

**The uberization of work and the legal regulation: the challenge of
labor protection in semi-peripheral economies**

Antonio Rodrigues de Freitas Júnior¹

Victor Raduan da Silva²

Abstract: The uberization phenomenon, as the best known expression of the so-called platform worker, is now noticeable in several countries and is far beyond an individual private passenger transport company, being present in a number of on demand services, especially those intermediated by apps. The uberization implies the intermediation of the personal delivery of certain services through a platform of a for-profit company. A worker without an employment agreement performs those services and is paid according to what he provides. The company is neither a legal non-profit cooperative nor a services company, but, otherwise, it presents itself as an intermediary platform between people who want to provide a certain service and people who want to hire it. However, this mediating platform not only sets the pricing, the payment terms and the service standard, but it also receives the payment, pays the people who provide the service, and earns profits. This relationship among service provider, receiver (client) and the intermediating platform/app challenges the conventional legal categories of labor law. Under the labor law that prevailed in the last century, the trend would be to try to promote the legal regulation of this activity through the legal form of an employment relationship. The problem is that the typical subordinate element of the employment relationship, if any, does not seem to be that of the conventional labor law. That is because the company neither imposes time patterns for the provision of the worker's work, nor provides such worker with the equipment to perform the service. In the case of the individual private passenger transport, the vehicle and the mobile phone are the property of the individual person, not of the company. Brazil, like other countries with semi-peripheral

¹ Professor of Law. Department of Labour Law and Social Security, University of São Paulo (USP) - School of Law. Contact information: arfreit@usp.br.

² Master in progress (2016 – to present) in the Department of Labour Law and Social Security, University of São Paulo (USP) - School of Law. Contact information: victor.raduan.silva@usp.br.

economy, is holding an intense and unresolved debate on the subject. Brazil has no federal statutory act yet dedicated to the express regulation of the individual passenger transport activity, but some cities like São Paulo, for example, allow the provision of the service by a decree signed by the mayor. The fares charged in Brazil are, generally, cheaper than those of taxis, what makes the public support such competition. Under the labor protection sphere, there is no law or court precedent guiding which rule should be applied and how to qualify this kind of work. In turn, this legal uncertainty is a strong ingredient to deepen the asymmetry in the relationship between the intermediating platform and the service provider; a factor that seems to be true in other activities, in addition to the urban transport. This article aims at summarizing the debate held until now and discussing possible trends for the legal regulation of the activity under the point of view of labor protection of the services provider whose work is a source of profit, based on the semi-peripheral economies, focusing on the Brazilian case.

Keywords: uberization; informal work; platform worker; semi-peripheral economies.

Contents: 1. Introduction; 2. An overview of the discussion; 3. Innovation, obsolescence and litigation; 4. Some preliminary conclusions; 5. Bibliographic references.

1. Introduction

The so-called creative economy³ is one of the few sectors of the economy that is showing a progressive, widespread and consistent demand for workers.

³ For the terms “creative economy”, as well as “cultural industries”, “creative industries”, “content-based or copyright industries”, “cognitive-cultural economy”, we follow closely the conceptual outlines present in the United Nations/UNESCO/UNDP publication *Creative economy report 2013 special edition: widening local development pathways* (2013, pp. 19-21). About the situation in the United States, we refer to the following: “Over the three years of our study (October 2012 to September 2015), 4.2 percent of adults, an estimated 10.3 million people – more than the total population of New York City – earned income on the platform economy. This number increased 47-fold over the three years.” (JP Morgan Chase & Co. Institute, 2016, p. 7).

For this reason, several governments have directed their economic, educational, and urban and technological development policies to promote the innovation business economy, especially as a public policy instrument to combat unemployment and create new job opportunities. Central governments have offered credit facilities for innovative business incubator projects (startups), and municipalities of major cities in several countries have been investing in the promotion of innovative businesses as a policy of urban regeneration of degraded neighborhoods, and fostering the expansion of job opportunities.

The bad news is that the creative economy, like some other sectors of the economy, seems to disclose an important but subtle paradox: the more it hires workers, the less they do so through the customary employment relationship.⁴

Under the impact of the growing visibility of the creative economy, we find in the specialized literature and widespread belief several explanations about the causes, as well as several interpretations regarding the effects that this paradoxical phenomenon tends to cause on the legal protection of workers.

However, considering the analytical purposes of this article, we indicate two methods of approach to this paradox that will be avoided here:

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

⁴ We consider in this case, for instance, the home care, informal education, tourism and hospitality.

2) the second one, which believes that the labor rights are part of a legal protection system: 2.1.) that is outdated, created for the predominant factory labor relations in the late 19th and first half of the 20th Century; 2.2.) a system that currently makes working relationships excessively rigid and expensive; 2.3.) tending to discourage the opening up of new jobs, increasing unemployment; 2.4.) operating in a paradoxical way, to the detriment of the worker, not as a legal system of its true protection; and 2.5.) regarding this approach to what matters most, the inability to provide typical jobs in the creative economy environment would not be a problem, but at least part of the solution.

These two approaches to the relations between the creative economy and the decline in typical employment, albeit acceptable and understandable, will be avoided here as a methodological strategy because either they reduce the decline to mere breach of law or they do not consider it as problem. In any of these cases, therefore, the possible contributions of this article would not be analytically useful.

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

patterns of the employment relationship, which causes their foreseeable insufficiency and/or inadequacy to regulate work and protect workers in the creative economy environment, particularly in its gig economy version.⁵

We must further provide in this introductory section a terminological definition regarding the meaning in which the expressions “creative economy” and those indicated as “gig economy”, “platform workers”, “on demand services” or “sharing business economy”, among others, are used.

The expression “creative economy” became popular from its use in 2001 by the British writer John Howkins to indicate the volume of

⁵ Thus, the following are conceptual elements of the employment relation: 1) the subordination of the worker to the direction of employer; 2) the personal nature with which the worker provides the service; 3) the continuity of the work itself by the employee; and 4) the consent regarding the compensation, predominantly pecuniary, provided by the employer to the worker. With some variations, these are the elements ordinarily referred to in many countries by the legal doctrine and the court decisions as a sufficient, though not exclusive, to characterize the employment relationship in accordance with the tradition of the European and American labor law. An interesting roadmap for assessing the degree of international consolidation and diffusion of the legal doctrine regarding the employment relationship can be found in the normative and analytical documents of the International Labor Organization (ILO), especially some clauses of its R. 198 - Employment Relationship Recommendation (2006), a “recommendation concerning the employment relationship”, highlighted below by us: “12. For the purposes of the national policy referred to in this Recommendation, Members may consider clearly defining the conditions applied for determining the existence of an employment relationship, for example, subordination or dependence. 13. Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include: (a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker’s availability; or involves the provision of tools, materials and machinery by the party requesting the work; (b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker’s sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.”

money moved by fifteen industries, comprising arts, science and technology. “Creative economy”, closely following what is proposed by the United Nations, refers to a wide range of activities involving the promotion, design, use, circulation and disclosure not only of culture and entertainment goods and services, but also games, toys, software, “research and development” (R&D) activities.⁶

The terms “gig economy”, “freelance economy”, “on demand economy”, “platform workers economy”, “Uber economy” and “sharing business economy” have been employed more recently in the media, by business, administration and labor analysts, to indicate those companies that carry out their business by mediating the service provided by workers, under a lawfully precarious, if not informal, occasional or with no regular time, work relationship.⁷

It should be noted that the term “creative economy” refers to a broad set of activities performed within the services of R&D, whereas “gig

⁶ United Nations (2013, pp. 19-20).

⁷ Concerning the effectiveness of contractual clauses to prevent a misclassification litigation, Elizabeth Tippett sums up the evolution of the use of the expression “sharing economy” in a clarifying way: “The term ‘sharing economy’ or ‘sharing businesses’ was first used with respect to businesses that facilitated peer-to-peer sharing of tangible goods or real property. For example, in 2010, Lisa Gansky argued that sharing businesses share four characteristics: ‘sharing, advanced use of Web and mobile information networks, *a focus on physical goods and materials*, and engagement with customers through social networks.’ The paradigmatic example of a sharing business focused on physical goods is AirBnB, which helps consumers rent out their homes to travelers. Over time, the sharing economy category has come to include companies that share a combination of labor and property, or labor only. The ride-sharing company, Uber, shares both labor and property – a car owner contributes both his physical property (a car) and his time to drive customers to their destination. Amazon’s MTurk service offers a form of virtual labor sharing – individuals complete tasks online, such as transcribing text from an image or audio file. Other labor-based sharing services, such as Zaarly and TaskRabbit, offer services on demand, such as furniture assembly, cleaning, shopping, and moving services.” (Tippett, 2016, [p. 5]). There are many accounts of the origin of the expression gig economy, and the references to exclusive musical or drama performances, or even the erratic way in which the beat generation youth related themselves with work, are common.

economy” and other similar expressions are intended to indicate the way the human work is managed in job opportunities that it creates.

Gig economy and other expressions are all figures of speech (metonymy) used to indicate the occasional and non-committed form of regularity with which the worker is recruited and/or accepts to provide services. Something close to the idea of a job without position, with no regularity and, above all, with no relationship among the service provider (worker), the one to whom the services are being provided and the company that mediates it.

Despite some variations in the organization and supply of the service, there are many companies now that carry out activities following this pattern. Among the most popular ones, and in addition to Uber (2009), we can point out TaskRabbit (2008), Lyft (2012), Zaarly (2014), Amazon Flex (2015) and many others that provide products on demand through the mediation of gig workers. In this paper, we will examine the problems related to the legal regulation of work, focused on Uber. The reasons for choosing Uber as a reference for the study are: 1) its significance as a company of rapid and substantial success across several countries; 2) its political visibility, due to the large number of conflicts it caused, not only between Uber drivers and taxi drivers, but between the company and the transport service regulatory agencies; 3) its symbolic significance, the example of which is the international spread of the expression “Uber economy” or simply “uberization” to indicate, as a case of success or controversy, the bewilderment caused by the gig economy; and 4) the spread of misclassifying related litigation involving Uber and former Uber drivers,

which offers a significant material of analysis of the phenomenon from a legal point of view.⁸

One worker without an employment agreement performs those services and is paid according to what he provides. Uber is neither a legal non-profit cooperative nor a services company, but, otherwise, it presents itself as an intermediary platform between people who want to provide a certain service and people who want to hire it. However, this mediating platform not only sets the pricing, the payment terms and the service standard, but it also receives the payment, pays the people who provide the service, and earns profits.

This relationship among service provider, receiver (client) and the intermediating platform/app challenges the conventional legal categories of labor law. Under the labor law that prevailed in the last century, the trend would be to try to promote the legal regulation of this activity through the legal form of an employment relationship.

The problem is that the typical subordinate element of the employment relationship, if any, does not seem to be that of the conventional labor law. That is because the company neither imposes time patterns for the provision of the worker's work, nor provides such worker with the equipment to perform the service. In the case of the individual private passenger transport, the vehicle and the mobile phone are the property of the individual person, not of the company.

⁸ We first debated some of the ideas of this paper in the International Meeting on Law and Society 2017, which took place in Mexico City from 20 to 23 June. We presented there the paper "The uberization of work in times of the on demand services: platform workers and the legal debate focusing on the Brazilian case".

It is intuitive to infer that, for the law, it is difficult to accept the existence of a relation between subjects, especially if it is done with economic purposes, and stripped of legal consequences: a relationship with no bond.

In this paper, considering some judicial manifestations of the gig economy based on Uber, we intend to draw attention precisely to the difficulties found by the law, particularly by labor law, in order to effectively and fairly regulate this working relationship between actors that recognize themselves as non-reciprocally related persons. A difficulty that becomes even greater as this “relationship with no bonds” is propagated across semi-peripheral economies⁹ in which the economic environment does not promote, without a firm State performance, acceptable compensation and work conditions.

2. An overview of the discussion

The labor “uberization” phenomenon has manifested itself in several countries around the world, including in the core economies of capitalism, such as the United States. Next, we will present recent events in

⁹ Semi-peripheral economy such as defined by Wallerstein (1976, pp. 462-463): “Semi-peripheral states play a particular role in the capitalist world-economy, based on the double antinomy of class (bourgeois-proletarian) and function in the division of labor (core-periphery). The core-periphery distinction, widely-observed in recent writings, differentiates those zones in which are concentrated high-profit, high-technology, high-wage diversified production (the core countries) from those in which are concentrated low-profit, low-technology, low-wage, less diversified production (the peripheral countries). But there has always been a series of countries which fall in between in a very concrete way, and play a different role. The productive activities of these semi-peripheral countries are more evenly divided. In part they act as a peripheral zone for core countries and in part they act as a core country for some peripheral areas. Both their internal politics and their social structure are distinctive, and it turns out that their ability to take advantage of the flexibilities offered by the downturns of economic activity is in general greater than that of either the core or the peripheral countries. It is in this context that we propose to look specifically at this group of countries in the present world situation.”

the labor area that occurred in these countries and then debates in Brazil, some of which handled the prohibition of the operation of Uber in cities in Brazil. This issue is still a matter of discussion, since Bill (PL) 5587/16 was passed by the House of Representatives in April 2017. Therefore, the “uberization” calls out not only the labor and social security law, but it can also call out the constitutional and the administrative law, what highlights the complexity of the phenomenon under analysis.

In 2016, the State of New York recognized the unemployment payments were due to two former Uber drivers, who should have been treated as employees rather than as self-employed (independent contractors), what is against the corporate policy. As a result, they were guaranteed access to a variety of protections and rights, such as the minimum wage and workers’ compensation insurance, what means further costs for employers. The decision was entered by the New York State Department of Labor, which does not involve the situations of other drivers or other protections usually addressed to employees, but the workers’ lawyers at the time intended to press the State for an extension of protection. This decision could make the operation of gig economy businesses, like Uber and its competitor Lyft, more costly and challenging.¹⁰

State authorities considered a third driver – who is a member of the New York Taxi Workers Alliance – as a self-employed worker, but he had claimed for unemployment payment. However, Alliance reported that the worker had been confused at the time of filing the required documents and that he planned to file an appeal to amend the decision. Alliance also argues that Uber’s control over “Uber X” drivers – its low cost service, which raises most questions about the employment relationship – is similar to the control in many other services, for some of which jobless benefits were

¹⁰ Sheiber (2016).

granted. There was a federal proceeding against the New York State Labor Department that led to the complainants' perception of the Monetary Benefit Determination and the recognition of the employment relationship with Uber. The company manifests itself in the sense that drivers are self-employed, and may lose the personal flexibility they value so much if they are framed as employees.¹¹

In California, jobless benefits have been deemed due to at least two Uber drivers, although other drivers have been classified as self-employed. The relationship between Uber and its drivers did not change in the State, but the National Labor Relations Board in Chicago filed a complaint – the first in this sense, according to a representative of the agency – against the on-demand delivery platform Postmates, claiming that it precludes the exercise of labor rights. In addition, the Board is investigating several cases against Lyft and Uber.¹²

In San Francisco, a federal judge overturned an agreement between Uber and a group of its drivers and former drivers in a class action. Under this agreement, of April 2016, Uber was expected to pay up to USD 100 million as reimbursement damages to about 400,000 drivers. Uber had also pledged to recognize and dialogue with drivers associated to quasi-unions in Massachusetts and California, as well as allow tips at the end of the rides. Such an agreement had been entered into by Uber as a victory of the drivers who wanted to maintain the flexibility of their work. However, it was already said by some people that the amount for reimbursement damages was very low.¹³

¹¹ Sheiber (2016).

¹² Sheiber (2016).

¹³ Isaac (2016).

Workers had first sued Uber in 2013, claiming recognition of the employment relationship, to which Uber opposed, given the costs incurred with payroll taxes and the guarantee of at least a minimum wage. For the annulment of the agreement, the court stated that it had not been reasonable, fair or adequate and that USD 100 million was well below the potential value of the decision. If they are considered employees, their drivers will have to be reimbursed for their expenses such as, for example, maintenance of the vehicle, something that they themselves pay as self-employed.¹⁴

In the United Kingdom, an employment court in London also decided in 2016 that Uber drivers are not self-employed and that they should earn the “national living wage”. James Farar, one of the drivers who sued the company in that case, said he was under tremendous pressure to work long hours. He also claimed that the company took measures against him when he canceled a ride and that in some months he earned about £ 5 an hour, which is well below the £ 7.20 that workers over the age of 25 should earn. Uber argued that it is a technology company, and not a transport enterprise, and that its drivers are self-employed, with freedom to choose when and where to work. The trial judges were quite critical of Uber. They supported that the company’s arguments were based on fiction and that it would be ridiculous to consider the existence of thousands of small enterprises connected to each other by a platform in the dynamics of this business. In addition, the judges stated that drivers cannot negotiate with passengers, but must accept the terms of the company.¹⁵

There are 40,000 Uber drivers in the UK who are not entitled to labor rights such as holiday pay or pension. The matter already opens up

¹⁴ Isaac (2016).

¹⁵ Osborne (2016).

possibilities of questioning the labor practices of companies that rely heavily on independent work. The largest union in the country, the Unite, reported at the time it was forming a new sector to deal with the bogus self-employment. The Citizens Advice suggests that approximately 460,000 people in the country may be falsely framed as self-employed. This accounts for around £ 314m of taxes and contributions of employers that were not collected within a one-year-term. The government also announced measures, such as investigation of companies, and Members of Parliament (MPs) started a survey on working and payment conditions in the country, aiming at mapping tax, labor and benefit issues.¹⁶ Despite all these measures, in particular the decision of the employment court, Uber stated the following to its drivers:

There will be no change to your partnership with Uber in light of this decision and we will continue to support the overwhelming majority of drivers who tell us that they use the Uber app to be their own boss and choose when and where to drive.¹⁷

In Brazil, the Court of Justice of the State of São Paulo ruled in October 2016 that a local law of the City of São Paulo – enacted on 8 October 2015 – was unconstitutional. This law had prohibited the use of private cars with registration in certain applications, such as Uber, to transport passengers on an individual and paid basis. In light of the noncompliance, the law provided for a fine of 1,700.00 Brazilian *reais* – around USD 520 – and seizure of vehicles, but such sanctions are not being enforced. This is because, following the enactment of the Law, the Mayor of the City at the time authorized this type of service by decree on 10 May 2016. The judgment

¹⁶ Osborne (2016).

¹⁷ Booth (2016).

was decided by a majority of votes, and one of the associate judges and the rapporteur of the action, stated that the prohibition provided for in law was against the right of choice of the consumer and free competition, among other issues. The decision was made in the sense of an opinion provided by the Attorney General of the State of São Paulo, dated of 5 April 2016, which was issued in a lawsuit filed by the National Confederation of Services.¹⁸

A similar case occurred in 2017 in the City of Aracaju, in the State of Sergipe, Brazil, where a judge denied the request made by the Municipal Transportation and Transit Agency, a self-managed State agency related to the regulation of public transportation in the city. The Agency requested the suspension of Uber's operation in Aracaju, arguing that the company offended a local law of 2015 that prohibits the service, as well as a federal law on individual passenger transportation. The judge, however, considered that the Uber drivers offer private transportation, and, in this case, the National Congress has jurisdiction on this issue. The local law, therefore, was considered unconstitutional, which released the application in the city, despite this decision could be appealed. From 1 January to 10 February 2017, the Agency seized 30 vehicles associated to Uber. The Sergipe Taxi Workers' Union entered the claim as a party interested in the case.¹⁹

Regarding the National Congress, the federal deputies passed in April 2017 the Bill (PL) 5587/16, which authorizes the operation of platforms such as Uber. However, the original text was amended and it may hinder such transport service. The main text established that Municipalities should regulate the matter, but the amendment deleted the section in the Bill that framed the individual passenger transportation as a private activity. The rapporteur-deputy of the main text said that this turned the activity into a

¹⁸ G1 (2016).

¹⁹ Fontenle (2017).

public one, requiring, thus, specific local laws on the matter, under penalty of rendering the activity unfeasible. On the other hand, the deputy who is the author of the amendment said that, for controlling purposes by the municipal governments, the individual passenger transport should be public. The amended text that was passed by the Chamber of Deputies will now be forwarded to the Federal Senate.²⁰

Uber considered the approved text as retrograde, pointing out to the equalization of its system with taxis. The amendment provides that the passenger transportation should be provided by vehicles under the rent category, what, according to the rapporteur of the main text, is the concession that Municipalities currently provide to taxi drivers. It also stated that, if the Bill passes unchanged in the Senate, the local laws allowing Uber will have to be revised. The deputy calls this a “taxization”, through which the application system is transformed into taxi. Another approved point in this line is that the driver of the application must have specific authorization from the public authority of the location where the service is provided.²¹

About court decisions concerning Uber in Brazil and its signed up drivers, some decisions that have been recently taken in Belo Horizonte and São Paulo caught our attention. Highlighting the relevance of this debate, two labor courts of Belo Horizonte – part of the Labor Regional Tribunal of the Third Division (TRT 3), State of Minas Gerais – have had different understandings, in less than one month, about the employment relationship between drivers and Uber.

The judge of the 37th Labor Court of Belo Horizonte has not recognized the allegation of a driver who had urged against his dismissal

²⁰ Calgaro (2017).

²¹ Calgaro (2017).

without granting any work termination allowance. Although the legal order focus on the “principle of the reality primacy” – term used by the Brazilian legal doctrine to express the idea in which the real work conditions are above the conditions fixed in the labor contract –, the judge ruled that there was no employment relationship and, consequently, there were no labor rights to be paid.²² However, the judge of the 33rd Labor Court of the same city ruled by recognizing the employment relationship and the concession of some labor rights, such as registration as employee, overtime pay and night work bonuses. In addition, the judge determined the refunding of the fuel costs and those related to water and candies, which are usually offered to the passengers.²³

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

²² “Artur Soares Neto v. Uber do Brasil Tecnologia Ltda., Uber Internacional B.V. and Uber Internacional Holding B.V.” (2017).

²³ “Rodrigo Leonardo Silva Ferreira v. Uber do Brasil Tecnologia Ltda.” (2017).

leads to “moral damage”. So the judge sentenced Uber to pay 50,000.00 Brazilian *reais* – around USD 15,360.00 – to the driver.²⁴

3. Innovation, obsolescence and litigation

One of the main characteristics of the creative economy is to add wealth through the development of innovative products and businesses.

Everything seems to work as if the main tangible wealth was a “good idea”, sufficient in itself to attract angel investors and millionaire transactions by crowd funding; all these attested by several glamorized accounts of good practices according to this model of success. This glance toward the supremacy of the “good idea”, even if compared with a reasonable amount of previously cumulative capital, is not exactly a novelty: the novelty perhaps is the conversion of this supremacy into a universal model of success and entrepreneurial virtue.

It is interesting to note here that this aesthetic and quasi-religious worship of innovation belongs to the ethos of the creative economy, just as gigantism and self-sufficiency have been for the Fordist management model.

The “good idea” must be, first of all, surprising, unpredictable and, if possible, clearly disconcerting; in one word: disruptive²⁵. Ignoring tradition, though not rebellious or contending, the creative economy relies

²⁴ “Fernando dos Santos Teodoro v. Uber do Brasil Tecnologia Ltda, Uber Internacional B.V. and Uber Internacional Holding B.V.” (2017).

²⁵ “Christenson contrasted ‘sustaining innovations’ with ‘disruptive innovations’ and tied the latter directly to creative destruction. He found that existing market leaders often successfully accomplish sustaining innovations, or incremental and marginal improvements on existing products. But Christenson demonstrated that start-up entrepreneurs with new technologies, or ‘new product architectures involving little new technology per se,’ are frequently better positioned than existing market leaders to carry out disruptive innovations, which create new markets and eventually destroy old ones” (Wroldsen, 2016, pp. 758-759).

on the virtues of the market economy. Especially in its sharing and gig economy versions, the creative economy is guided by an underlying ideology that seeks to combine market and solidarity; values hitherto seen as opposites, though not exclusionary.

All that to say that it is not surprising how much the creative economy, especially under the sharing and gig forms, causes litigation and conflicts. We have seen that this occurs in several areas of interest and involving several actors, not just in the form of classification litigation. We have also seen that this phenomenon is reproduced in different countries that follow different legal regulation standards.

Therefore, we can infer that the increase and spread of litigation are not important phenomena only in Brazil or in other semi-peripheral countries, but they follow the trail of the creative economy wherever it goes.

It is believed that most of this litigation can be explained exactly by the cult of innovation as a management paradigm and equivalent of wealth, making obsolescence not only a side-effect but especially a by-product often tolerated, if not pursued by creative businesses.

Many of the changes brought about by the creative economy imply identity changes that derive from transformations in the manner of working, earning and spending money. Identity changes that can, in a short term, make certain types of business and even certain professions or jobs obsolete.

The hypothesis supported by this paper consists in attributing to the growth of the obsolescence of products, processes and social roles, responsibility for a significant portion of conflicts and litigation related to the creative economy. A responsibility even greater than that of innovation itself.

This means that in a short time business and especially people have to rebuild their functional identities: an extraordinarily difficult challenge for ordinary people, even when they consciously accept to face it.

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

Let us take a closer look at the effects especially caused by the gig economy on the working relations environment, and the manner in which litigation can be seen as a lens to identify such effects.

The study of social phenomena through the lens of litigation imposes some caution; though useful and refined, the lens of litigation, like any lens, causes distortions that need to be understood and controlled.

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

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

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

3. differently from what already occurs in some countries, such as Spain, that have a legal system that protects self-employed workers and micro-franchisees in their relations with more powerful hiring firms, in most countries the choice evidences dramatic contours between being wholly inside or wholly outside the protecting border of the State and the law, depending on whether the employment relationship is classified, or not, as an employment relationship;²⁶

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

As the alternatives present in these three axes of possible regulation and protection systems are combined, we can talk about different

²⁶ In the case of the United States, where, as in Brazil, the boundaries between employees and independent contractors (self-employed workers) are decisive in relation to the acquisition of rights, despite a certain lack of sharpness in the practical distinction between them. Katherine Stone (2006) summarizes thirteen factors of a classification test determined by the Supreme Court from 1999 on, highlighting the emphasis of the Supreme Court on the predominance of the exercise of service control by the employer for the characterization of employment.

moral and political magnitudes that the misclassification litigation may present.

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

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

The political utopia of a full-fledged market society has been the backdrop to the different political experiences of the welfare state at least from the second postwar period up to the beginning of the 21st Century.

In the course of at least the last three decades, a gradual consensus has been developed on the recognition that political projects for social protection should seek alternatives to legal systems of rights built on

the basis of typical employment, i.e., that job-for-all-life, in which employee and employer bid farewell due to the retirement with a “golden hand-shake”.

Not because the preservation and expansion of such employment are seen as an undesirable goal, but simply because they started to be identified as unfulfillable. Even if no one definitively sentenced the employment to death, most analysts began to consider the following line of propositions: 1) typical employment tends to become a residual and declining form of paid occupation; 2) the new job opportunities tend to be offered on a precarious basis; and 3) the labor law is faced with the challenge of redesigning the approach to worker’s protection that handles this increasingly precarious and unstable scenario.

The theme of the social consequences of the changes affecting the employment relationship has perhaps occupied the most prominent position in the hierarchy of analysts and policy makers’ concerns.

Much has been written, developed and discussed about the growing need to think about legal tools for the protection of workers working through precarious and unstable legal relations. Perhaps the boldest definition in this sense is from the well-known “Supiot Report”, offered to the European Commission at the end of the last century.²⁷ The fact is that despite the efforts of professors and researchers who deal with this change trend, we still seem a little bit far from achieving satisfactory results in the sense of thinking legal rules for the protection of work outside the prevalent typical employment environment.

The latest expansion movement of gig economy or “uberization” has made this lack of response even more distressing.

²⁷ We mention here the publication: European Commission (1999). *Transformation of labour and future of labour law in Europe*: final report.

We do not intend to neglect that the deepening of this line of transformations has been challenged. In this sense, see the resistance of some Brazilian courts. In particular, see the effort of ILO embodied in its Recommendation 198 (2006) on employment relations. In its opening “whereas”, the ILO explicitly confirms the following, highlighted by us:

Considering that the protection of workers is at the heart of the mandate of the International Labor Organization, and in accordance with principles set out in the ILO Declaration on Fundamental Principles and Rights at Work, 1998, and the Decent Work Agenda, and

Considering the difficulties of establishing whether or not an employment relationship exists in situations where the respective rights and obligations of the parties concerned are not clear, where there has been an attempt to disguise the employment relationship, or where inadequacies or limitations exist in the legal framework, or in its interpretation or application, and

Noting that situations exist where contractual arrangements can have the effect of depriving workers of the protection they are due, [...] ²⁸

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

²⁸ International Labour Organization (2006).

Insisting on resistance patterns, forcing a great extension of the very concept of employment to account for flexible work may even work for those employment relationships that have been changing over time, but not for those labor relations that have been formed entirely outside the employment circle, as is the case of open opportunities in the gig economy environment.

4. Some preliminary conclusions

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

This is not about the support that the protection of work by legal tools and public policies is something functionally interdicted in relation to creative economy. The core issue of this paper is to admit that these new labor relations demand new forms of protection, which no longer adopt the employment relation as a regulatory paradigm.

This is an admittedly daring analysis hypothesis. After all, having been designed to protect blue-collar workers inside rank-and-file atmosphere, the working relationship expanded to encompass white-collars workers from the service sector, agricultural workers, domestic workers and even, to a large extent, public servants, why would not it show breath for one more wave of expansion now?

It will be good if the argument of this paper is refuted by the facts in the near future. Until then, however, we propose to explore the hypothesis that the present challenge is qualitatively different from the preceding expansion movements.

Now it is no longer just a question of making the employment relationship cover a new sector of economic activity, a new configuration of workplace where the service is provided, or a new social profile and income of workers.

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

On the other hand, it should be noted that this new labor agreement is often profitably intermediated by an actor, as much or more powerful than the conventional employer, who is actually allowed to set rules about the service to be rendered, even imposing sanctions on the worker who transgresses them. In essence, therefore, the marked political asymmetry between worker and the mediator who economically exploits third-parties' work is similar to the employment relationship.

The constitutive asymmetry of these new labor relations means that the law and the State cannot be indifferent to them. We agree with Davidov's assertion that society "can enjoy the gains of technological advances and innovative businesses without accepting the evasion of labour

laws”²⁹. Notwithstanding, our point consists of emphasizing the problems related to the questions: what kind labor law? What kind of labor protection? What sort of labor relation?

There are many other legal rules that have been created aiming at rebalancing the power asymmetries among economic actors. So is the case of the above-mentioned micro-franchisee, individual entrepreneur or small business, exclusive suppliers, traveling salesman, business representatives and relationship between consumer and supplier, in certain services.

In these and many other cases, the power rebalancing goals targeted by the legal intervention do not allow them to be treated as an employment relationship.

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²⁹ Davidov (2017, [p. 11]). In this sense, Marie-Cécile Escande-Varniol (2017, p. 173): “*Pour accorder un minimum de protection aux travailleurs concernés et préserver des régimes de protection sociale appuyés sur le contrat de travail subordonné, la solution du forçage du contrat risque de ne pas être tenable à long terme. Une solution plus pérenne et adaptée serait d’une part d’élargir la notion de travailleur afin de sortir du seul critère de la subordination et d’ouvrir les portes du champ du droit du travail afin de construire un état professionnel de la personne (A. Supiot, Les voies d’une vraie réforme en droit du travail, introduction à la nouvelle édition du rapport. Au-delà de l’emploi, Flammarion 2016). Le droit comparé montre la convergence d’une lente évolution en ce sens, le droit français n’étant pas en reste à travers des réformes récentes incluant les travailleurs indépendants dans de nouvelles protections (on pense particulièrement ici au CPA).*”

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