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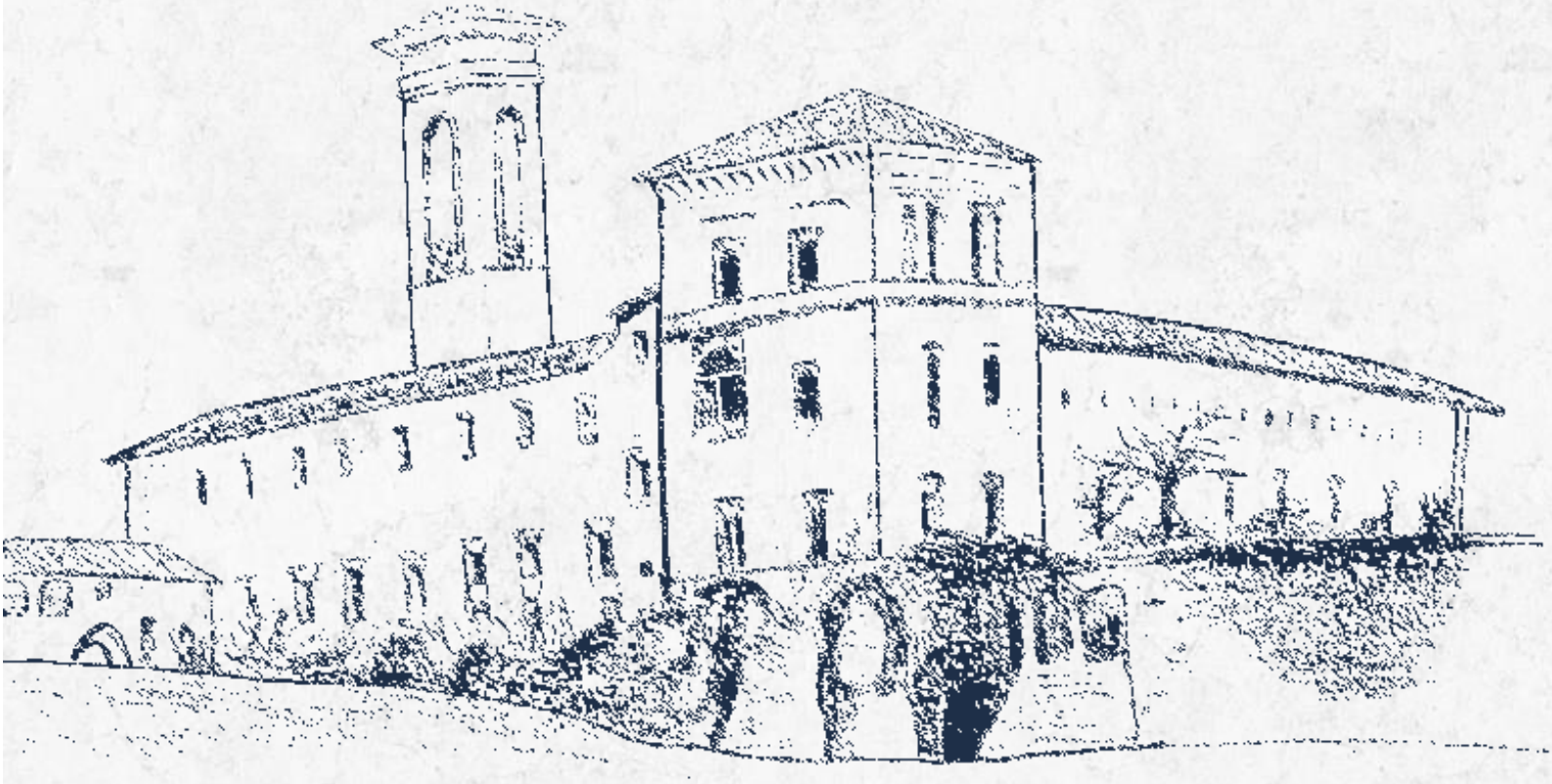

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Legal Characterization of the Worker in New Forms of Employment: Reflections on the Subjective Scope of Labour Law

Esther Guerrero Vizuete [1]

Abstract: This paper analyses the new forms of employment and their impact on the traditional notion of subordination in case law. The aim is to establish the criteria that should define the legal nature of the new provision of services and the subjective scope of Labour Law.
Purpose: The paper highlights the need to redefine the concept of subordination, delimiting its contours in order to establish a clear boundary between autonomous work and wage labour.
Design/methodology/approach: The objective is to determine whether the services provided on digital platforms fit into labour budgets or whether other legislative options should be pursued.
Research implications: The diversity of ways of working stemming from digitalization suggests that it is necessary to explore other ways of protecting digital workers. The traditional trend towards the employment of service provision in which there is a certain degree of subordination should be overcome.
Originality/value: The originality of the paper lies in its approach, which suggests including digital workers the category of economically dependent autonomous workers
Paper type: Research paper

Keywords – *Concept of employee, Labour subordination, Self-employment, New types of employment*

[1] Esther Guerrero Vizuete is a Serra Hunter Fellow in Labour and Social Security Law at University Rovira I Virgili (esther.guerrero@urv.cat). Orcid: 0000-0001-9710-4823. This research paper is part of Project RTI 2018-097947-B-I00 entitled "New technologies, organizational changes and work: a multidisciplinary vision" funded by the Spanish Ministry of Economy and Competitiveness. Main researchers: Ana Romero Burillo and Josep Moreno Gené.

1. Labour Law before the New Ways of Providing Services

Twenty-first century employment has a polyhedral morphology[2] that obliges us to reconsider the most basic concepts of our discipline. Moving away from a typically Fordist radiography, in which the company was a centralized production space, globalization, the intensive use of new technologies that facilitate crowdsourcing[3], and above all, the changes in the way consumers acquire goods and services are transforming our Labour Relations system. This change "will not be trivial", as ARIAS DOMÍNGUEZ points out, "since our historical employment model is built on social and productive bases under discussion"[4].

Companies are adapting to the new reality by replacing their hitherto centralized production process with a network of external collaborations with the dual objective of lightening their structure and adapting more easily to the swings in supply and demand. These changes have particular importance in the labour field, because the widespread use of productive decentralization as a formula for business organization is giving rise to new ways of integrating of employees in production processes[5]. The "traditional" job is stepping back for a "technological" job in which the employee's presence is "virtual". The employee is located in an ethereal space, where there are no or only limited orders and is often submitted to the standardized execution procedure imposed by computer programs. The results of which are not valued directly by the employer but indirectly by the final recipients of the work. Jobs are therefore carried out very independently, and there is a more intense

[2] This expression refers to the different ways of providing services at present: as an employee, subordinate worker with high doses of independence, self-employed worker, or as an economically dependent self-employed worker. In all of them, the notes of independence and subordination are present in different measure and with different scope.

[3] Crowdsourcing refers to a business model in which a provision of services that has traditionally been performed by a single employee is subject to division and its performance is attributed to a plurality of providers who perform a tiny part of it, and as a result, the consideration for the performance of a micro-task is a micro-payment.

[4] The aforementioned author considers that the very concept of work pivots on two inconclusive debates: firstly, the definition of employee, who suffers undeniable expansive processes in its substantive scope; second, the adaptation of the normative system to the demands imposed by new production methods. Arias Domínguez, A. "*¿Qué fue, qué era, qué es y qué será el Derecho del Trabajo?",* Laborum, Murcia, 2018, p. 36.

[5] Navarro Nieto points out that productive decentralization and self-employment are two phenomenons that feedback. Hence, in these new scenarios, self-employed workers do not limit themselves to providing outsourced services, but they rather facilitate their integration and coordination within the business production chain. Navarro Nieto, F.: *"El trabajo autónomo en las "zonas grises" del Derecho del Trabajo",* International and Comparative Review of Labour Relations and Employment Law nº4, 2017, p. 60-61.

connection between effective occupation and remuneration. This affects the volume of work assigned, as well as the remuneration of the employee's positive results[6]. In other words, the risks of the company are transferred to the employee. We could talk, therefore, about a job that is "self-generated" by the employee, since their availability and knowledge will give them certain status, which requires the standard of quality to be maintained over time in order to continue in that position.

The gig economy produces a transcendental change in the connection between employer and employee in the labour relationship because coordination replaces subordination. The employee is substituted by a self-employed worker, who is integrated as a necessary link in the flexible management of the production process and provides low-cost labour without having to comply with the Labour Laws. Therefore, self-employment contributes to the process of changing the way of companies operate. It consolidates "a "flexible" layer of labour that is characterized by unstable employment relationships, which can easily be terminated in the event of an economic recession and be restored when growth outlooks are more positive"[7].The International Labour Organization (ILO) points out that the digital transformation will bring "a rise in new forms of self-employed work, it will become common for people to have side businesses, side jobs, or two jobs at the same time", thus contributing to expanding the heterogeneity of this group[8]. Therefore, we are facing a divergent situation given that the business reality tends towards coordination as a form of legal relationship while the normative reality and the court decisions attempt to include, even forcibly, these new ways of providing services into the labour scope as the only way to protect the needs of those who provide the services.

It is important to point out that the real debate will be to analyse the business model that is being developed and its impact on service provision, given that there are being "generated new types of workers that hardly fit into the

[6] "Where the networked organization tends to replace the pyramidal organization, power is exercised in a different way: through an evaluation of the products of labour and not by means of orders over their content. This way, employees are more subject to results than to means. The consequence is a greater flexibility in the execution of the job and a release of its capacity for initiative ". AAVV: "Trabajo y Empleo. Transformaciones del trabajo y futuro del Derecho del Trabajo en Europa", Supiot (Coord.), Tirant lo Blanch, Valencia, 1999, p.47.

[7] This is referred to in the Opinion of the European Economic and Social Committee on 'Abuse of the status of self-employed' (own-initiative opinion) of 19 January 2013 (2013 / C160 / 03). DOUE of 6 June, 2013.

[8] Synthesis Report of the National Dialogues on the Future of Work International Labor Organization, 2017, Spanish Version p. 46, available at www.ilo.org

structure that the Labour Law has developed through its historical evolution"[9]. The evolution of the labour concept of worker must be analysed considering that we can no longer speak of a single type of employee. Therefore, the solution to the problem of regulating employment should perhaps be approached from a broader perspective[10] in which there are rights that protect the worker regardless of the legal qualification of the contract. The need to reformulate or update the concept of subordinate worker in connection with the vertiginous proliferation of forms of border self-employment is leading to what many have already qualified as a subordination crisis. It has been suggested that the Labour Law should be transformed into the Law of professional activity.

2. Labour Flexibility and New Technologies: The Effect on the Labour Relationship

One of the most visible effects of the flexibility promoted by European institutions, which aim for a work organization capable of responding rapidly and efficiently to new needs and on mastering the necessary capacities to increase production[11], has been "the thinning of companies"[12] by outsourcing activities either through traditional companies, multiservice companies or self-employment. In parallel, the intensive use of new technologies has led to new

[9] Goerlich Peset, J. M.: *¿Repensar el derecho del trabajo? Cambios tecnológicos y empleo*, Gaceta Sindical nº 27, 2016, p. 179. u

[10] There are authors who wonder if in the current job market and in the labour world in general we can clearly distinguish between subordinate work and self-employment, relaying only on the worker's dependence on the employer. Seghezzi, F.: *Siamo sicuri che il mondo si divide tra autonomi e dipendenti? en Verso il futuro del lavoro. Analisi e spunti su lavoro agile e lavoro autónomo,* Dagnino, E. and Tiraboschi, M. (editors), Adapt Labor Studies no. 50, 2016, p. 12; Riesco Sanz, A.: "Trabajo, independencia y subordinación. La regulación del trabajo autónomo en España", International Journal of Sociology, vol. 74, No. 1, 2016, p. 2, among others.

[11] Communication from the Commission of the European Communities "Hacia los principios comunes de la flexiseguridad: más y mejor empleo mediante la flexibilidad y la seguridad", COM (2007) 359 final. Brussels, June 27, 2007, p. 5. Un estudio crítico sobre el concepto comunitario de flexiseguridad in Martínez Abascal, V. A.: "La idea de flexiseguridad en el ámbito de la Unión Europea", in *El modelo de flexiseguridad en el ordenamiento español*, Magazine of the Ministry of Employment and Social Security, extraordinary number, 2018

[12] In the words of Romagnoli companies "grow slimming", hence faced with the fact a company that assumes the entire production process generalizes a system of coordination or subordination between business units, then outsourcing of the production is therefore no longer an option but a necessity. This organizational formula has had a full impact on the way workers are integrated into production processes. Esteve Segarra, A.: "*Externalización laboral en empresas multiservicios y redes de empresas de servicios auxiliares*", Tirant lo Blanch, Valencia, 2016, p. 19-20.

forms of productive organization such as online[13] and off-line[14] Crowdwork (also called 'human cloud'). The best known example is the work done on demand via Apps (UBER, Deliveroo, Glovo, etc.) characterized by the worker having decision-making power before the start and while carrying out the service, which the worker has committed to doing. This form of organization is revolutionizing the traditional dimension of companies as it is no longer necessary "to provide an estimated number of workers to meet the recurrent offer of services"; it is just necessary "to have a pull of potential providers who can connect in real time with the recipients of such services"[15].

The legal qualification of these ways of providing services with high organizational flexibility is not, however, a recent problem of our legal system. The novelty lies in how essential aspects of providing services are conceived. Freedom in determining working hours, decision-making capacity, retribution according to results, and substitution of the provider are aspects that identify the new work relationships. The nature and content of which is what allows the use of certain contractual relationships, which contribute to better adapting companies productive and organizational needs.

In this context, friction is caused by the widespread resource of self-employment as a way of instrumentalizing the bond that connects the employer with the worker. Its bases lie in the lower costs involved in hiring and the lower social protection of those hired, as the legislator has traditionally given less attention to this group of workers compared to salaried employees. The result, normatively speaking, is a situation of legal anomy that obliges the courts to delimit, through interpretation, the scope of those elements that should define the inclusion of these new ways of providing of services in the field of subordinate work or, on the contrary, in the sphere of private law. Thus, large doctrinal sector has begun to question whether dependence and

[13] Online Crowdwork consists in dividing the provision of services into a multitude of micro tasks that require a very short time for their execution. This reduces the time of production, due to the fact that what was previously done by a single worker, is now executed in a shorter time by a multitude of workers. The worker enters the platform and decides what micro-task they will perform, receiving a micro-compensation for the performed task.

[14] These are services rendered physically and therefore of a local nature. In the classification proposed by Codagnone and others, the Mobile Labor Market (MLMs) integrates those services contracted through digital platforms whose providers have a low qualification and whose qualification as self-employed is often incorrect. Codagnone, C., Abadie, F., Biagi F.: "The future of work in the" sharing economy ". Market efficiency and equitable opportunities or unfair precarisation? Publications Office of European Union, 2016, available at www.ec.europa.eu.

[15] Agote, R.: "On demand economy: 10 claves de entendimiento laboral". IUSlabor 1/2017, p. 5

subordination are adequate concepts for defining the new ways of working[16]. The importance of this delimitation is due to the need to establish a concept of worker that allows adequate protection against atypical ways of working[17], and promote decent work conditions[18]. Let's remember that the promotion of innovative ways of working that guarantees quality working conditions comes from the European Pillar of Social Rights. A task that is hampered by the lack of a Community concept of worker, "given that the diversity of national legal systems and the interpretation and application of Labour Law by the Court of Justice of the European Union (CJEU), hinders the creation and harmonization of a common European law in relation to the coverage of Labour Law"[19]. In addition, it appears that the one who requests and evaluates the work is the client, the market, the offer and demand[20].

In this analytical process, we must take into account that the jurisprudence has been guided by an expansive tendency that attempts to avoid the exclusion of those workers who have a certain autonomy in the execution of their work from the Labour Law scope. There are numerous examples in Spanish jurisprudence in which the courts have given a labour qualification to the work

[16] Sagardoy De Simón, Iñigo and Núñez-Cortés Contreras, P.: "Economía colaborativa y relación laboral: ¿un binomio conflictivo?", Cuadernos de Pensamiento Político, January-March 2017, p. 96-98; Mercader Uguina, J. R: "El nuevo modelo de trabajo autónomo en la prestación de servicios a través de plataformas digitales", Diario La Ley Unión, July 11, 2017, p. 9-11; Ginés i Fabrellas, A.-Gálvez Durán, S.: Sharing economy vs Uber economy y las fronteras del Derecho del Trabajo: la (des)protección de los trabajadores en el nuevo entorno digital, Indret nº 1, 2016, p. 36; Auvergnon, Philippe: "Angustias de la Uberización y retos que plantea el trabajo digital al Derecho Laboral", Revista de Derecho Social y Empresa nº 6, 2016, p. 11-14; Tiraboschi,M.-Del Conte,M.: "Employment contract: Disputes on definition in the changing italian labour law", available at www.jil.go.jp/english/events/documents/clls04_delconte2

[17] A classification of these is included in the "Non-standard employment around the world" report. Understanding challenges, shaping prospects", elaborated by the International Labour Organization (ILO), Geneva, 2016, p. 8 and ss. Available at ilo.org.

[18] The ILO has adopted this term in its Declaration on Fundamental Principles and Rights at Work (1998) with the aim of promoting productive employment which protects the rights, not only of paid employees but also of those who are self/employed and the activities included in the so called informal economy. For a complete study of this concept *vid.* Gil y Gil, J. L.: "Concepto de trabajo decente", Relaciones Laborales núm. 15-18, 2012.

[19] Sánchez-Urán Azaña, M. Y.: "Concepto de trabajador en el Derecho de la Unión Europea. Una aproximación sistemática y un enfoque propositivo ", 2017, copy, p. 7. Regarding the absence of a Community concept of self-employment vid. Rodríguez Egío, M.: " Hacia un trabajo autónomo decente", Bomarzo, Albacete, 2016.

[20] Report of the judgement nº 1737 of November 28 of the Court of Cassation (Labour Division) of Paris ECLI: FR: CCASS: 2018: SO01737, p. 10. This judgement clarifies the legal nature of the legal relationship between a deliverer and the TAKE EAT EASY platform.

carried out in a context of organizational[21] and schedule[22] independence, with professional autonomy[23], with ownership of the necessary means of production[24] and in situations in which the worker has the capacity to decide on their own replacement[25]. We can also observe this tendency in others countries[26]. Definitely, the *vis attractiva* that the Labour Law has brought with it is "an invasion of foreign territories endangering their identity and traditional boundaries"[27]. Therefore, the limits between autonomy and subordination are particularly complex nowadays, especially if we consider that coordination is the most prominent feature in new ways of working compared to the classical subordination. Thus, we find ourselves before a situation of legal uncertainty and deregulation, given the confusing parameters that are being used to determine the legal nature of new forms of employment stemming from digitization. It is therefore necessary to define the boundary between autonomy and employment more precisely.

3. Legal Subordination as a Delimiting Criterion of Employment and its Presence in the New Forms of Work

In view of the diversity of ways of working and the high degree of abstraction of some of the characterizing elements of labour, jurisprudence has confirmed their appreciation through casuistry, and has been forced to consider the authenticity of the facts. A circumstance that allow judges "to evolve the boundaries of salaried work according to social and economic changes without the need of a legislative reform"[28]. However, in our opinion, this evolution may

[21] Judgement of the Supreme Court (Labour Division) dated 23 November 2009 (RJ 2010/1163).

[22] Judgement of the Supreme Court (Labour Division) dated 20 January, 2015 (RJ 2015/456)

[23] Judgement of the Supreme Court (Labour Division) dated 19 February, 2014, Rec.3205 / 2012 (RJ 2014/2075)

[24] Judgement of the Supreme Court (Labour Division) no. 44/2018 dated 24 January, Rcud.3595 / 2015 (RJ 2018/817).

[25] Judgement of the Supreme Court (Labour Division) no. 902 / 2017 dated 16 November, Rec.2806 / 2015 (RJ2017 / 5543)

[26] As an example Supiot, A.: .: "Les nouveaux visages de la subordination", Droit Social nº 2, 2000

[27] Ojeda Avilés, A.: La "externalización" del Derecho del Trabajo, International Labor Review, vol. 128, 2009, No. 1-2, p. 51.

[28] Auvergnon, Philippe: "Angustias de uberización y retos que plantea el trabajo digital", Revista Derecho Social y Empresa nº 6, 2016, p. 15. It should be noted that the problem lies, as López Cumbre correctly points out, in the fact that this integrating tendency towards subordinate work occurs "in a context in which the legal system is not capable of guaranteeing the basic rights of workers. Contracts of short duration, extended days, reduced salaries ... show the deterioration of an apparently protective but unfulfilled regulatory framework".

be leading to an overly broad reconsideration of the boundaries of employment, particularly regarding the requirements of subordination. Therefore, the legal classification of new forms of employment is based on an unstable terrain in which this material reality is not always subject to a peaceful judicial interpretation.

The predominant doctrinal tendency attributes subordination as the delimiting criteria of employment because it is "a characteristic and unique note of Labour Law with respect to the note of alienation also present in civil and business contracts"[29]. Understood as the integration of a worker into the organizational, management and disciplinarian circle of the entrepreneur, the virtual nature of subordination, which is manifested in its ability to transform before the new economic realities, makes it an intensely mouldable concept capable of including virtually any new manifestation of work born from technological advances and productive decentralization.

In the Spanish system, if the response given to the interpretation of subordination in the "traditional" provision of services[30] has been ambiguous,

López Cumbre, Lourdes: "Start-ups y capitalismo de plataforma: renovación o adaptación de los presupuestos laborales" en *Starts-up, emprendimiento, economía social y colaborativa. Un nuevo modelo de relaciones laborales,* López Cumbre (Dir.), Revuelta García (coord.), Thomson Reuters Aranzadi, 2018, p. 107.

[29] Sierra Benítez, Esperanza M: El tránsito de la dependencia industrial a la dependencia digital: ¿qué derecho del trabajo dependiente debemos construir para el siglo XXI?, International and Comparative Review of Labour Relations and Employment Law, nº 4, 2015, p. 9.

Also, an importance indicated by judicial doctrine for whom "dependence is the most decisive backbone of the labour relationship" (Judgement of the Supreme Court of 14 May 1990 (RJ 4314/1990. The European Commission, in their Communication "A European agenda for the collaborative economy" places subordination as a key criterion for defining of the labour relationship, COM (2016) 356 Final, June 2, 2016, p. 13-14.

On the other hand, Ugarte Cataldo wonders about how subordination has become the cardinal notion of Labour Law, considering that the answer is simple: it does not arrive, but rather is born with the Labour Law. Ugalde Cataldo, José L: "La subordinación jurídica y los desafíos del nuevo mundo del trabajo", Labour gazette, vol. 11, No. 1, 2005, p. 24

[30] The Supreme Court (SC) has followed a contradictory interpretative line when they have examined the presence or absence of subordination in border areas with the Labour contract. The SC has considered some circumstantial facts of dependence, such as, among others, the employee's work performance; the insertion of the worker in the organization of the employer who is responsible for scheduling their activity, setting their working hours and schedule; the absence of freedom to reject the work tasks and that the work is performed following the employer's orders and instructions. Therefore, the SC understands in some cases that if the worker is not subject to a fixed schedule it does not imply that is not a labour relationship, when this schedule is integrated within the hours of attention to the public of the establishment in which the work was carried out (Judgement of the Supreme Court (Labour Division) no. 381 / 2018 of 10 April (RJ 2018/1858)). In others, the SC has indicated that the absence of fixed schedules is an indication that points to the inexistence of the labour relationship (Judgement of the Supreme Court (Labour Division) of 26 November 2012 (RJ

the delimitation in the new forms of employment that have emerged from the platform economy are even more complex. To this date, there are few judgements that analyse the nature that should be given to the worker who provides services on digital platforms. The first judgements qualify the services provided for the TAKE EAT EASY platforms (Barcelona)[31] and DELIVEROO (Valencia)[32] as labour relationships. They consider that when companies set a minimum remuneration require a time slot in which the services must be provided, indicate to the workers how they should carry out deliveries or control them by means of a GPS, they are exercising the powers inherent to their status of employers.

However, regarding the company GLOVO (Madrid)[33], the judge rejected the labour nature of the provision of services because the workers are free to choose their working days and schedule, and are free to accept or reject of the

2013/1076)). The free acceptance or not of entrusted assignments is also subject to different interpretations. In the case of the translator who freely decides not to provide the offered service, the judge understands that, indirectly, the worker runs the risk of not being called again, so that freedom does not really exist, concluding that we are facing an criteria of a labour relationship (Judgement of the Supreme Court (Labour Division) no. 902/2017 of 16 November (RJ 2017/5543)). The SC did not take into account the low value of the work tool when it declare as a non-labour relationship the provision of services of the musician who supplies their instrument (Judgement of the Supreme Court (Labour Division) no. 862/2017 of 7 November (RJ 2017/5692)), but it did describe the relationship between a driver and the transport company as a labour relationship due to the fact that the contribution of the vehicle itself did not have the necessary economic relevance since the personal work of the driver is what predominates (Judgement of the High Court of Justice of Valencia no. 2908/2016 of December 23 (JUR 2017/40857)).

[31] Judgement of the Labour Court no. 11 of Barcelona (No. 213/2018) of 29 May. In it, the relationship that unites the workers with the Take Eat Easy Company is declared as a labour relationship, since they are subject to exclusivity, have a guaranteed minimum compensation, use the tools and work clothes previously provided by the company, are subject to a disciplinary regime under which the commission of four infractions leads to the termination of the contract and finally, the company plans the work shifts that a chosen by the workers four weeks in advance as well as their vacations.

The same qualification is contained in judgment nº 1737 of 20 November, 2018 of the French Court of Cassation (labour division), considering that the worker of Take Eat Easy was subjected to a system of geolocation that allowed the platform to monitor the worker's position in real/time as well as the possibility to be subject to the power of sanction, both manifestations of the company's power of direction.

[32] Judgement of the Labour Court no. 6 of Valencia (No. 244/2018) of 1 June. The relationship between deliverers and Deliveroo was declared a labour relationship when it was verified that the company exercised a power of direction (when determining the conditions of the provision of services), control (since the workers are geolocated) and sanction (by penalizing the disconnection during the time slot or rejection of assigned orders).

[33] Judgement of the Labour Court no. 39 of Madrid (num.284 / 2018) dated September 3, 2018.

orders without penalty, the worker provides the work tools and assumes the risk and venture, depending on the retribution of the orders placed, considering that the geolocation of the worker and the scoring system established to assign the orders are not controlled or sanctioned. Therefore, these are not indications of subordination of the worker[34]. The judgement confirms that the existing formal reality between the parties is linked through a TRADE[35] activity contract.

The complexity in the legal qualification of the digital worker is evident in subsequent judgements referring to the same company. Thus, while the Judgement of the Labour Court of Madrid dated 11 January 2019 again considers the GLOVO delivery as TRADE, the Judgement of the Labour Court of Madrid dated 11 February 2019 and the Judgement of the Labour Court of Gijon dated 20 February 2019 qualifies the employee as a salaried employee. In both, the basis is the necessary role played by the distributors of putting the supplier and the final customer in contact in with each other. The worker is not free to decide the time and duration of their service and prior acceptance must be made for the assignment to be assigned "since GLOVO has such a wide range of distributors willing to work, [so] the absence of some of them is automatically replaced by the presence of others". They also consider that as a self-employed worker the distributor would have little chance of success without the technical support and exploitation of the brand that provides the platform, denying the relevant economic value of the material tools used (vehicle and mobile) compared to the costs involved in the application (App). The most noteworthy element of these last judgements is that they attribute the worker with the status of employee directly without previously analysing whether a true TRADE, relationship exists between the parties. Thus, they obviate the existence of this intermediate category of workers who move between self-employment and subordination as well as the material and formal adaptation of the contract signed between the deliverer and the company GLOVO. However, months later the Judgement of the

[34] Most of the labour doctrine holds a contrary opinion. Beltrán de Heredia believes that "the assignment of tasks based on a score / prior assessment is clear evidence of the subordination to the power of management and organization, so that the truly particular of this type of platform is voluntary "passivity" business to exercise the sanctioning power and / or termination power". Entry of his blog ""Riders de Deliveroo: son trabajadores por cuenta ajena" (05.06.2018) available at ignasibeltran.com

[35] The worker held the status of self-employed economically dependent and was linked to the company Glovo by an activity contract. The economically dependent self-employed worker (TRADE) is the self-employed worker who provides services predominantly for a company from which they obtain at least 75% of their income. This situation of economic dependence confers a special protection being the recipient of a set of rights established in Chapter III of Law 20/2007 of July 11, regulating the Self-employment's Statute.

Labour Court of Barcelona dated 21 May and 29 May 2019 (both rendered by the same judge) qualified the provision of services between the deliverer and GLOVO as a non-labour relationship because the worker had an organizational capacity of their own. The deliverers are free to carry out the itinerary with the means of transport of their choice, without a specific area assigned to them, without a schedule set by the company and it is the deliverer who selects the days and slots in which to work, they are able to reject orders, obtaining a variable retribution depending on the deliveries made. In neither of these judgments was the reality of the TRADE contract signed between the parties analysed, because they only had to affirm that the services workers provide the Glovo platform do not imply a labour relationship.

The latest judgements have been the Labour Court of Madrid on 22 July 2019 (DELIVEROO), the Labour Court of Salamanca on 25 July 2019 (GLOVO) and Judgement of the High Court of Justice of Asturias (Oviedo) on 25 July 2019 (GLOVO). In the first, 532 workers were qualified as employees, since the court understands that the dependency and alienation notes are present when the company predetermines the conditions of execution of the service. In addition, it considers that the workers were completely oblivious to existing commercial relations between the company (DELIVEROO) and the restaurants and final customers. With respect to GLOVO, the Judgement of the Labour Court of Salamanca reconfirms the TRADE status of the delivery person because the material and formal reality expressed in the contract signed by the parties coincide. Lastly, the Judgement of the Supreme Court of Justice of Asturias (Oviedo) confirmed the labour relationship between a worker and Glovo declared in the Labour Court of Gijon previously commented. The High Court of Justice considers that the control that the worker is subjected to and his weak bargaining power place him in the field of a labour relationship.

The digital worker also involves this complexity in other legal systems. In France, the Court of Cassation (Labour division)[36], reversed the first instance ruling, and held that the delivery person was subject to an employment contract because they were monitored with a geolocation system by the platform (TAKE EAT EASY), which could determine the worker's position and count the Kilometres they travelled. The contribution made by the Advocate General is interesting here, as he indicated that the workers do not register as entrepreneurs to find clients but to work for the platform. Regarding freedom of work, he considers that it is only an indicator of non-subordination without being able to displace all other indices of the labour

[36] Judgement nº 1737 of 28 November 2018 (Labour division). Available at https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000037787075&fastReqId=602365964&fastPos=1

relationship. The same occurs in the following judgements. If digital workers are initially described as independents contractors[37], the subsequent instance requalifies their contracts and declares them within the protective scope of labour law[38].

In the United Kingdom, the Employment Tribunal of London in 2016[39] described the UBER driver as a worker when it is understood that subordination element concurs because the worker only provides services for UBER and the company determines the terms of the work and is able to modify them unilaterally. In 2017, the Central London Employment Tribunal [40] considered a rider as a worker. The analysis of the conditions of carrying out work showed that the rider submitted to the company's power to manage and direct them. In particular, it is indicated that the worker personally provides the services. However, in Australia the UBER drivers are not considered as employees because they are free to decide when, where and for whom they work[41]. Nor are Grubhub deliverymen and UberBLACK drivers considered employees in the judgements of the Northern District Court of California and Northern District Court of Pennsylvania[42]. These courts emphasized the little control the company has over the workers, and therefore considered them to be independent contractors. Finally, in Italy, the judgement of the Labour Court of Turin[43] denied the condition of employee of five riders who provided services for the FOODORA Company on the understanding that the contract of coordinated and continued collaboration was not distorted by the workers decisions on how they did their job and related to the company. This qualification was slightly corrected later by the judgement of the Court of Appeal of Turin[44], which, without modifying the qualification of the riders,

[37] Judgement of Court of Appeal of 9 Paris November, 2017 (DELIVEROO); Judgement of Court of first Instance 29 January, 2018, available at www.legifrance.gouv.ft/initRechJuriJudi.do

[38] Judgement of Court of Appeal of Paris 13 December, 2017 (LeCab), Judgement of Court of Appeal of Paris 10 January, 2019 (UBER) and Judgement of Court of Appeal of Nice 22 January, 2019 (TAKE EAT EASY). In this case, the Tribunal, again, took into account that workers were subject to a geolocation system to qualify them as employees. Available at www.legifrance.gouv.ft/initRechJuriJudi.do

[39] Judgement 28 October 2016 (Aslam vs Uber). Available at https://www.judiciary.uk/wp-content/uploads/2016/10/aslam-and-farrar-v-uber-reasons-20161028.pdf

[40] Judgement 5 January 2017 (Dewhurst vs CitySprint). Available at https://www.clydeco.com/uploads/Blogs/employment/Dewhurst_and_CitySprint_1.pdf

[41] Judgement of the Fair Work Commission 21 December 2017. Available at www.fwc.gov.au

[42] Judgement 8 February 2018 and 11 April 2018, respectively.

[43] Dated on 7 May 2018. Available at www.bollettinoadapt.it/wp-content/uploads/2018/05/7782018.pdf

[44] Dated on 11 January 2019. Available at http://questionegiustizia.it/doc/sent_corte_app_torino_26_2019.pdf

declared that they are entitled to the remuneration established in the national agreement of the Logistics and Merchandise Transports Sectors.
As indicated by SUPIOT, we are witnessing a new reality in which "employment leaves room for what may be called self-employment in subordination, while, reciprocally, the non-salaried work has opened up to what can be called loyalty in independency"[45]. In this productive context dominated by technology and productive decentralization, we must ask ourselves what it means within the framework of the 4.0 economy to be subject to the directive power of another in providing services. What degree of subordination would be necessary to be qualified as a salaried employee?

3.1. What Degree of Subordination is Necessary to Configure a Provision of Services as a Labour Relationship?

The legal construction of subordination led to the configuration of self-employment and salaried employment as antagonistic. A conception that can be questioned in the current context given that the recourse to productive decentralization has led to circumstances in which independence and non-responsibility are at the same level, where the provision of services is characterized by the autonomy of the provider but also by the non-responsibility of the company that outsources the service[46]. A dependent person may not receive orders or be obliged to comply; however, a person may be subject to comply even when they are not economically dependent[47]. Thus a (new?) category of workers is generalized, the self-employed with non-responsibility. This obliges us to define the legal limits of subordination more clearly, especially considering that the opposite phenomenon is also observable in this digitalized context: subordinates who act with a high degree of freedom.
It is evident that we cannot assess the defining criteria of the labour relationships as they were formulated in the 20th century. All of which leads us to rethink the scope of subordination in new ways of working. New technologies allow easy and quick access to labour given the wide range of providers that are willing to work. They give the worker a capacity for initiative regarding the object of the service provided when they can decide whether to provide the service or not, the terms and what type of service will be provide

[45] Supiot, Alain: "Les nouveaux visages de la subordination", Droit Social, 2000, p. 133
[46] As Cruz Villalón warns, "these manifestations of productive decentralization where there is a self-employment with non-responsibility but without dependence are those that today cause greater difficulty in delimiting the boundaries between both regulations." Cruz Villalón, Jesús: El concepto de trabajador subordinado..., op. cit. P. 27
[47] Auzero, Gilles y Dockès, Emmanuel: "La qualification "contrat de travail" in Droit du Travail, ed. Dalloz, 30ª ed., 2016, p. 235

by unilaterally activating or deactivating the contractual relationship. These aspects do not adequately fit into the notion of subordination. However, organizational flexibility has as counterpoint a limited negotiating capacity in terms of the specific form of execution and in relation to the amount of remuneration. These factors can be seen not only in the employment but also in self-employment, especially in the case of a self-employed worker who provides services for large distribution companies. Therefore, it is necessary to distinguish between contractual weakness and economic dependence[48]. Consequently, that the worker does not the price of their services and that they are paid by the digital platform does not change their status as a self-employed worker, given the position of contractual inferiority in which the workers may find themselves.[49]

If we assume that the employment definition criteria apply strictly to this provision of services that are endowed with such wide margins of flexibility, we would be configuring an imperfect subordination that would denaturalize the concept of employment, because it is possible to activate or deactivate the labour relationship without the worker first determining the terms for the providing the services. The Spanish legal system (article 1256 of the Civil Code) prohibits that the compliance to contracts is subject to the discretion of one of the contracting parties.

It should be considered that the Directive on transparent and predictable working conditions[50] aims to regulate the minimum rights of workers subject to extraordinarily flexible work organization. It states that when the pattern of work is totally or mostly unpredictable, the employer will inform the worker about the hours and days in which the employer can ask the worker work (article 4.2.m, ii), understood as "reference hours and days", which are "the time slots in specified days during which work can take place at the request of the employer." (article 2.b). The paradigm of work freedom has been shaped by the European Community regulation from a negative perspective: the worker cannot be forced to work unless two conditions are met: a) that the work is provided in predetermined reference hours and days, and b) that the

[48] Vid. De Boüard, Fabrice: "La dépendance économique née d'un contrat", LGDJ-Montchrestien, Paris, 2007.

[49] See in this regard the regulation (EU) 2019/1150 of the European Parliament and the Council on promoting fairness and transparency for business users of online intermediation services in its second recital states that professional users are increasingly dependent on online intermediation services providers to reach consumers, so they often have a superior bargaining power that allows them to act unilaterally in a way that can be unfair and that damage the interests of professional users.

[50] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on Transparent and Predictable Working Conditions in the European Union (Official Journal of the EU 11 July 2019).

employer informs the worker of the task to be carried out with reasonable notice. The lack of one or both of these requirements determines that the rejection of the assigned task does not cause unfavourable consequences for the worker. It is therefore allowed that the worker has freedom of decision regardless of this being based on the previous existence of a contractual relationship that imposes on the employer the duty to inform the worker of the task to be performed with reasonable notice. It refers to a relationship that the Directive does not qualify being limited to stating that it aims to establish the minimum rights applicable to all the workers in the European Union who have an employment contract or an employment relationship as defined in the regulations of each Member State.

In our opinion, if the employer offers the worker a provision of service in a few predetermined days and hours, this is a form of employment that is different to that promoted by the business model that is developed through digital platforms. In the platforms economy it is the worker who formulates the offer expressed in the prior connection to the platform or in the indication of the time slots in which they will be connected and, therefore, available to work. Hence, digital workers are included within the scope of this Directive and thus to have the minimum rights contained therein they must be previously qualified as salaried employees. Therefore, once again we come full circle to the beginning. Without a concept of worker adapted to the current technological and productive context, articulating adequate legal protection involves multiple difficulties.

The delimitation of a broad concept of subordination and thus facilitating the regulation in the labour law of these groups of workers is connected to some particularly controversial contractual modalities. For example, there are the zero hour contracts and on-demand contracts that do not quantitatively define the hours of work that are due by the worker. The worker is also subject to a required work availability that invades the worker's personal and family spheres. At this point, these contracts must be endowed with strong protective measures, all of which, almost certainly, will lead us to a new escape from the Labour Law and the abuse of false self-employment.[51]

We concur with the proposal of a doctrinal sector that advocates for the redirection of the *vis attractiva* of the Labour Law, so that those provision of services in which there is no subordination and dependency with enough

[51] The Directive on transparent and predictable working conditions also stipulates that the Member State that allows these contracts must ensure that effective measures are taken to prevent abuse. In particular, it is mentioned the establishment of a legal presumption of employment with a guaranteed salary and with the limitation of its use or its duration (Article 11). It restates later that in no case should this regulation serve as a basis for the introduction of zero hours contracts or similar employment contracts.

notoriety are not recognised as work[52]. The synallagmatic nature of the employment contract generates mutual obligations under which the employer is not obliged to indemnify the worker if the latter has not performed the work agreed upon. Therefore, it requires a prior determination of the work time. Definitely, those services provided through digital platforms in which the worker has absolute freedom to decide whether or not to provide services and to set the duration of their working hours should not be classified as work benefits.

4. A Look Towards Economically Dependent Self-employment and its Existence in the New Types of Employment

A doctrinal option that has not been explored so far regarding the qualification of the provider of services in digital platforms is the one that places it in the scope of economically dependent autonomous work. A hybrid category of worker, between autonomy and subordination, which is contemplated in different countries with a different scope and social issue[53]. This option would eliminate some of the main open debates regarding the way of providing services, especially those related to freedom of work and organization that are attributed to the worker. We do not reject that it would also raise others, fundamentally those related to the infra social and legal protection that has traditionally been granted to these workers.

When the provider of the service receives individualized work orders before acceptance, with the power to determine the duration of their provision of services, being able to reduce the time pre-established by the company by disconnecting or rejecting work without penalty, receiving mere technical indications for carrying out the work, responding for the result of their work and being subject to a technological control that does not reasonably exceed what would be necessary to verify the fulfilment of the accepted job assignment to the satisfaction of the client, they should be qualified as a self-employed worker. In this area, if that autonomy to do the work is predominantly due to a digital platform and from it the worker obtains all or most of his/her economic income, their legal qualification should be economically dependent self-employed worker. A figure that, despite its

[52] In this regard, Garrido Pérez, Eva: La representación de los trabajadores al servicio de plataformas colaborativas, Social Law Magazine No. 80, 2017, p.230-232.

[53] In Germany through the figure of a quasi-salaried worker (*Arbeitnehmerähnliche person*); in the United Kingdom through the category of *worker*; In Italy, through the *parasubordinated work*; and in France, where through the reform of the Labour Code introduced by Act nº 2016-1088 of 8 August, digital workers are provided protection when they exercise their professional activity for several platforms (art. L-7341-1 and following).

shortcomings, will make it possible to reconcile the particularities of the new production models with the necessary protection of the providers of these services.

The economically dependent worker is defined by reference by two key requirements: one, they are self-employed workers, hence they have greater freedom in the decision-making process than the salaried employee regarding when, how much, how and for whom to work; and two, they are economically dependent workers, so the provider of the service is out of the market, being in a situation of not only economic but also contractual weakness due to the almost exclusive relationship with the client, from which the worker depends on to obtain most of his/her economic income.

The figure of economically dependent worker was introduced into the Spanish legal system through the Law 20/2007 of 11 July, regarding the Self-Employed Workers' Statute ("LETA" in Spanish). Since its entry into force, its dispositions have been criticized given that who provides services for another, with organizational and functional independence but with a strong economic dependence due to the fact that the worker obtains from the client at least 75% of his/her income, should have been integrated into the subjective scope of application of the Labour Law as a labour relationship of a special nature. This was not the option of the legislator who considered that the independence that characterizes these workers should prevail over their economic dependency. However, the legislator endowed them with a set of minimum rights similar to those recognized by salaried workers. After a little more than twelve years of its validity, we can affirm that it is a slightly used[54] figure given its deficient legal regulation, so the opportunity should be taken to reconfigure self-employment in general, and especially the economically dependent type.

The widespread presence of self-employed workers in the business model arising from digital platforms responds to the competitive advantages that it offers, since it allows combining flexibility with lower social costs. Based on this, the legislative and court responses should not be to reject the qualification of digital workers as self-employed workers opting for an indiscriminate incorporation in the labour system. As MERCADER UGUINA points out, "the reality presented by professional platforms can find a precise fit in the figure of the economically dependent autonomous worker. Therefore, it is a figure that can be reborn in view of the new digital economy"[55]. However, it is necessary to provide these workers with better guarantees, which will allow

[54] The latest statistical data reveal that only 9,055 workers are registered as TRADE. Self-employed workers, natural persons registered in the Social Security. Summary of Results. 30 September 2019. Available at www.mitramiss.gob.es.

[55] Mercader Uguina, Jesús R.: "El nuevo modelo de trabajo autónomo en la prestación de servicios…"op.cit. p. 11 (electronic format).

them to carry out their activity in decent conditions and with a broader social protection than the one that they currently have. Therefore, social dumping would be avoided, since what is happening is an escape from salaried work towards self-employment as well as from dependent self-employment to common self-employment. A situation that affects the competitiveness of the companies themselves, since those that are organized in the traditional way support higher costs linked to labour protection than those currently supported by digital platforms for their workers.

The freedom of work enjoyed by these self-employed but economically dependent workers must be compatible with the establishment of a professional regime based on minimum rights related to working hours, breaks, vacations, compensation, reconciliation of personal and professional life and collective protection of their interests, among others. Definitely, a regulation that equalizes the protection between employees and economically dependent autonomous workers should be opted for including a contribution regime that foresees the possible realization of a part-time autonomous activity.

5. Conclusion: What is Important and Urgent for the Future of Employment?

The traditional scheme of subordinate work does not respond adequately to the reality of the new business models that are being developed through digital platforms. Therefore, the solution should not focus on an overflowing extension of the subjective scope of the Labour Law; but rather it should focus on the complete opposite, the labour concept of subordination must be reformulated based on more defined criteria, avoiding, the intrusion into similar contractual figures or undermining of the nature the salaried work.

It is possible to configure a legal regime of digital workers with a greater autonomy and protection than the one currently available to the group of self-employed workers. It should be taken into account that the way of contracting is not the only thing changing, the way how many workers want to be hired is also changing by as they give more value to organizational independence than to the durability of the contractual relationship[56]. It is therefore necessary "to recap the fundamentals of Labour Law. We are so used to resorting to labour

[56] This is commented in the document prepared by the German Federal Ministry for Labour and Social Affairs, which states that not only technology is transforming reality; changes in preferences and social values are also being made as workers would like to have more flexibility and personal control over their time in certain phases of their lives. Federal Ministry for Labour and Social Affairs: "Re-imagining work. Green Paper, work 4.0 ", March 2017

legislation that we have forgotten its fundamental motivation: the welfare of the worker"[57].

At this point, given the complexity of the subject, it is necessary to distinguish what is important and what is urgent about the future of employment. The important thing will be to reformulate the concept of worker, updating it, taking into account the demands of the new productive models. It is necessary to draw a line between autonomy and work based on better defined legal criteria, providing both with equivalent protection so that "in any case, they cause a convergence of costs, so that the decision of tracing a line between one and another regime would not be that traumatic"[58].

What is urgent is to avoid workers' precariousness due to a false self-employment as an instrument of contractual agreement. There are many workers who expect a legal response to their situation. The avoidance of the Labour Law is not fought with more labour relationships. If the abuse of self-employment is a consequence of the lower costs involved in its use, the course of action must be to raise the level of social protection of those who provide their services on digital platforms, introducing and guaranteeing a minimum remuneration equivalent to the minimum wage existing in salaried employment and making these companies civilly liable for the insufficiencies and deficiencies of their working conditions.

The time will soon come, however, when the law will have to adapt. The question is how and how far?[59]

[57] Tirole, Jean: La economía del bien común, Taurus, 2017, p. 450.

[58] Cruz Villalón Jesús: "El concepto de trabajador subordinado frente a las nuevas formas…"op. cit. p.30.

[59] Study made by the European Parliament "The cost of non-Europe in the sharing economy. Economic, social and legal challenges and opportunities", 2016, available at www.europarl.europa.eu, p. 16.

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