

***Digitalization and its impacts of de-spatialization and de-temporalization
of work and de-territorialization of the labour market.
Is it time to rethink a “sustainable” labour law?***

Introduction

During the last decades, the employment relationship has changed a lot. Digitalization, and more generally, the 4th Revolution, has had a huge impact on labour, on labour relationships and on the labour market. Such revolution has contributed to the progressive destruction, which started two decades ago, of the pillars of labour law on behalf of flexibility and economic efficiency.

This is why scholars define the destabilization of labour law as a changing of paradigm¹ or as a genetic mutation², or, again, as a law “under fire³”.

Even its peculiar function of rebalancing the unequal contractual parties, through the protection of the workers as a weak contractor is questioned, thanks to the huge increase in the so called “non-standard forms of employment” in the past few decades (temporary employment, part-time, on-call work; temporary agency work, crowdwork, etc..), which makes difficult to define who can be considered a worker as the historical dichotomy of “standards” (protected) and “non-standards” forms of employment (less or no protected) more and more bygone with the atypical character of jobs in the post-industrial era. We are facing a new era of labour, on which the standard work relationship (the employee under the direction, power and control of the employer in the fordist fabric) is more and more abandoned in favour of other flexible forms of work which requires an urgent updating of the discipline, to solve problems such as the work relationship qualification, the need of social security protection, the remunerations and the guarantee of new social rights for those digital workers (such as the right to disconnect).

This paper aims thus to analyze the biggest consequences of digitalization on labour and the necessity to rethink labour law, suggesting a change of paradigm to face the challenges of the new era of work, such as the reference to Sustainable Development as a value framework to re-discover the roots of Labour Law and the evaluation of basic standards and decent work.

¹ A. Perulli, Il contratto a tutele crescenti e la Naspi: un mutamento di “paradigma” per il diritto del lavoro? In A. Perulli, L. Fiorillo (a cura di), Contratto a tutele crescenti e Naspi, Decreti Legislativi 4 marzo 2015, n. 22 e 23, Giappichelli, Torino, 2015; V. Cagnin, Diritto del lavoro e sviluppo Sostenibile, Cedam Wolters Kluwer, 2018.

² V. Speciale, La mutazione genetica del diritto del lavoro, in Dir. Lav. merc., 2016, 2.

³ A. Goldin, Some Defining Component of Labour Law Influx, Pompeu Fabra University, Barcellona, 2013.

1. Digitalization and the resulting transformations on the organization of work: de-spatialization and de-temporalization of work through working platform and smart work

Digitalization can be considered as “a true change of paradigm in the labour world, announcing enterprises tools of conceptions, production and cooperation which correspond to different ways of thinking, working and organization⁴”.

As a matter of fact, new technologies and the improvement of existing technologies have twisted labour in the last decade: thanks to the combination of automation and to the digital revolution, the nature of jobs and work and that of the labour market, has changed at a rapid rate, overcoming the typically Taylor Fordist ways of production and allowing forms of work that are now de-spatialized and de-temporalized thanks to digital work and, especially, to crowdworking.

The terms ‘crowdworking’ or ‘crowdsourcing of work’ refer to work carried out through online platforms (such Amazon Mechanical Turk, Clickworker, Crowdfunder, Microtask) which allow organizations or individuals to gain access via the Internet to an undefined and unknown group of other organizations or individuals, named “gig-worker”⁵, prepared to solve specific problems or supply specific services or products in exchange for payment⁶. Moreover, digital work is not limited to platforms, algorithms and gig-economy but is also widespread and pervasive both in the private and public sector, with the use of personal computer and emails, entailing a true de-spatialization of work and production⁷ (whereas, in the Fordist regime, work and production are always tied to a locality) and de-temporalization of work and require to rethink the concept of “place of work” and “working time” (that probably no longer exists as we have known it in the industrial age).

⁴ V. Pontif, Transformation numérique et vie au travail: les pistes du rapport Mettling, in Rev. Dr. Trav., 2016, p. 185 ss.. (About the report of B. Mettling, Transformation numérique et vie au Travail, 2015).

⁵ The risks are that of a dehumanized perception of workers with a devaluation and disguising of work (“gigs”, “tasks”, “services”, “favours” or “microbusinesses”), with an increasing trend towards casualization of work and informalization of the formal economy.

⁶ Green A., de Hoyos M., Barnes S-A., Baldauf B. and Behle H. (2013) CrowdEmploy: crowdsourcing case studies. An empirical investigation into the impact of crowdsourcing on employability, European Commission Joint Research Centre, Institute for Prospective Technological Studies, JRC Technical Reports, EUR 26351, Luxembourg, Publications Office of the European Union.

⁷ U. Beck, The Breve New World of Work, Olity Press, 2000.

Digitalization is thus changing parties' contractual rights and obligations⁸. To face the work digitalization, in Italy for example we had a recent regulation on Smart Work (Lavoro Agile), according to which (art. 18, co.1, L. 81/2017) the legislator "promotes smart work as a way of execution of subordinate work, established by an agreement between the parties without precise limits of working time and place of work, within or outside the enterprise, with the only limit of the maximum daily and weekly time working deriving from law or collective bargaining". Here the de-spatialization and de-temporalization of work allow a radical revolution of labour law in terms of change parties' contractual rights and obligations: Smart Work is not typically regulated by a law or a collective agreement but by a bilateral agreement, signed by the employer and the employee (which are considered as peers and not, as historically, as the strong and the weak part of the work relationship). This agreement then defines not only the way of job execution, but also defines the directional power of the employee (art. 19. co. 1) and his sanctioning power (art. 21). Such consensual definition demonstrates a new space for autonomy and freedom of the employee: elements of self-employed work and subordinate work are more and more promiscuous, mostly because of this general consideration of the individual autonomy of the worker (that was typically limited in the past due to his weakest position).

The changing of work relationship conditions and contractual balance power equilibrium of parties raise issues, not only in Italy, with regard to the application of existing legal frameworks, blurring established lines between employee and self-employed worker (as well as consumer and provider from which derives the term "*prosumer*", or the professional and non-professional provision of services). This can result in uncertainty over applicable rules, especially when combined with regulatory fragmentation stemming from divergent regulatory approaches at national or local level⁹.

1.1. The matter of work relationship qualification and of social rights recognition

The irruption on the economic scene of actors like platform economies, which are able to disrupt the historical subjective references of labour law, raises some problems of the labour relationship qualification and poses new questions of values, linked to the consequences of qualification.

⁸ Gottardi D., Da Frankenstein ad Asimov: letteratura 'predittiva', robotica e lavoro, in Labour & Law Issues, vol. 4, no. 2, 2018, p.8.

⁹ European Commission, A European agenda for the collaborative economy, Brussels, 2.6.2016 COM(2016) 356 final.

The historic dichotomy between employment and self-employment, typically used to qualify the labour relationship in most of countries, has become needless in the digitalization era.

This is demonstrated by the new recent jurisprudence on the matter of qualification of the *gig-workers*, which are qualified as “self-employed” but concretely treated as “employee”. Judges, facing the workers claim to be considered as subordinated, in different well-known cases¹⁰, defined those workers as independent contractors, as employees, as workers or, again, as autonomous workers¹¹. Those discrepancies realized by judges, mostly due to the necessity of evaluating the peculiarity of the job relationship case by case, arise two main (among others) questions: i) Referring to digital workers, is then the very notion of “worker” doomed to disappear, or will everyone be a worker, whatever the juridical qualification of the work relationship? ii) Which protections are recognized to these workers without a clear contract qualification?

i) Platforms usually qualify workers as self-employed to avoid the application of labour laws or to unmask the constructions that make it difficult to identify the employer and therefore the related responsibilities in

¹⁰ Perulli A., Lavoro e tecnica al tempo di Uber, in RGL, 2017, 2, I, 195 e ss; Ichino P., Subordinazione, autonomia e protezione del lavoro nella gig-economy, in RIDL, 2018, II, p. 294 e ss; Treu T., Rimedi, tutele e fattispecie: riflessioni a partire dai lavori della gig economy, in LD, 2017, III/IV, 367 e ss.; LOI P., Il lavoro nella gig economy nella prospettiva del rischio, in RGL, 2017, II, 259 e ss.; Prassl J., Risal M., Sottosopra e al rovescio: le piattaforme di lavoro on demand come datori di lavoro, in RGL, 2017, II, 219 e ss; DE STEFANO V., The Rise of the “Just-in-Time Workforce”: On-Demand Work, Crowdwork and Labour Protection in the “Gig-Economy”, in Comparative Labor Law and Policy Journal., 2016, XXXVII, p. 471 e ss; Biasi M., Dai pony express ai riders di Foodora. L’attualità del binomio subordinazione- autonomia (e del relativo metodo di indagine) quale alternativa all’affannosa ricerca di inedite categorie, in Zilio Grandi G., Biasi M. (a cura di), Commentario breve allo statuto del lavoro autonomo e del lavoro agile, Wolters Kluwer, Milano, 2018, 67 e ss.

¹¹ The reference is to the cases Employment Tribunals London, 28 October 2016; Dewhurst v CitySprint UK Ltd, 5 January 2017; Trib. Regional do Trabalho Belo Horizonte, Brazil, 13 February 2017; Trib. Regional do Trabalho San Paulo, 20 April 2017; Trib. Regional Brasil, 23 May 2017; Trib. Torino 7 May 2018; Trib. Milano 10 September, 2018. For an analysis of this debate, See P. Tullini, La digitalizzazione del Lavoro, la produzione intelligente e il controllo tecnologico nell’impresa, in Ead. (a cura di), Web e lavoro. Profili evolutivi e di tutela, Giappichelli, 2017, p. 3 ss.; G. Valenduc, P. Vendramin, Digitalisation, between disruption and evolution, Transfer, 2017, vol. 23, n. 2, 121 ss; A. Perulli, (a cura di), Lavoro autonomo e capitalismo delle piattaforme, Cedam Wolters Kluwer, 2018; M. Biasi, Uno sguardo oltre confine: i “nuovi lavori” della gig economy. Potenzialità e limiti della comparazione, in Labour and Law Issues, vol. 4, no. 2, 2018; Del Conte M., Razzolini O., La gig economy alla prova del giudice: la difficile reinterpretazione della fattispecie e degli indici denotativi, in DLRI, 2018, p. 673.

economic and regulatory terms: the inhabitants of the jungle of the platforms are able to negate their relationships without anyone being an employer or an employee¹².

If we map all the important legislative news on this field of regulation, to monitor the legislative progresses on the field of qualification of these “digital” workers, we can find some useful implications on the contractual status and on the consequent legislation protection for industry 4.0 workers in the French Legislation.

In France, the Loi Travail¹³, recognizes some protection to the platform workers, referring to them in terms of “*travailleurs indépendants recourant, pour l'exercice de leur activité professionnelle, à une ou plusieurs plateformes de mise en relation par voie électronique*” (art. L. 7341-1, Loi Travail). According to this law, when the platform determines the characteristics of the service provided or the good sold and fixes its price, the platform has, with respect to the workers concerned, “a social responsibility”, guaranteeing a series of individual and collective rights to those workers, such as a social insurance, a right of learning, the right of collective bargaining and unemployment benefits, which usually concern only the employee (and not the self-employed).

In Italy, we will have a decree in March (2019)¹⁴ to regulate a sub-category of this group of workers, that of riders work: at the moment, the only important attempt on regulation is the “Charter of fundamental digital social rights in the urban context” (“Carta dei diritti fondamentali del Lavoro digitale nel contesto urbano”) promoted by the Municipality of Bologna, signed on May 3018 by the Municipality, a local Riders Union, some platforms (Snam and Mymenu) and by the main territorial trade unions (CGIL, CISL and UIL), which fix some minimum standards for digital workers, regardless of the type of employment relationship.

ii) In the majority of countries, the matter of qualification is still essential for the fruition of social rights. And these new digital workers need a special protection because, if, from one side it is true that thanks to the new technologies workers could enjoy the freedom and the flexibility to choose their time and place of working and reduce commuting time resulting in a better overall work-life balance and higher productivity, from the other side

¹² A. Lyon-Caen, Plateforme, in *Revue du Droit du Travail*, 2016, p. 301.

¹³ Loi n. 2016-1088 relative au travail, à la modernisation du social dialogue et à la sécurisation des parcours professionnels.

¹⁴ Luigi Di Maio has announced that the norm aimed at regulating the riders should enter into force by next March (2019), and will guarantee riders protection from events such as illnesses and injuries and the minimum pay entitlement to workers making deliveries on behalf of food app delivery.

they can have also certain drawbacks, such as a tendency to work longer hours and an overlap between paid work and personal life (which could lead to stress), burnout risk, iper-connection (the worker sees his personal life invaded by the work), isolation of the worker due to not having contact with peers, decrease of productivity (if distance work is not well planned or executed) and part of the savings generated for the company can mean expenses for the worker (in workspace, cost of supplies, etc.)¹⁵.

This is why digital workers must be protected, not only with “classic” rights (social security, remuneration, training, collective bargaining, ecc.) but also with some “new” rights, such as the right to disconnect.

Referring for example to remuneration, if we refer to crowdwork, compensation is often lower than minimum wages, workers must manage unpredictable income streams, and they work without the standard labour protections of an employment relationship¹⁶.

Then, due to the de-spatialization and de-temporalization of work, spheres of personal and professional life are subject to a process of cross-colonization, which arises the need of a disconnection from work.

The new French Law (Loi Travail) recognizes for example le “droit à la déconnexion”, obliging the company to set up devices for regulating the use of digital tools, with a view to ensuring the respect of rest and leave periods as well as personal and family life, guaranteeing the full exercise by the employee of his right to disconnection (art. 55 Loi Travail).

In Italy this right has been named (even if not enough ruled) in the context of the Smart Work discipline (art. 19. Co. 1), where the Legislator provides that the agreement stipulated between the employee and the employer must identify (among the other aspects of the work relationship) “*the times of rest of the worker as well as technical and organizational measures necessary to ensure the worker disconnection from technological work tools*”.

1.3 Some very recent wins for gig workers in France, UK and Italy.

The matter of qualification is so important for those workers because their rights are strictly linked to the qualification they have: subordination remained the key to accessing the fundamental core of labor law protections (and the main object of the related litigation).

Aware that the speed of change means that laws are not up to date with circumstances (France is a pioneer on this field), scholars and judges must identify new tools, models and regulation techniques (or update the existing

¹⁵ ILO Report, Working anytime, anywhere: The effects on the world of work, 15 February 2017.

¹⁶ ILO Report, 20 September 2018, *Digital labour platforms and the future of work Towards decent work in the online world*.

ones) so as to ensure that workers affected by digitization have adequate social rights, especially in terms of adequate remuneration, insurance coverage and trade union freedom.

Contrary to the discontinuity in the judge's decisions already mentioned, in some very recent decisions, we can see a step forward for gig-workers in France, UK and Italy, which could suggest a strongest protection to those workers.

In France for example, on November 2018, there has been a new important decision for riders¹⁷.

If, according to the previous decision of the Court of Appeal, there was not a subordination link between the worker and the company for food delivery *Take Eat Easy*, the Court of Cassation identifies the existence of a link of subordination because “*it was clear that the application was equipped with a geo-location system allowing the follow-up real time by the company of the position of the courier and the counting of the total number of kilometers traveled by it and that the company had a power of sanction with regard to the courier*”¹⁸. And thus, repeating the necessity to evaluate case by case, the existence of a directional, control and sanctioning power for *Take Eat Easy* suggests the existence of a situation of subordination for the worker.

In the same direction, in the UK, Uber (December 2018) loses right to classify UK drivers as self-employed: a Landmark employment tribunal ruling¹⁹ states that the firm must also pay drivers national living wage and holiday pay. The ruling is not the end of the process for Uber. The firm will take the case to the employment appeal tribunal, and following its decision there could be further hearings in the court of appeal and then the supreme court but this decision has a huge implication for gig economy as judges recognized important social rights in the field of remuneration to those gig-workers.

Most recently, In Italy, the Court of Appeal of Turin (January 11, 2019) has accepted for a substantial part the appeal of five former riders of Foodora who demanded the recognition of the subordination of the employment relationship. In the first instance, last year²⁰, the requests had been rejected in its entirety. Now the judges sanctioned the applicants' right to have a sum calculated on the remuneration established for employees by the national collective contract establishing the right of the applicants to be matched, in

¹⁷ Arrêt n°1737 du 28 novembre 2018 (17-20.079) - Cour de cassation - Chambre sociale.

¹⁸ Garbuio C., Il contributo della Cour de Cassation francese alla qualificazione dei lavoratori digitali: se la piattaforma esercita i poteri tipici del datore, esiste un lien de subordination, in corso di pubblicazione.

¹⁹ London Court of Appeal, December 19, 2018.

²⁰ Trib. Torino 7 May 2018.

relation to the period in which they collaborated with Foodora, sums of money calculated “on the basis of indirect and deferred direct remuneration established for employees of the fifth level of the collective transport logistics contract goods”, deducting what was already perceived at the time. What is more important, is the fact that those riders have been recognized as ether-organized collaborators (collaboratori etero-organizzati) (a third category in the middle between self-employed and employee, which could correspond, in some way, to the English “worker”) ex art. 2 Legislative Decree 81/2015: such qualification allows such workers to gain the protection given to the employee, without the need to be qualified in that manner.

Those three recent decisions show both the awareness of judges to unmask the situation of subordination and the necessity to protect those workers, assuring them some basic social rights.

2. Digitalization and the deterritorialization of the labour market.

The new global or spatially de-concentred methods of production lead to a deterritorialization of the labour market²¹: a kind of work realm which is stretched tight across the gap between what constitute the local and what constitutes the global²².

This new dimension of the labour market with no borders arises firstly, a global competition among workers: crowdwork allows the enterprise to assign the execution of a job in outsourcing to a “crowd” of workers which are potentially connected from every corner of the world, which are at the same time supporter and protagonist of a real “social” competition²³.

Secondly, the lack of borders implies a disintermediation of the collective action and of the collective relationships: everything takes place on an individual level and this undermines the existence of a collective interest, as digitalization individualizes work relationships. Union organisation in the workplace is extremely fragmented in gig-works, not only because in many countries collective rights are recognised only to employees (and not to self-employed workers), but also because of the difficulty to create connections between work councils and trade unions, which should be strengthened to organise collective actions, negotiation and conflict to negotiate better wages and working conditions.

²¹ Mundlak G., *De-Territorializing Labor Law*, Law & Ethics of Human Rights, 2009,

²² U. Beck, *An introduction to the Theory of Second Modernity and the Risk*, Routledge, 2013, p. 112.

²³ M. Rigaux, *Droit du travail ou droit de la concurrence sociale? Essai sur un droit de l'égalité de l'homme au travail (re)mis en cause*, Bruylant, Paris, 2009, p. 8 ss.

Lastly, international markets and competition on a global scale, based on cutting labour costs, make local initiatives ineffective and impel towards a global approach to workers' rights. Indeed, if the platforms act at supranational level, cooperation between trade unions at national and international level is critically needed in order to build a framework of workers' rights at global level²⁴.

This problem is heard both at the European level (the revision of EU law in the framework of the European Social Pillar proposes to enlarge social protection to all workers, regardless of the type of employment relationship, including those in atypical and new forms of work) and at the International level: the ILO²⁵ proposes different approaches to include non-standard workers in the collective bargaining process; for instance, by recognising them legally the right to organise or bargaining collectively, facilitating the capacity of unions to be considered representative in sectors employing a high proportion of non-standard workers, and promoting actions to organise and collectively represent workers in non-standard employment.

4. Is it time to rethink labour law? A question that cannot be no longer postponed.

The Digitalization consequences on work and on the labour market demonstrate the incapacity of a traditional labour law to adequate its regulatory and cognitive structures to a new economic, social and cultural context in a profound change²⁶.

Starting from this assumption, the crisis of this field of regulation, which lead also to a general de-regulation in reply to the economic and flexibility reasons, could be an occasion to find a new reference paradigm to define the fondant value of a new "sustainable" labour law.

If, the whole evolution of labour law of the last century was based on the protection of the employee, intended as the weak part of the relationship to be protected, today the same notion of subordination is under discussion, so it is that of working time and place.

It is thus time to re-think labour law, to switch from the industrial era to the digital one and this could possibly rediscover its historic values of universalism, collectivity and solidarity, which has been in the last decades

²⁴ Lassandari A., Problemi di rappresentanza e tutela collettiva dei lavoratori che utilizzano le tecnologie digitali, in RGL, 2017, 2, pp. 59-70.

²⁵ ILO, NON-STANDARD EMPLOYMENT AROUND THE WORLD Understanding challenges, shaping prospects

²⁶ R. Del Punta, Epistemologia breve del diritto del lavoro, in L. Nogler, L. Corazza (a cura di), Risistemare il diritto del lavoro. Liber amicorum Marcello Pedrazzoli, Franco Angeli, Milano, 2012, p. 330.

too often pushed aside in the name of competition, de-regulation and flexibility.

A way to act this remodulation of labour law could be the adoption for the legislators and for judges of a new paradigm of reference for labour law: that of Sustainable Development²⁷.

This paradigm is based on two main considerations: i) the pillars of sustainable development (economic development, social development and environmental protection) are equally important, interdependent and mutually reinforcing; ii) intra and inter-generational solidarity: development can be defined as sustainable when it “meets the needs of the present without compromising the ability of future generations to meet their own needs”²⁸.

If labour law would assume such paradigm as a polar star, as a torch in the necessary re-modulation, there should be i) an adequate promotion of social rights, which should be considered as necessary for the whole general development and not erased or reduced by an economic ratio; ii) a recovery of some labour law values such as equity, solidarity and fairness, in order to reduce the gap between insiders and outsiders and inequality among self-employed and employee or among distant workers.

Those guidelines could lead the legislator to the elaboration of new “sustainable” norms, more adopted to the new (digital) contest and /or to a fair interpretation of the existing norms, generally reconsidering the importance of social rights as human rights and no more as subsidiary social goods²⁹ which can be scarified if they are an obstacle to the economic growth.

Another necessary step for a re-modulation of labour law, which is in line with the application of a universality of rights and solidarity among workers proposed by Sustainable Development is the exit from the “*tropisme travailliste*” that reduce labour law to a subordinate labour law, recalling, for example the idea of “*un droit de l’activité*” proposed by Alain Supiot, based on the personal dimension of each work activity, talking of a “labour law”, *tout-court*, without any adjective which limits its application. An example to follow is the solution given by the French Legislation (Loi Travail, art. 60) which has given a reply focused on essential rights and

²⁷ V. Cagnin, *Diritto del lavoro e sviluppo sostenibile*, Cedam Wolters Kluwers, 2018.

²⁸ United Nations, *Report of the World Commission on Environment and Development*, 1987.

²⁹ T. Novitz, *Core labour standards conditionalities: a means by which to achieve sustainable development?* In J. Fandez, C. Tan (eds), *International Economic Law, Globalization and Developing Countries*, Edward Elgar, Cheltenham, 2010, p. 237

protections, without the claim to legally define digital work and abandoning the legal traditional and rigid categories³⁰.

Then, the adoption of the Sustainable Development paradigm could lead to a revision of the conditions of access and the conditionality of social protections is needed: what digital workers need is a sort of hard-core of basic protections, unrelated from the contractual qualification, which could be adjusted to their needs of protections, which depend, case by case, as demonstrated by the recent case-law. In this sense Treu suggests the valorization of the basic standards of treatment³¹, which correspond to the notion of decent work given by the ILO: the evolution of the work and that of the labour market diversify the forms of work and it is thus fundamental to find some fundamental rules and rights for the worker, whatever their legal qualification, protecting the dignity of anyone who is doing a job.

As a matter of fact decent work is considered as a tool to reach a Sustainable Development and thus as a key application of this paradigm to labour law.

The adoption of the Sustainable Development as a new paradigm should thus be considered as the fundamental step of the post-modern era to adapt labour law to the new social, economic and digital context and thus to recover its lost legitimacy.

³⁰ A. Jammaude, Uber, deliveroo: requalification des contrats ou denunciation d'une fraude à la loi, *Semaine Sociale Lamy*, 178, 4 sept. 2017, p. 4 ss.

³¹ Treu, WP C.S.D.L.E. "Massimo D'Antona" .IT – 371/2018, p. 8