UBER CASE IN THE BRAZILIAN LEGAL SYSTEM: WHAT SOCIAL PROTECTION IS THERE FOR INFO-DRIVERS?

by Gemma Pacella

On 13 February 2017, the *Vara do Trabalho* of Belo Horizonte ruled that Uber drivers are employees. The challenge of this essay does not take into consideration the classification or misclassification of the relationship between Uber and its drivers; it rather focuses on the social protection that should be guaranteed to drivers.

The Uber case is the best-known example of work created from, and developed on an online platform organisation: this is integrated into a context of so-called "cybermediaries", i.e. online brokerage, offering a no-boundaries organisation model, where time, space, and services have no boundaries. Therefore, in terms of working time, drivers need protection against a platform that is always operational; in terms of remuneration, they are entitled to receive the wage established by the Brazilian legal system for the professional drivers category. However, adopting a systematic point of view, we can draw two main considerations: not every legal system is the same, and not every digital platform is the same. As a consequence, the aim of this essay is not to identify a law that applies to each and every platform and in all legal systems. The aim is instead to analyse a specific case with its own contractual relationship within a specified legal system, and to suggest a social protection scheme for our modern times' info-workers.

Il 13 febbraio 2017, la *Vara do Trabalho* di Belo Horizonte ha sentenziato che gli autisti di Uber sono lavoratori subordinati. Il presente saggio non si prefigge di analizzare la (errata) classificazione del rapporto di lavoro in essere tra Uber e i suoi autisti; l'obiettivo è piuttosto quello di descrivere le tutele che dovrebbero essere assicurate loro.

Il caso di Uber rappresenta uno degli esempi più conosciuti di lavoro creato e sviluppato a partire da una realtà basata su una piattaforma online: questa realtà è integrata in un contesto di cosiddetti "ciberintermediari", cioè di intermediazione online, che offre un modello organizzativo privo di confini, nel quale il tempo, lo spazio e i servizi non conoscono appunto confini. Pertanto, in termini di orario di lavoro, gli autisti necessitano di tutele rispetto a una piattaforma che è sempre operativa; a livello di remunerazione, tali soggetti hanno diritto di ricevere il salario fissato dall'ordinamento giuridico brasiliano per la categoria degli autisti professionisti. Tuttavia, adottando un punto di vista sistemico, è possibile trarre due considerazioni principali: non tutti i sistemi giuridici sono uguali, e non tutte le piattaforme digitali sono le stesse. Di conseguenza, lo scopo di questo saggio non è quello di individuare una norma che trovi applicazione in relazione a tutte le piattaforme e in tutti i sistemi giuridici. Lo scopo è piuttosto quello di analizzare un caso specifico con le sue relazioni contrattuali all'interno di un dato sistema giuridico, nonché di suggerire un regime di tutela per gli *info-workers* dei nostri tempi moderni.

1. The issue: what social protection is there for the so-called "info-worker"?

1.1. The impact of technological change on company organisation and workers

"We are now entering the second machine age" (Nogler, 2015, p. 339).

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Technological change has affected social groups such as production organisations (Perulli, 2016): "Modern information technology has become the midwife of the 'shared economy', the 'gig economy', the 'on-demand economy'" (Finkin, 2016, p. 603).

Company space and time are redefined and, thus, their organisation is the one that will change the most: "enterprise would be dematerialized because it would no longer be synonymous with a material goods organisation, rather it would consist of a set of knowledge, skills, relations, and procedures that are led into the market: it could be essentially an immaterial ability to stay on the market" (Barbera, 2014, p. 632).

"There is no doubt that this new entrepreneurship model establishes a new relation with workers" (ivi, p. 639).

It is the digitalisation process of organisation that produces this mechanism (Acemoglu, Restrepo, 2016): the illusory non-hierarchical nature of networking, and the sensation in new economies (sharing or gig economy) (Tullini, 2016) of self-managing their own work produces a mutated image of the worker, as well as of the work organisation (Nogler, 2015). We are witnessing the metamorphosis of the so-called "info-worker" (Berardi, 2016). Is the availability of the worker for the company everywhere and in any way, along with the exponential dilatation of company boundaries, entailing a return to the *locatio hominis* (Gaeta, Tesauro, 1993)? It is outlining a return to the worker's availability for the client/employer perpetuated for the whole lifetime, beyond the working dimension, and the result of the service is also becoming the focus of typical work, due to the effect of a reputational mechanism of the employer/client on workers (Thierer, Koopman, Hobson, Kuiper , 2016).

As Miriam Cherry says, the most common form of the so-called "virtual work" (Cherry, 2011) is "micro labour, which is identified for its small scope, short duration, tiny output, and limited remuneration. At the same time, it is characterized by an opposing feature: massive scale" (Cherry, 2016, p. 22).

Digitalisation, redefining transient boundaries of the organisation, is consequently rewriting the subordination concept, the flexibility (Carinci, 2016) of which is inherently characterised, and makes workers able to carry out their work everywhere and at any time. In this way, we have the sensation that subordination is increasingly blurring, leaving space to a sort of pan-autonomy.

A confirmation of this ongoing phenomenon is particularly recognisable in the cognitive work (Siotto, 2010) that redefines subordination boundaries and the perimeter extending them (Perulli, 2016), more clearly than manual work, as we try to argument. It implies greater decision autonomy: included in a digitalised organisation, the intellectual worker is conscious that they will not receive orders, that they are the owners of their action in their workspace, that in the executive phase of professional service they are the ones in charge of deciding how to carry it out (Donini, 2015), but they also know that the employer is the one in charge of the evaluation. Therefore, the ex-post evaluation cannot avoid playing a massive and constant control: the employer that renounces their power of establishing ex-ante the way work must be carried out, provides this waiver with *de facto* control exertion, extended to every single aspect of professional service, which is, therefore, massive[1].

The Uber case, which is considered as pivotal in this paper, is the best known example of work created from and developed with an online platform organisation (Manzini, 2017):

[1] Italian law forbids this kind of control: "the surveillance on work, albeit necessary for productive organisation, must be kept within a 'human dimension'". – Court of Cassation, judgment no. 4375 of 23 February 2010.

it is integrated in a context of so-called "cybermediaries" (Colangelo, Zeno Zenchovic, 2015), i.e. online brokerage, offering a no-boundaries organisation model, where time, space, and services are off-firm. The internet network, in which these new work types are inserted, implies a ubiquitous dimension of people working within it, and it presents itself in terms of abstraction just for these effects.

A research work by Valerio De Stefano has highlighted that: "in the 'gig-economy', technologies provide access to an extremely scalable workforce. This, in turn, grants a level of flexibility unheard in the past for the businesses involved. Workers are provided 'just-in-time' and compensated on a 'pay-as-you-go' basis; in practice they are only paid during the moments they actually work for a client" (De Stefano, 2016, p. 4). New types of on-demand jobs, therefore, are changing traditional employers' features (Prassl, 2015).

Actually, firms also encounter serious risks: "Employers on crowd labour platforms may lose some control over the work and the way in which it is performed. With loss of control generally comes a loss of the certainty and accountability that might normally characterise a formal employment or contractual relationship" (Felstiner, 2011, p. 153). This study, which is focused on employment in crowd sourcing, may be seen as a further confirmation of the need to conduct research on the inherent risks of employment relationships through digital platforms.

The challenge we can take up, in the light of these observations, relates to social protection that could be ensured to Uber drivers, this new generation of digital workers (Davidov, 2014): I chose Uber drivers' specific point of view.

The Uber case, therefore, could also be interesting as it results in a material and an immaterial performance at the same time: if drivers do not register with the platform, they do not have a relationship with firms, and if they are not connecting (through log-in status) to the platform, they cannot accept the work assignment. Once these necessary steps are taken, the work performance is a material performance, a transport service (Cabrelli, 2017). Uber is, thereby, an immaterial and, at the same time, deeply material[2] dimension.

The challenge of this essay does not relate to classification or misclassification of the relationship between Uber and drivers (Dubal, 2017).

"From an employment law perspective, the phenomenon of work supplied through digital platforms opens a new chapter in the age-old problem of determining the reason of employee- protective norms: are crowd workers employees or workers in a technical sense, and thus do they deserve legal protection, ranging from minimum wage and working time regulation to unfair dismissal and collective rights, depending on their jurisdiction? Are they independent contractors, operating as small businesses on their own account, and thus rightly exposed to the rough and tumble of the market? Or do they represent a genuinely novel form of work, deserving its own legal status and regulatory apparatus?" (Prass, Risak, 2016, p. 1). This paper takes into consideration the Brazilian judgment about the Uber case[3], which has classified Uber as a private transport service – and not as a digital platform or an intermediation algorithm –, and its drivers as employees (Resta, 2017).

Thus, what kind of social protection could be ensured to them?

[2] This link between the digital and the material dimension is common to other platforms that operate in the same private transport market and in the gig-economy field: Blablacar, Lyft, Taskrabbit, Foodora, Deliveroo, etc.

[3] Moreover, see: Superior Court of California – County of San Francisco, 16 June 2015, no. CGC-15-546378, *Berwick v Uber Technologies Inc.*; and Employment Tribunal of London, 28 October 2016, no. 220255.

1.2. Reasoning of the research: the Brazilian judgment about the subordination bond between Uber and drivers

On 13 February 2017, a Brazilian sentence declared that a subordination bond between Uber and drivers does exist. Following arguments that draw also from philosophy and labour doctrine, "*julgo procedente o pedido para reconhecer o vinculo empregaticio havido entre as partes*"[4].

The Brazilian matter around the Uber platform is enriched with new chapters: Uber was illegal for a long time, and only in October 2015, the Mayor of São Paulo authorised the service (Mosca, 2016); now, following the decision of the *Vara do Trabalho* (Employment Court) of Belo Horizonte, the issue of regulating work relationships with its drivers has risen. The abovementioned court departs from one of the most important legal principles of the Brazilian system, that is norm substance primacy over form: "*o princípio da primazia da realidade significa que, em caso de discordância entre o que ocorre na prática e o que emerge de documentos ou acordos, deve-se dar preferência ao primeiro, isto é, ao que sucede no terreno dos fatos*" (Plá Rodriguez, 2015).

The Brazilian court refers to Article 3 of CLT[5], according to which: "*empregado é toda pessoa fisica que presta serviços de natureza não eventual a empregador, sob dependência deste e mediante salário*"[6].

The first element confirmed by the court is the existence of the "personal nature": presumptive motorists are asked to submit personal identification documents as well as – as per testimonies given on trial – to undergo psychological tests and analysis of previous experiences with other companies.

Company organisation is the first hurdle that implies the disruption of relationships between the parties: the Uber case puts in front of us the urgency of reconsidering work organisation, to think about its features in the outdated post-Fordism and in the framework of the new-born "crowd sourcing, of social organization, of co-creation" (Tullini, 2015, p. 5). New digital organisation creates a paradox: with Fordism – the well-known type of industrial organisation – a total depersonalisation of the worker occurred: "each worker is considered as a gear, machine rhythm subordinated" (Supiot, 2000, p. 223). Then, with post-Fordism and the emergence of the first new technological forms replacing human work, work organisation started to be characterised by a very opposite element: the creativity and cognitive contribution that any worker puts into their job become a distinctive element of an organisation seeking a professional service and non-fungibility, which imply professional abilities and quality of a work performance that cannot be carried out by everybody or at least not in the same way and with the same results. However, this transition does not involve the entire work scenario but it concerns the current and so-known "crowd work" in the light of a stronger and stronger depersonalisation of work. This phenomenon comes up as an "outsourcing commitment of specific tasks by a client to an undefined number a people, named crowd. Assignments are inserted into a digital platform in order to be carried out by the crowd, or single appointed, named crowd workers" (Däubler, Klebe, 2016, p. 474). Thus, professional service non-fungibility disappears, and so does *intuitu personae*; the job vacancy attracts a potential and undefined group of crowdworkers

[4] "The judge proceeds to the assessment of the existence of an employment relationship between the parties".

[5] Consolidação das Leis do Trabalho (CLT), Legislative Decree no. 5452 dated 1 May 1943.

[6] "The typical worker is a natural person that provides their service to a businessperson on a regular basis, being subordinated to the latter and in exchange for a salary".

(Tullini, 2015), with minimal investment by the company, while enabling it to manage a large team of workers. However, this observation can make us consider that working on – and throughout – digital platforms represents a mere mediation relationship between the one executing the service and the one offering the necessary instruments: "we could say that normally, platforms operate like a medium between customers and crowd workers" (Däubler, Klebe, 2016, p. 475).

But, in the case we are now analysing (Uber platform and its drivers), previously cited case law has clearly confirmed the existence of a working relationship.

In accordance with the court, the relationship between the parties since the moment of the hiring focuses on *intuitu personae,* and on the importance that the choice of a specific motorist rather than another assumes in the light of strictly personal aspects connected to the candidate worker.

Another relevant aspect for the *Vara do Trabalho*'s decision is the fact that drivers are paid for their work, meant as "*o aspecto da relação empregaticia concernente à existência de contraprestação econômica pelo trabalho do empregado posto à disposição do empregador*"[7]; in other words, the aspect attesting the synallagmatic character of the relationship between the parties. The most interesting aspect deducible from the court's reconstruction with reference to the remuneration paid by Uber to its drivers for their "mere" availability to provide a ride, even when it is free of charge for customers, is that: "*o sitio eletrônico da plataforma demonstra que a reclamada remunera seus motoristas ainda que a viagem seja gratuita ao usuário*"[8]. This reconstruction is crucial for the sentence because it is a symptom of work continuity that does not end with the instant execution of a single activity requested to the driver. This continuity assumes and implies a subjection of the worker to a compulsory bond, as a consequence of this functional availability; as the authoritative Italian doctrine would say: "of worker to other businesses" (Gaeta, Tesauro, 1993, p. 76).

So, the following factor taken into account by the *Vara do Trabalho* is the "*não-eventualidade*", meant as non-casualness of work, as "*actividade normal*". In this context, the sentence touches upon the issue of Uber's qualification as a merely technological platform for mediation between users and drivers, and as a private transport service company. It tackles the problem by highlighting the fact that Uber decides the price of rides, and assumes responsibility for the final goal of the service offered to users, also investing in automatic cars to increase the company productivity. So, drivers' "normal" activities concern a transport service and not merely occasional performances[9].

The court gets to the decisive point of the judgment when assessing the existence of a subordination bond (Godinho Delgado, 2012; Vieira de Oliveira, 2011) between the company and motorists, and rules that "*sem qualquer duvida, a subordinação, em sua matriz classica, se faz presente*"[10]: drivers have been subject to the direction, continuous control, and disciplinary power of the employer. Arguments developed in favour of

[7] "The aspect of the working relationship concerning the payment of financial compensation in exchange for the working activity carried out by the worker in favour of the employer".

[8] "The website of the platform shows that the defendant pays its drivers even when the ride is not charged to the customer".

[9] The *Vara do Trabalho* clarifies the importance of the factual reality principle with regard to the written contract between the parties: "*Esse reflexão deve ser orientada pelo Principio da primazia da realidade sobre a forma, segundo o qual 'em caso de discordância entre o que ocorre na pratica e o que emerge de documentos ou acordos, deve-se dar preferência ao primeiro, isto è, ao que sucede no terreno dos fatos'*". – "This reflection should be oriented towards the prevalence of the principle of reality over form, according to which 'in case of disagreement between reality and the contract, the former prevails'".

[10] "Beyond any doubt, subordination, in its classical form, exists".

the existence of each of these powers are the same found in British case law. But the Brazilian sentence leverages to a larger extent massive, constant, and invasive control, typical of new surveillance forms offered by technological progress, not only for each segment of the driver's service, but even for every single aspect of its personal nature: "*que havia orientação do Uber em relação ao comportamento dos motoristas no sentido de que deveriam abrir a porta para o cliente, disponibilizar agua e balas, comportar-se com educação […] informações relativas a forma como os motoristas poderiam se comportar e como deveriam se vestir*"[11].

So, what does "*vinculo de emprego*" mean in the Brazilian legal system?

We can find some arguments about the subordination bond in case law. In a case concerning the employment relationship between intermediaries, the *Tribunal Superior do Trabalho* (i.e. the highest instance that deals with cases involving labour law in the Brazilian legal system) has ruled that: "*Para que se configure a relação de emprego, é necessário o preenchimento dos requisitos estabelecidos no artigo 3º da CLT, quais sejam: pessoalidade, não-eventualidade, onerosidade e subordinação jurídica, sendo que a ausência de um desses requisitos impossibilita o reconhecimento do vínculo empregatício entre as partes. […] O que se contrata na relação de emprego é a pura potencialidade de direção do trabalho alheio*"[12].

In the same direction, another ruling of the *Tribunal Superior do Trabalho* has specified that: "*No magistério de Maurício Delgado, a 'subordinação estrutural é a que se manifesta pela inserção do trabalhador na dinâmica do tomador de seus serviços, independentemente de receber (ou não) suas ordens diretas, mas acolhendo, estruturalmente, sua dinâmica de organização e funcionamento'*"[13].

So, according to Brazilian judgments, we should consider that the subordination bond exists not only in case the employer's directive power is exercised, but also when the employee is integrated into the organisation of an employer. That is the case of Uber drivers, who can decide themselves when to switch on the app and when to accept a ride, regardless of whether they are integrated into the Uber platform organisation.

Once the subordination bond between the parties has been recognised (Silva, 2004), the *Vara do Trabalho* of Belo Horizonte has issued a sentence showing what kind of social protection could be guaranteed to them.

Starting from the considerations on "*os algoritmos de controle*"[14], the court is concerned with evaluating the consequences that new and widespread control has on working relationships. It refers to Jeremy Bentham's philosophy and to Hannah Arendt and her

[11] "Uber provided us with some guidelines in relation to drivers' behaviour, how to open the door, offer water and candies, behave politely, […] information about how drivers had to behave, as well as the dress code they had to comply with".

[12] *Tribunal Superior do Trabalho*, 27 September 2017, no. TST-AIRR-10878-73.2013.5.01.0034, available at: https://tst.jusbrasil.com.br/jurisprudencia/504912913/agravo-de-instrumento-em-recurso-de-revista-airr-10878732013501034/inteiro-teor-504912932#. "In order for subordination to exist, the requirements set out in Article 3 of CLT shall be met: personal nature, non-occasional nature, the fact that the working activity is carried out in exchange for money, and legal subordination; should one of them not be fulfilled, it is impossible to identify a subordination bond between the parties. What is achieved in the framework of a subordination bond is a mere possibility of directing another person's work".

[13] *Tribunal Superior do Trabalho*, 10 May 2017, no. TST-AIRR-11-59.2010.5.01.0023, available at: https://tst.jusbrasil.com.br/jurisprudencia/457795770/agravo-de-instrumento-em-recurso-de-revista-airr-115920105010023/inteiro-teor-457795790. "According to Mauricio Delgado's teachings: 'structural subordination manifests itself through the insertion of the worker into the dynamics of the user of their services, irrespective of whether the worker receives or not orders directly from the user, however sticking, from a structural point of view, to the latter's organisation and functioning patterns'".

[14] "A control algorithm"

"*banalidade do mal*", to describe a "*um mercado no qual o detentor do capital, que organiza a extração de valor de toda a força de trabalho à sua disposição, institui formas de poder e controle algoritmico, que prescindem da intervenção humana*"[15].

2. Arguments for social protection

2.1. What's wrong with Brazilian Uber drivers?

Uber is now one of the most important and common sharing-economy systems in Brazil (Davidov, 2017), through which a car owner is able to amortise the cost price of the vehicle, offering someone else a transport service, in exchange for a charge.

Uber is thereby framed within a growing sharing-economy context that is developed and characterised by low prices: it is not a coincidence that several disputes are arising against this platform in terms of competition with businesses offering the same transport services at higher prices (Frazão, 2017). Therefore, Uber argues that: "their only products are apps and websites, and […] their only function is to refer drivers to passengers" (Sørensen, 2016, p. 15).

The Brazilian doctrine considers that: "*Tendo em vista que adquirir um veículo ou pagar o transporte de um local para outro, de forma individual, através de Táxis, para parcela da população é um meio custoso, observa-se a existência de ônibus e metrôs que compartilham os custos desses meios de transporte, diminuindo os valores para cada indivíduo*" (Borba Vilar Guimarães, do Monte Silva, 2016, p. 1239).

Therefore, "*a Uber, lançada há seis anos, opera em mais de 300 cidades e em mais de 60 países, tem mais de um milhão de motoristas em todo o mundo e está avaliada em mais de US$ 50 bilhões dólares*" (Assmann, 2016).

In the light of these figures, and mostly of these earnings, the Uber phenomenon should be regulated in the field of both taxation and labour law, in order to ensure social protection for workers: Uber earns huge profits but it keeps labour costs low, classifying its drivers as independent contractors rather than employees.

The doctrine says: "Employees cost more than independent contractors because businesses are responsible for, among other things, payroll taxes, workers' compensation insurance, health care, minimum wage, overtime, and the reimbursement of business-related expenses. If saddled with those costs, the on-demand business model might not survive, at least not in its current form. At the same time, the importance of adequate protections for workers does not diminish simply because workers' tasks are coordinated through a high-technology platform" (Means, Seiner, 2015, p. 1513).

2.2. Uber drivers' minimum wage and working time

Uber keeps labour costs low; is it compatible with a minimum wage legal regulation (Baltina, Faioli, 2016)?

The *Vara do Trabalho* of Belo Horizonte draws attention to a testimony given during the trial, according to which Uber, unilaterally, sets drivers' wage: "*que o salário mínimo era calcudado por hora, com base em 44 horas semanais; que a remuneração do motorista era*

[15] "A market where the capital holder, who organises the value extraction of the whole workforce under their control, produces forms of power and algorithmic control that are independent from human intervention".

calculada entre 1.2 e 1.4 salários mínimos, descontando todos os custos […]"[16] It is clear that the firm hides behind the "sharing" (John, 2013) policy, but it actually maximises profits, exploiting workers.

From this point of view, it is worth bearing in mind the workers' wage regulation in the legal Brazilian system.

The Brazilian doctrine (Godinho Delgado, 2012, pp. 711-712) states that: "*O salário, como se sabe, constitui a parcela central devida ao trabalhador no contexto da relação de emprego, afirmando- se ainda, historicamente, como um dos temas principais e mais recorrentes das lutas obreiras ao longo dos últimos dois séculos. Todos esses aspectos conferiram-lhe um caráter emblemático, simbólico, carregado de carisma na cultura ocidental desse período*"[17].

Beyond various distinctions made by the doctrine, in relation to the present case, the payment of a legal minimum wage could be verified within the meaning of CLT and of the Brazilian Federal Constitution[18] (such minimum wage corresponds to the lowest wage[19]): "*Assim, há o* salário mínimo legal *(hoje também incorporado na Constituição), que traduz o parâmetro salarial mais baixo que se pode pagar a um empregado no mercado de trabalho do país*" (Godinho Delgado, 2012, p. 716).

So, it could be maintained that the percentage amount paid to drivers by the platform does not comply with the principle of dignified remuneration, within the meaning of Article 76 of CLT and of Article 7, IV, of the Brazilian Constitution[20]; indeed, the *Vara do Trabalho*'s ruling explicitly refers to a "*política remuneratória abusive*"[21] implemented by Uber; on the contrary, the minimum wage, required by law and unified at national level, shall be ensured with a view to meeting drivers' and their families' essential needs[22].

Moreover, as the *Vara do Trabalho* ruled about the classification of drivers[23]: they are professional drivers, so they have the right to receive remuneration that is proportional to what the Brazilian legal system establishes in favour of this specific employee category, apart from the minimum wage.

The doctrine, indeed, distinguishes the minimum wage from the so-called "legal wage", "*que corresponde ao parâmetro salarial mais baixo que se pode pagar a um empregado no contexto de determinada* categoria profissional *(art. 611, CLT), segundo fixado em sentença*

[16] "The minimum wage was calculated per hour, on the basis of 48 hours per week; and a driver's wage was calculated to be between 1.2 and 1.4 times the minimum wage, after deducting all charges […]".

[17] "As known, the wage is the most important part owed to the worker in the framework of the employment relationship, and has historically represented one of the main and most recurring issues of labour struggles during the past two centuries. All of these aspects have given an emblematic, symbolic, and charismatic character to the western culture of that time".

[18] Brazilian Federal Constitution, Chapter II, *Social Rights*, Articles 6 e 7.

[19] The new level of the Brazilian minimum wage, published on 30 December 2016 in the Official Gazette of the Union, is set at BRL 937.00, which corresponds to a 7.47% increase compared to the previous year's value (http://www.ccib.it/aggiornamenti/salariominimo.htm).

[20] Article 7 of the Brazilian Constitution: "Urban and rural workers' rights, in addition to the right to improvement of their social conditions, include: IV. nationally unified minimum monthly wage, established by law, capable of satisfying their basic living needs and those of their families with housing, food, education, health, leisure, clothing, hygiene, transportation, and social security, with periodical adjustments to maintain its purchasing power, as it is forbidden to use it as an index for any purpose".

[21] "An abusive remuneration policy"

[22] The Brazilian minimum wage regulation is strictly linked to the Italian one, within the meaning of Article 36 of the Italian Constitution, according to which: "Workers have the right to a remuneration commensurate to the quantity and quality of their work and in all cases to an adequate remuneration ensuring them and their families a free and dignified existence".

[23] The court refers to Article 235 of CLT, which governs the professional drivers category.

normativa (salário-normativo em sentido estrito) ou em convenção ou acordo coletivo de trabalho (salário-normativo ou salário convencional*)*" (Godinho Delgado, 2012, p. 717).

Given that the court classifies Uber car drivers as falling under the professional drivers category, they should be paid the standard compensation established by collective agreements[24].

So, the Brazilian court condemns the defendant to pay drivers a remuneration of about 80% of ride charges[25]. It also bears in mind a recommendation from the International Labour Organization (ILO)[26], according to which "Members should formulate and apply a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship"[27].

The topic, at this point of the analysis, is Uber drivers' working time[28] and, above all, drivers' availability ensured in favour of the firm. The court enforces current regulations in terms of professional drivers' working time. "Professional drivers' working day shall not exceed eight hours; a maximum of two hours' overtime (which can be increased to four hours through collective conventions or agreements) is allowed […] Except in case of specific contractual provisions, employed drivers' working day has no fix start, end, or break time"[29].

It is clear that the court must consider drivers' classification in terms of dependent contractors. So, working time regulations (according to the relevant legal system) shall be applied to them, in order to avoid abusing flexibility in determining working time.

Once again in relation to working time, another issue considered in the Brazilian ruling concerns the availability every Uber driver must guarantee in favour of the platform.

Driver's performance is a material people transport service, but it always goes through the internet first: the starting point of the relationship between drivers and Uber is the platform (drivers register through a *personal* account[30]), which also represents the executive phase of the relationship (drivers accept the request for a ride by customers provided they are logged in, i.e. connected to the platform).

Therefore, one of the most difficult issues about Uber drivers' role in Brazil is that it is always necessary to be connected to the platform. This has also repercussions on compensation plans: should a driver be paid for on-call hours (i.e. the time they are logged in on the platform)? And, if so, how much should they receive?

Indeed, the *Vara do Trabalho* of Belo Horizonte has entirely addressed the issue through its judgment, and the Brazilian doctrine has also considered that on-call time must be

[24] In Brazilian labour law, there is a difference between collective conventions and collective agreements. The former regulate negotiations between employees and employers (each side is represented by their trade unions or associations); the latter are instead entered into by employees and a specific business.

[25] The Employment Tribunal of London also established that: "Uber drivers are not self-employed and should be paid the national living wage". – Employment Tribunal of London, no. 2202550 of 28 October 2016

[26] ILO Employment Relationship Recommendation, 2006 (no. 198).

[27] "All Member States should formulate a national policy to be reviewed periodically and, if necessary, by clarifying and approving the scope of relevant regulations and laws with a view to guaranteeing actual protection to workers who carry out their working activities in the framework of a working relationship".

[28] Article 7, XIII, of the Federal Constitution of Brazil establishes that working time should not exceed eight hours a day and 44 hours a week.

[29] Article 235, para. 13, of CLT.

[30] For the concept of "personal nature", see the first paragraph in the second chapter of this essay.

intended only as working time[31]: "the Brazilian labour law has included a general rule for many years stating that: *'It is considered actual working time the period when the employee is at the employer's disposal, waiting for, or executing directions, except for specific instructions explicitly provided'* (Article 4o of CLT)" (Viana, 2012).

Nevertheless, should it be right to make it clear how Uber drivers' availability is certified? It is registered through the log-in status of the potential driver, who, inasmuch as they are connected to the platform, is allowed to declare, through their mobile phone, their willingness to provide a ride. So, should we consider Uber work a zero-hour contract (Adams *et al.*, 2015)?

For a long time, the Brazilian doctrine and case law have interpreted workers' availability regulations as excluding traceability and availability through mobile phones. So, if the worker has the right to receive the so-called "availability remuneration", corresponding to one third of their normal wage, within the meaning of Article 244, para. 2 of CLT, why should it not be granted to workers who are not at home, but could be available, at a distance, through a mobile phone?

Today, Article 244 of CLT should be read in conjunction with the newly amended Article 6 of CLT, according to which: "There is no distinction between a work performance inside the employer's factory, the one inside the worker's domicile, and the one at a distance, unless it is considered a subordinate employment relationship"[32].

This provision also regulates the on-call time: so, in the Brazilian legal system, case law has classified the "sobreaviso" notion, that is workers' availability, in a better sense than before. Indeed, the so-called "Sumula"[33] now states that: "It is considered to be under 'sobreaviso' the worker who is in an on-call status or equivalent, at a distance, and subject to the employer's control power through telematic and computer instruments, and who is waiting for a call at any time during the rest period"[34].

As the doctrine says, "it should be born in mind that even the mobile phone is one of the abovementioned instruments, and so it is no longer necessary that the worker stays at home to be entitled to receive remuneration due to their availability; however, it is necessary that they are in an on-call or similar condition" (Viana, 2012, p. 6).

Therefore, availability remuneration has been granted by Brazilian case law even to those who are available through a mobile phone.

Certainly, the case of Uber drivers also fits into this new regulatory and interpretive environment: their availability, that is the fact of being "always connected" to the digital platform through telematic instruments, should entitle the drivers themselves to receive remuneration.

It could also be considered, as underlined by the *Vara do Trabalho*, that the connection (Vermesan, Friess, 2015) to the platform is strongly promoted and subject to strict control by Uber, even though it is originally the driver's choice: strongly promoted, as witnesses demonstrated in judgment, because Uber requires "staying connected" as long as possible

[31] Cf. European Court of Justice (ECJ), case C-151/02, *Landeshauptstadt Kiel v Norbert Jaeger*, 9 September 2003.

[32] According to Law no. 12551 of 15 December 2011: "There is no distinction between a work performance in the firm and at the employee's domicile, unless it is considered as a subordinate employment relationship".

[33] In Brazilian law, Sumula is a summary that records a shared or majority interpretation given by a court in relation to a particular matter, based on the analysis of several similar cases, with the dual purpose of making case law publicly available and of promoting uniformity between court decisions.

[34] Sumula no. 428.

(Spinelli, 2017), through messages sent[35] to potentials drivers, so as to accept as many rides as possible; subject to strict control because the log-in status is absolutely monitored through a digital platform like Uber's one.

3. Conclusions: Some tips on social protection for Uber drivers

Having verified the Brazilian court's ruling, it is clear that social protection in relation to wage and working-time matters should be ensured to Uber drivers (Faioli, 2017).

Therefore, the aim of this research is not to ban Uber from the labour market, but to regulate it and provide social protection against degrading work.

However, I think it is appropriate to address two issues to conclude the analysis from a systematic point of view:

1. not every legal system is the same;
2. not every digital platform is the same.

As regards the first point, several legal systems have unified their case law about Uber drivers. Therefore, the Brazilian *Vara do Trabalho* makes reference to the British Employment Tribunal[36]: it is a very interesting dialogue between "international judgments", as a traditional civil law system judgment makes reference to a traditional common law system.

Moreover, Brazilian and British judgments are, in turn, aligned with US case law about the Uber case[37] and also the Lyft case[38].

However, in spite of this international case law link between different legal systems, the understanding is that there is no general law that can uniform all relationships between Uber and its drivers in all legal systems. In my opinion, there must be a special law in every system. It is clear that there are similarities that can emerge in international systems: some have already come to light. However, we have to bear in mind the different work relationships regulations that each system has (Ratti, 2017).

Once again, the Brazilian case becomes useful to confirm the differences for each legal system.

An example is contract termination by Uber: as case law has mentioned[39], the company deactivates the drivers' account in its platform[40], thus terminating the contract unilaterally and without giving any justifications or formal notice to drivers.

In the Brazilian legal system, it is difficult to ensure protection against such a dismissal, because the only protection against it, within the meaning of Article 483 of CLT, is reparation in a few restricted cases, listed in the same article[41].

[35] As a witness declared during the trial against Uber: "I received an email, I don't remember when, which said that, if I couldn't take a ride at least once a week, I'd be expelled from the platform, but it did not happen".

[36] Employment Tribunal of London, no. 2202550 of 28 October 2016.

[37] Employment Tribunal of London, no. 2202550 of 28 October 2016.

[38] United States Court of Appeals – Northern District of California, 11 March 2015, no. C13-2826 EMC, *O'Connor v Uber Technologies Inc.*

[39] United States District Court – Northern District of California, 3 November 2015, no. 3:13-cv-04065-VC, *Cotter v Lyft Inc.*

[40] Even though, as witnesses said during the trial, "It could be easily reactivated online by notifying the firm".

[41] *O empregado poderá considerar rescindido o contrato e pleitear a devida indenização quando: a) forem exigidos serviços superiores às suas forças, defesos por lei, contrários aos bons costumes, ou alheios ao contrato; b) for tratado pelo empregador ou por seus superiores hierárquicos com rigor excessivo; c) correr perigo manifesto de mal considerável; d) não cumprir o empregador as obrigações do contrato; e) praticar o empregador ou seus prepostos, contra ele ou pessoas de sua*

On the contrary, the UK legal system features the Employment Right Act (ERA) 1996[42], which regulates unfair dismissal situations better than before.

During any proceedings with the purpose of ascertaining an unfair dismissal, the "employer must prove that the dismissal has been ordered for a suitable reason related to the worker (such as conduct, capabilities, surplus, statutory prohibitions, reaching retirement age, or other substantial reasons), and apply the relevant dismissal procedure, which ordinarily consists of three steps: providing the reason for dismissal and meeting the worker, confirming the decision in writing, and giving the worker the opportunity to reply" (Barbato, Chiaromonte, 2008, pp. 535-6).

Lastly, an Italian scholar has considered that, although technological changes can substantially disrupt markets, this will still be possible provided they are consistent with the applicable market law: so, "Uber can redesign urban mobility markets provided that public transport is permitted without a specific license and that the revenue for the platform holders is considered legitimate profit rather than illicit revenue from the intermediation of other people's work" (Salento, 2017, p. 6).

Concerning the second issue, indeed, not every digital platform is the same. This paper deals with private transport services; Uber is not the only business that operates in this area: there are also other platforms such as Blablacar, Flixbus, and Lyft. Each one has a different entrepreneurial organisation but, by analysing the employment relationship, we can infer its organisational structure. As De Stefano says: "also work-on-demand apps are not homogenous: the most relevant distinction can be drawn between apps that match demand and supply of different activities such as cleaning, running errands, home-repairs and other apps that offer more specialized services such as driving, or even some forms of clerical work such as legal services or consultancy. Some apps can also differentiate services of the same nature, for instance offering car rides at premium or cheaper prices, also trying to accede to different pools of workers (e.g. professional drivers or persons offering rides whilst commuting to and from other jobs), even if this is not always frictionless" (De Stefano, 2016, p. 3).

Therefore, even if these similar platforms work in the same business area and offer the same services, we should always verify the particular case and the single relationship

família, ato lesivo da honra e boa fama; f) o empregador ou seus prepostos ofenderem-no fisicamente, salvo em caso de legítima defesa, própria ou de outrem; g) o empregador reduzir o seu trabalho, sendo este por peça ou tarefa, de forma a afetar sensivelmente a importância dos salários. § 1º - O empregado poderá suspender a prestação dos serviços ou rescindir o contrato, quando tiver de desempenhar obrigações legais, incompatíveis com a continuação do serviço. § 2º - No caso de morte do empregador constituído em empresa individual, é facultado ao empregado rescindir o contrato de trabalho. § 3º - Nas hipóteses das letras d e g, poderá o empregado pleitear a rescisão de seu contrato de trabalho e o pagamento das respectivas indenizações, permanecendo ou não no serviço até final decisão do processo. The employee can consider the contract terminated and can claim reimbursement when: a) they have been asked to provide services implying an excessive workload, services prohibited by law or in breach of morality, or services other than those agreed in the contract; b) they have been treated by the employer or by their supervisors with excessive strictness; c) they have experienced an evident danger; d) the employer has not complied with the obligations set out in the employment contract; e) the employer, or their staff, has harmed the honour and good name of the employee or of the latter's family members;f) the employer, or their staff, has physically harmed the worker, except in case of self-defence for themselves or others;g) the employer reduces a working activity that is based on piecework or single assignments, with a view to influencing the value of the salary. § 1° - The employee may suspend the provision of the service or terminate the contract when they shall comply with legal obligations that are incompatible with the continuation of the service. § 2° - In case of death of the employer established as a sole proprietorship, the employee has the right to terminate the employment contract. § 3° - In the cases specified under letters d and g, the employee may require the termination of the employment contract and claim the payment of the relevant allowances, irrespective of whether they will continue to work, until a final decision is adopted in the framework of the trial.

[42] The previous labour regulation was contained in the Contracts of Employment Act 1963.

between contracting parties, mainly because the platforms have a different entrepreneurial organisation.

The *Vara do Trabalho* also rules according to the same assessment of our research: observing the particular case and analysing its consequences.

The aim of the essay is not to find a general *de jure* regulation that regulates each platform and could be applied in each legal system. The aim is instead to analyse a specific case with its own contractual relationship within a specified legal system, and to suggest a social protection scheme for our modern times' info-workers.

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