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### ABSTRACT

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This paper critically addresses the changes brought by the digital economy and its digital platforms to Labour Law.

It examines the concept of labour platforms and its typologies and models, including the critique of the online and offline work categories and offers other alternative solutions. It confronts the role of Labour Law, considering the perspectives of wage labour regulation in these platforms, and reflects on the relation between precariousness, technology and its fetishes.

**Keywords:** digital platforms; platform labour; labour regulation; precariousness, types of contract.

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## Concept and criticism of digital labour platforms

SUMMARY: 1. Introduction. – 2. Labour Law: context and purpose. – 3. The firm and the platform: relation and concept. – 4. Technological fetish and the concealment of the capitalism pattern in platforms. – 5. Classifying digital labour platforms. – 6. Outlining a critical concept and the models of action of the platforms. – 7. Innovations and continuity of work via digital platforms. – 8. Labour Law responses to digital platforms.

### 1. Introduction <sup>(1)</sup>

In the beginning of the third millennium, technology is presented as the great protagonist of society's ongoing transformations, which includes the ways of working, relating, making friendships and loving. Artificial intelligence, platforms, algorithms, among others technological instruments, undermine the old business organizations and their methods of work management, which, for many, configures a disruption in the sense of a creative destruction of past models.

Apart from its disruptive context, as mentioned above, in this paper we intend to address the innovations on the ways of working in the digital economy, as well as to identify continuing characteristics of work in the perspective of economic-social capitalist structure. In this contrast between changes and permanence, we discuss which are the proposed answers in terms of regulation of work on digital platforms by Labour Law, however, not before critically presenting concepts, elements, classifications on the platforms and their ways of operation.

For this purpose, we adopted a dialectical epistemological understanding and resorted to an exploratory method to elaborate on this legal-projective paper as of a bibliographical review. With these methodological elements and aware of the horizons and experiences of various authors, we have developed a critical text on regulation of work in digital platforms.

### 2. Labour Law: context and purpose

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<sup>(1)</sup> This work, with minor changes, was first published in Portuguese in *Revista Direito e Praxis*, v. 11, n. 4 (2020). English translation by Ana Julia Sampaio Oliveira.

In contemporary times, neoliberalism expands itself by producing subjectivities based on individualism and market competition, in addition to government policies and legislative innovations that constitute an increasingly authoritarian model. In this sense, political and economic measures to stimulate business activities instead of fundamental rights result in the reduction of labour protection and in an increase of its precariousness. By combining technological transformations and economic efficiency, yet repeating such neoliberal logic, digital platforms emerge and are in the process of consolidating themselves as a model of success in the digital economy, which is understood as a substantial change in productive activity that shifts its risks to the workers <sup>(2)</sup>. Digital platforms present themselves as synthesis of economic efficiency combined with ideas of technological innovations, but they uncover a productive arrangement that is supported on the precariousness of a work structured under the ideology of a man being his own self-entrepreneur <sup>(3)</sup>.

In the context of digital economy, in order to better understand the relation between the way of working promoted by digital platforms and Labour Law, it is necessary to rescue, in history and ontology, the ambiguous roles and purposes of this legal branch in capitalism.

In a synthetic conception and with a certain level of generalization, we can affirm that the role of Labour Law is to legally regulate expropriated work, that is, it was constituted as a normative system disciplining remunerated work in the capitalist social-economic organization.

Both the assumption and the justification for a unique regulation of this relationship between Capital and Labour is the perception of the deep imbalance between its parties – that is, the employer and the employee, which is the result of structured economic and social inequality in the labour market. Against the factual asymmetry and market illusions of a merchant self-regulation between its formally equal parties, Labour Law was constituted as a legal system aiming market regulation and as an immediate protection for people living off work, the non-owners, and in a mediated way, structuring the purchase and sale of workforce in capitalism.

The indissolubility between workforce and the worker as a person, the structural asymmetries caused by the impossibility of controlling the general job offer in the market, the necessity of immediate sale of working time to human

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<sup>(2)</sup> F. Trillo, *Economía digitalizada y relaciones de trabajo*, *Revista de derecho social*, 2016, 5, 59-82.

<sup>(3)</sup> P. Dardot - C. Laval, *A nova razão do mundo*, Boitempo, 2016.

survival, altogether, make the economic conception of supply and demand biased. Hence, understanding the historicity of law, we emphasize that social and union struggles forge their own law, potentializing a more collective and resistant dimension. Such normativity, based not only on the principle of labour protection, but especially on the prominence of collective subjects, has instituted limits to the exhaustive labour conditions driven by technical innovations resulting from industrial revolutions and consequences of continuous phases of capital accumulation.

However, critical reading forces us to remember the limits of such labour protection, in view of political functions carried out by an institutional design based on the individual work regulation that remains subordinate and dependent. Coutinho describes the protectionist dimension as a myth: “[..] It is stating that it protects, when it does not always provide effective protection. After all, Labour Law is capitalist labour law.”<sup>(4)</sup> Therefore, a classic conception of Labour law, structured on the basis of individual regulation may perform a legal legitimation function of capitalist wage-earning system, maintaining it without questioning the structure that creates and reproduces the inequality of employment relations.

Neoliberalism and the present technological revolution drive forward a process of precariousness of social rights of such magnitude that the aggravation of the precarious condition of those who live off their work requires that we recover the functions and meanings of labour regulation, particularly its counter-facto dimension. After all, as in its origins, Labour Law also exercises a function of control over technology and the economic power that supports and nourishes it.

### **3. The firm and the platform: relation and concept**

Once the historical role of Labour Law is situated, we now begin to examine the notion of platform, its elements, and its relation with firm and work in the digital economy. In view of the myriad meanings, uses, confusions and misconceptions and deviations on what is meant by the term “digital platform”, we present a few guiding concepts of its notion and applications.

The idea of a platform surpasses the digital realm and comes from a non-recent form of entrepreneurial organization, but currently is presented as a model for all types of companies, that is, a business model. A platform would

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<sup>(4)</sup> A. Coutinho, *O princípio da proteção revistado*, *Revista Bonijuris*, 2001, 452, 5 ss.

be seen as the infrastructure or the environment that enables the interaction between two or more groups. A classic example is a marketplace (such as a trade fair), that is, the space, time, organization and structures over which the merchants rely on to conduct business. The most complete current model of this format is a shopping mall. In this sense, the mall's administrator rents its stores and maintains all of its infrastructure (cleaning, security, energy, advertising, parking, access, organization etc.) so that the merchants can meet with potential customers in order to enable any kind of dealing that could arise between them.

This business model expands in influence and use to the point of integrating the general concept of a company, according to its conceptualization as nexus of contracts, <sup>(5)</sup> or as a network of relational contracts. As of this innovation, there is a reintroduction of market logic within the firm.

The company, as it happens with a market, would be characterized as a network of contractual relations between subjects that can be reproduced in all of the company's sectors, from the ones connecting the vertex of the firm and its creditors, to its shareholders and those relations between management and workers. <sup>(6)</sup> Thus, the corporation would then be the responsible for the governance of such network or the flow of contractual relations. As a consequence, it results in a corporation that not only is dematerialized (the physical structures and its purposes can be passed on to third parties, remaining to the firm the management of the contractual entailment), but also de-hierarchized (the relations start to be considered as civil contracts, between equals, and not hierarchized as pyramidal organizations of a classic company that would involve levels of subordination between its structures and corporate management) that should be governed by the rules freely negotiated by the parties. <sup>(7)</sup>

This notion brings out important consequences in the field of forms of employment contract, in the ways subordination and dependence, perhaps, in the own configuration of Labour Law. As of there, we can understand the new models of departments stores, and ever supermarkets, to the extreme of some beauty salons, where the establishment's spaces are offered to other companies

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<sup>(5)</sup> O. Hart, *An economist's perspective on the theory of the firm*, in *Columbia law Review*, 1989, 89, 7, 1757 - 1774.

<sup>(6)</sup> A. Perulli, *Costanti e varianti in tema di subordinazione e autonomia*, LD, 2015, 2, 259-283.

<sup>(7)</sup> A. Perulli, *Costanti e varianti in tema di subordinazione e autonomia*, *op. cit.*, 267-269.

(or individuals) to meet clients. The modern ideal-type of company coincides in a certain extent with the concept of platform.

Such idea is transposed to the virtual dimension to identify what digital platforms are: digital infrastructures that allow the interaction between two or more groups <sup>(8)</sup>. The evolution of the informational technology allows the model of e-commerce stores, each competing dispersed on its own website, to be replaced, or dominated, by centralized platforms in the form of a market that can control the entirety of its system. This technological evolution includes the use of the worldwide web via electronic devices with increasing accessibility, that also are agile, easy to use and with considerable portability, as well as the design of progressively more accurate algorithms and due to the construction of the infrastructure of huge data servers that we commonly (and misleadingly) call cloud.

The centralization of platforms expresses a process of capital concentration. The 2008 economic crisis demonstrated the weaknesses of financialization and of an economy founded on credit without poor guarantees. In the first moment after the crisis, the process of capitalist accumulation involved the adoption of austerity policies, with labour and social security reforms. At the same time, new ways of accumulation are established with the growth of “digital economy” or “capitalism of platforms”. The business concentration on large platforms is developed on a global scale, since it requires large financial injections, broadening the experiences of innovative business models (startups). The transformation of companies into platforms and from platforms into large corporations is an ongoing process.

#### **4. Technological fetish and the concealment of the capitalist pattern in platforms**

After these conceptual inputs, we present a critical intake on the technological fetish and the concealment that these innovations and speeches undertake. To this end, firstly, it is necessary to clarify that the digital environment did not imply a rupture with the capitalist productive structure. Economic and social relations transposed to an economy of digital platforms continue in the capitalist mode of creation, appropriation and reproduction of inequality.

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<sup>(8)</sup> N. Snircek, *Platform Capitalism*, Polity Press, 2017, 25.



The discursive approximation to an “economy of sharing” soon proved to be mere propaganda in the field of digital labour platforms<sup>(9)</sup>, which are organized by companies with typical capitalistic dynamics. In this sense, analyzing labour platforms is, in general, analyzing a model of work management that is organized by capitalist corporations, which explains the idea of a “platform capitalism”.<sup>(10)</sup>

These companies and their technological and organization network – website, mobile phone application, artificial intelligence systems and their algorithms – actually present themselves as innovative or disruptive organizations only when compared with the typical fordist firm organization. That is, when the analysis is guided by a more macro reading, in historical terms, we shall notice that these new business management arrangements are characterized by a recurrent productive restructuration with the externalization of the workers and, consequently, the imposition of precariousness. Hence, the 4.0 industry contains many continuities with the toyotist management through its expedients of externalization and high-tech employment.

The most significant and innovative feature these so-called “4.0 companies” have is a lean company organization, guided by maximum economic efficiency. These companies build an imaginary in which they have no factories, inputs, raw materials, means of production, workers and, therefore, no stock of produced goods or stores to sell their productions. Thus, it advertises an empty company, a “cloud company”<sup>(11)</sup>.

Likewise, there is a hazy discourse directed at workers in so-called “cloud companies”. The economic and commercial relationship with the workers is naturalized as if it were a concession or a gift for vulnerable people. That is, it is sought to legitimize these new forms of precarious work, transforming in common sense the idea that such types of work are an “income opportunity” in the context of an economic crisis and immense unemployment. In this sense, the “cloud company” expresses a myth of help and assistance.

Behind the marketing ads and appearances, we realize that there is a significant physical structure, goods and human labour involved in these companies, however, there is an attempt to hide these productive factors due to their externalized position.

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<sup>(9)</sup> T. Slee. *Uberização: A Nova Onda do Trabalho Precarizado*, Elefante, 2017, 23.

<sup>(10)</sup> R. Kalil. *Capitalismo de plataforma e Direito do Trabalho: crowdwork e trabalho sob demanda por meio de aplicativos*. PhD Thesis. Universidade de São Paulo, 2019.

<sup>(11)</sup> A. Leme. *Da máquina à nuvem: caminhos para o acesso à justiça pela via de direitos dos motoristas da Uber*, LTr Editora, 2019.



The use of technology is not a new expedient in the models of company management. However, technological innovations that contextualize these platforms are quite considerable, because technology takes over a role of an organization and not just a tool or technique accessory. The algorithm – understood as a set of procedures and instructions – enables management and operation based on millions of information and data, something impossible for human management. The storage of these millions of data about their users, workers, prices and demands allows a much deeper understanding of the economic activity and its market, also enabling artificial intelligence to present ideas, plans and changes in the business.

We have noticed that there is a lot of diversity and constant variation (upgrades) in the performance of these platforms. Therefore, a classificatory effort is necessary, in the classic sense of assorting the platforms by their common traits, attempting to systematize the knowledge through typologies.

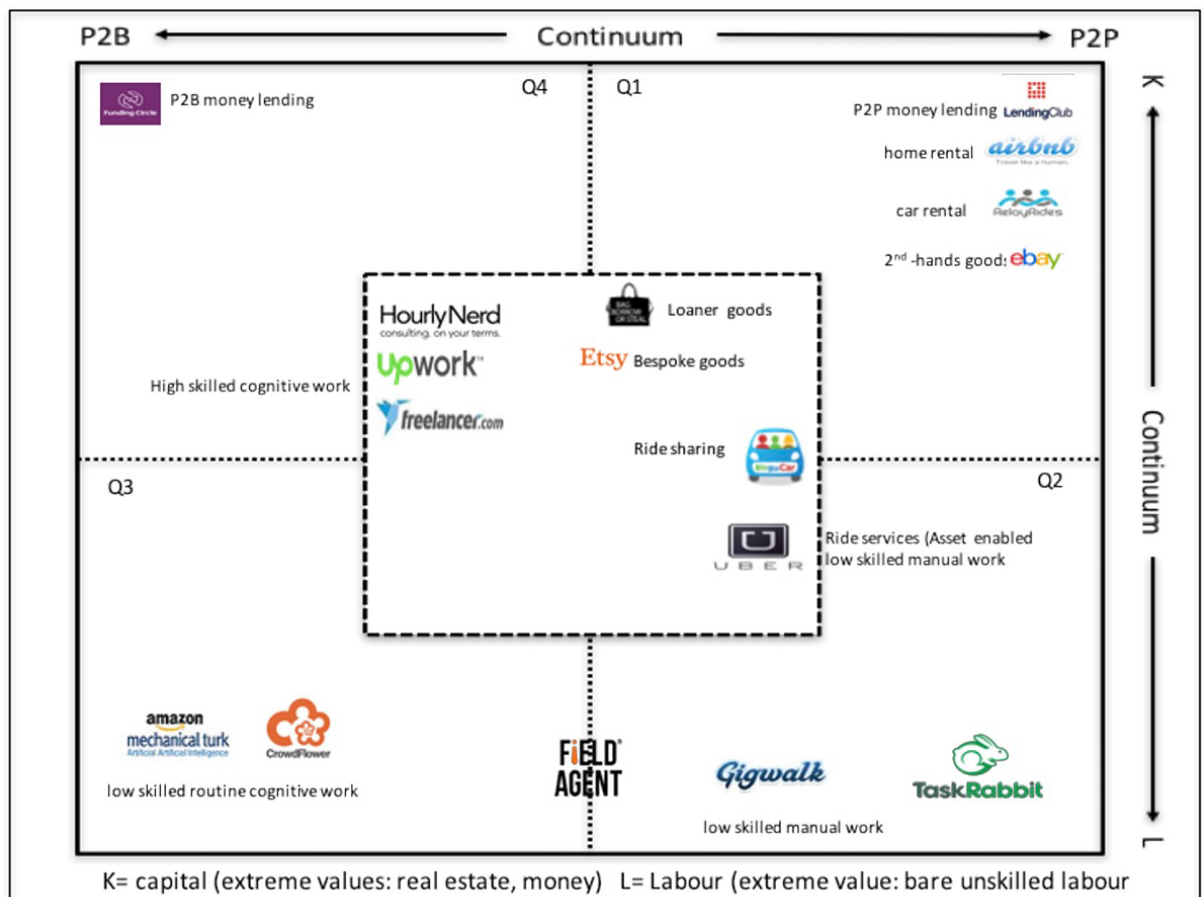
## 5. Classifying digital labour platforms

We can find an interesting classification of digital labour platforms in Codagnone, Biagi and Abadie. <sup>(12)</sup>From two variables the authors form four types of platforms (quadrants represented by letter Q) and a hybridization zone (the square in the middle). The horizontal variable would be on one side of the line if the platforms connect person and company, identified by P2B (peer-to-business) and on the other side if the connection is made between person and person (peer-to-peer). The vertical variable stands for the prevalence of utilization of capital on the platform (at the extreme, money or real estate), identified by the letter K or, if labour is the one that predominates, marked by letter L (if on the end, mere non-qualified labour). The quadrants then would be Q1, where the interaction person to person and capital utilization prevail, such as platforms for loans between individuals, real estate (e.g., Airbnb) and cars rental and exchanges of second-hand goods (such as Ebay and the Brazilian Mercado Livre).

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<sup>(12)</sup> C. Codagnone - C. Biagi - F. Abadie, *The passions and the interests: unpacking the 'Sharing Economy'*, Publication Office of the European Union, 2016.

Table 1



Source: C. Codagnone - C. Biagi - F. Abadie. *The passions and the interests: unpacking the 'Sharing Economy'*, Publication Office of the European Union, 2016.

In Q2 quadrant, there are the platforms in which the provision of unskilled work from person to person prevails, such as TaskRabbit (which, in Brazil, would be equivalent to Parafuzo). The Q3 Quadrant shows the low skilled work for companies, such as Amazon and Mechanical Turk and, in quadrant Q4, platforms for lending money from individuals to companies. In the internal chart, the authors indicate the existence of a hybrid zone, where there are platforms that provide skilled work to companies, and some that focus on sales of goods to individuals from individuals. In this hybrid zone, too,

platforms for transporting people such as Uber would be included, as they add an asset, even if of low value, to low-skilled manual labour.

Platforms such as the Brazilian “GetNinjas” could be situated in the hybrid zone, as those function as a marketplace for workers with both high and low qualification. <sup>(13)</sup> According to this classification, delivery platforms could be placed both in the quadrant 3 or in hybridization zone, in case some worker’s goods were used in the provision of the service, such as a motorcycle or a bicycle. Although recognizing the value of this classification, it does not seem correct to place Uber, alongside with other “transportation of people or goods” companies, in a hybrid zone due to the low value of the goods brought in by the service provider or even the fact that in an increasing percentage no capital is added to the provision of services by the worker, since it is well known that a large part of the services provided by platforms drivers is currently carried out with rented vehicles and that delivery of goods is frequently carried out on foot or by bicycles from low-cost public rental services available in large cities. The prevalence, in these cases, is in reality of the intensive labour done by the workers, even when using their own vehicles, which is simply a work tool. The authors acknowledge that the intensive use of labour is an important element in the classification of platforms.

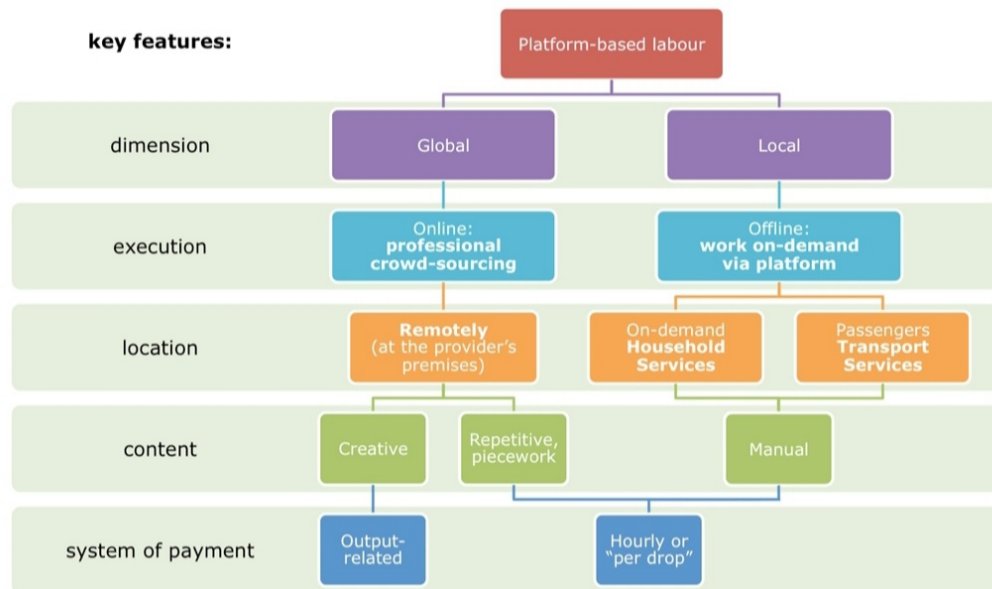
Aloisi and De Stefano <sup>(14)</sup> propose another division (table 3). Initially, labour platforms and platforms that facilitate the access to goods, property and capital are separated. The latter includes Airbnb, Blablacar (a service that allows the provision of actual rides), financial services through platforms and diverse marketplaces for selling goods. As for labour platforms, the authors, who focus on the most common types of labour platforms (crowdworking, on-demand domestic services and passenger transport), apply the classification of the table below. The authors, however, warn that it is very difficult to reach a rigid taxonomy, since we are still in an embryonic stage and there is a significant heterogeneity.

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<sup>(13)</sup> R. Carelli - A. Bittencourt. *Ninjas fazem bico: Um estudo de plataforma de crowdsourcing no Brasil*, *Revista Estudo Institucionais*, 2020, 3, 1309.

<sup>(14)</sup> A. Aloisi - V. De Stefano. *European legal framework for “digital labour platforms”*, Publications Office of the European Union, 2018, 9.

Table 2



Source: A. Aloisi - V. De Stefano, *European legal framework for "digital Labour platforms"*, Publications Office of the European Union, 2018, 10.

This division offered by the authors has the advantages of being easily visualized and being based on platforms that are more likely to bring problems (or challenges) to work regulation. However, it lacks the inclusion of workers on goods and fast food delivery platforms, but that certainly would be included in the typology for passenger service platforms.

Nonetheless, it must be pondered that the classification of online and offline work, which is also found in other authors<sup>(15)</sup>, has its advantages, such as warning the possibility of conflict of laws concerning territory and jurisdiction, especially because it highlights the characteristic absence of territoriality of the said online work. However, this division is reinforced as a way to hide human labour, since it strengthens a mistake that we have seen raging in recent years: the belief that there are digital workers.

Now, there is no online work. The workers are always flesh and blood humans, with needs, desires and wills, and perform their functions in the real

<sup>(15)</sup> A. Todoli. *O mercado de trabalho no século XXI: on-demand economy, crowdsourcing e outras formas de descentralização produtiva que atomizam o mercado de trabalho* in A. Leme et al., *Tecnologias disruptivas e a exploração do trabalho humano. A intermediação de mão de obra a partir de plataformas eletrônicas e seus efeitos jurídicos e sociais*, LTr Editora, 2017.

world, being simply camouflaged by the notion of “digital work”, that gives the impression that it is performed by a virtual being in the cyberspace. That is, cyberspace does not exist: it is a fiction built not only to enable or justify an escape from legislation <sup>(16)</sup>, but also to expand the market and to enable more competition among workers with consequent wage reduction.

Work is always physically located, even if online: what may be dislocated in an almost instantly is the product of the labour. Precisely because it is performed by a worker from one place and its result can be immediately received in another also locatable part of the planet is that the work on platforms may bring interesting and important challenges, even if they are not unprecedented (see conflicts regarding work on ships, for example). We believe that the difference between global and local would be enough to highlight such characteristic.

Back to Codagnone, Biagi and Abadie <sup>(17)</sup>, who classify digital labour platforms as digital labour platforms as those that:

(1) work as digital marketplaces for atypical and casual work/ (2) where services of various kinds are produced preponderantly using labour as a factor (as opposed to selling products or renting properties or a car); (3) where work (e.g., provided services) is exchanged for money (4) where the combination is digitally mediated and administered, although the execution and delivery of the work may be electronically transmitted or physical/ (5) where the allocation of work and money is determined by a group of buyers and sellers operating with a price system.

This classification would exclude platforms like LinkedIn (due to the lack of the first element) and Airbnb (that lacks the second one).

Notwithstanding its extent, this classification fails by leaving out the element of the control on the final service, which would disfigure the marketplace condition of some platforms. This would be misguided, unless these platforms, such as Uber, were not classified as labour platforms. As seen above, platforms must be seen as a modern business form, not as a specific sector of the economy. The digital form and the platform model is only one of the possibilities, which should soon be predominant, for conducting business.

Bogliacino et al. stress the issue of control exercised by certain platforms, which would generate a hybrid between the market and hierarchy. They also

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<sup>(16)</sup> J. P. Barlow, *A Declaration of the Independence of Cyberspace*, 1996, <https://www.eff.org/cyberspace-independence>.

<sup>(17)</sup> C. Codagnone - C. Biagi - F. A. badie. *The passions and the interests; unpacking the 'Sharing Economy'*, *op. cit.*

state that in platforms like Uber, one side of the platform (those called “self-employed workers” or “independent contractors” loses control over pricing, delivery, marketing, quality and terms and conditions of goods or services offered, which would violate the direct interaction between the parties connected by the platform. Nonetheless, they leave this aside, as if it were just a detail, that these parties often lose their control not to the other party, but to platform itself.

The Eurofound Report <sup>(18)</sup> proposes another classification as of five variables: 1) place where the service is delivered (if on-location or online); 2) selection process (platform, client or worker); 3) level of the service’s qualification (low, medium or high); 4) task scale (micro tasks or projects); and 5) the way supply and demand are connected (by offer or contest).

We should also note that Codagnone et al. bring two other dimensions of digital labour platforms that must be taken into consideration for this classification: a) whether the transactions are completely online or if there is a physical delivery and b) which types of tasks are negotiated and which skills are required to perform them. From the intersection of these two dimensions the authors classify four types of digital labour platforms:

1. Online Labour Markets – OLMs, those that potentially have global reach which, in turn, would be subdivided between 1a) microtasks platforms (fulfillment of partial and repetitive tasks with low complexity) and 1b) tasks or projects platforms (complete actions that require some important degree of qualification) and

2. Mobile Labour Markets – MLMs, that would be intrinsically located, subdividing into 1a) manual work or 2b) services requiring high qualification.

Thus, we conclude that Codagnone et al. are more accurate than Aloisi and De Stefano, demonstrating that what is called an online labour platform has as defining characteristics that the work is delivered through the internet, and not that its execution is performed online, which, as seen, does not correspond to reality.

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<sup>(18)</sup> Eurofound, *Employment and working conditions of selected types of platform work*, Publications Office of the European Union, 2018.

## 6. Outlining a critical concept and the models of action of the platforms

Alongside the above presented classifications, we may try to formulate a coherent definition of digital labour platform and a possible classification. Digital labour platforms would be business models based on digital infrastructures that allow the interaction of two or more groups whose main object is intensive labour, always considering platform not as the nature of the service provided by the company, but as the method, exclusive or conjugated, for the accomplishment of the company business.

As seen, platforms, both digitals and those that are not digital yet, are simply a business organizational model that soon will be hegemonic (are we there yet?) and widespread, hence, should not be treated as an autonomous economic activity. A digital platform in the transportation sector has more similarities and occupies the same competition space as other company models that provide transportation services than with the other platforms. A platform like Airbnb competes with hotels and not with a delivery platform and brings regulatory problems for housing and tourism, and not to digital technology. A delivery platform brings specific problems to society that are the same ones as those of “physical” delivery companies. That is, for legal purposes, considering platforms as a specific sector is a serious mistake that brings real problems into regulating competition, labour, security and other legal assets.

Thus, at first one can propose to divide platforms between pure and mixed/hybrid. The pure digital labour platforms would be those in which the *modus operandi* would be of a real marketplace, without relevant controlling over the interaction between the trading parties, as the Brazilian GetNinjas exemplifies. The mixed or hybrid digital labour platforms would be those in which there is a mix between market and hierarchy, such as Uber. In pure platforms, the object of the business confuses itself with the business form at some point: maintaining the infrastructure needed to the interaction of the parties negotiating.

In mixed or hybrid platforms, on the opposite, the business model of a platform serves the final provision of a service that is confused with the service itself. While GetNinjas’ business is an intermediation between people who want professional services and others who make themselves available to provide such services, that is, functions as an employment agency, Uber’s business object is people transportation, allowing, mostly through linking offer and demand, that



is, by the connection of those two groups, which is completed by a series of activities that make it possible to provide the intended service.

In the case of mixed or hybrid platforms, it is noticeable that the groups that interact do not negotiate with each other: the business is done between each one of them and the platform. The price, conditions and way the service is provided are designed entirely or almost entirely by the platform.

Platforms may also be defined in regard to the branches or sectors of service provision, which can vary from transportation of people, goods and food, provision of domestic or digital services, or as a generic or specific intermediation between self-employed workers. This classification is not exhaustive, because it depends on the final service offered by the platform, which may virtually include the entire economy.

It is interesting to divide these platforms according to the place of delivery of the service result, which can be online or on-site, the first category being potentially global and the second necessarily local.

## **7. Innovations and continuity of work via digital platforms**

By emphasizing this technological profile and its “lean” facet, digital platforms usually define themselves as technology companies that allow the implementation of connections in the labour market. They then propagate the idea that they are totally innovative or disruptive, so as to reject their legal framework in pre-existing legislation. Hence, they forge for themselves the inapplicability of traditional regulatory frameworks, such as civil, tax and labour, on the grounds that their activity is not regulated and that their innovations are strong and do not allow analogical application with similar actions of old companies. The speech based on lack of regulation is symptomatic in digital platforms, even with attempts to promote a type of self-regulation through classification systems or in the form of “social charters”, a kind of soft law by which companies, unilaterally, would choose which rights would be granted to the workers, such as currently stipulated by french law in the case of platforms for transporting people. <sup>(19)</sup>

The largest individual transportation company presents itself as a simple connector of customers and drivers, however, it coordinates and manages the

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<sup>(19)</sup> R. Carelli - D. Kesselman, *La régulation du travail des chauffeurs de VTC:: disrption et résistance par la voie du droit*, in *Chronique internationale de l'Ires*, 2019, 4, 29 ss.

largest fleet of vehicles and respective drivers in the world, maintaining an almost universal standard in its way of service provision.

Assimilating to the maximum the idea of economic efficiency, on-demand labour platforms prove to be “lean”, since they artificially remove from their ownership a considerable part of productive factors and labour responsibility in regards to their employees, although many of them continue to establish direction and control in order to maintain a standard of work, using communication technologies, algorithms and artificial intelligence.

Notwithstanding the diversity of labour platforms and their multiple classifications, we have found two more subtypes of performance and operation. The first subtype exercised by these is simply enabling the connection between self-employed workers and clients, which we classified as “pure platforms” in the previous section. They are situated in the function of virtual space for connecting workers with people who demand their services. The idea of connection here is well expressed by the actuation as a virtual means of communication for buying and selling services. In this first role, the communicative facet of a typical “marketplace” prevails.

A second role - more directive and controller - is exercised by on-demand labour platforms as they elect a standardized and specific service to be sold. That is precisely why we classify these platforms, then, as those “hybrids”, in the sense that they organize, model, and price the interaction between two groups: the customers who demand private trips vs. the drivers who sell them.

Far beyond connecting workers and consumers, setting a standard in a service requires direction, control, and supervision that can manifest itself in various methods such as: mandatory instructions; classification by reputation; punitive power; enforcement expedients; and economic managerialism in the work of others.

However, the manifestation of this management of services is subtler and less explicit at first sight. This is because these on-demand labour platforms of a hybrid nature exclude from their organisational model the classical method of functional hierarchy and include a range of freedom for the worker with regard to activation and deactivation. Such disruption in relation to the fordist business model would make it difficult to visualize legal subordination, since there is no hierarchically superior person issuing orders to the worker and because the workers are the one who decide which are their working days and hours and rest periods.

On the other hand, these digital platforms do not innovate in other methods of direction and control of economic activity. By critically breaking

down superficialities and advertisements, it is noticeable that some hybrid labour platforms clearly manifest a directive power. In the case of transportation platforms, such as Uber, there are clear instructions on how to work and how to act under certain circumstances, evaluation of performance by third parties, aside from total electronic surveillance via GPS. <sup>(20)</sup> De Stefano <sup>(21)</sup> emphasizes that, although there is no mandatory attendance from the platform driver, once they activate it, they follow instructions and, thus, remain under the company's control.

A standard of work is imposed through rewarding and punishing, resorting to gamification techniques: prizes for those who reproduce the standard of work and punishment for those who do not act in accordance with the instructions. In the end, the exclusion of workers who do not achieve the minimum score represents the manifestation of punitive power, something very typical and characteristic of the figure of the employer, whether fordist, toyotist or uberist model of management.

Another aspect in which hybrid labour platforms may reveal their directing and controlling characteristic is through the method of economic dirigisme. In this method, the pricing of the work of others, that is, the authoritarian and unilateral imposition of the worker's remuneration. If it were really independent labour, the service fare would be set by the workers, an expression of the autonomy and ownership of their own activity. Even more serious, in Uber's case, is the unilateral modification of rides fares, which, by changing the conditions initially set by the platform itself, it may, according to arguments of supply and demand that are impossible to audit, increase the "fee" they charge from their "partners", which constitutes flagrant asymmetry with such hyper economic dirigisme.

Therefore, these hybrid platforms, taking as an example the Uber standard, establish a factual economic and technological relation of profound inequality with their working "partners". That is, these companies are typically capitalist enterprises that use workers for maximum efficiency at the lowest possible cost, disguised as an innovative technology advertised as incompatible with existing regulations.

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<sup>(20)</sup> A. Aloisi, *Il lavoro "a chiamata" e le piattaforme online della collaborative economy: nozioni e tipi legali in cerca di tutele*, LLI, 2016, 2, 19-56.

<sup>(21)</sup> V. De Stefano, *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdfork, and Labor Protection in the "Gig Economy"*, Condition of work and employment series, n. 71, ILO, 2016.

In Uber's case, empirical research dispels the common sense that it consists in casual, well-paid work. In the research conducted by Federal University of Bahia (UFBA) on uberization, <sup>(22)</sup>it was detected a median profile of a driver who works, mostly, with exclusivity to the platform for more than eight hours a day and more than 44 weekly hours, in exchange of a gross remuneration that is, in general, inferior to 2 minimum wages. In Federal University of Rio de Janeiro's (UFRJ) survey, it was verified that 70% of the workers surpass 44 weekly hours and more than a third (35%) work more than 60 hours a week, receiving the gross value of R\$ 19,12 an hour. In addition to that, it must be taken into consideration that most (almost all) drivers do not have a notion of their expenses and do not count costs such as the depreciation of the vehicle or expenses in its maintenance. <sup>(23)</sup>

Such empirical basis reinforces the perception that platform workers live as typical wage earners and with low liquid remuneration. On the other hand, the critical analysis identifies that platforms act as service managers, through methods of control by performance and economic dependence. Thus, in the third millennium, there is a repetition of the social issue of the 19th century, in which the labour – even the one in excess – does not guarantee the economic progress of those who work, but the opposite, it ends up being a mechanism for the reproduction of poverty and social degradation.

## 8. Labour Law responses to digital platforms

The labour law responses for digital platforms can be reduced to four.

The first one is proposing there is no incidence of labour regulation on the situation, prevailing the private and mercantile characters of the relation. As the lack of personal hierarchy and the working freedom are emphasized, this response accentuates the disruptive nature of this technological arrangement to enable independent work in the new and broad virtual market, as the platforms function as a simple mediator of these relations, especially with its clever classification system that makes strangers hire strangers.

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<sup>(22)</sup> M. Oliveira - A. Assis - J. Costa, *Relatório da pesquisa Pibic 2018-2019 Uberização do trabalho: análise crítica das relações de trabalho prestadas por aplicativos*, Universidade Federal da Bahia, 2019.

<sup>(23)</sup> R. Carelli, *O Caso Uber e o controle por programação: de carona para o Século XIX*, in Leme C. - Rodrigues B. - Chaves Jr. J.(eds.), *Tecnologias disruptivas e a exploração do trabalho humano*, Ltr Editora, 2017, 130 ss.

In the opposite plan, the other options affirm a need for labour regulation for the digital platforms. In this sense, they differ regarding how and to what extent Labour Law will affect these situations.

The second answer considers that, as it is an entirely new system, there is a need for a new legislation, understanding the infeasibility of a labour regulation made for factories to a non-factory digital company, in which remuneration is no longer a direct result of the hierarchically controlled time in which worker is available to work for his/her employer, but calculated by the effective time or the results of the service provision. This second answer always advocates a regulation with intermediary protection that guarantees some rights, taking as paradigms the figures of “para-subordinate” in Italy or of the “dependent autonomous work” in Spain, as examples of a labour figure with intermediate protection to be created by law.

In the field of intermediate regulation, Renan Kalil <sup>(24)</sup> proposes the creation of a new category that would be the “dependent” work, a figure that is different from independent and subordinated work. Intending to guarantee some kind of protection to on-demand and crowdwork platform workers, but without economically impairing these business models, Kalil <sup>(25)</sup> defends the application of some labour rights, such as those rights present in the (Brazilian) constitutional text, however, excluding the concept of time at the employer’s disposal (Consolidation of Labour Laws, CLT, art. 4).

The third answer consists in recognizing that it is a new and specific labour relation, however, all labour rights should be extended to cover it. This solution, similar to the one created in Brazil to independent seaport workers, was recently adopted in Italy for platform workers who are organized by the company (hetero-organized workers, according to terms of law). <sup>(26)</sup>

The fourth answer is the most traditional one: to apply the current labour legislation when the platform, of hybrid nature, manifests direction or control of the services, exactly as disposed in art. 2 of CLT. Consequently, this answer highlights that Brazilian legislation chose an open concept – “under dependence” as in art. 3 of CLT - and that it is already updated to a “telematic” subordination as seen, since 2011, in sole paragraph of its art. 6. However, that

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<sup>(24)</sup> R. Kalil, *O Direito do Trabalho e o Capitalismo de Plataforma. A Regulação do Trabalho via Plataformas Digitais*, Blucher, 2020, 294.

<sup>(25)</sup> R. Kalil, *O Direito do Trabalho e o Capitalismo de Plataforma* cit.

<sup>(26)</sup> A. Aloisi - V. De Stefano, *Delivering employment rights to platform workers*, *rivistaimulino.it*, 2020; M. Novella, *Il rider non è lavoratore subordinato, ma è tutelato come se lo fosse*, *LLI*, 2019, 1, 82 ss.

presumes the recognition that Labour Law does not only focus on work in the typical fordist model, which necessarily depended on “subordination by hierarchy”, regulating different ways of human labour appropriation.

We immediately reject the proposal of exclusion from labour protection. Considering these workers as entrepreneurs that submit themselves to a commercial logic is contrary to constitutional and human rights aims of labour protection and is only built from a biased view of labour relations. In addition, the process of concentrating platform-companies and the intensification of new ways of direction and control of the worker as an embodied person, appropriated through digital platforms, suggest a renovation of the ways of wage earning and labour exploitation in capitalism, and not their overcoming.

We agree that in some specific cases of pure digital platforms work, the possible answer in Brazil’s current constitutional system may be the framing in the figure of the independent worker, with the extension of all labour rights, where applicable to the situation. The plurality of recipients of the services, intermediated by a third party, does not lead to the exclusion of Labour Law, since it can be included in the legal concept of on-demand workers (“trabalhador avulso”), with constitutional labour rights protection, in the broad sense or by analogy. <sup>(27)</sup> A translator or a digital designer regimented by a pure labour platform for casual work to a multitude of distinguished clients does not have all the elements of an employment relationship characterized, although still is not an independent worker in the strict sense. The inclusion of these workers in the labour law protection, which previously was practically impossible, gains viability with the intermediation carried out by digital platforms, to which they can be attributed as a center of enforcement of rights, such as “Seaports Labour Management Boards” (“Órgão Gestor de Mão de Obra”).

On the opposite, we believe that creating a third figure to withdraw labour rights is not justified. There is no principle of justice that could justify the creation of a subcategory of workers who, in terms of rights, would be worth less than others. The work in hybrid labour platforms does not create specificities enough to justify the withdrawal of rights, mainly in regards to the basis of labour law, which is regulating working hours based on the period of time the worker is available to the employer. This would not only prevent the regulation of workers’ working hours, i.e. the time of the workers’ life in which there is availability to company activities, but also would make it impossible to

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<sup>(27)</sup> R. Carelli - B. Carelli, *A zona cinzenta de trabalho e emprego, trabalhadores sob demanda em plataformas digitais e trabalhadores portuários avulsos: direitos trabalhistas além da relação de emprego*, *Contracampo*, 2020, 2, 28 - 41.



protect on-demand workers' salaries. The worker, even when waiting for assignments, is serving the company, which only functions due to the presence of workers there available (on duty) to immediately answer any customer's orders. This would maintain the exploratory system where the burdens of the economic activity fall on the workers and they have to stay active for long hours to earn a minimum remuneration.

However, regarding to hybrid labour platforms, we believe that the Brazilian legal framework in force is enough to regulate labour relationships that derive from them.

The frequent doctrinaire reduction of Labour Law to the fordist standard and, logically, to a "fordist" subordination does not have historic and conceptual grounds. Labour Law precedes and goes beyond the period of Fordist hegemony. Even before the success of Henry Ford's company and after the emergency of toyotist's way of working, the appropriation of the worker's labour, renovated by continuous technical and technological revolutions, in itself denotes workforce subordination and demands regulation and legal protection. As above enlightened, it is Labour Rights' role to regulate salaried labour under capitalism, including that in platforms companies.

In addition to this historical and ontological perspective, we consider that defending the application of Labour law in force in the case of "controller", "directive" or "mixed" labour platforms reveals itself as a political issue that is also symptomatic of the current correlation of forces in the ongoing conflict of capital versus work. Daniela Muñoz summarizes this political issue: <sup>(28)</sup> «we are not facing a sophisticated legal problem that compromises traditional labour categories, on the opposite (and in the case of uber it is sophisticated only in its "artificial" sense), but rather a lack of capacity from States in imposing limits to companies and making them effective, and in which the communicative skills of the doctrine can solely defend that Labour Law is applied to those workers, which also opens possibilities to them – that turn uncertain ones when it comes to taking their cases to courts. This inability is not so much due to the difficulty of creating legal instruments, but rather of accumulating the strength to create political will».

Finally, recognising that platform workers may be considered as "dependents" or "telematic" subordinated is understanding that the small amount of freedom of turning on or off the application does not change the

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<sup>(28)</sup> D. Muñoz, *Observaciones sobre el caso Uber: un museo de grandes novedades*, in Polido F. - Moura N. - M. Barbatto (eds.), *Trabalho, tecnologias e os desafios globais dos direitos humanos*, Lumen Juris, 2019, 97 -106.



platform's economic and technologically directed system of work. Particularly, the choice of day and working time is very much in line with the concept of intermittent or "zero hours" work (CLT, art. 452-A), as its non-activation or even deactivation does not invalidate the idea of legal subordination (art. 452-A, §3º). Likewise, the lack of personal hierarchy does not prevent the characterization of dependency, whether by algorithm subordination or by economic dependency.

Faced with the renewed asymmetry of the contemporary world, we argue that it is necessary to recover labour regulation for wage earners on these platforms, so that labour, in legal terms, does not continue to be treated as a mere commodity, now invisible and shrouded in technological fetishism. Not by chance, the most basic guidelines of labour law - minimum wage, maximum hours, a period of rest, and social security protection against labour risks - are the demands of workers on hybrid platforms.

In this critical paper, we face the changes brought by the digital economy with their business model (that is, digital platforms) and the existing responses to the application of Labour Law to workers of this new "digital" standard.

First, we demonstrated that the idea of a labour platform is a form of business organization based on technology and with an artificially lean nature, that is, an economic organization, as much as companies that function by fordist or toyotist models. It does not seem suitable to consider certain platforms just as a technological net that exclusively operates in the informative virtual world.

Second, the critical dimension enables us to unveil a range of fetishes and concealments that are fed by an unrestricted and deterministic adherence to technology, as if it were something autonomous and detached from the typically capitalist actions of companies behind the platforms. It is a technological fetish that attempts to naturalize political and economic decisions that construct arrangements of invisibilization of the worker, such as the idea of an autonomous platform in relation to the founding company, a notion of digital labour as a concealer of real labour, and a discourse of cyberspace as a mechanism to move away from labour regulations historically territorialized in nations.

Third, it is precisely the critical outlook that has urged us not to generalise and establish definitive and a priori analyses on labour platforms. According to classifications here discussed, there is a great variation between platforms and its modes of action, which demands more thorough examinations on the factual circumstances. Particularly, we argue that those platforms denominated as hybrid platforms act as business organizations that drive economic activity.

Fourth, hybrid labour platforms, by constituting, organizing and maintaining a pattern of wage labour, take on the typical facet of the employer in the exercise of managerial power and thus attract the incidence of labour law. The innovation of this business model takes place in the subtlest expedients for the manifestation of control. The fordist strategy of hierarchy and time vigilance is abandoned in order to make use of algorithmic control, a system of reputation, punitive power and economic dirigisme. New technological and business management methods for typical wage-earning work, including the generation of a new social question through the resumption of absolute added value: long hours; low pay; costs and production risks attributed to the worker.

By undoing these fetishes, propaganda and innovations in superficialities, we are witnessing a recurrent social process of job insecurity and permanent productive restructuring. While technology has allowed more efficiency, productivity and even certain freedoms at work, we are faced with more active working time, more social inequality and greater control over life in its entirety. The study of digital platforms from a critical perspective allows us to reveal not only technological fetishes and precariousness, but also to reflect on the functions of regulation and the meanings of Labour Law. For lawyers committed to the constitutional promises of dignity, the social valorisation of labour and the eradication of inequality, the application of (capitalist) Labour Law for leading platforms is more than a strong social-political option, it is a duty to make the constitutional and international human rights effective.

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