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Subordination in Employment Relationship

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ABSTRACT

This article seeks to highlight the various meanings of subordination in the employer-employee relationship. It does so by looking at the moral, legal, and jurisprudential basis. The latest ruling handed down by the Arbitration Council seems to have followed a certain pattern which would likely become a reliable source for statutory interpretation. Placing the subordination matter in a comparative context, the article concludes that there is space for more theoretical applications.

Keywords: subordination, theory, jurisprudence.

SUBORDINATION IN A MORAL MEANING

A quick definition offered by an online dictionary defines the adjective "subordinate" as being "subject to the authority or control of another." [2] Interpreted in this way, every individual would be subordinate to someone in one way or another. Authority and Control are two very necessary tools if a society is to maintain an orderly life for its members. From a psychological study viewpoint, Kohlberg famously explained six sequences of the so-called "moral development" which an individual would go through: [3]

Stage 1: Obedience and punishment
Stage 2: Reciprocity
Stage 3: Interpersonal conformity
Stage 4: Law and order
Stage 5: The social contract
Stage 6: Universal ethical principles

While the very first stage posits that an individual obeys another individual only out of fear for punishment, the reciprocity stage shows that the motivation for an individual to take actions flows from one's self-interest in receiving rewards within a give-and-take setting with another, reciprocally. When an employee enters into an employment relationship with an employer, it is unmistakably understood that the employee's main purpose is to receive payment for the work. There is a reciprocal relationship in which one person works and another one pays. But the employee, in obeying the employer's orders, would need to perform the work in a certain manner or risks being disciplined in accordance with internal policy and regulations. It seems, therefore, that subordination at the work place has its roots firmly established in the moral development theory.

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[2] http://www.thefreedictionary.com/subordination (accessed on 02 June 2016)
[3] Lawrence Kohlberg, "Moral Stages and Moralization: The Cognitive-Developmental Approach" in T. Lickona, ed., *Moral Development and Behavior: Theory, Research, and Social Issues*. New York: Holt, Rinehart and Winston, 1976.

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On the other hand, and this time from a social power point of view, Kohlberg's Stage 1 and Stage 2 may also relate to a theory of power developed by French and Raven. These two researchers identified five forms of power, namely, legitimate power, reward power, coercive power, referent power, and expert power.[4] The Legitimate Power is attached to the formal authority or formal position that a person holds, whereas the holder of a Reward Power normally earns obedience because others want to receive rewards the power holder can offer. If we follow this line of reasoning, the subordination by an inferior to a superior could stem as much from the superior's formal or legitimate position being the boss as it could from the desire of the inferior to receive a certain reward such as a year-end bonus following a good performance appraisal. Apart from its moral grounding, subordination arguably is also derived from social power theory.

SUBORDINATION IN A LEGAL MEANING

Although moral development and social power theories can describe subordination at a relative ease, it is not the same when it comes to the legal characterization of it. In Cambodian law, a contract is formed when there is an acceptance of an offer, both matching each other. In defining the employment contract, the Civil Code in its article 664 declares that "an employment contract is formed when one party promises to perform work for another party and the latter promises to pay for the work." Without a doubt, this is an ambitious and vague definition. The Labor Law adopts a narrower definition. Thus, in its article 2, article 3 and article 65, it explains that an employment contract creates an "employment relationship" between an employee and an employer, which may be created in any form agreed upon by both parties. It famously requires that the employee be under the "supervision and direction" of the employer.[5] Legally speaking, subordination would then revolve around these two elements: supervision and direction. But the law does not provide more detail as to what each of these elements actually means.

Without a clear guidance from the law on the meaning of supervision and direction, one could have a temptation to associate the legal authority to supervise and direct with Kohlberg's Stage One of Obedience and Punishment or with French and Raven's Legitimate Power because failure on the employee's side to comply with the employer's directions may result in a disciplinary action. But this temptation tends to be rather simplistic. Indeed, the difficulty in defining subordination in the law in clear terms or the lack of a definition altogether is not typically surprising. In France, for instance, the *Code du Travail* does not even give a definition of what constitutes a *contrat du travail*. French jurists have to rely on a list of several elements that their jurisprudence has devised over the years in order to determine whether an employment relationship exists in a given situation.[6]

[4] John R.P. French and Bertram Raven, "The Bases of Social Power" in D. Cartwright, ed., *Group Dynamics: Research and Theory.* Illinois: Row, Peterson, 1962.
[5] Note that purely personal relationship that may exist between an employee and the employer outside of work is not an employment relationship. For example, when an employee borrows money from his employer for a personal purpose, this relationship is governed by the Civil Code, not the Labor Law.
[6] See Alain Supiot, *Le Droit du Travail*. Paris: Press Universitaire de France, 5e edition, 2011. (Que sais-je?)

SUBORDINATION IN A JURISPRUDENTIAL MEANING

In a common law tradition, judges shall give effect to the meanings adopted in similar previous cases tried by judges of higher courts. In handling labor disputes, the Arbitration Council in Cambodia has consistently applied this common law tradition by abiding with its previous interpretations of a particular provision or on a particular issue. It is very common to see in arbitral awards a phrase such as this one: “The arbitration council in the present case also agrees with the interpretations given by previous arbitration council concerning…”

Evidently, in its very recent arbitral award 079/16 dated 27 May 2016, the Arbitration Council has attempted to clarify what is meant by the power of the employer to manage employees or, more precisely, to what extent are employees subordinate to the employer’s decisions. In this case, an employee was told that he was being transferred to another province. Unhappy, he sued the company. The issue at hands was whether the company would need the employee’s prerequisite agreement before the transfer to another province could happen. The company rightly asserted that the clause on such potential transfer in case of necessity was written in the employment contract to which the said-employee voluntarily agreed. Ultimately, the Arbitration Council ruled against the general need for a prerequisite agreement but maintained that the employer may not assume that the employee had agreed to such geographical transfer clause unless the scope of such transfer was clearly defined and reasonable. The Arbitration Council, therefore, ordered the employer to further discuss the matter with the concerned employee.

This arbitral award is jurisprudentially significant in two regards.

First, it declares that the scope of power an employer has over an employee is not automatic. For there to be an enforceable subordination, the exercise of managerial right which would substantially affect the employee’s livelihood must be clearly understood and clearly defined. In this 079/16 Award, the Arbitration Council explained in these terms:

> In this case, the Arbitration Council has noticed that there is such transfer clause in case of necessity. However, the Arbitration Council believes that the clause was not written in clear terms to define the degree or scope of the right of the employer to transfer employees to another workplace. Moreover, this clause also cannot confirm the employee’s true agreement to a transfer to wherever. (Arbitral Award, p. 24)

Secondly, in addressing the meaning of supervision and direction (Article 2 of the Labor Law), the Arbitration Council has reiterated its established jurisprudence which recognizes that the right to manage staffers does indeed fall under the meaning of supervision and direction. But, equally important, the Arbitration Council also reaffirms the scope of this right to manage and limits its exercise to legal and *reasonable* grounds. The principle of reasonableness has thus once again been recognized when dealing with a geographical transfer:

> Moreover, in our previous cases 17/03, 18/03, and 84/08, the Arbitration Council has interpreted that the right to manage includes the right to make transfers but with several conditions: (1) no pay reduction, (2) no transfer to a very distant

> location (3) no change to work shift from day to night or from night to day, and (4) no significant change to skills. (p. 25)

In a zealous demonstration of its jurisprudence, the Arbitration Council cited a separate but similar case involving a transfer of an employee from one province to another in which the Arbitration Council struck down the exercise of the right to manage as being unreasonable although the employer had agreed to cover the rent of the new home:

> The change of workplace […] from Kampot province to Phnom Penh is unreasonable because it involves a great distance from where he lives in Kampot […] despite the fact that the company covers the rent for the new place. The Arbitration Council believes that the change has violated the second condition of the abovementioned four conditions because this change involves a great distance […]. (p. 25-6)

SUBORDINATION FROM A COMPARATIVE VIEW

The French jurisprudence[7] has used the term juridical subordination (*subordination juridique*) since the famous decision *Bardou* in 1931 which characterized an employment contract on the basis of the employee's personal submission to orders and directives of the employer. But the law has evolved, and it is now more appropriate to speak of functional subordination (*subordination fonctionnelle*) as a matter of being integrated in an organization. Over the years, the French jurisprudence has developed a technique to discern several objective indications or signs of the existence of subordination. This technique lists, among others, the following signs, none of which is necessarily self-sufficient:

- Imposition on the time and place to perform work
- Respect for procedures
- Obligation to report
- Modality of remuneration
- Provision of tools to perform work
- Exclusivity clause or non-competition clause

All of the above signs reinforce the idea of being integrated into an organized service, which, according to a quite recent case law in 1996, was only a sign of subordination and that the actual subordination remained "characterized by the execution of a contract under the authority of an employer who has the power to give orders and directives, to control the execution and to sanction any breaches committed by the subordinate." [8] Put differently, the subordination of an employee occurs within three domains of power held by the employer: power to direct, power to regulate, and power to discipline.[9]

[7] This section heavily relies on Alain Supiot, *ibid*.
[8] Cour de cassation (Soc., 16 Nov. 1996, *Société générale*), in Alain Supiot, *ibid* at 72.
[9] *ibid*, at 76-78.

CONCLUDING REMARKS

Labor Law in Cambodia has rapidly developed into a body of complex regulations and procedures. While it is relatively easy to recognize the existence of an employment contract thanks to the available legal definition of such, disputes will continue to occur with regard to the extent of the power of the employer in supervising and directing the company. Employees do not suddenly lose all of their freedoms the moment they step onto the premises of their workplace. In this regard, the jurisprudence of the Arbitration Council on subordination seems encouraging but much more is needed, particularly in the art of theoretical reasoning. On a positive note, the arbitrators have got used to referring to international instruments adopted by the International Labor Organization to aid them in their statutory interpretation.[10] This is a welcomed approach, and they would do well to also give more considerations to established theories in relevant fields of social science such as those this article has briefly exposed. After all, law and jurisprudence seem to be products of the evolving interpretations of what we believe in, likely as a part of the "social construction." [11]

[10] The arbitrators have occasionally referred to the International Labour Organization's *Termination of Employment Recommendation*, No.166 dated 22 June 1982 regarding the transformation of a fixed duration contract into an unfixed duration contract when the total length—all renewals included— has exceeded two years. See, for example, The Arbitration Council's arbitral award 096/16 dated 26 May 2016, p. 33.

[11] For details on "social construction", see the classical work by Peter Berger and Thomas Luckmann, *The Social Construction of Reality: A treatise in the sociology of knowledge*. New York: Doubleday, Anchor Books, 1966.