

## Stefano Bellomo

### Platform work, protection needs and the labour market in the Labour law debate of recent years\*

**Summary:** **1.** The link between Digital Economy and Labour Law. Aspects of novelty and elements of continuity. **2.** A general outline of the opinions of Labour Law scholars. **3.** Platform work within the dichotomy of employment/independent freelance work. **4.** Is Platform Work in need of a new regulation? **5.** Platform Work and related changes in Social Security Systems. **6.** Platform Work and new (or redefined) protection needs. **7.** Platform Work as Labour Law crisis factor... **8.** ...and Platform Work as a possible vehicle of employment growth and social progress.

#### 1. *The link between Digital Economy and Labour Law. Aspects of novelty and elements of continuity*

It is undoubtedly true that, nowadays, several unheard labour issues are connected to the online platform economy. In many respects, new ways of working require a radical rethinking of the traditional statutory protection concept and the approaches unions must adopt to implement effective strategies to organise and represent gig workers<sup>1</sup>.

\* With regard to the contents and references of the essay, this is a development of the closing speech given by the author at the 6th International Seminar on International and Comparative Labour Law “*The Future of Labour Law and Labour Market Regulation in the Digital Era*”.

<sup>1</sup> Among the different research projects see, recently, the one entitled *Don't GIG up! Extending social protection to GIG workers in Europe*, aimed to identify policy options ensuring social protection and guarantee adequate labour rights to gig workers, commissioned by the DG Employment Social Affairs and Inclusion of the European Commission and carried out by Fondazione Giacomo Brodolini, IPA (Poland), IRES (France), UGT (Spain) and UIL (Italy), whose results might be found at <http://www.fondazionebrodolini.it/en/projects/don-t-gig-extend->

In the conference given during the ISLSSL Congress held in Turin in September 2018, Thomas A. Kochan pointed out some of the most extraordinary challenges posed by the digital economy to the traditional schemes of workers' protection, which include the ones of providing lifelong learning to prepare workers to participate in the digital economy, ensuring workers have influential voices in shaping the early-stage decisions on technology and work systems and providing suitable and equitable transition and income support policies<sup>2</sup>.

Adopting this digital economy perspective as a new ground for labour law could allow to properly deal with some specific features of these new forms of work, where the use and the role of digital tools deeply influence the content of the employment relationship.

At the same time, nevertheless, many scholars point out that considering the labour issues in the digital economy (and especially in the more circumscribed area of the gig economy' jobs) as a sort of "parallel universe" could result in a misleading path, given that "...whilst it is true that some of its dimensions are peculiar, and that the chief role of technologies in matching demand and supply of work is certainly one of those, it would be wrong to assume that the gig-economy is a sort of watertight dimension of the economy and the labour market. Nor would it be correct to take for granted that existing labour market institutions are entirely outdated in its respect or unsuitable to govern it and that, therefore, we would necessarily have to abandon existing institutions and regulations and introduce new, and possibly 'lighter' ones to keep pace with the challenges presented by the gig-economy"<sup>3</sup>.

If we look at the labour issues of the platform economy from this more orthodox point of view, the problems that scholars are called to solve to adapt traditional categories and institutes of Labour Law to platform work reveal

ing-social-protection-gig-workers-europe. See also ILO Working paper n. 27, entitled *Platform work and the employment relationship* and edited by DE STEFANO, DURRI, STYLOGIANNIS, WOUTERS, 2021.

<sup>2</sup> KOCHAN, *Learning from our Past: What Would our most Respected Fore-Fathers and Mothers want us to do in our Time of Crisis?* ([www.islssl torino2018.org/papers/](http://www.islssl torino2018.org/papers/)). The paper has been drawn from remarks made at the Frances Perkins Center Annual Garden Party, Newcastle Maine on August 19, 2018. The Author informs that an abridged version is published in The Boston Review online edition, August 30, 2018. <http://bostonreview.net/>.

<sup>3</sup> DE STEFANO, *The rise of the "just-in-time workforce": on-demand work, crowd work, and labor protection in the "gig-economy"*, in *CLLPJ*, 2016, p. 480.

a remarkable degree of complexity, due in most cases to the link between labour activity and the functioning of the software applications.

The reference is to the influence wielded by the platform power to “deactivate” drivers, riders, etc., who refuse some calls, on the traditional distinction between employees and self-employees and the high control power of the platform over working time and its intensity. Another difficulty in all situations, characterised simultaneously by significant enterprise fragmentation and a high degree of the immateriality of the companies’ structure, could be identifying the subject who could be defined as the employer.

Lastly, and in connection with the issue mentioned above of promoting the dialogue between workers and platform management, another aspect that draws scholars’ attention is the promotion of representative bodies among the platform’ workers<sup>4</sup>.

At a deeper look, all the above approaches are inspired by a shared vision of the platform work diffusion as a disruptive factor regarding the theoretical reconstructions and patterns of employment relationships and the distinction between employment and self-employment relationships<sup>5</sup>. Furthermore, in the broader perspective orientated towards social values which Labour Law is aimed to promote, the concern that, under many aspects, traditional legal schemes and consolidated forms of statutory and collective protections might not guarantee an adequate safeguard concerning the risks of precariousness and social and economic exploitation of the digital economy workers, is a pervasive worry<sup>6</sup>.

## 2. *A general outline of the opinions of Labour Law scholars*

An overall view of the latest studies about platform work suggests that the scholars who handled this matter alternatively moved along two general paths.

<sup>4</sup> As regards all these issues, see, recently, WEISS, *La platform economy e le principali sfide per il diritto del lavoro*, in *DRI*, 2018, p. 715 ff.

<sup>5</sup> With reference to the changes in Labour Law basic concepts and categories due to globalization and diffusion of new technologies see, among others ROSIORU, *The changing concept of subordination*, www.adapt.it, 2015.

<sup>6</sup> The challenge that Labour Law scholars face is the one “*d’éviter que ces travailleurs deviennent des sortes de sous-salariés, sous-payés et surexploités*”, as recently emphasized by DOCKES, *Le salariat des plateformes*, in *LLI*, 2019, Vol. 5, No. 1, p. 1 ff.

The first approach appears to be one of the implementation/adaptations of traditional labour law protection schemes to the various workers that it is possible to meet in the landscape of the platform<sup>7</sup>.

The analysis of these peculiar labour relationships may lead to identify the need to adjust or integrate the regulation of the most crucial forms of workers' protection (e.g., the dismissal's one) as well as to introduce or improve some rights that could better fit the characteristic of workers who at the same time constantly stay outside the workplaces (in the traditional meaning of this term) and consequently are not part of a firm's workforce. A good example is a French law (*Loi* no. 2016-1088 of 8 August 2016) that expressly recognises platform workers a specific right to training to favour the acquisition of new skills and consequently reduce the degree of economic dependence<sup>8</sup> on the platform.

Therefore, from a general point of view, it seems possible to acknowledge that platform work could represent one entire field of experimentation "to recognise diversity and multiplicity of employment forms in today's labour market, and secure better measurement of the evolution and development of work patterns and working relationships to develop fact-based policies"<sup>9</sup>.

The second approach, which results complementary to the first, relies on the positive value of platform work as a tool to favour access to work or the improvement of working conditions of some individuals that otherwise could be at risk of exclusion or in danger of severe marginalisation in the labour market, with a consequent high probability of total exclusion from labour law scope.

So, considering the phenomenon from a global perspective, the view that assigns platform work a sort of "erosive value" concerning the promotional and protective potential of everyday work and its regulation does not have a universal significance.

<sup>7</sup> For an example of this approach, see the ILO recent Report on *Digital labour platforms and the future of work: Towards decent work in the online world*, International Labour Office - Geneva, ILO, 2018.

<sup>8</sup> With reference to the current relevance of economic dependence in the definition of labour relationships see, among others, DAVIDOV, FREEDLAND, KOUNTOURIS, *The Subjects of Labor law: "Employees" and Other Workers*, in *Comparative labor law*, edited by FINKIN & MUNDLAK, Edward Elgar 2015, p. 115 ff.

<sup>9</sup> As stated in the conclusions of the 2017 IOE Report on the issue *Understanding the future of work*, [www.ioe-emp.org](http://www.ioe-emp.org).

This finding could not be referred only to the geographical and ethnic origin of the workers but also to several other different factors (sex/gender, age, physical conditions etc.), whose consideration may be relevant to evaluate the impact and the contribution that involvement in platform work could give to individual lives.

### 3. *Platform Work within the dichotomy of employment/independent-freelance work*

Within the first of the approaches described above, the more traditional/traditionalist method to situate platform work inside the existing Labour Law framework is to categorise it in the pre-existing patterns based on those used to distinguish employment relationships from the figures of independent workers, frequently applied in many recent case-law worldwide. As pointed out by many authors<sup>10</sup>, platform work is conceivably born as self-employment but develops in many cases according to schemes close to employment. What is the role played by the platform? Are we in front of *a*) a client, *b*) an employer, or *c*) an intermediary, with all the consequences that each function brings?<sup>11</sup> And if platforms can be considered employers, how should we qualify the employment relationship between the companies that operate the platform and workers? Are the traditional methods/-procedures/instruments adequate to such an endeavour?

These issues remain controversial, and scholars propose different answers: many express the idea that a new specific regulation on platform work might favour companies' opportunistic behaviour, which could be encouraged to hire workers as self-employed<sup>12</sup>.

The debate on platform work qualification and regulation has recently

<sup>10</sup> DE NARDO, *Platform work: Legal Categories and Protection Perspectives*, in PERULLI, BELLOMO, *Platform work and work 4.0: new challenges for labour law*, CEDAM, 2021, p. 3 ff.; ALOISI, *Platform work in Europe: lessons learned, legal developments and challenges ahead*, in ELLJ, 2021, p. 8.

<sup>11</sup> On this issue, see PRASSL, RISAK, *Uber, Taskrabbit, & co: Platforms as employers? Rethinking the legal analysis of crowdwork*, in CLLPJ, 2016.

<sup>12</sup> VALENTI, *The importance of a solid legal framework for Platform Works: a not-so-new challenge for Labour Law and its traditional forms of employment*, in PERULLI, BELLOMO, *Platform work and work 4.0*, cit., p. 45; cfr. BIASI, *L'inquadramento giuridico dei rider alla prova della giurisprudenza*, in LDE, 2018, p. 14.

intensified with the proposal for a Directive by the European Commission<sup>13</sup>, which includes measures to determine the employment status of people working through platforms. The proposal aims to introduce a legal presumption implying that if the platform controls work performance regarding some requirements identified by the directive, the contractual relationship shall be legally presumed to be an employment relationship.

This proposal, if passed, can have a disruptive effect on the Member States' legislation and policies regarding platform work.

#### 4. *Is Platform Work in need of a new regulation?*

Other scholars are oriented on quite different sides. They start from the assumption that the diffusion of platform work represents the clue (or the beginning) of a broader transformation of the whole, or at least of the most significant part of the labour market and ask for more radical adaptative regulatory interventions.

Within such a perspective, many observers support the opportunity of a specific regulation of the jobs related to the gig economy<sup>14</sup>. Platform work feeds the debate on the boundaries between self-employment and employment, which are increasingly blurred and uncertain. Subsequently, many scholars propose that Labour Law regulations ensure these workers an essential core of rights and prerogatives, regardless of identifying the reference category<sup>15</sup>.

Following the same trail, a scholar observes that “the phenomenon of digital work is nowadays so rooted and widespread that it needs precise regulation, above all, to guarantee rights, protection and dignity to the population of digital workers”<sup>16</sup>. She affirms that some instruments/solutions could

<sup>13</sup> Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, 9.12.2021, COM(2021) 762.

<sup>14</sup> According to GUADAGNO, *Addressing Inequalities and Delivering Protection in Key Areas of Platform Work*, in PERULLI, BELLOMO, *Platform work and work 4.0*, cit., p. 133, “some of the features of the work by platform need to be specifically addressed”.

<sup>15</sup> DE PETRIS, *On demand economy: the new face of work*, in PERULLI, BELLOMO, *Platform work and work 4.0*, cit., p. 49 ff.; cfr. ICHINO, *Le conseguenze dell'innovazione tecnologica sul diritto del lavoro*, in RIDL, 2017, pp. 533–534. On this trail, see the decision of the Italian Supreme Court (Cass., 24 gennaio 2020, n. 1663) that seems to focus more on protections than categories.

<sup>16</sup> TALARICO, *Platforms: how to protect and ensure Working Conditions in these hybrids of markets*

be adopted to ensure platform workers a higher level of protection (in terms e.g. of the establishment of the employee's social security position and the payment of social security contributions, annual rest or paid sick leave) and, when referring to these matters, she mentions the experimented model of the so-called "Umbrella companies"; in addition, she recalls the various experiences of associational unionism of platform workers promoted in several European countries as well as in the United States, either with the support of Trade Unions or autonomously and spontaneously through Facebook or WhatsApp groups or other social media. In the end, she admits that these initiatives could allow to achieve "just temporary and precarious solutions" and do not erase the need for a specific regulatory intervention.

The stances recalled in this paragraph are the basis of the new Italian regulation regarding platform work, deeply inspired by the above-mentioned French law. Despite the optimistic prospects, introducing some protections – only referring to self-employed platform workers – did not end the discussion on (mis)classification, which is still the main topic in the Italian digital work debate.

##### 5. *Platform Work and related changes in Social Security Systems*

Partially overlooking the issue of the specific nature of the working relationship with the platform, other scholars point more specifically their gaze toward the changing needs on which social security systems are called to intervene. Beginning from the reality that in most cases platform workers fall into the definition of self-employment, one author examines the possible reform paths of social security systems that could lead to a more effective inclusion of non-standard workers, among which platform workers will become the majority in the future. Given this preponderance, she recalls the specific solution of Digital Social Security, which ILO has proposed. More generally, she positively views the proposal to extend the scope of the rule of aggregation to cover all the periods related to labour force membership, which is also different from effective labour activity. Labour reality is undoubtedly changing, and this could not but have it reflected in social security schemes too.

*and firms? examples of new mutualism*, in PERULLI, BELLOMO, *Platform work and work 4.0*, cit., p. 20.

Another author<sup>17</sup> examines the pushes for the transformation of social security systems originated by the advent of technologies and the digital revolution and their effects on the increasing phenomena like the one of the so-called “working poor”<sup>18</sup>. Moving from the Italian experience, the author gives an overview of the adopted measures (such as the form of unemployment allowance introduced in 2017 for self-employed) and further reforms that could be undertaken explicitly for platforms and digital workers (for instance, the already mentioned umbrella-company model). More in general, the author observes that the significant development and the increasingly massive spread of forms of non-standard work result in a tendency of growth of assistance instruments besides the classical security schemes because “the extension and implementation of assistance models is, therefore, a useful and essential tool to protect all active individuals”. She ends her analysis by emphasising that the exponential increase of workers outside the subordination (significantly boosted by the massive expansion of platform work) suggests that the legislators are aware of having to intervene to guarantee protection to workers regardless of the type of contract.

#### 6. *Platform Work and new (or redefined) protection needs*

Besides the profiles connected to social security, some scholars turned their attention to other specific implications of platform work which could require a particular focus and some adjustments.

On the one hand, an author<sup>19</sup> proposes some considerations on the link between the increased use of ITC technologies and the corresponding expansion of the power of control exercised by the employer, in a direct way or through a Big Data System, also in the pre-employment phase. About these matters, she expresses the idea that a lack of attention and coordination persists both on a supranational and national level, even after the entry into force of the New GDPR (UE Regulation 2016/679) and highlights some

<sup>17</sup> GARBUIO, *The impact of digitalization on the labour market and the uncertain responses of the Italian social security system*, in PERULLI, BELLOMO, *Platform work and work 4.0: new challenges for labour law*, p. 157 ff.

<sup>18</sup> Among other, on this issue, see OCCHINO, *Povert  e lavoro atipico*, in *LD*, 2019, p. 103 ff.

<sup>19</sup> FORINO, *Power of control and competition in the era of digitisation of economic processes*, in PERULLI, BELLOMO, *Platform work and work 4.0*, cit., p. 61 ff.



critical uncertainties about the balance between the right to privacy and economic freedom. Due to the crucial importance of these matters within an employment landscape more and more linked to ICT use, she remarks that the need for a more specific discipline appears even more evident and urgent.

On the other hand, some scholars<sup>20</sup> identify an item closely related to new forms of work: the health and safety protection of digital workers. The first question is whether and when platform workers could fall into the scope of the general legislation on workers' health and safety protection and how the security organisation could ensure an adequate safeguard. As for these aims, many scholars believe that it continues to be essential a collective action in conjunction and connection with the specific figure of the workers' representative. This issue has become even more critical with the onset of the pandemic crisis. Especially during the early months of the emergency, many platform workers complained about the lack of personal protective equipment required to work safely<sup>21</sup>.

### 7. Platform Work as Labour Law crisis factor...

A considerable part of platform workers is indeed residing outside Europe and, in many cases, suffers to an even greater extent the already existing structural weaknesses of their national Labour Law Systems.

That is, for instance, the case of the Russian Federation well described by a local author<sup>22</sup>. The Russian situation is characterised by high uncertainty and disparities in relevant case law about whether platform workers can be classified as employees. That extremely relativistic approach, which does not

<sup>20</sup> ELMO, *Techniques to protect the right to health and safety of digital workers*, in PERULLI, BELLOMO, *Platform work and work* 4.0, cit., p. 103 ff.; cfr. DAGNINO, *L'ambito applicativo delle tutele in materia di salute e sicurezza sul lavoro. Spunti da una sentenza d'oltramanica tra piattaforme e lavoro precario*, in *DRI*, 2021, p. 582 ff.

<sup>21</sup> On this issue, see SPINELLI, *Le nuove tutele dei riders al vaglio della giurisprudenza: prime indicazioni applicative*, in *LLI*, 2020, p. 95 ff. Workers' demands on this item have been satisfied during the first months of the pandemic by two different Italian courts (*Trib. Firenze*, 1° aprile 2020, n. 886; *Trib. Bologna*, 14 aprile 2020, n. 745).

<sup>22</sup> KIZILOV, *Employment in the Gig-Economy: New Challenges for Russian Labour Law*, in PERULLI, BELLOMO, *Platform work and work* 4.0, cit., p. 171 ff.

seem to draw legislators' attention, could also lead to different classifications depending on the specific context (labour relationship, social security, immigration law) where such a category becomes relevant. This situation dramatically reduces the chances for each worker to attain the status of an employee.

Another paper<sup>23</sup> examines the issue of work in digital platforms in Latin America. From this viewpoint, according to the author, the digital economy, aimed at bringing benefits to people and societies, provoked opposite effects. He assumes that the massification of this type of work at unsuspected levels has taken workers and their labour benefits practically to the nineteenth century, at the time of industrialisation.

The author explains that significant development of platform work took place in a general context with many critical elements (weakness of labour institutions, insufficient administrative controls, issues linked to low levels of education, crime, state corruption, low wages, informality) that create a perfect combination for these platforms to "play at ease" in Latin America legal systems, reducing or ignoring labour protections. So, according to his opinion and as indeed it was also demonstrated by the unfolding of the few trials against them in front of Latin American Courts, the entrance of specific platforms seriously put the future of work in that area.

8. *...and Platform Work as a possible vehicle of employment growth and social progress*

Despite the above-mentioned critical situations, many scholars tend, however, to highlight a range of positive issues connected with platform work and, in general, with the changes related to the impact of new technologies on the labour market.

Many suggest some connections between the special protection/promotion needs of some vulnerable socio-economic groups of workers (parents, caregivers, disabled people, aged persons), recognised by several international sources, and the potentially inclusive outcomes that could be achieved through some promotional measures that facilitate access for mem-

<sup>23</sup> SUÁREZ ASTACIO, *Works on platforms, an approach to the Latin American Situation*, in PERULLI, BELLOMO, *Platform work and work 4.0*, cit., p. 181 ff.

bers of disadvantaged and vulnerable groups to these types of work by guaranteeing them adequate working condition and appropriate remuneration. Hence, “the challenge is to adapt labour and social protection policies to foster an inclusive labour market for the future, without forgetting to consider the different needs of the most disadvantaged groups of workers”<sup>24</sup>.

Others focused their attention on the new technologies impact on the gender gap in the Labour Market. An author notes that in broad terms, the new forms of work such as telework, electronic homework, offshore data processing, and office administrative services offer new employment opportunities for women and points out that there is some evidence of the fact that “emerging digital workers force is providing a much-needed solution by breaking down physical, geographic, and social barriers within the workforce. Remote work platforms allow millions of women to work from anywhere for anyone in the world”<sup>25</sup>. Nevertheless, in order to avoid the re-occurrence of situations of marginalisation, women’s access to these works should be complemented by appropriate skills training and retraining and by the development of specific social protection for those suffering technological unemployment.

There is a very close connection and an evident complementarity between these assumptions and the contents of another paper by a South African scholar<sup>26</sup> that examines the phenomenon of platform work in the context of her country, characterised by a general high unemployment and underemployment rate, a remarkable gender inequality exacerbated by the limited access to ICT job opportunities in the rural areas and a critical inadequacy of the education system. The focus on this latter deficiency and the priority assigned to interventions to overcome it appears as the main hint of the originality of the paper. She notes that the “education system in Africa plays a pivotal role in transforming the country. Society is at a crossroads, and while rapid technology-driven change may threaten existing em-

<sup>24</sup> CARCHIO, *Addressing Platform Work to promote Labour Market inclusiveness*, in PERULLI, BELLOMO, *Platform work and work 4.0*, cit., p. 153; cfr. BRONZINI, *Economia della condivisione e lavoro autonomo: una prospettiva europea*, in PERULLI (a cura di), *Lavoro autonomo e capitalismo delle piattaforme*, CEDAM, 2018, p. 7-9.

<sup>25</sup> FRANCONI, *New technologies and women’s labour force participation*, in PERULLI, BELLOMO, *Platform work and work 4.0*, cit., p. 117-118.

<sup>26</sup> XHALLIE, *The future of work and its impact on women and Africa*, in PERULLI, BELLOMO, *Platform work and work 4.0*, cit., p. 189 ff.

ployment structures, many opportunities are also becoming available for blue-collar workers and employers”.

The considerations referred to platform work may apply even more to other new forms of employment related to ICT, and that’s the Italian case of agile working. An author<sup>27</sup> describes the legislative signs of progress on this matter in the private and public sectors and points out that this form of work shows both its strength (a reduction in commuting time, better overall work-life balance, more flexibility in terms of working time organisation, higher productivity...) and its weaknesses (risk of social isolation, “hyper-connectivity” and abnormal expansion of working time, difficulties in complying to employer’s safety obligations towards the agile worker). Concerning the latter, she considers that the best way to prevent these risks could be the involvement of Trade Unions and workers’ representatives in guaranteeing agile workers further and more detailed rules and orderly development of remote work through telematic devices. The outbreak of Covid-19 has undoubtedly speeded up the digitalisation of work, but, on the other hand, emergency regulations have profoundly changed the nature and the structure of remote working<sup>28</sup>.

In conclusion, it seems possible to summarise the ultimate meaning of the latest research by Labour Law scholars by recognising that the pushes and the demands for change arising from platform work suggest that legislators and scholars are called to choose between three different paths.

The first is to maintain traditional categories, types of machinery and regulations, trying to adapt them to the new realities of work; the second is the creation of specific regulatory areas taking into account the peculiar features of the emerging forms of work (remaining aware that these jobs are currently undergoing a significant expansion and could one day replace standard work relationships); the third is the way of a complete restructuring of the whole regulatory system or at least of some legal institutions which historically represent a fundamental part of it, as the Social Security schemes. The debate remains open, and opinions from scholars worldwide provide attractive clues for its continuation.

<sup>27</sup> RUSSO, *Smart Working: Private and public Sector compared*, in PERULLI, BELLOMO, *Platform work and work 4.0*, cit., p. 75 ff.

<sup>28</sup> On this issue, with regards to the Italian regulation, see, among others, BIASI, *Brevi spunti sul lavoro da remoto post-emergenziale, tra legge (lavoro agile) e contrattazione (smart working)*, in *LPO*, 2021, p. 160 ff.

### **Abstract**

The essay takes into consideration the results of the latest research by Labour Law scholars in the field of platform work and its protection needs. It is indeed appropriate to question whether it's needed to address these issues, maintaining the traditional categories and regulations or creating a specific regulatory area. Otherwise, another way could consist of a complete restructuring of the whole regulatory system or at least of some legal institutions which historically represent a fundamental part of it, such as the Social Security schemes. The debate remains open, and opinions from scholars worldwide provide attractive clues for its continuation.

### **Keywords**

Platform work, protection needs, digital economy, social security, new forms of work.

