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Between *Sein* and *Sollen* of Labour Law: Civil (and Constitutional) Law Perspectives on Platform Workers

Vincenzo Pietrogiovanni*

PLATFORM CAPITALISM AND THE SCOPE OF LABOUR LAW

The production structure that companies of the so-called 'platform capitalism' adopt is based—in very essential terms—on the idea of resorting to the collaboration of an indefinite quantity of workers who are asked to provide their service with their own means[1] (bicycles, cars, etc.) only when it is actually requested by a customer—*on demand*.

The management of on-demand work is usually organised by companies through a smartphone application or an online platform—owned by the companies themselves—that find on the web a 'virtual, but global, space of production outsourcing'.[2] The result of these forms of acquiring and managing workforce can be defined as 'fractal work', characterised by an extremely irregular surface formed of an indefinite number of similarly irregular parts.[3]

When platform-capitalism companies define themselves as tech companies, they intend to rephrase such production structure in terms of intermediation: they are not producers, they just provide producers and consumers with the technology to facilitate the matching between the demand and the offer of services and goods. The immediate consequence of such a strategy is that platform companies refuse to take any legal responsibility for the social transactions of their operations.

The ability of today's capitalism to organise traditional means of production in unheard forms by powerful algorithms and digital devices, raises issues for labour law

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1 M Finkin, 'Beclouded Work in Historical Perspective' (2016) 37.3 Comparative Labor Law & Policy Journal 603–618.

2 P Tullini, 'C'è lavoro sul web?' (2015) v.1 n. 1 Labour & Law Issues 1–20 (*translation of the Author*).

3 V Pietrogiovanni, 'Redefining the Boundaries of Labour Law: Is "Double Aliennes" a Useful Concept for Classifying Employees in Times of Fractal Work?' in A Blackham, M Kullmann and A Zbyszewska (eds.) *Theorising Labour Law in a Changing World: New Perspectives and Approaches* (Hart Publishing 2019) 56–57.

when the nature of the legal relationship between these companies and their workers is classified as self-employment in order to circumvent the costs attached to employment work.[4] Platform companies usually refer to people performing their services using the most disparate terms, such as *suppliers*, *drivers* or *riders*—in the UK, for instance, Uber referred to them initially as *partners* and later as *customers*[5]—but not *workers* nor *employees*. Of course, this is not just a simpering exercise of lexicon, because being classified in the contract as an independent contractor, a worker or an employee brings about a variety of different legal terms and conditions: from a full employment protection, in the last case, to a few fundamental rights in case of workers, to no protection of any kind in case of independent contractors.

The definition of the employment status, thus, is considered the fundamental issue of labour law, since the classification of any contractual relationship functions as an *actio finium regundorum* of labour law, i.e. a process of definition of its scope and effectiveness. At the same time, it is important to focus on the way platform companies structure their business: indeed, their qualification 'as a pure intermediary is certainly possible, but not necessary. If and when it is, we are outside the field of employment law'.[6] This means that the genuineness of the intermediation role is one of the key problems about platform companies: if they are not playing the role as intermediary between the demand and supply of a service, then, they are most likely employers and their *suppliers*, *drivers* or *riders* are, in many legal systems, nothing but employees or workers.

RECALIBRATING LABOUR LAW

If the employment status represents the core of labour law, it is important to clarify that labour law has always been developing the relationship of employment status vis-à-vis disrupting phenomena; 'gig economy' is just the last example.

Labour law's adjustments to disrupting phenomena can be defined as internal and external. The external adjustment is when labour law adapts its scope because of the intervention of the legislator that, through statutory provisions, expands or restricts the application of employment protection's rights and freedoms. The internal adjustment is when labour law recalibrates its scope *rebus sic stantibus*, not with a change in the text of the law but in its 'meaning', i.e. how it is interpreted and applied—an operation that, on different levels, represents daily work for judges and all other interpreters (from labour law scholars to HR managers and trade union representatives).

4 E Menegatti, 'On-Demand Workers by Application: Autonomia O Subordinazione?' in G Zilio Grandi and M Biasi (eds.), *Commentario Breve allo Statuto del Lavoro Autonomo e del Lavoro Agile* (Cedam 2018) 93–111; P Loi, 'Subordinazione e autonomia nel lavoro tramite piattaforma attraverso la prospettiva del rischio', *ibid*, 113–134.

5 *Uber BV v Aslam* [2018] EWCA Civ 2748 (19 December 2018), para. 14–15.

6 M Barbieri, 'Della subordinazione dei ciclofattorini' (2019) vol. 5, n. 2 Labour & Law Issues I.6 (*translation of the Author*).

Now, the question is: does 'gig economy' really push labour law to adjust its scope? And if so, would it be better to pursue an internal or an external adjustment?

In the public debate as well as in the debate developed in many scientific fora, the idea of introducing new legislation that addresses directly platform workers has been advocated, usually referring either to the introduction of a *tertium genus* in those systems based on the bi-partite divide 'employment vs self-employment' (or contract of service vs contract for services) or the definition of a core group of fundamental rights to apply to all work relationships.

This contribution, on the contrary, advocates the pursuing of the internal adjustment of labour law: as new as they might look, many companies of the gig economy do operate in a way that a depart from the foundational elements of labour law is not necessary. What the present contribution deems accurate is a re-thinking of subordination as a concept rooted in a constitution-driven protection of employment.

However, there must be two technical premises to such advocacy. First, 'employment' or self-employment' are not ontological concepts but legal notions: all forms of human activity that have an economically appreciable value can be framed through a contract of employment or a contract of self-employment; moreover, there is no activity that is intrinsically or ontologically to be meant as employment or self-employment. The freedom of contract, generally accepted as a fundamental economic right, gives parties the chance to choose how to define the regulation of their interests raising from professional collaboration. As a consequence, the status of employment or self-employment is the result of a normative process that starts from each actual relationship as it occurs in its socio-economic reality and then connects it to the norms of the legal system.

Second, in many countries where fundamental labour rights are secured by the constitution, the employment status is particularly shielded against the individual contractual freedom, through some principles that regulate the relationships among the different applicable sources, shaping the hierarchy of labour laws.

For instance, French labour law has developed the concept of *ordre public social*[7] (social public order), which places statutory labour law at the top of hierarchy 'as soon as there are in question provisions which by their very terms are of an imperative nature' (the law excludes negotiation) or rules that 'concern advantages or guarantees which escape by their nature to conventional relationships'.[8]

Almost similarly, Italian labour law has established, along with imperative norms, the principle of *inderogabilità*[9] (inderogability), according to which statutory provisions

7 F Canut, *L'ordre public en droit du travail* (LGDJ—Institut A. Tunc 2007); T Sachs, 'L'ordre public en droit du travail: une notion dégradée' (2017) n. 10 Revue de droit du travail 585–592.

8 M Bonnechère, 'Sur l'ordre public en droit du travail: les principes sont toujours là … ' (2008) Droit Ouvrier 12 (*translation of the Author*).

9 The literature on this topic is vast, therefore see *inter alia* R De Luca Tamajo, *La norma inderogabile nel diritto del lavoro* (Jovene Napoli 1976); C Cester, 'La norma inderogabile: fondamento e problema del diritto del lavoro' (2008) Giornale di Diritto del Lavoro e delle Relazioni Industriali 344; G Santoro-Passarelli, 'Autonomia privata individuale e collettiva e norma inderogabile' (2015) 1 Rivista Italiana di Diritto del Lavoro 61; R Voza, 'L'inderogabilità come attributo genetico del diritto del lavoro. Un

vis-à-vis the individual employment contract and the collective agreement—as well as guarantees established in the collective agreement vis-à-vis the individual employment contract—cannot be derogated to the detriment of the worker.

If these principles of the hierarchy of labour law apply to the genetic phase of the employment relationship (when the employment contract is concluded), Italian Constitutional Court case law has developed the principle of *indisponibilità del tipo negoziale*[10] (non-disposal of contractual types), which is a functional principle that applies during the existence of the employment relationship. According to this principle, neither the legislator nor the parties can 'deny the legal qualification of employment relationships subject to relationships that objectively have such a nature, where this results in the inapplicability of the mandatory provisions of the law to implement the principles, guarantees and rights established by the Constitution to protect dependent employment'.[11] Moreover, the legislator is not even allowed to authorise the parties to exclude directly or indirectly, through their contractual declaration, the applicability of the mandatory regulation provided for the protection of employees to relationships that have the *content* and *ways of execution* of the employment relationship. The Constitutional Court makes clear that the principles, guarantees and rights established by the Constitution in this matter, in fact, are and must be subtracted from the disposal of the parties: 'in order to safeguard their preceptive and fundamental character, they must be implemented whenever there is, in fact, that *socio-economic relationship* to which the Constitution refers these principles, guarantees and rights'.[12]

These are regulatory principles that aim to 'grasp the composite modalities with which heteronomy sources operate or can operate in competition with (individual and collective) private autonomy';[13] however, the aforementioned principles have been questioned by the post-industrial labour market[14] as boosted by the recent neoliberal labour law reforms—and, apparently, by platform capitalism as well—whose narrative puts big emphasis on the autonomy of the parties in their contractual arrangements and of the collaborators' activity.

Therefore, it follows, the regulatory gaps created by platform capitalism cannot easily be solved without first addressing the contract classification.[15] And with these

profilo storico' (2006) I Giuridica del Lavoro 229; A Occhino, 'La norma inderogabile nel diritto del lavoro' (2008) II Rivista Giuridica del Lavoro 186.

10 M Novella, *L'inderogabilità nel diritto del lavoro: norme imperative e autonomia individuale* (Giuffrè Milano 2009); E Ghera, 'Subordinazione, statuto protettivo e qualificazione del rapporto di lavoro' (2006) 109 Giornale di Diritto del Lavoro e di Relazioni Industriali 17.

11 Case n. 121/1993 (Judgment) Constitutional Court of Italy (25 March 1993).

12 Case n. 115/1994 (Judgment) Constitutional Court of Italy (23 March 1994) (*translation and italics of the Author*).

13 P Tullini, 'Indisponibilità dei diritti dei lavoratori: dalla tecnica al principio e ritorno' (2008) Paper presented at XIII National Congress "Inderogabilita delle norme e disponibilità dei diritti"—A.I.D.LA.S.S. on 18–19 April 2008 (*translation of the Author*).

14 R Arum and W Muller (eds.), *The Re-emergence of Self-Employment: A Comparative Study of Self-Employment Dynamics and Social Inequality* (Princeton University Press 2004).

15 M Biasi, 'Dai pony express ai riders di Foodora. L'attualità del binomio subordinazione-autonomia (e del relativo metodo di indagine) quale alternativa all'affannosa ricerca di inedite categorie' (2017) 11 *Bollettino Adapt*.

premises in mind, the present contribution advocates for the constitutionalisation of subordination following the lead of Italian Constitutional Court case law, namely with its concept of *doppia alienità* (double alienness).

THE CONCEPTS OF SUBORDINATION IN ITALY

The classification, according to Italian scholarship, 'calls for a reflection on the identity of the employment contract and, in particular, on the very idea of subordination and its relation to the worker's protective status'.[16] Italian case law has produced a range of different notions of subordination, examples of which include hetero-direction, socio-economic dependency, collaboration, and availability or coordination.

According to Article 2094 of the Italian Civil Code, subordinate workers are those who bind themselves, in exchange for remuneration, to collaborate in the enterprise, performing their own intellectual or manual work, depending on and under the direction of the entrepreneur. Therefore, the subordination can be 'legal-technical' when it strictly connects to the element of dependency: the contract of employment is an open contract whose content must be constantly filled by the orders of the creditor (the employer) towards the debtor (the employee).[17] Moreover, subordination can also be meant as hetero-direction: the Civil Code, while referring to the entrepreneur, underlines the almost unique position that the head (and the owner) of the enterprise enjoys before her employees—she is, indeed, entitled to the three managerial (private) powers on them, i.e. the power of giving directives and orders, the power to control and monitor and the power to punish any breach of the contract.[18] Some scholars have defined this concept of subordination as 'technical-functional', underlying the functionality of such a contract within the enterprise as an organisation of means of production.[19]

The most common method used by Italian courts to identify subordination—irrespective of its concept—is the 'subsumption' method (*sussunzione* in Italian, *subsumption* in French, or *subsumtion* in German), through which judges observe the reality of the relationship as it has occurred between the contractual parties, and then connect it to the abstract provision of the law, in order to classify it as an employment relationship or not.[20]

16 E Ghera, *Diritto del Lavoro* (Cacucci Bari 2013) 71.

17 L Mengoni, 'Il contratto individuale di lavoro' (2000) 86 *Giornale di Diritto del Lavoro e di Relazioni Industriali* 181.

18 C Zoli, 'Subordinazione e poteri dell'imprenditore tra organizzazione, contratto e contropotere' (1997) 2 *Lavoro e diritto* 241.

19 M Napoli, 'Dallo Statuto dei lavoratori allo Statuto dei lavori' (1998) 3 *Diritto delle Relazioni Industriali* 297; P Ichino, *Subordinazione e autonomia nel diritto del lavoro* (Giuffrè Milano 1989).

20 G Ghezzi and U Romagnoli, *Il rapporto di lavoro* (Zanichelli Bologna 1995); L Mengoni and M Napoli, *Il contratto di lavoro* (Vita e Pensiero Milano 2004). Such method has been complemented by courts through empirical 'subsidiary' indices derived from experience, such as: observance of a working schedule; fixed and constant remuneration; the absence of the risk of the result and therefore of the productivity of the work; the insertion of the worker in the organisation of the enterprise; continuity or duration of work performance.

The Italian Court of Cassation has defined, in a very recent ruling,[21] the essential element of differentiation between self-employment and subordinate work as found in the bond of subjection of the worker to the managerial, organisational and disciplinary power of the employer. The Supreme Court is consistent in believing that this subjection is to be found exclusively in the concrete modes in which work has been carried out by the worker.

Thus, the key element is the insertion of the employees in the entrepreneurial organisation: employees make their own productive labour (*operae*) available to the employer and contextually subjecting them to the employer's managerial prerogatives. On the contrary, independent contractors provide a service that is constituted by the result of their activity (*opus*).[22]

The cornerstone for classifying the legal nature of the relationship as autonomous or subordinate lies in seeking the will of the parties, having to take into account the relative mutual reliance and what they wanted in the exercise of their contractual autonomy, not only in the moment they signed the contract but throughout their whole relationship. Furthermore, in this context the principle of non-disposal intervenes: therefore, even if the parties have declared (in the genetic phase) their intention to exclude an employment relationship, in cases in which there are elements compatible with both employment and self-employment, judges will re-classify the contract if it is shown that, in practice, the element of subordination has in fact been achieved in the course of the continuation of the contractual relationship.[23] The *nomen iuris* is just the starting point of the classification process which, however, can always be overcome in the presence of effective and unambiguous methods of performing work in a subordinated fashion.[24]

The Italian judge must give prevalence to the factual data emerging from the actual conduct of the parties, since their behaviour subsequent to the conclusion of the contract is a necessary element not only for the purposes of its interpretation,[25] but also for the purpose of ascertaining a new and different will that may have occurred during the implementation of the relationship and aimed at modifying individual clauses and sometimes the same nature of the relationship initially envisaged, from independent to subordinate; with the consequence that between the label and the *de facto* contract emerging from its concrete development, the latter must necessarily be of primary importance.[26]

21 Case n. 1555/2020 (Order) Court of Cassation of Italy of 23 January 2020.

22 See, among the many cases from Court of Cassation, judgments nn. 12926/1999; 5464/1997; 2690/1994; 4770/2003; 5645/2009, according to which, for the purpose of classifying the employment status, the primary distinctive parameter of subordination must be ascertained or excluded by using the elements that the judge must concretely identify by giving prevalence to the factual data emerging from the methods of conducting the relationship.

23 Cases nn. 4220/1991 and 12926/1999 (Judgments) Court of Cassation of Italy.

24 Case n. 812/1993 (Judgment) Court of Cassation of Italy.

25 According to Article 1362, second paragraph, of the Italian civil code.

26 Cases nn. 4770/2003 and 5960/1999 (Judgments) Court of Cassation of Italy.

Luigi Mengoni—a distinguished Italian labour law scholar—observes that

> the insertion of subordination in the content, and therefore in the cause, of the contract satisfies the need to re-personalize the relationship respecting the civil law principle of formal equality, which excludes that the contracts can differentiate due to the differences of the parties' economic positions and logically implies the need to consider (pretend) the consent of the worker as free as any other contractor.[27]

Interestingly, Luigi Mengoni has also served as Justice in the Constitutional Court and is the complier of the verdict establishing the concept of double alienness that will now be addressed.

THE CONCEPT OF SUBORDINATION AS DOUBLE ALIENNESS

The Italian expression '*doppia alienità*' does not necessarily refer to the condition of alienation of workers in Marxist terms; it rather adjectivises the status of their work in relation to the organisation in which they collaborate and the products they help producing, so as to express the exclusive destination of their labour to the employer. The concept of double alienness first appeared in the Italian legal system in the judgment No 30/1996 of the Constitutional Court.

The Constitutional Court was asked to evaluate the constitutionality of a provision regarding severance pay and pensions[28] for members of workers' cooperatives. Although the employment arrangement for members of a cooperative was different from an employment contract, they were nonetheless characterised as having a weak economic position in relation to the cooperative, which was similar to the position of subordination experienced by employees in relation to their employer. Such similarity was confirmed by several laws that extended protections enjoyed by employees to cooperative's workers.[29]

For the Constitutional Court, as far as the constitutional protections attached to the employment contract are concerned, the socio-economic relationship emerges considering the type of interests to which the activity is functionalised, and the corresponding arrangement of legal situations in which the activity is inserted. In this respect, 'subordination in the strict sense, peculiar to the employment relationship … is a more meaningful and altogether qualitatively different concept from the subordination of other contracts involving the working capacity of one of the parties'.[30] The difference is determined by the coincidence of two conditions which, in other cases, are never combined:

27 L Mengoni, 'Il contratto di lavoro nel secolo XX' (2002) Intervention at AIDLASS Congress. Paper available at www.aidlass.it/wp-content/uploads/2015/11/mengoni.rtf (accessed 1 March 2020) (*translation of the Author*).

28 Law No 297/1982, Art 2.

29 Case No 30/1996 (Judgment) Constitutional Court of Italy (12 February 1996) 1–2 [1] (*translation of the Author*).

30 *Ibid*.

'the alienness (meaning the exclusive destination to others) of the result whose attainment the work is finalised to, and the alienness of the productive organisation in which the activity is inserted'.[31] When integrated with these two conditions,

> subordination is not simply a mode of performance of the contract, but it is a classification of the performance resulting from the type of regulation of the interests chosen by the parties by concluding a contract of employment, involving the incorporation of someone's work in a productive organisation on which the worker has no power of control, being formed for a purpose in respect of which [they] ha[ve] no (individual) interest legally protected.[32]

This innovative concept of subordination, far from becoming mainstream, is thus far the only concept of subordination that succeeds in grouping together the unskilled worker (whose tasks are set on a routine basis), the driver of a CEO, the high-skilled engineer, and the manager of a department, because such workers all enjoy different levels of hetero-direction, but do not own the outcome of their activities, nor do they own the organisation in which their collaboration is inserted. Double alienness perfectly represents the rationale behind the legal institution of the employment contract as an object of legal protection by a Constitution.

This 'constitutionally driven' interpretation of the notion of employment provides a single criterion for distinguishing autonomy from subordination, rather than traditional multiple criteria.[33] For this reason, 'double alienness' seems to be very useful in the so-called 'grey zones' of the labour market, where indices of subordination coexist with elements of autonomy.

Applying the double alienness to Uber drivers would mean re-classifying their relationships in terms of employment. In Uber, the results of the activity performed by the drivers are directly and originally owned by Uber: indeed, customers while using the Uber app to book their 'rides', interface with the platform company and not with the drivers. The common expression 'taking an Uber' is an illustration of the degree to which the social reality of production has infiltrated the social reality of customers.

Furthermore, if one considers the Uber service as a broader picture—as the whole economic phenomenon—it emerges that the drivers' car is only one part of the organisation of production, and probably not even the most significant. Uber's activity is essentially based on the applications that connect drivers and passengers. The 'ride' follows and it is followed by other several important steps: creating an account; reserving the ride; rating the driver; checking information relating to drivers (e.g. their driving licence or the condition of their cars)—all of which is completely owned and directly managed by Uber, without any participation or direct access to the process by

31 *Ibid.*

32 *Ibid.*

33 M Roccella, 'Lavoro subordinato e lavoro autonomo, oggi' (2008) IT–65/2008 WP CSDLE 'Massimo D'Antona 37.

the drivers. Moreover, the algorithm that creates the match between the driver and the customer is probably the largest part of the entire production process. Indeed, it is through the app that the drivers get their information about each 'ride'. Once the journey has commenced, the app provides the driver with turn-by-turn directions—which are not obligatory on paper, but if drivers fail to follow them, they may encounter negative results. As even the Employment Tribunal in London has acknowledged,

> at the end of any trip, the fare is calculated by the Uber servers, based on GPS data from the driver's smartphone. The calculation takes account of time spent and distance covered. In "surge" areas, where supply and demand are not in harmony, a multiplier is applied to fares resulting in a charge above the standard level.[34]

This means that the relationship between Uber and its drivers respects also the second alienness, i.e. the alienness of the organisation. The same arguments can be easily transferred to Deliveroo riders.

Some courts, however, have re-classified, for instance, Uber drivers by just applying the very concept of subordination as hetero-direction, as long as this concept is rooted in Constitutional principles. The most recent example is the Uber verdict from the French Court of Cassation of 4 March 2020.[35]

The French Supreme Court established that Uber drivers are employees applying the following definition of employment: 'a job under the authority of an employer who has the power to give orders and instructions, to oversee performance thereof, and to sanction the subordinate for any breaches'. On such a traditional basis, the Court develops that 'working within an organised service may constitute an indication of subordination in cases where the employer unilaterally determines the terms and conditions of performing the job'. Thanks to the primacy of facts, the exercise of the three managerial prerogatives have been proven.

But what about the drivers' freedom to connect and to choose working hours? The Court of Cassation, in line with the Court of Appeal, has held that 'the fact of being able to choose one's working days and working hours does not exclude *per se* a subordinated working relationship, insofar as whenever a driver connects to the Uber platform said driver joins a service organised by Uber BV'.[36] As simple as that, the French case law has dismissed one of the strongest arguments of platform companies in courts.

As for the 'genuine and unfettered right of substitution', another strong argument deployed by platform companies' in courts, it is worthy to mention that in the Italian

34 Case m. 2202550/2015 & Others (Judgment) Employment Tribunal of London (28 October 2016) 4 [18] It is worth noting that the appeal in this case was heard in the Court of Appeal (Civil Division): *Uber BV v Aslam* [2018] EWCA Civ 2748 (19 December 2018).

35 Case n. 374 of 4 March 2020—Cour de Cassation of France—Chambre sociale—ECLI:FR:CCAS:2020:SO00374. The English version of the ruling is available here: https://www.courdecassation.fr/IMG/20200304_arret_uber_english.pdf.

36 For a British perspective on these aspects, see J Prassl, 'Who Is a Worker' (2017) 133 Law Quarterly Review 366.

legal system there had been for quite a long time a special contract called 'lavoro ripartito',[37] a sort of job sharing in which two employees committed themselves to undertake jointly a single employment: this contract was fully framed as an employment contract—as atypical as it was—without raising any systemic problem.

Thus, if employment is constitutionally protected, there is not any technical incompatibility between subordination and the right to substitution or the right to choose working hours: what matters is the arrangement of the socio-economic relations.

The double alienness is a useful concept to overcome to shortcomings of courts' exegesis of the *real* scope of labour law while classifying bogus and sham contracts; however, as the French Court of Cassation as proven, the main point is that legal systems with employment regulated by a body of rules rooted in constitutional rights and freedoms tend to drive case law towards a more protective approach against the 'armies of lawyers' that use all legal loopholes to refuse any responsibility of their social transactions. Likewise, it is clear that the employment status is only the first necessary step: no major improvement in the working conditions of platform workers is possible without the recognition of their entitlements to fully exercise their collective labour freedoms.[38]

CONCLUSIONS

What conclusions can be drawn from this framework? Succinctly (and boldly): labour law, if constitutionally enhanced, is a materialistic law—in other words, a law regulating such (individual as well collective) relationships that are ultimately determined by the material forces that operate in the social and economic reality.

When the Italian constitutional court builds the principle of non-disposal, and the French labour law creates the public social order, they move from a precise assumption: their Constitutions look at subordinate work as a *socio-economic relationship*, that is, a relationship that meets the law coming from a specific material basis, which concerns the definition of the socio-economic interests of the parties aimed at the production of goods and services.

This materiality is firstly translated into the principle of the primacy of facts. But in the second instance, in Italy the 'constitutional labour law'—if so envisaged—deals with further heuristic tools (which are, on the one hand, tools to keep the functioning of the system, on the other, to ensure the effectiveness of its protections) that find in the principle of non-disposal and in the concept of double alienness two inevitably relevant corollaries. Constitutional labour law is a *factual* labour law that is intrinsically related to the materiality of the social relationships it aims to regulate.

37 Introduced by Legislative Decree n. 276/2003, Articles 41–45, then abrogated by Legislative Decree n. 81/2015.

38 V Bavaro and V Pietrogiovanni, 'A Hypothesis on the Economic Nature of Labour Law: The Collective Labour Freedoms' (2018) 9(3) European Labour Law Journal 263–286.

The factuality of labour law lies, according to Luigi Mengoni, in the importance of historical and material conditions on the affirmation of law also in its jurisdictional translation; he affirms, indeed, that the Constitutional Court rules on labour in the prism of the principle of equality inspired not only by the certainty of the law and its calculability but also by the material justice.[39]

As Vincenzo Bavaro maintains, it is therefore necessary to question the relationship between the facts (the socio-economic expressions of capitalist production) and the norms: and this is crucial precisely in labour law, which is built on a completely abstract creation, the employment contract, 'with its legal devices to control the material relationships to be structured as a system'.[40] It follows that the employment contract has personalised labour law,[41] which in turn has become 'uncontainable within the rules of civil law'[42] being, according to Jürgen Habermas, a materialised version of private law, traditionally based on the freedom and autonomy of the parties.[43] The welfare state and, in particular, labour law have played the role of democratic counterweight to the free enterprise in the capitalist economy:[44] the materiality of labour law is, thus, the materiality of the conflicting interests in the production. Even Hans Kelsen (who is very far from Marxism) recognises that law is the expression of relations of production and their economic reality.[45]

In this complex and reciprocal relationship between socio-economic facts and norms, no one should be afraid to use alternative heuristic tools, even though these tools might be considered (*prima facie* or in-depth) ideological. After all, when a jurist expresses criticism of a norm or its jurisprudential interpretation, the neutrality of law—or its purity!—is very often betrayed: any normative discourse is not about the *Sein* but the *Sollen* of labour law, i.e. about the politics of labour law.

39 L Mengoni, 'Giurisprudenza costituzionale e diritto del rapporto di lavoro' in Asap Intersind (ed.), *La giurisprudenza costituzionale 1956–1986*, vol. 1, 75.

40 V Bavaro, 'Diritto del lavoro e autorità del punto di vista materiale (per una critica della dottrina del bilanciamento)' (2019) I Rivista Italiana di Diritto del Lavoro 179.

41 *Ibid*, 175–201; B Veneziani, 'Il lavoro tra l'ethos del diritto ed il pathos della dignità' (2010) 126 Giornale di Diritto del Lavoro e Relazioni Industriali 257–302.

42 G. Cazzetta, *Scienza giuridica e trasformazioni sociali. Diritto e lavoro in Italia tra Otto e Novecento* (Giuffrè Milano 2007) 212.

43 J Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996) 392.

44 V Bavaro, 'Diritto del lavoro e autorità del punto di vista materiale (per una critica della dottrina del bilanciamento)' (2019) I Rivista Italiana di Diritto del Lavoro 180.

45 H Kelsen, *The Communist Theory of Law* (Frederick A. Praeger New York 1955).