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Regulating Labour in Europe: Functions and Features

A Preliminary Study Using the Comparative Method

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Preface

This book represents a preliminary systematisation of the comparative work carried out within the Share Project SHARE (Seizing the Hybrid Areas of Work by Representing Self–employment), which has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant agreement N. 715950).

The research project was based on a transdisciplinary and multi-method study of hybrid areas of work, with a particular focus on work arrangements potentially able to "destabilise" traditional employment relations. It involved six European countries: France, Germany, Italy, Slovakia, the Netherlands, and the United Kingdom.

It combined a multi-sited and cross-national ethnography – conducted within unions, employer organisations, freelancer associations, grassroots groups and cooperatives – with a comparative labour law perspective and a comparative quantitative study.

This book has been conceived to present certain achievements related to the Share project and to pave the way for a broader and more comprehensive monography scheduled for release by a major publisher in early 2025. This forthcoming study will also explore the effects of generative artificial intelligence in the same area examined in this book. The research on generative AI is currently undergoing and conducted as part of the broader I.TE.CO (Technological Innovation As Opportunities) Project, funded under the aegis of the University of Milan's "Avviso Grandi Sfide di Ateneo" initiative.
Moreover, the forthcoming book will include a section dedicated to the EU level, which has been omitted at the last minute in this instance. This omission results in the current book focusing almost exclusively on comparative analysis.

The book focuses on labour law, firmly positioning it within the author's original scientific field while also seeking to highlight and valorise the scientific and methodological pathway that the author developed over the years, from the time spent in Japan under a JSPS fellowship to the daily collaboration with experts from various disciplines at the University of Milan. Therefore, labour law is placed in the context of its historical evolution and by references to cognate disciplines showcasing the author's interdisciplinary approach.

To further explore the methodological aspect, it is important to note that the comparative analysis not only identifies similarities between legal systems but also examines how different countries have addressed common issues and the effectiveness of their solutions. Moreover, the study draws on works from other disciplines to uncover and highlight the historical and ideological foundations of the analysed institutions and to explain the evolution of work organisations in recent years.

The methodological framework adopted in this book aims to heed the caution of one of Europe's foremost scholars of comparative law, who emphasised that employing the comparative method «requires a knowledge not only of the foreign law but also of its social, and above all, its political, context» to prevent the comparison from «becoming an abuse» when «informed by a legalistic spirit which ignores this context of law»[1]. Furthermore, the multidisciplinary approach woven into the fabric of this book seeks to offer a broader and enriched perspective, making the analysis more accurate and engaging for the reader.

For approximately forty years, labour lawyers have been debating whether the foundational institution of labour law—the contract of employment and its underlying relationship of subordination—can still support the overarching structure of legal institutions that constitute labour law. The distinction between dependent and independent work has been a topic of study and controversy among experts since its inception. Despite this, like any other legal institution, it is never strictly identical to itself. Even if the wording of Codes or Statutes, where they exist, remains unchanged regarding dependent employment, the interpretation of the law evolves over time, allowing for a continuous connection with the social reality it aims to regulate.

However, it must be said that there have been two historic moments in recent decades when the need for change has been the subject of the most intense debate among experts.

The first was at the turn of the last century, and the second was after the more recent rise of the so-called platform economy, or 'sharing economy"[2], as it was first called (this term mostly disappeared as soon as it became clear that one party was getting most of the benefits, as in the previous "analogue" economy).

In the first case, the experts' reaction has been linked to economic determinism[3]. In other words, scholars started to claim that deep structural transformation occurring in the economic structure of industrialised societies was producing changes in the economic relations to which labour law should have conformed[4].

In the second case, labour law's supposed inability to regulate relations is attributed to technological determinism, which posits that new technologies have altered the framework within which the law operates, making it unfit[5].

[1] Kahn-Freund, 1974, p.27.
[2] Scholars argue that terms like the 'sharing economy' and the 'gig economy' have been used as a form of rebranding for longstanding trends in precarious, short-term employment, thereby creating an 'innovation paradox.' This paradox suggests that despite the technologically novel features associated with app usage, there is nothing novel about the organisation of work in the gig economy (Prassl, 2018, Ch. 4 and see also Freedland and Prassl, 2017, 16).
[3] Kountouris, (2007), The Changing Law of the Employment Relationship. Comparative Analyses in the European Context, Routledge, 2007.
[4] In this terms ivi, p. 7.
[5] A certain economic and technological determinism appears to emerge, for instance, in the collective work of various authors in Stone and Arthurs (eds), 2013 accompanied by a certain scepticism regarding the ability of the employment contract to remain the category through which labour and fiscal law ensure their mode of operation. See also De Vos, Anderson, and Verhulp (Eds.), 2023.

Labour law is objectified, and the political and historical factors that influence the decisions of its creators—legislators, judges, and academics[6]—are obscured.

The author's point of view about the previously stated points determines the distinctive scientific direction of this research and the structure of the work presented here and of the forthcoming book which will collect all the research of those last years in the Share team. Historical and cultural matrices always serve as the premise and framework for analysing the legal discipline of institutions.

For this reason, the first section of the book situates labour law within its political and historical context, tracing its evolution up to the present day. The second part of this section, on the other hand, examines the national contexts to describe how the areas of subordination, autonomy, and potential hybrid areas have been legally addressed in each of the six countries studied.

In considering the law of each country, it is not only the written law that is taken into account but also the jurisprudential law and the doctrine referred to in the footnote.

Another corollary to the above is the way in which new technologies, and platform work in particular, are treated in this book.

The academic debate and media attention on these technologies have prompted both the European Union (see the analysis on this point in the second part of the book) and some countries to intervene with specific regulations.

As for the legislation at the national level, the regulation does not cover the entirety of issues since normally a) it covers only some sectors, such as the mobility industries or the delivery sector; b) often this legislation aims at ensuring some rights to self-employed platform workers (as for example the right to collective bargaining or health and safety standards) or rights connected to the specificity of the digital technologies as, for example, the right to disconnect. Moreover, normally, this legislation does not tackle or solve the issue of the status of workers, with a few exceptions. Curiously, the case of Spain and Greece are on the opposite side of the spectrum regarding this point. In Greece, Law no. 4808/2021 introduced a negative presumption of employment, which implies that the contract between a digital platform and a service provider is presumed not to be a dependent worker when some criteria are fulfilled cumulatively. They relate to the right to use subcontractors or substitutes and to accept or deny platform proposals to work. The Spanish Riders Law, on the contrary, reaffirmed the presumption of employment, already existing in the Workers" Statute, for workers of delivery platforms industries.

The point is that despite specific legislation, the general rules (and definitions, when provided) in each country remain decisive in ascribing a specific status to digital workers in concrete cases. It is particularly crucial to understand how national case law interprets the dividing line between employment and self-employment. Consequently,

[6] Van Caenegem, 1987.

platform work is not treated as a separate topic in this book; instead, references to it are integrated into the broader discussion.

According to the analysis performed in this book, the platform economy correlates with the organisational models that have spread over the years at the company level to organise work and that sociologists have studied. Furthermore, these models are read in the light of economic theories that explain the boundaries of the "firm" and its relationship to the market. This is the target of the latest section, which paves the way for the conclusions.

Sectio One
THE REGULATORY EVOLUTION IN THE LIGHT OF ITS POLITICAL AND HISTORICAL DIMENSIONS

This Section dwells on the evolution of labour law and the status of subordination, trying to underline the reasons and logic behind that evolution in the belief that this perspective sheds light on the changes underway in this branch of law in the current scenario. Furthermore, the approach used in this Section helps to treat the most recent challenges, such as platform work and the consequences of the pandemic on the organisation of work, under a specific perspective angle so as to avoid looking at them as peculiar and isolated issues pushed by new technologies or concluded in the pandemic urgency. Indeed, each wave of technology has its own technical peculiarities which pose specific issues, but the latest wave of technology also revamps old problems in a new way. This will probably be true also for the case of the generative AI, whose changes are on the go and were not yet part of the Share project scrutiny. The pandemic exacerbated and accelerated changes in the organisation of the labour factor, particularly concerning space and time. This is because the obligation to work where and when the employer demands has traditionally been a clear indicator of subordination, but it has lost relevance in many cases today.

This Section takes two widespread views on labour law as its starting point and subjects them to criticism in order to investigate some of the essential issues of the subject and describe the current scenario accordingly. This path is designed to bring the reader to focus on the foundations of labour law and path dependency to comprehend how the current *status quo* regarding the discernment between employment and self-employment interacts with today's economy and society.

The results of this analysis are then used to discuss how the approach to delineating the line between employment and self-employment in labour law, and from a broader perspective, the lawmaking policies lately adopted in this regard, also affect collective rights and social law.

Chapters One and Two are thought to give the reader an overview of the issues addressed by analysing general trends. To achieve this, the peculiarities of each national legal system are generally kept in the background; however, specific legal systems are occasionally used as examples in Chapter One to demonstrate the congruence between theoretical assertions and the actual functioning of legal systems.

The Section ends with concluding remarks.

1. What is the function of labour law and the employment contract?

The first opinion I referred to above holds that labour law's primary objective is to combat inequality[7] (which is often framed as contractual inequality). A slightly different way of expressing a cognate view is that labour law is «based on the need to protect labour in the field of productive processes»[8], or, in other words, that at its foundation, labour law aims to protect workers[9]. As it has been underlined, this view is historically, systematically and exegetically at least partial and one-sided since it conceals the function performed by this branch of the law that is a legal formalisation (and thus legitimisation) of relations of power proper to the capitalist world of production[10].

The legal recognition of the employment contract presupposes a society that abandoned statuses and embraced the idea of formal equality before the law and the freedom to contract and work. Those ideas became politically relevant only after the bourgeois revolutions and prevalent in Europe only after the French Revolution.

The evolution of the labour contract in continental Europe can be traced back to at least two fundamental stages[11].

In the XIX century, Roman law was adapted to new circumstances. The definition of an employment relationship as one involving a *locatio conductio operarum* implied a *fictio*, that is, the abstraction of the workforce over which workers exercised their property rights and the resulting possibility to place this workforce on the market just like any other commodity[12].

Essentially, work and labour relations could be objectified, allowing for a «moderate abstraction of labour activity from the person»[13] In this way, labour entered the mercantilist exchange economy.

The exchange of work versus payment of money was possible because, under the new regime, freedom of contract and freedom of choice of the contracting parties replaced the system of *status*, and therefore, any worker could place the only commodity in its mercy at someone else's disposal. The only restriction was provisions that precluded

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[7] Rodríguez-Piñero Y Bravo Ferrer, 2012
[8] Perulli, 2020.
[9] Among others, Ghera, 1996 and Freedland, 2006.
[10] Garofalo, 2006, p. 130 (*Translation is mine*).
[11] For a more detailed history of the employment contract, which would be beyond the scope of this section, see Veneziani (1986), who highlights "regional" differences from a comparative perspective, as well as other authors, mentioned in the following footnotes.
[12] In other words, labour performance was incorporated into the ancient legal scheme of *locatio operarum,* which, since it could no longer involve the individual itself (as it was in the Roman Law), who was now considered free and equal, instead had as an object the labour workforce. Cfr. Mengoni, 2000, p. 182.
[13] Grandi M., 1999, p.330.

the creation of a perpetual obligation to work for the same purchaser of work since this would have brought back a form of slavery.

At the time, the distinction between subordinate or self-employed work was still nebulous under the umbrella of the broad category of *locatio,* which could embrace both the case of renting 'workforce' for a specific business or for a continuous job. Only later, therefore, and not for chance, did continuity emerge as one of the characteristics of subordinate work, as it is still today when it is also used to distinguish, in some legal orders, forms of coordinated or dependent self-employment.

However, freedom and equality were merely notional. The old social system based on the status of 'servant' was still far from being truly overcome, and, in a way, it was still preserved in the new context. Indeed, the reality was characterised by profound disparities and social conditions that were not so different from the past regime, with employers retaining old master's privileges[14].

The contract of employment and the category of subordination are more recent devices crafted at the beginning of the XX century[15] that were necessary for the major industrial concentration and to favour capital accumulation. At that point in history, the necessity was not so much the free exchange of labour in the mercantilist economy but rather the capacity to direct and organise labour in a rampant industrialised economy.

The employment contract and the category of subordination emerged together with social laws and collective bargaining[16].

Social law was initially devoted to preserving the health of women and children[17] to avoid compromising population growth. Additionally, due to the special features of certain hazardous industries, in exceptional cases, laws were introduced to ensure the safety of men, who were also required to serve in the military, making it essential for national states to maintain their good health

Therefore, social law was characterised as public law, while the labour market was left to contract law. In a way, private law masked the employer's power by allowing a 'free' exchange on the market, while public law aimed to avoid the most detrimental effects.

Collective bargaining is one of the tools (together with strikes, picketing, etc.) that resulted from workers' ability to organise themselves to oppose employers and obtain

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[14] Simitis, 1986.

[15] A first attempt to disengage labor relations from the schemes of *locatio* and exchange contracts can be considered the German Civil Code (BGB) of 1896. In the UK, the Master and Servant Acts, although formally abolished in 1875 with the passing of the Employers and Workmen Act, were effectively rendered obsolete by the introduction of the Trade Disputes Act of 1906.

[16] It is worth mentioning that the development of early labour law also owes much to arbitral justice bodies, particularly in Italy and France, and to the equitable powers granted to them by law.

[17] One of the arguments used to grant some protection to children was that they had no freedom of contract at all as minors and, therefore, legislation in their favour would not have constituted an exception to the general principle of freedom of contract.

better conditions. This collective contraposition and, in particular, collective agreements were able to bring into play two dimensions that the law initially denied.

From a legal standpoint, the employer's business organisation appeared as a set of personal legal relations between the employer and each of the workers and not as a collective social organisation through which one exercised power over many. Unions and collective organisations of workers were able to bring to light the collective dimension of enterprises. The second dimension was the real condition of the parties, which, as pointed out, the law considered to be formally equal and free to exchange money versus labour as if the latter was separable from the person who worked.

Therefore, workers gained recognition that one party in the contract holds a position of power over several workers, who are required to operate as part of and for the purposes of someone else's organisation.

The position of power of one party over the other and the social environment in which production is operated were both recognised only at this stage[18]. Both these two components, i.e. power and organisation, are still crucial, as clarified further on. At the same time, workers accepted this new condition (and, in particular, those who were artisans who previously were organised in Gildas and independent in organising their work despite strict regulations) in exchange for political participation, protective regulation and welfare state.

Once the real situation of workers was recognised, protective regulation could be guaranteed within the individual legal relationship and no longer only as a public law with a public function. This is the reason why, in labour law, the will of the parties often gives way to mandatory *ex-lege* regulation (or to rules decided via collective bargaining by collective organisations which govern employment relationships). Like in the civil law model of the contract, the will of the parties is necessary and sufficient for the relationship to come into being, but unlike that model, the parties are inhibited from disposing of the effects of the contract by separating the relationship from the mandatory provisions governing that relationship. When detected from concrete circumstances, the 'status" of subordination prevails even on expressed parties' intention[19]. Because of this characteristic, it is very important to define the border

[18] "In Italy, Barassi (1915) identified the need for social legislation exactly in the entanglement of the individual in their work and the power exercised by employers over workers. At the same time, he links the emerging social legislation specifically to *locatio operarum*, tracing back subordination to this concept (the distinction between "*locatio operis"* and "*locatio operarum"* were indeed an elaboration by German pandectists).

[19] However, it is worth noting that the general principle described above is not undisputed in some legal systems that focus on general contractual schemes rather than rigid categories. The issue is notably acute in the UK due to the primacy of express contractual arrangements. However, recent case law indicates a shift towards alignment with the continental approach.

Initially, the concept of 'sham contracts" was utilized to facilitate this shift *(Autoclenz Ltd v Belcher & Ors, 2009 ECWA Civ 1046; Court of Appeal Uber B. V. & Ors v Aslam & Ors 2021 UKSC 5*). More recently, UK courts have invalidated clauses and terms that purport to exclude or limit statutory protections or prevent the contract from being interpreted as a contract of employment or a status of 'worker' (this after the landmark judgment of the *Supreme Court in Uber B.V. & Ors v Aslam & Ors, 2021 UKSC 5*). Consequently, as in continental Europe, the contract should be disregarded if between forms of work and forms of entrepreneurship since, for companies, this logic does not apply.

On the other side of the coin, however, the employer's power and the labour market continued to be legitimised and recognised by the legal system. Consequently, it has to be clarified that labour law also had the function of smoothing the working of the "free" market, avoiding the insurgence of movements able to upset capitalism (as it actually happened and could happen in multiple countries all along the XX century).

Thus, labour law can be considered as the result of a political compromise between the bourgeoisie and their interests and the workforce with theirs, and it has its origins in the capability of workers to participate in society and democracy by employing political Parties and Unions[20]. Democracy is indeed *wertfrei* (when certain interests are constitutionally validated, they can rise to principles but never to values), and therefore, the prevalence of the interests of some over the interests of other components of a given society depends on the shifting political balance. It is not by accident that labour law started its journey into liberal democracy and flourished when Democratic Constitutionalism changed the balance after the Second World War.

Underlining this political dimension and the conflict of interest behind any democracy makes it easier to understand what happened at the turn of the twentieth century and the enduring consequences of this process, which took place under a new political-balance shifting.

The legislators" response to economic globalisation was, in the global north (in the field of labour law), a deep (de)regulation that began probably with the believed intent to favour a reorganisation of their economies. The postulate has been that workers' rights were a humper to the economies that compete on a global scale. In general, legislators have decided, during that historical period, to support the already ongoing de-verticalisation of companies and labour cost reductions. Specific neo-liberal ideologies (as well as a different constitutional compromise represented in the EU legal framework[21]) had a pivotal role in this process, which led to job precariousness. Moreover, they boosted the crises of Unions in organising the labour side, decreasing their capability to bring their political agenda into the public institutions coupled with their internal difficulties and a less strict link with political Parties.

In the early stage of labour law, the principle of freedom of contract and at-will employment (which implied the freedom to dismiss) was absolute and allowed the entrepreneur to continually adjust the amount of labour according to his economic calculations so as to better serve his production goals[22]. Those principles have never disappeared since they are ingrained in the capitalistic economy and are considered

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inconsistent with reality, and statutory provisions remain hierarchically superior to contractual provisions. For more detail refer to the UK chapter of the book.

[20] Additional evidence of what is stated is that men's electoral suffrage and demands for universal suffrage, for example, are also historically interlinked to legislative achievements in terms of rights related to labour.

[21] On this point more extensively Digennaro, 2022.

[22] On the foundations of the right to dismiss, see Carnelutti, 1911 and Mancini, 1962.

implications of free economic initiative at a constitutional level. Nevertheless, they have been restricted by legislation based on other constitutional rights that are deemed prevalent according to democratic/social constitutionalism.

The liberalisation of the use of subcontracting, labour supply contracts via temporary agencies, the increased use[23] of bogus self-employment and economically dependent self-employed workers, as well as temporary or zero-hour work, which started before the end of the XX century following the neo-liberal agenda, can also be seen as a substitute for the freedom to dismiss that had meanwhile been restricted by legislation above all after the Second World War till the seventies[24].

It is not, in fact, necessary to dismiss workers who are not formally and legally employees of that employer or who have a contract that will not be renewed unless necessary. In this way, the new version of a flat and smart enterprise regained the capability of maximising the utilisation of its in-house workforce, which is made up of fewer and fewer persons, while shifting the burden of under-utilisation of the labour factor onto other parts of the system. In fact, one of the axioms of the functioning of the enterprise in the capitalist-industrial system is that within the enterprise, the labour resource must tend to be utilised to the maximum, while the diseconomies generated by the under-utilisation of the labour resource must be discharged externally to families, the welfare state and so on[25]. In the contemporary economy, the burden of the negative externalities associated with unemployment or under-employment has been borne not only by the above-mentioned institutions but also left on the shoulders of individuals working as self-employed ‘entrepreneurs’, who additionally suffer from a less generous system of unemployment benefits end pension schemes compared to employees. In the case of staff leasing, the burden is left even on other companies specialised in the furniture of the workforce on demand.

In this way, an efficiency very similar to the level that was typical in the late eighteenth-century industrialism in saturating the use of the workforce could be reached, though in a different shape. Moreover, this frame requires constant reinvestment in worker training, which has been placed under the responsibility of public institutions or, even more so, of individual workers who are called upon to be ready to adapt to market demands at any given moment.

The neoliberal theory of human capital[26], according to which any worker is thought of as a self-entrepreneur with their own capital, is at the foundation of these reforms and the vision of a "flexible labour market".

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[23] See ILO 2016 about non-standard employment.

[24] Coupled with this, it is important to remember that reforms of legislation on dismissals in countries such as Germany, Italy, Spain or the Netherlands, which have had traditionally high standards of dismissal protection (Hepple, 2012) were implemented following the 2008 economic crisis (Bij de Vaate, 2017; Gorelli, 2012) right according to the last wave of neoliberal reforms.

[25] Garofalo, 1992.

[26] On those theories see more extensively *infra* (Part II).

In the context of neo-liberal capitalism, a portion of self-employment loses its real independence from the production processes of others and instead becomes integrated and coordinated with them.

The need to govern and coordinate production has not disappeared. Instead, the forms through which this happens have changed since the connector has become the market, with the help of unprecedented technologies able to process information as never before.

A well-rooted perspective on the evolution of labour law is only possible after taking into account that law has a historical, political, and, in a certain sense, ideological dimension. Neglecting these aspects results in analytical impasses and complicates the interpretation of the current legal framework governing labour. It likewise makes the changes of direction and the different *ratio legis* of measures taken in each national system at different historical moments challenging to understand because they are not always homogeneous and do not target the same purpose. Moreover, this leads to wrong answers when investigating the function of labour law as well as the concept of subordination on which this branch of law was founded.

The inseparability of a person's work from the person themselves inevitably creates the risk that exercising power over their work activity also establishes a sphere of power and influence over the individual.

The contract of employment (more properly, the 'status" of subordination in the civil law area) was both a way to legitimise this power and an instrument that constrained it by imposing protective standards to protect the person over their work. This mechanism and its "constraining effect" reached a peak in the *trente glorieuses*. In a way, the person has been protected so that labour could be integrated as one of the factors of production that employers have the power to dispose of.

From a broader perspective, it can be argued that labour law played a role in resolving or neutralising the contradiction that emerged from the bourgeois revolutions. These revolutions espoused equality among individuals (or, more accurately, among male citizens), yet forgot to implement this principle in practice.

For all of the above-mentioned reasons, it has to be recognised that labour law has been constructed as a law of powers[27] or, rather, aimed at the regulation of powers. Therefore, even when a very strict definition of employment is assumed, the employment relationship can be seen as a tool that ensures a set of powers in favour of the employer, but under conditions imposed from outside the employment relationship, i.e. from the legal system. The issue arises when a power-subjection relationship is preserved without granting corresponding rights to counterbalance it, which is what happens in some cases nowadays, thanks also to reforms in labour law that accepted and supported

[27] Pélissier, Auzero, Dockés, 2024.

the misalignment between the legal category of subordination and organisational and economic subjection[28].

[28] On the understanding of the term ‘subjection” used here as well as about other factors, see below in the book (Section 3).

2. Is labour law unfit for the current scenario?

This leads to the second opinion I was referring to in the introduction, i.e. the one according to which labour law is undergoing an irreversible crisis, which in particular hinges on the inability of the distinction between employment and self-employment to serve as the keystone of the entire subject matter[29]. This view was particularly prevalent between the end of the old millennium and the beginning of the new one[30] (although it never lost its appeal) and is based on the idea that the characteristics of employment and those of self-employment were becoming less and less distinctive[31]. This is so because self-employment acquired some of the typical features of employment and vice-versa. Therefore, that being the case, some authors suggested that the distinction between the two categories cannot be justified anymore[32] and considered the idea of structuring labour law overcoming this *summa divisio* by a system that should integrate several layers of protection with full protection reserved only to the inner circle of full-dependent workers or by using a third category between employment or self-employment[33] often based on the idea of economic-dependence[34].

On this point, it is worth noting that when one proposes to overcome the concept of subordination, one inevitably places a concept drawn from one or more national legal systems (when using the comparative method) and, moreover, a concept historically given at the time of the analysis is made, as the basis for this deemed imperative.

Indeed, it is essential to emphasise that legal systems, legal institutions and categories do not remain untouched over time but evolve even when provisions remain firm from a literal point of view. Actually, the adaptability of legal systems is often ensured thanks to a lack of detailed definitions of facts that the legislator wants to regulate or by using general and abstract legal paradigms, which are always at least partially indeterminate and given significance by means of interpretation. Moreover, judges must also give meaning to the ensemble of words composing a disposition, and this operation also gives room to multiple options. There are many schools of thought as regards the interpretation of law and the role of judges. It is not helpful for the purpose of this chapter to dwell into such a very complex debate to position, but it cannot be denied that the role of judges is always crucial as they co-participate in lawmaking[35] even more so in Common-law systems, but also in Civil-law systems. Instead, the point is to

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[29] More recently, a charge of the dysfunctionality of what Pedrazzoli called the "labour synecdoche" can be found in Treu and Perulli, 2022.
[30] Italian doctrine also participated in this wave of "distrust" of the *summa divisio* in the same turn of the year, sometimes even ahead of the English-language doctrine. See, in particular, Pedrazzoli, 1998 and D"Antona 1989 and 1995.
[31] Supiot, 1999.
[32] For example, Linder, 1999; Richard and Carlson, 2001: Judge et al., 2002.
[33] This approach was proposed, for example, by De Luca Tamajo, Flammia, and Persiani (1996) among Italian scholars.
[34] This technique is in use in Germany and Spain, and many lean toward it in Italy too. See, for example, Perulli, 2003; Treu, 2010; Santoro Passarelli, 2013. For a comprehensive analysis of the various options for economically dependent work, see Pallini M., 2013, Ch. I.
[35] Gusmai, 2015.

underline that the concept of subordination is one of these general legal paradigms whose conceptualisations have always been debated from the time it was crafted more than a century ago in a completely different social context until our days. Therefore, its interpretation and conceptualisation have not always been identical or unaltered over all those years. This means that overcoming the current legislative framework through direct legislative reforms is one option, but scholars and judges have also pursued a functional alternative, that is, 'stretching' the meaning of provisions by means of interpretation so as to match the current scenario. A similar perspective is that of trying a reconceptualisation of the dividing line, which is the option pursued by scholars.

Different paths can be functionally equivalent as long as the starting point is clear. It is important to emphasise that unless a new societal paradigm is conceived and implemented—one that does not recognise the foundation of the capitalistic mode of production (thereby rendering labour law obsolete in its historical configuration)—it remains crucial to expose the power-subjection relationship between those who dispose of others' work and the workers themselves[36]. This is indeed the dynamic behind labour law, while what has changed is the making of this dynamic, that is, the possible ways to exercise this power after the dismantling of Taylor-Fordism and the vertical firm, which have been for some decades the predominant paradigm.

The issue is that control is nowadays operated often directly through the market instead of inside a plant, and digital technologies create intra-organisational markets that are operated and controlled by private companies[37].

Thus, the sharp distinction between what constitutes a firm and what constitutes the market[38] may seem less clear at first glance. However, the underlying reasons for strategic decisions regarding the framework for the production of goods and services remain tied to costs, production planning, and the ability to control and direct personnel, albeit in a different manner.

It is also true that a power-subjection relationship can exist between undertakings, but legal systems already acknowledge this by incorporating antitrust laws designed to dismantle dominant positions. Therefore, in order to determine the scope of labour law versus the scope of antitrust and commercial law, it is important to examine and investigate the differences and distinctive dynamics of these power relations.

The potential for overlap is highlighted by recent European Union Guidelines[39], which aim to confine the application of antitrust regulation to avoid completely undermining collective bargaining for the self-employed. This approach is necessary because, while the concept of "worker" in the EU legal framework is fragmented, the self-employed are considered enterprises under antitrust law.

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[36] Digennaro, 2020.
[37] (See on this further in the third section).
[38] Coase, 1937.
[39] Communication from the Commission. Guidelines on the application of Union competition law to a collective agreement regarding the working conditions of solo self-employed persons (2022/ C 374/ 02).

Another proof is the attempts of some jurisdictions to insert a third *genus* between autonomy and subordination based on economic dependence. Where the third category has been framed, *personal work* (relying on its own work lacking any form of business organisation) and *specific economic parameters* (one-predominant client or economic soils) identified the marker-characteristic. The issue with this solution is that the perspective utilised by legal systems, in this case, is to distinguish an imbalance in the relationship between enterprises (self-entrepreneurs are categorised as assuming an enterprise subjectivity). Consequently, a logic not typically inherent to labour law is applied within the domain of labour law.

This is the reason why those third categories ended up restricting the area of application in full of labour law. Being framed in the third category implies the application of only some protective standards (most of the time, starting from collective bargaining rights) by isolating a form of power and control considered to be milder than in the case of employment. Quite the opposite, the workers' need to engage in collective bargaining and associate already serves as evidence of a form of subjection in the face of a counterpart wielding significant power.

Furthermore, a legal scenario as such often legitimised the misuse and misclassification of workers that, notwithstanding having all the characteristics of employees, are instead insured only a portion of rights and incomplete social security coverage.

Judgments in the UK on app-based workers are the latest clear example of this issue. Even when workers in the app-based market have been found to be performing personal work under the control of a main employer that, *de facto* and *de jure*, also exercises substantial amounts of managerial authority, they were classified as lamb-b "workers" and, therefore, entitled only to some rights instead that being framed as employees[40].

Instead, countries, where the concept of subordination was less defined (or even lacking in codes or statutes) or broader in its conceptualisation, have often shown a different path.

I stated above that judges have also had a role in shaping the line between employment and self-employment and in bordering the scope of labour law.

To be schematic on this point, judges developed a complex set of indicators over time to measure dependence and control that can be grouped into specific tests. The most common and direct way to infer subordination has been the so-called control test, which measures the power to direct someone else's work and implies the possibility of giving orders about when, where and, above all, how to perform work (therefore, about modality and manner of working). This test has been considered the easiest way to fasten labour law standards in times when it largely overlapped with the area of

[40] Kountouris, 2022.

subordination during the era in which vertically integrated firms organised workers according to Taylor-Fordism or the Toyota production system.

When strictly applied, this kind of test was able to cut off the picture of those workers who were working outside the employer's premises (in times when ubiquitarian connectivity was not supported by technologies), managers, those workers whose jobs require higher specialisations, creativity, or high level of discretion. For this reason, judges, over time, enlarged the concept of hetero-direction of someone else's work first of all by accepting that the mere *right* to direct and control work determines the existence of hetero-direction even if this power is not constantly exercised. Secondly, they considered included within employment forms of 'attenuated subordination', i.e. cases when direction and control over the work are performed indirectly by looking at the result or at the accomplishment of phases of the same operational process, as it is typical of forms of HR management that have become common in the post-Fordism.

This criterion is, therefore, still useful in many cases when work is managed according to more traditional styles, but it is not quite obsolete or practically unfit, not even for platform work or workplaces where new technologies are in use.

Judgments in several countries[41] pointed out that instructions are, for example, given to Uber drivers concerning the vehicle used, the itinerary, the expected waiting time for a customer to arrive, and the performance of the ride without interruptions. As for food delivery platforms, judges lend weight to the instructions given related to the timeframe for delivering parcels and conduct during delivery, the existence of a fixed maximum delivery time, the obligation to activate the geolocation system and reach a specified departure area to start the shift as well as the duty to check orders when picking them up, and the requirement to notify successful delivery.

All of this should not come as surprising since experts started to label some form of exploitation of digital technologies, above all in low-skilled jobs, as "new digital Taylorism" already about a decade ago[42]. This form of *heteromation*[43], (a neologism that stands for automation plus hetero-direction) is characterised by a pre-defined set of possible human operations and interactions dictated by the algorithmic organisation of the machine. Therefore, control is operated both directly and indirectly. In the latter case, by means of the digital environment that the worker accesses by logging in. In this way, digital Taylorism is combined with a demand for workers to adopt a proactive attitude, effectively incorporating their subjectivity into the system to ensure its functionality[44].

This state of affairs ultimately implies that the digital worker is in constant interaction with an organisation which is alien to him and whose purpose is independent of those of the workers who engage with it. In the case of digital work, platforms and applications provided to workers are in themselves the external organisation by means of which modalities of work are compelled since this digital infrastructure organises the

[41] For details on case law, see Hiessl, 2021.
[42] Hirsch-Kreinsen, 2016.
[43] Ekbia and Nardi, 2017.
[44] Armano, Leonardi, Murgia, 2022.

performance of multiple workers in a coordinated manner, organises payments and selects information and job opportunities to offer to each worker. Even more, platforms and applications represent a "whole environment", and generative AI will bring us even further. This technology consists of two-way interaction and does not merely receive and process data, as was the case with computer software.

At this point of the analysis, it is also important to underline for our purpose that there is something in common between the platform-based organisational scheme and the process I described referring to the late eighteenth century. At the time, the law disregarded the organisation created by multiple workers coordinated by a single employer, rendering it effectively invisible in juridical terms. Today, it is the technology in use that takes the functionality that the law had at the time since it masks the overall asset and the required coordination of multiple persons. It does this by creating multiple vertical platform-user relations that come into existence by entering and accepting the terms to use an application. To make this possible, labour law that had evolved in the interim had to be disarmed, which was achieved by framing the relationship between the company and the user as a commercial service. This approach was precisely how many platforms positioned themselves before the courts in multiple countries.

In the face of this situation, it is natural that the concept of hetero-organisation, which is a way to infer subordination known to labour law, inevitably gained traction[45] precisely because it is the most suitable criterion to unmask the power-subjection relationship in the current labour market.

Integration into another organisation entails the exercise of power over individuals to coordinate their labour contributions, making each worker an integral part of the employer's technical, economic, and possibly bureaucratic system. This process not only involves organising the workforce but also establishing a productive purpose unique to the organisation and discernible from the individual worker's interests.

The concept of working under the organisation of others is explicitly addressed in Spanish employment legislation. However, as clarified further, it is not unique to Spain and is also present in the employment laws of other EU countries.

Specifically, Article 1(1) of the Spanish Workers" Statute[46] defines employment by referencing work performed under the direction and organisation of others. Additionally, Article 8(1) explicitly mentions the criteria of direction and hetero-organization as elements that support the presumption of an employment contract's existence.

This conceptualisation is not alien to the common-law systems as well, which are familiar with the idea of bureaucratic or administrative control operated within the firm. This implies having the Court testing "whether the worker is "part and parcel of the

[45] Pallini, 2019.
[46] Estatuto de los Trabajadores, Real Decreto Legislativo 2015/2 de 23 de Octubre.

organisation" or "integrated" into the employer's business" or, as another formulation put it, whether the worker is "part of the regular business of the employer""[47].

Looking at the case law, it is also possible to discern other criteria that can be grouped into an economic-dependence scheme. To avoid this group of indexes from being indistinguishable from that of the hetero-organisation, I refer to cases when Courts look if: a) a worker is an independent entrepreneur since it bears the risk of loss and chance of profit; b) if they hire aides and substitutes or if they employ capital investments or their own tools. In these terms, this way to demark the dividing line can be traced not only in statutory laws that funded a third *genus* or, as for the case of Belgium, for example, as one of the criteria to identify subordination but also in some judgments[48]. Often, platforms tried to demonstrate that they did not hire employees exactly by changing contract clauses that obliged workers to display the platform's brand (also by wearing specific garments) or by obliging them to use their own means of transportation. In the UK and the Netherlands, where courts are more sensible to the substitution clause, contracts also include such a clause precisely with the purpose of gaining an advantage in litigation. It is worth mentioning that in Switzerland, the courts also pointed to factors such as the bearing of risks to be not paid by customers or of fines for violation of taxi service regulations in order to infer entrepreneurial risk on Uber[49]. This is interesting since the Share project also found that self-employed workers group together in umbrella companies or cooperatives also with the purpose of alleviating their risk of missed earnings or overstayed payments due to bad payers.

As a partial conclusion of this chapter, it can be maintained that if the function of labour law is still to govern situations of power and subjection, the opinion about its capability to solve its function today cannot be given in a conclusive way since only lately, after the wave of neo-liberal reforms, a partial change can be traced in latest reforms in some countries and above all in the judge made law.

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[47] Davidov, 2002, 366.
[48] For details, Hiessl, 2021.
[49] Chambre administrative de la Cour de Geneve May 29, 2020, ATA/55/2020 *(Switz.)(UberEats);* Cour d"appel civile du Canton de Vaud Apr. 23, 2020, HC / 2020 / *535 (Switz.)(Uber).*

3. The consequences on the collective dimension and social security.

The scenario just outlined also has implications in two other closely related areas. It is important to briefly mention these implications before proceeding, even though this monograph does not provide an in-depth analysis of these spheres at the national level or within EU law, as these topics extend beyond the book's primary focus and scope.

One issue is the fragmentation exactly of that counterpower that was decisive in developing labour law in the past. Once the centrality of the standard open-ended contract has been overshadowed by means of both non-standard forms of work and platform work, the fragmentation of the labour side in collective representation is boosted. It is worth spending some more words on platform work in particular because it is the youngest phenomenon.

As clarified above, platforms, by merging what has been named "bureaucratic" power with "market power"[50], deny the horizontal collective dimensions among workers in a way that differs if compared with the past due to the evolving landscape of labour law stratified in the meantime.

From the platform point of view, the only relationship which matters is the one between each worker and its consumer, between whom the application acts as a mediator. Time and space of work are falsely presented as free-to-choose options for the worker. Those *fictiones*, have been refuted by riders, one of the main categories which formed coalitions to oppose such businesses with classical tools such as strikes and collective bargaining, thanks to two conditions.

First, the counterpart was easily identifiable in their case, and secondly, they could gather together in the physical space they shared (departing areas, collecting areas, streets of the same city). This physical space is opposed to the dematerialisation of space and time that technology brings about. The dematerialisation of space and time might, at first glance, appear as deconstructing with respect to two criteria that have classically been used as indices of subordination, which are the possibility to dictate time and space where to work. The pandemic case demonstrates once more that this is not so since no one would ever claim that all employees who shifted to remote working at home during the pandemic also shifted to self-employment. Therefore, in a time of "augmented reality", "artificial intelligence", and app-based business, the question is not anymore where the worker is placed, but rather who is the owner of the digital space where the job and tasks are performed.

Assuming this perspective makes it clearer how labour law should classify many of the workers who could otherwise be considered self-entrepreneurs. This will become even more evident as soon as companies begin to exploit augmented reality as a new resource to be plucked by creating a new virtual space in which not only new needs and products

[50] On the difference, see Collins 1986.

will be sold to avatars but also new workers will operate in a space that is connected to, but different from, material reality.

An issue remains, that is the isolation of workers who do not gather physically but only online with other workers who share the same digital infrastructure, a factor that is able to partially hamper the engagement of workers in the collective dimensions that is a necessary condition for the usability of typical forms of collective rights. The case of freelancers demonstrates that one pivotal factor is, in fact, their self-perception and identification regardless of the recognition of collective rights for a portion of the self-employed workers by national laws (as in the case, for example, in the UK, Germany, and Italy and so forth). On this point, on-field studies conducted in the Share project underline an additional layer. Even when a strong collective identity among freelancers is gained, if it is coupled with radicality, those two elements discourage the construction of alliances with other actors in the industrial relations arena, whereas, on the contrary, having a less strong collective identification and smoothing the radicality enhance the possibility to build a significant alliance with a well-established trade union[51].

In other words, the institutional context and legislation played a role in fragmenting the labour side, which was no longer able to recognise itself in the typical in-plant standard worker. Additionally, even when, despite the difficult context, subjectivities could build collective identities, for example, as freelancers, this turned out to be an emerging obstacle for the sake of a broader form of solidarity.

Finally, there is one more area to mention that is influenced by the way how labour law interacts with economic processes, which is the area of social security.

A growing number of European countries cover self-employed workers under mandatory regimes only for certain risks, while in many cases, the participation remains voluntary. Therefore, non-standard workers and self-employed do not have a comprehensive set of benefits as those of employees and, in particular, suffer from a lack of coverage or gaps regarding unemployment, work injury, and paid sick leave[52]. Furthermore, there are issues related to the transfer of benefits across schemes and transparency of systems, particularly when a worker operates under more legal schemes during their career.

To focus more on pension schemes, having large layers of workers who work under self-employment carries two interlinked orders of problems. Contribution rates for self-employed are typically higher than the rates for employees (according to the International Social Security Association) since they need to account for both the employer and employee share that are paid by two different entities in case of employment. One might believe, therefore, that a solution lies in creating incentives for self-employment (as done, for example, in the Netherlands, where self-employment received tax incentives and tax relief for new businesses, coupled with inferior contributions due to the lack of mandatory earning-related pension schemes for self-employed workers) or a simplified regime (as in the case of France, for example, for auto-entrepreneurs) in order to prevent the self-employed from shirking their

[51] Piro, Murgia, 2024.
[52] European Commission, 2023.

contributions[53]. However, the introduction of incentives raises two other issues. It can lead to an increase in the number of people working as self-employed, many of whom accept this solution at the urging of their former employers and are driven by this economic convenience. Ultimately, incentivising workers to work as self-entrepreneurs shrinks overall contributions, and, therefore, the resilience of the national pension system is placed under pressure; at the same time, those solutions increase the risk of self-employed receiving an inadequate pension once they retire (currently, pension systems are contribution-based).

A partial response to this has been that some organisations of self-employed workers organised to offer collective insurance, pensions and other services to their members who are not always looped in the welfare system.

The point is that the third player is often missing in the social security system, and this is the one who often uses the labour of the self-employed for his or her own purposes and for his or her own productive organisation but does not contribute to their pension. For this reason, Portugal, for example, utilises the economic dependence status exactly with the purpose of extending social security coverage to the self-employed through the recognition of an economic dependence status for some workers, requiring the contractor to make contributions[54].

[53] Since this happens because they tend to use money for living and are often already at risk of poverty (on the risk of poverty also for self-employed persons see Ratti, 2022).

[54] Contractors that account for 50 to 80 per cent of the total value of the independent worker's activity within a calendar year are required to contribute annually to workers" social security at a rate of 7 to 10 per cent.

4. Concluding remarks.

This Section of the book outlined the evolution of labour law from its origins, looking at this phenomenon with particular reference to the question of how subordinate work has been defined and distinguished from autonomy until today.

A review of the reasons and modalities through which this branch of law has appeared on the legal stage allows for clarifications regarding its function. This, in turn, makes it possible to understand whether and how the fundamental categories on which labour law was built (subordination vs. autonomy) can still be useful today within an economically and technologically changed context.

What has emerged is that labour law arose both from the abandonment of the society of *status* but also with the crucial participation of workers in the democracy and that subordination was a compromise that granted a form of power on labour with constraints attached and imposed by the law. Recalling the ideological and political dimensions of labour law provides a better understanding of how labour law is not necessarily aimed at protecting one party. In fact, the last four decades have represented a phase in which lawmaking policies based on neoliberal ideologies have given greater weight to the needs of business and private initiatives.

This shift of balance in the legal systems and the use of new technologies are among the factors that have opened the gate to the concealment of *forms of subjection* that otherwise would have been counterbalanced to the counterweight represented by the mandatory rules imposed by labour law.

In this scenario, some of the more recent legislative reforms and initiatives, along with judge-made law, seem to support a partial change of course.

A first more comprehensive analysis that also takes into account European countries that are not under direct scrutiny in this book shows that judges, in most cases, albeit not always with a linear trend, have interpreted the category of subordination so that it could encompass at least some of the new modalities that digital companies used to exercise power over workers.

This has been made by using the hetero-direction test but more often by employing and refining the hetero-organisation test, rarely the economic dependence test[55]. This is due to the typical organisational asset that platform-based businesses take, whose peculiarities I will elaborate more about in the third Section.

The situation that has arisen in recent decades has created quite a few difficulties both from the point of view of the viability of collective social rights and from the point of view of the functioning of the welfare and social security system.

[55] Cfr. Hiessl, 2021.

On the one hand, it can be assumed that, just as in the past, the reorganisation of workers and freelancers may lead to the emergence of "new law", contributing to the modification of legal systems. Share's project work is a useful contribution to the examination of new forms of collective organisation in the hybrid area.

On the other hand, from the point of view of social law, despite different roots and routes in the national regimes, improvements in social security coverage for self-employed persons can be detected overall, though the share of vulnerable self-employed workers at risk of poverty is still significant and increasing, especially in some countries[56].

[56] Schoukens, 2022.

Section Two:
THE SIX NATIONAL LEGAL FRAMEWORKS UNDER SCRUTINY

This section of the book analyses the six countries mentioned in the preface, which were the focus of the Share project. Five of these countries (France, Germany, Italy, Slovakia, and the Netherlands) are still part of the European Union, while the United Kingdom is no longer a member, despite having been influenced by European Community and Union law for several decades.

Although classifications of legal systems have lost appeal due to the numerous factors influencing their development and the difficulty of establishing unifying criteria with a heuristic function, the selected countries as a whole still represent a variety that can be traced back to multiple classification systems.

In particular, when examining the classification of legal families proposed by Zweigert and Kötz[57], which considered various factors[58] to develop their classification, the selection includes three countries placed within the Romanistic Legal Family, one within the Germanic Legal Family, one within the Common Law Family, and one within the former Socialist Legal Family. It is evident that these legal frameworks do not correspond to pure models, given the cross-pollination of legal ideas among European countries over centuries and their shared membership in the EU in recent decades.

In any case, the scope of the survey is very specific, focusing precisely on the definitions of employment and its distinction from self-employment in each of these countries. This includes consideration of both legislation and the most relevant case law. Specifically, this section elucidates the main criteria used by the law and judges to distinguish between these two concepts. It also provides an overview of how legal systems have categorised forms of work that challenge the traditional distinction between subordination and self-employment, where applicable.

The aim of this section of the monograph is twofold: first, to provide a comprehensive and succinct overview of the current state of affairs in various countries; and second, to ascertain the extent to which courts have considered criteria of subordination that transcend the most immediate and direct criterion, namely the direction and control of work.

For a long time, the most straightforward criterion for establishing subordination was the power to direct and control the workforce, owing to the organisational structures of firms that had developed throughout Europe both before and after World War II,

[57] Zweigert, K., & Kötz, H., 1998.
[58] Those elements are the historical origin and evolution of a legal system, the predominant and characteristic way of thinking of jurists, the characteristics of legal institutions, the sources of law and their interpretation, and ideological factors.

particularly during the “Trente Glorieuses”. However, as these organisational structures evolved, this criterion became increasingly inefficient.

Although the direction and control criterion never fully encompassed the concept of subordination—since the origins of labour law and the concept of subordination predate, or are at least contemporaneous with, the social archetype of the factory worker and the Fordist factory—it can be argued that hetero-direction, in a way, “cannibalised” the concept of subordination once this archetype became prevalent in society.

With the gradual decline and eventual demise of this archetype, legal doctrine and case law in various countries have increasingly emphasised other possible ways of determining subordination. Nevertheless, in some jurisdictions, this development has had to contend with the sometimes-ambiguous choices made by national legislators[59].

These alternative criteria have shown their relevance with the advent of the digital or platform economy.

Indeed, as will become evident in the discussion, it is precisely the case law concerning the legal status of platform economy workers that has reignited the evergreen issue of the legal classification of the employment relationship and the indices of subordination.

The six countries are presented in an attempt to align them based on certain peculiarities relevant to the discourse.

Slovakia and the Netherlands are presented first, as their legal frameworks are grounded in a dual approach that remains more entrenched in the concept of subordination, understood as the employer’s power to direct someone else’s work. However, the debate remains open before the Courts and within legal doctrine, particularly in the Netherlands, on a notion of subordination that includes the element of the organisation.

This characteristic, therefore, does not imply, as clarified further in this section, that these countries do not face the issue of potential camouflage of dependent employment.

Germany and the UK are presented next as two cases of legal orders where the legislators decided to embed a *tertium genus*, although with different characteristics and probably also with differentiated aims. Both are normally understood as tackling the grey area of economic dependence.

The latest cases presented are those of France and Italy. While these countries’ legal systems are still formally based on a distinction between subordination and self-employment, without recognising a *tertium genus*, they actually present a complex patchwork. In both countries, legislation has evolved due to various pressures that have not been homogeneous over time in terms of the aims pursued by the legislators.

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[59] See, for example, Gomes and Sachs (2021), who, in their chapter, provide a detailed account of the significant conflict between legislators and judges in France, particularly in the context of platform work.

1. The **Slovakian** case

Slovakia was part of the socialist bloc until the dissolution of the Soviet Union. It, therefore, has a very recent constitution, which was promulgated on 1 September 1992 and came into effect on 1 January 1993. Given that it is one of the most recent (and less known) constitutions in Europe, akin to those of other former socialist countries, it is worth briefly discussing the social rights it enshrines before delving into the central topic of this chapter.

Section Five of the Constitution is devoted to ensuring economic, social and cultural rights.

Article 35 of the Constitution incorporates elements of previous European constitutional models, reflecting the experience of other European countries. This is evident in the protection of both the freedom to choose a profession and the right to work[60]. The right to freely choose a profession and receive appropriate training includes the right to engage in entrepreneurial or other gainful activities.

It is important to note that while the rights to choose a profession or engage in entrepreneurial activities are granted to "everyone," the right to work is specifically ensured only for "citizens,"[61] with a guarantee of state intervention for citizens who are unable to exercise this right to work through no fault of their own.

Article 36 of the Constitution includes a full set of social rights to ensure "fair and satisfactory conditions of work". The article mentions explicitly a) the right to wages for the work performed, sufficient to secure a dignified standard of life, b) the protection from arbitrary dismissal and discrimination at work, c) the protection of safety and health at work, d) the setting of maximum working hours, e) appropriate rest time after work, f) the minimum admissible length of paid vacation, g) the right to collective negotiations.

Collective rights are fully protected by art. 37.

Provisions that regulate labour are contained in a special Code in Slovakia.

The Labour Law Code, adopted for the first time in 1965, was at first largely amended by Act No. 3/1991 Coll, the purpose of which was to create the basic legal framework for the transition to a market economy. This was replaced to remove any remnants of the previous regime, and a new Labour Code was adopted in 2001.[62] This reform

[60] The difference between those two rights is discussed in the second Section of this book.
[61] This means that foreigners, stateless persons or refugees must first obtain a residence permit and a work permit before they can exercise the right to work in the Slovak Republic on an equal footing with citizens, while the right to pursue an economic activity is subject to fewer restrictions.
[62] By means of Act No. 311/2001 Coll. It is important to note that Part. 1, which is related to the general provisions and the scope of the Labour Code, includes a general clause according to which, «Unless stipulated otherwise by the Part one of this Act, the general provisions of the Civil Code shall apply to

marked a crucial step in the approximation process between Slovak and European Union law.

The Labour Code does not explicitly define an employment contract; instead, it outlines the characteristics of "dependent work" performed by an employee for the benefit of an employer. In such cases, an employment contract is required. Consequently, the Labour Code provides definitions for both "dependent work"[63] and "employer,"[64] specifying that an employer must have at least one person employed to be classified as such. Additionally, work can be conducted as a business activity, which necessitates the establishment of a civil or commercial legal relationship.

The Labour Code underwent many amendments over time,[65] including those in 2007, 2012[66], 2015[67] and 2018. It has been reported that the amendment of the Slovak Labour Code made in 2007,[68] which introduced a definition of dependent work for the first time, was due to «an increased number of cases where, in the legal practice, employees were being forced to change their legal employment status to a commercial relationship status despite the fact that these natural persons continued to perform the same dependent work as they did before. In this way, employees were formally transformed into self-entrepreneurs (henceforth labelled as 'self-employed persons" – abbreviated as SZCO in the Slovak legislation) although, in fact, the essential characteristics defining "business activity" were not fulfilled».[69] Successively, both the amendments made by Law 361/2012 and by Act 14/2015 included changes in the definition of "dependent work", which is now consequently very different from the original version.

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legal relations according to paragraph 1» [1(4)]. This is of relevance since the first part of the Labour Code concerns general labour law concepts, such as the legal personality of the employer and employee, the method of counting time, and the invalidity of legal acts or legal safeguards.

[63] Part 1, General Provisions §1.

[64] Part 1, General Provisions §7. «(*1) An employer shall be a legal person or natural person employing at least one natural person in labour-law relation and, if so stipulated by a special regulation, also in similar labour relations.*
(2) An employer shall act in labour-law relations in his/her own name and shall have responsibility arising from these relations. An organisational unit of an employer shall also be an employer, if stipulated by special regulations or statutes under special regulation. If a participant to labour-law relation is an employer, his/her organisational unit cannot simultaneously be a participant and vice versa.
(3) An employee, who is also a statutory body or a member of a statutory body, shall have conditions according to § 43 paragraph (1) agreed in the employment contract by the body or the legal person who has established him/her as a statutory body.»

[65] Act No. 210/2003 (abolished soon after), Act No. 348/2007, Act No. 49/2009, Act No. 48/2011, Act No. 341/2011.

[66] Act No. 361/2012 Coll., effective as of 1 January 2013. This reform largely contributed to harmonising the Slovak labour law with European Union law, but also included a new definition of dependent work, a new legal regulation of the probationary period, and stricter legal conditions of definite-period employment contracts.

[67] Art. 1(1) Act. 14/2015.

[68] Part one, General Provisions, Scope of the Labour Code § 1 «(*2) Dependent work, which is carried out in a relationship where the employer is the superior and the employee is subordinate, is defined solely as work carried out personally as an employee for an employer, according to the employer's instructions, in the employer's name, for a wage or remuneration, during working time, at the expenses of the employer, using the employer's means of production and with the employer's liability, and also consisting mainly of certain repeated activities.*»

[69] M. Mészáros, 2018, 53.

The aim was to enlarge the coverage of the original definition since the latter consisted of so many elements that it was hard for an employee to meet them.

According to the original version of the law, «dependent work, which is carried out in a relationship where the employer is superior and the employee is subordinate», was defined according to seven elements: a) work has to be carried out personally; b) according to the employer's instructions; c) in the employer's name; d) for a wage or remuneration; e) during working time; f) at the expense of the employer, using the employer's means of production and with the employer's liability; and g) consisting mainly of certain repeated activities.
The problem with this definition was that a working relationship could be framed as dependent work only when all those requisites were contemporarily fulfilled in a cumulative manner. The practical consequence was that employers were allowed and used to establish more flexible labour relations by concluding agreements that were formally civil or commercial contracts and which masked the performance of dependent work instead. This also made the work of inspectors more complicated.[70] Therefore, «with the aim of preventing the substitution of labour-law relations with other forms of contractual relations (e.g. work carried out based on a trade licence)»,[71] the definition was changed in 2012 to remove any reference to the employee's expenses, means of production and liability, as well as to repetitive activities.[72] For the same reason, a specific prohibition relating to performing dependent work as a business activity or another earning activity based on a contractual civil-law relation or a contractual commercial-law was stated.[73] Lastly, in 2015, the wording «for a wage or remuneration» was deleted.

In light of these reforms, two remaining elements are pivotal for classification purposes. The first is the personality of work. As seen in other countries such as the UK and the Netherlands, this can lead to the "displacement" of labour law through a simple substitution clause in the contract. The second element is the significance of the employer's instructions in classifying a worker as an employee, suggesting a correlation between "dependent work" and hetero-direction. This perspective, however, does not align with the ongoing transformations in work organisation that have been occurring for many years.
There are also indirect proofs of this correlation. First of all, a description of the type of work, the place of work performance, together with a working time schedule, are among the few substantial elements that a contract of employment has to include to be deemed concluded and valid,[74] and they represent the frame upon which the control of the employer is applied. Moreover, in the labour code, there is no specific mention of

[70] The previous situation is described by H. Barancová and A. Olšovská, 2014.
[71] European Commission, 2017, p.159.
[72] The new text states that «Dependent work, which is carried out in a relationship where the employer is the superior and the employee is subordinate, is defined solely as work carried out personally as an employee for an employer, according to the employer's instructions, in the employer's name, during working time».
[73] Part. 1 §1[3] «*dependent work shall not be a business activity or another earning activity based on a contractual civil-law relation or a contractual commercial-law relation according to special regulations*».
[74] According to art. 43 (1) of Labour Code. The remaining ones are day of commencement of work and wage conditions

integration in the employer's organisation as an indispensable element of the employment contract, so it can be only assumed implicitly. Economic dependence is also not mentioned and, «from the point of view of the legal regulations in force, it is fairly irrelevant».[75] However, among the criteria in use to investigate the nature of the relationship, two have a partial ability to measure the independence of the worker from the employee. The employee does not perform work to make their own profit or work in their own name, as these characteristics would frame the work performed as a business activity regulated by the Commercial Code.
It is worth mentioning peculiar arrangements that, in the Slovakian legal framework, make it permissible to provide work "outside employment relationship" as stated in the Labour Code. Those kinds of arrangements are quite peculiar if compared to other countries" legal systems but can be considered to cover the same function that the third *genus* assumed in some countries, i.e. escaping subordination to decrease the labour cost for employers.
Indeed, according to the Labour Code, in those cases of work "outside employment relationship, a relationship of labour is realised, but most of the protective standards provided by the Labour Code do not apply with some exceptions (mostly general principles and conditions). So, for example, all general clauses of Section One of the Code, provisions related to the protection of work of women and minors, provisions related to general liability on both sides, health and safety standards, and provisions on working time are among the few standard applicable to those contracts. This is likely also due to the constitutional grounding of many of these provisions, as evidenced by the analysis of the constitutional text discussed earlier.

Agreements for work performed "outside the employment relationship" can be used only in exceptional cases, theoretically only when establishing an employment relationship is not possible or would be highly ineffective for the employer. If the work meets the characteristics of dependent work, the employer must conclude an employment contract with the employee.

There are three agreements of such nature: the agreement for work performance[76], the agreement for work (activity)[77] and a special agreement for part-time work by students[78].

The closest contract arrangement to the "agreement for work activity" can probably be considered the German mini-job scheme since this contract is intended for a job of minor value which does not exceed ten hours per week. The agreement must include specific obligatory elements such as the type of work, the agreed remuneration, the length of working time, and the period for which the agreement is concluded.

[75] On this point, refer to R. Schronk, 2017, p. 636, who reports also that «There is no relevant case law on this issue».
[76] § 226 of the Labour Code.
[77] § 228a of the Labour Code.
[78] § 227 and 228 of the Labour Code.

As far as the "agreement for work performance" is concerned, it shows similarities with the Italian "project-based work,"[79] which was repealed in 2015. This agreement pertains to the completion of a specific job defined by the task to be performed. Remuneration is typically due upon completion and submission of the work, though the parties may agree that partial payments are made as intermediate targets are reached. The agreement must include the definition of the work task, the agreed remuneration for its performance, the period in which the work task is to be performed, and the "extent of work" if this is not directly inferred by the definition of the work task. In any case, the same worker cannot work over 350 hours per year for the same client.

One final aspect that remains to be addressed in this discussion is the issue of platform work in Slovakia.

In Slovakia, there is a legally binding definition of online platforms for fiscal purposes under the Income Tax Act—595/2003. Digital platforms are defined as hardware or software platforms necessary to create and maintain applications through which transport and accommodation platforms offer their services.

There are no specific regulations related instead to platform economy or crowd workers. Despite customers" large use of platforms in every sector, up to 2023, no specific court cases or suspected misclassifications of the employment status of platform workers were registered in Slovakia.

This is due not only to the Union's weakness but also to the courts" limited competence in reviewing the employment status of platform workers because of the strictness of the definition of "dependent employment" contained in the Slovak Labour Code.

The case of Slovakia demonstrates that when the concept of subordination is so rigid and still only rooted in the idea of external direction, it creates more opportunities for exploiting workers, above all in the current economic scenario. Indeed, employers will use work otherwise regulated, for example, as a form of self-employment to save costs in terms of taxation and contributions and to also exclude the workforce from the protection of labour laws.

The proof of the relevance of the legal frame analysed in this chapter is also provided by statistics. Indeed, Slovakia is one of the countries in Europe with the highest share of solo-self-employed persons, i.e. a self-employed person who works personally with no workers under their employ, among self-employed.
On average, SSE account for about 70% of the self-employed. However, whereas in Germany, Austria, and France, the proportion of SSE did not exceed 60% of self-employment, in Norway, the UK, the Czech Republic and Slovakia, the proportion of SSE workers increased over time and in 2022 exceeded 80%.[80]

[79] Italian Legislative Decree 276/2003, which was subsequently reformed by Law 92 /2012 and repealed by the Italian Legislative Decree 81 /2015, since charged with being a way to employ bogus self-employed personnel.
[80] Bozzon R. 2025, forthcoming.

2. The frame in **the Netherlands.**

Dutch labour law, like that of Italy and Germany, is governed by the Civil Code, which includes provisions dedicated to employment as well as other contracts enabling the acquisition of labour on the market.

As mentioned at the beginning of this section, the Dutch legal system is part of the Roman legal family and shares a similar history with the Italian case. The first Dutch Civil Code ("Burgerlijk Wetboek"), formed in 1838, was based on French civil law with some minor additions from the Roman-Dutch law that ruled before the French occupation.

A chapter regulating various terms of employment contracts was introduced in the Civil Code in 1907 and entered into force in 1909.

Lastly, the code was modernised in 1992 with the release of the new Dutch Civil Code. The new Civil Code was largely influenced by the German Civil Code, and the distinction between civil law and commercial law has been abandoned in the current version of the Code. Even in its provisions, echoes of the evolution from the adaptation of Romanist categories to their subsequent modernisation are discernible.

In today's Dutch Civil Code, there are two kinds of possible contracts that the Code explicitly places "outside the case of an employment contract," which are interlinked.

Indeed, the "contract for work" is the agreement whereby "one party, the contractor, undertakes to the other party, the principal, to create and deliver a work of a material nature outside employment in return for a price in money to be paid by the principal"[81]. The obligation is to produce a particular work of a tangible nature, therefore.

The Code differentiates the latter case from the "agreement for service", which constitutes an agreement by means of which "a party (independent contractor) undertakes vis-à-vis the other party, the client, to perform work, not on the basis of an employment contract, that consists of services instead of the creation of material work of a material nature, the storage of goods, the publishing of works or the transporting of persons or goods". [82]

The contract covers work performed personally and for payment in return. However, since it is not an employment contract, the relationship of authority is excluded and replaced by a right of instruction. This means that the contractor is obliged to follow instructions provided by the client regarding the performance of the services.[83].

Therefore, the modality and organisation of the work performed are in the sphere of control of the self-employed worker. In this case, the elements that are considered useful

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[81] Art. 7:750 BW overeenkomst tot aanneming van werk
[82] Art. 7:400 BW *vereenkomst van opdracht.*
[83] Art. 7:402 BW. Section 7.7.1

to determine whether a worker can be qualified as an independent need to be found in a specular way if compared with those that are in use in the case of dependent work. The most relevant are: the freedom to organise their work; whether payments are made directly by several clients; the extent to which the worker bears an entrepreneurial risk; the extent to which the worker supplies their own raw materials, consumables and tools; and the extent to which, in addition to the agreed work, other work is performed.

As far as subordinate work is concerned, Art. 7:610 (section 7.10.1) of the Dutch Civil Code contains a definition of "employment agreement" described as «a contract whereby one party – the employee – undertakes to perform work in the service of the other party – the employer – for remuneration for a given period of time.»[84] According to the definition, three components are paramount in determining the existence of an employment relationship. These components are: (1) the performance of work, (2) the relationship of being "in the service" of an employer, and (3) the payment of wages[85]. Recently, the component related to the time of performance has also been central to judicial decisions, as clarified further.

Therefore, the employment contract is founded on a synallagmatic exchange of remuneration for work, with wages distinguishing the employment contract from a volunteer relationship.

The most significant element mentioned in the definition is undoubtedly the obligation to work "in the service of the employer," particularly due to recent partial jurisprudential contrasts and the ongoing doctrinal debate surrounding its interpretation. This significance arises from the long-standing association of working in someone's service with the employer's power of direction and unilaterally issuing binding rules concerning the way in which the work has to be done. This power has traditionally been viewed as the key instrument to distinguish between subordination and autonomy, with autonomy being characterised solely by the power of instruction as outlined above[86].

In some cases, the exercise of authority can be limited mainly to the organisational and disciplinary aspects of the job.

For those reasons, the jurisprudence of the Supreme Court of the Netherlands has always held that the element of "authority" characterises the employment contract. According to doctrine, «the view that the component of *authority* continues to be essential dominates legal regulations as well. It is generally argued that replacing this

[84] The second paragraph states that «*when an agreement has the characteristics of both, an agreement as meant in paragraph 1 and of another statutory regulated particular agreement, then the statutory provisions of the present Title (Title 7.10) and the statutory provisions set by law for this other particular agreement shall apply simultaneously (side by side) to that agreement*», but in case of conflict, the provisions of this section of the Code prevail.
[85] Van Voss, G. H., 2017 pp. 477-503.
[86] Disregarding the differences between the two contractual arrangements placed "outside the case of the employment contract" by the Code, they are discernible from employment "based on the lack of authority of one party over the other", in this terms Van Voss G. H. id., 482

with other criteria would conceal the crucial importance of the employer's discretionary power»[87].

By extensively using the "control test" to distinguish the contract of employment from self-employment, the Supreme Court incurred the same difficulties as other national Courts in this regard due to the increasing defectiveness of this criterion.

Those issues were partially solved by clarifying that the Court's assessment of the subordinate nature of a contract should weigh all relevant circumstances that are connected with each other ("holistic approach").[88] This led to the elaboration of some more indicators by case law for the same purpose. To enumerate only the more important indicators, the judge investigates: whether the worker has the freedom to refuse to work; the discretion of the worker to organise their work and schedule; who bears the entrepreneurial risks; who owns the material used to perform the job; whether the worker performs other activities besides the one concerned; and whether the person needs to perform other jobs for a living.

This perspective led some scholars to downgrade the centrality of the authority relationship in assessing employment. About a decade ago, commenting on the holistic approach used by judges, it was already argued that «generally speaking, the control test is no longer seen as the unique or preponderant test distinguishing the contract of employment from other agreements for the performance of labour.» [89]

Recently, an author has advanced this view further, proposing an approach to the concept of authority that, in his opinion, aligns more closely with technological innovations. This approach emphasises the significance of the power exercised through the employer's organisation[90] framework, which is also expressed through the rules, customs, and practices applicable within it[91]. Such a solution would bring the debate on the understanding of employment in the Netherlands closer to that of other European countries.

In fact, platform work has precisely been the arena where the debate on the elements of subordination in the Netherlands has been rekindled[92].

[87] Van Voss G. H., id., 481.
[88] Dutch Supreme Court, 11 February 2011, JAR 2011/75; Dutch Supreme Court, 17 November, 1978 1979, 140 and 5 November, 1982, NJ 1983, 231; Dutch Supreme Court, 8 May, 1998, JAR 1998/168.
[89] Jacobs, *The Netherlands*, ELL Suppl. 421, 2015, 66.
[90] Verulp, 2023.
[91] Dutch Supreme Court, 1 May 2015 JAR 2015/ 133 It worth noting that, in this case, the existence of an employment relationship was discussed in a lawsuit between an association and its members who performed work in the company run by the association.
[92] In the Netherlands, although no dedicated legislation on platform work exists, the issue has been acknowledged at the political level. In 2020, the Social and Economic Council (SER) published a report titled "How does the platform economy work?" which recognized the platform economy's potential to facilitate job creation and business activity. However, the report also emphasized the risk of precariousness, including the exclusion of workers from social protection and labour rights. It called for legislative action to regulate the employment status of platform workers and for increased supervision by the Tax and Customs Administration and Labour Inspectorate within the existing legal framework.

In the Netherlands, as in many other countries, lower courts were initially reluctant to recognise that workers in the delivery sector are employed by platforms. This was also the case of the Court of Amsterdam, which, in 2018, denied the plaintiff's request to be recognised as an employee when asked to determine whether Deliveroo should be considered an employer. The decision[93] was mostly based on a formalistic approach, which sought to give weight in qualifying the contract to the intention expressed by the parties in the written contract and to the substitution clause therein. Indeed, in the Netherlands, the Civil Code[94], explicitly includes a fundamental tenet of the employment contract that the employee shall perform the service personally unless the employer and the employee have agreed otherwise.

One year later, a different judge from the same Court overturned the previous ruling, basing the judgment[95] on the actual operation of the labour relationship. The Court emphasised that it was not possible to conclude from the circumstances that a relationship of authority between Deliveroo and the deliverer was lacking and that the work activity was integral to Deliveroo's business. Notably, this latter part of the reasoning could suggest an openness to the idea that the employee's work is embedded in an external organisation whose property does not belong to them.

The Amsterdam Court of Appeals, to which the case was subsequently referred, supported this view and upheld the decision of the Amsterdam District Court, deeming Deliveroo to be the employer of the food deliverers it uses for its services[96].

Upon completion of its itinerary, the case was adjudicated by the Supreme Court, which delivered its decision on 24 March 2023[97].

The decision had been eagerly awaited by the legal community as a possible turning point, as the Advocate General had argued in his Advice that the focus of the decision should have been on the embedding of the work in the provider's organisation.

On the one hand, the Supreme Court decision stressed that the deliverers are subordinate to the system and, therefore, employees, but on the other hand, the Court did not base its decision on the Advocate General's opinion.

The Supreme Court, employing the holistic approach, held that by considering the employment relationship as a whole, all the criteria of Art. 7:610 were integral to the case, and the platform's authority over the workers could be established.

In its judgment, the Court addressed the question of interpreting the concept of 'being in the service' as to include a meaning that could encompass the authority inherent to the integration of the work within the employer's organization. However, the Court

[93] *Rechtbank Amsterdam, 23 July 2018, n. 6622665*JAR 2018/189.
[94] Art. 7:659 para. 1 The employee is obliged to perform the contracted work himself; in performing his work he can only be replaced by someone else with approval of the employer.
[95] *Rechtbank Amsterdam*, 15th of January 2019 n. 7044576 JAR 2019/23.
[96] Amsterdam Court of Appeal, 16 February 2021, ECLI:NL:GHAMS:2021:392
[97] Dutch Supreme Court, 24 March 2023, ECLI:NL:HR:2023:443

declined to take a position on this issue, stating that there was no reason to rule on a matter currently before the national legislature.[98]

As reported above, the definition of employment encompasses a notion of continuity (“in a given period”). This element has been considered of minor importance because “in the Netherlands, even small jobs covering only a few hours or days, may be classified as contracts of employment”[99].

Conversely, this element was scrutinised in legal proceedings concerning platform workers. Platforms argued in Courts that delivery work was a minor form of gig work, not performed by workers on a continuous basis. This strategy was unsuccessful and aimed at avoiding the application of the presumption of employment under the Dutch Civil Code. Indeed, according to Article 7:610a[100], «a person who performs work on behalf of another person for three consecutive months […] is presumed to perform such work pursuant to an employment agreement».

This legal presumption has the function to reverse the burden of proof on the employer, who has to persuade the court that the contract is not a contract of employment.

The final element of interest in the Dutch legal system pertains to the rise and fall of "payroll companies." These companies have de facto similarities with a specific tool embedded by the French legislator, which will be discussed below. Payroll companies act as the employer, although the employees do not work directly for them. In other words, the employee is not employed by the user company and was not subject to the terms of employment applicable at the user company notwithstanding their work is utilized by the user company.

However, payrolling has become a marginal arrangement since the legislature determined that user companies must apply the same terms of employment to all their employees, including those hired through payroll companies.

[98] Point 3.2.6.
[99] Jacobs op. cit. p. 66.
[100] Article 7:610 was amended to introduce the legal presumption by the “Flexibility and Security Act” (Law 1998-05-14, No. 300).

3. The case of **Germany** and the 'economic dependence'

For many years, the distinction between self-employed and employees in Germany was based on the jurisprudential-built concept of personal dependence and on Section 84(1) in the Commercial Code *(Handelsgesetzbuch—HGB*), which provides a legal definition of the term 'commercial agent' as a person «essentially free to arrange his professional activities at his own discretion and decide when to perform a job». This is still the notion of self-employment in Germany.

Conversely, an employee was always deemed to be someone who may not determine their work performance free from instructions by the employer and who is bound by specific working times. In the Federal Labour Court's words, an employee is «a person who, on the basis of a contract of private law, is obliged to perform work in the service of another person».[101]

Although «personal subordination has always been understood to differ from mere economic dependency on the employer […] meanwhile, it has become highly contentious what personal subordination precisely means».[102] It was the Federal Court that elaborated, over time, a complex notion of subordination consisting of a wide range of elements that had to be combined and evaluated together. For this reason, the Federal Court case-law laid down the foundation of the legislative intervention in 2017, through which the new section 611a, which includes a legal definition of an employment contract, was introduced into the Civil Code.[103] Indeed, the new definition is strongly based on the existing case law[104], and it transforms certain cornerstones of jurisprudential law into normative statements that include (1) the concepts of personal dependence, (2) the holistic approach, (3) the primacy of facts over contractual statements.

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[101] Federal Labour Court of 15 March 1978 - 5 AZR 819/79

[102] M. Weiss and M. Schmidt, Germany, ELL – Suppl. 366, 2010.

[103] According to section 611a BGB: «*The employment contract obliges the employee, in the service of another person, to perform work which is subject to instructions and determined by a third party and which is personally dependent (section 611a sentence 1). The right to issue instructions may relate to the content, performance, time and place of work (section 611a sentence 2). Anyone who is not essentially free to organise his activity and determine his working hours is bound by instructions (section 611a sentence 3). The degree of personal dependence also rests on the nature of the activity in question (section 611a sentence 4). An overall assessment of all circumstances must be made in order to determine whether an employment contract exists (section 611a sentence 5). If the actual performance of the contractual relationship shows that it is an employment relationship, the designation in the contract is irrelevant (section 611a sentence 6).*»

[104] Some scholars criticised this intervention, considering it too cautious and unable to grasp the current world of work. Others focused their criticism on the poor crafting of the law. Either way, the point is that the legislator «has strongly oriented itself on the existing case law» with regard to the requirement developed by courts over the years to avoid any wrong (Waas, 2019, 31-32 who also reports the other scholars' opinions on the new law).

As regards point (2), the recent article in the Civil Code states that in order to determine whether an employment contract exists, an overall consideration of all circumstances must be made. As regards point (3). It clarifies that the designation in the contract is irrelevant if the actual execution of the contractual relationship shows that it is an employment relationship. The analysis of the Netherlands case law on platform work showed already how important this point is, for example, to avoid the circumvention of the law by platform companies by means of the substitution clause.

Point (1) is the epicentre of the definition. Indeed, the point is that although «personal subordination has always been understood to differ from mere economic dependency on the employer […] meanwhile, it has become highly contentious what personal subordination precisely means».[105]

Actually, it has to be said that the new art. 611a of the Code provides some explicit points of reference while other indicators remain ambiguous, requiring the interpreter to refer to the established case law of the country for clarification. In particular, the Supreme Court's case law is crucial for understanding the peculiarities of dependent personal work.

The first point of reference is the instructions issued by an employer and the ability to control work. This concept, known as heteronomy in Germany, involves employees receiving external directives regarding the content, performance, time, and place of work. When such instructions are given, there is no doubt about the classification of the relationship. Generally, anyone who is not free to organise their activities or working hours is considered to be bound by these instructions.

The civil code article, however, extends beyond the concept of service to another party and the related instructions. In fact, it adds precisely the reference to personal dependence and the fact that the degree of dependence is linked to the activity in question.

This provision refers to case law[106] concerning highly skilled workers who can work outside premises or with flexible working hours and have a higher grade of skill discretion but are still not independent workers.

In this case, German case law and doctrine elaborated on the concept of *Eingliederung*, i.e., the worker's integration in business operations, as a relevant criterion for identifying personal dependence[107] and, consequently, an employment relationship.

Indeed, the integration in the employer's work organisation «is more than a mere coordination of independent contractors *[since it]* indicates external determination by

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[105] M. Weiss and M. Schmidt, Germany, ELL – Suppl. 366, 2010.
[106] Federal Labour Court [Bundesarbeitsgericht (BAG)]: Judgment 15 March 1978, 5 AZR 819/76, AP BGB § 611 Abhängigkeit Nr. 26; BAG: Judgment 6 May 1998, 5 AZR 247/97, AP BGB § 611 Abhängigkeit Nr. 102 at [1.a].
[107] BAG: Judgment 20 September 2000, 5 AZR 61/99, AP BGB § 611 Rundfunk Nr. 37 at [IV.39]; BAG: Judgment 22 November 2016, 9 AZB 41/16, AP ArbGG 1979 § 2 Nr. 105, at [19]; BAG: Judgment 20 September 1994, 5 AZR627/93, AP BGB § 611 Abhängigkeit [Dependence] Nr. 73; BAG: Judgment 7 February 2007, 5 AZR 270/06, AP BGB § 611 Abhängigkeit [Dependency] Nr. 118 at [13]

the employer»[108]. Courts are used to scrutinise whether tools and materials are provided by the employer or whether work is performed interdependently – relying upon or supporting the work of others or, broadly speaking, if the work performance is integrated into the broader organisation of the enterprise.[109]

The Federal Labour Court clarified that «everything points to an employment contract if an activity is planned and organised by another person and the 'contractor' is incorporated in a foreign work organisation to an extent that the autonomous organisation of the work is *de facto* all but impossible».[110]

The Federal Court also takes into consideration who bears the entrepreneurial risk under the terms of the contract since the employees are not normally burdened with business risk.

As clarified above, it is widely accepted that simple economic dependence is insufficient to qualify as employment if personal dependence is lacking. However, economic dependence does lead to partial extensions of labour standards for workers in such situations.

The *'Arbeitnehmerahnliche Personen'* are self-employed whose economic situation nevertheless resembles that of an employee insofar as they are economically dependent on their clients. The criteria to identify 'economic dependency' were also developed initially by the courts. Indeed, the Federal Labour Court stated that «economic dependence is usually given when the employee's livelihood is dependent on the utilisation of his labour and on the income he receives from the tasks he carries out for the contractual partner».[111]

There is no universally applicable legal definition for an 'employee-like person'. However, the definition provided in Section 12a (1) of the Act on Collective Bargaining Agreements (*Tarifvertragsgesetz – TVG*), though initially intended for a specific sector, is widely used as a general point of reference.

Therefore, currently, employee-like persons are defined as persons who: a) are economically dependent and in need of social protection comparable to an employee; b) work on the basis of a contract of service or a contract for work and services for other person; c) have to perform their contractual duties personally and essentially without the help of employees; and d) either the major part of their work is performed for one person or more than on average half of their income is paid by one person. The client can also be an institution, a corporation or even a group of companies. Key elements of

108 Schubert and Rieger, 2023, pp. 54-55.
109 With regard to the distinction between employment and self-employment in Germany, as well as between self-employment and false self-employment see Dietrich; Patzina; Wank, 2017.
110 Federal Labour Court 25.09.2013 -10 AZR 282/12. This ruling places the 'integration criterion' in close proximity to the concept of 'dual alienity' as elucidated by the Italian Constitutional Court on 5 February 1996, n. 30.
111 Federal Labour Court, AP ArbGG 1979 § 5 No. 68

this status are the personality of the work performed and the economic dependence with their client.

The presence of multiple clients does not automatically exclude someone from being considered an employee-like person, as long as the activity for one client predominates and the remuneration from that client constitutes the primary source of their livelihood. «For the comparable need for social protection, the case law depends on whether there is a dependency such as that which generally occurs only in the context of an employment relationship and where the services rendered are comparable to those of an employee in terms of their sociological typology»[112].

For these workers, the dividing line is characterised by the absence of an organisation that would otherwise reach the level of a small business undertaking and the lack of market access typical of the self-employed[113].

Only some of the statutory protection typical of the employees has been extended to such workers. Hence, disputes between them and their contractual partners are to be settled by labour courts.[114]

Employee-like persons are included in the scope of several laws in the fields of holidays[115], health and safety[116,] maternity protection[117,] work permits and parental leave[118], and data protection[119].

They have the right to join unions and exercise the right to collective bargaining, and therefore, their working conditions are potentially regulated by collective agreements.[120] They cannot be discriminated against on the grounds of race or ethnic origin, sex, religion or belief, disability, age or sexual orientation.[121]

Regarding the legal status of platform workers in Germany, case law on the subject is somewhat sporadic. Initially, German courts and legal doctrine framed platform work in such a way that platform workers were not recognised as employees. This is because platform workers were seen as operating under a framework agreement, where each

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112 Krause, 2023, p.42. On the employee-like persons, refer also to Wass refer to B. Wass, pp. 147-149 and 160-161 and M. Weiss and M. Schmidt *op. cit.,* 47-48.
113 BAG: Judgment 8 May 2007, 9 AZR 777/06, AP BGB § 611 Arbeitnehmera¨hnlichkeit [Employee-Likeness] Nr. 15;BAG: Judgment 17 January 2006, 9 AZR 61/05, EzA BUrlG § 2 Nr. 6; BAG: Judgment 15 November 2005, 9 AZR626/04, AP BGB § 611 Arbeitnehmera¨hnlichkeit Nr. 12; BAG: Judgment 21 February 2007, 5 AZB 52/06, AP ArbGG 1979 § 5 Nr. 64.
114 Section 5 paragraph 1 sentence 2 ArbGG.
115 Section 2 sentence 2 Federal Act on Holidays (*Bundesurlaubsgesetz – BUrlG*).
116 Occupational Health and Safety Act of 7 August 1996 and subsequent amendments (*Arbeitsschutzgesetz – ArbSchG*)
117 Act on the Protection of Mothers at Work, in Training and at University (*Mutterschutzgesetz – MuSchG*).
118 Law on Care leaving (*Pflegezeitgesetz – PflegeZG*)
119 Federal Data Protection Act (*Bundesdatenschutzgesetz*)
120 Section 12a TVG.
121 Section 6 paragraph 1 No. 3 General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz* – AGG).

assignment constitutes a service contract with no obligation for the worker to undertake the work[122].

In a 2016 case concerning a programmer involved in construction projects who worked remotely from home[123], the Federal Labor Court (BAG) rejected the classification of the individual as an employee. The court's decision hinged on the formal autonomy of the worker to determine whether and to what extent he engaged with the company's work. The Court deemed the pressure to accept work assignments as irrelevant. Additionally, the BAG dismissed the argument that the worker's integration into the company's organisation was sufficient to establish an employment relationship, finding the involvement to be inadequately substantial.

Subsequently, the ABG reversed the original view on a number of points. In the case of a crowd worker whose work consisted of checking the proper presentation of branded articles in retail stores or gas stations, the Court did not consider the framework agreement and each individual assignment as separable but as an organisation structure. Moreover, the incentive system aimed at inducing the worker to engage in activities continuously has been considered designed to lead the worker to work according to a predictable time, place, and content that the company could expect[124].

[122] This is the position expressed by Schubert and Rieger, op. cit. p.70, who also reports that the German labour law literature predominantly does not regard platform workers as employees, (see p 72). Waas (Crowdwork in Germany, *Op. cit.*) seems in this same positioning.
[123] BAG: Judgment 14 September 2016, 9 AZR 305/15, NZA 2016, 1453 in particular paras 22-27.
[124] BAG 01.12.2020-9 AZR 102 AZR 102/20, NZA 2021, 552, in particular paras. 28-54.

4. **The UK:** the employment contract and the worker status?

In the UK, it is possible to perform a job according to three personal statuses: independent contractor (self-employment, also known as a contract for service); employee[125] (also known as a contract of service) and 'worker'.

For what concerns self-employment, various contractual arrangements can be utilised, ranging from formal to informal, such as service contractors, franchisees, agents, personal service companies, and others. In the UK, there is no direct definition of a self-employed contractor. It is a typical catch-all residual category for all cases that do not meet the tests for employment.

Currently, Section 230 of the Employment Rights Act provides a statutory definition of both employee and worker.

The law states that «'employee' means an individual who has entered into works under (or where the employment has ceased, worked under) a contract of employment»[126]. It adds that «in this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing».[127] The definition is somehow circular and not well-defined. Therefore, interpreters have to rely on the criteria elaborated by the Courts for distinguishing between a contract of service and a contract for services[128]. This case law developed into several tests used to determine when a contract of employment is set.

This peculiarity is due to the British labour law tradition, which conceptualised the contract of employment on a case-by-case basis, whereas civil law systems of continental Europe moved from a general theory of contract towards a specific concept of an autonomous contract of employment.[129]

Therefore «today the courts adopt a compound approach to defining the contract of employment combining tests of control, organisation and considering whether an

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[125] The Growth and Infrastructure Act in 2013 has introduced a sub-status of the employee status. Individuals can opt to become 'Employee shareholders' to receive shares in their employing company or parental undertaking of a minimum value fixed by the law. If they do so, they have to renounce to the following: the right to be unfairly dismissed; the right to statutory redundancy pay; the right to request flexible working; and the right to request to undertake study or training.
[126] Employment Rights Act 1996, Part. XIV, Chapter III, Section 230 (1).
[127] Employment Rights Act 1996, Part. XIV, Chapter III, Section 230 (2).
[128] Therefore, to distinguish employment and self-employment in the UK, the words of Mark Freedland wrote decades ago are still relevant when he warned to examine «the common law of the contract of employment, an area where, despite the marginal impact of many statutory provisions, the legal ground rules are still the judge-made ones» M. Freedland, 1976,1.
[129] M. Butler., 2018, 91.

individual is ‘in business on his or her own account or, alternatively, whose business is it».[130]

The first and most traditional test to be developed was the ‘control test’ with roots that date back to the nineteenth century in the UK and that, according to Deakin, is more closely related to the forms of industrial subordination which emerged in the manufacturing industry in the XIX century than with any true relation to medieval relation of master and servant.[131] The recurrence of a power to control the manner in which the work is done is considered to be the critical element. A contract of service, following this test, is one under which an employer «can not only order or require what is to be done but how it shall be done».[132]

Of course, the higher the skills of the employees are, the more complicated it is to only rely on the control test. Consequently, in the UK, as in other legal frameworks, two other tests dated from the middle decades of the twentieth century when where the vertically integrated firm was the normality.

The so-called ‘integration test’ investigates whether the person is part of the employer’s organisation. In other words, «under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it».[133]

Another criterion for distinguishing a self-standing business, indicating an inconsistency with an employment contract, has been identified as the entrepreneurial nature of self-employment.

In order to address this element, therefore, judges introduced the ‘business test’ or ‘economic reality test’, which aims to ascertain whether a person is in business on their own.[134] «Factors to be considered in this context include the extent to which the person takes the chance of profit or risk of loss by investing money or equipment in the business».[135] The Court also check whether a substitution clause, which would allow a worker not to perform work personally, is integrated into the contract. Indeed, the option to subcontract tasks is considered a clear characteristic of self-employment in the UK, similar to in the Netherlands.
It is necessary to return to this aspect of the performance's personality further because of the crucial role it has had in recent years, but not before presenting the latest test developed in case law, namely the ‘mutuality of obligation’ test.

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[130] Benjamin and Prassl, 2017, p. 756.
[131] Deakin and Wilkinson, 2005, pp. 90-95. *Contra* Freedland, 1976, op. cit. ; Steinfeld, 1991 and Simitis, 2000.
[132] *Lane* v. *Shire Roofing* [1995] IRLR 493 at 495. See also an older judgment such as Ready Mixed Concreate Ltd v. Minister for Pensions and National Insurance [1968] 2 QB 497, 515 (QB).
[133] *Stevenson, Jordan & Harrison Ltd* v. *Macdonald & Evans* (1952) 1 TLR 101.
[134] *Ready-Mixed Concrete (SE) Ltd* v. *Minister of Pensions* [1968] 2 QB 497; *Lane* v. *Shire Roofing* [1995] IRLR 493 at 496.
[135] Butler, *op. cit,* 93. About the tests developed by case-law refer also to Deakin and Morris, *Labour Law,* 6th Ed. Hart Publishing, 2012, 121-160.

This test emerged only in the 1970s, partly in response to the increasing protection afforded to employees regarding unfair dismissal and the resulting pressure to clearly distinguish between 'standard' and 'non-standard' employment[136]. The development and consistent application of this test aimed to ensure that only those genuinely working under an employment contract could enjoy the statutory protections afforded to employees. In reality, it essentially served to confine labour law, preventing its scope from expanding.

The test is based on a more formal approach that looks at the obligations that parties underwent according to the contract. Basically, such a mutuality exists whereby there is an obligation on the part of the employer to provide work and pay for it, and a corresponding obligation on the part of the worker to perform the work provided.

Therefore, it is intended as a contractual mutual obligation to exchange labour for remuneration in the future and finds a substantial correspondent in the requirement of contractual stability (in other words, an obligation for mutual collaboration extended over a significant period).[137]

Put differently, it was clarified that this test has been used: (i) as a prerequisite for contractual continuity and (ii) as a synonymous term for contractual consideration.[138]

The purpose of this test is to emphasise that a worker who refuses work or does not maintain a stable, continuous relationship with an employer cannot be classified as an employee under a contract of service[139]. This creates an issue, as individuals who lack their own business and, at the same time, lack a regular, stable employment end up in a grey area, being neither self-employed nor employees[140].

As clarified, therefore, the assessment of judges must take into account a multitude of factors, none of which is necessarily determinative. Although the key point is to ask whether the provisions of the contract are consistent with its being a contract of service according to the multiple test assessment. [141] The point of reference has always been the written contract clauses according to the primacy of the express contractual terms rule as inevitable in a legal system where traditionally the contract is the centre of the solar system with other sources revolving around it (unlike in continental systems where the ‘sun’ is represented by written law).

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[136] In this terms Deakin, 2020. As reconstructed by Kountouris (2014), the concept was originally developed by Mark Freedland (1976, *op. cit.*) with the purpose of bringing relational aspects of work contracts to the fore of labour contract law analysis, where traditional contract law elements, such as contractual consideration, had typically failed to acknowledge them. Subsequently, English court judgments have employed the concept of mutuality in a manner that effectively negates the original intention of the concept and has a detrimental impact on workers in precarious and atypical employment relations.

[137] Grandi, B., 2015, 166 ff..

[138] Kountouris, 2014, *op. cit.*

[139] Carmichael v National Power plc [1999] UKHL 47

[140] Burchell, Deakin, and Honey, 1999, p. 8.This is, in particular the case of zero hours contracts.

[141] Butler, *op. cit.* 92. See the case *Express and Echo Publications Ltd Taunton* [1999] IRLR 367, CA.

However, this principle has long been showing its limitations, progressively falling into crisis. The latest step was driven by the need to ensure at least the minimum protection of worker status for platform workers.

Kountours and Bogg well reconstructed the beginning of this path[142].

At first, the judges recognised the prevalence of the reality of the employment relationship over the legal fiction of the contractual arrangement when both parties have conspired to shape a contractual arrangement aimed at circumventing a legal requirement, as suggested by the traditional English sham doctrine[143].

Subsequently, judges recognised that when one party, typically the employer, abuses its 'relative bargaining power' by unilaterally producing a written agreement that does not reflect the 'true agreement,' then 'the reality of the relationship' should prevail over the written documentation. This principle is exemplified in landmark judgments such as Protectacoat[144] and Autoclenz[145].

The latest step towards shifting the emphasis from the primacy of express contractual clauses to the primacy of facts and the legal norms that govern those facts was marked by the Supreme Court's ruling in a case involving platform work in 2021[146].

Indeed, the Court clarified that when rights are created by legislation, the task of the tribunals and courts is not to start from the written contract terms as a point of reference to determine whether an individual falls within the definition of a "worker". Instead, the focus is to determine whether the claimants fall within the statutory definition of a 'worker' to qualify for these rights, regardless of the contractual terms. In short, the Court declared that the primary question is one of statutory interpretation, not contractual interpretation.

This complete reversal of perspective highlights the evident influence of the UK's prolonged membership in the European Union and the consequent impact of Euro-continental legal models on the Supreme Court judges.

However, despite recognising the principle of the primacy of facts over contractual clauses, UK courts classified platform workers as 'lamb-b workers' when they were asked to determine their status[147]. This occurred even when it was recognised that platforms exercised a substantial degree of direction and control as well as managerial powers, including disciplinary actions.

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142 Kountouris, Use and Misuse, *op.cit.*; Bogg, 2012.
143 Under Snook v London and West Riding Investments Ltd [1967] 2 QB 786
144 Firthglow Ltd (t/a Protectacoat) v Szilagyi [2009] EWCA Civ 98
145 Autoclenz Ltd v Belcher and others [2011] UKSC 41, paras 22 and 35.
146 Uber v. Aslam [2021] UKSC 5.
147 Aslam v Uber BV [2016] EW Misc B68 (ET) (28 October 2016); upheld by the Court of Appeal in Uber BV v Aslam [2018] EWCA Civ 2748 , and by the Supreme Court in Uber BV v Aslam [2021] UKSC 5; Dewhurst v Citysprint uk ltd (ET 2202512/2016 , 5 Jan 2017); Mr A Boxer v Excel Group Services Ltd (ET 3200365/2016 , 22 March 2017); Lange v Addison Lee Ltd (ET 2208029/2016, 25 September 2017).

As has been argued, this may be partly due to the procedural strategy chosen by workers since it is easier to satisfy the benchmark for ‘worker’ status as opposed to that of 'employee’.[148]

Nevertheless, this strategy was certainly facilitated by the fact that the definition of 'worker' is looser than that of an employment contract, as established by the analysed jurisprudential law. Moreover, this confirms that third categories normally have the effect of narrowing the area of subordination, making it harder to demonstrate compliance with employment definitions.

As regards the definition of ‘worker’, this is provided by Section 230 (3) of the Employment Rights Act 1996, which states that: «‘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».

This definition excludes those individuals who are not engaged *intuitu personae* because, for example, they, in turn, hire other personnel to complete the task or job, and those who work for professional clients.
This explains why companies, and platforms in particular, began to include clauses allowing workers to be replaced at work from a certain point onwards.
In fact, their intention with this technique is to completely exclude the protective statutes, both those reserved for employees and the reduced protections for those classified as 'workers
Also, a contract for the sale of a completed work (an opus perfectum) would exclude the applicability of this ‘status’, since the latter should be considered as self-employed. At the same time, the distinction to be drawn between self-employment and ‘workers status’ is a problematic one. Self-employed people who are not running their own business would fall within the statutory definition of ‘worker’, while self-employed who are in business for themselves would not be workers and instead classified as independent contractors.[149]

Being classified as ‘employee’ grants access to a more considerable cluster of rights, such as, for example, rights to complain of unfair dismissal,[150] to claim compensation for redundancy,[151] to be given a written statement of employment terms,[152] and collective rights. At the same time, to be included in the category of ‘workers’ is important to secure certain collective rights (right to form and be associated with a union and the

[148] Kountouris, 2021.
[149] M. Freedland and H. Dhorajiwala, *2019, p.* 285. *See Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, [2014] ICR 730.
[150] ERA 1996, s. 94(1).
[151] ERA 1996, s. 135.
[152] ERA 1996, s. 1.

freedom to participate in collective actions). Moreover, workers are entitled to certain employment rights, including rights to the national minimum wage and the national living wage; statutory paid holidays, statutory rest breaks, including night breaks; and limitations on consecutive working hours;153 not being discriminated against if they work part-time; not being subject to a detriment, or offered inducements in relation to trade union membership; to be accompanied to a disciplinary or grievance hearing by a fellow worker or a trade union representative; to be automatically enrolled in a pension scheme. They are also granted protection against unlawful deductions from wages, against unlawful discrimination, and for 'whistleblowing'.

Finally, the Equality Act 2010 applies to those employed under a contract of service or apprenticeship as well as those employed under a contract personally to execute any work or labour.

[153] No more than 48 hours on average per week.

5. The complex patchwork of the **French legal system**

In French legislation, there is no definition of 'employment contract' or 'employee,' nor is there a description of the elements that should substantiate or characterise subordination. However, as in the other countries reviewed herein, there is a doctrinal and jurisprudential elaboration on this matter.

According to scholars[154] and case-law,[155] a contract of employment is a synallagmatic exchange of workforce for a wage or a salary. The employee makes their work available to the employer who pays them.

The predominant factor to differentiate the employment contract was found by the *Cour de Cassation* in 1931[156] in the power to issue orders and to check that instructions are respected as a view that opposed to the concept of *dependence économique* elaborated by the doctrine[157] as a way to infer subordination from a social condition[158].

Therefore also, at a later time, the French Supreme Court reiterated in a landmark judgement that «a relationship of subordination is characterised by the performance of duties under the authority of an employer who has the power to give orders, monitor the execution of assigned duties and punish his subordinates' breaches of duties».[159] In other words, the Supreme Court acknowledges the three classical powers to direct, control and sanction the employee.

Even so, this understanding of the subordination did not prevent the French Courts from going partially beyond this restricted definition, lending weight to concrete indicators, similar to what happens in other European countries. Courts normally investigate whether a worker: must comply with a scheduled working time or can instead arrange it as they wish; receive remuneration on a regular basis; works on company premises and the company provide them with all necessary work equipment and materials; has a portfolio of clients; and whether the company cannot accomplish the same tasks with its own staff. These elements tend to measure the existence of controlling mechanisms and integration in the employer's organisation, as well as a lack of independence. This is because, on the flip side, art. L 8221-6-1 of the Labour Code clarifies that a self-

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154 Favennec-Hery, and Verkindt, 2014, 615.
155 A clear statement on this point can be found in (Court de Cassation, 22 July 2014, Bull civ IV, No 576) where it was stated that «The contract of employment is an agreement by which a person undertakes to work on account of another and under its subordination in exchange for remuneration»
156 Cour de Cassation, July 6, 1931, Recueil Dalloz 1931 J.121. reported in E. Dockès, 2019.
157 Cuche, P., 1913.
158 According to Kessler, 2017, 199 this *pouvoir de direction* is still the core of subordination in France since it is «the only constitutive element that is not found in other contracts».
159 Cass. Soc. 13 November 1996, n° 94-13187 (Societe Generale).

employed worker is presumed to be one whose working conditions are defined exclusively by themselves or by means of the contract with their client.

The situation in France did not differ from that in other countries, such as the United Kingdom or Italy, among those analysed herein. French courts[160] have also needed to extend employment protections to skilled workers, commercial agents, and franchisees who work more independently but still within the framework of the other party's bureaucratic organisation. This was achieved through the concept of '*service unilatéralement organisé par autrui*'[161].

«*Service organisé* is shorthand to indicate the whole of the geographical, bureaucratic, and organisational constraints that shape the performance of the work»,[162] and it is a concept that turned out to be particularly useful when jurisprudence has faced cases related to the platform economy.

A notable case that exemplifies subordination as integration into an organisation not belonging to the employees, which manifests as an external source dictating rules of conduct, is a judgment released by the Court of Cassation in 2009. It concerned reality show participants whom the Court classified as employees[163]. Indeed, in that peculiar context, participants in the television program were obliged to take part in various activities and meetings, follow the rules unilaterally defined by the producer, and had their behaviours unnaturally guided for the benefit of the show. They were required to be permanently available, could not leave the site, and could not communicate with the outside world unless they underwent sanctions.

This case was important also because it reiterated what had already been established in a ruling regarding a cab driver[164] well before the Uber cases arose: the principle that the existence of an employment relationship depends not on the parties' will or the name given to their agreement but on the factual conditions under which the professional activity is carried out. This implies that circumventing labour law by choosing a contract type other than an employment contract does not produce any legal consequences[165].

In that case, although the taxi driver rented the car from a company, he did not exercise any organisational choice as to the working arrangements or services offered and so could not qualify as a self-employed person according to art. L 8221-6-1 of the Labour Code.

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[160] See Cass. Soc., Nov. 13, 1996, Bull Civ. V, n° 386; Cass. Soc., Dec. 1, 2005, Juris Classeur, n° 05-43.031; Cass. Soc., June 27, 2007, Juris Classeur, n° 04-45.769, 04-45.770.
[161] On this point refer to Razzolini, 2010, particularly p. 285.
[162] *Ibidem*
[163] Cour de cassation, civile, Chambre sociale, 3 juin 2009, 08-40.981 08-40.982 08-40.983 08-41.712 08-41.713 08-41.714, Publié au bulletin.
[164] Cour de Cassation, Chambre Sociale, 19.12.2000, MM Labanne v. Soc. Bastille taxi et autre, n° 98-40572. More recently Uber drivers were also classified as employees, see Cour d'appel de Paris, 10 ja 2019, n° 18/08357.
[165] Cour de cassation, Criminal chamber, 29 October 1985, no. 84–95559 (Guegan)

When the Court of Cassation faced the first cases of taxi drivers operating via the platform, it based its judgments on similar principles, even though the criteria followed underwent certain modifications.
In the TakeEatEasy case,[166] the Court inferred the existence of an employment contract by verifying a company's unilateral power to geolocalise and disconnect the workers from the platform. The circumstances of the case were used to inspect the existence of a relationship where one party has the power to control and punish the other. In this way, the power to strongly influence how tasks should be performed remains with one party to the contract only. In other words, the *Cour de Cassation* did not investigate in detail the recurrence of the key criteria of subordination in this case, but conversely, it could not infer, from the facts under scrutiny, the typical characteristics of a contract for service, i.e. the independence of the contractor in carrying out their work without receiving permanent instructions and orders from the company.

A couple of years later, in the Uber judgment[167], The Court placed greater emphasis on the organisational aspect by highlighting that the driver joined a transport service created and entirely organised by the company, which exists solely through this platform. The Court also highlighted that, as a result, it was impossible for the driver to build his own clientele or freely set his rates and conditions for the transport service
Moreover, the Court detected stipulations that could incite drivers to remain connected in the hope of performing a ride. These tools engage the subjectivity of the worker so that they constantly remain at Uber BV's disposal throughout the duration of the connection without being able to choose the ride that befits them, or at least not in the way it would be possible for an independent driver.
Following this pronouncement, in particular, a part of French doctrine maintained that judges are moving towards a different conception. «The characterisation of an inter-individual relationship of power between employer and employee over the content of the service is replaced by that of a power that has control over an organisation, and therefore over the conditions of performance of the service»[168].

This conceptualisation, according to which an employee is part of an organisation that does not belong to him and over which he has no control, is present across multiple legal systems, particularly in the Italian and Spanish legal systems (in addition to the French case just discussed).

Therefore, it becomes necessary to understand the boundaries of the firm and the internal functioning of the organisation in relation to the external market which is a point on which I dwell more in the latest section of this book.

The primacy of facts principle that has been analysed above is also important to read through the French technique based on legal presumptions.

"Indeed, article L.8221-6 of the Code du Travail provides a rebuttable presumption for individuals registered as self-employed service providers. Specifically, anyone

[166] Cour de Cassation, Chambre Sociale, 28 novembre 2018, n. 1737.
[167] Cour de Cassation, Chambre Sociale, 4 March 2020, n. 19.13.316.
[168] Gomes and Sachs, 2021, p. 92. In this terms Pasquier, 2020, p. 227.

registered with the Commercial and Companies Registry or the Commercial Agents Register is presumed not to be bound to the client through an employment contract for the activities covered by the relevant registration. However, the Supreme Court, consistent with its case law, does not apply this presumption if the facts of the case demonstrate that the terms of work are typical of an employment contract.

On the opposite side, the legislator decided to set specific legislation for professions where cases of bogus self-employment can often occur in so far as the atypical nature of the relationship makes it difficult to prove subordination. Therefore, in these cases, a presumption of a contract of employment is set, which is very difficult to reverse. That is the case, for example, for journalists,[169] artists,[170] models,[171] caregivers, employees of buildings, attendants and nursing assistants,[172] and even some managers of businesses.[173] The legislator aimed to extend the legal regime of the subordinate employees to these workers for a certain and variable extent. Journalists are, for example, entirely assimilated as employees and even enjoy some additional advantages, whereas only protections concerning salary, dismissal and working time have been granted to managers of food franchises. Moreover, the legislator intervened to qualify *ex lege* as a labour relation those occupations whose nature could have been doubtful (this is the case, for instance, of homeworkers[174] and commercial travellers[175]).

On the one side, the French legislator used this specific legislative technique to directly enlarge the scope of labour law to the most controversial area of work with a similar aim that case law attempted to achieve[176], but on the other, engaged in a battle against judges over platform worker qualification[177].
This is a typical example of how changing political majorities influence legal policy, resulting in legislative layering that is not always consistent.
Other regulatory provisions can also be considered in terms of this ‘expansive’ technique. Indeed, some managers or persons who are at the head of an enterprise, such as managers of petrol stations, licensees, exclusive distributors and franchisees, can benefit from the protection of the Labour Code.[178] Economic criteria are considered that include the exclusivity or quasi-exclusivity of the activity for one company and prices imposed by this company.[179]

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[169] Section L. 7112-1 of the Labour Code.
[170] Section L. 7121-3 of the Labour Code.
[171] Section L. 7123-3 of the Labour Code.
[172] Section L 7211-2.
[173] Section L 7321-3.
[174] Sections L. 7411-1 and L. 7412-1 of the Labour Code.
[175] Section L 7313-1
[176] However, the binary divide between dependent work and self-employment remains untouched if the option to add an intermediary category has been considered. A report was prepared for the minister to pave the way for this option. See H. Antonmattei and J. Sciberras, *Le travailleur économiquement dépendant: Quelle protection?*, 2008, in http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/084000694.pdf.
[177] On terms and timing of this battle refer to Gomes and Sachs, 2021, *op.cit.*
[178] Art. L 7321-1 and following.
[179] On this point refer to F. Kessler *Op. cit.*, 215.

Two more legal devices are worth mentioning because they sit on the edge of the dividing line between subordination and self-employment and should theoretically ensure more protection to those workers. First, the *portage salarial* scheme (which resembles the case mentioned above of the 'payroll companies' in the Netherlands' legal framework) was introduced by law in 2008[180] at Art. L 1251-64 of the Labour Code. The law defines the *portage salarial* as a unity of contractual relationships organised between an umbrella company[181], an independent contractor and a customer company. In this case, high-skilled workers can perform jobs for several clients, enjoying administrative services, such as invoicing and recovery of payment, provided by for the *portage salarial* company. Persons who work for such a company should have the competence to autonomously identify potential clients and negotiate directly with them, as if they were self-employed, but they formally conclude a contract of employment with the *portage salarial* company. These companies «function as employers only on paper, since they do not exercise power or provide work for these workers».[182] Basically, those workers find their own customers and receive their remuneration from the *portage salarial* company based on the amount that the customer pays to the same company, deducting social security contributions and some operating costs. Scholars have criticised this legal instrument because it is self-evident how this scheme can, in practice, resemble the tripartite scheme of temporary agency work with the company that hires out labour.[183] Theoretically, this instrument aims to make workers benefitting from employment status and other advantages, such as affiliation to social security and pension funds, contributions to unemployment insurance, paid vacation, right to training, management of legal-administrative and accounting tasks by the company without being subordinate or economically dependent.

Second, there is the status a worker acquires when becoming a member of a *Coopératives d'activité et et d'emploi*, which also ensures individual support to project holders to launch a new activity by offering them the chance to become 'salaried-entrepreneurs' (*entrepreneurs-salariés*). As with the case of the *portage salarial*, the project holder can work autonomously, find clients and deliver their services. However, they are bound to the cooperative by an employment contract. The cooperative collects clients' payments and gives them back to the project owner in the form of a salary once social charges and management fees have been deducted. Known in the anglophone debate as a 'Business and Employment Cooperative' (BEC), these cooperatives can either be a SCOP (only the workers can vote) or a SCIC (other types of actors are involved in the governance).[184]

A few words are needed about a form of individual entrepreneur – the 'auto-entrepreneur' – that was introduced in the Law on Economic Modernisation in 2008. «The system established by the law does not create a specific status, rather a regime for independent workers» pursuing or beginning a small-scale activity that can also be

[180] Law No 2008-596 of 25 June 2008.
[181] On the topic of the umbrella companies, see Ichino, 2018.
[182] E. Dockés, 2019, p. 222
[183] E. Dockés, *ibidem.,* who refers to this happening frequently.
[184] Bureau, Corsani, 2017.

complementary.[185] Once the worker opts for this regime, they can benefit from simplified tax returns and social charges, subject to a maximum turnover. The self-entrepreneurs are solo traders or one-person businesses or professionals and in principle are not included in the scope of labour law.

[185] N. Levratto, E. Serverin, *Become independent! The paradoxical constraints of France's 'auto-entrepreneur' regime*, *JSBM*, 2014, 53, 1, 284-301, 285.

6. The Legal Framework in **Italy**: A Boat Stuck Midstream?"

Art. 2094 of the Civil Code contains a definition of a 'subordinate employee' as being an individual «who undertakes an obligation to cooperate in the business in exchange for a remuneration by performing his work manually or intellectually at the dependence and under the direction of the entrepreneur».[186]

On the flip side, a definition also exists in Art 2222 CC of an 'independent worker' as a person who is under an obligation to perform a service or deliver a piece of work for a fee, mainly by means of their labour, and in the absence of subordination vis-à-vis the principal. Basically, the system is set so that all the workers who are not employees, since subordination is lacking in their case, are classified as self-employed.

The Italian legal framework has traditionally been based on a binary system. However, over time, legislators have decided to 'work' on the two main categories. This can be viewed, depending on the perspective, either as a tool to extend some protections originally reserved for employees to self-employed workers in need of safeguards or, conversely, as a means to prevent the expansion of labour law.

The criteria used to identify the employee have been discussed for decades by legal commentators and in the Courts.

In Italy, as in other scrutinised countries, the courts have also developed a typological method based on the primacy of facts and concrete circumstances as indirect indicators of subordination. The first point to detect still remains the employer's power to issue orders and instructions, to control employees, and to sanction them in case of a breach of contract. Of course, in Italy, too, the employer's direction and control is considered to be there even if those powers are not concretely exercised and remain in a potential status only in the same vein as analysed in the other legal frameworks.

On this point, an issue arises whereby a client has the right to ask the *opus* to have specific characteristics or to be made according to specific conditions. This, in turn, means that this kind of request is also capable of influencing the work performed by a self-employed worker[187]. Therefore, in order to define a difference, the employer's

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[186] Art. 2094 cc «*È prestatore di lavoro subordinato chi si obbliga mediante retribuzione a collaborare nell'impresa, prestando il proprio lavoro intellettuale o manuale alle dipendenze e sotto la direzione dell'imprenditore*». The definition provided for in art. 2094 of the Civil code contains complex legal terminology which has spurred a large debate in the Italian doctrine that is still ongoing. For this reason, it was translated in very different ways by different authors. See Treu, 2016, p. 41; Ales, 2017, p. 351; Gramano and Gaudio, p. 241: Pietrogiovanni, 2019, p. 62. Scholars offer a different interpretation of the concept of 'collaboration'. Moreover, the wording «*alle dipendenze e sotto la direzione*» can be considered as a hendiadys translating only the power to direct someone else's work or, more properly, as expressing two separate concepts.

[187] Both art. 2224 and 1665 of Civil Code are clear examples of a possibility for the client to control and supervise the way the job improves.

power is understood as operating in a more pervasive way, to the point that employees have the duty to comply with specific procedures and can be requested to observe a specific operational modality in performing tasks. Even when so characterised, the so-called hetero-direction is an insufficient criterion to secure a demarking line, since there are employees who enjoy large discretion on the job because that is essential to operate in favour of the company.[188] This freedom of action does not, per se, exclude subordination.[189]

For this reason, other elements help in defining a dividing line when subordination understood merely as hetero-direction is insufficient. For this purpose, some specific words that are integrated into the definition of employee ex-art. 2094 CC have been used as a gateway for such an operation. In particular, the words 'dependence' and 'cooperation'. '*Alle dipendenze'* can be understood according to different nuances as a stable transfer of work energy or as availability over time of the employee, or as a permanent inclusion in the productive organisation of others.[190] All of these definitions recall the idea of permanency or continuity, which should be lacking in the obligations of a self-employed worker. However, some forms of employment, such as on-call jobs, have reduced the capability of the criterion of continuity to serve as a distinctive sign of an employment contract when merely understood in terms of continuity in the availability and performance of the worker.

The Italian *Corte di Cassazione* underlined the critical importance of continuity in terms of functional dedication of working energy to the productive result pursued by the entrepreneur when it comes to demonstrating subordination.[191] Therefore, to explain how a labour relationship that does not entail the worker always performing their tasks (for instance, on-call or part-time jobs) can be deemed to be classified as a contract of employment, the emphasis should be on the functionality of tasks to reach an external purpose. The employer indeed decides this purpose, and it can change over time.

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[188] This is, for instance, the case for workers higher up in the hierarchy or who are in charge of managing the company or other workers. It is also, for example, the case for creative industries where workers are encouraged to innovate. In this case, the Italian case law elaborated the concept of 'attenuated subordination'. Therefore, according to the Italian Corte di Cassazione in these cases, the employer's hierarchical power is expressed by means of general programmatic recommendations (Cass. Civ. 1094/93; 5301/86; 648/86; 5022/85) and therefore without any need for direct and continuous orders and checks by the employer (Cass. 6086/1991). Barbieri, 2019, p. 2, points out that the case-law related to the so-called 'attenuated subordination' recognises *de facto* that, in some cases, the subordination essentially consists of a permanent inclusion in the employer's productive organisation and that this is the inevitable result of a more correct interpretation of the wording of art. 2094 c.c, which already embeds both hetero-direction and hetero-organisation. On the contrary, according to Pallini, 2019, p. 4, «Italian case-law has remained firmly anchored in the concept of hetero-direction as a necessary (and sufficient) requirement to classify a relationship as subordinate, with respect to which the other indicators are merely 'subsidiary'». Nevertheless, in the same article, the author suggests that the last wave of reforms marked the decline of the hetero-direction as the exclusive distinguishing element of 'subordination' in Italian labour law.

[189] This statement was already expressed by the Italian Corte di Cassazione in the '1970s (Cass. civile n. 1885/76 and Cass. Civile n. 1064/75.

[190] On this point and for more references, see Razzolini, 2020, pp. 360-61 and the doctrine mentioned *ivi*.

[191] Cass. Civ. 5024/85; 57/84.

The obligation to cooperate with the employer's targets and purpose can also be understood as a way of 'translating' a technical and organisational element of integration in the employer's organisation.

Another position that emphasises the element of organisation as a selective criterion can be found in the idea of 'double alienness', which was first elaborated in legal literature,[192] and thereafter applied in a judgment of the Constitutional Court[193]. According to the latter judgment, two conditions are always bound with one another only in the case of subordination. One is the alienness of the result, which means that the final result of the work performed by each of the members of the workforce does not belong to any of them. The second element is the alienness of the organisation, which belongs to the employer and to which each employee has to integrate. The Court also clarified that this condition of 'double alienness' is implied in the circumstance for which the work performance is integrated into an organisation over which the employee has no control because the said organisation is crafted for a purpose over which the employee has no legitimate interest.

This notion of subordination resorted in a judgment of the Tribunal of Palermo[194] on a case involving riders. The Court underlined that there was no substantial freedom to choose whether or when to work since the platform system incorporated in the algorithm dictated this condition.

This leads us to consider the relevance of the hetero-organisation as an intrinsic characteristic of subordinate employment. Indeed, case law also underlined that work performances are strictly interlinked with the employer's organisation functionality. This means that an employee becomes an integral 'particle' of the employer's technical, economic and administrative organisation.[195]

Over time, the Italian legislature, while never intervening in the fundamental division between autonomy and subordination, has nonetheless complicated the landscape with multiple interventions.
The first intervention was in 1973 by an addition to the Code of Civil Procedure.
Article 409, n. 3 of the Code, from that point forward, described a category of quasi-subordinate work based on how workers performed their jobs. These workers were

[192] Romagnoli, 1967, pp. 188 ff. and Mengoni, 1971 as well as in, 1986, 17.
[193] Case n. 30/1996 Constitutional Court. This approach to detecting a case of subordinate work was further applied in a small number of judgments both at the highest level by the national Corte di Cassazione (Cass. n 19657/2019; Cass. n. 26813/2018; Cass. n. 14660/2017; Cass. n. 820/2007) and by first or second instance Courts (Trib. Lucca 18 gennaio 2018, n. 35; App. Genova 30 settembre 2013; Trib. Siena, 24 luglio 2012, n. 32; Trib. Siena 12 luglio 2012, n. 16; Trib. Siena, 27 aprile 2011, n. 257; Trib. Siena 15 ottobre 2010, n. 119; Trib. Siena 6 settembre 2010, n. 80). V. Pietrogiovanni, *op. cit.*, describes the concept of 'double alienness' for an English audience endorsing its use to reconduct, in particular, the case of Uber drivers under the umbrella of subordination.
[194] Tribunal of Palermo, 24 November 2020 n. 3570.
[195] Cf. *ex multis*, Cass. Civ. 5921/80; 5210/78.

initially granted the same judicial protection as those in subordinate employment. The doctrine labelled this category of self-employed workers as para-subordinate.[196]
Art. 409 n. 3 of the Code of Civil Procedure, recently amended by Art. 15 law 81/2017, contains a definition of 'coordinate and continuative work relationship' indeed. This is the case of self-employed workers who perform a continuative service, mainly in person, for a client with whom they have a deal in order to coordinate tasks with the client's organisation. The law specifies that this form of cooperation should not compromise the autonomy of the worker in organising their work. In other words, coordination means a necessary connection between execution (by the worker) and organisation (of the client) that does not imply directional powers.
The legal framework underwent several amendments, none of which were free of faults and interpretative conundrums, and lately, art. 2 of the decree 81/2015 (amended soon after by law 128/2019) introduced the so-called 'hetero-organised work relationship'. The law provides that labour law regulations that apply to subordinate employment also cover those collaborators who perform continuous activities on a prevalently personal basis which are organised by the employer. An amendment also added that those dispositions apply to those self-employed workers who deliver goods when platforms are in use to issue modality of work execution.

The national Corte di Cassazione already applied[197] the previous drafting[198] of this new disposition to a case related to Foodora riders. In this circumstance, the Court interpreted the law by stating that it does not create a *tertium genus*. Indeed, according to the Court, the law has the effect of broadening labour law protection (to the extent that excludes only provisions that are, in the Court's wording, "ontologically incompatible" with the concrete case) when three characteristics stand out: work performed personally, continuity of the service, and hetero-organisation. The judgment does not solve all the issues that this new provision poses to the current legal framework, and the issues are twofold. First, the need for delineating differences between 'coordinate and continuative work' and a 'hetero-organised work relationship' emerges. Both, according to the law, are forms of work performed mainly personally and in a continuative way. Moreover, both imply a form of coordination that, only in the former case, has to follow a specific agreement between the parties. Furthermore, the legislation wording seems to imply a different level of coordination between the client and the collaborator, which is tighter in the case of a 'hetero-organised work relationship', since the law refers to coordination in the method of execution of work. The second issue is related to the distinction between subordination and hetero-organised work. An author suggests that it may not be essential to investigate the nature of hetero-organized collaborations in the end. This is so because the legislature appears to have linked the protective statute to hinge on the occurrence of three elements: the

[196] On the topic of 'para-subordinate work', *ex multis,* refer to Santoro Passarelli, 1979; Pedrazzoli, 1984; Ballestrero, 1987; Leonardi, 1999 ; Perulli, 2000; Nogler., 2000; Colantoni, 2001.
[197] Cass. 1663/2020.
[198] Before the latest amendment, the law provided that the work should have been performed exclusively on a personal basis and that the coordination with the external organisation could also involve timing and place of the performance.

prevalence of the personal work, continuity, and an external organisation of the work to perform.[199]

In any case though put in these terms, three problems remain.

The first is that this category would at that point be carved out within subordination with the disadvantage that the protective statute could be partially removed by collective bargaining and, in any case, would never appear to be intact since, according to the Supreme Court, there would be rules ontologically foreign to the case in question.

The second is the use of a different category by judges to qualify also workers as for example, riders that are clearly subordinate.

The third problem is the unnecessary proliferation of legal statuses, creating a complex maze, as evidenced by numerous discussions within the doctrine

This is also probably due once again to different targets that governments of different political composition had in their mind in drafting the issued amendments.

Broadly speaking, the methods that were used in each of these legislative interventions are highly contestable, as the legislator chose not to operate on the general category on which the Italian system has been built (embedded in art. 2094 CC) to clarify its scope and therefore valorising, in this way, its inherent adaptive nature. Instead, the preferred technique has always been to keep untouched the original concept of subordination embedded in the code and, conversely, to carve out one of the main characteristics of subordination that is also the most useful in order to extend the area of protected labour. The result is a fragmented legal framework that lacks systematic consistency and opens the door to many possible interpretations and dilemmas that case law will have to cope with.

[199] Razzolini, 2024.

6. Concluding Remarks

The analysis has revealed that the legal systems under scrutiny still show similarities that are due to the historical evolution of labour law across the whole of Europe and above all in the area of the civil law family.

Currently, it can be assumed that all the analysed countries, including the United Kingdom, recognise the principle of the primacy of the actual facts over the formal clauses in contracts. This principle has proven particularly useful in disputes between workers and platforms where the platforms effectively impose working and service conditions but require workers to sign contracts as self-employed or to accept fictitious substitution clauses. These clauses are especially significant as all countries tend to place considerable importance on the personal nature of the performance.

Generally, an employment contract is considered a reciprocal exchange of labour for a salary or wage. For a long time, hetero-direction (external direction and control) was the main parameter used to investigate employment circumstances. However, this parameter lost its regulatory efficacy, likely due to the decline of the industrial economy based on vertical firms. Despite this, direction and control still play a significant role in defining employment in many countries and have been beneficial in framing the rise of the platform economy in many circumstances.

Having said this, all countries have moved towards valuing other criteria for determining subordination, generally on two fronts: the absence of an independent entrepreneurial structure or direct market access by the worker, and the presence of an external organization capable of influencing or commanding the worker's activities, where the worker is merely a part of the larger entity. In reality, these two fronts can be seen as two sides of the same coin, representing the active and passive aspects of organisational issues.

Case law has played a crucial role in all countries, and it is easy to understand why. Judges are always confronted with reality and have to provide responses on a case-by-case basis. Moreover, in many countries, general principles exist that favour the weaker party of the contract, as well as constitutional principles that oversee labour, and judges are bound to them. Courts started to elaborate new criteria to enucleate dependent employment and to attribute a particular case to the general category of subordination.

The holistic approach to cases has often been beneficial for judges, enabling a more balanced assessment of cases and criteria that lead to legal qualifications favorable to workers. However, this approach could become counterproductive in the long term if it impedes the transformation of the concept of subordination into a more inclusive one.

This transformation process can occur under three conditions, the first two of which I will analyze here, leaving the third for the final conclusions.

Comparative analysis shows that the systems least responsive to economic and social changes are those with either rigid definitions of subordination, such as Slovakia and the Netherlands, or those that have introduced intermediate categories. These systems fragment the discipline not only through the proliferation of non-standard contractual forms but also by crowding the spectrum of intermediate legal categories with the theoretical aim of modulating protections. In reality, many platform workers with all the characteristics of subordinate employees were often classified differently: as employee-like persons in Germany, hetero-organized workers in Italy, and limb-B workers in the UK.

In other words, intermediate categories often provide a more accessible opportunity for misclassifying employees, ultimately lowering protections for many workers. Additionally, the creation of a tertium genus often narrows the area of subordination, which ensures the highest standard of protection. These intermediate or adjunctive categories are frequently derived from some of the criteria judges use to define subordination. As a result, this leads to a dilution of protections for workers who exhibit characteristics typical of subordinate employment.

Judgments that have transcended these classifications often do so by emphasising the organisational role of the employer. This aspect requires greater attention in the next section.

Section Three
Hybrid work in hybrid organisations? Labour law facing new organisational methods.

As it has been clarified in the first Section, it took some time to adapt the ancient legal institutes so as to reach the distinction between employment and self-employment across the XIX and XX centuries. Notwithstanding the possible different concrete arrangements thanks to which labour was performed in someone else interest, in the XX century, the category of employment was given a unifying role that has been argued as being somehow 'a forced' unity[200] if compared to the actual situation. It was only with full industrialisation that the figure of the factory worker, which was perfectly in line with the scheme of subordinate work, could be said to be largely prevalent. In any case, from its existence in the juridical world ahead, the contract of employment and the category of subordinate work have been both the expression of subjection to the prerogative of the employer but, at the same time, the instrument of a growing set of protective standards in the following decades.

Since the 80s of the XIX century, the trend has reversed in a mirror-image fashion. In fact, labour law has reacted to the economic and social process of differentiation by institutionalising it in the legal system and by incentivising this demand of the business world. During this long period, a short-sighted view prevailed that understood labour law as an instrument of economic policy aimed at an alleged goal of maintaining and holding on to one's own industrial system placed in fiercer competition with those of others by the globalisation of economies. This has made the legislator lose sight of the fact that, on the contrary, labour law is, first and foremost, an instrument for mediating conflicts of interest in relations pertaining to production and only as such and secondarily an instrument of economic policy[201].

Legislation multiplied instruments of so-called atypical work that differed from standard fixed-term subordinate work for some portion of the discipline. Some countries have also ensured incentives for self-employment based on reductions of tax and/or social security contributions. The misalignment from the standard employment contract may concern various features. Therefore, for instance, temporary agency work implies a third party (that is not internal to the employment relationship) for which work is performed for a limited length of time, so it broke both the bilaterality of the standard scheme and the element of continuity. Part-time employment contracts also detach from the standard scheme inasmuch as the working time can be generally redefined during the relationship thanks to elastic clauses. Job-on-call instead marks a difference with one of the possible meanings of continuity in the employment relationship, i.e. the simplest one that implies a regular and protracted supply of labour according to a pre-set scheduled timework.

[200] Kountouris, 2007, p.26
[201] Garofalo, 2006.

The use of bogus self-employment or commercial contracts to outsource a portion of the manufacturing or productive cycle to independent contractors is more extreme than using different forms of flexible employment contracts. In the most refined form of this technique, the employment contract is directly displaced by forms of coordinated self-employment and/or commercial contracts, which include clauses that allow forms of control that are no less compelling than those typical of the employment contract. The consequence is that once the whole scheme of the employment contract is denied, the same happens to the protective discipline attached to it.

Atkinson[202] named the latest mentioned option 'distancing' and considered it as an alternative to the flexible use of internal workers who, in turn, were split between core workers with a standard employment contract who were asked to provide functional flexibility and peripherical workers engaged by means of an atypical form of working arrangements and provided numerical flexibility. While numerical and functional flexibility works well in the internal enterprise market, 'distancing' operates in a market external to an enterprise since it makes use of the labour of formally non-dependent workers.

In recent times, however, new technologies and algorithm-based platforms have functioned according to a scheme that can be seen from two points of view. From one point of view, technologies increasingly blurred the distinction between the firm's internal and external market. From the other point of view, they enabled companies to control assets and employees over the company's formal legal boundaries. In this way, flexible workforce use has also been implemented for the core group of workers and enterprise are able to load the risk of lack of working on workers's shoulder.

On the other hand, from the worker's subjective point of view, the idea that the enterprise can function without management has been exploited and taken to the extreme since managerial functions are currently covered by mixing the new technology and the pressure exerted on the workers by the market itself that has shaped the inner core of the enterprise. Therefore, in terms of the organisation of the firm, a pattern can be identified that is a complete shift from the hierarchy of Taylor-Fordism to the *holocracy* as a first step and from this stage to the idea of self-entrepreneurs in the digital market as the latest stage.

The ultimate goal of these management techniques is to maintain firm management and organisation of the labour factor while evading the protective scope of labour law and decreasing costs (both in terms of transaction and information costs).

The pressure exerted above all by part of the platform workers and the organisations that have organised the self-employed, as well as the increasingly widespread awareness in public opinion, seems to have recently pushed legislators in some countries and jurisprudence towards the valorisation of elements that are suitable for bringing part of the workers back into a scheme on the basis of which subjection to the

[202] Atkinson, 1987.

power of others also implies the recognition of rights and prerogatives in favour of the worker.

This chapter is devoted to describing the hybridisation of the enterprise and the labour market both from a subjective and objecting perspective and detecting instruments that can be deemed able to unveil and offset this hybridisation.

Consequently, the next Section describes the passages from the vertical and integrated firm to the tail of the firm without bosses made of self-entrepreneurs.

Section 3 describes the 'marketisation' of the employment relationship and the firm and connects those phenomena with the institutionalist theories that, when considered mutatis mutandis, can still explain the current scenario.

Section 4 makes use of examples taken from the countries that the Share project investigated to show how the case law of those countries seems to be aware of certain dynamics. In some cases, Courts have interpreted the legal provisions existing in their respective countries in order to bring workers who were in a situation of subjection to the power of others back under the protective umbrella of labour law. Considering the space available, mainly cases were selected where the weight of managerial power of direction and control is less evident, and therefore, another logic has been put in place to investigate and qualify the employment relationship.

In the last Section some conclusions are presented.

Again, as in the previous chapter, it should be pointed out that the study takes into account the state of the art before the full expansion of generative artificial intelligence, which is likely to be a game-changer and represents not only a new organisational opportunity but also the following regulatory challenge.

1. Hybridisation from the subjective standpoint. From self-management to self-entrepreneur.

Scholars (Boltansky, Chiappello, 2005) have clarified how the first phase of capitalism, which involved a hierarchical and bureaucratic organisational structure, was replaced by flatter structures that emphasised teamwork, innovation, and the pursuit of personal fulfilment and that this also implied a replacement of the ideal worker. During the first phase of industrial capitalism, workers had to be obedient, loyal and committed to their job. Later on, the ideal worker has been transformed from a compliant cog in the machine into a creative, self-motivated individual. Basically, the "critiques" or challenges to the existing order in terms of lack of participation, creativity and self-development originally seen by countercultural movements as oppositional to capitalism were eventually co-opted and incorporated into its logic. Those critiques shifted from being slogans against alienation, bureaucracy, and hierarchy into standards companies started to ask, making concrete the suspicions Friedman raised as early as 1977 about 'responsible autonomy' as a way to counteract, contain and coopt worker resistance and maintain or augment managerial control. Furthermore, post-industrial capitalism relies on the voluntary commitment of individuals to organisational goals. Instead of relying solely on coercion or external incentives, organisations now seek to enlist their employees' active participation and enthusiasm through various strategies.

When looking at platform capitalism, those paradigms do not disappear. Although it is difficult to think that digital platforms can promote any sense of mission or purpose, they have been depicted positively. If one looks back at the first debate on this issue, digital capitalism was presented as a new opportunity for self-expression and personal development, a way towards a new sharing economy able to empower individuals and build social relations or a means through which anyone can decide when and how to work (a claim the latter often brought about by platforms during legal disputes against workers). Therefore, also in this new phase of capitalism, the active participation of the workers is mobilised. A study conducted during the Share project demonstrates that in the delivering sector platforms requests for a proactive attitude on the part of workers that englobes their motivation, desire for autonomy and private time management and, in a word, their subjectivity (Armano, Leonardi, Murgia, 2022). In the authors' words, 'the innovation in organisational processes introduced with the phenomenon of connectivity mediated by lean platforms (Srnicek, 2016) has enabled a freelance work model on a digital scale in which subjectivity, autonomy and risk-taking have become barycentric'.

The platform model brings to the extreme the tail of a 'capitalism without bosses', also called *holacracy* (Robertson, 2007). In the latter model, decision-making is delegated to self-managing 'circles' and single employees. In such circles, a collective governance process decides how goals placed by the 'Board circle' are to be achieved and how the lower circles themselves organise to reach those goals (Robertson, 2007). Ferschli's work (2017) described well how, however, in this scheme, like in the oldest organisation models, workers do not decide the final goal of the organisation and how much to do in order to reach it. Moreover, a form of hierarchy is maintained. At the same time, unlike in Taylor-Fordism, the general purpose is clear to everybody, and it is fragmented in internal circles so that those groups of workers can decide how to organise to achieve meta-purposes which converge in the main one decided according to the *desiderata* of company's owner and stockholders. Hierarchy is, in fact, exercised thanks to peer control and pressure. Managerial function is 'collectivised', ensuring production without supervision. Each worker starts to assume an entrepreneur-like identity invested in the company, in the consequent responsibilities, but without corresponding profits. Therefore, this model is very efficient when it comes to cutting management costs and optimising production by fragmenting and sharing control so as to operate without supervision and central organisation. In this organisational model, one can hear echoes of the theories of human capital developed from the studies of Shultz (1961), and Becker (1964).

Turning our attention to the platform model organisation, there are some differences to underline.

In the scheme previously described, the organisation is still relevant, and a new shaping of it is crucial for the working of this model, whereas platforms tend to conceal their organisation by often presenting themselves in courts as mere connectors between self-entrepreneurs and customers. This position, for example, was assumed many times in various jurisdictions disregarding the service provided, so for example, Uber used it both for its taxi service as well as for Uber Eats (just as an example among many see the position of Porter Pacific in the Australian Uber Eats case[1], and in the UK in the Uber[2] case where the argument was rejected and in California in the cases Addison Lee[3] and Uber[4]).

Furthermore, the market assumes a different role. In the *holacracy* model or in a flat enterprise, the internal market of the enterprise and the external market are still easily discernible, and the board still translates signals and demands of the market with the difference that, compared to the classical organisational model, the response is immediate and more abrupt. In the platform model, instead, the 'marketisation' of the company is completed, as well as the idea of a market made of self-entrepreneurs since each individual, according to the narrative proposed by the leader companies, can be one of them just by logging in. The next two sections intend to focus more on these points in order to clarify the reasoning.

2. Hybridisation from an objective standpoint. The marketisation of the employment relationship and the firm.

Both holocracy and platform-based organisations share the tendencies of the 'marketisation' of the firms. 'Marketisation' can be intended in two ways. The first one is looking at the formal relationship that links employers and employees. From this point of view, the platform-based model seems to be an evolution of 'Atkinson's model' since, in the latter, a company would still have a first layer of core workers employed according to the standard long-term contract and a second layer of workers employed by means of non-standard employment contract. Only the last layer of workers would be engaged as self-employed or self-entrepreneurs. Platform companies instead make use of commercial contracts and self-employment also for their core 'workers'. 'Distancing' is therefore employed indiscriminately; the company relates to their workforce mostly as contractors, so to resemble apparently a 'virtualised' company.

A second understanding of the term 'marketisation' can be linked to the pressure exerted on the workers by the market. In Fordism, the workforce was 'protected' into the firm by the pressure of the market to ensure efficient production. In *holocracy*, instead, hierarchical control is replaced by 'coordination'; therefore, competition permeates the relationship between units within the company and contemporary pressure is also exercised in intra-units by peers to respond to market requests efficiently. In the platform business model, instead, each and every worker is placed in direct competition with all others in a market that theoretically encompasses all workers potentially available in the labour market outside the business organisation through the medium of technology. This is so because, theoretically, every person with a bicycle, car, or personal computer, for example, can transform itself into a labour supplier or, as it is supposed to be according to a specific narrative, as a self-entrepreneur.

By combining the two possible meanings of 'marketisation' it has been possible to maintain that the mechanism of power and control that once was exercised by means of the employment contract, in a growing number of cases, is today exercised *de facto* directly through the market (Digennaro, 2020) due to a combination of factors, i.e. changes in the regulatory framework brought about by legislators (See Chapter 3), changes in the organisational structures of companies and, finally, the use of new technologies. This implies that, at most, the paradigm of a legal subordination based exclusively on the direct direction and control of the worker, which, by the way, already appeared to many scholars in the past as too limiting a definition of subordination (albeit coinciding with the Taylor-Fordist model), is nowadays sometimes outdated. Instead, a broader concept of subjection to someone else power and organisation is not and can still bring labour law into the frame.

At this point of the chapter, it is important to briefly look at institutional economics to better clarify some of the concepts that have already been mobilised in writing about firms and markets.

As it is well known, it was Coase (1937) who started this vein of studies through his seminal work in which he tried to define in which conditions a firm would rise. Coase (1937) clarified that the decision to organise economic activities within a firm is based on the trade-off between the costs of internal coordination (hierarchical control) and the costs of external market transactions (price coordination). Coase's central insight is that the decision of whether to conduct a transaction in the market or within a firm depends on a comparison of transaction costs. Transaction costs include various expenses such as search and information costs, negotiation and contracting costs, and enforcement costs. These costs can make it more efficient for certain economic activities to be conducted within a firm, where coordination and communication are easier, rather than through arms-length market transactions. This model has been deemed able to explain the flourishing of integrated vertical firms where orders given through managerial hierarchy are cheaper than coordination through the market.

Decades later, Alchian and Demsetz (1972) suggested instead that firms emerge to reduce coordination costs associated with team production, defining team production as a situation where the output of a group of individuals working together is greater than the sum of their individual outputs if they were to work independently. Indeed, in team production, there are coordination costs associated with organising and directing the efforts of individuals within the team due to the need for communication, cooperation, and the resolution of conflicts among team members. By bringing individuals under a common organisational umbrella, firms can facilitate coordination, enforce cooperation, and allocate resources more efficiently. Therefore, by internalising internal transactions between different departments or units, firms can minimise the information costs and uncertainties associated with market exchanges. As the authors wrote themselves, their view is not inconsistent with that of Coase since it underlines a different reason for the firm to exist. Alchian and Demsetz's ideas can explain the lean production system and the organisational asset called *holocracy* since they reduce the cost of managing team productions.

Both theories are also still significant in explaining the platform-based production model. This is so since the algorithm, which is a property of the enterprise, is capable of a double function. It coordinates single-person units that are crucial to running the business, and so decreases the managing cost also by getting rid of most of the management positions and, at the same time, is able always to set the best price, for example, for the delivery of the parcel or car ride by matching supply and demand in the organisation's internal market consisting of the variable number of workers logged into the application at any given time. In this kind of organisation, the non-shirking behaviours, which are so crucial in the Alchiand and Demsetz vision, are enhanced by marketisation, gamification, and involvement of subjectivities rather than by instilling team spirit and loyalty. For those reasons, it is evident that platform-based production is not the end of the firm, as someone maintained it, but it is, on the contrary, a very efficient new way to organise it.

On closer inspection, Alchian and Demsetz themselves, in fact, contributed with their reflections to blurring the sharp distinction between market and enterprise since they clarified that in their interpretation, the firm is a specialised surrogate for a market for team use of inputs. They depicted the firm as a privately owned market that provides a cheaper collection and collaboration of knowledge about heterogeneous resources. In other words, «the firm takes on the characteristic of an efficient market in that information about the productive characteristics of a large set of specific inputs is now more cheaply available.» This view brings two corollaries: the emphasis on the intra-firm competition among inputs (i.e., workers and units within the same firm) and the dimensional issue. As for the latter, the authors explained that the greater the set of inputs about which knowledge of performance is being collated within a firm, the greater the costs of the collation activity. Moreover, the larger the firm, the greater the attenuation of monitor control. Therefore, the issue of the 'iper-flated' internal market should have been resolved, in their view, by having the firm 'divisionalised' in ways to economise costs just as the market would be specialised. The latter technique brings to *holocracy*, whereas, in the platform-based organisation, decreasing costs is made possible by the algorithm and technology involved with its calculus power disregarding firm dimensions. Technologies smooth and enhance the functioning of the firm's internal market.

These theories are not outdated if they are considered able to describe different ways to organise different inputs and, in particular, labour (since also platform-based technologies are just a new way to organise production) and if, at the same time, we 'do not treat firm and corporation as metonyms' (Tomasetti, 2017). Indeed, on the one hand, technologies can expand the central coordinator's power and capabilities to manage inputs and, on the other hand, can similarly open new enhanced capabilities to manage formally separate entities so as to control assets and employees without owning them formally so to discharge them at wish. In both cases, the organisation remains, and so the firm and the firm production will be cheaper. From a labour law perspective, wherever there is an organisation and a subjection to someone else's power, there it is also labour law 's raison d'être.

3 . How regulative schemes are facing the described phenomena of hybridisation.

Once it is not always given that the firm and the formal boundaries of a corporation coincide, two specular and connected questions open up from the point of view of regulation, namely identifying the employer and identifying the type of relationship that is established between a worker and the one who benefits from its labour.

With regard to the question of the employer, two possible approaches can be adopted (Razzolini, 2023). One is to reconsider the idea of the single-employer, which implies that the legal order connects each employment relationship with one employer only. The second option is to adopt a functional approach, which consists of placing a third party as responsible alongside the employer case by case, depending on the detriment caused to the employee (on the issue from the employer point of view, see also Prassal, 2017).

The research carried out during the Share project has been routed to the second problem, that of the criteria for the legal qualification of the relationship established.

The research demonstrated some similarities among those countries but also differences in approaches to governing labour relationships over time (Digennaro, 2020).

Since, as clarified in Chapter 3, employment implies always a power exercised on the worker, there is no doubt that when a direct external direction of someone else's work is detected, an employment relationship has been established. Complexity increases when forms of organisations like the ones analysed above take advantage of legal orders with the aim of reducing costs and offloading part of the risks (in particular, the risk of non-work) onto the workers. In these cases, being able to identify an organisation that wields power over workers, regardless of the legal form taken by the company or the narrative through which it identifies and situates itself, is crucial.

The case law of countries scrutinised during the Share project concerning platform work is of particular interest right because it brings in front of the bar the described methods of labour organisation, and those, in turn, ended up becoming the litmus test with regard to the congruity of the legal categories with respect to their function in the legal system. In many cases, the most direct way to establish subordination of riders and drivers was to demonstrate the capabilities to issue commands and monitor work via applications. In the end, although some fluctuations, once the real functioning of the algorithms was understood, using the criterion of the hetero-direction of workers was already enough to categorise workers as employees. More complex is the case of crowd workers or workers who do not work clearly for the platform but, at least apparently, through the platform.

In Germany, a case was decided by the BAG in 2020[5] , which brings forward very interesting Court reasoning. The latter is interesting in two ways.

First of all, the Court underlined that crowd workers did not have a distinguishable organisation since their ‘work result’ was a portion of someone else process, and labour was split among many workers in a fashion that could be useful only as a piece of someone else’s organisation. This was possible right by fragmenting the job into simple micro-tasks. Indeed, the Court states that even a few organisational requirements well decided in advance can determine the performance of tasks that are so simple to exclude from the outset a free choice for the worker in performing and managing. In this case, the status of the employee cannot be excluded stated the Court.

This Court’s reasoning aligns with Williamson’s (Williamson et al. tri., 1975) teaching, who, notwithstanding his partial criticism of Alchian and Demstez’s work, recognised, however, that only when tasks are idiosyncratic in non-trivial degree is the worker-employer relationship no longer equivalent to a sequential spot market contracting. In this case, the organisation tied up workers by keeping the tasks very easy and, in this way, tried to replace the employment relationship by holding in front of the judge that crowd workers were independent contractors. This was possible by shaping the contract in a way that excluded a clear power to direct someone else work since it was not necessary to stipulate that.

Secondly, the Court stated that another circumstance weighed in favour of an employment relationship: the company created an incentive system that induces the worker to continuously take on work assignments and personally complete tasks within a certain time frame according to precise specifications. This was useful for the company to plan its own activities in a fashion similar to an organisation that would directly employ its workforce. This aligns with what has been described above in terms of the ‘marketisation’ and ‘hybridisation’ of the relationship. Indeed, as the Court described, the workers were pressured to combine and fulfil several micro-jobs to gain profitable employment and to constantly engage with the platform, also via gamification mechanisms, in order to be able to take advantage of a favourable supply situation that arises for each crowd-worker on the basis of his filter settings.

In a nutshell, the application was able to organise tasks and labour processes even without issuing constant commands, and contemporary peer-competition and work fragmentation kept crowd-workers always engaged and busy in performing their best.

Another interesting case is the development before the Amsterdam Courts of the Helping case, a platform that was considered among those studied in the Share project. The Amsterdam District Court[6] decided the case, underlining the circumstance that the platform did not give any instructions or directions to cleaners on how to perform their duty and, therefore, was engaged in irregular job placement (this was deemed so because Helping until this judgment demanded payments to the workers for intermediary service). The Amsterdam Court of Appeals[7] instead applied to this case art. 7:690 of the Civil Code[8] and, therefore, it recognised that the cleaning service was the core of the Helping businesses, and therefore, the platform worked as an instrument of organising the workforce for the better. The Court stated that ‘the posting of cleaners to households does not take place incidentally, but occurs in the course of Helpling's business' (3.17.1).

Also, in this case, it emerges that an organised firm existed over the legal arrangements operated by Helping. The platform's efforts to avoid being depicted as an employer likely stem from a significant rise in labour costs resulting from the inability to utilise exceptions provided for domestic work under Dutch labour laws. These exceptions were rendered inapplicable once the courts deemed Helping as the employers of the cleaners (Verhulp, 2023).

It is also worth mentioning how the French Cassation decided the Uber case in 2020[9]. On that occasion, the Court, while referring to the principle of authority and the power to give orders and instructions as the basis of subordination, elucidated that subordination can also arise from having to adhere to unilaterally prepared terms and conditions. This is so because the drivers basically join a service that is entirely created and organised by another company and that is, therefore, governed by Uber, whereas drivers are not only constrained as to terms and conditions of the transport service but also precluded in creating their own clientele and business.

In this case, too, it emerges that drivers are a portion of someone else's firm, and their work is governed by employing technologies that grant Uber that workers are exposed to peer competition in the internal firm market.

4. Conclusions.

This Section contributed to opening a dialogue between different fields of study that often do not dialogue with each other. The general frame of hybridity has been used as a tool to describe the organisational changes of firms and the consequences that these, coupled with the options opened up by the legal regulation of the employment relationship, have entailed on the workers' condition and their legal qualification. In particular, by rereading critical writings by institutionalists and neo-institutionalist scholars, the internal-external boundary of the market, which has increasingly permeated not only the organisation but also the performance of work, has been discussed.

The outcomes of this first part of the Section were then placed in dialogue with some judgments encountered in the study of the Share project countries, which were selected because they are indicative of how the written law of the various countries can be interpreted by some judges in order to interface with and address the organisational changes of recent decades, of which the platform economy represents only the latest evolution.

As far as the statutory law of countries is concerned, this has been analysed in an extensive comparison published within the project (Digennaro, 2020). Furthermore, two elements were referred to in Chapter 3 and the introduction, namely, the large doses of numerical and functional flexibility within subordination that legislators introduced from the end of the last millennium and the choice of introducing a modulation in the field of autonomy as well (as it is for the case of Germany and lately Italy) or a third genus (as it is in the UK).

Often, these intermediate statuses have turned out to be to the detriment of workers as they provide a convenient chute for companies wishing to exploit technology as an instrument of external control and conditioning of coordinated labour. The case of Italy has its own peculiarity since hetero-organised workers can potentially be assured rights that can even reach the full-scope of protection. However, it is also true that after a landmark ruling by the Supreme Court of Cassation[10], jurisprudence inevitably tends to settle on the hypothesis that platform workers all belong to the latter category carved within the area of autonomy. This is so even though, less than one year after the Supreme Court ruling, the court in Palermo[11], for example, had revived the broader notion of subordination as double alienation[12] (see on those rulings Carinci, 2021).

CONCLUSIONS

The conclusions offer final reflections based on the findings from each section of the book.

From the first section, it emerged that labor law was essentially formed as a functional tool for the development of contract society and the dynamics of modern, industrialized capitalism. Subordination, therefore, is based on an exchange between the ability to direct entrepreneurial activity (and thus exercise power) and workers' entry into society. Furthermore, the exercise of this power was gradually 'tempered' and balanced by rights and guarantees for workers.

The needs of companies have not changed, but the forms of exercising power have evolved in a liquid society where internal organisation increasingly resembles the external market. Workers are now directly exposed to market pressures, including through subjective means.

Therefore, focusing on the organisation and its functioning would still enable labour law to fulfil its role as a regulator of conflicting interests.

Labour law has not entered an irreversible crisis, as it remains closely linked to the capitalist economy. Although the concept of organization and the power exercised through it has proven to be quite elastic, obstacles to its application, arise from the evolution of labour law itself.

Weighting' means that not all factors typically considered by judges are given equal importance; often, the power to direct and control is still given a pivotal role.

'Clustering' means that factors are not thought of as independent of one another but are grouped together. Judges tend to make holistic and overall decisions based on their impression of the circumstances.

Regarding economic dependence, when understood as a parameter to address bargaining imbalances, this criterion is promising. It serves as a good indicator that, regardless of workers' legal status, they have a counterpart capable of conditioning their work activity.

This perspective has been used, albeit with less than fully convincing results, in the European Commission guidelines. In this instance, the parameter has been formulated in a way that is likely ineffective in most cases. According to the Commission's document, the imbalance of power must be extraordinary, presumed only when the counterparty or counterparties represent the entirety of a sector or industries, or if the aggregate annual turnover of the counterparty or counterparties and/or the annual balance sheet total exceeds EUR 2 million.

However, the third option—having a staff headcount of 10 or more persons—seems easier to meet and sounds more useful.

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