The Uberization of Work And The Legal Subordination:
The Brazilian Case[1]

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ABSTRACT

The uberization phenomenon, as the best known expression of the so-called platform worker, is now noticeable in several countries and is far beyond an individual private passenger transport company, being present in a number of on demand services, especially those intermediated by apps. The uberization implies the intermediation of the personal delivery of certain services through a platform of a for-profit company. The problem is that the typical subordinate element of the employment relationship, if any, does not seem to be that of the conventional labor law. That is because the company

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neither imposes time patterns for the provision of the worker's work, nor provides such worker with the equipment to perform the service. Brazil, like other countries with semi-peripheral economy, is holding an intense and unresolved debate on the subject. Brazil has no federal statutory act yet dedicated to the express regulation of the individual passenger transport activity, but some cities like São Paulo, for example, allow the provision of the service by a decree signed by the mayor. The fares charged in Brazil are, generally, cheaper than those of taxis, what makes the public support such competition. Under the labor protection sphere, there is no law or court precedent guiding which rule should be applied and how to qualify this kind of work. This article aims at summarizing the debate held until now and discussing possible trends for the legal regulation of the activity under the point of view of labor protection of the services provider whose work is a source of profit, based on the semi-peripheral economies, focusing on the Brazilian case.

Keywords: Informal work. Platform worker. Semi-peripheral economies. Uberization. Work relation.

1. Introduction

The so-called creative economy[5] is one of the few sectors of the economy that is showing a progressive, widespread and consistent demand for workers. The bad news is that the creative economy, like some other sectors of the economy, seems to disclose an important but subtle paradox: the more it hires workers, the less they do so through the customary employment relationship.[6] Considering the analytical purposes of this article, we indicate two methods of approach to this paradox that will be avoided here:

1) the first one, that believes that the paradox is explained by the intentional and consciously unlawful attitude of "employers" of misclassifying these work relations, avoiding by all means treating them as employment relationship, aiming at making them become cheaper and more manipulated than they would be if the labor rights provided for in law or in a collective bargaining had been complied with;

2) the second one, which believes that the labor rights are part of a legal protection system: 2.1.) that is outdated, created for the predominant factory labor relations in the late 19th and first half of the 20th Century; 2.2.) a system that currently makes working relationships excessively rigid and expensive; 2. 3.) tending to discourage the opening up of new jobs, increasing unemployment; 2.4.) operating in a paradoxical way, to the detriment of the worker, not as a legal system of its true protection; and 2.5.) regarding this approach to what matters most, the inability to provide typical jobs in the creative economy environment would not be a problem, but at least part of the solution.

These two approaches to the relations between the creative economy and the decline in typical employment, albeit acceptable and understandable, will be avoided here as a methodological strategy because either they reduce the

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[5] For the terms "creative economy", as well as "cultural industries", "creative industries", "content-based or copyright industries", "cognitive-cultural economy", we follow closely the conceptual outlines present in the United Nations/UNESCO/UNDP publication *Creative Economy Report 2013 Special Edition: Widening Local Development Pathways* (p. 19-21). About the situation in the United States, we refer to the following: "Over the three years of our study (October 2012 to September 2015), 4.2 percent of adults, an estimated 10.3 million people – more than the total population of New York City – earned income on the platform economy. This number increased 47-fold over the three years." (JP Morgan Chase & Co. Institute, *Paychecks, Paydays, and the Online Platform Economy,* 7).

[6] We consider in this case, for instance, the home care, informal education, tourism and hospitality.

decline to mere breach of law or they do not consider it as problem. In any of these cases, therefore, the possible contributions of this article would not be analytically useful.

The starting point for this article otherwise comprises the adoption of the following propositions on trade-off between the increase of job opportunities and the decrease of typical employment in the creative economy: 1) although one can incidentally talk about misclassification derived from breach to law, there are, in fact, in the atmosphere of the creative economy, some job opportunities that arise from demand for service rendering, according to the patterns that differ from traditional ones in typical employment; 2) although it can be argued that such patterns are external to conceptual elements of the employment relationship, it is equally true that their presence is traditionally associated with the occurrence of employment relationship and its corresponding legal classification; 3) labor rights were designed to protect workers who provide service according to conventional patterns of the employment relationship, which causes their foreseeable insufficiency and/or inadequacy to regulate work and protect workers in the creative economy environment, particularly in its gig economy version.[7]

The expression "creative economy" became popular from its use in 2001 by the British writer John Howkins to indicate the volume of money moved by fifteen industries, comprising arts, science and technology. "Creative economy", closely following what is the proposed by the United Nations, refers to a wide range of activities involving the promotion, design, use, circulation and disclosure not only of culture and entertainment goods and services, but also games, toys, software, "research and development" (R&D) activities.[8] The terms "gig economy", "freelance economy", "on demand economy", "platform workers economy", "Uber economy" and "sharing business economy" have been employed more recently in the media, by business,

administration and labor analysts, to indicate those companies that carry out their business by mediating the service provided by workers, under a lawfully precarious, if not informal, occasional or with no regular time, work relationship.[9]

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[7] Thus, the following are conceptual elements of the employment relation: 1) the subordination of the worker to the direction of employer; 2) the personal nature with which the worker provides the service; 3) the continuity of the work itself by the employee; and 4) the consent regarding the compensation, predominantly pecuniary, provided by the employer to the worker. With some variations, these are the elements ordinarily referred to in many countries by the legal doctrine and the court decisions as a sufficient, though not exclusive, to characterize the employment relationship in accordance with the tradition of the European and American labor law. An interesting roadmap for assessing the degree of international consolidation and diffusion of the legal doctrine regarding the employment relationship can be found in the normative and analytical documents of the International Labor Organization (ILO), especially some clauses of its R. 198 - Employment Relationship Recommendation (2006), a "recommendation concerning the employment relationship", highlighted below by us:

"12. For the purposes of the national policy referred to in this Recommendation, Members may consider clearly defining the conditions applied for determining the existence of an employment relationship, for example, subordination or dependence.

13. Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include:

(a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;

(b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker."

[8] United Nations, *Creative Economy Report 2013 Special Edition,* 19-20.

Despite some variations in the organization and supply of the service, there are many companies now that carry out activities following this pattern. Among the most popular ones, and in addition to Uber (2009), we can point out TaskRabbit (2008), Lyft (2012), Zaarly (2014), Amazon Flex (2015) and many others that provide products on demand through the mediation of gig workers. In this paper, we will examine the problems related to the legal regulation of work, focused on Uber. The reasons for choosing Uber as a reference for the study are: 1) its significance as a company of rapid and substantial success across several countries; 2) its political visibility, due to the large number of conflicts it caused, not only between Uber drivers and taxi drivers, but between the company and the transport service regulatory agencies; 3) its symbolic significance, the example of which is the international spread of the expression "Uber economy" or simply "uberization" to indicate,

[9] Concerning the effectiveness of contractual clauses to prevent a misclassification litigation, Elizabeth Tippett sums up the evolution of the use of the expression "sharing economy" in a clarifying way: "The term 'sharing economy' or 'sharing businesses' was first used with respect to businesses that facilitated peer-to-peer sharing of tangible goods or real property. For example, in 2010, Lisa Gansky argued that sharing businesses share four characteristics: 'sharing, advanced use of Web and mobile information networks, *a focus on physical goods and materials,* and engagement with customers through social networks.' The paradigmatic example of a sharing business focused on physical goods is AirBnB, which helps consumers rent out their homes to travelers. Over time, the sharing economy category has come to include companies that share a combination of labor and property, or labor only. The ride-sharing company, Uber, shares both labor and property – a car owner contributes both his physical property (a car) and his time to drive customers to their destination. Amazon's MTurk service offers a form of virtual labor sharing – individuals complete tasks online, such as transcribing text from an image or audio file. Other labor-based sharing services, such as Zaarly and TaskRabbit, offer services on demand, such as furniture assembly, cleaning, shopping, and moving services." (Tippett, "Using Contract Terms to Detect Underlying Litigation Risk", [5]). There are many accounts of the origin of the expression gig economy, and the references to exclusive musical or drama performances, or even the erratic way in which the beat generation youth related themselves with work, are common.

as a case of success or controversy, the bewilderment caused by the gig economy; and 4) the spread of misclassifying related litigation involving Uber and former Uber drivers, which offers a significant material of analysis of the phenomenon from a legal point of view.[10]

In this paper, considering some judicial manifestations of the gig economy based on Uber, we intend to draw attention precisely to the difficulties found by the law, particularly by labor law, in order to effectively and fairly regulate this working relationship between actors that recognize themselves as non-reciprocally related persons. A difficulty that becomes even greater as this "relationship with no bonds" is propagated across semi-peripheral economies[11] in which the economic environment does not promote, without a

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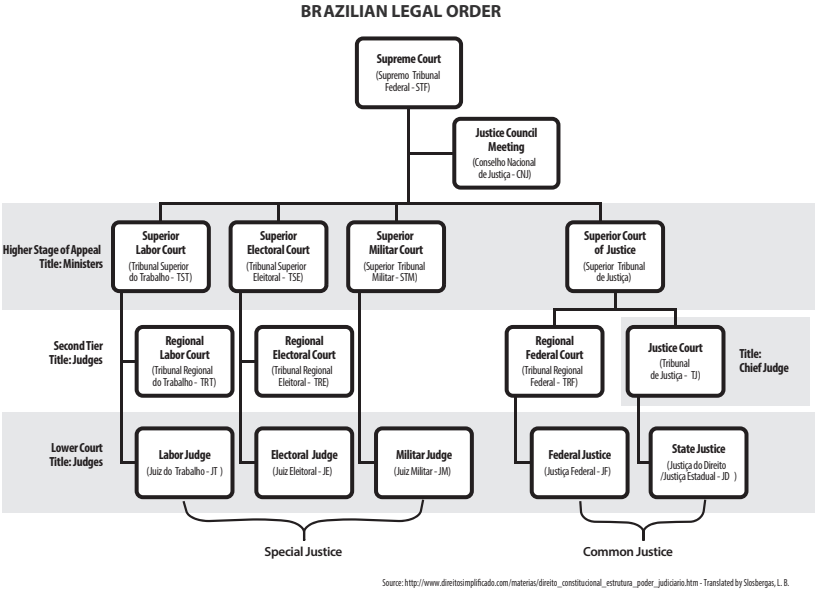
10 We debated some of the ideas of this paper in two events: in the International Meeting on Law and Society 2017, which took place in Mexico City from 20 to 23 June, in which we presented the paper "The uberization of work in times of the on demand services: platform workers and the legal debate focusing on the Brazilian case"; and in the Labour Law Research Network (LLRN) Conference 2017, which occurred in Toronto from 25 to 27 June, in which we presented "The uberization of work and the legal regulation: the challenge of labor protection in semi-peripheral economies".

11 Semi-peripheral economy such as defined by Wallerstein: "Semi-peripheral states play a particular role in the capitalist world-economy, based on the double antinomy of class (bourgeois-proletarian) and function in the division of labor (core-periphery). The core-periphery distinction, widely-observed in recent writings, differentiates those zones in which are concentrated high-profit, high-technology, high-wage diversified production (the core countries) from those in which are concentrated low-profit, low-technology, low-wage, less diversified production (the peripheral countries). But there has always been a series of countries which fall in between in a very concrete way, and play a different role. The productive activities of these semi-peripheral countries are more evenly divided. In part they act as a peripheral zone for core countries and in part they act as a core country for some peripheral areas. Both their internal politics and their social structure are distinctive, and it turns out that their ability to take advantage of the flexibilities offered by the downturns of economic activity is in general greater than that of either the core or the peripheral countries." (Wallerstein, "Semi-peripheral Countries and the Contemporary World Crisis", 462-3).

firm State performance, acceptable compensation and work conditions.

2. The discussion in Brazil

In order to understand better our legal framework, we can see it represented on the figure bellow by Mestriner[12], altered by us:



Source: http://www.direitosimplificado.com/materias/direito_constitucional_estrutura_poder_judiciario.htm - Translated by Slosbergas, L. B.

In this session, we intend to describe court decisions concerning Uber in Brazil and its signed up drivers. We use those justice decisions as a theoretical reference framework and both as an assessment and parameter, a jurisdictional approach that may serve as grounds to re-interpret the nature of the relationship between Uber and its drivers. Recently, some rulings in the Federal District and in the cities of Belo Horizonte and São Paulo have driven

12 Mestriner, "Direito Constitucional".

some attention.

Our labor law provides the relevance of the "principle of the reality primacy", term used by the Brazilian legal doctrine to express that the reality is above the form. In other words, to determine whether there is a legal relation, it is necessary to verify the fact circumstances concerning a determined relation, giving the latter more importance than to formal documents. In order to characterize the employment relationship, the Brazilian legal presuppositions are: verified personality, legal subordination, gratifying and non-eventuality in the provision of services, which are institutes of the 2nd and 3rd articles of the national labor code (CLT). Therefore, in order to characterize an employment bond, it is necessary to have a combination of all four assumptions.

Highlighting the relevance of this debate, two labor courts of Belo Horizonte – part of the Regional Labor Court of the Third Division (TRT 3), State of Minas Gerais – have had different understandings, in less than one month, about the employment relationship between drivers and Uber. The judge of the 37th Labor Court of Belo Horizonte has not recognized the allegation of a driver who had urged against his dismissal without granting any work termination allowance. Although the legal order focus on the "principle of the reality primacy", the judge ruled that there was no employment relationship and, consequently, there were no labor rights to be paid.[13] However, the judge of the 33rd Labor Court of the same city ruled by recognizing the employment relationship and the concession of some labor rights, such as registration as employee, overtime pay and night work bonuses. In addition, the judge determined the refunding of the fuel costs and those related to water and candies, which are usually offered to the

[13] 37th Labor Court of the City of Belo Horizonte, "Artur Soares Neto v. Uber do Brasil Tecnologia Ltda., Uber Internacional B.V. and Uber Internacional Holding B.V.".

passengers.[14]

A quite similar decision has been taken by the judge of the 13th Labor Court of São Paulo. He ruled in favor of the recognition of the employment relationship and the concession of some labor rights, understanding that Uber provides transport services to consumers, "making use of the human work force supplied by the drivers", and, therefore, it is not correct to affirm that the drivers are Uber's "clients". The drivers were considered workers who expend energy supporting the enterprise's profitable activity. Five elements that characterize an employment relation in Brazil are quoted in the decision: 1) individual provision of services; 2) personality, on behalf of the worker; 3) non-eventuality; 4) subordination; and 5) rewarding. But this case is also a milestone in the country: Uber was sentenced for non-pecuniary loss. The driver alleged having suffered non-material harm due to Uber's behavior, by imposing him a harmful work routine. This practice was called "social dumping", which leads to "moral damage". So the judge sentenced Uber to pay 50,000.00 Brazilian reais – around USD 15,360.00 – to the driver.[15]

We summarize some relevant cases in the chart bellow:

[14] 33rd Labor Court of the City of Belo Horizonte, "Rodrigo Leonardo Silva Ferreira v. Uber do Brasil Tecnologia Ltda.".

[15] 13th Labor Court of the City of São Paulo, "Fernando dos Santos Teodoro v. Uber do Brasil Tecnologia Ltda, Uber Internacional B.V. and Uber Internacional Holding B.V.".

Analysis	CASE 1	CASE 2	CASE 3	CASE 4
Process No.	001186362.2016.5.03.0137	001135934.2016.5.03.0112	100149233.2016.5.02.0013	000199546.2016.5.10.0111
Court/City	37th Labor Court of the City of Belo Horizonte	33rd Labor Court of the City of Belo Horizonte	13th Labor Court of the City of São Paulo	Labor Court of Gama in Federal District
Plaintiffs	[Artur Soares Neto] v. [Uber do Brasil Tecnologia Ltda., Uber Internacional B. V. and Uber Internacional Holding B.V.]	[Rodrigo Leonardo Silva Ferreira] v. [Uber do Brasil Tecnologia Ltda.]	[Fernando dos Santos Teodoro] v. [Uber do Brasil Tecnologia Ltda., Uber Internacional B. V. and Uber Internacional Holding B.V.]	[Wiliam Miranda da Costa] v. [Uber do Brasil Tecnologia Ltda.]
It is employment confirmed	----------	The set of documents of probative value revealed the existence of the CLT 2nd and 3rd articles legal preconditions, which characterize the employment relation. In this case, it was also verified the presence of the structure subordination vs. autonomy.	The set of documents of probative value revealed the existence of the CLT 2nd and 3rd articles legal preconditions, which characterize the employment relation. This case is a milestone because it sentenced Uber for non-pecuniary loss ("moral damage" and "social dumping").	----------
It is not employment confirmed	The body of proof did not reveal the existence of the driver's subordination, neither his reward, fundamental pre-requirement to characterize the employment relation. The claim was invalidated because the plaintiff refunded Uber between 25% and 30% of the total amount collected.	----------	----------	The body of proof did not reveal the existence of the driver's subordination, neither his reward, fundamental pre-requirement to characterize the employment relation. The claim was invalidated because the plaintiff refunded Uber 25% of the total amount collected. Based on the productive gains sharing of the service performed by the driver, the judge dismissed the request of employment relation. She claimed that the plaintiff had a high percentage of the total intake amount and that such percentage, 75%, constituted more than 50% of the plaintiff's

				production. It would not fit into the legal concept of employment. It would rather characterize that he worked in an autonomous manner, in the condition of partner, as he shared his earnings with the defendant.
Status	The appeal decision is pending.	The appeal was judged.	The appeal decision is pending.	The appeal decision is pending.
Appeal decision	----------	The Regional Labor Court of the Third Division (TRT 3), State of Minas Gerais, unanimously considered that there is no employment relation between a partner driver and the Uber application. This is the first decision of second instance in Brazil. According to the judges, drivers who use the application are free to decide the amount of hours they work and can stay out of the application as long as they want, which would characterize the eventuality of the job. There is also no personality since the driver may be replaced by another who was also registered in the platform. Finally, as for subordination, it only exists when there is power of direction and command of the company, as well as interference in the mode of activity performance, which has not been proven in this case.	----------	----------

3. Innovation, obsolescence and litigation

It is interesting to note that the aesthetic and quasi-religious worship of innovation belongs to the ethos of the creative economy, just as gigantism and self-sufficiency have been for the Fordist management model. The "good idea" must be, first of all, surprising, unpredictable and, if possible, clearly disconcerting; in one word: disruptive[16]. Ignoring tradition, though not rebellious or contending, the creative economy relies on the virtues of the market economy. Especially in its sharing and gig economy versions, the creative economy is guided by an underlying ideology that seeks to combine market and solidarity; values hitherto seen as opposites, though not exclusionary.

All that to say that it is not surprising how much the creative economy, especially under the sharing and gig forms, causes litigation and conflicts. We have seen that this occurs in several areas of interest and involving several actors, not just in the form of classification litigation. We have also seen that this phenomenon is reproduced in different countries that follow different legal regulation standards. Therefore, we can infer that the increase and spread of litigation are not important phenomena only in Brazil or in other semi-peripheral countries, but they follow the trail of the creative economy

16 "Christenson contrasted 'sustaining innovations' with 'disruptive innovations' and tied the latter directly to creative destruction. He found that existing market leaders often successfully accomplish sustaining innovations, or incremental and marginal improvements on existing products. But Christenson demonstrated that start-up entrepreneurs with new technologies, or 'new product architectures involving little new technology per se,' are frequently better positioned than existing market leaders to carry out disruptive innovations, which create new markets and eventually destroy old ones." (Wroldsen, "Creative Destructive Legal Conflict", 758-9).

wherever it goes.

It is believed that most of this litigation can be explained exactly by the cult of innovation as a management paradigm and equivalent of wealth, making obsolescence not only a side-effect but especially a by-product often tolerated, if not pursued by creative businesses. The hypothesis supported by this paper consists in attributing to the growth of the obsolescence of products, processes and social roles, responsibility for a significant portion of conflicts and litigation related to the creative economy. A responsibility even greater than that of innovation itself.

In addition, rapid identity changes require an additional effort to accept the other, intensifying the sense of correspondence between mourning and the closeness of the different, between loss and diversity; an environment that tends to cause intolerance, hostility and violence. The violent street conflicts between taxi and Uber drivers in some major cities, especially in the City of São Paulo in 2015, evidence the deep difficulties in the development of reciprocal acceptance and tolerance guidelines that go far beyond a mere conflict of interest.

In this paper, we argue that we should keep in mind some important covariations of factors that exist in the institutional environment in order to better evaluate the meaning of litigation:

1. the litigation on misclassification, despite relevant due to its importance as a roadmap for the acquisition or deprivation of rights, is not the only issue that deserves to be observed to evaluate the impact of gig economy on labor relations. It is also necessary to consider the litigation concerning the union representation and maybe it is also interesting to investigate the litigation on issues related to indemnity for damages and accidents at work and occupational disease;

2. the economic, fiscal, legal and symbolic consequences deriving from the

classification of a labor relation as an employment relationship vary greatly from country to country. This variation includes, on the one hand, countries that admit the legality, even though challenged, of zero-hours contracts, such as the United Kingdom, and other countries, such as Brazil, in which informal labor practices challenge a highly severe and detailed labor legislation;

3. differently from what already occurs in some countries, such as Spain, that have a legal system that protects self-employed workers and micro-franchisees in their relations with more powerful hiring firms, in most countries the choice evidences dramatic contours between being wholly inside or wholly outside the protecting border of the State and the law, depending on whether the employment relationship is classified, or not, as an employment relationship;[17]

4. there are economies that show a low level of inequality in the distribution of wealth, associated with the provision of social services of acceptable quality (e.g., basic education, unemployment insurance), and a booming labor market, which makes human cost of precariousness and informality of the gig economy something morally tolerable. Quite differently from the meaning of the lack of State and legal protection in semi-peripheral countries, especially those with high rates of open unemployment and the tax crisis of the State, as is the case of Brazil in 2016.

So if the alternative employment vs. non-employment occurs in a hypothetical country where the self-employed workers do not have any kind

[17] In the case of the United States, where, as in Brazil, the boundaries between employees and independent contractors (self-employed workers) are decisive in relation to the acquisition of rights, despite a certain lack of sharpness in the practical distinction between them. Katherine Stone (2006) summarizes thirteen factors of a classification test determined by the Supreme Court from 1999 on, highlighting the emphasis of the Supreme Court on the predominance of the exercise of service control by the employer for the characterization of employment.

of legal protection scheme, denying the classification of a labor contract as an employment relation can mean not only the increase of precarious jobs, but also the condemnation of these workers who do not have the social protection of the State and of the law. This, however, will only result in an important outcome if, in this same country, there is a legal protection scheme of the employee of considerable significance. Otherwise, the classification as an employee will be limited to a measure intended to provide institutional visibility and tax consequences to the employment relationship. The moral magnitude of the lack of legal protection in this case will be less if all this occurs in an economic environment: 1) of appreciable welfare services; 2) comparatively high wages; and 3) a booming labor market.

In other words: yes, the misclassification litigation tends to be considerably relevant in all countries where the gig economy is significantly present. Its centrality, while a tool for social protection and recognition of rights, tends, however, to vary greatly according to the legal system of each country. For this reason, the evaluative conclusions to which we are led need to take into account their weight in each specific legal regulation environment.

The political utopia of a full-fledged market society has been the backdrop to the different political experiences of the welfare state at least from the second postwar period up to the beginning of the 21st Century. In the course of at least the last three decades, a gradual consensus has been developed on the recognition that political projects for social protection should seek alternatives to legal systems of rights built on the basis of typical employment, i.e., that job-for-all-life, in which employee and employer bid farewell due to the retirement with a "golden hand-shake".

Not because the preservation and expansion of such employment are seen as an undesirable goal, but simply because they started to be identified as

unfulfillable. Even if no one definitively sentenced the employment to death, most analysts began to consider the following line of propositions: 1) typical employment tends to become a residual and declining form of paid occupation; 2) the new job opportunities tend to be offered on a precarious basis; and 3) the labor law is faced with the challenge of redesigning the approach to worker's protection that handles this increasingly precarious and unstable scenario.

Much has been written, developed and discussed about the growing need to think about legal tools for the protection of workers working through precarious and unstable legal relations. Perhaps the boldest definition in this sense is from the well-known "Supiot Report", offered to the European Commission at the end of the last century.[18] The fact is that despite the efforts of professors and researchers who deal with this change trend, we still seem a little bit far from achieving satisfactory results in the sense of thinking legal rules for the protection of work outside the prevalent typical employment environment.

We do not intend to neglect that the deepening of this line of transformations has been challenged. In this sense, see the resistance of some Brazilian courts. In particular, see the effort of ILO embodied in its Recommendation 198 on employment relations. In its opening "whereas", ILO[19] explicitly confirms the following, highlighted by us:

> Considering that the protection of workers is at the heart of the mandate of the International Labor Organization, and in accordance with principles set out in the ILO Declaration on Fundamental

[18] We mention here the publication: European Commission, *Transformation of Labour and Future of Labour Law in Europe*.

[19] International Labour Organization, " R. 198 - Employment Relationship Recommendation".

> Principles and Rights at Work, 1998, and the Decent Work Agenda, and
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> Considering the difficulties of establishing whether or not an employment relationship exists in situations where the respective rights and obligations of the parties concerned are not clear, where there has been an attempt to disguise the employment relationship, or where inadequacies or limitations exist in the legal framework, or in its interpretation or application, and
>
> Noting that situations exist where contractual arrangements can have the effect of depriving workers of the protection they are due, [···]

The problem we wish to highlight is that the employment movement towards precariousness explains only part of the phenomenon: the vast majority of the job opportunities created by the creative economy, only in this economic sector, already appear in the form of precarious occupation, if not gig or on-demand.

4. Some preliminary conclusions

As we mentioned at the beginning of this paper, we have argued here that its vocation to create job opportunities following a precarious pattern of rejection or simple lack of bond constitute the gig economy, the sharing economy and, more broadly, the creative economy itself. In other words: this vocation to offer precarious work, regardless of whether it is ideologically tolerated or praised by the enthusiasts of the creative economy, is not the result of a deliberate strategy of overexploitation of the worker, even though the overexploitation may be one of its most attractive by-products.

This is not about the support that the protection of work by legal tools and

public policies is something functionally interdicted in relation to creative economy. The core issue of this paper is to admit that these new labor relations demand new forms of protection, which no longer adopt the employment relation as a regulatory paradigm. This is an admittedly daring analysis hypothesis. After all, having been designed to protect blue-collar workers inside rank-and-file atmosphere, the working relationship expanded to encompass white-collars workers from the service sector, agricultural workers, domestic workers and even, to a large extent, public servants, why would not it show breath for one more wave of expansion now?

It is a qualitatively different way of agreeing core aspects of the employment relationship, such as: 1) frequency of work; 2) form and value of compensation; 3) work and rest time; 4) allocation of risk of activity and ownership of the tools and means of work; and 5) in some cases, of which micro-franchisee workers are an example, even the kind of legal entity that the provider becomes, make it critical the personal nature with which the worker provides the service, as is characteristic of the employment relationship.

The constitutive asymmetry of these new labor relations means that the law and the State cannot be indifferent to them. We agree with Davidov's[20] assertion that society "can enjoy the gains of technological advances and innovative businesses without accepting the evasion of labour laws"[21]. Notwithstanding, our point consists of emphasizing the problems related to the questions: what kind labor law? What kind of labor protection? What sort of labor relation?

[20] Davidov, "The status of Uber drivers", [11].

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[21] In this sense, Marie-Cécile Escande-Varniol: "*Pour accorder un minimum de protection aux travailleurs concernés et préserver des régimes de protection sociale appuyés sur le contrat de travail subordonné, la solution du forçage du contrat risque de ne pas être tenable à long terme. Une solution plus pérenne et adaptée serait d'une part d'élargir la notion de travailleur afin de sortir du seul critère de la subordination et d'ouvrir les portes du champ du droit du travail afin de construire un* état professionnel de la personne (*A. Supiot,* Les voies d'une vraie réforme en droit du travail, introduction à la nouvelle édition du rapport. Au-delà de l' emploi, *Flammarion 2016*). *Le droit comparé montre la convergence d'une lente évolution en ce sens, le droit français n'étant pas en reste à travers des réformes récentes incluant les travailleurs indépendants dans de nouvelles protections (on pense particulièrement ici au CPA).*" (Escande-Varniol, "L'Ubérisation, un Phénomène Global", 173).

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