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The legal and jurisprudential evolution of the notion of employee

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Abstract
The essay analyses the concept of employed worker in the light of the expansive trend of labour law. Two perspectives are investigated. The first concerns the revisiting of the concept of employed worker through the interpretation of jurisprudence. Comparative analysis demonstrates a tendency, not univocal but prevalent, of jurisprudence to broaden the notion of subordinate work, which manifests itself through purposive interpretation techniques. The other perspective is that of the creation of intermediate categories, such as that of 'worker' in the UK or that of 'parasubordinato' work in Italy, or even the notion of 'economically dependent self-employment' (Spain, Germany), to which selectively apply some protections of subordinate work. The current challenge of labour law is therefore to be able to respond to changes in the production reality, exemplified by work through a digital platform, to provide adequate protection for new forms of work and new ways in which subordination is expressed.

Keywords
Subordinate and self-employed work, intermediate categories, expansive trend of labour law, jurisprudence, labour legislation

I. The expansive tendency of labour law

In all European countries, labour law, as a discipline that is autonomous from civil and commercial law, is based on the need to protect labour in the field of the productive processes of enterprises and, more generally, on the relationship between a subject who works by offering his/her (manual or intellectual) activity on the market, and an employer who benefits from these services. Since its inception, in the social legislation of the nineteenth century, the reference to the notion of 'worker' or 'employee' has been essential in order to limit the scope of application of the discipline, for

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example in matter of safety or social security. Following the formation of a systematic corpus of rules, that we may call 'labour law', the need to root the social protection to a subject that 'works for another party' finds in the notion of subordination its conceptual basic. The notion of employee, as referred to as a subject that works for 'another party' under subordination, juridically qualifies the concept of employee as opposed to that of a self-employed worker. While the former is subject to the directives and the organisational power of the employer, the latter is mainly free to self-determine the modalities of execution of the service.[1]

Some important early studies on the discipline have placed both issues of subordinate and autonomous labour in the field of labour law (this is because in the tradition of civil law, both derive from the roman root of *locatio operis faciendi*). Further, some constitutions like the Italian one act in this unitary perspective by affirming the principle to protect labour 'in all its forms and application' (Art. 35), therefore including autonomous labour in this general protection. However, that very same doctrine of the origins obtained from the broader notion of worker, which includes both subordinate and autonomous workers, started to shape a narrower and more distinctive category of 'employee' as highlighted in the distinction between Arbeiter and Arbeitnehmer in Germany[2] and between locatio operis and locatio operarum in Italy.[3] So, labour law systems have historically privileged subordinate labour as the object of social protection, and referred to civil or commercial law for the cases of self-employment, thus creating a binary system between the figure of employee and the independent contractor. If it is true that labour law has been growing as a corpus of specific rules for the employee, the exclusion of other categories of workers from its scope has not impeded the development of a broader protective vision. From this perspective, in several juridical systems, labour law has been expanding its scope, by including some typologies of workers (not necessarily 'employees') within its sphere of application (either partially or fully). We may call this universalistic tendency of labour law 'expansion tendency', which is concretely implemented through a mix, variable from system to system, of universalism and selectivity.[4] The expansion of labour law may be achieved in two different ways: through a re-definition (interpretative or legislative) of the notion of 'employee' and of the underlying element of subordination which characterises the employment relationship or through a selective extension of the protection provided by labour law to non-subordinate forms of labour (that is to say of forms of labour not exactly to be inserted in the juridical category of subordinate labour, even though presenting elements of 'economic dependency' or of 'organisational dependency').[5] The first method of labour law expansion relates to the inner category of employee and, for this reason, to the notion of subordination; the second relates to a dimension that is external and superior to the notions of employee and subordination and refers to the broader category of social and economic

1. See, inter alia, B. Waas, G. Heerma van Voss (eds.), Restatement of Labour Law in Europe, Vol. I: The Concept of Employee, Hart, 2017.
2. See R. Dukes, The Labour Constitution, OUP, Oxford, 2014, p. 15, which expressly refers to the work of H. Sinzheimer, Grundzüge des Arberitsrechts, Jena, 1921, pp. 8-11.
3. See B. Veneziani, The Evolution of the Contract of Employment, in B. Hepple (ed.), The Making of Labour Law in Europe. A Comparative Study of Nine Countries up to 1945, Mansell, 1986, o. 33 ff.
4. See G. Davidov, Setting Labour Law's Coverage: Between Universalism and Selectivity, OJLS, 34, 2014, p. 543 ss.
5. The subject of economically dependent self-employment has been the subject of research by the European commission, with reports from A. Perulli, Economically dependent/quasi subordinate (parasubordinate) employment: Legal, social and economic aspects, Brussels, EC, 2003. More recently see the Report written by N. Countouris and V. De Stefano, New Trade Union Strategies for New Forms of Employment, ETUC, Brussels, 2019, p. 25 ff.

subordination. From this perspective, therefore, even self-employment relationships (genuinely autonomous) or 'quasi-subordinate' are considered worthy of receiving full or partial protection of labour law, and this protection, although varying in its legal forms from system to system (lavoratori parasubordinati in Italy, Trabajo autónomo dependiente in Spain, worker in UK, arbeitnehmerähnliche Person in Germany etc.) seems to express a concept common to all these systems, namely that labour law does not exhaust its protective function in favour of subordinate workers in the strict sense, but also concerns economically dependent self-employed workers. This tendency has been labelled as the expression of a creation of 'third'[6] or 'intermediate' categories between subordination and autonomy[7], even if, from a strictly legal-qualifying point of view, these forms of work fall within the broad genus of self-employment.

Let us analyse these two modalities of labour law expansion, pointing out that they are not necessarily mutually exclusive, but they may co-exist (and they indeed co-exist in some juridical systems).

II. The expansion of labour law through the redefinition of the notion of employee: Legislative and jurisprudential approaches

With regard to the expansive tendency of labour law through the redefinition of the notion of employee, we may include systems that, not having a legislative notion of subordination, have progressively broadened the notion of employee, especially in a jurisprudential way. It is in fact evident that juridical systems that do not have a legal notion of subordination are able to broaden the concept of employee with greater freedom, adapting it to the different subjective situations, to the changes of the economic and social context, to the different and new productive models, etc. In this respect, we may state that the notion of employee is not static, but dynamic, and that jurisprudence is the main means to adapt the notion of employee to the changed social and economic context. This is the case with Germany and France.

In Germany, where until 2017 there was no a legal general definition of employee,[8] the civil code (BGB) has drawn a distinction between a work contract (Werkvertrag) and a service contract (Dienstvertrag), but this does not exactly correspond to the distinction between self-employment and employment. In this context, the Federal Labour Court elaborated a very complex notion of subordinate employment based on the concept of personal dependence (persönliche Abhängigkeit):[9] the main indicator for subordination being the fact that the individual is under the control of the employer. However, other elements have been included as distinctive of the concept of subordination such as the fact that the individual is part of the employer's organisation; the fact that the employer benefits from the service; the need for social protection; and the service provider's weak socio-economic situation. The Labour Court decisions, thus, showed a tendency to extend the notion of employee so as to cover as many people as possible.

6. See A. Goldin, Labour Subordination and the Subjective Weakening of Labour Law, in G. Davidov and B. Langille (eds.), Boundaries and Frontiers of Labour Law, Hart Publishing, 2006, p. 109 ss.
7. G. Davidov, A Purposive Approach to Labour Law, OUP, Oxford, 2016
8. Following an amendment to the Civil Code, German law, for the first time, contains an explicit statutory definition of a 'contract of employment'; however, Section 611a 'basically does not go beyond the existing case law': cf. in this regard, B. Waas, The position of workers in the collaborative economy – A view on EU law, in R. Singer/T. Bazzani (eds.), European Employment Policies: Current Challenges, BWV, Zivilrecht. Band 76, 2017, p. 108.
9. See Richardi, in R. Richardi (ed.), Münchener Handbuch des Arbeitsrechts, 3 ed., 2009, par. 16, note 16.

In France, where a legal notion of subordination does not exist either, the jurisprudence has been decisive in re-defining the concept of employee. The broadening of the notion of employee has been realised through a re-qualification of the bond of subordination (lien juridique de subordination). The Court of Cassation, similarly to what occurred in Germany, considered the situation of partial subjection of an autonomous worker in the technical dimension of his/her work (like in the case of doctors, professional sportsmen, artists) as sufficient to constitute a bond of subordination. This substantial extension of the notion of employee has allowed to include in the sphere of labour law a large number of situations that stretch from domestic labour to assembly line labour, doctors, engineers and professional sportsmen. The maximum expansion of the notion of employee has been achieved by the jurisprudence when it identified the existence of subordination in a labour service supplied in the framework of an 'organised service' (service organisé) – where the employer unilaterally determines the conditions of execution of the service.

The affirmation of a traditional model of subordination which witnesses the resistance of judges to move from the historical criteria of identification of the employee, has not excluded an expansive tendency of labour law in jurisprudential way, confirming the structurally dynamic character of the notion of employee and of the continual quest of the limits of the subordination on the part of the French judges. In this regard, we may mention the heretical *Labanne* case, which emphasises the qualifying characteristics underpinning the situation of economic subordination (rather than juridical) of a service provider (taxi driver) able to self-determine the hours and places of his/her activity. More recently, the Court of Cassation in the *Formacad* case has re-qualified the service of professional trainers operating in regime of self-employment on the basis of a series of extrinsic index of absence of independency (lack of clients, non-competition clause, and continuity of the service). This confirms that the notion of employee, as constantly re-defined by jurisprudence, does not exclusively depend on the exercise of a directive power of the employer, but also on a situation where the 'condition of execution of labour' and 'the goals of the activity' (provided to third parties and not on the market) are not compatible with the qualification of self-employment.[10]

Mutatis mutandis, paths of re-definition of subordination in a broadening sense are also known in Common Law countries. Here, the formalist approach in interpreting the notion of 'employee' is replaced by a principle of reality, adopted by the UK Supreme Court and by a 'purposive approach', aimed to avoid workers being excluded from protection, which a part of the UK doctrine would like to push for the creation of a 'general presumption' of employee status. The UK jurisprudence moved in a similar perspective. On the one hand, by considering the public interest pursued by labour law legislation, the courts tend to interpret the concepts that determine the scope of labour law in an extensive way. On the other hand, the use of the 'economic reality test' provides a more adequate representation of the social and economic reality of subordination. To this end, it is necessary to verify where the financial risks are allocated and if the worker is in the position to make profit out of such allocation with the help of this qualification method of the contract. This test is not limited to assessing who bears the risk of employment, but it considers other elements such as the ownership of the production equipment or the ways of payment, useful in determining whether the worker carries out an activity for his own, organising work and thus assuming the risks or whether he/she is inserted in the business of someone else.

10. See T. Pasquier, Sens et limites de la qualification de contrat de travail, in Revue DT, 2017, p. 95 ss.

By its use and the adoption of other ways based on formal criteria (in particular, the mutuality of obligation test based on the continuity and stability of the contract),[11] the Courts were able to qualify many casual workers, who are atypical and irregular and who would remain without any protection, as subordinate. Such a test also revealed the economic weakness of those workers who are not subject to a control and who are considered autonomous workers on the basis of the control test. From this perspective, the economic reality test can be considered a jurisprudential forerunner of the legislative concept of worker through which, as we will see, a part of the protective legislation was extended beyond the borders of standard subordinate work.[12]

Differently, in Italy, where the legal notion of subordination (Article 2094 civil code), expresses a structural element of the labour relationship, namely the heteronomy, a more rigorous and restrictive interpretation of employee has evolved. Indeed, an orientation has become more steady holding that Article 2094 c.c. should be interpreted as referring to an employment relationship characterised by directives given by the entrepreneur on the execution of the work. As for the qualification, the directional power should be interpreted as referring to specific and precise orders, inherent to the intrinsic execution of work. Even the Constitutional Court seems to believe that the subordinate employment relationship is characterised by a power of the employer that is expressed in pervasive, punctual, continuous directives, while the forms of 'coordination' of the working activity, which in the Italian system are typically present in the case of coordinated and continuous autonomous collaborations (Art. 409 n. 3 cpc), are compatible with the concept of self-employment.[13] Generic or programmatic directives, or indeterminate instructions are not sufficient to establish the existence of a subordinate employment – given their compatibility with autonomous work. This does not exclude, however, that there can be 'softened' forms of subordination due to the particular organisation and type of work, like in the case of journalists, doctors, managers, etc. In such cases, subordination is identified by the 'continuous, loyal and diligent availability of the worker for the employer according to the instructions of the counterparty'. The Italian doctrine on this point observes that the existence of the directional power should not be judged in absolute terms but 'in relation to the specific nature of work'.[14]

In the course of the years, labour law has therefore had to confront a constantly evolving economic and productive reality, adapting the notion of employee to the protective ratio of labour protection. Basically, the dynamic re-definition of the notion of employee (or, better, of the scope of application of labour law) is a structural condition of labour law, whose scope of application may not be pre-defined in relation to a social, static typology of employee – a sort of immutable 'ideal-type' of employee – but it needs to be constantly modulated in order to meet the teleological profile of labour law – it being aimed at providing protection to subjects that are by definition 'vulnerable', to the extent that their working conditions are characterised by 'democratic deficit', asymmetry of power, and dependency.[15] Consequently, any index that identifies 'employees'

11. The 'mutuality of obligation' test tends to exclude large groups of casual workers from employment rights: see N. Countouris, Uses and Misuse of Mutuality of Obligations, in A. Blogg, C. Costello, ACL Davies and J. Prassl (eds.), The Autonomy of Labour Law, Hart, 2015, p. 169.
12. See A. Perulli, Subordinate, Autonomous and Economically Dependent Work: A Comparative Analysis of Selected European Countries, in G. Casale (ed.), The Employment Relationship. A Comparative Overview, Hart-ILO, 2011, p. 137 ss.
13. Constitutional Court, n. 76/2015.
14. A. Perulli, Il potere direttivo dell'imprenditore, Giuffrè, Milano, 1991.
15. See G. Davidov, A Purposive Approach to Labour Law, OUP, 2016, p. 34 ss.

should be adaptable to the new (social) material conditions where this vulnerability is present, regardless of the traditional forms (and for some reasons obsolete) of hierarchical subordination.

However, this evolutionary capacity of the systems must not go beyond a limit of reasonableness, that is respecting the criteria of rational adaptation of the law to the social reality in change. For example, extreme positions, which tend to extend the field of application of the entire labour right to any personal work activity rendered in favour of a subject in order to obtain a subsistence income outside a genuine condition of independence,[16] turn out to be very problematic. On the one hand these proposals are lacking from the point of view of the normative technique: how is the subjective juridical situation that deserves the full application of the labour law identified? To affirm that the recipients of the protective discipline are those who are not genuinely autonomous, or those who are weak on the labour market, is equivalent to introducing into the system an extreme vagueness in terms of typological category, a harbinger of legal uncertainty. On the other hand, propositions so generous towards the 'category' (indeed so generic as to be a sort of blank clause) of personal work risks diluting the labour law, making it lose its historical sense, to make it applicable to every relationship of work, outside of any criterion of reasonable need to modulate labour protection.

Probably, the need to overcome the rigid, and in some ways, obsolete, dichotomy between subordinate work and self-employment in a direction of widening the rights of workers, should arrive at more articulated and complex solutions. For example, radically overcoming the distinction based on the assertion of a core of basic rights for all forms of work, regardless of qualification in terms of subordination/autonomy, and then modulating an articulation of specific protections based on the different positions subjective legal of the worker (whether or not subject to control and direction; if 'organised' by the client; if economically dependent though autonomous in the organisation of the means and in carrying out work activities, etc.). Another solution for reaching the aim of guaranteeing a greater degree of assological rationality to the system may consist of the selective identification of protections that go beyond the enclosure of subordination in the strict sense (however one wishes to identify it) to provide individual and collective rights also to the self-employed[17] (in particular but not limited to those that are economically dependent; on this point see below, paragraph 4).

III. The qualification problems in the digital economy

Today, the so-called 'gig economy', which allows individuals to work with unprecedented and flexible modalities, to be economically active in situations where the most traditional forms of employment are not available or not suitable to their needs, poses new challenges. We need to acknowledge that the supply of services in the context of the gig economy (at least as so far experienced) may not necessarily lead to labour relationships in a strict sense. For example, an Italian draft law on technological platforms, currently under discussion in the Parliament, does not qualify the service providers that use an IT platform as workers (in autonomous or subordinate sense), but as 'operating users', equal to the beneficiary of the service, qualified as 'users'.

16. See N. Countouris, V. De Stefano, New trade union strategies for new forms of employment, ETUC, Brussels, 2019, p. 65 ff.
17. For the Italian experience, which, albeit with many limitations, reflects this need, see the contributions of M. Del Conte & E. Gramano, Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors Under the Italian Legal System, in Comp. lab. Law & P. J., 39, 3, 2018, p. 579 ss.

However, this draft law provides that the managers of the platforms should adopt a document of company policy that cannot contain provisions that impose upon the operating user any form of control on the execution of the service of the operating user, including the use of any hardware and software systems. We may deduce that, if the platform is able to exercise forms of 'command and control' over the operating users, the latter shall be qualified as employees, thus bringing to light the matter of what we should intend for command and control mechanisms applied to the platforms. From this perspective, instead of trying to define, once and for all, the juridical nature of the digital platform worker, it is necessary to proceed case by case, by assessing the type of platform, its way of functioning, and the modalities with which the service is performed.

Differently, the French legislator, with the 2016 Loi-Travail, has granted some (very modest) protection to platform workers by defining them as autonomous workers. In reality, it is not a real qualification, because the legislator only states that the law involved is 'applicable to autonomous workers that use digital platforms in the exercise of their professional activity', and provides for a modest 'social responsibility' of the platforms towards workers (only in case the platform determines the characteristics of the services or fixes the price of the good). This leaves the door open to a possible re-qualification of these workers in case the index of subordination elaborated by the French jurisprudence recurs.

As pointed out in the European Agenda on collaborative economy, in this context 'the borders between autonomous workers and employees are more and more blurred, and there is an increase of fixed term contracts, so as the number of people that have more than one job', as the Eurostat data show. The rights guaranteed by the Social Chapter of the European Union are applied only to those subjects that may be defined as 'workers' under EU case law. According to the Court of Justice of the European Union, the essential feature of subordinate employment is that, for a certain period of time, a person performs services for and under the direction of another person in return for which he receives remuneration. However, what application would this general – and very traditional – criterion identifying an employment relationship have with regard to, for example, service providers that operate through a digital platform? According to the European Agenda 'for the criterion of subordination to be met, the service provider must act under the direction of the collaborative platform, the latter determining the choice of the activity, remuneration and working conditions. In other words, the provider of the underlying service is not free to choose which services it will provide and how, e.g. as per the contractual relationship it entered with the collaborative platform.' In the EU Agenda it is not explained what 'the direction' of the collaborative platform means, but we may assume, on the basis of the Commission's declarations, that the existence of the subordination, in this case, is not necessarily dependent on the actual exercise of management or supervision on a continuous basis. As a matter of fact, the services provided through digital platforms permanently seem to overcome the traditional notion of subordination as subjection of the employee to the employer's directional power, towards forms of 'organisational subordination'. From this perspective the above-mentioned 'direction' – that according to the EU Agenda must anyway be present – may actually be achieved even in view of an IT platform that 'pre-defines' the modalities and the conditions of labour, thus realising the 'direction' of the labour through the platform. Or, according to an even broader view of the concept of 'employed person', when the worker is in a position of 'economic dependence' in respect of the platform based on a series of criteria such as the

personality of the service, the relationship with a (or few) platforms, the lack of operational resources for the worker, etc.[18]

Although judged as not subordinate in the light of the very traditional legal categories, these workers still express needs for protection, in fundamental matters for their working conditions such as compensation, safety conditions, health protection, accident, etc. If the existing legal categories do not facilitate offering these workers basic guarantees, there is a problem of 'axiological rationality' of the legal categories of positive law, and in this respect the binary view of subordination and autonomy built around the notion of hetero-direction appears too narrow to meet these needs for substantive justice. It is therefore necessary to resort to the interpretative dimension; but, as we have seen, interpretation cannot always provide adequate answers, thus posing a problem of 'axiological rationality' also in relation to hermeneutics, which in fact does not proceed by dogmas but uses the juridical categories in order to establish judgments consistent with the values of protection of the worker proper to the legal system.

Faced with this need for axiological rationality in the qualification of labour relations, some interpretative guidelines come to employ the same legal categories with greater adherence to labour protection requirements, even at the cost of raising some doubts about the full compliance of the decision with the conceptual substrate of traditional subordination. This is the case of the French Court of Cassation, which has deemed it appropriate to classify the Take it Easy livreurs as subordinates, valuing two factual elements of the relationship which, according to the Court, would be indicative of a state of subordination: the geolocation that allows follow in real time the position of the worker and the accounting of the number of kilometers covered by the courier, and the existence of a bonus/malus system similar to disciplinary power. According to the reasoning of the Court, from these two elements there is the existence of a power of management and control of the execution of the characteristic performance of the 'lien de subordination'.[19] The reasoning of the Court has been widely criticized on a technical-legal level.[20] In fact it is impossible to understand how from the elements considered (in particular a geolocation device) it is possible to deduce the existence of a directive power and a power of control, while other indices, such as the presence of an 'organised service', were not taken into consideration by the Court. However, it is precisely this critical nature of judicial reasoning that clearly demonstrates the willingness of jurisprudence to adapt, even at the cost of some forcing, the concept of subordination to forms of work that do not present the trappings of the accepted dogmatics but, nevertheless, require adequate social treatment also at the cost of an extensive interpretation of traditional criteria.

The Australian Fair Work Commission moved in the same direction with a decision concerning a Foodora employment relationship. In a regulatory context different from the French one, in which the subordination is identified, the factual elements that are valued coincide with those of the case decided by the French Court de Cassation. The Decision in fact recognised Foodora as having considerable capacity to control the manner in which the applicant performed work, and it fixed the place of work and the start and finishing times of each engagement or shift, and this was reflected by the metrics that were used in the batching system which ranked the work performance

18. See M. Risak/T. Dullinger, The concept of 'worker' in EU law. Status quo and potential for change, European Trade Union Institute, 2018, Report 140, p. 46 s.
19. Arrêt n°1737 du 28 novembre 2018 (17-20.079) - Cour de cassation - Chambre sociale
20. See P. Adam, Plateforme numerique: être ou ne pas être salarié, Lexbase Hebdo, éd soc., n. 766, 2018.

of, inter alia, the applicant.[21] The operation of the batching system meant that in order to maintain a high ranking the applicant would be required to perform a certain number of deliveries during any particular engagement, to work a minimum number of shifts in a week, and work a number of Friday, Saturday or Sunday nights (para. 73). In essence, the level of control that might be exercised in employment situations by way of direct verbal or written instruction to an employee from the employer, was obtained by Foodora by virtue of the operation of the batching system: as a matter of practical reality, the applicant could not pick and choose when and where to work, or how fast or slow to make deliveries. Furthermore, the worker had a substantial investment in capital equipment that he used to perform his delivery work (para. 78). The consequence was that 'the correct characterization of the relationship between the applicant and the respondent is that of employee' (para. 102).

These cases demonstrate that interpretative techniques can move in the expansive direction of the notion of subordination if the system allows it in terms of coherence with existing normative categories. In truth, this attitude of the jurisprudence to apply the law by employing the lenses of the evolution of social relations in a flexible way has been questioned in a very clear way by a part of the doctrine, which has even drawn one of the main elements of crisis of the current law of work.[22] The criticism hits the mark, but only in part, because - as we have seen - there is no lack of examples of an adaptive process, sometimes even at the cost of obvious hermeneutical forcing, of the notion of subordination on the part of the Courts. Rather, in my opinion, it is the legislator, both national and supranational, who demonstrates a certain immobility, neglecting to intervene on the legal notion of subordination to adapt it to a new context. The case of Germany is emblematic of this legislative 'inertia'. The European legislator is not exempt from this criticism: just think of the recent text of the European Parliament on the proposed Directive on a transparent and predictable working conditions, in which one adheres strictly to the interpretation criteria of the ECJ case law in the qualification of working relationships with the consequence that 'domestic workers, on-call workers, intermittent workers, voucher workers, workers through platforms . . . could fall within the scope of the directive provided they meet these criteria'. Consequently, if the platform workers cannot be qualified as subordinates according to the traditional notion of an employed person which implies the subjection to the employer's power, they will not be able to enjoy the rights provided by the Directive.

In other words, if the legislator does not decide to consider structural, and probably irreversible, changes in the sphere of production and consequently in the new ways of working,[23] the adaptive task of jurisprudence is left to the case-by-case approach, to the sensitivity of individual Courts and to the feasibility of an innovative interpretative approach due to the textual rigidity of the law (where it exists) or the fluidity of the defining framework, with little rational and unpredictable outcomes in the process of qualifying the working relationships of the platforms as subordinates or autonomous.[24] This is why it is important, in this scenario, to also consider - and above all - alternative routes in the legal treatment of platform workers, for example through the use of

21. FWC 6836 Joshua Klooger v Foodora Australia Pty Ltd (U2018/2625)
22. See G. Davidov, A Purposive Approach to Labour Law, supra note 15
23. See F. Hendricks, Regulating New Ways of Working: From the New 'Wow' to the New 'How', 9 European Lab. L. J., 2018, 195, pp. 195 ff.; see also F. Hendricks, From Digits to Robots: The Privacy-Autonomy Nexus In The New Labor Law Machinery, Comp. Lab. Law & P. J., 40, 3, 2019, pp. 365 ff.
24. Not surprisingly, the 2017 Taylor report points out that 'Government should replace the minimalistic approach to legislation with a clearer outline of the tests for employment status, setting out the key principles in primary legislation, and using secondary legislation and guidance to provide more detail'.

'alternative' categories to traditional ones. An alternative to the qualification problems of the workers of the platforms as employees is offered by the intermediate categories, which although criticised in doctrine, sometimes offer satisfactory solutions to the request for protection of the platform workers. The London Labour Court has granted Uber drivers the qualification of 'workers' (not employees), complying with the Employment Rights Act that guarantees to this intermediate category social legislation only in a small area (on matters such as Minimum Wage).

IV. The expansion of labour law through 'third' categories

The expansion of labour also goes through a legislative technique intended to selectively extend the protection to intermediate figures that are not employees in a strict sense but economically dependent workers and, like employees, need social protection. From this perspective, therefore, even self-employment relationships (genuinely autonomous) or quasi-subordinate are considered worthy of receiving full or partial protection of labor law, and this protection, although varying in its legal forms from system to system ('parasubordination' in Italy, 'economically dependent autonomous work' in Spain, 'workers' in UK, 'employee-like persons' in Germany, and so on) seems to express a concept common to all these systems, namely that labour law does not exhaust its function protective against subordinate workers in the strict sense, but also concerns economically dependent self-employed workers. This is a trend that unites many European countries, but that goes beyond the continental borders, involving systems such as Korea or Australia, in which forms of selective extension of protection of employment subordinated to categories of self-employed workers, especially in light of the recent changes produced by the gig economy and by the 'causalisation' of work typical of new production processes.[25]

The mechanisms of extension, or almost substantial assimilation, of 'non-subordinate but economically dependent workers' to subordinate workers have been operating for a long time in the French juridical system.[26] We are thus dealing with 'hybrid' figures who, while their labour contract is not qualified as subordinate (actually, they are entrepreneurial figures), benefit from the application of the Code du Travail, without the necessity to verify the existence of a lien de subordination juridique.

More recently, the Italian legislator, following a labour law 'annexationist' logic, created a new type of collaboration, so-called continuous collaboration 'organised' by the customer, establishing for such workers a total equality to employment (Article 2, d. lgs. N. 81/2015). Academia is currently discussing whether it is a legislative revision of the general notion of employee, or whether it is a sub-category of employee, or again whether the norm is to be intended as a labour law protection extension in favour of workers that are not employees but autonomous workers. The latter is the preferable interpretation, so that the goal of labour law may be to protect not only 'employees' but also workers 'organised' by the customer. This Art. 2 may be usefully applied to

25. See A. Yun, Reconstructing Labour law Actors beyond Employment, in Int. Jour. Of Comp. Lab. Law and I. R., 34, 4, 2018, pp. 435 ff.; A. Blackham, 'We are All Entrepreneurs Now': Options and New Approaches for Adapting Equality Law for the 'Gig Economy', ivi, pp. 413 ff.
26. Article L 7321 -1 of the Code du Travail, which refers to the managers of subsidiaries (''Les dispositions du présent code sont applicables aux gérants de succursales, dans la mesure de ce qui est prévu au présent titre'') and Article 7322 -1, relating to non-paid managers of subsidiaries of food retailers.

digital platform workers that do not necessarily offer their services under a directional power in a traditional sense, but they are still under the organisation of the platform.[27]

In other systems, the mechanisms of labour law extension are far more limited and are built around figures of parasubordinate/economically dependent workers, like in Germany. Here too, it is possible to trace the steps taken to find a suitable legal framework applicable to this type of work. As was the case in Italy (see infra), the first German law dealing with economically dependent workers ('arbeitnehmerähnliche Person'), was a procedural law. This extended to economically dependent workers the procedural protection applying to employees. The Procedural Act on labour law (Arbeitsgerichtsgesetz, § 5) includes among employees 'other persons who, because of a lack of economic autonomy, are treated as dependent workers'. The same terms are used in the Holidays Act (Bundesurlaubsgesetz, 1963, § 2). However, perhaps the most relevant legislation is the 1974 Collective Agreement Act (Tarifvertragsgesetz – TVG, § 12a). This Act extends its scope of application to economically dependent workers in cases where they carry out work for the benefit of other persons under a service or work contract, personally and largely without the collaboration of subordinate employees, and: a) work mainly for one individual, or b) receive more than half of their total occupational income mainly from one individual. In the event that it cannot be known in advance whether the worker received half of the total occupational income from one individual, and provided that there is nothing to the contrary in the collective agreement, the calculation of the earnings shall be based on the previous six months. Should the duration of the activity be less than six months, earnings shall be calculated for the whole of that period.

In the UK, where there is no definition of parasubordinate worker, the legislation, inspired by the criterion of economic dependence, has introduced an intermediary category of 'worker' lying somewhere between (subordinate) employee and self-employed person. This is defined in Article 230 (3) of the Employment Rights Act as someone who 'undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried out by the individual'. For the purpose of identifying this category, the use of one or more jurisprudential criteria serving as the basis for the distinction between subordinate employment and self-employment is determining. It is worth observing that the criterion for the determination of the status of worker basically cannot be different from the one used in the case of subordinate workers given that, if there is a difference between the latter and the first ones, it refers to the degree and not to the type. In reality this thesis can be easily challenged on the grounds that the 'intermediate categories', like that of worker, are characterised by different identifying elements not only in the 'quantity' of subordination, but for the presence of conceptually different qualifying elements for example economic dependence, as happens in the Spanish system with reference to the figure of the economically dependent self-employed (TRADE) or the 'coordination' of the service as an index different from the subjection of the worker to the directive power, according to the Italian experience.

In Italian law, forms of very selective extension of labour protection were initially promoted by the notion of coordinated and continuous collaboration, mainly personal in nature (Art. 409 CCP). Continuity means that the work is intended to meet a long-term requirement of the other party and that it will take time to complete. Coordination of the work by the client must be distinct from

27. Recently the Court of Appeal of Turin (n. 26/2019) expressed itself in these terms, having qualified Foodora's riders as hetero-organised collaborators (Art. 2 d. lgs. 81/2015); according to the Court, although relations are independent, the consequence is the application of the discipline of subordinate employment.

employer control (eterodirezione), otherwise the work could fall within the subordinate employment category. In structural terms, coordination, unlike control, does not imply a close link in terms of the way work is performed in space and time. Coordination is a functional relationship, a necessary connection between the execution of the work and the organisation of the work by the beneficiary (entrepreneur or not). In other words, the obligation on the part of the quasi-subordinate worker to comply with requirements is not as strong as for an employee. The mainly personal nature of the work to be done must be understood either in quantitative terms, i.e. provision of capital or other workers, or in qualitative terms, i.e. the importance of the service for the business involved. With regard to the quantitative aspect, the fact that the work has to be of a mainly personal nature means that it is possible to exclude activities that are purely entrepreneurial.

Although it is arguable that this is really an 'intermediate category', given that, in systems that know this typology, parasubordination or economic dependence qualify autonomous forms of work that can be categorised as independent types of independent work, the use of a regulatory technique that actually overcomes the rigid binary and divisive context of labour law tend to make the re-definition of the notion of employee less urgent, while it makes the grammar of labour law more complex and articulated. Basically, this perspective makes the alternative employee/not employee less dramatic, because it identifies forms of work that deserve social protection regardless of the research and the proof of the existence of the bond of subordination. This was the thesis, put forward in the Supiot Report, of re-writing the regulative content of labour law according to four concentric circles, three of which centred on the 'labour market membership' and one of these on the 'occupational activity' including both employees and independent providers to whom a threshold of common protection indifferent to the binary logic of qualification should be guaranteed. The paradigm of employment is thus replaced by the paradigm of professional statute of people that is not defined by reason of the exercise of a profession or of a determined job, but it includes the different forms of activity that any person may carry out throughout one's existence. From this perspective, the substantial redefinition of the notion of employee is implemented through paths that are external to the notion of subordination, or, better, it is implemented through a basic generalised guarantee for labour in all its forms and applications, and through a modular articulation that takes into account the different levels of vulnerability that define the continuum that from subordination goes towards autonomy. The system of protections, and labour rights in a general sense, consequently, from monolithic (because it refers only to subordinate work) becomes modular (because it refers to a heterogeneous category of workers, even autonomous), so that the binary regulatory scenario becomes ternary, or in any case more articulated according to the different degrees of social need expressed by the professional figures of reference.

The systems that contain intermediate categories – to be summarised in the notion of 'parasubordination' – go in this direction. However, they contain contradictory situations. Besides the employee in a strict sense, these juridical systems recognise the existence of situations of imperfect subjection, or of quasi-subordination, in cases that are typologically qualifiable as autonomous labour. The economic doctrine qualifies these situations as quasi-markets or quasi-hierarchy, hybrid situations of long term contracts characterised by incompleteness where, on the one hand, the criteria of the traditional subordination are not present in an exhaustive way and, on the other hand, the independency of the provider is limited due to conditions of economic dependency, or of subjecting to coordination of long-term services.

The partial broadening of the field of labour law towards situations of non-subordination seems to be a positive strategy, to the extent that it realises an extension of the protections to labour

situations yet characterised by the vulnerability of the provider. The economic dependency, together with index that denotes the lack of 'full' autonomy, like not having a clientele, the continuity of the service, or the presence of prerogatives of coordination of the client, are factors that require a social protection for the worker in order not to leave these typologies to the mere normative logic of private law (that is to say to the economic logic of the market).

However, these juridical forms of parasubordination or of 'economic dependency' open the way to forms of systematic abuse, such as false autonomous workers, very much spread in Germany, Italy and Spain. A solution to these problems of possible fraud should not lead to the choice to eliminate these intermediate forms, but to a more attentive legislative formulation, which may limit the possible abuses and guarantee the quality of the economically dependent forms of self-employment, together with a broader apparatus for their protection. It is well known that a good part of the doctrine is opposed to this regulatory strategy, arguing that the existence of intermediate categories actually legitimises companies to structure their work needs with contractual forms that offer the possibility of dissembling (or disguising) relationships of subordinate work for the sole purpose of reducing the economic and regulatory costs of employment.[28]

These criticisms are partly founded (the phenomena of abuse actually exist, as in all cases where a rule is circumvented) but tend to confuse the plans of genuine self-employed economically dependent with bogus self-employment. The two plans must remain distinct: otherwise it is clear that the 'intermediate' category is toto identified as a fictitious device, suitable only to qualify fraudulently paid employment in terms of a false autonomy. If, as the juridical method requires, it is admitted that the two planes of the discourse are different (one thing is pathology, that is bogus self-employment; the other is physiology, that is a truly autonomous work though characterised by elements of parasubordination/economic dependence) the provision of more or less extensive protections in favour of genuine but economically dependent self-employed workers can only be viewed in a positive sense, as a selective strategy of the universalisation of labour rights. however, the issue is very complex and has long been the focus of the European Commission, which already in the 2006 Green Paper on the modernisation of labour law to address the challenges of the 21st century drew the attention of Member States to the desirability of making the boundaries between subordinate work and self-employment clearer, but also to provide a series of basic safeguards for economically dependent self-employed work. The European Economic and Social Committee, for its part, appropriately distinguished the new self-employment trends[29] from the phenomena of abuse of the status of self-employed,[30] recognising the positive aspects of a specific discipline for workers who are not subordinated in the strict sense (also for the purpose of strengthening the 'entrepreneurship' of these subjects);[31] after all, the phenomenon of abuse does not depend on the legal characteristics of the contractual type, but on the elusive behaviour of employers (as shown, for example, in the long-running dispute on fixed-term contracts, including European contracts).

28. See, from last, N. Countouris, V. De Stefano, New trade union strategies for new forms of employment, ETUC, Brussels, 2019, p. 59.
29. The more sharp-eyed social scientists, coined the term 'second generation' self-employment to highlight its innovative specificity and the distance from the traditional forms of 'locatio operis', cf. S. Bologna, The Rise of the European Self-employed Workforce, Mimesis International, 2018.
30. See EESC, INT/628 12 March 2013
31. See EESC, SOC/344, 29 April 2010

From a strict legal point of view, these forms of labour are generally qualified as self-employment but the condition of economic dependence or quasi-subordination justifies the growing trend towards the creation (or the extension) of legal protection for such employment forms. In those States where this trend has not yet brought about legislative amendments, one can observe that in the public debate there is a request expressed by different parties for a greater protection than the one made possible by the traditional binary model,[32] while in systems that already recognise 'third' categories, their improvement is discussed both in terms of identifying the notion and in terms of the quantity/quality of the protections.[33] This is the state strongly longed for by the EU (at least starting from the 2006 Green Paper where the necessity to supply a set of protections to economically dependent autonomous workers was highlighted), and this is the perspective that we should promote today, in view of the necessity to protect hybrid forms of work relationships in the economy of the fourth industrial revolution.

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32. For example, for France, see the 'Antomattei-Sciberras' 2008 Report given to the Ministry of Labour for the creation of a protective statute in favor of economically dependent workers.
33. For example, with reference to the United Kingdom, the 2017 Taylor report points out that 'government should introduce a new name to refer to the category of people who are eligible for ''worker'' rights but who are not employees. We recommend that the legislation refer to this group as ''dependent contractors''‘. The indication of the report, however, risks being more definitional than content, in order to reflect more on the rights attributable to independent contractors.