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Trabajadores independientes dependientes en la Administración Pública. El caso de los Contratos de Locación de Servicio en Argentina (1995-2007)

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Resumen

Este artículo explora las implicaciones de la categoría "trabajador independiente dependiente" a través del análisis de un caso particular: los trabajadores autónomos que se incorporan a la Administración Pública Nacional, entre 1995 y 2008, con la firma de un Contrato de Locación de Servicios.

La categoría "trabajador independiente dependiente" denota la situación de trabajadores formalmente inscriptos como trabajadores independientes, pero que dependen económicamente de un dador de trabajo principal. Esa posición, producto de la conjunción de independencia jurídica y dependencia económica, se caracteriza por la inseguridad laboral y un acceso limitado a la seguridad social. El objetivo de este trabajo es analizar, a través del estudio de la reglamentación, la manera en la que esta categoría problemática es definida y redefinida a lo largo del período 1995-2008.

Dependent Self-Employed Workers in Public Administration

The Case of Lease-of-Service Contracts in Argentina (1995-2007) *

The last twenty years have seen an increase in the participation of independent workers in most national labour markets. Many of these own-account workers can be considered "dependent self-employed workers" (ILO, 2003; EIRO, 2002; OECD, 2000). They are formally self-employed; however, since they depend economically on a contractor, their working conditions are similar to those of wage employees (Supiot, 1999). These workers do not have an employment contract, but rather supply labour to their employer via a private or commercial contract. Because this hybrid category of dependent self-employment has characteristics of both wage employment and self-employment, problems inherent to workers in this category are limited job security and restricted access to the social security system.

During the 1990s, this "new" labour status gave rise to an interesting debate. Many international organisations, such as ILO, OECD or EU, as well as academics in various countries, have tried to define the specificity of this form of participation in the labour market (Muehlberg & Bertolini, 2007; Muehlberger, 2009; Robson, 2003; Buschoff & Schmidt, 2009; Román, Congregado & Millán, 2009). The first hurdle in this debate was to clarify the distinction between dependent self-employment and "bogus self-employment" (EIRO, 2002; ILO, 2003). In most countries, the self-employment status seems to be used to reduce the cost of labour and to avoid making social security contributions and severance payments. In the search for increased numerical flexibility and competitiveness, employers have pushed this status of "self-employed" to the edge of illegality. Disguised forms of wage employment have

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long existed, but the end of the twentieth century witnessed a new phenomenon: the emergence and establishment of dependent self-employment as a legalised status.

This paper focuses on an analysis of a particular case: that of self-employed persons working in national public administration in Argentina. In 1995, for the first time there, self-employed workers were allowed to lease services to the state as individual workers. A self-employed person was considered a one-person business. When this new regulation for temporary public workers was created, it was applied to very few government areas, and it was primarily aimed at the hiring of professionals as part-time consultants. In 2001, as a result of the state financial crises, this employment regulation was extended to all national public administration. Despite the original intent of this regulation, it came to be used to contract self-employed workers for administrative or maintenance work, as full-time workers. These workers represented 64% of all self-employed workers hired by public administration in 2002 (ONEP, 2003). As a consequence of this over-intensive use of this employment regulation, these workers found themselves in labour relationships characterized by ambiguous labour conditions and reduced social protection. The primary aim of this research is to analyze the development of rules governing the participation of independent workers in a particular labour market: the Argentinean public-sector labour market. We argue here that the application of various regulations for self-employed workers, however unintentionally, has allowed dependent self-employment to become a legal, legitimate, and common status in public administration in Argentina.

The research behind this paper was conducted in two strands. First, we examined the legislation under which self-employed workers participated in the Argentinean labour market, especially the public-sector labour market. We analysed all laws and presidential decrees related to the use of lease-of-service contracts from 1995 to 2007. Second, we analyzed the implementation of this legislation by using statistical data produced by ONEP (*Oficina*

Nacional del Empleo Público). Since these data refer to the way the state functions, they are sensitive, and we cannot have full access to them. The data used here are also incomplete for other reasons: they cover only a few government areas, and for only a short period of time (from 2002 to 2007). This first reason is due to the fact that, even though all government areas were obliged to inform ONEP about the evolution of the employment situation, few areas did so. And of course, the second reason prevents us from analysing what happened before 2002. Available data do allow us, however, to perform a helpful analysis of the use of temporary contracts in public administration.

The paper proceeds as follows: the first section analyses, from a historical perspective, the two laws which regulated the participation of self-employed workers in Argentina's labour market. The second section analyses the structure of lease-of-service contracts and their use in public administration. The third section discusses corrective regulation created by the state to limit the over-extensive use of lease-of-service contracts. The fourth section presents some conclusions.

Becoming a Self-Employed Worker in Argentina

In 1955, during the Juan Domingo Perón Administration, as a part of a policy of extending social security, the self-employment status was created in order to allow independent workers to participate in the social security system[1] and especially to give own-account workers the right to a retirement pension. The only judicial criterion used to define self-employment was the absence of subordination. However, economic independence was also considered crucial for the integration of own-account workers into the labour market. The result was the creation of a credit system which helped professional self-employed workers

[1] Law 14.397, published in the Official Bulletin on 01/21/1955.

get started. Nevertheless, the scope of this system was very restricted, and it lasted for only four years.

The self-employed workers' retirement pension system was structured in the same way as the one for wage employees, and it went through similar changes over time (Schulthess & Lo Vuolo, 1991). However, independent workers' participation in the retirement system has always been more nominal than practical because only a small number of them make regular contributions. The principal reason for this lack of social contributions has been that self-employed workers must pay monthly, even if they do not have work. In 1988, 54.5% of self-employed workers did not make their contributions (Schulthess & Lo Vuolo, 1992: 40), and, by 1998 this had risen to 64.3% (SAFJP, 1999: 9). So self-employed workers have been, from the beginning, members of an unprotected category.

During the 1990s, independent workers increased and changed their participation in the labour market, and as a result, self-employment as a legal category was revised by Congress. Since 1960, rates of both wage employment and self-employment had been stable. Independent workers had always represented a quarter of working people. By 1991, however, this had increased to 30%, meaning that there were 3.7 million independent workers (INDEC, 1991). Most of these worked in very precarious conditions and participated in an informal market without any kind of legal protection.

In 1989, a survey concerning own-account workers shows that half of those interviewed did not pay social security contributions, and only 30% of them said that they had registered their business (MTSS, 1989). The informal situation of self-employed workers became critical due to the fact that for the majority of those interviewed (86.5%) the own-account activity was their principal employment. The majority (75%) worked alone, without employees. It is important to note in terms of our analysis that only 7% of independent

workers had only one employer, meaning that they can be considered dependent self-employed workers.

Thus, at the 1990s, the main problem was the informality of independent workers rather than their economic dependence. For this reason, in 1998, as part of a reform of the tax system, Law 24.977[2] established new legislation to protect self-employed persons working in the informal market by pushing them into the legal labour market. This law simplified the way work activities were registered and the way social security contributions were paid. A single unified tax called *monotributo* was created in order to facilitate the conversion of informal own-account workers into legal independent workers. This tax merged state and income taxes with social security contributions. Additionally, the law reduced the minimum income level necessary to enter this category, so as to allow a greater number of informal independent workers to register their activities. Besides access to the pension system, under this new legislation, for the first time, independent workers could have access to the state health system. Before this law, self-employed people had had to purchase private health insurance or resort to using public hospitals because there was no public health insurance system specially designed for them.

However, in fact, the *monotributo* regulation appears to have been useful only for registering informal workers in the tax system and for formalizing the situations of own-account workers. Since the majority of workers were not able to pay social contributions because their low incomes, this legislation could not achieve its second main goal of extending social security benefits to all self-employed workers.

In 1999, the first year after this legislation was passed, most self-employed workers were registered in the lowest income categories: 39.6% were in the low-income bracket, 32.6% in the medium-income bracket, and 27.8% in the high-income bracket. In 2005, 48.8% were in

[2] Law 24.977, published in the Official Bulletin on 07/06/1998.

this first category, 25.6% in the second, and only 20.5% in the third (Salim & D'Angela, 2006b: 14). So the participation of registered self-employed workers in this lowest earning bracket increased, while that of workers in the other two brackets decreased.

Regarding social contributions, we see that over time only a minority of workers regularly paid into the system. During the first year after de new law, most workers paid their contributions, but then the numbers dropped. By 2000, a half were paying, and by 2002, only a quarter. After that, the number rises again. In 2005, more than half paid their contributions (Salim & D'Angela, 2006a: 12). In spite of this growth of contributions, to date, half of self-employed workers registered as *monotributo* taxpayers do not have access to social security benefits.

So, although the extensive application of *monotributo* legislation has allowed many low-income self-employed workers to become legal, and some of them to have access to social security benefits, it has also allowed many of these workers to become legally dependent self-employed workers. This is what happened to low-income independent workers who became dependent self-employed workers by signing lease-of-service contracts to enter into public administration.

Independent Workers Without Economic Independence

During the hyperinflation crisis of 1989, Argentinean President Carlos Saul Menem determined that it was imperative to create a new system of contractual relationships for national public administration. The stated goal was to introduce "basic principles of entrepreneurial management efficiency"[3] into the regulatory framework that was in effect. At the time, the modernization of public administration meant increased flexibility in labour relationships. Since the current fixed-term contract system appeared not to be flexible enough,

[3] Presidential Decree 1757/90, published in the Official Bulletin on 06/09/1990.

the government decided to begin hiring temporary workers from within the self-employment status. Because the state could not make use of this category in the illegal or nearly illegal way that private companies had been doing, it had to develop a new legal contract for the hiring of self-employed workers for temporary activities. Thus, by 1995, by presidential decree,[4] lease-of-service contracts had been created.

These lease-of-service contracts contain several stipulations. The first is the invariability of the contractual relationship linking public administration and the self-employed worker. The only contractual relationship admitted between the two parties is an independent labour relationship. Neither party can change the nature of this contractual relationship for any reason. The second is that self-employed workers who sign lease-of-service contracts must work alone; they cannot employ someone else to help them with their contractual obligations because they are hired as a one-person business. The third is that a self-employed worker has to make regular payments to the social security system and purchase all necessary insurance because the state will not "assume any responsibility for life insurance, health insurance, labour risk insurance, travel insurance, or any kind of insurance which might be necessary or convenient for the achievement of the present contract."[5] The fourth is that a self-employed worker is the only responsible party for any claims related to contractual activities coming from a third party. If a third party claim goes to court, the self-employed worker has to pay all court costs and any resulting payments. The last stipulation is that a self-employed worker who signs a lease-of-service contract has to follow his superior's orders. The lease-of-service contract includes a clause which strictly forbids taking orders from a third party. These five stipulations that define the self-employed worker labour relationship with the state show us that this labour relationship has ambiguous traits. The obligation to pay social security

[4] Presidential Decree 93/95, published in the Official Bulletin on 01/24/1995.
[5] Presidential Decree 92/95, clause 2.

contributions is clearly present as is the responsibility to assume entrepreneurial risk. Yet, surprisingly, the obligation to work in some subordinate way is also included.

The duration of the lease-of-service contract is set forth in writing, and the terms of the contract cannot be changed or extended under any circumstances, even if the self-employed worker continues working when the contract expires in order to fulfil contractual obligations. If the two parties decide to continue their labour relationship, they must sign another fixed-term contract.

The labour relationship established by such a lease-of-service contract is very fragile because either party can break it at any time, for any reason. Moreover, if the state decides to break off the labour relationship, it has no obligation to make severance payments. Yet, according to the goals of this new public employment regulation, the fragility of the labour relationship is not problematic because the system was created with the sole intention of hiring qualified self-employed workers as part-time consultants. It is supposed that independent workers who sign a lease-of-service contract with the state have other employment, at least part-time. They do not depend solely on their independent activity in public administration.

However, since there are no restrictions on the types of services that can be hired out this way, many self-employed workers enter into national public administration as full-time workers by using lease-of-service contracts. Most of these are not hired to work as part-time consultants, but are rather assigned administrative duties as full-time workers. Those hired as part-time consultants represented a minority of lease-of-service contractors: 14% of all contractual independent workers in public administration, in 2002 (ONEP, 2003). By contrast, self-employed workers hired to perform administrative duties represented 64%. Only half of these had the level of education required to perform these activities: 54.4% had finished secondary school. More than a quarter of them (27.4%) hired to do administrative work had a

university degree. As for their income level, half of them were registered in the lowest bracket of the *monotributo* system. The other half was registered in the second lowest income bracket (ONEP, 2005). Empirical data show that until 2002, most self-employed people working in public administration as lease-of-service contractors, and registered in the two lowest income brackets, were in a dependent self-employment relationship because the state was their principal (or their only) employer.

In 2002, the state recognized that dependent self-employed workers were in a precarious labour situation due to their low income, and established a new regulation to limit the use of this status in public administration. This law, named "framework of regulation for public employment," [6] instituted in its article 9 a new contractual system for fixed-term employment contracts. From that moment, the state has the obligation to change the status of some dependent self-employed persons working in public administration: they became wage employees.

Protecting the Weakest Workers from Economic Dependence

This new framework of fixed-term contract rules that appeared in 2002 is still in use today. This new legislation was intended to limit the over-extensive use of lease-of-service contracts by creating other flexible contractual forms, such as fixed-term contracts for wage employees. According to this new pattern of employment regulation, wage employees hired using fixed-term contracts are more protected than self-employed workers hired under lease-of-service contracts, but less protected than wage employees hired as permanent workers. This is because dismissal procedures have been simplified: the state needs not justify contract interruption or make severance payments if a contract is interrupted.

[6] Law 25.164, published in the Official Bulletin on 10/08/1999.

Even though this 2002 legislation promoted the use of these new fixed-term contracts, only few dependent self-employed workers changed their status before 2005. The legislation was not robust enough to produce a change in hiring practices, and stronger measures became necessary. So in 2005, during the Nestor Kirchner's administration, a new presidential decree[7] established the obligation of a change of status for some kinds of lease-of-service contractors. The hiring of administrative workers as self-employed workers under lease-of-service contracts was no longer allowed: all independent workers who did administrative work had to change their status and become wage employees. Also, according to this new legislation, all lease-of-service contractors earning less than $1,512 monthly for full-time work—that is, falling within the second income bracket of the *monotributo* system (at that time)—had to sign a new contract with the state as fixed-term wage employees.

With this new presidential decree, the state attempted to minimize the negative consequences of the prior extensive (or even excessive) use of lease-of-service contracts in public administration. The state determined that these outsourced workers were in a very precarious situation because their low income did not allow them to manage the risks inherent in the dependent self-employment status. Low income became the factor that explained the precarious position of dependent self-employed workers in the labour market.

Data show that after 2005, most administrative workers who had signed lease-of-service contracts changed their status, becoming fixed-term wage employees. During 2005, the number of lease-of-service contractors was reduced to about half, and the number of fixed-term workers tripled: lease-of-service contractors numbered 12,987 in January of that year, and 8,016 in December, whereas fixed-term workers numbered 1,857 in January and 6,505 in December. The difference between the numbers of people working under the two types of contract has grown over the years. In 2006, lease-of-service contractors numbered 5,299 and

[7] Presidential Decree 707/05, published in the Official Bulletin on 06/23/2005.

fixed-term workers 16,666, and in 2007, the former numbered 4,485 and the latter 19,480. And so we see that, over time, the number of lease-of-service contractors in national public administration decreased by one third and the number of fixed-term workers doubled.

Staff hired under the two types of contract have shown different social profiles. Fixed-term workers have tended to be younger than lease-of-service contractors. In 2007, people under 34 represented 53.8% of fixed-term workers and 30% of self-employed workers. Before the creation of the transitory worker category, most young people had entered public administration under lease-of-service contracts, seeing them as a great opportunity for a start in the labour market (Poblete, 2006). However, since 2005, most young people have been hired under fixed-term rather than lease-of-service contracts. Middle-aged workers (35-54 years old) have been more numerous in the self-employed workers' group, in which they represent 49.8%, as opposed to 37.4% in the fixed-term group. A similar situation exists for people in the 55-64 age group, who represented 15.7% of all self-employed workers, but only 7.8% of all fixed-term workers. People over 65 have been a minority in both groups, representing less than 5% (ONEP, 2008 a/b).

Looking at educational levels, data show that from 2005 to 2007 workers with university degrees increased their participation in both types of contract used by national public administration. They accounted for the majority of lease-of-service contractors: 46.2% in 2005, 78.5% in 2006, and 83.2% in 2007, much as had been the intent when the legislation was passed. Yet, they also increased their participation in administrative activities, representing 24.7% of all fixed-term workers in 2005, 27.8% in 2006, and 30.4% in 2007. Workers with a secondary school education reduced their participation in both groups. Among self-employed persons, they represented 37.5% in 2005, 13.5% in 2006, and 9.9% in 2007. During this period, people with an elementary school education represented less than 10% in both groups, as did people with a technical education. So we see that the state has

hired workers with higher levels of education, even for administrative duties. In 2008, 40% of fixed-term workers had a university or technical education. This means that a large number of these administrative workers have been overqualified for their jobs (ONEP, 2005 a/b, 2006 a/b, 2007 a/b).

Even though both types of contract are for fixed-terms, with no right to severance payments in the case of contract interruption, they do not provide equal security in terms of job stability (Poblete, 2010). In terms of the duration of the contract, fixed-term contracts bring more stability than do lease-of-service contracts. According to data provide by ONEP, from 2006 to 2007, the number of one-year lease-of-service contracts grew slightly, from 61% to 62.3%. The number of contracts for six-months or shorter also grew, but more sharply than the number of one-year contracts: from 26% of all lease-of-service contracts in 2006 to 29% in 2007. This growth of six-month-or-shorter contracts can be explained by the increase in the number of contracts with a duration of less than three months. These doubled from 2006 to 2007, from 4.1% to 10.5% of all lease-of-service contracts (ONEP, 2007 a/b, 2008 a/b). As for durations of fixed-term contracts, one-year contracts represented 81.3% in 2006 and 78.8% in 2007. This drop in the number of one-year contracts can be explained by the fact that the number of contracts with durations of six months to one year doubled: representing 6.5% in 2006 and 12.5% in 2007. Contracts of six-months or less represented 12.3% of fixed-term contracts in 2006, and only 9% in 2007. So we see an opposite tendency in the two types of contract during this period. Lease-of-service contracts have tended to have durations shorter than six months, while fixed-term contracts have tended to have longer durations: those lasting from six months to one year comprised 87.8% of all transitory contracts in 2006, and 91.3% in 2007 (ONEP, 2007 a/b, 2008 a/b).

For low-income self-employed workers, the obligation to change status to wage employees seems positive because it brings various kinds of protection. Even if they sign a

fixed-term contract for no longer than a year, which might or might not be extended for another year, they have access to all social security benefits: health insurance, a retirement pension, family allowances, and unemployment benefits. Also, the change of status exempts them from the entrepreneurial risk associated with independent activities. Thus, the new employment regulation has been partially successful in correcting the over-intensive use of lease-of-service contracts in public administration by changing the status of workers with the lowest income. However, most self-employed workers who have the state as their principal or only contractor, and whose income is slightly higher than the established limit, remain in a precarious labour condition because of their economic dependence on the state. This means that they have to assume entrepreneurial risk and have no guarantee of access to the social security system since they cannot regularly pay their social security contributions.

Conclusion: Economic Dependence and Low Income

The analysis of the evolution of self-employment regulation in public administration in Argentina brings up questions similar to those that were presented at the time of the creation of the self-employment status in 1955: is it necessary to have capital to perform activities as a self-employed worker? Is there a minimum capital needed in order to be able to assume the entrepreneurial risk and to make regular contributions to the social security system?

In 1955, Congress gave a vague answer to these questions due to the fact that economic independence was not considered a second criterion for determining self-employment status. However, in the debate over the law that legalized this labour status at that time, three ideal-types of self-employed worker were introduced and distinguished by the activities they performed and the capital they possessed. There were self-employed workers who performed intellectual work and those who did manual work. The first ideal-type of self-employed worker identified by Congress was the entrepreneur. This kind of independent worker was

defined as performing intellectual activities using patrimony as capital. The second ideal-type was the craftsman who did manual work using the results of his/her activities as the capital necessary for continuing in the labour market as a self-employed worker. The third ideal-type was the professional who did intellectual work, but had no capital. Once Congress recognized that a lack of capital was problematic for the performance of independent activities, the law created a specific credit system for professionals. Although this credit system lasted for only four years, its institutionalisation emphasized the importance of capital for the performance of independent activities.

When the *monotributo* system was created in 1998, this idea reappeared, though it became blurred by the addition of two subcategories: domestic self-employed workers and independent farm workers. The *monotributo* system established different income brackets in order to define categories of self-employed workers. These income brackets determined the minimum capital necessary to perform independent activities. Also, the *monotributo* system distinguished self-employed workers who leased services from those who owned small businesses.

From 1998 to 2006, most self-employed workers were in the lowest income bracket. Available data suggest that workers with the lowest income have more difficulty paying taxes and social security contributions. Although specific bracket data is not available, we observe that despite the increase in the number of workers in the lowest income bracket, contributions decreased (Salim & D'Angela, 2006a: 12). Nevertheless, for the Treasury, nearly $12,000 a year ($1,000 or less monthly) was considered income enough for a self-employed worker to perform independent activities.

However, in 2005, the state decided that the status of full-time, low-income, self-employed workers in public administration had to change. Here, the question about whether minimum capital is needed in order to function as an independent worker is answered

affirmatively. The state fixed a minimum income considered to be necessary to sustain an independent activity or more exactly an dependent independent activity. As a result, all those earning less than $1,512 a month had to sign new contracts as fixed-term wage-employed workers. The line dividing those capable of performing an independent activity from those who did not earn enough to do so, was fixed at $2,264 a month in 2006[8] and increased to $3,041 in 2008[9]. However, even though these monthly earnings almost tripled the legal minimum income, they were still considered insufficient to allow dependent self-employed workers to assume the risks of their independent activity. Thus, in order to reduce the precarious situation produced by over-intensive use of the self-employment status in public administration, many independent workers became wage employees. But, this political decision—which recognizes low income as a factor that hinders the performance of self-employed workers—does not address the more important problem of economic dependence that characterizes dependent self-employed workers.

Economic dependence is not a matter of low income, although low income is indeed a useful factor for establishing a minimum below which economic dependence seems to become unmanageable for self-employed workers. The analysis of the case of lease-of-service contractors in Argentina underlines the fundamental contradiction inherent in the dependent self-employment status. The combination of formal independence—being registered as a self-employed worker—and the economic dependence on one contractor cannot produce a consistent labour status. These characteristics have resulted in an ambiguous labour status under which the independent worker must absorb all risks related to the labour relationship. This status allows employers (who become "contractors") to transfer the "employment risk" and the "social risk" to independent workers (Morin, 1999). The first of these risks has to do with factors of termination of service and sporadic earnings. The second has to do with the

[8] Presidential Decree 2031/06, published in the Official Bulletin on 01/24/2007.
[9] Presidential decree 480/08, published in the Official Bulletin on 03/28/2008.

incapacity to generate income because of illness, aging, or other reasons. In a situation of economic dependence, it is difficult to imagine how self-employed workers can manage these risks. Under given conditions, independent workers usually find themselves in a very vulnerable position. Thus, the legalisation of this hybrid status produced the institutionalisation of various kinds of precarious labour situations. Also, since the dependent self-employment status has become legal, it has been socially legitimized, and not considered as problematic enough to be at the core of the public or academic debate about new kinds of precarious jobs.

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