee" as defined under labour and social law—this has already been done countless times. Instead, it aims to adopt the perspective of employers, trade unions and society at large in examining ways in which the status of "employee" might change in a service and knowledge society, which is largely shaped by globalisation and digitalisation. There is ample evidence that the traditional concept of the "employee" is rooted in a very specific type of society—the capitalist industrial society—and that this type of society, while it has not disappeared entirely, owing to the forces mentioned above, is no longer predominant. The point of departure is a critique of the core criterion of the prevailing concept of the employee: "personal dependency/subordination". This concept stems from a pre-modern method of production and remains bound to it so that it is not suitable to answer questions regarding the constitution of globalised post-Fordist and service societies. This critique has become considerably more resonant in line with the tendencies toward the globalisation and digitalisation of the working world.

The paper points out that the concept of "personal dependency" has feudal, pre-bourgeois roots that cannot be reconciled with the normative requirements of a democratic community. A generalised relationship of subordination and dependence cannot be reconciled with citizenship or with a democratic approach to social relationships, nor is it an appropriate - both legitimate and efficient - means of reconciling differing interests and preferences. From a normative point of view, a modernised, legal concept determined by citizenship requires an understanding of *work relationships as horizontally as well as vertically "networked", that is as multilateral and reciprocal discursive relationships*. Within functional dependencies, there can be no "subjects", and "objects", "dependent" and "independent". Everyone involved is entitled to freedom, opportunities for participation, and the same fundamental rights. These considerations attempt to integrate the social protection of work within a framework of the theory of democracy: Starting out from an understanding of "citizenship" based on democracy (citizen within society), "citizenship at work" is developed into "social citizenship" independent of employment.

From an empirical point of departure, too, the diversity and ambiguity of employment relationships shaped by globalisation and digitalisation have radically changed the employee–non-employee dichotomy. Today, the same workplace might have people working side by side who have completely different employment status, social protections, and pay levels and who are represented under completely different industries and

structures in terms of working conditions and pay—thanks in part to telecommunications and digital networking. Although a number of those people may continue to work as *"standard"* employees, they are surrounded by a *broad diversity of "non-standardness", both in society and in the workplace.* The digitalisation of work appears to increase rather than decrease this diversity. That fact makes it a prime topic for reregulation.

This paper proposes taking a "strategic" approach to the concept of "employee", which is becoming less widely applicable and losing its integrative power. The four-ring model (Fig. 2 in this paper) shows a "continuum" of employment relationships, from jobs with a high level of protection under labour law to those that enjoy little (or no) protection. The goal is to overcome the dichotomy that characterises our work-oriented society and unfortunately divides those who "belong" from those who do not. Within this continuum, a legal distinction must be made between various types of workers–this is why the figure shows four distinct rings rather than a gradual transition from one extreme to the other. Such a type-based continuum is better able to reflect the increasingly diverse employment situations and protection requirements that exist in the digital age.

We should also look at rights that are based not on employment relationships, but on the status of all members of a democratic community: human rights and the rights of citizenship. As members of a democratic community, all citizens enjoy what T. H. Marshall called the "social rights of citizenship". The constitution grants certain fundamental rights of dignity, participation and respect to every citizen. Those rights do not require specific contributions or the performance of market or nonmarket work, but at most some activity or sacrifice of the individual that benefits the community. It would seem necessary and realistic to grant them more legal protection. Those might include caregiving—nonmarket arrangements caring for others, which are essential for the survival of a modern society. Traditional examples include *volunteer work and help for others;* as a result of demographic trends, *rights related to parenthood and caregiving* are no longer as closely linked to the market and employee status as they once were. Rights derived from such community-oriented activities remain the exception—but they are expanding and deserve systematic recognition by society.

The paper (with the four-ring model included) summarises efforts of both legal doctrine and legal policy to safeguard work in the digital age. It highlights the fact that the problems described in the four rings and at-

tempts to solve them should be considered not in isolation, but as a whole. This will ensure that attempts at a solution are in keeping with the dynamic nature and growing diversity of work in the digital age.

1. "Breaking up the organisation"

On November 17, 2016, the *Frankfurter Allgemeine Zeitung* published a four-page special issue on the role of information and communications technologies in driving innovation. That issue included an article entitled "Schöne neue Arbeitswelt" [Brave New World of Work] which presented the scenario of the breakup of organisations (Hutschenreuter 2016, p. V4). This scenario is typical of how Industry 4.0 and Work 4.0 are currently perceived in Germany, so I will quote the passage in its entirety:

"Because of increased digitalisation, the modern working world is characterised by networks. This makes it possible to break down value creation into ever smaller steps, which are then completed by experts. These highly specialised workers need not be physically present in the company; more and more, they are freelancers who are hired when their expertise is required. Typical examples include graphic designers and research groups that perform scientific analyses. New models are also emerging, such as crowd work and cloud-based models that allow people to complete digital tasks from their home offices. Employment relationships are being replaced by individual work assignments. Thus, there is no longer a permanent relationship between employee and employer. People lack the ties to their industries and occupations that they had in the past. Expertise in a certain field is no longer among the key skills required for dealing with digital technology, and those key skills can be applied to other jobs as well. As a result, employees can move more easily from one industry to another."

Many of the article's assessments of the current situation and trends are questionable. Published in a prominent media outlet, the article points out that we are in fact seeing a development toward Industry 4.0, and it also reflects a certain perception of that development. Important in this context are two essential aspects of the digitalisation of the labour market: the breakdown of the *organisation* (the business as a technical and organisational unit is giving way to digitally connected networks) and the breakdown of the *employment relationship* (a permanent relationship between employer and employee). Of course, it can be argued that the trends described in this scenario are too general and ignore history and empirical evidence, and that they are therefore "false". Obviously, *businesses* and *industries* still exist, as do *employment relationships*. But these comments point to *possible consequences* of the expansion of digital work in significant segments of the labour market. And they express a *view* that favours *adjusting* to this new *uncertainty* rather than returning to the certainty of the past. Subject to the reservations I have mentioned, I will keep both assumptions underlying this scenario in mind in the remarks that follow.

2. Status and contract in the employment relationship

My purpose here is not to address the concept of the "employee" as defined under labour and social law—this has already been done countless times. Instead, my aim is to adopt the perspective of the trade unions and society at large in examining ways in which the status of "employee" might change in a service and knowledge society, which is largely shaped by globalisation and digitalisation. There is ample evidence that the traditional concept of the "employee" is rooted in a very specific type of society—the capitalist industrial society—and that this type of society, while it has not disappeared entirely, owing to the forces mentioned above, is no longer predominant. Accordingly, it is essential to consider these matters from the perspective of the trade unions and society at large.[*]

This paper begins with two theoretical assumptions, which will not be discussed in greater detail. One is the rapidly changing role of status and contract in employment relationships; the other is the type of deregulation that is typical today.

2.1 Contract and status under labour law

"From status to contract" was Sir Henry Maine's famous description of the transition from a feudal to a bourgeois society. This transition marked the beginning of labour law, granting freedom of contract to the parties to an employment agreement. For wage earners, it was what Karl Marx cynically referred to as "double freedom": freedom from personal bonds, but also freedom from the means to make a living. This meant dependence on wages, which led proletarians to seek limits to freedom of contract through protection standards and collective bargaining. The goal was to confer on workers a new kind of "status" that contracts could not call into question—based not on coercion, but on agreements (which, however, might be reached through conflict). During the "golden years" of the Weimar Republic and most notably in the 1950s and 1960s, this status was reflected in what came to be known as

* My thanks go to Daniel Euler for helping me obtain relevant materials and to Antje Kautz of the Centre of European Law and Politics (ZERP) at the University of Bremen for technical assistance in compiling the manuscript. I equally thank Geoffrey Cox and Jonathan Fine from German Language Service for the translation and Christina Schildmann and Lisa Schrepf for help in editing the English version of the text.

an "employment relationship" or a "standard employment relationship". It was during this period that the concept of the "employee" gained its prominence and its "dignity". Today market forces and a renewed "contractualisation" of the employment relationship ("recontractualisation") are changing the status of the employee. What was assumed to be a secure pillar of labour law— the concept of the "employee"—is again being tested. This is the subject of the brief remarks that follow.

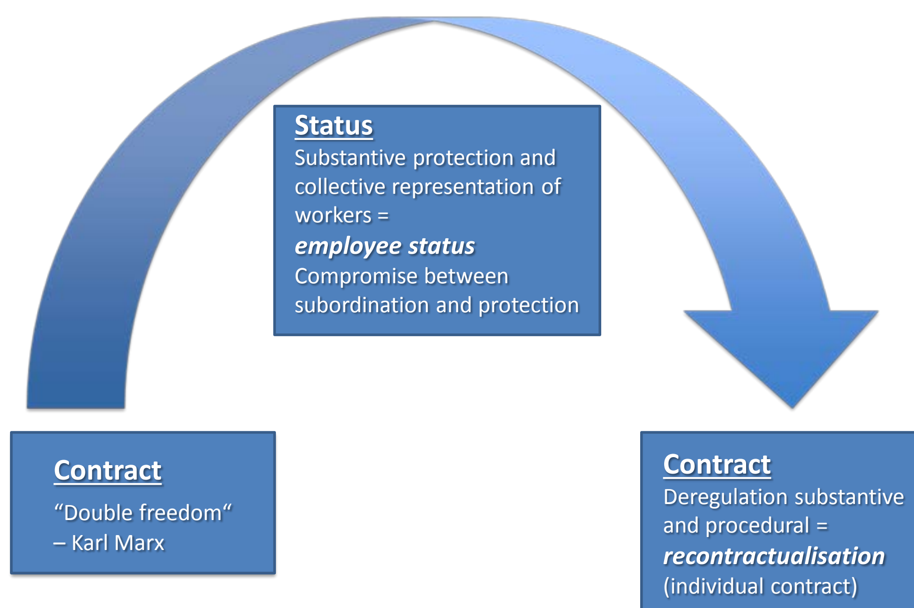

Fig. 1 Status and contract in employment relationships (illustration by the author)

2.2 What is deregulation—and does it still exist?

In Germany, there is little talk today of the kind of massive deregulation seen in the 1980s and 1990s (epitomised by the policies of Reagan and Thatcher). This is because we tend to take a quite narrow view of deregulation. With the help of three concepts, I will show that our current era of "recontractualised" employment relationships is actually marked by a very specific kind of deregulation.

2.2.1 (Active) direct deregulation

Deregulation is generally understood to mean what I describe as active direct deregulation: Existing regulations are removed through political (i.e., parliamentary) action. This has happened in Germany, too. For ex-

ample, the 2003 amendment of section 23 (1) sentence 3 of the Protection Against Unfair Dismissal Act (Kündigungsschutzgesetz, KSchG) changed the coverage threshold from five employees to ten, applicable to workers hired after 2003. As a result, employees of small businesses who were previously covered lost their protection against unfair dismissal. This is "deregulation" in the understanding of regulation removing hitherto existing substantive and procedural protection, hence leading to individual recontractualisation of the issue at stake. However, this kind of deregulation is relatively uncommon in Germany.

2.2.2 (Active) indirect deregulation

More common in Germany is what I call active *indirect* deregulation. Here the government may, for example, promote certain types of employment that enjoy less protection under labour and social law than "regular" employment relationships. Examples include government support for part-time work and self-employment, as in start-ups. No changes are made in the law, in contrast to direct deregulation. Here too, however, some employment relationships lose their protected status with "active" state involvement.

2.2.3 Passive deregulation

In an era of globalisation and digitalisation, what I refer to as "passive" deregulation plays an important role—in Germany and elsewhere. Passive deregulation means that the government *refrains from acting*—hence *deregulation by omission* rather than *by action*. When there is an increase in the number of precarious employment situations—which may include temporary, minimal or self-employment—a self-identified welfare state will recognise its duty to respond by modifying existing protections to meet changing needs. This has long been common practice in accordance with the principles and standards of a welfare state. As the White Paper on Work 4.0 (German Federal Government 2016, p. 12) correctly points out, "Lawmakers should identify the needs of certain kinds of workers for protection and ensure that they are protected under labour and social law, in keeping with the prevailing circumstances." When the government fails to make the appropriate changes, *it is, in effect, tolerating the existence of precarious employment and neglecting to amend the relevant protections.* As I explain below, this is now a significant form of deregulation.

We are living—at least as far as Germany is concerned—**in a period of *indirect* and *passive* deregulation which, by its nature, affects only *certain segments* of society.** It has an impact on the fringes of the labour markets—those who are less organised, even if they are high-

ly qualified, and young people and women more often than men. Perhaps this is why there is so little organised resistance to this form of deregulation, although it is fundamentally at odds with the principles of social justice.

3. Elements of the traditional concept of the "employee"

According to modern labour and social law (see recently Waas/v. Voss 2017), being an employee connotes the status of a "dependent worker". This status elevates employees out of the general civil framework and confers them with certain protections. Employee status is the proverbial eye of the needle for substantive protection and collective representation. The basic provisions of substantive protection—to take the German case only—such as section 1 of the Protection Against Dismissal Act (Kündigungsschutzgesetz, KSchG) or sections 2 and 3 of the Working Hours Act (Arbeitszeitgesetz, ArbZG) as well those of collective representation in section 5 of the Works Constitution Act (Betriebsverfassungsgesetz, BetrVG) or section 1 of the Collective Bargaining Agreements Act (Tarifvertragsgesetz, TVG) are tied to the concept of the "employee" or the employment relationship and thereby simultaneously differentiate the substantive protection and collective representation of those in need of social protection and those not in need of social protection.

That accounts for the current topicality of this status. If the corpus of German labour and social law is tied to the concept of the "employee", then it accordingly does not generally include those to whom this status does not apply. This is so not only in Germany but also all over Europe (Waas/v. Voss 2017) and beyond (Veneziani 2014; Teklé 2010). However, if the digitalised service and knowledge-based society yields a great number of workers whose status does not fulfil that of an employee or if this status is disputed, then the system of social protection has an overall protection and solidarity problem.

3.1 Definition in labour law

According to the prevailing German view, an employee is an individual "who based on a contract under private law is obligated in the service of another entity *in personal dependency for the performance of work subject to the directive of the other entity*" (Müller-Glöge 2012: marginal number 171 to section 611 of the German Civil Code (Bürgerliches Gesetzbuch, BGB)).[1] Or: "who based on a contract under private law is ob-

1 Following the Bundesrat's approval of the reform on November 25, 2016, section 611a of the employment contract now reads: "(1) Through a contract an employee is obligated in the service of another entity in personal dependency for the performance

ligated to work in service of another entity" (Preis 2016: marginal number 35 to section 611 of the BGB).

Before the revision of section 611a of the German BGB, no legal definition of what is to be understood as an "employee" existed in German labour law. Therefore, other individual characteristics such as "personal dependency/subordination of the staff member", "the requirement of observe directives", or "incorporation into an external work organisation" were often pointed to (Kreuder 2013, marginal number 9 to section 611 of the BGB). "The right to issue directives can concern the content, performance, time, duration and place of the activity. An employee is a type of worker who in principle cannot freely structure his employment and determine his working hours" (in conformity with section 84 (1) sentence 2 and section 84 (2) of the German Commercial Code (Handelsgesetzbuch, HGB); Reinfelder 2016, 87; see also Brammsen 2010).

Thomas Klebe emphasises that this has currently led to a stark differentiation vis-a-vis something like crowdwork. In doing so he refers to elements of the concept of the "employee" such as the "personal dependency of the party concerned, imparted by the employer's right to direct, with personal instructions and via the incorporation into the contracting authority's work organisation" (Klebe 2016, 279). These quotations could be complemented by any number of related or similar sounding quotations from the German literature and case law.

There are labour law-related exceptions to this concept of the "employee" predicated upon personal dependency to which we will return later. Nevertheless, this concept of the "employee" determines the rule regarding the applicability of labour law.

3.2 Expansion in social law

In German social insurance law, the additional concept of "occupation" is chosen as a criterion for application (see Forst 2014).[2] Section 7 (1) of

of work subject to the directive of another entity. The right to issue directives can concern the content, performance, time, duration and place of the activity. An employee is a type of worker who in principle cannot freely structure his employment and determine his working hours. The degree of personal dependency depends on the specific type of each activity. All circumstances must be ascertained to determine whether an employment contract is in effect. If the actual fulfilment of the contractual relationship shows that an employment relationship is intended, it does not depend on the exact description in the contract. (2) The employer is obligated to pay an agreed upon salary." In general, the new version codifies the constitutional court's jurisprudence.

2 In the following I will not address the definition of the concepts of "employment relationship" and "service relationship in income tax law" (section 1 LStDV) as the points

the Social Security Code IV (Sozialgesetzbuch, SGB IV) states: "Occupation is non-independent work, in particular in the context of an employment relationship. Indications of an occupation include directed activities and incorporation into the director's work organisation."[3] Occupation is likewise connected to the employment relationship and its indications, but it is more than this ("in particular"). The scope of protection of social insurance is determined by the concept of the insured. In section 2 (2) number 1 SGB IV, this is connected the concept of the occupied individual: "According to the provisions for the individual classes of insurance, in all classes of social insurance the first who are insured are individuals who are employed for salary or for training." Section 2 of SGB IV, however, involves additional groups of individuals—such as disabled people who work in protected institutions; farmers; and, under certain circumstances, sailors. Section 2 (4) defines in a general form: "The insurance of other groups of people in individual classes of insurance is derived from the particular provisions that apply to them."

Some of the many determinations that expand insurance coverage will concern us later. Nevertheless, the departure point for the applicability of social insurance law is as follows: The determinative fact for the insured individual is the characteristic of being occupied; the determinative fact of being occupied is the characteristic of being employed. Excep-

to consider for German income tax obligations are different from those in labour and social law. They are less concerned with the private legal contract modalities and are accordingly more expansive in their coverage—see for comparison and for references to the relevant jurisprudence of the German Federal Fiscal Court Mechnit 2005, under 3 and, in particular, 3.3.

3 From 1999 to the end of 2002, section 7 (4) of SGB IV stipulated a list of five criteria that aimed at a precise delineation of the concept of employed individuals in social security law via a legal presumption and which perhaps also influenced the discussion of the concept of the "employee" in labour law. The only remnant of that revision (emphasis in original material) is the new second sentence in the new version of section 7 (1) of the SGB: "Occupation is non-independent work, in particular in the context of an employment relationship. Indications of an occupation include directed activities and incorporation into the director's work organisation." The briefly applicable section 7 (4) recently read: A commercially active person is…presumed to be employed if at least three of the following five characteristics apply: 1. In connection with this activity, the person does not regularly employ an employee subject to social security whose salary pursuant to this employment relationship regularly exceeds 630 DM per month, 2. The person is generally only employed by one employee for a long duration. 3. The employer or a comparable manager regularly delegates tasks to those who are employed by him, 4. The activity does not evidence any typical signs of corporate activity, 5. The activity generally corresponds to the activity that the person could have performed for the same employer based on an employment relationship. (...) The presumption can be refuted. (...)" The currently applicable sentence 2 of section 7 (1) actually only affirms the status quo in labour law. Numbers 1 and 4 of section 7 (4), however, would have brought a significant revision: The orientation of self-employment toward employment by employees and participation in the market. The reasons why the list of presumptions were eliminated cannot be addressed here.

tions from this rule require legal determination. The defining characteristics in labour law, of the concept of the "employee" thus reproduce themselves in social insurance law.

3.3 The concept of the "employee" has long been a topic of discussion

The roughly outlined concept of the "employee" in labour and social law has long been an object of discussion in legal doctrine and legal policy. These do not need to be discussed in detail here. Two lines of thought characterise this discussion. The *first* line grasps on to the concept's *lack of legal specificity* and accordingly strives for "clarification". This line pursues, for example, the (short-lived) reformulation of section 7 (4) of SGB IV between 1999 and 2002 (wording in footnote to 4.2). The current reformulation of section 611a of the BGB (wording in footnote to 4.1) also pursues this line.

The *second* line is more foundational. It grasps on to the *lack of suitability and adequacy* of the concept of the "employee" for *problems regarding the constitution of work that currently need to be solved* and accordingly strives for a change to the *concept* and finally to *a legal change*. The point of departure of this line of discussion is generally a critique of the core criterion of the prevailing concept of the worker: **"personal dependency/subordination".** This concept is reproached for stemming from a premodern method of production and remaining bound to it so that it is not suitable to answer questions regarding the constitution of post-Fordist and service societies. In Germany, this critique has become considerable more resonant in line with the tendencies toward the globalisation and digitalisation of the working world.[4]

The question of how to envision (and design) Work 4.0 under the conditions of Industry 4.0 (see BMAS 2015 and 2016a) is representative for this thread of the discussion. Therein lies the crux of my argument.

In another context, I have pointed out that the concept of "personal dependency" has feudal, pre-bourgeois roots that cannot be reconciled with the normative requirements of a democratic community. A generalised relationship of subordination and dependence cannot be reconciled

4 See in the bibliography (which does not claim to be exhaustive) only Absenger et al. 2016; Bauschke 2016; Däubler 2015 and 2016; Däubler/Klebe 2015; Günther/ Böglmüller 2015; Hanau, Hans 2016; Klebe 2015 and 2016; Kocher 2016; Kocher/ Hensel 2016; Krause 2016; Lingemann/Otte 2015; Mückenberger 2015 and 2016; Risak/Lutz 2017; Thüsing 2016; Tillmans 2015; Uffmann 2016; Wank 2016; Walser 2016.

with citizenship or with a democratic approach to social relationships, nor is it an appropriate or legitimate means of reconciling differing interests and preferences (Mückenberger 2015; 2016). A modernised, legal concept determined by citizenship requires an understanding of *work relationships as horizontally as well as vertically "networked", that is, as multilateral and reciprocal discursive relationships*. Within functional dependencies, there can be no "subjects" and "objects", "dependent" and "independent". Everyone involved is entitled to freedom, opportunities for participation, and the same fundamental rights (Matthies et al., 1994). I have developed a hypothesis based on these considerations that attempts to integrate the social protection of work within a framework of the theory of democracy: Starting out from an understanding of "citizenship" based on democracy (citizen within society), "citizenship at work" is developed into "social citizenship" independent of employment.

The main thrust of legal discussion[5] turns around the question of whether and to what extent the concept of the "employee" can be divorced from the criteria of *"personal dependency"* and *"incorporation"* in an organisation. There is unanimity that simple *"economic dependency"* is not sufficient to classify the dependent person as an employee. Economic dependency can also exist between self-employed individuals (as well as between other sorts of actors). In section 12a of the German TVG, for example, economic dependency alone is not sufficient to classify a self-employed person as "similar to an employee"/"employee-like" (let alone as an employee). However, where exactly within the interplay between personal and economic dependency the new dividing line between employee and non-employee should be drawn has not yet been clearly answered.

Rolf Wank's position (see 1988; updated 2016), which unlike case law and the prevailing literature does not content itself with an ontological concept of the "employee", has been and remains influential: "*When one connects the current definition of the worker with a teleological orientation, the result is that whosoever cannot make business decisions independently because according to contract he is subject to directives and incorporated into an organisation is an employee."* (Wank 2016, p. 150) In this the decisive criterion of demarcation is between individuals *who are able to benefit from market opportunities and take entrepreneurial risks* and those *whose work is contractually subject to external control, leading to fewer market opportunities and risks*. This criterion is more realistic than personal dependency as it is more flexible and situa-

5 Rather than all the overviews for the national level in Richardi 2009; Müller-Glöge 2012 and for the international comparison in Rebhahn 2009a.

tionally appropriate so that it be applied to the diverse constellations found in the contemporary world of work.

That this has not been able to substantially challenge the predominant concept of the worker and its stabilisation in the revised section 611a of the BGB is apparent in the recent German discussion regarding the classification of crowdworkers in labour law (summarising BMAS white book 2016a, p. 171ff). Whether explicitly approving of the traditional concept of the "employee" (such as in Thüsing 2016) or with obvious "social regret" (such as Klebe 2016; Kocher/Hensel 2016) or in an attempt to make the concept of personal dependency—or even the criterion of someone similar to an employee—applicable to crowd workers under certain conditions (such as Hanau 2016; Krause 2016), crowdwork cannot be juristically covered with this criterion, because the juristic instrument is not designed to address the specificities of a digitalised era. Ulrich Preis (2000) and in particular Wolfgang Däubler (2015) proceed the most consequentially insofar as they advocate and explain social protections independent of the concept of the "employee". Preis already advocated for security in social insurance, tax and works constitution law whose applicability does not depend on the concept of the "employee". Däubler has recently meticulously described how the developed consumer protection law as well as the law regarding minimum social standards should be understood as components of a social civil and economic law and can frequently apply to crowdwork even if labour law's "entry ticket" (Forst 2014, p. 163), the concept of the "employee", is dropped. This approach must be built upon.

On the European level as well, the current labour law debate is determined by the idea that even an expanded concept of "employer" and "employee" is unsuitable to guarantee the requisite social protection in light of tertiarisation and digitalisation. It is increasingly being proposed that the employment relationship should be liberated from the structure of bipolarity. **A "spectrum" of protection zones has been considered in an attempt to correspond in turn in a typical way to the diversity of observed social forms of work and their typical requirements for protection** (see Supiot 1999, p. 88-90; Davies/Freedland 2000, p. 286ff; Rebhahn 2009a and b, p. 250/51). I will consider this in Section 5. It must first be explicated to what extent digitalisation, which has played a structuring role in the commission's work, requires a reorientation.

4. Rethinking the concept of the "employee" in the age of digitalisation

In particular, two elements of the concept of "employee" discussed here are out of alignment with the strategic structural needs of a digitally-driven service and knowledge economy. First is the fact that legal protection is contingent on a **bipolar contractual relationship between two legal persons, an employer and an employee**. Second is the fact that, within this bipolar structure, there is a presumed **dichotomy between employees and non-employees**, with **personal subordination (or dependence) as the main distinguishing criterion**. I will begin my critique of these two elements in general terms and then elaborate, using examples including crowd work and Uber.

The provisions of employment law in Germany and other Western industrialised countries (cf. Rebhahn 2009 a and b; European Network 2009; Sutschet 2016; Walser 2016; Waas/v. Voss 2017; Ziegler 2011) are based on a bipolar relationship, *with an employer on one side and an employee on the other*. The right to social protections such as those afforded under labour law and social insurance law apply to this legal relationship only if it is entered into and executed by a legal person that is both clearly identifiable and clearly qualifies as the *employer* on one side and a legal person that clearly qualifies as the *employee* on the other. These rights to social protection generally do not apply if one of these requisite elements is missing (that is, if one side is not an "employer" or the other is not an "employee"). In such cases, the general terms of civil or even commercial law apply instead, with their permissive as well as their social elements.[6]

The bipolar employee-employer relationship reflects the social structure of industrial society. An increasing concentration of "individual capital" (employers) stands juxtaposed with the growing number of employees (labour), the latter being homogeneous in that they are all equally dependent on the wages (remuneration) they receive in exchange for providing services for and under the direction (external control) of the other legal person per an employment contract. The social protections enshrined in legislation in industrial societies reduce the structural subordination of labour in two ways (examples taken form German law): 1)

6 Recent discussions of this latter point in connection with crowdworkers include Däubler 2015, Däubler/Klebe 2015, Thüsing 2016, Klebe 2016, Kocher/Hensel 2016, and Krause 2016.

mandatory employee protections (such as protection from unlawful dismissal, regulated working time, minimum wages, and occupational health and safety rules) and 2) binding collective agreements with employers at the plant level (under the Works Constitution Act), at the company level (Codetermination Act), and at the industry or macroeconomic level (Collective Agreements Act).

The service economy (which already accounts for approximately 75% of value creation in Germany) and its increasing digitalisation and globalisation are transforming the social structure—also as it applies to paid work. The *concept of the legal person that clearly qualifies as an employer is crumbling*, at least at its edges. When *operating as part of a development or distribution network* and, under some circumstances, when operating *within global supply chains*, individual capital loses its autonomy as an employer. *Digital platforms* serve as the means by which work is obtained, but with no clearly identifiable employer.

Often-cited examples include digital intermediaries of electronic services (crowd work/crowdsourcing) and passenger transportation services (Uber). In the case of **crowd work**, which has been a major focus of the recent discussion on "Work 4.0" (cf. BMAS 2016a; Krause 2016; Thüsing 2016; Klebe 2016; Absenger et al. 2016; Däubler 2015; Däubler/Klebe 2015), employers become "anonymised". The digital platform appears to be the entity offering and assigning tasks. Whether the platform operator or a person contractually linked to the platform operator reaps the benefits of the assignment, is immaterial. There is no contractual link whatsoever with the "provider" (the person completing the assignment) since no person is specified when the assignment is offered. As a result, a number of individuals who respond to an offer with performance could walk away empty handed because they have no contractual relationship on which to base any claims. In the case of **Uber**, on the other hand, the intermediary is clearly "specified" and known (a similar three-way relationship applies to **Airbnb**[7]). However, the intermediary does not enter into a contractual relationship with the driver, and thus neither is client nor employer, but rather merely an intermediary. Contractual relationships exist only between the customer and the intermediary and between the customer and the driver (as is the case with personnel leasing or agency work). The contractual relationship between the customer and the driver is a contract for work or services. Although "work" is performed in this case, there is no contractual employment relationship from which the worker can derive social protections.

7 Nils Röper (2016) recently illustrated how Airbnb makes itself unrecognisable as such in that it transforms the users of its intermediary service into lobby organizations operating under the guise of citizen-led referendums.

Because there is no (bipolar) contractual relationship—let alone an employment contract—between the person offering the assignment and the person performing it, the *clear dichotomy between employee and non-employee does not apply* to those performing the work. As we have already seen, this dichotomy is an essential element of labour law in industrial society. As we have also seen, it entails *personal dependence* as a particular criterion under which the work is performed. And precisely this is generally missing in relationships that are no longer clearly bipolar (as touched upon in our discussion of crowd work and Uber). Rather, a new plurality of "workers"—which is amplified by digitalisation, is casting doubt on this dichotomy and in some respects superseding it. Instead, there is now a broad spectrum of forms and social frameworks for work. Some workers still work within a standard, "Fordist" assembly-line production model. Others are integrated within the framework of a company but are semi-autonomous in their work. Yet other workers are dispatched by temporary employment agencies or are employed by an outside company (cf. Becker/Tuengerthal 2016). Others still are self-employed—a descriptor that can mean many different things: They may or may not have their own employees, they may have continuous or only occasional relationships with one or only a few clients, and they may have high or low levels of skill and corresponding market power. Many workers find themselves in a grey area between employment and non-employment (one-euro jobs, internships, research fellowships, volunteer work) and between dependent employment and self-employment (real or pseudo self-employment).

Some might argue that these variations and grey areas are merely a marginal phenomenon in the world of work and that most people engage in standard employment. But that is not the case. *The grey areas extend deep into the core of our working world.* That is due to the restructuring that is typical of our economy, which entails reducing vertical integration[8] and integrating the production of goods and services into external supply chains—both of which are made possible and further driven by digitalisation and Industry 4.0 (the "Internet of Things"). If we look inside a German automotive factory[9], we see a veritable army of third-party external

8 I discussed the extent to which a reduction in the vertical integration and the resulting production and service networks impact risks to the terms of labour and social policy in plants back when this trend began in the 1980s and 1990s in my monograph on then-section 116 of the Employment Promotion Act (Arbeitsförderungsgesetz, AFG): Mückenberger 1992.

9 From the service sector, we could cite television and radio broadcasting services (which use self-employed camera, production, and talk show teams), adult education centres (whose teachers are mostly self-employed), or universities (which use a patchwork of contractual relationships and even establish start-up companies in

workers. The entire range of supply logistics tasks is performed by individuals working for outside logistics companies. In addition, automotive manufacturers respond to fluctuations in ordering activity and employee turnover with a large contingent of temporary workers, who serve as a flexible "buffer" for coping with uncertainties and whose use is tolerated by management and the workforce. Because *grey areas relating to widely varied employment relationships extend deep into companies' core areas*, there arises within the companies a *diversity of applicable wage agreements, pay and skill levels, and representation structures that is problematic* from the perspective of equality. Such networked company structures also make for *enormous challenges* with respect to developing a *spirit of solidarity*—challenges that were never part of Ford's production model.

The diversity and ambiguity of employment relationships outlined above have radically changed the employee–non-employee dichotomy. Today, the same workplace might have people working side by side who have completely different employment status, social protections, and pay levels and who are represented under completely different industries and structures in terms of working conditions and pay—thanks in part to telecommunications and digital networking. Although a number of those people may continue to work as *"standard"* employees, they are surrounded by a *broad diversity of "non-standardness", both in society and* –as shown in the examples above—*in the workplace.* The digitalisation of work appears to increase rather than decrease this diversity. That fact makes it a prime topic for regulation.

As the role of "employer" and the bipolar contractual bond with employers diminishes, so too does any clarity about "employee" status. That is already apparent in the examples of crowd work and Uber above. In the case of **crowd work,** the lack of an identifiable "client" and the lack of specificity about the "provider" means that there is no contractual link that would enable one to examine whether the relationship is an employment relationship or—if there is no personal dependence—merely relates to a contract for services (as opposed to a contract of service). In line with this fact, Wolfgang Däubler and Thomas Klebe (ibid.) lay out the protections for self-employed individuals, not for employees, in their discussion of crowd work. Similarly, the rules and standards of labour law have only limited application to **Uber**. In this case, the persons involved and their contractual relationships are specified. However, although there is a contractual link between the intermediary and the driver, the driving service itself generally does not exhibit

nearby tech centres). There are many and varied examples of the dissolution of the employee–non-employee dichotomy.

the characteristic of personal dependence, and so here, too, the social protections afforded under labour law do not apply.[10]

Thus, the legal realm remains largely closed to the new digital diversity of work. After all, irrespective of globalisation and digitalisation (in fact, even before these trends began or took on the importance they now have in modern discourse), the concept of "employee" no longer functions as the sole ticket to social protections in certain cases.

- In Germany, additional worker categories have been developed besides "employee" (Hess 2008; compare Rebhahn 2009a), which uncouple social protections from the requirement of an employment contract in certain cases. These categories include "employee-like" persons (overview in Hunold 2008; compare Rebhahn 2009b) and "working persons" (German: *Beschäftigte*, used in particular within the context of social security law) (Rützel 2005 section 3.4, keywords *Beschäftigung*, *Beschäftigungsverhältnis*).
- Standards have also been developed (for instance, with respect to the right to equal treatment) that ensure protection without requiring personal dependence—and certainly without requiring continuous dependence—in the execution of work. Similarly, standards have

10 **In the United States,** governments have been working—and last year stepped up their efforts—to verify and enforce the status of employees who are misclassified as **"independent contractors"** (including Uber drivers) (cf. United States Department of Labour 2015a and b; Murray 2016). The Uber Technologies v. Barbara Berwick case recently (June 2016) gained prominence and is now pending in the Superior Court of California (2016). Contrary to Uber's classification of Uber driver Barbara Berwick as an "independent contractor", California's Labour Commissioner had ruled that she was to be classified and treated as an employee. Uber filed an appeal of this decision with the Superior Court of California on June 16, 2016 (case no. CGC-15-546378). The Labour Commissioner stated that Uber had "all necessary ***control***" over the driving services for which it acts as intermediary. ***"Control"*** as a means of defining employee status is broader than the **"personal dependency"** criterion used in Germany since it **can be applied to all digital forms of management and service mediated by technological means**. The fact that governments in the US are undertaking such efforts to verify employment status likely stems primarily from the government's interest in obtaining income tax revenue—and the definition of "employee" under income tax code. That fact limits the transferability of this definition to European contexts. The "control test" has been cited as early as a 1947 US Supreme Court opinion. In two fairly comparable cases relating to transportation services: "According to the Supreme Court, an industry's right to **control** how work shall be done is a factor in the determination of whether the worker is an employee or independent contractor. ... Probably it is quite impossible to extract from the statute a rule of thumb to define the limits of the employer-employee relationship... [T]he courts will find that **degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation** are important for decision. No one is controlling nor is the list complete." (emphasis mine) Interestingly, the opinion's author puts "control" in direct correlation with "opportunities for profit and loss" (see section 4.3 above). However, here too the limitation must be pointed out that this legal action had its origin in the tax treatment of the parties, not their treatment under labour law.

been developed (for instance, with respect to technical health and safety), which make companies' obligation to protect contingent upon hazards or sources of risk rather than on individual contractual relationships, thereby extending protection to a diverse range of individuals. In a practical sense rather than a systematic legal sense, these include norms that make entitlements or rights acquired as a result of work independent of individual employment relationships and of each contracting party's identity as defined under such relationships. They accomplish this by superseding legal positions, whether of a concrete employer or of employee status. These standards unlink rights and benefits from a respective employer, making them *"portable"* so that they can be carried over to subsequent employment relationships. In Germany, these include leave rights under sections 4 and 6 of the Federal Leave Act (Bundesurlaubsgesetz, BUrlG) and post-employment benefits under sections 1b and 4 of the German Occupational Pensions Act (Betriebsrentengesetz, BetrAVG). They can also consist of the establishment of protections that are fully independent of any contract for employment or work. Such protections include the social insurance fund for independent artists under the Artists' Social Security Act (Künstlersozialversicherungsgesetz, KSVG) and workforce representation (as for independent contractors and, to some extent, as provided for under section 14 of the Personnel Leasing Act (Arbeitnehmerüberlassungsgesetz, AÜG) (cf. Brenke/Beznoska 2016; Schulze Buschoff 2014).[11]

11 The dilemma relating to the current definition of the "employee" generally arises only when employment status changes—however such changes often result from the **diffusion (proliferation and/or disappearance) of "employers",** which in turn is driven by globalisation and digitalisation**.** As a response, legal strategies that establish legal positions for workers with relationships to multiple, perhaps even changing, employers, are of interest. The portability of post-employment benefits under section 4 BetrAVG was a first step in that direction. **France** has made some significant progress in that respect. There, the vocational training system uses contracts that are entered into with multiple companies and that apply to various stages of training as well as the transition into full employment (République française 2012) (such interagency vocational training programmes also exist in Germany and are governed by the German Vocational Training Act (Berufsbildungsgesetz)). That system unlinks components of vocational training and corresponding rights of apprentices from individual employers. Similar features that eliminate that link are contained in **France's latest**—and rather controversial—**labour law reform of July 2016** (Rep. fr. 2016). The controversy stems primarily from the fact that the reform made aspects subject to collective bargaining (French: *dialogue social*) that had previously been mandated under French labour law. However, at the same time it is the first regulation of which I am aware that comprehensively addresses and attempts to regulate the **digitalisation of work**. One component, the **"personal activity account" ("compte personnel d'activités")** created in 2015, is to be expanded under Title V and made available to workers of varying status beginning in 2017. The aim of the activity account is to increase these workers' autonomy and mobility with respect to individual employ-

- There are also legal positions that are completely independent of any participation in work, which are based instead on civil and human rights. They include those very same civil and human rights as well as directly derivative rights such as the right to a minimum standard of living within the sociocultural context, now governed by Social Security Code XII (Sozialgesetzbuch, SGB XII), or the right of individuals to control the use of their personal data. They also include provisions of civil law that are aimed at promoting social equity, consumer protections, and the protections afforded under sections 305 et seq. of the German Civil Code (Bürgerliches Gesetzbuch, BGB) with respect to general terms of consumer contracts.
- These ideas will be discussed further, with respect to the four-ring model (see Chapter 6). However, their existence does not change the basic fact that the radical shift that our world of work and the concept of the "employee" have undergone (and continue to undergo) as a result of globalisation and digitalisation have, at best, been addressed only in parts and as exceptions but not systematically.

---

ers, a factor that is particularly important in the digital age. It lends **portability to social rights and benefits** (training and continuing education, preventive/hardship leave, and recognition of civic engagement) **that a worker accrues through work for different employers** and makes rights such as paid leave, continuing education and training, and even assistance for setting up a business available to workers. For each worker who requests it, a single account is maintained that collects these rights and benefits—independent of current career status or employer—and allows them to use the benefits at their own discretion over the course of their careers (cf. Art. L. 5151- 1 through L. 5151-7 Code du Travail as amended on September 2016). Critical analysis of these provisions is beyond the scope of this paper. However, it clearly serves as a **boon to the mobility and self-determination of workers in the digital age** and deserves closer consideration and evaluation.

The key provisions of the law from August 8, 2016, are as follows (in the original French): Art. L. 5151-1. "Le compte personnel d'activité a pour objectifs, par l'utilisation des droits qui y sont inscrits, de renforcer l'autonomie et la liberté d'action de son titulaire et de sécuriser son parcours professionnel en supprimant les obstacles à la mobilité. Il contribue au droit à la qualification professionnelle mentionné à l'article L. 6314-1. Il permet la reconnaissance de l'engagement citoyen." Art. L. 5151-4. "Le compte ne peut être mobilisé qu'avec l'accord exprès de son titulaire. Le refus du titulaire du compte de le mobiliser ne constitue pas une faute." Art. L. 5151-5. "Le compte personnel d'activité est constitué : 1° Du compte personnel de formation ; 2° Du compte personnel de prévention de la pénibilité ; 3° Du compte d'engagement citoyen. Il organise la conversion des droits selon les modalités prévues par chacun des comptes le constituant." Art. L. 5151-7. "Le compte d'engagement citoyen recense les activités bénévoles ou de volontariat de son titulaire. Il permet d'acquérir : 1° Des heures inscrites sur le compte personnel de formation à raison de l'exercice de ces activités ; 2° Des jours de congés destinés à l'exercice de ces activités."

The fact that the **White Paper** "**Work 4.0"** (BMAS 2016a) proposes the creation of a Personal Activity Account **(German: *persönlichen Erwerbstätigenkonto*)** that shares certain similarities with the French model, is discussed in section 6.5 of this paper.

As a whole, then, *despite the structural changes that are shaping the world of work, social protections have largely remained stymied in the basic premises of traditional labour law, that is, a bipolar, contractual relationship between an employer and an employee and the dichotomy between employees and non-employees (i.e. self-employed individuals).* Openings to new work relationships, as are becoming increasingly prevalent in the digital service economy, have been few and far between. Such relationships are still considered atypical. That is precisely the problem with the "standard employment relationship" that has been discussed for the last 30 years or so. I am not suggesting that "standard" employers and "standard" employees no longer exist. However, they have since become more of an exception than the rule as a result of the proliferation of different roles on both sides of the industrial relationship. Social protections are being divided among fewer and fewer "standard employees" while a growing number of workers are stuck in a social protection grey area.

It's not surprising then, that this "crisis of normality" has evolved into a crisis of representation. Works councils, trade unions, and even employers' associations overrepresent a "relative standard" that actually represents fewer and fewer individuals. Meanwhile, a rising number and diversity of "non-standard" workers (all the more so in the digital age) remains largely unrepresented and without the regulatory and protective functions that representation affords. *Thus, the crisis of normality is also becoming a crisis of solidarity.* Inequality and unequal representation not only call into question the legitimacy of labour organisations, they are also robbing them of a growing share of their membership.

This crisis of social protection has garnered widely varying responses. Those involved in labour law (including the *social partners*) in Germany and the Western industrialised countries tend primarily to want to safeguard and broaden the existing concept of the "employee". This group can also at times be found working on establishing a third category between employees and self-employed individuals—such as the "employee-like" persons identified in Germany and Austria as *arbeitnehmerähnliche Personen* or in Italy as *lavoro parasubordinato*. On the flip side, the media, professional associations, civil society are often heard arguing for the opposite approach, that is, that social protections should be ensured for all working persons, even if they are not "employees", that social protections should not be contingent on an employment relationship. The most prominent example is the call for a universal basic income. However, the spectrum is far too varied and complex to be reduced to this one demand.

In the next section, I will attempt to describe a basic model of protections under labour and social policy that are more appropriate to the economic and social realities of our time. I begin by presenting a *continuum of worker profiles that more or less correspond to the traditional concept of the "employee"*. I assign them to *existing protection structures* and then offer ideas for *how they can be further developed to align with the current situation.*

5. The four-ring model of labour protection: The concept of "employee" in terms of legal policy

In this paper, I propose taking a "strategic" approach to the concept of "employee", which is becoming less widely applicable and losing its integrative power. The four-ring model (Fig. 2) shows a "continuum" of employment relationships, from jobs with a high level of protection under labour law to those that enjoy little (or no) protection (cf. Davies/Freedland 2000). The goal is to overcome the dichotomy that characterises our work-oriented society and unfortunately divides those who "belong" from those who do not. Within this continuum, a legal distinction must be made between various types of workers (this is why the figure shows four distinct rings rather than a gradual transition from one extreme to the other). Such a type-based continuum is better able to reflect the increasingly diverse employment situations and protection requirements that exist in the digital age.

Rings 1 to 4 include groups of persons who perform different kinds of work and receive different levels of protection under labour and social law. In the centre (Ring 1) are employees, surrounded in Ring 2 by "employee-like" individuals. Ring 3 encompasses people who have some connection to working life and enjoy protection unrelated to their status as an employee or "employee-like" person. In the outer ring (Ring 4), finally, are individuals independent of their relationship to work: "citizens".

Fig. 2: Four-ring model of labour protection (illustration by the author)

In presenting this model, I encourage addressing the increasingly fraught issue of the concept of the "employee" in **two ways**:

- First, within the context of **current efforts to redefine the concept of "employee" in legal doctrine,** I propose opting for a definition that is most in keeping with the "Work of the Future". Applied to the four-ring model, this means consolidating and expanding the inner rings. This is not intended to suggest that the search for a new understanding of "employee" under labour law, one that better suits the digital age, is no longer worthwhile and should therefore be abandoned.
- Second, we should consider **legal changes** to **protect the diverse employment and living situations, present or future**, that are related to the various levels of the four-ring model, since these situations are not covered by traditional labour law, or at least not fully. No matter what the outcome of the current dispute over employee-friendly labour law may be, it appears to be inevitable, in the digital age, that an increasingly important and ever-growing share of employment will no longer be regulated under labour law, but instead under civil or commercial law. The four-ring model is an attempt to **visualise these two strategies** as **synchronous** and **interconnected**.[12]

5.1 The model: A new diversity

The four-ring model is intended, first of all, simply to provide a graphic depiction of the situation as it exists today—a situation that has developed over the past few decades, exacerbated by globalisation and digitalisation. Under current law, the groups in the four rings are already entitled to various rights. Employees (Ring 1) enjoy the core protections enshrined in labour and social law. "Employee-like" persons (Ring 2) have certain defined rights. Under labour and social law, persons with a relationship to the working world (Ring 3) enjoy the protections provided under labour and social law that are not tied to an employment relationship. Citizens (Ring 4) are entitled to certain rights under civil and com-

12 Focusing on the connection between them is intended to encourage greater openness to such policy options as a guaranteed basic income. As long as that idea is believed to emanate from certain elements of the alternative movement, it will be widely perceived as entirely foreign to the system that governs existing employment relationships—and rejected out of hand. If, on the other hand, it is regarded as **one** element of security **in the context of the changing working and living situations of the** currently **employed population**, it is likely to be seen in more pragmatic and forward-thinking terms.

mercial law; several of those rights are listed in the last pages of this paper. To that extent, the ring model offers nothing new.

However, this model does lead to greater insight when seen in the context of the changes described in Chapter 4, with the strategic goal of shaping change by exerting social influence. It is evident that the individuals in Ring 1 still account for a large portion of all paid work. This share is declining, though, largely because of globalisation and digitalisation, and such work is increasingly being carried out by individuals in Rings 2 through 4. If our goal is the *general protection and defence of labour*, protection should not be limited to Ring 1. The four rings coexist in a *dynamic relationship*, and protection strategies should also take into consideration the individuals in the other rings.

If we focus only on securing and defending the status of an "employee", we risk acquiescing to or even exacerbating the segmentation of our society (along the lines of the rings in our model). If, however, we understand that the four rings coexist in a **dynamic relationship that can be handled strategically** ("continuum"), we will find solutions that will not deepen divisions, but quite possibly lead to greater equality.

In a sense, the rings reflect the dual role that a social (and trade union) reform strategy should play. Assuming that this is in keeping with the wishes of the affected groups, efforts should be made through the law and legal policy to protect the legal positions of the individuals in the inner rings against obsolescence, and particularly against manipulation by social adversaries. This also means finding terms for these legal positions—such as the definition of an "employee"—that are better suited to the digital era. At the same time, efforts should be made, through legal and legal-policy means, to strengthen the rights of those in the outer rings. Such individuals, too, should be allowed the autonomy that the situation requires and provided with a safety "cushion"; they must also be protected against the unforgiving forces of the market through "decommodification" (Esping-Andersen, 1990)—in other words, they should be afforded protection independent of the market. In combination, the two functions and strategies might help reclaim the "solidarity" that our society so urgently needs.

5.2 Two avenues for modernising the legal concept of "employee"

With respect to the concept of "employee" (Ring 1), the proposed dual strategy means two things: first, as many as possible of the jobs that are becoming increasingly important as a result of globalisation and digitali-

sation should be included under the current definition of "employee" in legal doctrine, so that the individuals involved are protected. Second, a more appropriate legal concept of "employee" needs to be developed (even if, at present, no court has defined that concept).

To illustrate the first approach, let us take a look at the **case of Uber**. In many of the countries in which Uber is active, legal disputes concerning the drivers' employment status are currently underway. Footnote 10 describes attempts in the United States to use the criterion of "control" to classify Uber drivers as employees. Similarly, it is possible to depersonalise the idea of subordination and relate it to modern electronic control mechanisms—as German labour lawyers are doing (see Chapter 4 above).[13] If such efforts are made in legal doctrine at the international level and attract the attention of the media, the affected individuals stand to benefit greatly.

The second strategy would expand the concept of "employee" to include individuals who are not personally, but substantively or economically dependent on an employer as a result of work obtained via digital platforms. It might be helpful in this context to borrow certain elements of the "control" criterion used in the United States, disregarding the element of personal dependence and instead giving electronic networking, as an example of substantive dependence, the importance it now deserves. In the context of this legal argument, it is useful to differentiate, as Rolf Wank does, between individuals who are able to benefit from market opportunities and take entrepreneurial risks and those whose work is contractually subject to external control, leading to fewer market opportunities and risks.

Such a strategy in legal policy should not merely focus on the functional "modernisation" of the concept of "employee"; it should also emphasise that the subordination approach is incompatible with the principles of democratic equality. A relationship of subordination and dependence is not consistent with citizenship or with a democratic approach to social relationships, nor is it an appropriate or legitimate means of reconciling differing interests and preferences. Employment relationships should be recognised as many-sided, reciprocal, and "networked" both horizontally and vertically. Within these relationships, there are neither subjects nor objects, and neither dependent or independent parties. Everyone involved is entitled to freedom, opportunities for participation, and the same fundamental rights (cf. Matthies et al., 1994).

13 The legal concept of "employee" under European law, which has long been more comprehensive (see, most recently, ECJ 2010 and 2015a and b) is not helpful in this context because, by definition, it cannot be applied to national labour rights.

5.3 Extending intermediate categories between employees and the self-employed

In the case of "employee-like" individuals (Ring 2), whether significant labour law and social protection regulations are applicable depends on the status of the given individual (cf. Rebhahn 2009b).[14]These individuals, unlike employees, are legally autonomous. "Employee-like" persons, however, are economically dependent and require protection comparable to that provided for employees. In terms of legal doctrine, the inclusion of individuals in Ring 2 depends largely on the interpretation of the latter "soft" concepts. Additional criteria—whether an individual performs work personally, without his or her own employees, continuously, and primarily or in large part on behalf of a contracting party—might be taken into account in order to protect the people concerned.

However, only a limited number of labour law protections apply to individuals in "employee-like" situations.[15] Because they are considered independent contractors, social insurance coverage applies only under certain conditions (cf. section 2 SGB IV)

It would be wise to consider systematically enlarging the group of persons to be protected, as well as expanding the applicable protections. Given the increased number of independent contractors and the public funds they receive (cf. Breneke/Beznnoska 2016), the current situation—with "employee-like" individuals, certain "home workers", and certain "commercial agents" covered under labour law and "working persons" (deviating from the term "employees") covered under social insurance law—is unsustainable. A third group should be created that is not

14 For Germany, e.g. section 6 (1) sentence 1 number 3 of the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, AGG), section 2 sentence 2 and section 12 of the Federal Leave Act (Bundesurlaubsgesetz, BUrlG), section 7 (1) number 3 of the Nursing Leave Act (Pflegezeitgesetz), section 2 (1) number 3 of the Occupational Health and Safety Act (Arbeitsschutzgesetz), certain state-level leave acts, section 12a of the Collective Bargain Agreements Act (Tarifvertragsgesetz, TVG), section 5 (1) sentence 2 of the Labour Court Act (Arbeitsgerichtsgesetz, ArbGG). Dependent commercial agents (section 92a (1 and 2) of the German Commercial Code (Handelsgesetzbuch, HGB)) and home workers (section 1 sentence 2 of the Home Worker Act (Heimarbeitsgesetz, HAG) and sections 1, 10 and 11 of the Continued Remuneration Law (Entgeltfortzahlungsgesetz, EFZG)) are handled in a similar manner.

15 In Germany, e.g. they are not covered by general or special forms of protection against dismissal (section 9 of the Maternity Protection Act (Mutterschutzgesetz, MuSchG) and sections 85 et seq. of Social Security Code IX (Sozialgesetzbuch, SGB IX)). They are not represented by, nor do they elect, the works council; special cases are home workers who work primarily for a specific company (section 5 (1) sentence 2 and section 8 (1) sentence 1 of the Works Councils Act (Betriebsverfassungsgesetz, BetrVG)) and temporary workers who are assigned to a company for more than three months (section 7 sentence 2 BetrVG).

based on categories of workers (such as "employee-like" individuals), but instead includes those "solo" self-employed people who do not employ other individuals, who are to some extent economically dependent and require a certain amount of social protection. Protections should be available to this group at least as an option. They might include some degree of job security, collective representation (at the company or industry level), and social security that has some degree of consistency.

5.4 Expanding areas of labour and social law in which protection of work is not linked to the individual "employment" relationship

The third ring relates to rights that are linked either in fact or by law to the performance of work, but that are not related to the individual's legal status or contractual relationship. Some of these have already been mentioned. They may be linked to the relevant hazard, as in the case of technical health and safety measures (section 2 (2) of the Labour Protection Act (Arbeitnehmerschutzgesetz, ASchG) and section 2 SGB VII), and they also protect independent contractors and employees of third parties. In our digital, knowledge-based society, risks related to data processing should also be covered, as in the right of individuals to control the use of their personal data. As mentioned above, the right to equal treatment provides certain protections (e.g. sections 19 to 21 AGG) even in the absence of a dependent work relationship. A more detailed discussion of the expansion and application of these standards in legal doctrine is beyond the scope of the present paper.

I believe that the third ring has considerable potential for legal policy. One of the main changes taking place in our digital, knowledge-based society is that employment relationships can no longer be assumed to take the form of ongoing, bipolar relationships between an employer and an employee. As outlined above, this is true for the following reasons: 1) Employees can no longer be certain that a specific employer will continue to exist, and as in the case of crowd work, their employment situations may not be transparent. 2) Employees themselves have an interest in mobility and must therefore have some measure of autonomy in the relationship with their employer. 3) When individual employers—the counterpart of the employee—are part of a production, logistic, or digital network, they forfeit some autonomy in their actions and decision making. *Labour law has not yet found a way to deal with the issues of discontinuity and the loss of an employer's legal identity.* Section 613a BGB—which transformed European transfer-of-undertaking directives in-

to German law—contains provisions governing business transitions, and section 4 of the German Occupational Pensions Act (Betriebsrentengesetz, BetrAVG) addresses a change of employers. These provisions are exceptions, however—they have no bearing on the system, which is based on individual employer-employee relationships.

It is therefore important, in my view, to consider two questions when formulating legal policy: *First: How can the* ***portability*** *of employee rights and positions be ensured, so that these benefits are not lost when people change employers or lose their jobs, and so that the benefits are transferable to other social and economic constellations?* It would be useful to learn from the provisions of and experiences with leave-time laws, company pension plans, and time credits, as well as social insurance schemes for artists. The White Paper on Labour 4.0 (German Federal Government 2016a, pp. 181 et seq.) mentions something else that might be helpful: the establishment of a *“Personal Activity Account”,* a benefit that should be expanded in this context to include long-term accounts. The parameters and mechanisms of this type of portability have not yet been fully explored, although the French example of a *“compte personnel d’activités”* provides some guidance. Ultimately, portability is essential if workers are to be as mobile as today’s society requires them to be. *Second:* Our current system of workforce representation (which is linked to a single business or company) is unable to handle “diffuse” employers (as in the case of crowd work) or companies that are part of a digital network, since such employers lack the authority to participate in effective negotiations. *What type of workers’ representation would be capable of dealing with the diffusion and proliferation of employers (often across industries) and allocate the participating of workers there where the actual decision is taken?* Collective bargaining is often ineffective, at least in its current form that is based on industry-specific unions, since logistic chains and clusters of companies usually involve multiple industries. A better option, as I have suggested in the past, would be *employee representatives along logistic value chains or employee representatives in territorial clusters of companies* (Mückenberger 1993). If the company level is no longer the focus of our digitally interconnected economy, it must not continue to be the only place where workers are allowed to participate in decision-making.

5.5 Creating citizens' rights that apply to the work context regardless of an individual's employee status

Whatever their employment status, all members of society have certain rights—and particularly when they are structurally subordinated in regard to power (renters and consumers, for example). Too little attention has been given to the role of such "social civil or commercial law" in the workplace, because labour law standards generally provide more effective protection for an individual's rights. These rights granted by a socially adjusted civil law are taking on added importance, since in many cases the work-related standards in Rings 1 through 3 no longer apply to individuals and their jobs in the digital world. There is ample indication that the affected group (Ring 4) is expanding.

Wolfgang Däubler has shown that consumer protection regulations under the law of obligations may also apply to crowd work in cases of general terms of consumer contracts (sections 305 et seq. BGB). However, he also points out the paradox that crowd workers are in greater danger of losing the status of a (protected) "consumer" (section 13 BGB) the more economically dependent they are on crowd work. It would also be important to examine whether and in how far the provisions of the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, AGG) that are unrelated to employment (sections 19 through 21—equal treatment in other civil law contracts) offer protection for workers even when no employment relationship exists. Furthermore, we should look at data protection law and the right of individuals to control the use of their personal data, to the extent that such rights do not require that an individual be an "employee". Copyrights and protection for utility models and designs may be even more relevant to crowd work (and digital work in general) than to employment relationships, since "expropriating" legal fictions, such as "possession on behalf of another" (section 851 BGB), would hardly seem applicable. Overall, it is important to consider a "social" kind of civil and commercial law—particularly when the concept of "employee" does not apply to a particular job.

We should also look at rights that are based not on employment relationships, but on the status of all members of a democratic community: human rights and the rights of citizenship. As members of a democratic community, all citizens enjoy what T. H. Marshall (1950) called the "social rights of citizenship". The constitution grants certain fundamental rights of dignity, participation and respect to every citizen. Those rights do not require specific contributions or the performance of market or nonmarket work, but at most some activity or sacrifice of the individual

that benefits the community. It would seem necessary and realistic to recognise other activities on behalf of the community, unrelated to market work, and to grant them some legal protection. Those might include caregiving—nonmarket arrangements caring for others, which are essential for the survival of a modern society. Traditional examples include *volunteer work and help for others;* as a result of demographic trends, *rights related to parenthood and caregiving* are no longer as closely linked to the market and employee status as they once were. Rights derived from such community-oriented activities remain the exception—but they are expanding and deserve systematic recognition by society.

A secure income for all members of society, independent of work effort, belongs in Ring 4. Such payments have long been taken for granted when people are ill or on vacation, much as is the case with the social insurance system's wage-replacement benefits. They may be directly or indirectly linked to gainful employment. The right to supplementary benefit, which has been recognised in Germany since 1961, as a subjective individual right, eliminates that connection—but in many cases benefits are still linked to market income. SGB XII (formerly called the Supplementary Benefits Act) has introduced a guaranteed minimum income that does not eliminate but lessens the link to the market in the case of the elderly and individuals whose earning capacity is reduced, and SGB II has done the same for job seekers. The idea of "decommodification", of a basic income that is independent of the market—which will not be discussed in detail in this paper—is therefore less far-fetched than some discussions might suggest (for example in the White Paper on Labour 4.0—cf. Frankfurter Allgemeine Zeitung, November 28, 2016). In any event, we have to create and extend protective rules and institutions as jobs are becoming increasingly common that are not part of the employment-based system, but nonetheless require protection (cf. White Paper 4.0, p. 12).

6. Solidarity

The four-ring model summarises efforts of both legal doctrine and legal policy to safeguard work in the digital age. It highlights the fact that the problems described in the four rings and attempts to solve them should be considered not **in isolation, but as a whole**. This will ensure that attempts at a solution are in keeping with the dynamic nature and growing diversity of work in the digital age. As a result, however, the issues to be addressed will become more complex, and a wider range of actors and institutions will have to be involved.

In itself, the four-ring model does **not** present **a solution** to the problems of the employee concept in a time of digitalisation and globalisation. Instead, it has a **"heuristic" (= investigatory)** function in considering how best to structure employment relationships in the modern world. In the process—and this is already happening in the context of Work 4.0—the idea is to expand the concepts of employee and employer, taking into account the need for protection, while also recognising the limits of that endeavour (see 5.2 above). Given these limits, structures will also be considered and put in place that resemble an employee-like situation under a contractual relationship (see 5.3 above) or that exceed the boundaries of such a relationship (see 5.3 above). Inevitably, there will be certain kinds of socially necessary work that are not covered under traditional labour and social law, but that still (or precisely for that reason) require protection of a wider legal framework ("social civil and commercial law") (see 5.5 above).

The complexity of the view of the relevant problems and possible solutions that is proposed here poses not only an intellectual challenge. **It also raises fundamental questions about solidarity in our society.** Often, different entities in society are "responsible" for the four rings. Each considers itself responsible for different groups. Unions, for example, tend to view the people in Ring 1 as their clientele, and they focus mainly on protecting employee rights in a time of digital upheaval, as well as on safeguarding and expanding the number of people who are recognised to be employees. Their concerns are clearly legitimate. In Section 4 I asserted that "Because there is no (bipolar) contractual relationship—let alone an employment contract—between the person offering the assignment and the person performing it, the *clear dichotomy between employee and non-employee does not apply to those performing the work ... the grey areas extend deep into the core of our working world."* If I am correct in this assertion, over time, therefore, the foundation for such a "division of labour" and for limited solidarity will no longer exist. A broader view, greater solidarity and the kind of overview sug-

gested by the ring model are then essential—not least so that the rights that are intended to ensure the integrity and dignity of employees will survive over the long term.

References

Absenger, Nadine; Ahlers, Elke; Herzog-Stein, Alexander; Lott, Yvonne; Maschke, Manuela; Schietinger, Marc (2016): Digitalisierung der Arbeitswelt? Mitbestimmungsreport No. 24. Hans Böckler Foundation, Düsseldorf.
Bauschke, Hans-Joachim (2016): Arbeitnehmer und andere – Bewertung der neuesten Gesetzesinitiativen. In: Zeitschrift für das öffentliche Arbeits- und Tarifrecht, No. 4, pp. 69-71.
Becker, Silke; Tuengerthal, Hansjürgen (2016): Auch ohne Blick in die Ferne: Externe – ein Leitfaden für den Einsatz von Fremdpersonal im eigenen Unternehmen. In: Betriebs-Berater, No. 37, pp. 2229-2236.
Brammsen, Joerg (2010): Der Arbeitnehmerbegriff – Versuch einer einheitlichen Neubestimmung. In: Recht der Arbeit, No. 5, pp. 267-274.
Brenke, Karl; Beznoska, Martin (2016): Solo-Selbständige in Deutschland – Strukturen und Erwerbsverläufe. Forschungsbericht No. 465. Federal Ministry of Labour and Social Affairs, Berlin.
Davies, Paul; Freedland, Mark (2000): Employees, Workers and the Autonomy of Labour Law. In: Collins, Hugh et al. (eds.), The Legal Regulation of the Employment Relation, London, pp. 267-86.
Däubler, Wolfgang (2015): Crowdworker – Schutz auch außerhalb des ArbR. Eine Bestandsaufnahme. In: Benner, Christiane (ed.): Crowdwork – Zurück in die Zukunft?, 1st ed. Bund Verlag, Frankfurt.
Däubler, Wolfgang (2016): Herausforderungen für das Arbeitsrecht – Deregulierung, Globalisierung, Digitalisierung. In: Arbeit und Recht, No. 8-9, pp. 325-334.
Däubler, Wolfgang, Klebe, Thomas (2015): Crowdwork: Die neue Form der Arbeit – Arbeitgeber auf der Flucht? In: Neue Zeitschrift für Arbeitsrecht, 17/2015, pp. 1032-1041.
Esping-Andersen, Gösta (1999): The Three Worlds of Welfare Capitalism, Polity Press, Cambridge.
European Network of Legal Experts in the Field of Labour Law (2009): Thematic Report 2009: Characteristics of the Employment Relationship, Contract No. VC/2008/1211.
Forst, Gerrit (2014): Arbeitnehmer – Beschäftigte – Mitarbeiter. In: Recht der Arbeit, No. 3, pp. 157-165.
Giesen, Richard (2016): Der europäische Arbeitnehmerbegriff und die Mitglieder der Leitungsorgane von Kapitalgesellschaften. In: Zeitschrift für Arbeitsrecht, No. 1, pp. 47-70.

Günther, Jens; Böglmüller, Matthias (2015): Arbeitsrecht 4.0 – Arbeitsrechtliche Herausforderungen in der vierten industriellen Revolution. In: Neue Zeitschrift für Arbeitsrecht, 17/2015, pp. 1025-1031.

Hanau, Hans (2016): Schöne digitale Arbeitswelt? In: Neue juristische Wochenschrift, No. 36, pp. 2613-2617.

Hess, Harald (2008): Stichwort "Arbeitnehmer (im Sinne des Betriebsverfassungsgesetzes)". In: Spiegelhalter, Hans Joachim (ed.): Arbeitsrechts-Lexikon, Beck'sches Personalhandbuch Vol. I, C. H. Beck, Munich.

Henssler, Martin; Preis, Ulrich (2007): Diskussionsentwurf eines Arbeitsvertragsgesetzes (ArbVG) – Stand: November 2007, in Neue Zeitschrift für Arbeitsrecht, 21/2007, Appx. 1, pp. 6-32.

Hunold, Wolf (2008): Stichwort "Arbeitnehmer/arbeitnehmerähnliche Personen". In: Spiegelhalter, Hans Joachim (ed.): Arbeitsrechts-Lexikon, Beck'sches Personalhandbuch Vol. I, C. H. Beck. Munich

Hutschenreuter, Stefanie (2016): Schöne neue Arbeitswelt? Frankfurter Allgemeine Zeitung Verlagsspezial/Innovationstreiber IKT, November 17, 2016, p. iv.

Jacobs, Matthias (2016): Reformbedarf im Arbeitszeitrecht. In: Neue Zeitschrift für Arbeitsrecht, 15/2016, pp. 733-737.

Klebe, Thomas (2016): Crowdwork: Faire Arbeit im Netz? In: Arbeit und Recht, No. 7, pp. 277-281.

Klebe, Thomas (2015): Workers of the crowd unite? Betriebsratsrechte bei Crowdsourcing, in Benner, Christiane, Crowdwork – Zurück in die Zukunft?, 1st ed., Bund Verlag, Frankfurt.

Kocher, Eva (2016): Das Andere des Arbeitsrechts. In: Arbeit und Recht, No. 8-9, pp. 334-337.

Kocher, Eva/Hensel, Isabell (2016): Herausforderungen des Arbeitsrechts durch digitale Plattformen – ein neuer Koordinationsmodus von Erwerbsarbeit. In: Neue Zeitschrift für Arbeitsrecht, 16/2016, pp. 984-990.

Krause, Rüdiger (2016): Digitalisierung der Arbeitswelt – Herausforderungen und Regelungsbedarf. In: Neue Zeitschrift für Arbeitsrecht, 16/2016, pp. 1004-1007 (abridged).

Krause, Rüdiger (2016): Gutachten B: Digitalisierung der Arbeitswelt – Herausforderungen und Regelungsbedarf, Verhandlungen des 71. Deutschen Juristentages in Essen 2016. In: Vol. I Gutachten, C. H. Beck, Munich, pp. B1-B112.

Lingemann, Stefan; Otte, Jörn (2015): Arbeitsrechtliche Fragen der "economy on demand". In: Neue Zeitschrift für Arbeitsrecht, 17/2015, pp. 1042-1047.

Marshall, T. H. (1950): Citizenship and Social Class and Other Essays, Cambridge University Press, Cambridge. German edition: Marshall, T. H. (1992): Bürgerrechte und soziale Klassen. Zur Soziologie des Wohlfahrtsstaates, Frankfurt/New York.

Matthies, Hildegard; Mückenberger, Ulrich; Offe, Claus; Peter, Edgar; Raasch, Sibylle (1994): Arbeit 2000. Anforderungen an eine Neugestaltung der Arbeitswelt - Eine Studie der Hans-Böckler-Stiftung, Rowohlt, Reinbek.

Mechnik, Peter (2005): Lohnsteuerpflicht und Versicherungspflicht für Beschäftigte und Selbstständige, Lohnsteuer. In: Knur, Richard; Schlather, Christine (eds.): Lohnsteuer und Sozialversicherung, Beck'sches Personalhandbuch, Vol. II, Ch. II, C.H. Beck, Munich.

Mückenberger, Ulrich (1992): Produktionsverflechtung und Risikoverantwortung, Verfassungsfragen zur Neufassung von § 116 AFG n. F., Nomos Verlag, Baden-Baden.

Mückenberger, Ulrich (1993): Auf dem Weg zu einem post-fordistischen Arbeitsrecht. Das System rechtlicher Regulierung im Betrieb unter Veränderungsdruck. In: Müller-Jentsch, Walther (ed.): Konfliktpartnerschaft. Akteure und Institutionen industrieller Beziehungen, 2nd ed., Munich, pp. 203-228.

Mückenberger, Ulrich (2015): "Bürger am Arbeitsplatz". Ein gewerkschafts- und gesellschaftspolitisches Leitbild. In: Schroeder, Wolfgang; Bogedan, CLAUDIA (eds.): Gute Arbeit und soziale Gerechtigkeit im 21. Jahrhundert, Nomos Verlag, Baden-Baden, pp. 51-87.

Mückenberger, Ulrich (2016): Citizenship at work. A guiding principle for social and trade union policy. In: Transfer, Vol. 22, No. 1 (February 2016), pp. 25-44.

Müller-Glöge, Rudi (2012): Kommentierung zu § 611 BGB. In: Münchener Kommentar zum Bürgerlichen Gesetzbuch: Vol. 4, Part II, 6th ed., C. H. Beck, Munich.

Murray, Jean (2016): Difference Between Independent Contractor and Employee. Classifying Workers–Why it Matters, https://www.thebalance.com/independent-contractor-or-employeewhat-s-the-difference-397912 (downloaded October 10, 2016).

Preis, Ulrich (2000): Neuorientierung in der arbeitsrechtlichen Gesetzgebung. In: Neue Zeitschrift für Arbeitsrecht, 1/2000, pp. 9-13.

Rebhahn, Robert (2009a): Arbeitnehmerbegriff in vergleichender Perspektive. In: Recht der Arbeit, No. 3, pp. 154-175.

Rebhahn, Robert (2009b): Arbeitnehmerähnliche Personen – Rechtsvergleich und Regelungsperspektive. In: Recht der Arbeit, No. 4, pp. 236-253.

Reinecke, Gerhard (2016): Rechtsprechung des BAG zum Arbeitnehmerstatus – Eine kritische Bestandsaufnahme. In: Neue Zeitschrift für Arbeitsrecht – Rechtsprechungs-Report Arbeitsrecht, No. 8, pp. 393-400.

Reinfelder, Waldemar (2016): Arbeitnehmer – Gesellschafter – Geschäftsführer. In: Recht der Arbeit, No. 2, pp. 87-97.

Reiserer, Kerstin (2016): Arbeitnehmerschutz für Geschäftsführer? – EuGH und BAG leisten Schützenhilfe, in Betriebs-Berater, No. 19, pp. 1141-1145.

Richardi, Reinhard (2009): § 23 Arbeitnehmerbegriff. In: Richardi, Reinhard; OTFRIED, WLOTZKE (eds.), Münchner Handbuch zum Arbeitsrecht, Vol. 1 Individualarbeitsrecht, 3rd ed., C. H. Beck, Munich.

Risak, Martin; Lutz, Doris (eds.) (2017): Arbeit in der Gig Economy - Rechtsfragen neuer Arbeitsformen in der Crowd und Cloud, 1st. ed., ÖGB Verlag, Vienna.

Röper, Nils (2016): Airbnbs Häuserkampf im Verborgenen. In: Frankfurt Allgemeine Zeitung, No. 273, November 22, 2016, p. 25.

Rützel, Michael (2005): Lohnsteuerpflicht und Versicherungspflicht für Beschäftigte und Selbstständige, Kranken-, Pflege-, Renten und Arbeitslosenversicherung. In: Knur, Richard; Schlather, Christine (eds.), Lohnsteuer und Sozialversicherung, Beck'sches Personalhandbuch, Vol. II, Ch. II, C.H. Beck, Munich.

Schulze Buschoff, Karin (2014): Teilhabe atypisch Beschäftigter: Rechte und Chancen, Presentation at the SAMF-Jahrestagung 2014 on February 20/21, 2014 at the Hochschule für Wirtschaft und Recht, Berlin (www.wsi.de; downloaded November 29, 2016).

Schwab, Brent (2016): Haftung im Arbeitsverhältnis – 1. Teil: Die Haftung des Arbeitnehmers. In: Neue Zeitschrift für Arbeitsrecht – Rechtsprechungs-Report Arbeitsrecht, No. 4, pp. 173-179.

Supiot, Alain et al. (1999): Au-delà de l'emploi. Transformations du travail et devenir du droit du travail en Europe, Flammarion, Paris. English trans. (2001): Beyond Employment. Changes in Work and the Future of Labor Law in Europe, Oxford University Press, Oxford.

Sutschet, Holger (2016): Neuere Tendenzen zur personellen Reichweite des Arbeitnehmerschutzes im englischen Arbeitsrecht. In: Europäische Zeitschrift für Arbeitsrecht, No 2, pp. 171-183.

Teklé, Tzehainesh (ed.) (2010): Labour Law and Worker Protection in Developing Countries, Oxford etc.: Hart Publishing/Geneva: ILO.

Thüsing, Gregor (2016): Digitalisierung der Arbeitswelt – Impulse zur rechtlichen Bewältigung der Herausforderungen gewandelter Arbeitsformen. In: Soziales Recht, No. 3, pp. 87-108.
Tillmans, Kerstin (2015): Arbeitnehmereigenschaft und Statuswechsel. In: Recht der Arbeit, No. 3, pp. 285-288.
Uffmann, Katharina (2016): Digitalisierung der Arbeitswelt – Wie gestalten wir die notwendigen Veränderungen? In: Neue Zeitschrift für Arbeitsrecht, 16/2016, pp. 977-984.
Veneziani, Bruno (2014), "Formation, Modification and Termination of Employment Contracts", in: Kahn-Freund, Otto/ Hepple, Bob A. (eds.), International Encyclopedia of Comparative Law, vol. 15: Labour Law, Tübingen: Mohr Siebeck, pp 1–91.
Waas, Bernd, and V. Voss, Guus Herma (eds.) (2017): Restatement of Labour Law in Europe, Vol I: The Concept of Employee, London et al.: Hart Publ.
Wank, Rolf (1988): Arbeitnehmer und Selbständige (Habilitationsschrift, Vol. 2), C. H. Beck, Munich.
Wank, Rolf (2016): Die personelle Reichweite des Arbeitnehmerschutzes aus rechtsdogmatischer und rechtspolitischer Perspektive. In: Europäische Zeitschrift für Arbeitsrecht, No. 2, pp. 143-171.
Walser, Manfred (2016): Homeoffice in den Niederlanden. In: Arbeit und Recht, No. 8-9, pp. 338-341.
Ziegler, Katharina (2011): Arbeitnehmerbegriffe im Europäischen Arbeitsrecht, Dissertation, 1st ed., Nomos Verlag, Baden-Baden.

Official Texts:
(Judgments, Statutes or Guidelines)

BMAS – Federal Ministry of Labour and Social Affairs (2015): Grünbuch Arbeit 4.0, Berlin.
BMAS – Federal Ministry of Labour and Social Affairs (2016): Entwurf eines Gesetzes zur Änderung des Arbeitnehmerüberlassungsgesetzes und anderer Gesetze, https://www.bmas.de/SharedDocs/Downloads/DE/PDFSchwerpunkte/referententwurfarbeitnehmerueberlassungsgesetz.pdf?__blob=publicationFile&v=1 (downloaded November 29, 2016).
BMAS – Federal Ministry of Labour and Social Affairs (2016a): Weissbuch Arbeiten 4.0. Diskussionsentwurf (November 2016), Berlin.

EuGH – European Court of Justice (2010): Judgment of the Court of November 11, 2010 – Rs. C-232-09 – Danosa. In: Europäische Zeitschrift für Wirtschaftsrecht (2011), 74.
EuGH – European Court of Justice (2015a): Judgment of the Court of July 9, 2015 – Rs. C-229/14 – Balkaya. In: Neue juristische Wochenschrift (2015), 2481.
EuGH – European Court of Justice (2015b): Judgment of the Court of September 10, 2015 – Rs. C-266/14 – "Federación de Servicios Privados del sindicato Comisiones obreras". In: Neue juristische Wochenschrift (2016), 145.
République française (2012): Décret n° 2012-627 du 2 mai 2012 relatif à l'accueil des apprentis dans plusieurs entreprises. In: Journal Officiel n°0105 du 4 mai 2012, page 7907, texte n° 42, https://www.legifrance.gouv.fr/eli/decret/2012/5/2/ETSD1207018D/jo/texte Alias: https://www.legifrance.gouv.fr/eli/decret/2012/5/2/2012-627/jo/texte.
République française (2016): Loi n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels. In: Légifrance.bouv.fr, October 13, 2016.
Superior Court of California (2016): Uber Technologies vs. Barbara Berwick (Case No. CGC-15-546378).
Supreme Court of the United States (1947): United States vs. Silk, opinion June 16, 1947: Supreme Court on Employee vs independent contractors tax status: 331 U.S. 704; 67 S. Ct. 1463; 91 L.Ed. 1757 (1947).
United States Department of Labor, Wage and Hours Division (WHD) (2015a): The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors. Administrator's Interpretation No. 2015-1; http://www.dol/whd/workers/misclassification/ (downloaded November 9, 2016).
United States Department of Labor, Wage and Hours Division (WHD) (2015b): Misclassification of Employees as Independent Contractors. https://www.dol.gov/whd/workers/misclassification/ (downloaded November 9, 2016).

This paper aims to adopt the perspective of employers, trade unions and society at large in examining ways in which the status of "employee" might change in a service and knowledge society. The traditional concept of the "employee" is rooted in the capitalist industrial society—and this type of society, owing to the forces of globalisation and digitalisation, is no longer predominant.
The point of departure is a critique of the core criterion of the prevailing concept of the employee: personal dependency. What we need is an up-to-date vision of both employees, within the dynamic nature and growing diversity of work in the digital age, and social protection not based on employment, but for workers as citizens.

ISSN 2509-2359