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ARTICLES

Work and “platform economy”

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The “on-demand economy” is the latest wave in the new economy. Rental platforms, craft platforms or financing platforms and gig platforms are developing at a fast rate across the globe. Who hasn’t heard of or used Airbnb for lodging, BlaBlaCar to share a trip or Deliveroo to order take out from a restaurant? The so-called “*platform economy*” is structured on websites or apps whose goal is to offer direct contact between clients and service providers. It is a connection in which everyone wins, new services and consumers are born into the economic world market.

This business model has been installed in traditional activity sectors that are solidly consolidated (transport, cleaning, delivery, etc.) but it has radically transformed their activity means and methods. Technical development allows for a more fluid and clear connection through automated payment methods, the traceability of all service provision phases, and, ultimately, the pricing of services based on demand peaks. But this set of transformations has had a deep impact on the way in which services are provided. The traditional forms and concepts that have sustained the idea of work are being questioned. Various factors have led to this result.

Computerized platforms base their actions on algorithms and, through these algorithms, activities are assigned to professionals included within the platform. Perfect planning is used to offer more efficient assignation. In other words, the computer system carries out the allocation of tasks by assigning the service to those professionals who, at any given time, meet- the particular professional and geographic requirements that are the most adapted to the client’s needs. In short, the manager is in fact, an algorithm.

A second differentiating factor in the activity of these platforms is the transparency of their operations, given that all of the information related to each transaction is registered. This ensures the visibility of the economic and productive activity and the improvement of the collection and administrative control processes for tax and social security purposes. This opinion is shared by the European Parliament who, in its report, *The Situation of Workers in The Collaborative Economy* highlights that “Information exchange with platforms allows them to determine the earnings of their workers, which then leads to the improvement of tax declaration”.

Another feature that may be added to this previous one is that of the traceability of operations. This generates a high level of reliance amongst service providers and the recipients of said services. The verification of identities and the reputation and assessment of systems contributes to this. The collective reputation of the company with the control of its employees’ behavior results in the individual reputation.

A third feature characterizing the service provision of these platforms is the fully voluntary nature regarding the time and place of the service provision. The platform presents the delivery service and the providers compete to accept this service. The decision to offer the service depends exclusively on the service provider. There are no exclusive jobs. These activities are meant to offer service provision for a plurality of companies, even within the very activity sector.

Finally, the work is carried out through "micro-tasks", given that in these provisions, time is quite limited, and therefore, micro-payments are offered, ultimately leading to the creation of *microworkers*. This situation has been highly criticized with Robert Reich calling it the "economy of the delivery of remains". Job insecurity adopts new forms while, in some cases, the time of the service provision may lead to high economic compensations. In any case, this presents a challenge for traditional unionism which must leave its comfort zone and seek responses to these new collective interests.

The debate regarding the employment status of this new form of service provision is a burning issue: Are we heading towards the standardization of the self-employed worker? In the case of Uber, current legal case decisions have clearly ruled its employment status (*O'Connor v. Uber Technologies*, 11 March 2015, United States District Court for the Northern District of California; and the judgment of the Employment Tribunal of London from 26 October 2016, *Aslam v. Uber*), however, in the judgment by the Cour d'Appel of Paris from 20 April 2017, determining the complaint made by a deliverer from the Take Eat Easy platform, the Court concludes that it is not possible to consider the existence of a working relationship. In Spain, the judgment of Commercial Court No. 2 of Madrid on 2 February 2017, while not making a decision on its employment status, did confirm that Blablacar is not a transport company but rather, a "technology company" that carries out its activity as a computer company.

This new reality requires some profound reflection- and, more importantly, a capacity to adapt to change. The reflections offered by Jean Tirole in *Economics for the Common Good* are of special relevance: "It is therefore necessary to summarize the foundations of labor law. We are so used to referring to labor legislation that we have forgotten its fundamental motivation: the worker's well-being. The competitive neutrality between the different forms of organization should be guaranteed, without the need to roll the dice in order to favor the salaried employee or auto-entrepreneur. The one sure thing is that it is necessary to reconsider our legislation and the labor context in a world of rapidly changing technology".

The Status of Uber Drivers: A Purposive Approach

GUY DAVIDOV

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Abstract: The status of Uber drivers – the question of whether they are independent contractors (as argued by Uber) or employees – has been the subject of a heated debate recently. The goal of this paper is to address this question at the normative level: what should the law be in this regard? It begins, in part II, by briefly discussing some preliminary issues about how to address the problem: does it make sense to retain the employee/independent contractor distinction at all? Is it justified to maintain an “all or nothing” dichotomy? Should we leave the determination of “who is an employee” to courts? And finally, how should we interpret the term “employee” that appears in legislation? As will become clear, my approach is purposive, and Part III outlines – based on my previous writings – what this means in the context of identifying an employment relationship that justifies the application of labour laws. I will briefly consider several goals of labour law, and suggest that the most useful level of abstraction for current purposes is to focus on the unique vulnerabilities of employment, which I identify as democratic deficits (subordination, broadly conceived) and dependency (economic as well as for social/psychological needs). Finally, part IV applies these general principles to the specific context of Uber drivers, concluding eventually that Uber drivers should be considered employees.

Keywords: employee, independent contractor, Uber, gig economy, on demand.

I. Introduction

The status of Uber drivers has been the subject of a heated debate recently. This transportation service – which ingeniously connects drivers with customers through an online app – is highly popular especially with residents of big cities, both those (customers) who use it as a cheap and efficient taxicab, and those (drivers) who enjoy the opportunities it creates for extra income. There is little doubt that such a service offers some gains to society. At the same time, it is quite obvious that the use of new technologies cannot be a valid excuse for evading the law. Thus, for example, if a legal system requires taxicab drivers to obtain a license to be able to drive people commercially, and only under certain conditions, it would be

* Elias Lieberman Professor of Labour Law, Hebrew University of Jerusalem. Thanks to professors Jesús R. Mercader Uguina, Francisco Javier Gómez Abelleira and Ana Belén Muñoz Ruiz for the invitation to write this paper for a special issue of the Spanish Labour Law and Employment Relations Journal and to present it at a workshop on the sharing economy in Universidad Carlos III de Madrid. Thanks also to the participants at the workshop for their helpful comments.

silly to allow some people an exception from this law just because the taxicab is called Uber, or because the car is used also for private purposes, or because the service is booked online rather than by phone.

The same is true with regard to the status of drivers – the question of whether they are independent contractors (as argued by Uber) or employees. If the protection of labour law is needed in such cases, the use of new technologies such as an online platform should not matter; it cannot be a valid excuse for evading the law.¹ Nonetheless, the relationship between Uber and its drivers is also based on a somewhat new model of work organization, which raises a valid question as to their status. The goal of this paper is to address this question at the normative level. I will not try to fully describe or assess the current state of the law, but rather ask: what *should* the law be in this regard?

The discussion is also relevant to numerous other companies which, like Uber, connect buyers and sellers of services (or work time) online. Many different names have been proposed to this phenomenon, including the sharing economy, crowdsourcing/crowdworking, the gig economy, platforms and so on. Personally I prefer the term “on-demand” work, at least for current purposes, as it points attention to the most important aspect in terms of work organization.² I will therefore use this term below, without getting into a debate on the most appropriate term. The discussion is relevant to “on-demand” workers in general, but I will rely on the facts relevant to Uber (at least as it operates in the United States and the United Kingdom) so application to other cases might require some modification depending on their own factual details.

It is important not to overstate, and at the same time not to underestimate, the magnitude of the problem. The “on demand” economy may be revolutionary in some respects (Lobel, 2016) but in the current context the challenges it creates are not unlike those we have already been struggling with for many years (Finkin, 2016; De Stefano, 2016). These challenges certainly require discussion, and justify debates regarding the best way to address the new problems, but there is no reason to see them as paradigm-shifting. Moreover, although the “on demand” sector is growing, it is important to remember that it still represents only a small fraction of the labour market (estimated in the United States at 0.5% of all workers as of 2015; see Katz and Krueger, 2016). It is certainly significant and justifies the interest it has generated, but at the same time has to remain in context; for example, we should not change our general understanding of employer-employee relations in light of the experience of 0.5% of the workers, if this might negatively impact the other 99.5%.

The paper proceeds as follows. It begins, in part II, by briefly discussing some preliminary issues about how to address the problem: does it make sense to retain the employee/independent contractor distinction at all? Is it justified to maintain an “all or nothing” dichotomy? Should we leave the determination of “who is an employee” to courts? And finally, how should we interpret the term “employee” that appears in legislation? As will become clear, my approach is purposive, and Part III outlines what this means in the context of identifying an employment relationship that justifies the application of labour laws. I will briefly consider several goals of labour law, and suggest that the most useful level of abstraction for current purposes is to focus on the unique vulnerabilities of employment, which I identify as democratic deficits (subordination, broadly conceived) and dependency (economic as well as for social/psychological needs). Finally, part IV applies these general principles to the specific context of Uber drivers, concluding eventually that Uber drivers should be considered employees.³

The main advantage of a purposive approach is that it avoids technical-legalistic application of tests that could be outdated, instead looking for the ultimate goals behind labour laws – and consequently behind the distinction between “employees” and independent contractors – to decide who should be protected. By the very nature of this approach, then, it is well suited to deal with new forms of work arrangements. I will attempt to show that if a purposive approach is applied, it can address the challenge of “on demand” work arrangements, without the need to invent new solutions.

¹ I use the term labour law in this article in the broad sense, including what North American call employment law and workplace discrimination law.

² For a useful typology and overview of different online platforms see Signes, 2017.

³ Parts I and II are based on my previous writings, which culminated recently in Davidov (2016). Part III and the structure of this paper as a whole are based on a series of three posts that I published on May 2016 in the blog www.onlabor.org. The current version is updated and expanded.

II. Some preliminary questions

Before moving to consider directly whether Uber drivers should be classified as employees, we have to acknowledge some preliminary issues. First, does it make sense to retain the employee/independent contractor distinction at all? Surely the “on demand” economy in itself cannot lead one to suggest otherwise. However, the rise of this new model of work is part of a much larger phenomenon, the shift to “alternative” work arrangements which depart from the traditional model. Although hardly new, this trend continues to grow in magnitude; in the United States, for example, it has recently been estimated that the percentage of workers in alternative arrangements rose from 10.1% in 2005 to 15.8% in 2015 (Katz and Krueger, 2016).⁴ And such alternative arrangements are known for creating hard cases in grey areas between “employee” and “independent contractor”, and sometimes blatant cases of deliberate misclassification. These difficulties have always been an inseparable part of the law, but they have exacerbated over the last three decades together with the proliferation of atypical, non-traditional (and usually precarious) work arrangements.

Given these ongoing difficulties, several scholars have argued that the distinction should be abolished and the protections afforded by labour law extended to independent contractors (and possibly others) as well (See, e.g., Carlson, 2001; Tucker, Fudge and Vosko, 2003). Others have also called for drastically expanding the scope of labour law (see, e.g., Langille, 2011). However, while it may well be justified to redraw the lines, some line-drawing is unavoidable when setting the scope of labour protections (as is often the case in law). Moreover, although by dramatically extending coverage (for example to all those who perform work for others) we can minimize problems of misclassification, such extension would also lead to diluting the standards themselves. If we offer the same level of protection to everyone, we can offer much less than what those workers really in need of protection might need. Imagine, for example, that the plumber or the tax consultant that you hire to help you occasionally will be treated as your employees, with the same rights that full-time employees of a large firm have *vis-à-vis* that firm. It is easy to see how this will lead to lower standards: the expectations that society can have from the hirer of an occasional consultant are much lower than what we can expect from a business regularly employing workers. In short, re-drawing the lines is necessary; avoiding them altogether is problematic.

This leads to a second (and related) issue: should we maintain an “all or nothing” dichotomy? The distinction between employees and independent contractors has been described as a “binary divide” (Freedland and Kountouris, 2011: 104). In recent years it is becoming increasingly clear that such a crude dichotomy is insufficient to deal with the multitude of work arrangements and their nuances. A useful way to explain this is by reference to the spectrum of possibilities between universalism and selectivity (Davidov, 2014). A universal arrangement is one that applies to everyone; a selective arrangement is targeted only at specific groups. There are obvious advantages to a universal approach: most notably, it is much easier for people to know their rights (and for society to enforce them) when all employees or all workers have the same rights. In contrast, by using selective laws we can target a solution to a specific group (for example, a specific sector) that is more suitable for that group, sometimes at a higher or lower level of protection.

Mark Freedland and Nicola Kountouris (2011: 284-9) have argued in favour of a high degree of selectivity: different rights to different (numerous) groups. Some degree of selectivity is surely needed, especially if we want to expand protection to new groups. At the same time, we have to take into account the drawbacks as well. The challenge is to find the right balance between universalism and selectivity. One useful method towards an optimal balance is to add a third (intermediate) group between employees and independent contractors. One additional group should not make it too difficult for people to know their rights. At the same time, it will allow us to bring into the scope of protection workers who share only *some* of the characteristics of employees, and should be covered by some (but not all) labour and employment laws. Indeed, an intermediate group of “dependent contractors” (or some other name) al-

⁴ The authors define alternative work arrangements as including temporary help agency workers, on-call worker, contract workers, and independent contractors or freelancers. This is quite a limiting definition, not including part-time, fixed-term, zero-hours and other arrangements. The point for current purposes is that the overall phenomenon is very significant, and growing.

ready exists in many countries and its acceptance around the world is proliferating (Davidov, Freedland and Kountouris, 2015). When examining the best way to classify Uber drivers, in part IV below, I will therefore assume the possibility of an intermediate category as well.

A third preliminary question is whether we should leave the determination of “employee” status to judges. It is tempting to suggest that the question of “who is an employee” should be resolved with clear-cut answers in legislation or administrative regulations. It is indeed useful to create more determinacy by allowing workers in specific sectors to know their status. There have been some interventions of this kind in the United States with regard to Uber drivers. The city of Seattle has passed an ordinance allowing drivers of Uber and similar platforms to bargain collectively, whether they are otherwise considered employees or not. The ordinance faces legal and other challenges and in the meantime its entry into force has been delayed.⁵ Much more common are interventions in the other direction: some states have enacted legislation classifying Uber drivers as independent contractors, whether decisively (Indiana) or as a rebuttable legal presumption (South Dakota) or by listing several specific indicia that easily lead to this conclusion (Arkansas, Nevada).⁶

However, a proclamation that specific workers will be deemed employees or independent contractors notwithstanding any other result reached by the regular tests, cannot replace the tests themselves. This is an area in which some degree of indeterminacy is necessary. New forms of work appear all the time. If we set in legislation a specific list of criteria for clear-cut determination, it will be easy for employers to work around them and evade the law. To prevent evasion as much as possible and provide solutions for new work arrangements, it is necessary to leave a wide margin of discretion for courts. To be clear, this is not to say anything against regulations that deem groups of workers to be employees – whether conclusively or as a rebuttable legal presumption – as a solution for evasion problems in specific sectors. However, such solutions can lead employers to change the method of work organization, thus opening new uncertainties. At the end of the day, if our goal is first and foremost to ensure protection to those who need it, rather than ensure determinacy, some judicial discretion is unavoidable.

This leads us to the fourth and final preliminary issue. Given that we have labour laws that grant rights only to “employees”, and as we have seen, generally speaking such a system – which excludes independent contractors, and relies on a degree of judicial discretion – makes sense, how should we interpret the term “employee”? There is growing consensus among courts in many countries that the term should be interpreted purposively: a term in legislation should be given a meaning that will best advance the purpose of that legislation.⁷ This seem to be – if applied correctly – the only sensible approach. So to decide who should be considered an “employee” we have to ask what are the goals (justifications) behind a specific law, or the goals behind the “project” of labour law as a whole (because at some level, all labour laws share the same basic purpose). As part of the need to balance between universalism and selectivity, I believe we should aim for a general understanding of “who is an employee”, based on the project as a whole. Then we can also make adjustments, when necessary, in light of other/more specific goals of specific legislation.

Adopting a purposive approach will also allow us to expose problems that cannot be resolved by interpretation and require legislative amendments. For example, there are some specific protections for which the exclusion of independent contractors could be impossible to explain (i.e. for which the distinction as a whole seems unsuitable). It may also be the case that new forms of work require new

⁵ For information on the ordinance see <http://www.seattle.gov/council/issues/giving-drivers-a-voice> and on the delay see <http://seattle.ubermovement.com/seattle-ordinance/>.

⁶ The best source for up-to-date information on these developments (in the U.S.) is the blog www.onlabor.org. See, e.g., <https://onlabor.org/2015/12/11/gig-news-uber-successfully-pursuing-state-legislation-on-independent-contractor-status/>. See also <http://www.iecoalition.org/blog/four-states-enact-laws-affecting-the-definition-of-independent-contractor/>.

⁷ See *Autoclenz Ltd v Belcher* [2011] UKSC 41 (UK Supreme Court); *Pointe-Claire (City) v Quebec* (1997) 1 SCR 1015 (Supreme Court of Canada); *HCI 4601/95 Sarusi v National Labor Court* PD 52(4) 817 (1998) (Supreme Court of Israel); *Konrad v Victoria Police* (1999) 165 ALR 23 (Federal Court of Australia). The United States is an exception: although originally, its Supreme Court was a pioneer in adopting the purposive approach in this area (*United States v Silk* 331 US 704 (1947)), in more recent years conservative judges explicitly rejected this approach (*Nationwide Mutual Insurance Co v Darden* 503 US 318 (1992)). However, in the U.S. as well, some State courts adopted a purposive approach when interpreting State labour laws; see, e.g., *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, recently applied with mention to this point in *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

legal protections. For example, to the extent benefits are unnecessarily tied to a specific workplace and accumulate over time, this is becoming increasingly detrimental for people who work for short periods or for multiple employers. In other words, new forms of work such as “on demand” work – together with other alternative arrangements – should trigger rethinking of some existing laws and their suitability. Nonetheless, as far as the employee/independent contractor distinction in itself is concerned, a purposive approach ensures its suitability for “on-demand” workers: when we encounter new work arrangements such as these, we should not ask whether they are similar to “traditional” employment or not, but rather whether this is the kind of arrangement that requires the application of labour laws, given their purposes. In other words, if Uber drivers are in need of labour protection, purposive interpretation would ensure that they get it (assuming this is not explicitly prevented by legislation).

III. A purposive approach

In the previous part I advocated purposive interpretation of the term “employee” to set the scope of labour law. This is not an original position; other labour law scholars have adopted this approach before me. However, there was very little attempt to actually articulate the goals of labour law and derive conclusions for the appropriate “who is an employee” test. This is something I have engaged with for some time (see Davidov 2016); below is a very brief summary.

What does a purposive approach mean in practice, in the current context? Some have criticized it for being a case-by-case solution with no determinacy. It appears that some courts (for example in Israel) are adopting this approach: only after applying the “regular” tests, they ask in difficult cases whether the purpose of the law justifies the inclusion of the worker in question within the protected sphere. As a result, labour laws are applied on specific workers that appear to be vulnerable but were left out by the tests. While better than nothing at all, such an approach misses the point of purposive interpretation, which requires us to rethink the tests themselves. The tests were developed by courts, and they have to make sense in light of the goals of the legislation. If the tests lead to results that seem unwarranted, this is probably because they are not in tune with the purpose behind the law.

What is the purpose, then? A critical challenge is to choose the right level of abstraction or generality, in two respects. First, specific labour laws have specific goals. But there is also, as already noted, a general goal behind labour laws. If we want some degree of universalism, rather than complete selectivity (in which the meaning of “employee” is different for each and every law), we need to focus first on the general goal. Later, the scope of specific regulations can be amended, if needed, in line with more specific goals. As for the general goals, they can be articulated at different levels of abstraction. We can explain the need for labour laws in terms of the general values that they advance, such as equality, workplace democracy, distributive justice, autonomy, efficiency (more controversial), non-domination or maximizing capabilities. At another level, we can say that labour laws are needed to correct market failures or (most common) to address the inequality of bargaining power between employer and employee. Also, we can explain labour laws as addressing the vulnerabilities characterizing employment relations, which in my view are democratic deficits (or subordination, broadly conceived) and dependency.

The different articulations listed above do not contradict each other; they are all correct. The challenge is to choose the articulation that is most useful for current purposes, and this seems to be the latter one. If labour laws are needed to counteract subordination and dependency, they should cover workers who suffer from these vulnerabilities vis-à-vis an employer. And these characteristics are specific enough to allow us to make this determination, i.e. to identify those in need of protection (which is not possible with a vaguer concept such as inequality of bargaining power). Although one can certainly also argue that Uber drivers should be employees for reasons of distributive justice or non-domination (Rogers, 2016), this is not helpful to solve the next/other challenge. It is much better to identify *ex-ante* the kind of relationships that create a systematic disadvantage (vulnerability) in distributive and other respects. With this in mind, the different indicia used to identify employees can be re-examined, to consider if they are helpful and relevant in identifying the existence of subordination or dependency (I believe that only some of them are; see Davidov 2016: chapter 6).

To clarify, this does not ignore the fact that specific pieces of legislation have other goals. The point is that they also share some basic reasoning: we need to intervene in the context of *these* market transactions (and not others), we need to protect workers under *this* kind of work arrangements (and not others), because of some basic characteristics that are unique (or stronger) in this exchange/relationship. Consider, for example, the California Family Rights Act, the California Wage Theft Protection Act, and the National Labor Relations Act – to give just a few diverse examples from the United States. Obviously they each have their own goals. But why do they all apply only to “employees” and exclude independent contractors? I suggest that the answer has to do with the vulnerabilities mentioned above. This leads us to a general interpretation of “employee” that can then be used at least as a starting point, before making it broader or narrower, if needed, in light of specific goals.

Generally speaking, the tests proposed here appear similar to those adopted by courts around the world. But there are a number of important differences. First, control (or subordination, the term usually used in Europe) is understood not in a technical way, but more broadly – the question is whether there is submission to commands or to rules of the organization, in the general sense of democratic deficits. Second, economic dependency is given more weight, and is similarly understood also in a broad sense – the question is whether the worker is in a position to spread risks. Third, dependency is not only economic, but also for the fulfilment of social and psychological needs. Finally, the more specific indicia are just aids to identify the two general vulnerabilities, and should be retained only if able to do so.

Should we require both subordination and dependency to determine that one is an employee? It appears that much of the labour law apparatus is designed to counteract dependency (and mostly economic). There are however some regulations designed to protect against subordination, and some concentrated on social/psychological dependency (the importance of work for the individual). Perhaps the easiest solution – in terms of minimizing upset of current laws – is to require some degree of both subordination and dependency for employee status – but extend current protections in two ways. First, the more a relationship is characterized by dependency, the less the worker will have to show subordination to be considered an employee. Second, at least *some* labour laws – probably most – should be extended also to workers in a position of economic dependency, even without any subordination, through an intermediate category of “dependent contractors”. Thus, for example, the right to a minimum wage, and the right to bargain collectively, are both needed in situations of economic dependency, even without subordination.

IV. The Status of Uber Drivers: Applying the Tests

We are now (finally) in a position to examine the status of Uber drivers. To what extent is there subordination (or democratic deficits, or “control” in a very broad sense) in the typical relationship between Uber and its drivers? Although people who work outside of a factory or an office obviously experience less *direct* control over their actions, it is not so unusual for businesses to employ people outside of clear geographical boundaries and still control them in different ways. Technology allows employers to maintain and strengthen such control. The facts indeed suggest that Uber drivers have to abide by detailed rules of the firm regarding the way they provide the service, and they are monitored at least to some degree through the app (see De Stefano, 2016: 491-3; Sachs 2015). The rating system in particular is a tool used to control the drivers by relying on feedback from customers about their performance. Moreover, the fact that drivers provide the Uber service to Uber customers on behalf of Uber suggests that they are integrated in the organization, explaining why a relatively high degree of control is necessary (poor service would harm Uber’s reputation and its business vis-à-vis its customers; they are not the driver’s customers).

The claim made by Uber in litigation that it is not a transportation company but only a technology company – and the drivers are its customers (or “partners”) – has been rightly rejected by American and British courts alike (at least thus far, litigation is still ongoing).⁸ The London Employment Tribunal made

⁸ In the U.S., see *O’Connor v. Uber Technologies, Inc.*, 82 F.Supp.3d 1133 (N.D. Cal. 2015) (denying Uber’s motion for summary judgment in a class-action suit filed by drivers); and see similarly *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal.

this point most eloquently: “The notion that Uber in London is a mosaic of 30,000 small businesses linked by a common ‘platform’ is to our minds faintly ridiculous... Uber’s case is that the driver enters into a binding agreement with a person whose identity he does not know (and will never know) and who does not know and will never know his identity, to undertake a journey to a destination not told to him until the journey begins, by a route prescribed by a stranger to the contract (UBV) [Uber] from which he is not free to depart (at least not without risk), for a fee which (a) is set by the stranger, and (b) is not known by the passenger (who is only told the total to be paid), (c) is calculated by the stranger (as a percentage of the total sum) and (d) is paid to the stranger... The absurdity of these propositions speaks for itself.”⁹

The California courts which discussed whether control is present gave significant weight to the fact that Uber can terminate the relationship with a driver “at will” (without cause).¹⁰ This was seen as a leading indication of control (and accordingly of employment). But in fact arm’s length business relations are even *more* characterized by the ability to leave at any time, which is a staple of the free market. Limitations on the ability to terminate do no say anything – one way or another – about the existence of subordination while the relationship exists. The fact that drivers work under a constant threat that Uber will terminate the relationship with them does not in itself suggest subordination/control. It is the fact that Uber uses the ratings given by customers and other information collected by the app to monitor drivers’ actions and ensure that they abide by Uber rules that creates subordination. The background threat of termination in case of misbehaviour is important, but does not help to distinguish the relationship from other commercial relations (also characterized by the same constant threat).

While control over how drivers do their jobs appears to be quite significant, in contrast they have a relatively high degree of freedom to choose how much to work and when to do so. Notably, there are sometimes cases in which employers create the *illusion* of such freedom by drafting agreements which appear to give it to workers, even when in practice they work full time and on regular hours.¹¹ In the Uber case as well, it has been noted that there are strong incentives to work more hours and in times of heavy demand, as dictated by the firm (Means and Seiner, 2016: 1542). Still, it seems that there is a degree of real freedom in this respect.¹² This is a relevant consideration when examining the existence of control (or more broadly, democratic deficits/subordination) in the relationship. Being under the control of an employer explains, for example, the need for laws limiting the number of hours that one can be required to work. If a driver is free to decide for herself how many hours to work, at least in this particular respect the relationship is not characterized by control/subordination.

While I consider control of one’s time a relevant indicator against employee status, I disagree with the view that this should be the main or only consideration (see Means and Seiner, 2016 for this view). Overall, the indications of subordination seem to outweigh the contrary indications. There is at least some degree of control/subordination in this relationship, which is one of the vulnerabilities justifying employee status. This also means that there is no reason to classify Uber drivers as dependent contractors (for a proposal along these lines see Harris and Krueger, 2015).

2015). In the U.K., see *Aslam v. Uber*, judgment of Oct. 28, 2016 (London Employment Tribunal) (accepting drivers’ claim that they are “workers” for the purpose of UK labour laws). For an elaborated discussion of Uber’s claim/narrative see Tomassetti, 2016. For a review of the litigation in the U.S. see Cherry, 2016. Although the drivers have been somewhat successful in their litigation in the U.S. – so far in lower courts – they are still facing a serious obstacle: the fact their contracts include arbitration clauses that place significant limitations on the ability of the drivers to challenge their status in court. Strangely, U.S. courts tend to enforce such contracts. See Stone, 2016, and see the recent decision in *Mohamed v. Uber Technologies, Inc.* (9th Cir., judgment of Sep. 7, 2016). It is this judicial policy that has led Uber drivers in the U.S. to agree to settle one major class-action suit by renouncing their claim for employee status in return for some cash and small changes to their standard contract. However, this settlement was so far rejected by the courts (see *O’Connor v. Uber Technologies, Inc.*, judgment of Aug. 18, 2016 (N.D. Cal.)), so the legal situation of Uber drivers in the U.S. remains unclear. A settlement reached by Lyft (a competitor similar to Uber) with its drivers has been approved by another judge; see *Cotter v. Lyft, Inc.*, judgment of June 23, 2016 (N.D. Cal.).

⁹ *Aslam v. Uber*, note 8 above, pars. 90-91.

¹⁰ *O’Connor v. Uber*, note 8 above; *Cotter v. Lyft*, note 8 above. In both cases the judgments relied on *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341 for this point.

¹¹ Zero-hour contracts are an obvious example; for a critical analysis see Adams, Freedland and Prassl (2015).

¹² Eisenbrey and Mishel (2016) convincingly refute the claim that the Uber drivers’ working hours are immeasurable. But the fact that it is possible to measure the number of working hours does not contradict the fact that drivers are free to choose how many hours to work.

With regard to economic dependency – which as a normative matter is even more important – there are similarly strong indications supporting employee status. Most significantly, in my view, the firm is setting the cost of the ride and the payment to the driver unilaterally; the ability of drivers to influence the level of profit (other than by working more hours) is virtually non-existent; and drivers have almost no “entrepreneurial control” over business decisions. The main contrary indicator is the ownership of the car. To the extent one can use such equipment to spread risks, this is a sign of economic independence. Uber and similar platforms allow people to use an asset (their private car) to make an income in ways that were much more difficult in the past. The fact that the worker has control over this asset and can choose how to utilize it does indicate some independence.

An additional characteristic of Uber drivers that should be considered in this context is the fact that for many of them (though certainly not all; see Hall and Krueger, 2015) this is a “side gig” – they do this work only for a few hours per week. However, working only part-time (even a small part) does not seem material to our decision. If a driver is working with many different platforms – say a few hours per week with each platform – we can see this as spreading of risks and a sign of economic independence which should be taken into account. However, this is a different indicator – having numerous client-employers – which could be a characteristic of *some* workers in the on-demand economy, but certainly not many of them. The mere fact that one is working part-time does not in itself indicate independence. When examining the existence/degree of dependence we should only be concerned with the ability to spread risks within the same line of work. The existence of other, irrelevant sources of income cannot be taken into account (otherwise workers will be seen as non-dependent and without access to employment rights if they have, for example, a rich spouse).

Overall, while taking into consideration the ownership of the car, there are stronger indications of economic dependency in this case. It appears, then, that both vulnerabilities are present and Uber drivers should be considered employees. The case seems difficult at first because of the combination of three characteristics that distinguish Uber drivers from “regular” employees: their freedom to choose how many hours and when to work; the ownership of the car used to provide the service; and the fact that many drivers work for a small number of hours per week. While neither of these characteristics is entirely new or unique to the “on-demand” economy, they all become much more possible and therefore common thanks to the new technologies; and their combination might create an impression that the drivers should be considered independent contractors. Nonetheless, a closer look, through the purposive framework outlined above, shows that one of these characteristics (number of hours) is irrelevant, and the other two are relevant for different questions, and each is outweighed by other indicators.

What does this mean for Uber (and similar companies)? If they have to treat drivers as employees, will they close up shop? There is no reason to believe so. Following labour laws can certainly be a hassle, and involve costs, but this is no different for any other business. They will have to adapt, for sure, for example by agreeing with each employee on a minimum number of hours (where the law requires such a commitment), as well as a maximum number of hours (to avoid paying wages when this is not justified economically by demand for rides). The cost of a ride is likely to be somewhat higher as a result, but this is not a reason, in itself, to abandon the entire model of connecting riders with drivers through an online platform. Society can enjoy the gains of technological advances and innovative businesses without accepting the evasion of labour laws.

V. Conclusion

Online platforms in which workers can be invited to work “on demand”, with broad discretion given to the workers themselves to decide how much to work, present a new challenge for labour law. The age-old legal question of “who is an employee” has resurfaced with yet another reincarnation. Courts who formulate the answer to this question by reference to existing technical-legalistic tests may find the challenge insurmountable, meaning either that they will look for new tests altogether or simply decide that “on demand” workers are not employees. But if we adopt a purposive approach to determine who is an employee – as courts and scholars around the world increasingly do – the novelty of work

arrangements does not divert us from asking the same question: should workers under this arrangement enjoy the protection of labour laws (all or some of them), given the goals of these laws? If the answer is positive, then they should be considered employees. In this respect, no new tests are needed; just an examination of the new factual situations in light of labour law's goals.

There can be different views, of course, about what these goals are, and specifically, about the most appropriate level of abstraction to articulate them. I have argued (based on previous writings) that subordination (in the sense of democratic deficits) and dependency (in the sense of inability to spread risks) are two vulnerabilities that characterize employment relations and provide a general explanation for why we need labour laws. Accordingly, to decide if one is an "employee" we have to ask whether the relationship vis-à-vis a potential employer is characterized by these two vulnerabilities. Even one of them should trigger at least *some* protection. But the existence of both vulnerabilities clearly points to the need to apply labour laws. The many tests (*indicia*) used in most legal systems to decide "who is an employee" can be used as aids, but only to the extent that they help to find whether subordination or dependency are present.

Online platforms are proliferating, thanks to advances in technology. They come in different shapes and forms, including a wide variety of work arrangements. It makes a big difference, for example, if the worker is free to decide her own hourly rate or rather has to accept the rates as set by the platform; if the worker is free to decide how to perform the work and for whom, or has to follow directions from the platform; and so on. My concrete examination in the current paper was limited to Uber drivers, and it appears on balance (after taking into account also contrary indications) that they should be considered "employees".

This is not to suggest that the "old" system of labour law is entirely suitable and sufficient to confront new work arrangements such as "on demand" work through platforms. When asking if these workers should be considered employees or not, a purposive approach leads us to answers. But a different question is whether the existing labour laws sufficiently address new problems faced by new models of work. In other words, the question of *scope* discussed in this paper is separated from the question of *substance* which also requires re-examination. Perhaps, for example, new protections are needed for employees working part-time vis-à-vis many different employers – that is, workers relying on multiple "gigs" – who might not be able to secure under current arrangements rights to vacations, overtime payments, pensions and more. Also, the question of what amounts to "working time" for purpose of minimum wage laws and working time laws requires a unique answer in the context of "on demand" workers.¹³ Finally, new protections could be needed for very small businesses that are *not* characterized by subordination and dependency on any single employer but still find it difficult to protect and insure themselves. Such challenges will have to be addressed in future research.

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¹³ The London Employment Tribunal was faced with this question in *Aslam v. Uber*, note 8 above, and concluded that any time the app is "on" and the driver is available for rides within the assigned territory is working time.

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Employees, workers and the 'sharing economy' Changing practices and changing concepts in The United Kingdom

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Abstract: Recent years have seen a radical shift in the practice and profile of the labour economy in the United Kingdom consisting in the considerable growth of the so-called 'Sharing Economy' or 'Gig Economy', better identified as the 'On-demand Economy'. From that starting point, it is argued that a corresponding change seems to have occurred in the set of concepts which the labour/ employment law of the United Kingdom uses to analyse and to characterize the work relations and work contracts which are created, made, and operated within this rapidly growing sector of the labour market. Two recent high-profile Employment Tribunal decisions in the Uber and Citysprint cases, and a decision of the Court of Appeal in this same area in the Pimlico Plumbers case have served to confirm the legislative creation of a third intermediate category of 'workers' who benefit from a set of employment rights which is more limited than that enjoyed by employees but which is nevertheless very important. This crystallization of labour law's newly tripartite taxonomy of work relations has occurred very largely in the context of the on-demand economy, and is beneficial to those located in that sector. This is, however, a rather fragile conceptual structure.

Keywords: employees, workers, 'sharing economy', 'on-demand economy', recent cases in UK.

This paper takes as its starting point a radical shift in the practice and profile of the labour economy in the United Kingdom consisting in the considerable growth of the so-called 'Sharing Economy' or 'Gig Economy', better identified as the 'On-demand Economy'. From that starting point, it is argued that a corresponding change seems to have occurred in the set of concepts which the labour/ employment law of the United Kingdom uses to analyse and to characterize the work relations and work contracts which are created, made, and operated within this rapidly growing sector of the labour market. UK employment law has traditionally used the same bi-partite set of categories as those of tax and social security law to classify and to differentiate personal work relations and contracts, namely by distinguishing be-

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For an extended discussion of the themes developed in this article, see J Prassl, *Humans as a Service* (OUP 2018).

tween 'employees' and 'independent contractors', or between 'contracts of employment' and 'contracts for services'.

Two recent high-profile Employment Tribunal decisions in the *Uber* and *CitySprint* cases, and an even more recent decision of the Court of Appeal in this same area in the *Pimlico Plumbers* case have served to confirm the legislative creation of a third intermediate category of 'workers', and more specifically non-employee workers, who benefit from a set of employment rights which is more limited than that enjoyed by employees but which is nevertheless very important. This very significant crystallization of labour law's newly tripartite taxonomy of work relations has occurred very largely in the context of the on-demand economy, and is beneficial to those located in that sector. It will be argued that this is, however, a rather fragile conceptual structure, not least because there is a real tension between this system and the still bipartite system which is used to categorise the same set of work relations for tax and social security purposes.

This argument is developed in four sections; the first one describes and loosely defines the 'on-demand economy', linking it up with relevant concepts such as those of 'casual work', and 'zero-hours contracts', and showing how it is especially bound up with new forms of digitized intermediation in the arrangement and delivery of personal services. A second section explains the legal basis for the tripartite analysis of personal work relations. The third section recounts the recent case-law's confirmation and enhancement of the emergent third category of non-employee worker in the context of the on-demand economy. The fourth and concluding section concentrates on the troublesome combination of this tripartite system with the still bi-partite regime of tax and social security law.

1. The Rise of the On-Demand Economy in the United Kingdom

The phenomenon under scrutiny in this contribution is often traced back to the concept of 'crowdsourcing', as described in technology magazine *Wired* just over ten years ago.¹ Under varying (yet overlapping) labels such as 'crowdwork', the 'gig economy', or 'sharing economy', a new industry of digital platforms has sprung up in the intervening decade, relying on websites and / or mobile phone applications ('apps') to intermediate between customers and large pools of 'on-demand' workers.²

Originating mostly in the United States, most of the major operators have today found a firm foothold in the United Kingdom. At first glance, we observe a near-unlimited number of variations in business models: some platforms focus on particular services (the most frequently-discussed ones being transportation apps *Uber* or *Lyft*, the latter of which has however not yet established operations in the United Kingdom), whilst others deliver their services exclusively online (such as digital task platforms *Mechanical Turk* or *UpWork*), whilst yet others deliver a wide range of services – from delivering food to assembling modular furniture – in major urban areas (this includes *Deliveroo* for food delivery across major towns and cities in the UK, or *TaskRabbit* for a wide range of domestic services in London). Amidst this variety of operators and business models, there is one constant: providers' reliance on a large and constantly available workforce, to which individual tasks are assigned through sophisticated algorithms driven by consumer demand.

It is for this reason that we eschew the terminology of the 'sharing' or 'gig' economy in this contribution, relying instead on the terminology of an 'on-demand' economy, for two reasons. Despite much industry hype and lobbying efforts to the contrary, first, there is little about the business models at the core of the phenomenon which would justify altruistic notion such as sharing or helping out: the on-demand economy is clearly driven by economic incentives. Second, the language of 'gigs' and 'tasks' and 'rides' devised by different operators must not obscure the reality of the underlying arrangements, which might – as we go on to demonstrate in this section – often closely resemble the working conditions found in traditional low-wage sectors.

¹ <https://www.wired.com/2006/06/crowds/>.

² For a detailed discussion of on-demand platforms' business models, see J Prassl and M Risak, 'Uber, TaskRabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork' (2016) 37 *Comparative Labor Law and Policy Journal* 619.

In charting the rise of the on-demand economy in the United Kingdom, the present section is structured as follows. We begin by presenting the best available evidence on the size of the 'on-demand economy' in the United Kingdom, before highlighting key concerns about the working conditions (in particular low pay and unpredictable work) associated with the phenomenon. We then situate on-demand economy work in the broader context of casual work in the United Kingdom, highlighting in particular the parallels and close overlap with the much-discussed phenomenon of 'zero-hours contracts'.

a) Measuring Work in the On-Demand Economy

At first glance, it is nearly impossible to determine the extent of on-demand work in the UK's broader labour market developments: official UK labour market statistics – in particular the *Labour Force Survey* – do not contain any specific measures concerning on-demand, 'sharing' or 'gig' economy work.³ In April 2016, the ONS released a detailed feasibility study on measuring the sharing economy, presenting several potential options and data sources, as well as a wide range of problems;⁴ an updated report from September of the same year 'identified 2 overarching research questions which we will be taking forward – each with differing stakeholders and policy implications [...]: what is the value of the sharing economy? [And] how is the sharing economy impacting on the labour market?'⁵ Whilst first results are due to be published in August 2017, they are likely to be of limited utility; not least because of an initial focus on two sectors – property rental services, and transportation platforms, only one of which will have a significant impact on labour markets, given the former sector's asset – rather than labour-intensive business models.

In the absence of official data, it is surprisingly difficult to present clear findings as to the economic and social situation of on-demand workers in the UK – even though such information ought to form the backbone of any informed debate. Indeed, the lack of data surrounding crowd work is reflected in the on-going difficulty of measuring work in a rapidly fragmenting labour market more generally.⁶ The best currently available evidence can therefore only be drawn from private studies. As regards the economic situation of on-demand economy workers, first, in February 2016, the Foundation for European Progressive Studies (FEPS) and UNI Europa published a survey of crowd work in the United Kingdom which had been authored by Ursula Huws and Simon Joyce at the University of Hertfordshire, in collaboration with Ipsos MORI.⁷ Both the headline figures and the more fine-grained picture contained in this survey are of significant interest for present purposes.

On the basis of a representative online survey of 2,238 adults aged 16-75, the authors suggested that over 10% of the working-age population in the United Kingdom have worked for a gig-economy platform – the equivalent of approximately 4.9 million workers.⁸ Whilst crowd work spans across all age groups, young workers are particularly heavily represented, with the 25-35 years-old age cohort making up a third of on-demand economy workers alone.⁹ Interestingly enough, students represented but a comparatively small share of workers, with a mere 6% regularly engaging in platform-based work.¹⁰

³ See e.g. LFS, *Statistical Bulletin: UK Labour Market – April 2016* (ONS 2016), available at <http://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/uklabourmarket/april2016> (last accessed 15 May 2016).

⁴ M Hardie, *The Feasibility of Measuring the Sharing Economy* (ONS 2016), available at <http://www.ons.gov.uk/economy/economicoutputandproductivity/output/articles/thefeasibilityofmeasuringthesharingeconomy/2016-04-05> (last accessed 15 May 2016).

⁵ <https://www.ons.gov.uk/economy/economicoutputandproductivity/output/articles/thefeasibilityofmeasuringthesharingeconomy/progressupdate>

⁶ S O'Connor, 'We're still in the dark about the new world of work' (*Financial Times*, 9 February 2016) available at <https://next.ft.com/content/a1ad6c9a-ce4e-11e5-92a1-c5e23ef99c77> (last accessed 15 May 2016).

⁷ U Huws and S Joyce, 'Size of the UK's "Gig-Economy" Revealed for the First Time' (University of Hertfordshire, February 2016) available at <http://www.feps-europe.eu/assets/a82bcd12-fb97-43a6-9346-24242695a183/crowd-working-survey.pdf> (last accessed 15 May 2016) ('2016 Crowd-Working Survey')

⁸ 2016 Crowd-Working Survey (n 8) 1.

⁹ 2016 Crowd-Working Survey (n 8) 1.

¹⁰ 2016 Crowd-Working Survey (n 8) 3.

On-demand economy workers' earnings tend to be low: over 40% earn a gross annual income of less than £20,000;¹¹ a figure which is particularly troubling when considering the fact that crowd workers will usually bear the vast majority of cost associated with their work – from providing tools such as their cars or computers to paying for upkeep and running cost. The trade union GMB, for example, has calculated that even top-rated and – paid *Uber* drivers in London will earn no more than £5.68 per hour once their cost (including for example car rental or depreciation, platform commission, fuel, and ancillary services) are taken into account.¹² As of April 2017, the UK's adult minimum wage (for those aged 25 and over) will be set at £7.50; it is due to rise further to exceed £9 per hour by 2020. There are, however, increasing concerns that on-demand economy workers will not always benefit from this increase given their (supposed) self-employment status (on which see more in the legal discussion, below).¹³ This would not necessarily be a problem, if on-demand work was an occasional occupation undertaken to supplement a stable primary income. Crucially, however, it appears that such arrangements have become the only, or at least main, income source for a substantial number (up to one third) of crowd workers in the United Kingdom.¹⁴ The fact that many workers thus find themselves 'piecing together a livelihood from a range of different tasks' is reflected in the fact that over 65% are registered on more than one platform.¹⁵

The social situation of on-demand economy workers is heavily influenced by this precarious economic reality: whilst there is a small group of highly successful 'micro-entrepreneurs' who have been able to harness the potential of gig-economy work to their advantages, the reality for the vast majority is very different. As Huws and Joyce suggest, there is 'a wide variety of work. The range is extremely broad, from high-skill professional work at the one extreme to running errands at the other.'¹⁶ It is not surprising therefore that the 'rewards of new forms of employment contract accrue to a minority, while others lose out. [...] Benefits such as pensions and sick leave are often attached to permanent jobs and increase with longevity. As jobs fracture, individuals who switch jobs, work as consultants or run "micro-businesses" with one or two employees need similar support.'¹⁷ Given the current legal regime in the United Kingdom, however, it is not necessarily clear how such support could be achieved; a question to which discussion will return in sections two and three.

b) On-Demand Business Models and Casual (Zero-Hours) Work

Having set out the contours of on-demand work in the UK labour market, it is important to note a fundamental point: from an employment law perspective there is little, if anything, that is novel about the work arrangements underlying different on demand platforms' business models. Instead, they closely mirror working conditions in casual work settings more broadly – particularly when compared with zero-hours work, one of the most high-profile labour market issues in the UK over the course of the past years: in most contexts, on-demand economy work can be characterized as a set of digitally intermediated zero-hours contracts.¹⁸

One of the most difficult challenges in defining Zero-Hours Contracts is the fact that despite many assertions to the contrary, they are not a single category of work arrangements. Instead, they stand for a wide range of arrangements in which workers are not guaranteed a fixed (or indeed any) number of

¹¹ 2016 Crowd-Working Survey (n 8) 2.

¹² GMB Newsroom, 'New Uber Drivers Pay Down by £1 per Hour' (London, 24 November 2015) available at <http://www.gmb.org.uk/newsroom/new-uber-drivers-pay-down-by-one-pound> (last accessed 15 May 2016).

¹³ D Strauss, 'Rise in minimum wage to bypass 1.7m self-employed' (Financial Times, 21 March 2016) available at <https://next.ft.com/content/25e37996-ec0-11e5-9f20-c3a047354386> (last accessed 15 May 2016).

¹⁴ 2016 Crowd-Working Survey (n 8) 1.

¹⁵ 2016 Crowd-Working Survey (n 8) 2-3.

¹⁶ 2016 Crowd-Working Survey (n 8) 2.

¹⁷ J Gapper, 'New 'gig' economy spells end to lifetime careers' (Financial Times, 5 August 2015) available at <https://next.ft.com/content/ab492ffc-3522-11e5-b05b-b01debd57852> (last accessed 15 May 2016).

¹⁸ A Adams, M Freedland, and J Prassl, 'The "Zero-Hours Contract": Regulating Casual Work, or Legitimizing Precarity?' (2015) 147 *Giornale di Diritto del Lavoro e di Relazioni Industriali* 529.

hours in a particular period and, at least in theory, in which they are not obliged to accept any offers of work which might have been made by their employer.

Despite this wide factual variety, there is a frequent assumption that clear-cut definitions could be found – as is now the case with a newly-inserted section 27A of the Employment Rights Act of 1996 ('ERA 1996'), sub-sections (1) and 92) of which stipulate that

- (1) In this section “zero hours contract” means a contract of employment or other worker’s contract under which:
 - (a) the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker, and
 - (b) there is no certainty that any such work or services will be made available to the worker.
- (2) For this purpose, an employer makes work or services available to a worker if the employer requests or requires the worker to do the work or perform the services.

The main problem with such accounts is their underlying assumption that *the* Zero-Hours Contract is a unitary category – an assumption difficult to sustain in the face of widespread factual complexity.¹⁹

It is important to note that despite the new statutory definition, there can be no clear divisions or watertight categories in precarious work arrangements.²⁰ The ‘Zero-Hours Contract’ label should not be seen as representing a clear or overarching category or organising principle of precarious work, or as somehow cleanly mapping onto received understandings of ‘atypical work’. There is a considerable degree of ‘heterogeneity of temporary work’,²¹ reflected in ‘a growing nomenclature of ‘atypical’ and ‘non-standard’ work, apart from commonly used categories such as temporary, part-time and self-employed work. Terms include ‘reservist’; ‘on-call’, and ‘as and when’ contracts; ‘regular casuals’; ‘key-time’ workers; ‘min-max’ and ‘zero-hours’ contracts.’²² Indeed, the various categories of ‘atypical’ work can frequently overlap, for example where agency work incorporates a ‘zero-hours contract dimension’.²³ As Kilner Brown J in *Mailway* suggested, the claimant’s Zero-Hours arrangement there ‘in one sense [...] was casual labour; in another sense it was part-time work.’²⁴

Zero-Hours arrangements thus represent various degrees of fragmentation of work – from reasonably regular and consistent employment to a spot-market in labour.²⁵ Rather than forming a single or unitary category, they represent some of the many possible variations of employment, ranging from ‘preferred choices, well-paid and secure’²⁶ to ‘vulnerable’²⁷ or ‘poor work’.²⁸ The use of algorithms to effect sometimes extremely short-term zero-hours contracts might thus be the most extreme instantiation of the phenomenon (yet); but it should not be seen as in any meaningful way analytically or legally distinct.

¹⁹ A fact realized by the ONS’ most recent definitional attempts, introducing the notion of ‘Contracts that do not guarantee a minimum number of hours’ (‘NGHCs’): ONS, *Analysis of Employee Contracts that do not Guarantee a Minimum Number of Hours* (London 2014) 4-5.

²⁰ Indeed, ZHC can also be seen as a feature in other characterisations, such as Albin’s notion of ‘personal service work’: E Albin, ‘The Case of *Qashie*: Between the Legalisation of Sex Work and the Precariousness of Personal Service Work’ (2013) 42 ILJ 180, 186.

²¹ D McCann, *Regulating Flexible Work* (OUP 2008) 102.

²² Dickens (n 33) 263.

²³ J O’Connor, ‘Precarious Employment and EU Employment Regulation’ in G Ramia, K Farnsworth and Z Irving, *Social Policy Review 25: Analysis and Debate in Social Policy* (OUP 2013) 238.

²⁴ *Mailway (Southern)* (n 31) 513F.

²⁵ Not unlike online platforms such as Amazon’s ‘Mechanical Turks’. See J Horton, ‘Online Labor Markets’ in A Saberi (Ed) *WINE 2010* (Springer, Berlin 2010) 515.

²⁶ O’Connor (n 23) 228.

²⁷ Busby and M McDermont, ‘Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings’ (2012) 41 ILJ 166; citing in fn 3 DTI, *Success at Work: Protecting Vulnerable Workers, Supporting Good Employers*. (London, 2006) [25].

²⁸ T Shildrick, R MacDonald and C Webster, *Poverty and Insecurity: Life in Low-Pay, No-Pay Britain* (OUP 2012) 24.

In concluding our argument that on-demand economy work closely resembles existing zero-hours models, it is also important to highlight the wide-spread (and misguided) perception that Zero-Hours work arrangements are a relatively new phenomenon, rather than part of a much larger 'tendency toward numerical flexibility [which has been] particularly marked [since] the 1980s'.²⁹ Litigation arising from the use of Zero-Hours Contracts to allow employers numerical flexibility and to attempt to avoid the application of statutory protection can be traced back nearly forty years.³⁰ In *Mailway*,³¹ for example, the claimant postal packer 'could and would only attend for work in accordance with the need expressed by the employers'.³² A study by Katherine Cave in the 1990s showed the already widespread use of 'something that could be classified as zero hours contracts';³³ with a strong growth trend as an area where there has been abuse³⁴ continuing in the subsequent decade.³⁵ The technology underpinning work in the on-demand economy is new: the underlying reality of precarious work is not.

This point can be further illustrated by reference to a recent UK Employment Tribunal ruling that Uber drivers were workers employed by the company and thus entitled to minimum wage and other basic labour rights. In *Aslam v Uber BV*, the court focused on the 'practical reality' of the relationship between Uber and its drivers and showed that the drivers, regardless of contractual statements to the contrary, are to be qualified workers. The mechanisms designed by Uber to insist that its drivers were self-employed merited a high degree of 'scepticism': 'Armies of lawyers' could not help a business avoid employment liabilities, despite contractual 'fictions, twisted language and even brand new terminology'.³⁶

The employment tribunal's ruling was widely welcomed by commentators. The tribunal's focus on the reality of the relationship between the parties and its clear and accessible analysis of the law as well as Uber's business are a role model for similar cases pending in jurisdictions worldwide. The basic protection now afforded to drivers will overcome some of the worst problems— not least, because the tribunal (rightly) ruled that a driver is 'working' for the entire time that his (the vast majority being male, as noted in the decision) Uber drivers' app is switched on, and he is able and willing to accept rides. In the longer run, however, Uber drivers – even when classified as workers – will still face many of the problems encountered by zero-hours workers across the United Kingdom: from low income to struggling with unpredictable shifts due to a lack of guaranteed work. Restoring the scope of employment protection is but the first step on the road to decent work in the on-demand economy.

2. The Taxonomy of Personal Work Relations in the United Kingdom: from a Binary Divide to a Tri- or Multi-Partite Regime

Having in the previous section presented an outline of the main factual and legal features of the 'on-demand economy' in the United Kingdom, we now proceed to describe in somewhat more detail the creation and evolution of the very complex legal taxonomy of personal work relations within which that economy has developed and upon which it to a significant extent depends. It will be argued that the key feature of that taxonomy is the way that it has taken shape as an intricate and uneasy combination of two different classification systems, one of which is bi-partite and the other of which is tripartite in

²⁹ S Fredman, 'Labour Law in Flux: The Changing Composition of the Workforce' (1997) 26 ILJ 337, 339. The effects were originally particularly marked in the case of female workers (339-340) and industries such as construction and dock-working (340), or trawler working. See also P Leighton and R Painter, "'Task' and 'Global' Contracts of Employment' (1986) 15 ILJ 127; A McColgan, *Just Wages for Women* (OUP 1997) 391.

³⁰ In the instance cited, the employer's minimum guarantee payment for employees within the meaning of s 22(1) of the Employment Protection Act 1975.

³¹ *Mailway (Southern) Ltd v Willsher* [1978] ICR 511 (EAT).

³² *ibid* 513G. See H Collins, K Ewing and A McColgan, *Labour Law* (CUP 2012) 163.

³³ K Graven, *Zero Hours Contracts: a Report into the Incidence and Implications of Such Contracts* (University of Huddersfield, 1997); as discussed in L Dickens, 'Exploring the Atypical: Zero Hours Contracts' (1997) 26 ILJ 262, 263.

³⁴ J Lourie, *Fairness at Work – Research Paper 98/99* (HC Library, London 1998) 26-27.

³⁵ B Kersley et al, *Inside the Workplace: First Findings from the 2004 Workplace Employment Relations Survey* (DTI, London 2005).

³⁶ *Aslam & Ors v Uber BV & Ors* [2016] EW Misc B68 (ET) (28 October 2016) at [87] and [96].

character. It is that ambiguity between bi-partite and tri-partite classification systems which has come to have a crucial bearing upon the application of employment law to the on-demand economy.

This is a problem which has developed incrementally, in a sequence of law-making activity upon which it will be useful briefly to recapitulate. During the period from the early 1960s to the middle and later 1970s when the main building blocks of the United Kingdom's system of statutory employment rights were being put in place, a straightforwardly bi-partite contractual classification of personal work relations was applied to designate the relational boundaries, or the 'personal scope' of the new employment rights which were being created. Closely following the contours of the tax and social security systems, the legislators made and the courts applied a binary divide between 'employees' who were engaged under contracts of employment and the 'self-employed' or 'independent contractors' operating under 'contracts for services'.³⁷ Most of the new employment rights which were created at that period applied only to employees and not to the self-employed. For example, the right not to be unfairly dismissed, originally created by the Industrial Relations Act 1971 applied only to employees with a stated period of continuous contractual employment with the employer, originally set at two years, a qualification which has been varied from time to time but which applies today.³⁸

There were significant exceptions to this rule, in the form of employment rights which applied on both sides of this binary divide. This was in a sense true of the rights and obligations in respect of health and safety at work which were created by the Health and Safety at Work etc Act of 1974.³⁹ Moreover, this was also true, in intention at least, of the big wave of employment equality or employment discrimination legislation which swept in from 1970 onwards in the shape first of the Equal Pay Act of that year, then of the Sex Discrimination Act 1975 and the Race Relations Act 1976, to be followed by the Disability Discrimination Act of 1996 and quite a host of subsequent measures.⁴⁰ These measures applied to 'employment under a contract of employment, a contract of apprenticeship or a contract personally to do work' as the current consolidated version of the legislation, the Equality Act 2010, now puts it⁴¹. This was a formulation which appeared in a number of variants which in our view were intended to apply to all personal work contracts, whether of employment or for self-employment, and which were so interpreted by the courts over many years subsequent to their original enactment.⁴²

This bi-partite system, under which employees enjoyed a full set of employment rights while the personally self-employed were confined to a much more limited set of such rights, though for a long time apparently a robust one, had by the later 1990s become fragile under the pressure of a growing perception that the 'employee' category was an unduly exclusive one,⁴³ especially in the face of the rapid growth of 'marginal' or 'atypical' forms of employment, a set of developments which now appears as a precursor of the emergence of the 'on-demand economy'. Particular strains were placed upon the binary divide between employment and self-employment as employing enterprises began vertically to disintegrate.⁴⁴ Once largely released from the constraints of a previously vigorous collective bargaining system, business undertakings increasingly chose to meet their labour requirements by means of casual forms of engagement, such as those of temporary agency employment, and moreover as they increasingly cast the contracts for such engagements in the mould of self-employment. The resulting pressure points on the bipartite system became more acute as the courts, so far from relaxing the tests for employee status to accommodate casual forms of working within the category, actually restricted that category by imposing tight qualifications of 'continuing mutual obligation' for the employer to provide

³⁷ M Freedland, 'The role of the contract of employment in modern labour law', in L. Betten (ed), *The Employment Contract in Transforming Labour Relations* (Deventer: Kluwer 1995) 17, 19.

³⁸ J Prassl, 'Les seuils sociaux en Europe: Royaume-Uni' (2015) *Revue de Droit du Travail* 215.

³⁹ For an illustration of these extensions at work, see e.g. J Prassl, *The Concept of the Employer* (OUP: Oxford 2015) 177-178.

⁴⁰ *ibid.*, 179-180; cf also S Fredman, *Discrimination Law* (2nd edition, OUP: Oxford 2011) 143ff.

⁴¹ Section 83(2)(a) of the Employment Equality Act 2010 (emphasis added).

⁴² The leading case in this regard is that of *Kelly v. Northern Ireland Housing Executive* [1998] UKHL 33; [1999] 1 AC 428; [1998] ICR 828.

⁴³ E Albin and J Prassl, 'Fragmenting Work, Fragmented Regulation: The Contract of Employment as a Driver of Social Exclusion' in M Freedland et al (eds), *The Contract of Employment* (OUP: Oxford 2016) 209.

⁴⁴ H Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 OJLS 353.

work and for the employee to perform work when called upon, and moreover to do so strictly in person rather than by the occasional substitution of others.⁴⁵ This was an approach to the construction of the employee category which would increasingly enable employing enterprises to formulate work contracts so as to take the workers in question out of that category both by designating them as self-employed and by inserting 'no obligation' and 'substitution' clauses into the contracts to confirm that designation⁴⁶.

Towards the end of the 1990s, the New Labour government then in power implemented a legislative strategy designed partially to mitigate these exclusionary effects of the operation of the employee category: a new and more extensive personal work status, that of 'worker', was devised and deployed as the qualifying category for the important new employment rights which were introduced by the National Minimum Wage Act 1998 and by the Working Time Regulations of 1998, implementing the EU Working Time Directive of 1993 which was then in force⁴⁷. This new contractual category was defined in an elaborate formulation which has been embodied in section 230 of the Employment Rights Act 1996; it is as follows:

- (3) In this Act "worker" [...] means an individual who has entered into or works under (or, where the employment has ceased, worked under),
- (a) a contract of employment, or
 - (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly.'

It was this rather complex formulation which eventually super-imposed a firmly tri-partite system of classification of personal work contracts upon the previously bipartite one which we have hitherto described; we proceed to explain that transition in more detail.

It will be apparent that the definition introduced by section 230(3) has two parts or limbs, (a) and (b), and hence it has become customary to speak of 'limb (a) workers' and 'limb (b) workers' to designate the two types of contractual sub-categories which between them compose this new 'worker' concept or status. It is our view, though subsequently as we shall see this was to become a matter of controversy, that this new composite category was intended to be and was logically set up to be an intermediate third category interposed between the two previously existing categories, so that it represented a tri-partite system of classification of contractual work statuses.⁴⁸ As we have seen, the existing bi-partite system recognised the two categories of, on the one hand, employment as an employee under a contract of employment, and, on the other hand self-employment under any other kind of personal work contract. This new third category straddled the two existing categories, being larger than either one but smaller than both the existing categories put together. It was larger than either of the existing categories in that it comprised the whole of the existing employee category in limb (a) and also included some of the existing self-employment category in limb (b); but it was smaller than both existing categories put together in that limb (b) did not include all contracts for personal self-employment, since it carved out and excluded an excepted category where the status of the counterparty to the contract was 'that of a client or customer of any profession or business undertaking carried on by the individual [who under-

⁴⁵ This mode of judicial testing for employee status had been largely initiated by the Court of Appeal in *O'Kelly v Trust House Forte plc* [1983] ICR 728, and can be seen in full operation in decisions such as that of the Court of Appeal in *Express and Echo Publications Ltd v Tanton* [1999] EWCA Civ 949 and of the House of Lords in *Carmichael v National Power plc* [1999] UKHL 47.

⁴⁶ A valuable analysis of this phenomenon is provided in S Deakin and GS Morris, *Labour Law* (6th Edition 2012) at paras 3.22 and 3.29.

⁴⁷ The Working Time Regulations 1998 (SI 1998/1833) implemented the original Council Directive 93/104/EC concerning certain aspects of the organization of working time (O.J. No. L307, 13.12.93, p.18), since superseded by Working Time Directive 2003/88/EC.

⁴⁸ J Prassl, 'Employee Shareholder Status: Dismantling the Contract of Employment' (2013) 42 ILJ 307, 325-327.

takes the work]'. The intention underlying that exception seems clearly to have been that of excluding genuinely independent contracting for personal work, thereby leaving the composite category of worker to include not only employees as traditionally defined but also those working under semi-dependent or economically dependent personal work contracts.

These legislative initiatives could perhaps have been seen as promising to create a clear and coherent tri-partite taxonomy of personal work contracts and relations; but any such promise was not realised, and instead it gave rise to a classification regime which was both mixed and confused as between bi-partite and tri-partite taxonomies. The new classification regime was mixed in the sense that the new tri-partite taxonomy for employment had to co-exist with the still resolutely bi-partite taxonomy which applied in tax law and practice and social security law and practice – this is a point to which we revert in the concluding section of this paper. This alone has been a source of continuing confusion; but we suggest there has been a deeper confusion within the fold of employment law itself, since even within that domain there has been an enduring uncertainty as to how the 'worker' concept which typifies the new tri-partite taxonomy maps onto the two categories of the traditional bi-partite classification. In particular, the problem has been to work out how far limb (b) enlarges upon limb (a), or in other words, how large the zone of non-employee worker status should be deemed to be.

For more than a decade after the legislative initiative of 1998, this problem of how to reconcile the bi-partite and the tri-partite taxonomies, and how to apply both of them in the growing sphere of 'marginal' or 'atypical' employment was a perceptible one but not an evidently urgent one. It seemed that limb (b) of the worker category might not extend very far beyond limb (a); for example, the very influential decision of the Employment Appeal Tribunal in the case of *Byrne Brothers (Formwork) Ltd v. Baird & Ors*⁴⁹ suggested that a rather similarly strict requirement of mutual obligation might apply when it held that 'in considering the latter question the boundary is pushed further in the putative employee's favour', so that the distinction between employee status and worker status was best understood as one of degree, rather than kind.⁵⁰ However, this was not necessarily an acute problem if the courts were prepared to take an expansive view of the scope of limb (a); and the Supreme Court famously did precisely that in 2011 in the leading case of *Autoclenz Ltd v Belcher & Ors*,⁵¹ in which the personal work contract of a 'zero-hours' car-wash valet was held to be a contract of employment falling within limb (a) despite the best efforts of the employing enterprise to present it as a contract for self-employment falling outside both limbs of the 'worker' definition.

However, the problem of reconciliation of the bi-partite and tri-partite taxonomies was in truth becoming a more pressing one, as it became more and more important to respond to the rapid development of 'zero-hours contracts' and of the 'on-demand economy' more generally as described it in the previous section of this paper. Moreover, that rather complex mixed taxonomy was to experience a sudden, unexpected, and rather curiously deep legal disruption.

On the very same day on which the *Autoclenz* case was decided by the Supreme Court, judgment was also given by the Supreme Court in the case of *Jivraj v Hashwani*.⁵² The latter decision was at first glance very differently located in a dispute concerning the appointment of a legal arbitrator under a large commercial contract but turned out upon closer inspection to have profound implications for the taxonomy of personal work contracts not least in the context of the emerging 'on-demand economy'.⁵³ This decision reinterpreted and re-configured the category of 'employment under a contract of employment, a contract of apprenticeship or a contract personally to do work' which was identified earlier in this paper as the one which is used as the qualifier for employment equality rights, and which used to be regarded as encapsulating the whole range of personal work contracts on both sides of the binary divide, and therefore as specifying and including both the two contract types which were separated by that divide. The decision was in essence that the words 'employment under' confined this whole employment

⁴⁹ [2001] UKEAT 542_01_1809, [2002] ICR 667.

⁵⁰ Ibid at para [17] (5), at page 678H (*per* Recorder Underhill QC).

⁵¹ [2011] UKSC 41, [2011] ICR 1157.

⁵² [2011] UKSC 40, [2011] ICR 1004.

⁵³ The discussion of this case in the ensuing paragraphs builds upon the journal article by Mark Freedland and Nicola Kountouris, 'Employment Equality and Personal Work Relations – A Critique of *Jivraj v Hashwani*' (2012) 41 *Industrial Law Journal* 1-11.

equality category to those personal work contracts under which the employed person was in a relation of subordination to the employer – so that the relation or contract with the legal arbitrator which was at issue in the *Jivraj* case itself fell outside the scope of the employment equality legislation.

The courts and the commentators have been grappling since that time with the resulting disruption to the whole system of taxonomy of personal work relations and contracts of which this employment equality category turned out to be an unexpectedly crucial component. We suggest that this disruption can best be understood as having significantly aggravated the tension between the bi-partite and tri-partite classification systems, and added to the confusion around that central ambiguity. Clearly, the result of the *Jivraj* decision was that the outer envelope of the whole category of personal work relations which qualify for statutory employment rights was being forced inwards by the contraction of the employment equality category. The much more difficult question was how far this implosion was meant to go. Was it meant simply to collapse the employment equality category into the 'worker' category, while still following the contours of the tri-partite classification system? Or would this negative and reductionist impulse press on still further to carry *both* the employment equality category *and* the worker category back into a newly narrow subordinate employee category, thus restoring the bi-partite system in its full exclusionary rigour? The courts circled round this perplexing set of problems in a sequence of cases,⁵⁴ and it was not until some very recent case-law emerging from the context of the 'on-demand economy' that any significant resolution of them began to occur. This case-law and the partial resolution which they produced are presented and analysed in the following section of the paper.

3. The non-employee worker in the on-demand economy

In the course of recent months, the theoretically very interesting but decidedly arcane body of case-law concerning the legal taxonomy of personal work contracts and personal work relations has been electrified and illuminated by three high-profile legal decisions, two of them from Employment Tribunals and the third and most recent from the Court of Appeal. These are the cases of *Uber*⁵⁵, *Citysprint*⁵⁶, and *Pimlico Plumbers*⁵⁷: they have attracted considerable public interest because they concern three enterprises functioning in the 'on-demand economy', one of which namely the Uber digital platform has become emblematic of that economy; we argue that their cumulative impact upon employment law's taxonomy of contracts and relations has been a very significant one. Between them they have considerably reinforced the tri-partite classification of personal work contracts, somewhat transforming it in the process, and leaving in their wake a number of complexities and some possible concerns with regard to those ultra-casual personal work arrangements known as zero-hours contracts of employment which are, as we have seen, so widely deployed in the on-demand economy as to have become almost typical of it.

The detailed accounts, as provided in the respective judgments, of the personal work arrangements which were under consideration in these three cases – those of Uber-drivers, of a cycle courier, and of an on-call plumber – between them provide a good representative sample of the wide spread and variety of work relations which are loosely comprehended within the 'on-demand economy' as generally described in the first section of this paper. In all these three cases, the claimants succeeded in showing that they were 'workers' within the meaning of Section 230(3) of the Employment Rights Act 1996 so as to be entitled to national minimum wage rights and working time rights; and in *Pimlico Plumbers* the claimant was also held to be qualified for employment equality rights under Section 83(2) of the Equality Act 2010 – that is to say, it was held that his work relation fell within the category of 'employment under a contract of employment [...] or a contract personally to do work', the category which had been re-configured in the

⁵⁴ Prominent in this sequence were the decisions of the Supreme Court in *Clyde & Co LLP & Anor v Bates van Winkelhof* [2014] UKSC 32, [2014] ICR 730, and of the Court of Appeal in *Halawi v WDFG UK Ltd* [2014] EWCA Civ 1387, and *Windle & Arada v Secretary of State for Justice* [2016] EWCA Civ 459, [2016] ICR 721.

⁵⁵ *Aslam & Ors v Uber BV & Ors* [2016] EW Misc B68 (ET) (28 October 2016). For comment, see R Hunter and J Prassl at <http://ohrh.law.ox.ac.uk/worker-status-for-app-drivers-uber-rated/> (accessed 13.2.2017).

⁵⁶ *Dewhurst v Citysprint UK Ltd* ET/2202512/2016 (5 January 2017).

⁵⁷ *Pimlico Plumbers Ltd & Anor v Smith* [2017] EWCA Civ 51 (10 February 2017)

Jivraj case. It is not surprising that each of these three cases was perceived by the news media as a victory for the workers concerned, or that the three cases were regarded as cumulatively signalling a major advance of employment rights into the domain of the on-demand economy. This paper argues that those are largely correct perceptions, but that some notes of caution nevertheless need to be sounded.

On the positive side, from the perspective of the development of employment rights in the on-demand economy, it can be said that these three decisions do jointly and severally reinforce a reasonably expansive construction of the 'worker' category, extending its advance into the on-demand economy, as initiated by the *Autoclenz* case, across quite a broad front. The fact that the work relations in each of these three cases was regarded as falling within limb (b) of the 'worker' definition marks out limb (b) as unequivocally more extensive and therefore inclusive than limb (a); it seems to confirm in particular that there is a less stringent requirement of mutual obligation for personal work contracts to be admitted under limb (b) than applies under limb (a), or perhaps indeed that mutuality of obligation is not a relevant element to be taken into account in determining worker status under limb (b), as certain recent cases had begun (erroneously, in our view) to suggest.⁵⁸

The decisions furthermore clearly delineate a territory within which a work arrangement may mark out the working person as a 'worker' although he or she is at the same time classified as self-employed rather than being an employee and as such falling under limb (a). The idea is thus confirmed⁵⁹ that a person may, for the purposes of this particular taxonomy at least, be self-employed though working for another, thus distinguishing between persons self-employed and working on their own account (who still fall outside limb (b)), and persons self-employed but not working on their own account, for whom there is therefore a distinct conceptual basis for their admission into limb (b) of the category of 'worker'.

There was also a further positive development of employment rights in the *Pimlico Plumbers* decision in particular. In that case, the claim was not only for minimum wage and working time rights as a 'worker' within section 230(3) of the Employment Rights Act definition, but also for employment equality rights (in respect of alleged disability discrimination) under the 'employment' category as defined by section 83(2) of the Equality Act 2010. The Court of Appeal in *Pimlico Plumbers* confirmed the indication,⁶⁰ first given by Lady Hale in the Supreme Court in *Bates van Winkelhof*,⁶¹ that the two categories were to be regarded as essentially convergent ones, both invoking a *broad* notion of 'subordination' which was implicit in EU law's notion of the worker. This means that the employment equality category of 'employment' replicates the extent of limb (b) of the 'worker' as well as that of limb (a). The two categories are now in effect being treated as identical to each other. This equating of the two classes of personal work contract or relation, the 'worker' class and the employment equality class, when coupled with the Court of Appeal's expansive approach to limb (b) in the *Pimlico Plumbers* case itself, could and hopefully will serve to dispel the fear, to which we adverted earlier, of a contrary movement pushing the whole combined category inwards towards a narrow conception of dependent employment almost coincident with limb (a) and rendering limb (b) virtually or entirely empty of content.

However, perhaps three caveats need to be entered, enjoining caution against regarding this recent case-law as a straightforwardly progressive development of employment rights in the domain of the on-demand economy: one is a slight cautionary note and the other is a more substantial one. The slight cautionary note is that there is still the possibility that the courts could revert to a more rigorous deployment of the requirement of mutual obligation as a restriction upon the scope of this emergent composite category of the 'worker' who is in 'employment' for equality law purposes. The finding that there was sufficient mutual obligation to satisfy that definition on the facts of *Pimlico Plumbers*, and the indication given by Underhill LJ that the approach taken to those facts might be extensible to a wider

⁵⁸ See, notably, *Windle & Arada v Secretary of State for Justice* [2016] EWCA Civ 459, [2016] ICR 721.

⁵⁹ The idea of such a distinction was sketched out by Lady Hale in *Bates van Winkelhof* [2014] UKSC 32 at para 25.

⁶⁰ [2017] EWCA Civ 51 at para 48.

⁶¹ [2014] UKSC 32 at para 32:- 'The concept of subordination was there introduced [in *Allonby v Accrington and Rosendale College* (Case C-256/01) [2004] ICR 1328 at para 68] in order to distinguish the intermediate category from people who were dealing with clients or customers on their own account. It was used for the same purpose in the discrimination case of *Jivraj v Hashwani*.'

range of cases,⁶² are between them encouraging against that possibility, but it might nevertheless still present itself in relation to some of the ultra-casual 'zero-hours' work contracts or arrangements which, as we have seen, are sometimes to be found in the sphere of the on-demand economy. We would regard any such development not only as deeply problematic in practice, given its potential to leave increasing swathes of those most thought to require recourse to at least the basic standards such as working time and minimum wage protection beyond the scope of employment and anti-discrimination law, but also as indefensible in principle, as so narrow a construction of limb (b) would clearly go against Parliament's intention to extend a floor of rights beyond the traditional core category of employees.

The second caveat is a less specific one, but perhaps a more substantial one. The price of the claimants' victories in these recent cases was that they were found to be, indeed in a sense were left remaining in, the general category of self-employment in which their personal work contracts had located them, albeit in a part of that category in which they were qualified for minimum wage rights, working time rights, and employment equality rights. That was all that the claimants needed to claim, and that was all that the tribunals or courts needed to find in order to grant them their victories. But those victories were therefore only partial ones, in the sense that the workers in question were not accorded full 'employee' status under limb (a) of the definition of 'worker', and these findings perhaps encourage the view that further claims to rights dependent on that full employee status could not have been made, or if made would not have been upheld by the appellate courts. This may represent something of a retreat from the robust approach taken by the Supreme Court in the *Autoclenz* case, where the claimants were deemed to fall under limb (a) of the definition of the 'worker', as being employed under contracts of employment strictly so called, although a finding that they fell under limb (b) might have sufficed to sustain the rejection of the employer's appeal.

The third caveat, finally, relates to the broader labour market impact of these recent decisions.⁶³ The employment tribunal's ruling in *Uber*, for example, was widely welcomed by commentators as a progressive decision in favour of workers' rights.⁶⁴ The tribunal's focus on the reality of the relationship between the parties and its clear and accessible analysis of the law on worker status (as well as Uber's business more generally) will serve as a role model for similar cases pending against on-demand economy employers in the UK and further afield. An important note of caution should nonetheless be sounded: the outcome for workers might be less positive than appears at first sight.

This is not, of course, because employment rights somehow mean less flexibility, as the company attempted to argue in the wake of the decision: it is perfectly possible to employ workers on decent, yet flexible terms. The problem arises from the fact that only a limited set of core rights are attached to worker status, including the National Minimum Wage Act 1998 and the Working Time Regulations 1998. Such basic protection will overcome some of the worst problems faced by Uber drivers and other on-demand workers – not least, because the tribunal (rightly) ruled on the facts that the drivers were 'working' for the entire time that their Uber drivers' app was switched on, they were in the territory in which they were licensed to work, and they were able and willing to accept rides, not just when transporting passengers in their car. In the longer run, however, Uber drivers – even when classified as workers – will face many of the problems encountered by zero-hours workers across the United Kingdom: from low income to struggling with unpredictable shifts due to a lack of guaranteed work.⁶⁵

So the upshot of the recent litigation on UK worker status is that workers in the on-demand economy are tending to be placed into a slightly shaky intermediate category between full employment and full self-employment, treated as self-employed workers but not working on their own account. They seem likely to find themselves on the right side of the fence for the rights of 'workers' and for employ-

⁶² See in particular Underhill LJ, [2017] EWCA Civ 51 at para 145:- 'If the position were that in practice the putative employee/worker was regularly offered and regularly accepted work from the same employer, so that he or she worked pretty well continuously, that might weigh in favour of a conclusion that while working he or she had (at least) worker status, even if the contract clearly (and genuinely) provided that there was no legal obligation either way in between the periods of work.'

⁶³ For further development of this critique, see R Hunter and J Prassl at <http://ohrh.law.ox.ac.uk/worker-status-for-app-drivers-uber-rated/>.

⁶⁴ See e.g. S O'Connor et al, 'Uber drivers win UK legal battle for workers' rights' (*Financial Times*, 28 October 2016).

⁶⁵ For further analysis, see our blog post on zero-hours contracts at <http://ohrh.law.ox.ac.uk/zero-hours-zero-solutions/>.

ment equality rights, but may, if our fears about the potential (mis-) development of the law were to be realised, find themselves on the wrong side of the fence from the rights of employees with contracts of employment. In the latter case, workers might thus be liable to be in effect partly within the fold for the tri-partite classification of employment rights, but out in the cold so far as the system has remained a bi-partite one. This is a rather confused state of affairs, especially when it has to be reconciled with the tax and social security classification systems which still maintain a basic binary divide, and does not distinguish between those who are self-employed and operating 'on their own account' and, on the other hand, those who are self-employed but not operating on their own account because they are seen as working for an employer. It is this rather convoluted set of combinations of statuses which is the subject of our brief conclusion to this paper.

4. Worker Status Beyond Employment and Anti-Discrimination Law: Coherence and Confusion

As we hope to have demonstrated, the rise of the on-demand economy in the UK is but the latest chapter in a story dating back to the mid-1960s, in which we find the binary divide between employment and self-employment becoming gradually more contested and fragile, as the incentives and opportunities multiplied for employing enterprises to re-cast employment contracts as contracts for services, and to identify their workers as being 'self-employed', in order to minimise the application of worker-protective employment legislation, and to obtain fiscal and social security advantages.⁶⁶ Crucially, however, certain incentives towards such (re-)classification of individual employment relationships could also be found on the workers' side, with independent contractor status appearing, at least in the short term, to be of financial advantage to both parties.

This final consideration arises from the legal status of on-demand economy workers as self-employed individuals, particularly in the context of tax law. In the United Kingdom, self-employed workers are taxed (for national insurance purposes) at a lower rate than the employed; a rate which can be reduced further when services are offered through the worker's own limited liability company.⁶⁷ The tax authorities (HMRC) have become worried about the 'unfair manipulation' of the applicable rules (IR35), which they suggest 'contribute to, and reinforce, the incentives for individuals to work through companies when they would otherwise be employees, and for businesses to engage individuals through companies, even if they are working in a similar way to their employees' – and thus a considerable loss of approximately £430m per annum to the Exchequer.⁶⁸

This development has increasingly troubled policy makers, but hitherto there have been no comparative legislative initiatives to introduce a concept of 'the worker' designed to be more inclusive than that of 'the employee' in tax and social security law, or judicial initiatives to be more aggressive in detecting and countering employers' attempts to disguise relations and contracts of employment as those of self-employment.⁶⁹ The binary divide has thus survived more or less intact in the realm of taxation and social security; indeed, in very recent years both the legislature and the courts have if anything somewhat relaxed their pursuit of 'disguised employment'.⁷⁰ Certain elements of Government policy have even favoured the growth and development of self-employment, because it enables the claim to be made that the level of unemployment is constantly falling, and it reduces the cost of social security provision.⁷¹

⁶⁶ See e.g. *Tilson v Alstom Transport* [2010] EWCA Civ 1308, [2011] IRLR 169

⁶⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/446242/Intermediaries_legislation_IR35-discussion_document.pdf, at 2-3.

⁶⁸ *ibid* 3, 5. One of the key proposals mooted in a recent official consultation document was a shift of responsibility for determination whether the IR35 tax regime should apply to those who engage a worker through a Personal Service Company ('PSC'). This would be an important development for on-demand economy platforms, as they clearly fall within the notion of 'engagers', and would therefore have to become involved in the tax arrangements of individual drivers.

⁶⁹ Akin to the decision in *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] 4 All ER 745; see A Bogg, 'Sham Self-Employment in the Supreme Court' (2012) 41 ILJ 328, 332.

⁷⁰ *Halawi v WDFG UK Ltd (t/a World Duty Free)* [2014] EWCA Civ 1387.

⁷¹ See M Freedland, 'The "Deane Review of Self-employment"', Institute of Employment Rights, March 2016:- <http://www.ier.org.uk/blog/deane-review-self-employment>

Even if the difficult questions which we have flagged up in the context of UK employment and anti-discrimination law *stricto sensu* could satisfactorily be resolved, a further set of problems thus lurks in the beguilingly simple question of whether a worker for the purposes of employment law should be characterized as an employee or independent contractor for purposes of tax and social security legislation. Put differently, the current mismatch between binary and tripartite classificatory systems leaves open the difficult question as to how to map worker status in the tripartite employment and anti-discrimination law regime onto the binary regime of employees and independent contractors which determines the applicability of key provisions of UK tax and social security legislation.

A detailed analysis, let alone proposals for the resolution, of this conundrum lie beyond the scope of the present contribution. Nonetheless, the foregoing brief statement of the problem provides further support for our key argument that recent decisions about the role of worker status in the on-demand economy have highlighted the rather fragile conceptual structure underpinning English law's approach to employment categorization, as a result of tensions both within the system itself as highlighted in sections two and three, and because there is a real and in a sense even starker tension between that system and the tax system's provisions for, and incentives surrounding, the determination of on-demand workers' fiscal obligations and social security entitlements.

The sharing economy: the emerging debate in Spain

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Abstract: Focusing attention on work-on-demand via apps, this article deals with the consequences of the slow emergence of the so-called sharing economy in Spain. As far as the labour field is concerned, it examines the advantages and risks that this new type of service provision (work?) entails and how Spanish law treats it as a previous step to reflect on the ability of the (labour) current regulation to secure ‘collaborators’ decent working conditions. By extension, it also analyzes the impact that these developing activities could have on the Social Security system, in terms of protection (or lack of it) and financial condition.

Keywords: sharing economy, employee, employment contract, social security.

1. Introduction

Whether we are or not living what has been called the *fourth industrial revolution*¹, the economy is going through a process of great technology-driven transformation which is changing the nature of employment in very different ways. One of them concerns the rise of economic activities which are based on the use of on-line platforms. Major questions are immediately raised, the most relevant one being whether the task/service provided must be considered work or not from a legal perspective. In-depth considerations are to be made throughout the paper.

At this point my attention is drawn to the evidence that this ‘platform work’ certainly has similarities with other forms of nonstandard employment. But is it a specific (autonomous) category or is it nonstandard employment itself? Moreover, and if we admit the latter, for how long will this type of work maintain this status given the rapid development of these new forms of economic activity? Focusing on the conditions in which such tasks/services are carried out, serious doubts rise regarding risks of precariousness, casualization and commodification of work, and the emergence of ‘invisible’ workers. Such circumstances become real obstacles to guaranteeing decent work.

On the whole, what is at stake is the future of work and its implications in very different fields that the law tries to command. In this regard, labour law is facing a major challenge: how to preserve the traditional guarantees which have historically balanced the relationship between labour and capital

¹ Borrowing the expression used by SCHWAB (2016).

in western Welfare States. By extension, this deep transformation threatens the current design of those Social Security systems, such as the Spanish one, where benefits are primarily based on the previous contributions made by workers.

2. Shaping the concept of ‘sharing economy’

The almost brand-new expression ‘sharing economy’ or ‘collaborative economy’ (*economía colaborativa* in Spanish) is often overused. Increasingly the type of activities developed has little to do with real sharing, lying closer to simple selling and profit seeking². In that respect it is probably a misleading concept³ that should be replaced by a more generic expression. Such alternative formulas are already common in English: gig economy, digital on-demand economy, platform economy... On the contrary, scholars and experts are finding more difficulties in Spain to coin an accurate term that includes a wide range of activities, described by the European Commission as “... business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals”⁴. In an attempt at clarification that sheds light over this diversity, we suggest making a triple-fold distinction.

First of all, one category could be what we may identify as *sharing economy in a strict sense*. This is a type of economic activity where a collaborative component is openly present. Often linked to consumption, two basic features may be pointed out. One is that providers act as private individuals, not professionals, so that we come across a new character: ‘prosumer’, a hybrid resulting from producer and consumer. And another would be that these activities are not for profit or, at least, that they are inspired by the principles of social economy.

The suggested taxonomy would include as a second category the *crowd-work* or *crowd-sourcing online*. It refers to those working activities that imply completing tasks (often ‘microtasks’) characterized as follows: first, they are offered on a competitive base to a large number of people (crowd) through online platforms; and second, they are paid to the crowd-worker either by the ‘client’ (crowd-sourcer) or by the platform itself depending on the role of the platform in contractual terms. Certain parallelism with home-work can be found in this case⁵.

Finally, there is still a third category, partially similar to the former, named as *work-on-demand via apps*, where the execution of traditional or (increasingly more frequent) non-traditional working activities is characterized in the following terms. It shares with crowd-sourcing online three key aspects: one, it is based on just-in time relationship where the ‘collaborator’ is in theory free to determine his/her time availability; two, it is channeled through apps which are managed by firms that set minimum quality standards in the service provider and manage the ‘workforce’ with more or less strict criteria; and three, the performance is compensated on a ‘pay-as-you-go’ basis. Beyond these features, the key difference is that tasks are physically delivered (*crowdsourcing offline*), which in principle limits the number of potential collaborators.

My attention in this article will focus on this last category for three main reasons. On the one hand, work-on-demand via apps is to be considered the most common of the new (digital) forms of work that are developing in Spain. On the other, given its offline component this type of ‘work’ seems to be closest to the ‘typical’ (traditional) employment relationship. And finally, it is consistent with a consolidated line in the labour field which seeks cost reduction and profit maximization by adding (extreme) flexibility in a context of high competitiveness.

² As ALOISI (2016, 664) points out, often “... ‘sharing’ could be seen as a euphemism for ‘selling’...”.

³ DRAHOKOUPIL–FABO (2016, 1).

⁴ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee and the Committee of the Regions, “A European agenda for the collaborative economy”*, Brussels, 2.6.2016, COM(2016) 356 final.

⁵ RISAK and WARTER (2015) defend such a remark arguing that it could even fall into the definition of the ILO Home Work Convention (No. 177).

3. The debate on ‘sharing economy’: Why is it emerging so slowly in Spain?

The debate on ‘sharing economy’ has only very recently started in Spain and it has not drawn too much attention so far. It reflects a (relatively) low development of these new business models in this country caused by certain factors regarding the current legal and socioeconomic circumstances.

Firstly, there are specific characteristics of the Spanish economy which constrain the interest for this type of on-demand activities. One of the consequences of the rising digitalization of the economy is the polarization of the employment⁶: the amount of high-skilled and low-skilled employees grows as the intermediate-skilled ones, often linked to ‘classic’ industrial activities, lose their jobs due to the technological transformation and the concurrent process of tertiarization of the economy. However the fact that the Spanish economy is characterized by the importance of a tertian sector that intensively uses (an excessive number of) workers with low skills implies that the potential for further polarization of the employment is limited. In a way it could be stated that such a polarized economy already exists in Spain.

Secondly, it is evident that the context of economic crisis and austerity-driven policy has had a negative impact on the development of these new business models. From mid-2008 until the beginning of 2014 more than 3.6 million jobs were lost as a result of a double-dip recession, so that economic growth has only taken place since 2015. That is to say that the moment the gig economy takes off in other countries (around 2010) there were no favourable conditions in Spain. Here it is still a fairly new phenomenon.

Thirdly, it must be taken into account that the (ultra)flexibility sought by the new ‘gig economy’ is ordinarily reached in Spain through alternative channels favoured or spoiled by the labour regulation. Although a widespread idea claims that the Spanish labour market is very rigid, its real functioning shows a great deal of flexibility that causes severe instability by means of the following factors. One, an excessive level of temporary employment that very often is not based on temporary reasons as the regulation formally requires. Two, the overuse of dismissals as an instrument to adjust production, avoiding other measures of internal flexibility much more effective in maintaining employment and lowering adjustment costs in a context of economic contraction⁷. And three, other anomalous practices that aggravate precariousness such as a very high proportion of involuntary part-time work, and intense job rotation.

Lastly, there have also been occasional, but real, legal obstacles to the development and expansion of these new platform activities. On the one hand, Competition Law has deterred the development of new businesses in regulated sectors; Uber’s case is the best example⁸. On the other hand, we might also consider that Labour Law could have in a way restrained the flourishing of ‘gig economy’ as a consequence of the actions (or threat of actions) taken by the Inspectorate of Labour and Social Security whereby the so-called ‘collaborators’ (acting as independent contractors) were classified as workers with the subsequent legal consequences: labour guarantees and Social Security obligations for the employer⁹.

All in all, the aforementioned circumstances decisively contribute to the (relatively) slow growth of ‘gig economy’ in Spain. And this probably explains the scarce attention paid to this new phenomenon by the Spanish labour law scholars so far despite the very serious implications that it has for labour and Social Security regulation¹⁰.

⁶ AUTOR (2014).

⁷ A widespread idea traditionally claims that the Spanish labour market is rigid mainly because it is difficult and/or expensive to dismiss permanent workers. Quite the opposite, *OECD Indicators of Employment Protection* shows that such a conclusion has never been accurate, even less after the 2012 labour market reform. See: SUÁREZ CORUJO (2014, 57).

⁸ Among other legal actions, a licensed taxi-drivers association in Barcelona claimed that Uber was providing a transportation service breaching the Spanish unfair competition law. A commercial court made in 2015 a make a reference to the Court of Justice for a preliminary ruling on the nature of Uber’s activity (transport service or an information society service). The judgement is still pending.

⁹ As a matter of fact, in the EsLife case the startup decided to close down the activity after the Inspectorate of Labour declared that its ‘collaborators’ providing cleaning services merited the condition of workers.

¹⁰ As salient exceptions, see: SIERRA BENÍTEZ (2015); GINÉS i FABRELLAS – GALVEZ DURAN (2016); CAVAS MARTÍNEZ (2017); TODOLÍ SIGNES (2017).

4. ‘Sharing’ economy and its impact seen from the spanish perspective

The main contribution of this article deals with the responses given by Spanish law in two different, although closely linked, fields: Labour Law and Social Security Law. It is to be noted at this point that although most of the analysis carried out by experts have concentrated on the labour issues, those regarding the Social Security system are equally relevant and therefore should not be forgotten.

A. Employment relationship

This section tackles two central questions regarding the development of these new forms of work on-demand via apps in Spain. One wonders how Spanish (Labour) Law treats this type of work; in other words, does it fall into the field of Labour Law or is the nature of the relationship that supports the activity different? Likewise, once the position within the legal frame is determined, a second question is pertinent: has the current regulation the ability to secure decent working conditions?

As a preliminary consideration, it is undeniable that this new phenomenon that could be named ‘uberization’ of the economy will (potentially) have significant implications for the labour market and its regulation. Focusing the attention on the collaborators’ side, there are certainly (potential) positive effects stemming from participation in these types of (economic) activities.

In this regard, the main advantage has to do with the flexibility that it offers to workers (‘collaborators’). In principle, this is always attractive as a way of having full control of time. But it is especially relevant in those cases where carrying out this monetary activity must be compatible with other such as care responsibilities, education, etc. Thus it could favour an extension of the labour force benefiting youth and women, among others¹¹. Furthermore work on-demand via apps (certainly more crowd-sourcing on line) could increase as well the employment opportunities for job seekers with special difficulties (disability, health problems...) and limited capacity of movement.

‘Uber-like’ activities are also attractive as a convenient way of earning additional income when the ‘collaborator’ has a regular job. Or it makes it easier to combine ‘working’ for different platforms which in certain cases could be interesting in order to reduce the dependence on a single one and to maximize the profit obtained with respect to the time invested.

Finally, the growth of this platform activity could contribute to reducing the size of undeclared economy. The thorough digitalization of an activity that directly affects three different parties favours control and makes illegal practices more difficult. And this would be particularly relevant in a country such as Spain where tax fraud is extensive.

Having said this, many voices have warned against the negative effects that this process of *uberization* of the economy could have. Those inconveniences are mainly associated with distinctive drivers of these types of activities. One is an excess of labour flexibility: although such flexibility may in principle equally benefit both parties, the experience shows that it generally tips the balance in favour of platforms¹²; that is to say that it is a kind of flexibility that does not entail a greater freedom for the worker¹³. Another one is individualization in a two-fold sense: on the one hand, the collective dimension is annulled, as we will see; and on the other, a key element in reducing labour costs lies in the fierce competence among ‘collaborators’. And finally, the third driver refers to the blurring role played by on-line platforms, very often deliberately sought.

In an effort to be more precise, ‘collaborators’ might be exposed to various labour risks which weaken their contractual position with respect to negotiation and the actual conditions of performance. Such risks are to be classified into three main groups.

Given that these types of activities are often carried out on a just-in-time, intermittent or irregular basis, the first group includes risks associated with key professional conditions. One is that short-time

¹¹ DE GROEN – MASELLI (2016, 24).

¹² As PRASSL and RISAK (2016, 624) observe, this “... increasing desire for labor flexibility...” has been the driver behind the emergence of different forms of atypical work.

¹³ ALOISI (2016, 662).

activities could jeopardize a sufficient level of income. That would not be a major problem in those cases where work on-demand via apps does not account for the main source of earnings, but it is an actual threat of underpayment if it is the principal activity. Note that this could be circumventing or eluding minimum wage regulation: on the one hand, it does it directly when the ‘collaborator’ acts as an independent contractor as there is no bottom limit for payment; and on the other, microtasks and just-in-time services increase the risk of low-wage workers¹⁴ opening the door to in-work poverty and economic instability.

And from a different perspective, another risk has to do with working time given the fact that the ‘collaborator’ is (theoretically) free to determine when to be ‘active’. In particular, as the payment for the service may not be generous, overworking could be a reality and, in that sense, a way of self-exploiting in order to guarantee a decent level of income¹⁵.

A second group of risks reflect that the reinforcement of the platform’s position within the contractual relationship goes too far even in terms of labour regulation where a strong subordination is characteristic. Alongside thorough supervision and strict control on the service carried out, the relevance given to the client’s ratings cause great vulnerability to ‘collaborators’. Especially when we take into account that, as a general rule, platforms have the power of (account) ‘deactivation’ –a denial of the opportunity to offer services through the app. It is evident that this is to be deemed a sort of disciplinary power that attempts to legitimize what probably constitutes an abusive way of contractual termination which seriously threatens all different dimensions of stability.

Finally, risks also stem from the strong individualistic component of the service provision that virtually annuls the collective dimension of an activity carried out by an undefined (usually numerous) group of ‘collaborators’. This means that the individual vulnerability already described cannot be faced by the typical collective subjects and actions of Labour Law. To be more precise, it is not that collective action is not possible: as the Uber cases in the US and the UK¹⁶ prove, there is a certain margin for it despite the initial attempt at leaving aside labour regulation. But we have to be conscious that channeling the contractual relationship outside the labour field entails that the legal means to defend common interests to the ‘collaborators’ are very limited. And, thus, it aggravates the weaknesses associated with their ‘invisibility’ and the existence of huge competition among them.

On the whole, we can state that the development of these work on-demand via apps directly cause great uncertainty to ‘collaborators’. This normally turns into acute instability and precarious working conditions which, if no specific response is given, could foreseeably lead to the emergence of a new group of precariat¹⁷. In this respect, the legal classification of the relationship between the online platform and the service provider is a key issue, given the fact that independent contractors do not enjoy any labour guarantees. However, we should be note that probably neither of the regulations applied (including labour legislation) offers an adequate response to the challenges that the *uberization* of economy brings about.

a) Legal classification of the relationship between on-line platform and service provider

There are three possible classifications in Spanish Law according to the specific characteristics of the relationship between the platform and the ‘collaborator’, not to the name given by the parties, as we will see.

First of all, the one used in practice so far is to identify them as *independent contractors*, that is to say self-employed who are in business on their own account. This implies the absence of any specific guarantees beyond the basic ones recognized by common private law between parties or contained in the *Self-Employed Workers' Statute* (Act 20/2007).

¹⁴ DAGNINO (2015, 10).

¹⁵ In crowd-sourcing online there is also a risk linked to the cost of time searching for microtask that are very low paid.

¹⁶ *Mr. Y. Aslam, Mr. J. Farrar and Others v. Uber* (<https://www.judiciary.gov.uk/judgments/mr-y-aslam-mr-j-farrar-and-others-v-uber/>).

¹⁷ See: STANDING (2014, 224).

Secondly, service-providers could be classified as *economically-dependent self-employed workers* [*trabajadores autónomos económicamente dependientes*, TRADEs]. By virtue of section 11 *Self-Employed Workers' Statute*, this category refers to those who usually, personally and directly carry out an economic or professional activity for income purposes receiving 75% (or more) of their income from one single client. Even though the analysis of this peculiar type of self-employed is not one of the purposes of this article¹⁸, it is nevertheless important to underline two aspects with respect to its legal regulation. On the one hand, certain guarantees are (partly) secured by the law regarding conditions on contract termination, working time limitations, coverage against work-related accidents and cessation of activities, and the recognition of collective agreements. On the other, a further requirement to obtain the status as economically-dependent self-employed workers is a formal recognition by the client (section 11bis Act 20/2007), a major obstacle in practice as we will see *infra*.

Lastly, the third possible classification is that of *employees*. According to section 1 of Workers' Statute (Royal Legislative-decree 2/2015), they are defined as those rendering services for another person within the scope of the organization and management of that person, the employer. Needless to say, such a condition opens the door to all labour guarantees for employees and the correspondent obligations for employers.

There are still two additional and closely-related remarks to be made regarding this triple-fold classification. One is that section 8 of the Workers' Statute contains a 'labour presumption': a contractual relationship whereby someone personally works for the benefit and under the direction of someone else in exchange of remuneration is, in principle, considered as an employment contract¹⁹; so unless it is proven that one or more of those defining characteristics are not present in certain cases, the appearance leads to the recognition of labour status. This also implies, as a second remark, that in Spanish Law contractual classification is not dispositive. That is to say that a "*primacy of fact*" principle rules, in the sense that it is facts, and not labels, which determines the attribution of employee status or, on the contrary, the existence of a commercial relationship²⁰.

In conclusion, legal classification will depend on the result of a multifactorial test that will be based on the facts emerging from the relationship between the platform and the service provider ('collaborator')²¹. Specifically, attention should be drawn to those defining features that separate the concepts of employee and self-employee in Spanish Law (section 1 WS), which are questioned in these types of cases. So we are back facing what has been expressly described as the 'cornerstone' of Labour and Employment Law²².

Leaving aside two of the defining characteristics of the employee (personal work and remuneration), I will focus on the ownership of the benefit and, above all, the (lack of) subordination with respect to the potential employer. As far as the former is concerned, we could probably state that, notwithstanding being a highly casuistic issue, it will remain (it certainly does, so far) largely unchallenged since the 'collaborator' works for a platform (to the platform's benefit) pursuant to a contract. So the claim that platforms act as technological companies²³ whose activity is limited to matching demand and supply cannot be accepted for two main reasons. One, because the business is not viable without the participation of 'collaborators'. And, two, for it tends to be evident that the platform does not sell software, but services that are provided by 'collaborators' usually subject to detailed instructions.

The key aspect is whether the service is provided by the 'collaborator' in a dependent or independent manner with respect to the platform: in the first case, that will reflect the subordination that

¹⁸ Extensively on this issue: PÉREZ REY, J. (2016).

¹⁹ Note that such a provision is in line with ILO Recommendation No. 198 that encourages to provide for "... a legal presumption that an employment relationship exists where one or more relevant indicators is present".

²⁰ See, as an illustration of this principle, the Spanish Supreme Court (Social Chamber) Ruling of 25 January 2000 (No. 582/1999).

²¹ ALOISI (2016, 669).

²² See DAVIDOV (2002, 358), quoting the renowned work by KAHN-FREUND (1956) ["Legal framework", in: FLANDERS, H. – CLEGG, H.A. *The system of industrial relations in Great Britain: Its History, Law and Institutions*, Basil Blackwell, Oxford, 1956, pp. 42-45].

²³ See the request for a ECJ's preliminary ruling from the Juzgado Mercantil No. 3 de Barcelona (Spain) lodged on 7 August 2015 — Asociación Profesional Élite Taxi v Uber Systems Spain, S.L. (Case C-434/15).

characterizes an employment relationship; while in the second one, such autonomy would lead us to classify the provider as an independent contractor.

Following Spanish case-law²⁴, the assessment of (in)dependency in case of uber-type collaboration should be based on the already mentioned multiple test that takes into account signs of the existence or not of such a feature. From a general point of view, a traditional analysis of the potential employee status would find strong evidence of independency (self-employment) stemming from the following contractual conditions²⁵. First, the most relevant one arguably is that working time is determined at the collaborator's discretion, which means that there is no fixed timetable and, even more importantly, that the very 'collaborator' decides when to be active in the platform. Second, and along the same lines, it is common that he/she enjoys freedom to refuse tasks commanded through the platform. Third, it seems to show autonomy that the performance of the activity is basically self-directed, notwithstanding the existence common instructions directed to all 'collaborators'. Fourth, the non-exclusivity of the contractual engagement, that is to say, the possibility of 'collaborating' with several platforms is generally considered a sign of independence (ancillary income). And, fifth, the fact that activity-related spending is not compensated for by the platform could also indicate that the service is provided on his/her own account.

Having said that, evidence of dependency of the 'collaborator' on the platform are also frequently found in practice, some of them being typical signs of a traditional idea of subordination and some others showing new forms of such dependency. Firstly, in cases of work-on-demand via apps, where the performance is physically carried out, it is common to have 'collaborators' fulfill certain conditions before being activated. Secondly, another sign of subordination lies in the personal dimension of the performance in the sense that it is not transferable. Thirdly, according to the experiences analyzed in Spain, the supremacy of platforms is obvious in very different aspects: strict (no matter if indirect) supervision and control; detailed indications of how to perform the tasks; three, price fixing of services performed; sham incentives on 'activation' that hide a minimum level of availability. Fourthly, the fact that the platform is allowed to 'deactivate' 'collaborators' in a wide range of circumstances shows a sort of disciplinary power, one of the most typical characteristic of employers. And fifthly, without being exhaustive, it is also a sign of subordination of 'collaborators' that the relationship established with the client (payment included) is always channeled through the platform.

So far, contracts signed by web-based platforms and service providers usually classify the latter as independent contractors (self-employed). Only exceptionally –in one case due to an intervention of the Labour Inspectorate²⁶ –, service providers are considered as employees carrying out a service under a contract of employment signed with a platform who acts as employer. Is this interpretation moving away from Labour Law reasonable?

It is certainly risky to make a general judgement on such a casuistic issue. But what concrete experience shows in very recent years in Spain is that one of the main points sought by this new kind of business model is to reduce 'labour' costs. So it could be stated that, deliberately or not, considering 'collaborators' as independent contractors tries to circumvent labour and Social Security regulation. In other words, in most cases we would be in front of bogus self-employed that shows that the aim pursued is not only reducing (or eliminating) the cost of unproductive time at work²⁷, but often to avoid the constraints of Labour Law.

Then the question to be posed is what would be the adequate legal classification of this type of contractual relationship. Apparently classification as economically-dependent self-employed workers (TRADES) could be reasonable as an intermediate category that reflects the mix of features that makes it difficult to give a clear-cut response according to the traditional patterns. Note that this solution might be

²⁴ See: CRUZ VILLALÓN (1999).

²⁵ See a complete analysis of this issue in MERCADER (2017, 90).

²⁶ In the EsLife case, a startup providing home cleaning services that decided that decided to quit its activity after an intervention by the Labour Inspectorate whereby 'doers' (terminology used by the company to refer to cleaners) were to be considered employees, not self-employed workers. The corresponding obligations, namely Social Security contributions, brought along an important cost increase that the company could not afford according to its representatives.

²⁷ PRASSL and RISAK (2016, 625).

attractive for both parties as it offers a minimum level of professional guarantees to ‘collaborators’, and flexibility and reduced costs to those firms behind the platforms. However, it does not seem to be a real option. Besides the (more theoretical?) objection that ‘collaborators’ may diversify their activity among different platforms not fulfilling the legal requirement of rendering services principally (75% of their income) for one client, current regulation presents a significant obstacle²⁸: the requirement of a formal recognition of TRADE’s status (or the way it is foreseen by the Law) is preventing this potential group from growing²⁹. Therefore, notwithstanding that such a condition can be successfully claimed in court, the reality is that the number of registered economically-dependent self-employed workers has always remained very low³⁰, even after a legal amendment in 2011.

Having verified that the legal classification as economically-dependent self-employed does not seem to be an effective response to the challenge set by work-on-demand via apps, it is reasonable, in principle, to conclude that an employment relationship exists according to the case law³¹. But various questions immediately arise revealing what arguably can be considered an unsatisfactory regulation.

Doubts arise concerning the type of employment contract in terms of duration. Given the just-in time performance characteristic of the ‘uberized’ activities and the overuse of temporary work in the Spanish labour market, it is easy to imagine the temptation to channel the relationship through a fixed-term contract. Nevertheless, as service provision (through the app) constitutes the main activity regularly carried out by the platform, we are bound to conclude that the appropriate type of contract is one of indefinite duration. But therefore we have to face new legal problems.

In particular, the peculiar working time characteristic of this type of activity would normally lead us to conclude that ‘collaborators’ are deemed to be part-time employees. However, another feature forces an additional remark. We are referring to the fact that the service/task is provided on an irregular or intermittent basis. That means that, in principle, this employment relationship would fall outside the scope of part-time contracts³² and consequently correspond to a fixed discontinuous one. Once again such a solution raises doubts that reflect the inadequacy of current regulation on this contractual relationship. Just as an illustration, we could ask ourselves whether the requirement of ‘homogeneous activity’ is fulfilled³³ or how the right to be called to work is exercised.

b) Beyond legal classification: the vulnerable position of platform ‘collaborators’

Beyond the legal classification of uber-like ‘collaborators’, we may conclude that their position is very vulnerable in any of the three cases mentioned, employment relationship included. So it appears to be necessary to reconsider certain legal aspects as a way of guaranteeing decent working conditions.

We have already seen that ‘collaborators’ are normally classified as self-employed workers. Leaving aside dubious practices seeking to avoid labour regulation, in most cases the specific characteristics of the contractual relationship may well support a different classification according to Spanish Law. The first alternative –economically-dependent self-employed workers– does not seem to be fully satisfactory. On the one hand, given the poor numbers registered so far, a legal amendment making it easier to attribute is indispensable. And even if we overcome this obstacle it is not clear, on the other hand, that

²⁸ See: AGUT GARCÍA y NÚÑEZ GONZÁLEZ (2012, 130).

²⁹ On the requirement of communication to the client as a constituent element, see GINÉS i FABRELLAS and GALVEZ DURAN (2016, 14).

³⁰ The specific Register for economically-dependent self-employed workers at the Public State Employment Service, which belongs to the Ministry of Employment and Social Security, merely counts 16.000 TRADEs. A high contrast in comparison to the circa 260,000 self-employed working for one single client estimated by the National Statistics Institute in the Economically Active Population Survey.

³¹ It is interesting in comparative terms to recall the main functions underpinning the position of employer according to PRASSL and RISAK (2016, 636): inception and termination of the employment relationship; receiving labor and its fruits; providing work and pay; managing the Enterprise –internal market; managing the Enterprise –external market.

³² This would include fraudulent part-time work on demand, as well as sham private employment agencies (DE STEFANO 2016, 9).

³³ *Vid.* Supreme Court ruling of 24 February 2016, among others.

the solution will be adequate since this intermediate category could be used to cover real employment relationships according to section of the Workers' Statute³⁴.

So focusing on the labour field, we must be conscious of the difficulties and limitations shown by the current legal framework originally conceived to give responses to a very different economic environment. This means that, in order to prevent a significant escape of individuals from the scope of Labour Law, the definition of employment relationship has to be adapted and reinforced in a two-fold manner.

First of all, a key aspect is the redefinition of the concept of 'dependence' on the employer as one of the defining features of an employee. The traditional idea of rendering services within the scope of the organization and management of the employer gives way in a digital economy to a new characterization. Among other changes, it is noteworthy that, rather than strict subordination, the employment relationship is mainly defined by the existence of economic dependence. Along these lines, monitoring is performed in a very different manner: although there is no physical presence, employer's control can be equally, or even more, effective thanks to new instruments such as client's rating and its impact on digital reputation³⁵. From a different perspective, the very position of employer could be in certain cases altered: it is relatively common for start-ups to have a business model based on no big investments that are exposed to a higher risk of failing. In that sense, it is not exaggerated to speak of more prevalent business 'precariousness', a relevant factor that tends to aggravate the employee's dependence.

Secondly, and as a logical step forward, it urges to adapt labour regulation and institutions to the new working forms, so that the resulting legal framework offers sufficient flexibility to platforms, while preserving at the same time labour guarantees in favour of 'collaborators'. The question is how to achieve such an ambitious goal.

De lege ferenda, two main solutions are conceivable. TODOLI has suggested that the most appropriate option would be the formulation of a new special employment relationship. This means that, without being excluded from Labour Law, the aforementioned contractual relationship would be subject to a specific regulation purposely designed to reflect the singularity of certain circumstances typical of the new economic activities³⁶. However, there are two objections to be made. On the one hand, it is foreseeable that an *ad hoc* regulation would imply –following most of the special employment relationships– certain sacrifices for employees in favour of employer interests. And, on the other, in the long (possibly even medium) term this new sort of business model will probably represent a major proportion of economic activity, not a minor part as it does today. Therefore a special regulation could turn to be a way of undermining labour rights.

In my opinion, it is more reasonable to classify platform 'collaborators' as ordinary employees. That is compatible with adapting the Workers' Statute to the singular working conditions, which characterize this type of activity, by following the example of the current remote working clause (section 13 WS): a new section regulating its singularities (working time, salary, surveillance, etc.), within the general legal framework applied to common employment relationships.

B. Social security

Difficulties of formal classification in legal terms, as well as the specific characteristics of work on-demand via apps create problems from the perspective of Social Security. In brief, questions such as the following arise: how does the Spanish system of Social Security treat these new forms of work?; has it the ability to secure adequate social protection?; and, from a broader point of view, could the gig economy impact on the financing of Social Security and its future sustainability?

Focusing on the formal side of the relationship, the first issue to deal with is determining which scheme, if any, corresponds when registering with the Social Security system. The answer basically stems from the contractual classification. That is to say that when the platform 'collaborator' has the

³⁴ This skeptical view on intermediate category is shared by DE STEFANO (2016, 20) with respect to Italy.

³⁵ PRASSL and RISAK (2016, 625).

³⁶ See: TODOLI SIGNES, A. (2015, 17). More extensively by the same author: TODOLI SIGNES, A. (2017, 71-75).

condition of employee he/she will be bound to register with the General Scheme, whereas independent contractors (including economically-dependent self-employed workers) enroll in the Special Scheme for Self-Employed Workers.

However, the fact that the services performed are often sporadic complicates the answer. At this point, a distinction must be made between those cases where ‘collaborators’ act as independent contractors and those others in which, despite being occasional services/tasks, the defining features of the concept of employee are met. With respect to the latter, the rule is that all employment relationships require registration with the General Scheme, regardless of how brief or infrequent the working activity is³⁷. As far as the case of independent contractors carrying out sporadic services is concerned, the legal criterion is much more unclear. In principle, they are to be excluded from the scope of Social Security since at least one of the legal requirements is missing: that the activity is performed in a regular manner (*de forma habitual*)³⁸. The problem is how to interpret this ambiguous situation.

Case-law tries to give an answer pointing at a minimum level of (net) income, equivalent to the national minimum wage³⁹ (707 euro per month in 2017). Scholars concede that such a rule is not fully adequate⁴⁰, because it is still uncertain and entails a serious risk of fraud as undeclared work. But the solution is even more unsatisfactory when it is projected onto activities based on work-on-demand via apps. On the one hand, it could be easier to measure working time as a way of proving a regular performance. Especially when we take into account, on the other, that it is (could be) common that earnings do not reach a certain minimum amount given the intermittence of the activity. Note that the consequence is to exclude the ‘collaborator’ from the Social Security system.

The next question deals with how registration and subsequent Social Security contributions (or the lack of both) affect the adequacy of future social benefits. It is not exaggerating to state that there is a serious risk of partial or total lack of protection due to three main factors. One is that the relatively common pattern of sporadic services leads to the absence of compulsory payment of contributions making it impossible to have access the contributory benefits of the Social Security system. Likewise, an additional factor is that protection against employment risks is not fully provided for self-employed since it works on a voluntary basis. And finally, low-level contributions are (potentially) common given the reduced working time and characteristic intermittence, in particularly when it comes to self-employed; again, the benefit amount will feel the negative effects.

In relation to this last factor of downsizing protection, it is important to note that recent legal reforms have aggravated the potential problem in the pension field by increasing the proportionality of benefits with respect to previous contributions (an extension of the period of reference to calculate pensions and a rise in contribution years to draw a full pension). We have to be conscious that this extra effort demanded to the whole working population to keep the current level of pension benefits will be particularly exacting for those professionals rendering services in economic activities based on the use of on-line platforms.

All in all, is the traditional pattern of Social Security coverage inevitably heading towards a reduction of benefits?

It is also important to think over the impact that these new types of businesses could have on a very thorny issue at present in Spain: the financing of Social Security and, by extension, its future sustainability. The premise would be that it is foreseeable that Social Security funds coming from contributions will decrease as a result of the described low (or lack of) contributions associated with the new forms of platform work. Some difficulties arise.

To begin with, the fall of contributory resources is always problematic for Bismarckian-type Social Security systems due to their structural dependence on contributions as the main source of financ-

³⁷ Formally there is a provision that attributes to the Government the ability to exclude from the scope of application of Social Security marginal activities that do not provide for sufficient means to make a living (see section 7.5 of the Social Security General Act).

³⁸ According to section 305 of the Social Security General Act, those who habitually, personally and directly performs a profit-driven activity, without an employment contract must register with the Special Regime for Self-Employed Workers.

³⁹ See the Supreme Court Rulings of 29 October 1997 (No. 406/1997) and 20 March 2007 (No. 5006/2005).

⁴⁰ DESDENTADO BONETE and TEJERINA ALONSO (2004, 61-67).

ing. That is particularly problematic in the Spanish case where over 90% of Social Security benefits are paid from employers' and workers' contributions.

On top of it, this threat of imbalance between contributions and benefits becomes more serious if we take into account two circumstances. One, the current financial condition of Social Security (in a critical situation in Spain since 2012). Two, the challenging future linked to the ageing process in the coming years and the subsequent needs of additional resources.

So, we draw the conclusion that, to a certain extent, these new forms of work could undermine the pillars upon which traditional Bismarckian systems have been built. On the one hand, the dependence on the labour market now gives way to a new allocation of (economic) risks led by individualization enhancing a tendency towards social polarization. On the other, Social Security systems face increasing needs of income, caused by growing numbers of pensioners, with a decreasing amount of contributions.

Having said that, and focusing again on Spain, it is pertinent to pose the question whether we should reform our Social Security system in order to face the consequences of the platform economy and new forms of work. In brief, a new design of financing resources seems necessary so that the State assumes a greater role to make up for the foreseeable lack of contributions. To attain this goal, we may think of two different paths. One would represent a first step towards a more *Beveridgean* system by assuming a significant reduction of benefits and focusing, instead, on reducing poverty through assistance benefits. The other would try to modernize the *Bismarckian* system: keeping its traditional pattern by reinforcing solidarity mechanisms to compensate for labour precariousness.

5. Concluding remarks

Throughout this article we have examined the most relevant legal issues regarding the (slowly) ongoing development of the imprecisely named 'sharing economy' in Spain. In particular, attention has been drawn to the impact that these new types of activities have on the design and effectiveness of labour and social security regulation. This analysis shows what lies behind this emerging economic reality: the 'sharing' economy is a major challenge for two basic institutions of the Welfare State: the labour market and Social Security. So when we are to think of possible legal changes demanded by this new phenomenon, we have to be conscious that it is this Social State itself, and its implications in terms of economic progress and welfare, which is at stake.

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