

# LABOUR AND LABOUR LAW IN THE TIME OF THE ON-DEMAND ECONOMY

EMANUELE DAGNINO

*PhD Candidate at the University of Bergamo - ADAPT*

Fecha de recepción: 9/11/2016

Fecha de aceptación: 18/11/2016

**SUMARIO:** 1. INTRODUCTION. 2. THE WORKING CONDITION OF THE ON-DEMAND WORKFORCE. 2.1. The on-demand workforce; 2.2. Focusing on the working conditions: why and how?; 2.3. Working conditions in the on-demand economy. 3. WORKERS' PROTECTION AND MARKET CONSTRUCTION. 4. THE PATTERNS OF INCLUSION. CROSSING THE PILLARS OF HERCULES: A NEW SCOPE BEYOND EMPLOYEES. 5. CONCLUSION.

**RESUMEN:** El artículo analiza las dinámicas de la economía on-demand desde la perspectiva del Derecho del Trabajo (en el sentido amplio de regulación que se refiere a los trabajadores) para (1) entender las condiciones de trabajo en la economía on-demand que derivan del marco legislativo actual; (2) evaluar la capacidad del Derecho del Trabajo, en su estado actual, para responder a los retos derivados de este nuevo fenómeno; y (3) proponer posibles soluciones en caso de que sea necesario reformar la legislación laboral.

**ABSTRACT:** The contribution analyses the dynamics of the on-demand economy from a labour law (in the broad meaning of regulation regarding the workers) perspective to (1) understand the working conditions in the on-demand economy, accounting for the actual legislative framework; (2) evaluate the capacity of the labour law, as it stands today, to

address the challenges of this disruptive phenomenon; and (3) propose a possible policy approach in case of a need to reform labour regulation.

**PALABRAS CLAVE:** Economía on-demand, economía compartida, Derecho del Trabajo, futuro del trabajo.

**KEYWORDS:** On-demand economy, sharing economy, labour law, future of work.

## 1. INTRODUCTION

Technological advances assume different forms in the new reality of work. Many are the phenomena that, in association with technological innovation, are reshaping ways of working -inside or outside companies- and the very functioning of the labour market. Some examples, *inter alia*, are: job polarization, Industry 4.0, consumer work and digital labor<sup>1</sup>.

In this context, a groundbreaking phenomenon, which is becoming increasingly relevant in the labour market of many advanced economies<sup>2</sup>, is known as, among other names, the on-demand economy. Defining the on-demand economy and distinguishing it from other phenomena occurring in the new reality of economic relations are not simple tasks. On the one hand, many other names are used to refer to this phenomenon, such as the «sharing economy»<sup>3</sup>, «collaborative economy»<sup>4</sup> and «crowd-employment». On the other hand, because this phenomenon is ongoing, its manifestations may change<sup>5</sup>.

.....

1 Regarding the impact of technology on work, see the report «Transformation numérique et vie au Travail» (also called «*Rapport Mettling*»), released in September 2015 by a group of experts led by Bruno Mettling (Deputy CEO of Orange). The report is available at [http://travail-emploi.gouv.fr/IMG/pdf/rapport\\_mettling\\_transformation\\_numerique\\_vie\\_au\\_travail.pdf](http://travail-emploi.gouv.fr/IMG/pdf/rapport_mettling_transformation_numerique_vie_au_travail.pdf). See also C. DEGRYSE, «Digitalisation of the economy and its impact on labour markets», *ETUI*, 2016.02.

2 J. DOKKO ET AL., «Workers and the Online Gig Economy», *Hamilton Project Framing Paper*, December 2015, p. 3. See also M. CHERRY, «Beyond Misclassification: The Digital Transformation of Work», *Comparative Labor Law & Policy Journal*, Vol. 37, num. 3, 2016, pp. 577, 578. It is worth noting that the expansion of the on-demand economy is one reason the U.S. Department of Labor has decided to «rerun the Contingent Worker Supplement to the Current Population Survey. It will give us reliable, credible insight into what's going on across a range of work arrangements - from independent contractors to temporary employees to workers holding multiple jobs at the same time». Secretary T. PEREZ, «Innovation and the Contingent Workforce», January 25, 2016 (<http://blog.dol.gov/2016/01/25/innovation-and-the-contingent-workforce/>).

3 While the expression «sharing economy» is often used to refer to services such as those provided by Uber and Taskrabbit, I agree with commentators who prefer a narrower definition. See, *inter alios*, R. BOTSMAN, «Defining The Sharing Economy: What Is Collaborative Consumption - And What Isn't?», *Fastcoexist.com*, May 27, 2015 (<http://www.fastcoexist.com/3046119/defining-the-sharing-economy-what-is-collaborative-consumption-and-what-isnt>); F. PICK, J. DREHER, «Sustaining hierarchy - Uber isn't sharing», *Kings Review*, May 5, 2015 (<http://kingsreview.co.uk/magazine/blog/2015/05/05/beyond-hierarchy-why-uber-isnt-part-of-the-sharing-economy/#top>).

4 See, for example, the Communication COM(2016) 356 - A European agenda for the collaborative economy, issued by the European Commission (June 2, 2016). For a brief comment on the Communication see E. DAGNINO, «Work in the Sharing Economy. The Position of the EU Commission», *The Future of Work - ADAPT Special Bulletin in collaboration with CIETT*, no. 5/2016.

5 Recently, two major lawsuits regarding the most known companies (Uber and Lyft) were settled through agreements that involve, beyond the plaintiffs, the position of everyone working for the platforms, as they regard the terms of service established by the company. See P. IZVANARIU, «Matters Settled but Not Resolved: Worker Misclassification in the Rideshare Sector», *Institute for Research on Labor and Employment UCLA, Working Paper*, June 8, 2016, pp. 15 ff. The settlements need a final approval by the judge, which had not yet been issued in both cases.

The on-demand economy, can be defined as the economic activity of immediately matching supply and demand of services and goods through a technological platform. I will use the expression with reference to the mediation of services in both the virtual and the physical worlds<sup>6</sup>. Different companies and services are included in this broad definition, ranging from Amazon Mechanical Turk to Upwork and UpCounsel, from Uber and Taskrabbit to Medicast. Because the services mediated by the platforms, sometimes called «tasks», are actually work performances, it is important to analyse the dynamics of the on-demand economy from a labour law (in the broad meaning of regulation regarding the workers) perspective to (1) understand the working conditions in the on-demand economy, accounting for the actual legislative framework; (2) evaluate the capacity of the labour law, as it stands today, to address the challenges of this disruptive phenomenon; and (3) propose a possible policy approach in case of a need to reform labour regulation.

## 2. THE WORKING CONDITIONS OF THE ON-DEMAND WORKFORCE

### 2.1. The on-demand workforce

The first question to address in such an analysis is: who is in the on-demand workforce?

Regarding the composition of the workforce that provides services in the on-demand economy, the fundamental concept is that of heterogeneity. As noted above, the expression of on-demand economy has a broad meaning: it can be applied to refer to many different platforms, that mediates services of various types. They range, for example, from transportation (ride-sharing?) services (Uber), to design (Upwork), from «clickworking»<sup>7</sup> (Amazon Mechanical Turk) to repairs (Taskrabbit), and from medical services (Medicare) to legal consulting (UpCounsel).



6 ( ) The expression is used in the same sense as in R. SMITH, S. LEBERSTEIN, «Rights on demand: Ensuring Workplace Standards and Worker Security in the On-Demand Economy», *National Employment Law Project*, September 2015. See also R. TEODORO ET AL., «The Motivations and Experiences of the On-Demand Mobile Workforce», in *Proceedings of the 17th ACM conference on Computer supported cooperative work & social computing*, 2014, p. 236, where the authors use the expressions «on-demand mobile workforce» (referring «to the workers who complete physical world tasks») and «on-demand virtual workforce», referring to the workers in the virtual world. Another widely used expression is «gig economy».

7 Clickworking is undertaken in the context of crowdsourcing. One work project is subdivided into smaller tasks that require a minimum of worker awareness. As noted, «the «click» in clickworkers, and in clickworking as well, is onomatopoeia for the noise a worker makes when «clicking» his or her computer mouse». M. A. CHERRY, «The Global Dimension of Virtual Work», *Saint Louis University Law Journal*, Vol. 54, num. 2, p. 480.

In this regard, the tasks mediated differ in terms of not only their localization (i.e., either the physical or the virtual world) but also the skills required, complexity, and levels of payment and autonomy<sup>8</sup>. Consequently, working conditions differ slightly with differences that emerge in relation to the tasks. The platforms also differ regarding the variety of tasks mediated: some platforms mediate only a specific task, while others mediate different tasks<sup>9</sup>.

By contrast, workers do not differ only with reference to the characteristics of the tasks. Another fundamental feature of the on-demand workforce composition relates to the hours dedicated by the workers to on-demand activities and the related economic expectations. From this perspective, it is possible to distinguish workers for whom work on demand is the sole or main activity and workers for whom it is a secondary activity<sup>10,11</sup>.

These differences affect worker behavior in terms of the use of the platforms and their needs and weaknesses. Based on these differences, workers are more or less exposed to the dynamics of the labour market created by the platform, with reference, among other market features, both to competition and to the entry costs.

Despite heterogeneity, I argue that, focusing on the functioning of the business model, it is possible to identify similar consequences for workers' conditions in the different platforms. The economic model presents communal features in its diverse expressions, demonstrating similar dynamics, even if of differing intensities.

Nevertheless, the outcomes undoubtedly affect low wage workers, for whom «platform work» is the main activity, more severely: thus, they will be the principal workers referenced in the next section.



8 B. BERGVALL-KAREBORN, D. HOWCROFT, «Amazon Mechanical Turk and the Commodification of Labour», *New Technology, Work and Employment*, Vol. 29, num. 3, 2014, pp. 213, 214.

9 A. TODOLÌ-SIGNES, «The End of the Subordinate Worker: Sharing Economy, On-Demand Economy, Crowdsourcing, Uber Economy and Other Ways of Outsourcing», (December 21, 2015). Available at SSRN <http://ssrn.com/abstract=2719772>.

10 See J. V. HALL, A. B. KRUEGER, «An Analysis of the Labor Market for Uber's Driver Partners in the United States», *Working Papers (Princeton University, Industrial Relations Section) n. 587*, January 2015, where mentioned data from a Benenson Strategy Group survey appear, referred to on December 2014. In particular, «Uber's driver-partners fall into three roughly equal-sized groups: driver-partners who are partnering with Uber and have no other job (38 percent), driver-partners who work full-time on another job and partner with Uber (31 percent), and driver-partners who have a part-time job apart from Uber and partner with Uber (30 percent)». Regarding the income: «driving on the Uber platform provides an important source of income for driver-partners. For nearly one-quarter of driver-partners (24 percent), Uber is their only source of personal income, and for another 16 percent, Uber is their largest but not only source of income. More than one third of driver-partners view income earned on the Uber platform as a supplement to their income but not a significant source (38 percent)».

11 The fact that a sizeable share of individuals undertake work mediated by platforms only as a secondary activity is also an important argument raised by the companies in the litigation to reclassify workers as employees. See N. ZATZ, «Is Uber Wagging the Dog With Its Moonlighting Drivers?», *Onlabor*, February 1, 2016 (<http://onlabor.org/2016/02/01/is-uber-wagging-the-dog-with-its-moonlighting-drivers/>). Regarding the litigations concerning the classification of workers in the on-demand economy, see *infra*, § 2.2.

## 2.2 Focusing on the working conditions: why and how?

While the debate concerning the so-called sharing economy and its capacity to provide good jobs has been structured around two argumentative poles, the one of autonomy/flexibility and the one of precariousness<sup>12</sup>, the following analysis of the on-demand economy will focus on the conditions of the workforce toward understanding whether intervention is required to make the model socially sustainable.

From a labour perspective, the fundamental feature of the economic model is the type of relationship established between worker and platform: there is no employment relationship between the company running the platform and the worker using the platform<sup>13</sup>. As the conditions of service of the platform often clearly state, the worker status is to be regarded as that of independent contractor, and the platform, as a mere intermediary<sup>14</sup>.

According to N. Zatz, three types of reason explain the concerns about «work outside traditional employment [...]». In order of increasingly profound challenge to an employment-centered ‘idea of labour law’, these are misclassification, displacement, and exclusion»<sup>15</sup>.

Even if this classification is promoted by the companies, the characteristics of the work relationship, as has been outlined by the first commentators inside and outside the courts, make it difficult to include the relationship in the traditional categories of labour law<sup>16</sup>. On the one hand, workers decide where, when and whether to work and possess a degree of autonomy regarding their ways of working, autonomy which varies from company to company. On the other hand, companies supply advice concerning how the work should be performed, establish reputational systems used to exert an overall control over the quality of the services provided, and decide whether and when to deactivate the workers’

.....

12 See, for example, «Can the Sharing Economy Provide Good Jobs?», *The Wall Street Journal*, May 10, 2015 (<http://www.wsj.com/articles/can-the-sharing-economy-provide-good-jobs-1431288393>). In this article, Rachel Botsman and Andrew Keen expose their opposite positions. For more information on the autonomy/flexibility argumentation, see T. KALANICK (Uber CEO), «The Future of Work: Independence and Flexibility», *Pacific Standard*, October 15, 2015 (<http://www.psmag.com/business-economics/the-future-of-work-independence-and-flexibility>).

13 R. SMITH, S. LEBERSTEIN, «Rights on demand», *op. cit.*, p. 3, regard the independent contractor classification as a «core feature» of the business model.

14 The cases of on-demand services offered by companies employing their workers are beyond the scope of the present study. For information on these cases see A. KAMDAR, «Why Some Gig Economy Startups Are Reclassifying Workers as Employees», *Onlabor*, February 19, 2016 (<http://onlabor.org/2016/02/19/why-some-gig-economy-startups-are-reclassifying-workers-as-employees/>).

15 N. ZATZ, «The Impossibility of Work Law», in G. DAVIDOV, B. LANGILLE (eds.), *The Idea of Labour Law*, Oxford University Press, 2011, p. 240.

16 Paradigmatic, and widely quoted, the order by judge Chhabria in *Cotter et al. vs. Lyft, Inc.*, Case No. 13-cv-04065-VC, Order denying cross-motions for summary judgment. In the academic field, see, *inter alios*, B. MEANS, J. SEINER, «Navigating the Uber Economy», *U.C. Davis Law Review*, Vol. 49, 2016, pp. 1511-1549. See also the above-mentioned Communication COM(2016) 356.

account on a given technological platform. Moreover, they may also determine the price of the service, as for example, Uber does.

By being classified as independent contractors, workers are usually ineligible for the rights and protections provided by labour law, because they fall outside the traditional coverage of labour regulations<sup>17</sup>. It is unsurprising that lawsuits seeking to obtain a reclassification of the relationship have abounded in recent months, most of all in the US<sup>18</sup>: many of the weaknesses of the on-demand workforce, in fact, derive from the inapplicability of labour regulations. While some of these actions have ended in the reclassification of workers' status<sup>19</sup> and although some administrative boards have echoed this opinion<sup>20</sup>, I believe that the protection of workers in the new reality of work should not rely on reclassification because the work relationships in it are too variegated to be identified by the tests and because, in many legal systems (for example, the American legal system), there are different tests for different statutes<sup>21</sup> and in different states<sup>22</sup>.

As noted, the classification of workers in the gray area poses a major concern and problem to the enforcement of labour law. Currently, the situation seems to have worsened, and the definition of employee is increasingly removed from the elephant test Lord Wedderburn mentioned: the employment contract as «an animal too difficult to define, but easy to recognize when you see it»<sup>23</sup>. Maybe the classification of an employee is similar to a *twin test*: in some cases, it is impossible to distinguish an employee from an independent contractor. Thus, while some scholars have elaborated how the categories should be interpreted to better address the new work relationships<sup>24</sup>, in this article, I wonder if



17 For a comparative analysis see G. DAVIDOV, M. FREEDLAND, N. KOUNTOURIS, «The Subjects of Labor law: «Employees» and Other Workers», in M. FINKIN, G. MUNDLAK (Eds.), *Research Handbook in Comparative Labor Law*, Edward Elgar, 2015, p. 115.

18 To be accurate, before the wave of lawsuits against on-demand economy companies in the physical world, the first known lawsuit aimed at reclassification was *Otey vs. Crowdfunder, Inc. et al.*, Case No. 4:2012cv05524. For an overview on the lawsuits see M. A. CHERRY, «Beyond Misclassification», *op. cit.*, pp. 579 ff.

19 See *Berwick vs Uber Technologies, Inc.* Case. No. 11-46739 EK, Order, decision or award of the Labor Commissioner.

20 See, for example, the «Advisory Opinion of the Commissioner of the Bureau of Labor and Industries of the State of Oregon, Regarding: the Employment Status of Uber Drivers», October 14, 2015. It is known that the same conclusion arose, outside the US, in the Inspección de Trabajo de Cataluña; see, E. M. SIERRA BENITEZ, «Los conductores de vehículos privados de uberpop: una nueva situación de anomia laboral», in AA. VV., *El Derecho del Trabajo y la Seguridad Social en la encrucijada: retos para la disciplina laboral*, Laborum, Murcia, 2016.

21 S. D. HARRIS, A. B. KRUEGER, «A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The «Independent Worker»», *The Hamilton Project, Discussion Paper 2015/10*, December 2015, 6.

22 See, with specific reference to Uber, H. ROSS, «Ridesharing's House Of Cards: O'Connor v. Uber Technologies, Inc. and The Viability of Uber's Labor Model in Washington», *Washington Law Review*, vol. 90, 2015, p. 1431.

23 K. W. WEDDERBURN, *The Worker and the Law*, Penguin, Harmondsworth, 1986, p. 116.

24 See, e.g., B. ROGERS, «Employment Rights in the Platform Economy: Getting Back to Basics», *Harvard Law & Policy Review*, vol. 40, 2016, pp. 479-520; B. MEANS, J. A. SEINER, «Navigating the Uber Economy», *op. cit.*, and R. SPRAGUE, «Worker (Mis)Classification in the Sharing Economy: Square Pegs Trying to Fit in Round Holes», 31 A.B.A. J. Lab. & Emp. L. 2015. Outside the U.S., see E. M. SIERRA BENITEZ, «Los conductores de vehículos privados de uberpop», *op. cit.*, and A. GINÈS I FABRELLAS, S. GÁLVEZ DURAN, «Sharing economy vs. uber economy y las fronteras del Derecho del Trabajo: la (des)protección de los trabajadores en el nuevo entorno digital», InDret, January 21, 2016, available at [http://www.indret.com/pdf/1212\\_es.pdf](http://www.indret.com/pdf/1212_es.pdf).

instead of applying and reinterpreting the outmoded tests of the 20th century, a legislative intervention could provide a preferable solution.

In this regards, still relying on Zatz's argument, the conditions of the on-demand workforce can be analysed from the «displacement» perspective and from the «exclusion» perspective.

As for the displacement, «[i]nsofar as the nonemployment form offers advantages - including nonapplication of labour law - employees may be pushed aside [...]. More subtly, labour standards within employment relationships may face downward pressure from the threat of such displacement»<sup>25</sup>. This argument could lead to antidisplacement rethoric as a justification for a legislative intervention.

Regarding the on-demand economy, it is still difficult to understand if the jobs promoted by the platforms are displacing more steady jobs. Even if some studies on the matter have been issued<sup>26</sup>, this kind of analysis needs a sector-by-sector approach and a better understanding of the link between platform economy and shadow economy. While in some sector it is possible to face displacement, in some other the on-demand economy «transfers transactions that were probably conducted in the shadow economy to the formal sector»<sup>27</sup>.

Instead of focusing on displacement, since «employment is underinclusive of the work relationships that merit protection or support»<sup>28</sup>, the article aims to deepen the on-demand economy from the exclusion perspective in order to address some major questions. How does exclusion (from labour protections) affect workers in the on-demand economy? Do they need labour protections?

### 2.3 Working conditions in the on-demand economy

Beyond unresolved issues concerning the worker status of the independent contractor, the functioning of the platforms poses some problems to workers. By considering the weaknesses related to the business model in general, I identify three fundamental aspects in relation to which I analyse the conditions and the weaknesses of the on-demand workforce: economic security and workers' safety, reputation and education/training.

It is important to add another aspect to these three fundamental aspects: the problem regarding the formation of a collective voice. This aspect serves as concomitantly a con-



25 N. ZATZ, «The Impossibility of Work Law», *op. cit.*, p. 241.

26 See, e. g., S. WAHEED ET AL, «Ridesharing or Ridestealing? Changes in Taxi Ridership and Revenue in Los Angeles 2009-2014», *Policy Brief UCLA Labor Center*, July 2015 and B. FANG ET AL., «Effect of sharing economy on tourism industry employment», *Annal of Tourism Research*, vol. 57, in press.

27 I. MASELLI ET AL., «Five things we need to know about the on-demand economy», *CEPS Essay*, no. 21, 8 January 2016.

28 N. ZATZ, «The Impossibility of Work Law», *op. cit.*, p. 243.

dition of weakness and a circumstance that precludes an improvement in working conditions related to the other aspects. On the one hand, the problem stems from a regulatory issue because of the use of some of the typical instruments of workers' claims, i.e., strike<sup>29</sup> and collective bargaining, and because some of the prerogatives of unions and workers' representatives are exclusively linked to the status of the employee<sup>30, 31</sup>. On the other hand, there are substantial motivations deriving from features connected to the functioning of the model and of the platforms: the heterogeneity and the high turnover of the workforce, the absence of face to face interactions, the precariousness of economic conditions and the possible outcomes in term of reputation and the availability of work due to protests<sup>32</sup>. Despite these difficulties, attempts to build a collective voice and to set collective organizations in the context of the on-demand economy are emerging, in different forms (new and traditional unions; online communities) and with different aims and instruments, ranging from the sharing of information about the clients to the active support in getting benefits and to the organization of protests<sup>33</sup>. Last December, the Seattle City Council passed a law granting the right to unionize to drivers, including the drivers working for on-demand services: against this decision, the U.S. Chamber of Commerce protested, filing a lawsuit against the bill<sup>34</sup>. A petition to the NLRB (National Labor Relations Board) was recently filed by an organized group of Uber drivers serving the New York airport in La Guardia<sup>35</sup>: this will provide another case to analyse the application of the traditional tests of employment status. Finally, in the «Uber Settlement», the company has agreed to help establish a drivers association, which is something different from a union<sup>36</sup>.

.....

29 See B. ROGERS, «The Social Cost of Uber», *University of Chicago Law Review Dialogue*, Vol. 82, 2015, p.100; V. DE STEFANO, «The Rise of the «Just-in-Time Workforce». On-Demand Work, Crowd Work and the Casualization of Labour: Towards a 2.0 Putting-Out System?» *Presentation at 4th Conference of the Regulating for Decent Work Network* (July 8-10, 2015) and, with specific reference to crowdwork, A. FELSTINER, «Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry», *Berkeley Journal of Employment & Labor Law*, Vol. 32, 2011, p.180.

30 See R. SMITH, S. LEBERSTEIN, «Rights on demand», *op. cit.*, p. 4. See also F. ZLOTNICK, «The Future of Work: Uniting Workers in the Gigging Economy», *Pacific Standard*, August 5, 2015 (<http://www.psmag.com/business-economics/the-future-of-work-uniting-workers-in-the-gigging-economy>).

31 In this regard, paradigmatic was a tweet by Charlotte Garden, that commenting a tweet from another user stating «Video Shows Uber Employee Recording Footage of Protesting Drivers», wrote «Could be a labor law violation, if drivers are employees» (February 2, 2016).

32 See N. SALEHI ET AL., «We Are Dynamo: Overcoming Stalling and Friction in Collective Action for Crowd Workers», in *Proceedings of the 33rd Annual ACM Conference on Human Factors in Computing Systems*, ACM, New York, 2015, pp. 1621 ff.

33 See, e.g., the action of We Are Dynamo, FairCrowdWork (run by IGMetal) and Freelancer Union. With reference to workers' movements in the on-demand economy, see N. SCHEIBER, «Uber Drivers and Others in the Gig Economy Take a Stand», *The New York Times*, February 2, 2016 (<http://www.nytimes.com/2016/02/03/business/uber-drivers-and-others-in-the-gig-economy-take-a-stand.html?smid=tw-share&r=0>).

34 See V. DONG, «U.S. Chamber of Commerce to Seattle: Collective Bargaining for Uber Drivers Violates Antitrust», *Onlabor*, April 14, 2016 (<https://onlabor.org/2016/04/14/u-s-chamber-of-commerce-alleges-seattle-collective-bargaining-rights-for-uber-lyft-drivers-violates-federal-antitrust-laws/>).

35 See J. WEINBERG, «Gig News: Union Files NLRB Petition to Represent Uber Drivers in New York», *Onlabor*, February 3, 2016 (<http://onlabor.org/2016/02/03/gig-news-union-files-nlrp-petition-to-represent-uber-drivers-in-new-york/>).

36 See B. SACHS, «On The Uber Settlement & What's Next for Drivers», *Onlabor*, April 22, 2016 (<https://onlabor.org/2016/04/22/on-the-uber-settlement-whats-next-for-drivers/>).

An economic issue related to the business model is income insecurity and instability<sup>37</sup>. Because they are independent contractors, «on-demand workers» bear the costs of their activities, do not receive the economic protections they would with the status of employee (for example, the minimum wage, sick leave, paid holidays) and often lie beyond the scope of coverage of social security systems and related treatments. Additionally, the markets created by the platforms seem to fluctuate highly, in terms of not only demand but also supply in particular. Being structured around the capitalization of assets people already possess (material means, time, skills), the market competition will be highly affected by general economic conditions (for example, unemployment and underemployment rates), particularly where the activities mediated do not require particular skills and costs of entry. The said characteristics affect the level of remuneration of the activities performed using the platforms that are not high even for the tasks in the physical world, despite the claims of some companies<sup>38</sup>, and are significantly low for crowdworking activities.

In general, in the absence of protection for the workers engaged in the platforms<sup>39</sup>, we are witnessing a shift in risk from the companies to these micro-entrepreneurs; the situation is exacerbated in cases, as in many crowd employment platform mediating services in the virtual world, in which the requesters can refuse the work completed by the workers<sup>40</sup>.

The situation of income insecurity and instability as outlined also bears consequences for the health and safety of workers, who, given their employment status, are ineligible for such protections under the traditional labour law. It is possible to distinguish a direct consequence related to the effects of this situation of precariousness on workforce well-being and indirect consequences arising from how the situation affects the behavior of the worker as an entrepreneur. The economic conditions impact the possibility and the propensity of workers to invest in the appropriate equipment to ensure their own safety, the quality of tasks chosen and the times they decide to be available to receive work through

37 On income insecurity, see also V. DE STEFANO, «The Rise of the» Just-in-Time Workforce»: On-Demand Work, Crowdwork, and Labor Protection in the «Gig Economy», *Comparative Labor Law & Policy Journal*, Vol. 37, num. 3, 2016, p. 479 ff.

38 See R. SMITH, S. LEBERSTEIN, «Rights on demand», *op. cit.*, at 5 ff. With reference to crowdwork, see EUROFOUND, *New forms of employment*, European Foundation for the Improvement of Living and Working Conditions, 2015, p. 115 and J. BERG, «Income Security in the On-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers», *Comparative Labor Law & Policy Journal*, Vol. 37, num. 3, 2016, pp. 543-576.

39 See, *inter alios*, R. SPRAGUE, «Worker (Mis)Classification in the Sharing Economy», *op. cit.*, p. 4, and R. SMITH, S. LEBERSTEIN, «Rights on demand», *op. cit.*, p. 2. The shift in risk could be considered in continuity with the phenomenon of the «demutualization of risk» occurring in other sectors of the labour market (V. DE STEFANO, «The Rise of the» Just-in-Time Workforce», *op. cit.*, pp. 480 ff) or as «a new allocation of risk and reward» (B. ROGERS, «The Social Cost of Uber», *op. cit.*, p. 98). Even from the second perspective, however, the new allocation seems to shift risks to workers.

40 See M. RISAK, J. WARTER, «Decent Crowdwork. Legal Strategies towards fair employment conditions in the virtual sweatshop», *Paper presented at the 4th Conference of the Regulating for Decent Work Network* (July 8-10, 2015). The rejection, as I will explain *infra*, «has an effect on a Turker's [generally, on a worker's] online reputation and ability to compete for work in the future» (M. A. CHERRY, «The Global Dimension», *op. cit.*, p. 481).

the platform. More specifically, the circumstances could pressure on-demand workers to increase working hours beyond sustainable limits<sup>41</sup> (i.e., beyond the limits posed by employment regulation to protect employees): the risk of overworking is real, with possible effects on society as an entirety<sup>42</sup>.

It has been clearly explained that reputational systems are a crucial asset to the on-demand economy success because they permit the surmounting of traditional problems arising from information asymmetry in the market, that is, from a consumer perspective<sup>43</sup>. For the workers, these systems, based on feedback and reviews, raise important concerns, particularly because the possibility of obtaining work through the platform is strictly linked to the rating of the worker as published on the platform<sup>44</sup>.

Some problems are based on the unfair use of the system. In particular, the reputational systems can be used in discriminatory ways, facilitated by untruthful assessments aiming to damage particular workers, or can be manipulated by some users to gain a competitive advantage over their peers. Moreover, the platform is furnished by the company «as is», exempt from liabilities for the maintenance of the service level<sup>45</sup>; on the other hand, workers are not covered by the protections provided by labour law only to employees<sup>46</sup>, but only by a part of the anti-discrimination legislation<sup>47</sup>.

Other issues are, however, related to the very functioning of the reputational systems, namely, in the absence of system misuse. Three such issues appear to spur problematic effects:



41 ILO, «Non-standard forms of employment», *Report for discussion at the Meeting of Experts on Non-Standard Forms of Employment*, (Geneva, 16-19 February 2015), 18, with reference to working arrangements «with a high level of variability and a lack of predictability in working time and schedules», including crowdwork. See also V. DE STEFANO, «The Rise of the» Just-in-Time Workforce», *op. cit.*, p. 479.

42 Tired workers are more likely to experience or cause accidents, with consequences for the general wellbeing of society and welfare systems.

43 A. D. THIERER ET. AL, «How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve the «Lemons Problem»», *Mercatus Working Paper*, May 2015.

44 The functioning of the reputational systems differs depending on platform. For some platforms, the consequences of low ratings only affect consumer demand, whereas in other cases (Uber and Taskrabbit, for example), low ratings could lead to the deactivation of the account on the platform. For Uber see *O'Connor vs. Uber Technologies, Inc.*, Case No. C-13-3826 EMC, Order denying defendant Uber Technologies, Inc.'s motion for summary judgment. Regarding the consequences of the rating systems for the reclassification process, see B. SACHS, «Uber and Lyft: Customer Reviews and the Right-to-Control», *Onlabor*, May 22, 2015 (<http://onlabor.org/2015/05/20/uber-and-lyft-customer-reviews-and-the-right-to-control/>).

45 A. DONINI, «Il lavoro digitale su piattaforma», *Labour&Law Issues*, Vol. 1, 2015, p. 58.

46 With reference to the Uber case, see B. ROGERS, «The Social Cost of Uber», *op. cit.*, p. 97 and B. SACHS, «Uber: A Platform for Discrimination?», *Onlabor*, 22 October 2015 (<http://onlabor.org/2015/10/22/uber-a-platform-for-discrimination/>); with reference to crowdwork, A. FELSTINER, «Working the Crowd», *op. cit.*, p. 170. The discriminatory concerns related to crowd employment platforms are not limited to reputational systems. See, for the case of the broader sharing economy, N. LEONG, «The sharing economy has a race problem», *Salon*, 2 November 2014 ([http://www.salon.com/2014/11/02/the\\_sharing\\_economy\\_has\\_a\\_race\\_problem/](http://www.salon.com/2014/11/02/the_sharing_economy_has_a_race_problem/)).

47 Regarding the application of provisions contained in statutes beyond the scope of employment law in the US, see N. ZATZ, «Beyond Misclassification: Gig Economy Discrimination Outside Employment Law», *Onlabor*, January 19, 2016 (<http://onlabor.org/2016/01/19/beyond-misclassification-gig-economy-discrimination-outside-employment-law/#more-9141>).

- The pressure to obtain a good rating could lead to so-called «emotional labor», i.e., the effort to remain pleasant with customers, such that workers become servile and deny features of their identity<sup>48</sup>.
- The reputational systems could have consequences for «newer or less affluent users» because «a user's inability early on to establish a reputation, potentially lead[s] to marginalization and exclusion from services»<sup>49</sup>.
- Raising quality standards of performance due to review-based competition affects the possibility of vulnerable workers, specifically workers with a disability<sup>50</sup>, a disease or who are of old age, as well as in terms of competencies, to obtain work through the platforms<sup>51</sup>.

Regarding the third issue, that relates to education and training, we must examine the functioning of the system as an entirety and how the phenomenon of the on-demand economy could be connected with other phenomena occurring in the world of work. We must direct particular attention to the possible link between the on-demand economy and the polarization of the labour market<sup>52</sup> to understand the weakness of workers' positions, as well as of the economic system. Before exploring this issue, it should be noted that in many cases, this economic model, based on micro-entrepreneurship, is taken up by people lacking the required management competencies<sup>53</sup>. The reason for this circumstance relates to the educational systems: if it is true that entrepreneurship education has been a major emphasis in some institutional initiatives, particularly in the EU<sup>54</sup>, then the educational approach seems to have led to prioritizing the aims of job creation, economic growth and, with reference to the people, improving employability. These aims are important, but I

.....

48 B. ROGERS, «The Social Cost of Uber», *op. cit.*, p. 97.

49 This issue was raised by Arun Sundararajan at the Federal Trade Commission workshop «The «Sharing» Economy: Issues Facing Platforms, Participants, and Regulators» (June 9, 2015), as reported by J. BRACY, «In The Sharing Economy Could Reputation Replace Regulation?», *privacyassociation.org*, 10 June 2015 (<https://iapp.org/news/a/in-the-sharing-economy-could-reputation-replace-regulation/>).

50 For the situation of people with disabilities with reference to crowdwork, K. ZYSKOWSKY ET AL., «Accessible Crowdwork? Understanding the Value in and Challenge of Microtask Employment for People with Disabilities», in *Proceedings of the 18th ACM Conference on Computer Supported Cooperative Work & Social Computing*, 2015, pp. 1682 ff.

51 The flexibility provided by on-demand work could also benefit workers with reduced capacities by enabling them to balance their needs with the requirements of their work. See V. DE STEFANO, «The Rise of the» Just-in-Time Workforce», *op. cit.*, p. 479.

52 Regarding job polarisation, as the process of erosion of middle skill, middle wage jobs and the growth of both high skill, high wage and low skill, low wage jobs, due to the automation of tasks, see the work of M. GOOS and A. MANNINGS, starting from «Lousy and Lovely Jobs: The Rising Polarization of Work in Britain», *Center for Economic Performance Discussion Papers dp0604*, December 2003. Recently, *inter alios*, D. AUTOR, «Polanyi's Paradox and the Shape of Employment Growth», *Paper prepared for Federal Reserve Bank of Kansas*, Jackson Hole Conference (August 22, 2014).

53 According to the «2015 1099 Economy Workforce Report» by Requests for Startups, a major concern, the second concern after the capacity to obtain the required amount of work, is understanding the bureaucracy surrounding their status.

54 See the report «Entrepreneurship education: a road to success. A compilation of evidence on the impact of entrepreneurship education strategies and measures», European Union, 2015, p. 7, which highlights that to «entrepreneurship education is given a significant role in supporting the main goals of the Europe 2020 strategy; growths and jobs».

believe that the approach to entrepreneurship education should be enriched from a «capabilities» perspective because the new reality of work is witnessing increased numbers of independent contractors and micro-entrepreneurs and because of the frequency of occupational transition between dependent and independent work.

It is also worth highlighting that the economic model assumes that workers already possess the necessary assets for such activities, including skills. Consequently, acquiring and refining work skills are workers' responsibility. Because, as has been correctly noticed, «skills are not costless to obtain, nor do they come without risk»<sup>55</sup>, and «skills are an investment and often what economists call a «specific investment» - an investment that is tied to a particular line of work, industry, or technology»<sup>56</sup>, this delegation of responsibility to workers could be seen as consonant with the previously mentioned shift in the bearer of risk. On the one hand, on-demand work seems to exclude the sharing of skills and competencies between the worker and the customer or the platform. On the other hand, there is a regulatory argument that precludes company training provided by the platforms because the fact of receiving training could be considered an index of employee status<sup>57</sup>.

Finally, this situation of worker responsibility, in connection with the phenomenon of job polarization, could result in the marginalization of low wage/low skilled workers and of the workers recruited in the category because the automation process renders their skills obsolete. This dynamic could negatively impact the entire economic system by exacerbating the problems of skills shortage and vertical mismatch (overeducation, overqualification)<sup>58</sup>.

### 3. WORKERS' PROTECTION AND MARKET CONSTRUCTION

Labour regulations, including those mandated by the law and by collective agreements, aim not only to protect workers but also to rationalize production systems and ensure fair competition between companies and between workers<sup>59</sup>. In questioning the introduc-

.....

55 J. S. HACKER, «*The great risk shift: the assault on American jobs, families, health care, and retirement and how you can fight back*, Oxford University Press, 2006, p. 78.

56 J. S. HACKER, *id.*

57 This is a reason why some companies providing on-demand services have shifted to an employer-employee relationship: namely, they can train their workforce without fearing worker reclassification. See E. HUET, «Yet Another On-Demand Service, Sprig, Switches Its Independent Contractors To Employees», *Forbes*, August 6, 2015 (<http://www.forbes.com/sites/ellenhuet/2015/08/06/on-demand-sprig-switches-independent-contractors-to-employees/>). See also A. KAMDAR, «Why Some Gig Economy Startups Are Reclassifying Workers as Employees», *op. cit.*

58 See for the definition of skills shortage, vertical mismatch, overeducation and overqualification ILO, «Skills mismatch in Europe. Statistics brief», *International Labour Office*, September 2014.

59 See M. TIRABOSCHI, *Teoria e pratica dei contratti di lavoro*, Adapt University Press, 2015, p. 4. See also G. LYON-CAEN, «L'infiltration du droit du travail par le droit de la concurrence», *Droit ouvrier*, 1992, pp. 313 ff.

tion of a new regulation to address the on-demand economy phenomenon, it is worth considering the above mentioned weaknesses of the workforce engaged in this form of work, in addition to the effects of this economic model on competition.

Namely, the inapplicability of labour law protections causes two interrelated consequences: one is the workers' position; the other is linked to the competition between companies. Regarding the workers, the inapplicability seems to engender a race to the bottom because the competition is shifted to peers who are working on the platforms and can result in a form of self-exploitation. Regarding the competition between companies, the inapplicability gives companies in the on-demand economy a competitive advantage because companies in the traditional economy must bear the costs resulting from the employer-employee relationship<sup>60</sup>. Contradicting the fundamental principle that «*labour is not a commodity*»<sup>61</sup>, a principle that motivates the efforts to exclude human labour from economic competition, the deterioration of working conditions seems to become an element that permits taking advantage of the market.

Thus, if the question «who will benefit from a legislation aimed to address the challenge of the on-demand economy?» was raised, it is clear that the positive output of such an intervention would interest not only the on-demand workforce but also the economic system.

Why, though, does addressing the issues arising from the on-demand economy require a legislative intervention?

To respond, it is necessary to consider other possibilities. The following three possibilities seem to be the major such possibilities:

a. Judicial reclassification of the work relationship.

Courts may reclassify workers in the on-demand economy as employees, thereby creating new interpretations or adapting the current interpretations of the tests to be applied. Although, as mentioned (*supra* § 2.2), some scholars<sup>62</sup> and some administrations, particularly in the American context<sup>63</sup>, are proceeding in this direction, interpreting the tests in order to fit with the new reality of work, I believe pursuing this direction will prove unproductive.



60 A study, focused on the American case, noted the range of expenses companies save because of the independent contractor classification. See R. HABANS, *Exploring the Costs of Classifying Workers as Independent Contractors: Four Illustrative Sectors*, UCLA Institute for Research on Labor and Employment, December 2015.

61 This foundational principle has characterized the work of the International Labour Organization since its first steps in 1919. The article 427 (General Principles) contained in the XIII Part of the Treaty of Versailles states that «labour should not be regarded merely as a commodity or article of commerce».

62 See *supra* note 24, particularly B. MEANS, J. A. SEINER, «Navigating the Uber Economy», *op. cit.*, where the authors claim that «a significant advantage of the approach we recommend is that its implementation would not require new legislation».

63 See, beyond the on-demand economy phenomenon, USDOL, «Administrator's Interpretation No. 2015-1. Subject: The Application of the Fair Labor Standards Act's «Suffer or Permit» Standard in the Identification of Employees Who Are Misclassified as Independent Contractors», July 15, 2015, issued by David Weil. For a comment on the possible effects of the *Interpretation* on the on-demand economy, see B. SACHS, «New DOL Guidance on Employee Status: News for Uber or Lyft?», *Onlabor*, June 22, 2015 (<http://onlabor.org/2015/07/15/new-dol-guidance-on-employee-status-news-for-uber-or-lyft/>).

First, modifying the tests and the *indicia* used to determine the type of work relationship, thus supplementing or expanding the relevant legislation, is extremely difficult, particularly in civil law systems. Second, even after doing so, the resulting tests may not be able to address the many different forms of the on-demand economy, resulting in different classification for the workers of the various on-demand companies, even if they have characteristics and weaknesses that deserve a similar treatment. Third, as previously noted, in many cases to the same relationship should be applied different tests for different statutes and in different countries: the consequence is a high unpredictability of the classification. Finally, as the tests remain based on the old definitions specified by labour law statutes, it is unlikely that they would be able to account for the peculiarities of the new economic model.

Moreover, once reclassified, the workers will be covered by a set of protections intended for another type of worker and responding to the proper features of that type of worker. Although reclassification does not imply a change in the flexibility provided by the economic model to the workers<sup>64</sup>, there remain some peculiar conditions of this type of worker that demand specific regulations (as, for example, for the functioning of reputational systems, as well as for the method of quantifying the hours worked).

An argument has been set forth<sup>65</sup>, which is valid for a legislative intervention as well as for a judicial interpretation of the test of employment status. This argument maintains that, from a market competition perspective, reclassification could be used to encourage competition between platforms and avoid the formation of monopolies: such an outcome would be possible «if 1099 status required that suppliers multihome [...] in a substantive, not mere token way». The suggestion, as expressly admitted by its Author, would be positive for customers, not for workers: in the given legal framework, workers would experience more difficulties in the proposed reclassification (i.e., they would be forced to multihome)<sup>66</sup>. The argument proposes to address the problem by providing an unconditional basic income. I agree with Sachs' counterarguments: «The risk, then, is that we end up adopting the pro-competition policy and don't get the worker-protective policy to go along with it. [...] and more important, being an employee under current law is important for reasons that go beyond the right to earn a minimum income»<sup>67</sup>. However, even from a market competition perspective, the proposal is inadequate without other interventions because, while it ensures competition between platforms, it confirms the competitive advantage of companies using the platforms over other companies avoiding the costs of an employer-employee relationship.

.....

64 See B. SACHS, «Uber: Employee Status and «Flexibility»», *Onlabor*, September 25, 2015 (<http://onlabor.org/2015/09/25/uber-employee-status-and-flexibility/>).

65 The argument, provided by Steve Randy Waldman in his blog *interfluidity.com* (post titled «1099 as antitrust», September 27, 2015; <http://www.interfluidity.com/v2/6165.html>) was mentioned and discussed by B. SACHS, «1099 as Antitrust?», *Onlabor*, September 29, 2015 (<http://onlabor.org/2015/09/29/1099-as-antitrust/>).

66 In this context «multihome» means that workers provide their services through multiple platforms.

67 B. SACHS, *id.*

b. Platform cooperativism, i.e., the workers' ownership of the platform, which mediates their work<sup>68</sup>.

«The principles of platform cooperativism include job security, good pay, transparency, a pleasant working atmosphere (acknowledgment and appreciation), co-determined work, a protective legal framework, weekly work time of 30 to 40 hours, and protection against arbitrary mandates. It rejects excessive workplace surveillance»<sup>69</sup>. While I agree that platform cooperativism could improve working conditions for the on-demand workforce, I believe there are some challenges to this type of organization that should be addressed with regulation<sup>70</sup>. From a competition perspective, two challenges seem particularly relevant: «the implication of antitrust law to platform cooperativism»<sup>71</sup>, and, the competitive advantage of the companies providing platforms to be exempt from compliance with those features of the job. How could cooperative challenge monopolies in this situation?

Additionally, the high turnover of the on-demand workforce poses difficulties both to the structuring of the cooperatives and to the provision of employment related benefits. Most problematically, without a legislative intervention, workers who continue working on traditional platforms would remain without protections.

So, while a regulatory intervention could foster this dynamic, platform cooperativism alone could not be the answer to the challenges posed by the on-demand economy.

c. Self-regulation, i.e., the «reallocation of regulatory responsibility to parties other than the government»<sup>72</sup>.

Why not involve the companies that provide the platforms in regulating the labour aspects of their business? Self-regulation solutions for the so-called sharing economy have been proposed with reference to market failures, in particular, information asymmetry, negative externalities and the blurring of boundaries between the personal and the professional<sup>73</sup>. While self-regulation is broadly defined and can assume different forms<sup>74</sup>, in this field,



68 See T. SCHOLZ, «The Future of Work: The People's Uber», *Pacific Standard*, September 23, 2015 (<http://www.psmag.com/business-economics/the-future-of-work-the-peoples-uber>). See also N. SCHNEIDER, «The Future of Work: Owning What We Share», *Pacific Standard*, September 1, 2015 (<http://www.psmag.com/business-economics/the-future-of-work-owning-what-we-share>).

69 () T. SCHOLZ, *id.*

70 T. SCHOLZ himself, *id.*, acknowledges the presence «of huge challenges» to platform cooperativism, «from the self-organization and management of workers, to technology, UX design, education, long-term funding, scaling, wage scales, competition with multinational corporate giants, and public awareness».

71 This is the headline of the intervention by Valerio De Stefano at the conference «*Platform cooperativism. The Internet. Ownership. Democracy*», November 13-14, 2015.

72 M. COHEN, A. SUNDARARAJAN, «Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy», *University of Chicago Law Review Dialogue*, Vol. 82, 2015, p. 116.

73 M. COHEN, A. SUNDARARAJAN, *id.*, pp. 119 ff.

74 For a synthesis of the different forms, see again M. COHEN, A. SUNDARARAJAN, *id.*, pp. 123 ff. For a complete analysis, see J. BLACK, «Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a «Post-Regulatory» World», *Current Legal Problems*, vol. 54, 2001, p. 103.

we should concentrate on two possibilities: «the main form of self-regulation in industrial relations»<sup>75</sup>, also known as collective bargaining and other form of self-regulation established in accordance with worker voices; or, self-regulation «unilaterally set by businesses»<sup>76</sup>.

As for self-regulation established by bipartite bodies<sup>77</sup>, representing both companies and workers of the on-demand economy, the above-mentioned difficulties - substantial and regulatory as well<sup>78</sup> - seem to preclude the success of such an operation.

Regarding self-regulatory organizations (SRO), without the collective voice, such regulation is likely to be incapable of addressing labour-related problems. Hence, self-regulation has been proposed to regulate some market issues, but as for labour issues, the same author advocates governmental efforts «to modernizing labour policy»<sup>79</sup>.

I believe that a labour law reform could constitute the best instrument for bringing the on-demand economy in relationship with «broader phenomena such as casualization of the workforce, informalisation of the formal economy and the so-called «demutualisation of risk» in modern labour markets», and re-design a legal framework coherent and able to address the challenges raised by the new reality of work<sup>80</sup>.

#### 4. THE PATTERNS OF INCLUSION. CROSSING THE PILLARS OF HERCULES: A NEW SCOPE BEYOND EMPLOYEES

«The goal of regulation is not to impede technological advances, nor need it have that effect»<sup>81</sup>.

How, then, to introduce a regulation that fosters innovation and would be able to protect workers from the negative outcomes of the on-demand economy? How to address the issues arising from the exclusion of these work relationships from labour law?

To respond to these questions, I will use a conceptual tool suggested by Guy Davidov to

75 R. ROGOWSKY, *Reflexive Labour Law in the World Society*, Edward Elgar, 2013, 43.

76 V. DE STEFANO, «The Rise of the» Just-in-Time Workforce», *op. cit.*, p. 503.

77 For an argument favouring this type of self-regulation, see P. TULLINI, «C'è lavoro sul web», *Labour & Law Issues*, vol. 1, 2015, p. 17.

78 See § 2.2. See also the antitrust argument, mentioned under b).

79 A. SUNDARARAJAN, «A social safety fit for the sharing economy», *Financial Times*, June 22, 2015 (<http://www.ft.com/intl/cms/s/0/b1d854de-169f-11e5-b07f-00144feabdc0.html#axzz3qFFDqTt8>). For an argument favoring a self-regulatory approach in the labour field, with specific reference to platforms mediating virtual work, see A. DONINI, «Il lavoro digitale su piattaforma», *op. cit.*, p. 67, and M. A. CHERRY, «The Global Dimension», *op. cit.*, p. 488.

80 See V. DE STEFANO, «The Rise of the» Just-in-Time Workforce», *op. cit.*, p. 473 ff.

81 R. SMITH, S. LEBERSTEIN, «Rights on demand», *op. cit.*, p. 7.

describe and explain labour law coverage, namely, the continuum between universalism and selectivity<sup>82</sup>, because the lack of protection in the on-demand workforce is widely a problem of labour regulation coverage. In particular, on which part of the continuum should a legislative intervention be centered? In attempting to propose the preferable balance between these two poles, I will place in relationship the solutions already proposed in research on the on-demand economy with the components outlined by Davidov to improve the coverage of labour legislation<sup>83</sup>.

The components, as expressed by the author, are the following:

- a) untie connection to non employment-related rights;
- b) correct unjustified exclusion of specific groups;
- c) add an intermediate group of dependent contractors;
- d) use purposive interpretation for additional «corrections»;
- e) add special protections to groups that are particularly vulnerable.

The regulation of labour in the on-demand economy, as clear from reading the positions expressed until now, could be put in connection with any of these components, except for the component under letter b), because the article accounts for the on-demand services in which the workers are classified as independent contractors<sup>84</sup>. Each component intervenes in the traditional *summa divisio* of labour law, even if in different measure with respect to the outcomes.

Before explaining why I believe the most suitable solution could result from a balance between components a) and e), and given the discussion in the previous paragraphs, I briefly review the other positions.

In particular, component d) includes the efforts of scholars and administrative personnel to specify that a certain application of tests and indicia leads, in accordance with the broad definition of employee and the purpose of the regulation, to reclassifying workers<sup>85</sup>. I have already explained my concerns regarding this type of action. From the perspective

82 See G. DAVIDOV, «Setting Labour Law's Coverage: Between Universalism and Selectivity», *Oxford Journal of Legal Studies*, Vol. 34, 2014, p. 543.

83 G. DAVIDOV, *id.*, p. 554 ff.

84 The exclusion argument would be of relevance if we were studying the model adopted in the American context by other companies providing on-demand services. Specifically, some companies chose to re-designate independent contractors as employees, while offering them part-time work. Such actions permit companies to avoid the expenses related to Employer Shared Responsibility provisions in the Affordable Care Act.

85 In the American context, see, *inter alios*, B. ROGERS, «Employment Rights in the Platform Economy», *op. cit.* and the above-mentioned «*Administrator's Interpretation No. 2015-1*», issued by D. Weil. See also G. DAVIDOV, «Guest Post: The Status of Uber Drivers - Part 2: A Purposive Approach», *Onlabor*, May 19, 2016 (<https://onlabor.org/2016/05/19/guest-post-the-status-of-uber-drivers-part-2-a-purposive-approach/>) and G. DAVIDOV, «Guest Post: The Status of Uber Drivers - Part 3: Applying the Tests», *Onlabor*, May 24, 2016 (<https://onlabor.org/2016/05/24/guest-post-the-status-of-uber-drivers-part-3-applying-the-tests/>).

of an analysis of the different possible regulatory interventions, a similar result may be achieved, above all where Courts possess less flexibility in the interpretation of the notion of employee, modifying the definition of employee contained in the law to expand its scope<sup>86</sup>. This type of action generates three major problems. First, it is difficult to individuate a definition of employee that sufficiently encompasses the different types of workers deserving protection in the on-demand economy and in the labour market considered in its entirety. Second, this action remains based on the old system of the «employee takes it all», with the consequence of enabling attempts to disguise the work relationship. Third, as noted above with reference to reclassification, certain peculiarities of the economic model require specific interventions.

Two authors propose<sup>87</sup> a different approach based on a revised definition of employer. Relying on Prassl's - who is one of the authors - functional-typological concept of employer, they propose to identify the relevant employer for each function (namely: *Inception and Termination of the Employment Relationship, Receiving Labour and its Fruits, Providing Work and Pay, Managing the Enterprise-Internal Market, Managing the Enterprise-External Market*) to allocate employment law obligations. According to the proposal, «different employers may bear (or share) a range of obligations, depending always on their specific roles», including the worker, where the relevant employer function is exercised by the worker herself<sup>88</sup>. This challenging proposal, that tries to address the fluidity of nowadays work relations also beyond the context of the on-demand economy, raises some matters. In this broader context, beyond the possible attempts to disguise and the hardship (in some cases) in identifying who is exercising the employer function, the major of these matters is, in my opinion, that the proposal seems to still rely for the provision of protections on the presence of an employment relationship in order to apply the piece of legislation related to the function. As a consequence, where the worker is the employer for a specific function, she would face the weaknesses of her position lacking the needed protections.

The introduction of a new category of workers (component c)), has been widely proposed in relation to the on-demand economy<sup>89</sup>. First, it is worth noting that this category

.....

86 In this sense, peculiar is the case of Italy because the d. lgs. n. 81/2015 expanded the application of labour law to a particular form of employer-organized freelance work, though it is unclear how this expansion should operate and if it could affect worker classification in the on-demand economy. See A. DONINI, «Il lavoro su piattaforma digitale «prende forma» tra autonomia e subordinazione. Nuove regole per nuovi lavori?», *Diritto delle Relazioni Industriali*, 1/2016, pp. 178 ff. and G. BRONZINI, «Il punto su il futuro (giuridico) del lavoro autonomo nell'era della share economy», *Rivista Italiana di Diritto del Lavoro*, 1/2016.

87 J. PRASSL, M. RISAK, «Uber, Taskrabbit & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork», *Comparative Labor Law & Policy Journal*, vol. 37, 619-651.

88 J. PRASSL, M. RISAK, *id.*, p. 650.

89 The claim originates in different sectors: see *Cotter et al. v. Lyft, Inc.*, under VII, p 19, where Judge Chhabria suggested that «perhaps Lyft drivers should be considered a new category of worker altogether, requiring a different set of protections». See also T. ZIER, «Could Creating A New Class Of Worker Solve The Sharing Economy's

could not be that of dependent contractor. In particular, the category of dependent contractor, as known in some countries (for example, Spain), requires workers to be economically dependent on a client, namely, by earning from the work relationship an amount (in percentage terms) that varies from country to country but is always high: this definition would not suit the on-demand economy, even if we consider the platform the source of the workers' income. Moreover, neither the worker nor the business would know the income the worker would gain from such «gigs», so it is impossible to establish beforehand if the worker belongs to the category<sup>90</sup>.

A solid proposal for an intermediate category of workers has been made by two American scholars<sup>91</sup>. They propose to introduce the category of the «independent worker». Unlike the category of dependent contractor that relies on the economic dependence of workers, this intermediate category relies on the existence of a triangular relationship between the worker, who decides when, where and whether to work, the customer and the company. In this relationship, demand is matched to service offers in both online and offline cases. This proposal aims to establish the protections required by this type of worker, avoid the inefficiency of the dichotomy employee/independent contractor in the market and ensure neutrality between the different categories of workers to avoid attempts to opt out of the application of certain regulations (mainly classifying workers as independent contractors). The proposal outlines the benefits and protections to which the independent workers should or should not be entitled<sup>92</sup>: on-demand workers are covered by this set of protections. In my opinion, the proposal, being focused on the sole triangular relationships, fails to place the on-demand economy in relation to other phenomena occurring in the labour market, where it would be possible to see an increase in precarious work outside triangular relationships. According to this proposal, three categories would exist, yet there will be workers lacking fundamental protections, while facing similar concerns and problems.

The same shortcomings apply to another proposal that, rather than creating an intermediate category, relies on the configuration of a distinct regime for the workers of the

.....

Labor Problems?», *FastCoExist*, June 19, 2015 (<http://www.fastcoexist.com/3047617/could-creating-a-new-class-of-worker-solve-the-sharing-economys-labor-problems>) and A. HAGIU, R. BIEDERMAN, «Companies Need an Option Between Contractor and Employee», *Harvard Business Review*, August 21, 2015, (<https://hbr.org/2015/08/companies-need-an-option-between-contractor-and-employee>).

90 Labour law scholars unanimously agree on the unviability of the dependent contractor category. See, *inter alios*, V. DE STEFANO, «The Rise of the» Just-in-Time Workforce», *op. cit.*, pp. 494 ff.; B. SACHS, «A New Category of Worker for the On-Demand Economy?», *Onlabor*, June 22, 2015 (<http://onlabor.org/2015/06/22/a-new-category-of-worker-for-the-on-demand-economy/>); S. D. HARRIS, A. B. KRUEGER, «A Proposal for Modernizing», *op. cit.*, pp. 7-8; A. TODOLÌ-SIGNES, «El impacto de la «Uber Economy» en las relaciones laborales: los efectos de las plataformas virtuales en el contrato de trabajo», *IUSLabor*, 3/2015, p. 19.

91 S. D. HARRIS, A. B. KRUEGER, «A Proposal for Modernizing», *op. cit.*

92 Independent workers, *inter alia*, should have the right to organize and should be covered by civil rights protections but should not be entitled to overtime pay and minimum wage.

on-demand economy within the borders of traditional labour law, thereby specifying a unique set of rules in accordance with the peculiar characteristics of this form of work<sup>93</sup>.

Finally, we may discuss components a) and e). Davidov, explaining the former, writes: «changes of recent decades have made it ever more obvious that we cannot rely on employment status for the delivery of all social rights»<sup>94</sup>. This statement seems to apply particularly to the situation of on-demand economy workers. For this reason, it is understandable why some commentators have directed their attention to rethinking the social safety net, regardless of employment status. It has been proposed that some employment related benefits, such as «health coverage, insurance against workplace injuries, paid vacations and maternity leave»<sup>95</sup>, should be ensured to any worker and decoupled from employment status. The action should extend beyond the safety net: one proposal suggests including the right to paid leave, livable minimum wage, overtime pay, pay equity, and fair scheduling<sup>96</sup>; another proposal recommends expanding protection associated with the Fundamental Principles and Rights to Work («namely freedom of association and the effective recognition of the right to collective bargaining, elimination of all forms of forced or compulsory labour, effective abolition of child labour, elimination of discrimination in respect of employment and occupation») and OSH protections<sup>97</sup>. I agree that decoupling benefits and rights from the employment relationship is the main viable solution for addressing the new reality of work relationships, but I would like to specify a methodological approach in this regard. Namely, the objective should be achieved not by selectively extending a set of rights traditionally tied to the employment relationship but by re-conceptualizing labour law as an entirety, beginning with the pole of universalism.

It has been noted that a hidden asset of the sharing economy «may ultimately be the re-configuration of staid worker relationship models and outdated regulations to accommodate and foster a new, more flexible and likely enduring business model»<sup>98</sup>. It may be time for this type of reconfiguration, specifically for labour regulation to cross the «Pillars of

93 A. TODOLÌ-SIGNES, «El impacto de la «Uber Economy»», *op. cit.*

94 G. DAVIDOV, «Setting Labour Law's Coverage», *op. cit.*, p. 555.

95 A. SUNDARAJAN, «A social safety fit for the sharing economy», *op. cit.* See also PORTABLE BENEFITS, «Common ground for independent workers. Principles for delivering a stable and flexible safety net for all types of work», *Medium*, November 8, 2015 (<https://medium.com/the-wtf-economy/common-ground-for-independent-workers-83f3bfcf548f#.dt7oes76n>), R. SMITH, S. LEBERSTEIN, «Rights on demand», *op. cit.*, p. 12 and J. PISANI-FERRY, «Social Benefits in the Age of Uber», *Project Syndicate*, October 31, 2015 (<https://www.project-syndicate.org/commentary/individual-social-benefits-account-economic-efficiency-by-jean-pisani-ferry-2015-10>).

96 N. HANAUER, D. ROLF, «Shared Security, Shared Growth», *Democracy*, Issue 37, Summer 2015. See also the response to Nick Hanauer and David Rolf by K. STONE, «Beyond Shared Security», *Democracy*, Issue 38, Fall 2015.

97 V. DE STEFANO, «The rise of the «just-in-time workforce»: On-demand work, crowdwork and labour protection in the «gig-economy»», *International Labour Office*, Inclusive Labour Markets, Labour Relations and Working Conditions Branch. - Geneva: ILO, 2016 Conditions of work and employment series; No. 71 p. 14.

98 L. BROWNLEE, «The Sharing Economy's Increasingly Exposed Liabilities And Hidden Assets», *Forbes*, July 21, 2015 (<http://www.forbes.com/sites/lisabrownlee/2015/07/21/the-sharing-economysincreasingly-exposed-liabilities-and-hidden-assets/>).

Hercules» of the *summa divisio* (employee/independent contractor) and for addressing the entire continuum of distinct work relationships occurring in the economy. Obviously, this is not a new wake-up call in the field of labour law.

This type of approach would configure a better framework for addressing the problems described, namely, collective voice, economic security and workers' safety, reputation and education/training, and not only for the on-demand workforce, but for any worker, indeed for the entire labour market. This approach should lead to the creation of a legal framework able to furnish a common ground of protection to any workers both in the relationship, for example regarding income insecurity issues and discriminatory or unfair behaviors and in the labour market, for example, through a functional system of active labour market policies that respond to the increasing pace of job transitions and skills obsolescence, affecting not only workers' conditions but also the efficiency of the market. The approach also requires rethinking the social safety systems, which should be portable and prorated<sup>99</sup> because many more workers will earn a living by working different jobs simultaneously.

This two tiered approach allows also to include in the solution of the issues related to working conditions, regulations coming from outside the field of labour law, where they are able to solve the problems complying with the protections provided by the common ground of labour rights. The partial hybridization of labour law is nothing new: a paradigmatic example is given by the regulation of privacy in the workplaces that relies heavily on general provisions. Regarding the on-demand economy, this hybridization could come from a regulation that ensures rights to the peers providing goods and services through the platforms with provisions aimed to forbid unfair terms and conditions. An example can be read in the legislative proposal regarding the sharing economy recently presented in the Italian Parliament, where some protections are given to the «utenti operatori» (operative users, alias those providing goods and services).

Those general protections - which, even if they need to be improved and better deepened, deserve a peculiar attention - are able to solve some issues also of the peer as a worker. After all, it is ongoing an hybridization of the different expression of human being in many fields: people are at the same time consumers, producers, workers<sup>100</sup> (and also mothers and fathers; caregivers, etc.). As a consequence, labour law should be open to integrate in its context regulation protecting the worker from a different perspective: those provisions, once evaluated on the basis of the labour rights, would not deprive labour law of its function, but strengthen its capacity to address the needs of the workforce.



99 Regarding the portability and proration of social benefits, see PORTABLE BENEFITS, «Common ground for independent workers», *op. cit.*; see also N. HANAUER, D. ROLF, «Shared Security, Shared Growth», *op. cit.*

100 Regarding the crisis of this categories, see M. FORLIVESI, «I Makers: il lavoro agli albori della terza rivoluzione industriale», *Labour&Law Issues*, vol. 1, 2015, pp. 72-85. With specific reference to the on-demand economy see O. LOBEL, «The Law of the Platform», forthcoming in *Minnesota Law Review*, 2016.

## 5. CONCLUSION

The on-demand economy is a disruptive phenomenon that occurs in the context of a considerable transformation of work. Labour law is facing this transformation in terms of its old structures and particularly, its old dichotomy. Consequently, labour law has been unable to satisfy the requirements of regulating a new reality of work. The resulting inefficiency of labour legislation impacts both the conditions of the workers and the economic system as an entirety.

An overview of the on-demand economy reveals the shortcomings of labour regulations by enabling an analysis of the conditions of the workforce involved in this economic model. The outcomes of this analysis raise questions concerning whether a legislative intervention is required, a question to which I respond affirmatively. Such a legislative intervention could be of different types. I have considered the proposals already presented in related research, using the conceptual tool of the continuum between universalism and selectivity.

I argue that to more effectively address the challenges of the on-demand economy, placing it in relations with other, broader phenomena that are transforming the world of work (such as the increase of the contingent workforce, the transformation of the economy and the destandardization of work), a re-conceptualization of labour law is required.

Labour regulation, broadly defined, should go beyond the traditional distinction between employee and independent contractor that creates a mismatch of protections between workers. It should be rethought to provide a universal set of labour protections to workers, regardless of the type of work relationship. To be effective, this wave of universalism should be complemented by a set of specific rules that will address the peculiarities of the different types of relationship, in compliance with a clear, flexible and adaptable legal framework and relying mainly on the action of social partners in the different forms of organization.

**EMANUELE DAGNINO**

*PhD Candidate at the University of Bergamo - ADAPT*

*e.dagnino@studenti.unibg.it*