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Reshaping the legal categories of work

Digital labor platforms at the borders of labor law

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ABSTRACT

The article questions the fundamental paradigms of labor law in view of the challenges presented by digital platform work. It uses heuristic methods, namely legal doctrine and labor law theory, to show how legal concepts of employment have been informed by organization theory. It proposes taking lessons from organizational analyses of market organizing that have already addressed new organizational forms with some precision. This approach would facilitate the development of a consistent and effective regulatory design for digital labor platforms. The design would include two levels: First, regulation should modify the criteria and indicators for classifying workers, either in the employment category or in a new category, to capture indirect mechanisms of worker control such as feedback and rating systems. Second, the rights and obligations associated with labor law, as well as the participation and governance structures, should be reformulated to address indirect control and the social dynamics of virtual workplaces.

1 Introduction

While the policy debate on the regulation of digital platforms is picking up steam, the legal issues surrounding digital labor platforms are attracting increasing attention. For example, in November 2020, the German Federal Labor Ministry presented concrete proposals for "fair work in a strong platform economy."[1]

The term "digital labor platforms"[2] covers a wide range of platforms, from online clickwork platforms (e.g., Amazon Mechanical Turk) and bid-based design platforms for complex online crowdwork (e.g., 99designs) to platforms for on-site household services, transport, or food delivery (e.g., Helpling, Uber, or Glovo).[3] The latter have particularly attracted labor lawyers' attention. While the French, Italian, Spanish, and UK supreme courts have established that work on certain food delivery and transportation platforms is a form of "employment" or similar,[4] the European Court of Justice[5] has been more hesitant, and a proposal to broaden the employee category in European law in Directive (EU) 2019/1152 also failed.[6] Likewise, on November 3, 2020, Californian voters were asked to decide on Proposition 22, a legislative initiative backed by record amounts of money from Uber, Lyft, and Doordash.[7] This proposition succeeded in undoing California Assembly Bill 5 (AB5) from September 2019, which had aimed to extend labor law coverage to workers on transport and delivery platforms.[8]

This article asks what this debate means for labor law. Is the category of "employment" that is central to labor law able to capture these new forms of work? Or is a fundamental paradigmatic change in the basic concepts underpinning labor law underway—a change requiring new categories?

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1 German Ministry for Labour and Social Affairs (BMAS), 'Eckpunkte "Faire Arbeit in der Plattformökonomie"', <https://www.denkfabrik-bmas.de/fileadmin/Downloads/eckpunkte-faire-plattformarbeit_1_.pdf> accessed 11 February 2021.

2 For more on this term, see Jamie Woodcock and Mark Graham, The Gig Economy. A Critical Introduction (Wiley 2019): "Digital labour platforms"; Frankfurt Declaration on Platform-Based Work, 2017, <http://faircrowd.work/unions-for-crowdworkers/frankfurt-declaration/> accessed 11 February 2021: "online labor platforms."

3 For more on methods and variables of categorization, see Daniel Schönefeld and others, 'Jobs für die Crowds: Werkstattbericht zu einem neuen Forschungsfeld' (Frankfurt (Oder) 2017); Woodcock and Graham, *The Gig Economy. A Critical Introduction* (n 2) 5-6.

4 Cour de Cassation Case No 1737, 28 Nov 2018 (*Take Eat Easy*); No 374, 4 Mar 2020 (*Uber*) (France); Tribunal Supremo, Sala de lo Social, Case STS 2924/2020, 25 Sept 2020 (*Glovo*), paras. 7.2., 19.-21 (Spain); Corte di Cassazione Case 1663/2020, 24 Jan 2020 (*Foodora*) (Italy); *Uber BV & Others v Aslam & Others* [2021] UKSC 5 (UK); for a German case on crowdwork, see Bundesarbeitsgericht (BAG) 1 Dec 2020—case 9 AZR 102/20 (Germany). See discussion below at n 37-45.

5 Case C-692/19 *B v Yodel Delivery Network* ECLI:EU:C:2020:288; see discussion below at n 42.

6 Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union [2019] OJ L186/105, art. 2; Ulrich Preis and Kai Morgenroth, 'Die Arbeitsbedingungenrichtlinie 2019/1152/EU - Inhalt, Kontext und Folgen für das nationale Recht (Teil I)' [2020] ZESAR 351; Martin Henssler and Benjamin Pant, 'Europäisierter Arbeitnehmerbegriff. Regulierung der typischen und atypischen Beschäftigung in Deutschland und der Union' [2019] RdA 321.

7 Official voter information guide (California), <https://voterguide.sos.ca.gov/propositions/22/> accessed 11 February 2021.

8 California Assembly Bill 5 (2019); the state had already obtained a preliminary injunction against Uber and Lyft (first-instance decision having been affirmed by the California First District Court of Appeal on Oct. 22, 2020).

The article addresses these questions by considering the entire spectrum of digital platform work. It starts by establishing the legal prerequisites to classifying digital platform work as employment (Section 1), draws lessons from organizational theory to explain the need for innovation (Section 2), and gives hints as to the possible consequences for the design of rights and obligations that could effectively protect workers on digital labor platforms (Section 3). It concludes by explaining how creating specific rules for digital labor platforms in their function as market organizers can lead to a more consistent and effective regulatory design (Section 4).[9]

2 Employment classification of digital platform work

One feature that most digital labor platforms share is that they classify platform workers as independent contractors rather than employees. Worker classification is important for digital labor platforms' business models because the "employment" and "independent contracting" statuses entail widely differing legal and financial obligations. In most jurisdictions, these implications of classification extend not only to labor law but to other areas of law such as social security[10] or tax law.[11] As far as labor law is concerned, in most jurisdictions, employee status means that the worker enjoys a full set of rights and the employer bears a full range of obligations. By contrast, classification as an independent contractor only entails the rights stipulated by the individual contract, i.e., what the platform has been able to dictate in line with its market position.

The strong interest of digital labor platforms in avoiding employment contracts is reflected in the terms and conditions they use in relation to their workers, which often include a variety of creative ways to frame them as independent contractors.[12] While these instances of contractual "double-speak"

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9 The issues identified in sections I, IIB, and IVC of this article have been analyzed in more detail in Eva Kocher, 'Market organization by digital work platforms: At the interface of labor law and digital law' CompLabL&PolicyJ (forthcoming).

10 Isabell Hensel, 'Soziale Sicherheit für Crowdworker_innen? Zu Regulierungsproblemen am Beispiel der Alterssicherung für Selbstständige' (2017) 66 Sozialer Fortschritt 897 902; Seth D Harris and Alan B Krueger, 'A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker": Discussion Paper 2015-10.' (2015) 18-20 (Hamilton project).

11 Harris and Krueger (n 10); Wilma B Liebman and Andrew Lyubarsky, 'Crowdworkers, the Law and the Future of Work: The U.S.' in Bernd Waas and others (eds), *Crowdwork. A Comparative Law Perspective* (Bund-Verlag 2017) 106. Mark R Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (New York; Oxford University Press 2011) 296.

12 Cf. Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press 2018) 96, which contains an example from TaskRabbit; Eva Kocher, 'Die Spinnen im Netz der Verträge: Geschäftsmodelle und Kardinalpflichten von Crowdsourcing-Plattformen' [2018] JZ 862, which contains examples from (the German platforms) Clickworker and AppJobs; overview: Cesira Urzì Brancati, Annarosa Pesole and Enrique Fernández-Macías, *Digital Labour Platforms in Europe: Numbers, Profiles, and Employment Status of Platform Workers*, European Union 2019, 18 seq.

have been convincingly dismantled,[13] the scholarly debate around employment classification continues unabated. As many authors have lamented, it has been far from easy to reach conclusions in this regard.[14]

The following crossnational analysis will explain the central issues of these debates. This crossnational approach is possible because labor law is driven by similar demands and circumstances across the world—it seeks to regulate the relationship between worker and employer and is shaped by its economic circumstances. For this reason, the basic ideas underpinning labor law can be treated as functionally equivalent across jurisdictions.[15] However, labor law is embedded in different legal and institutional contexts across national legal systems. For instance, any comparative study must account for the existence of further categories alongside the two primary categories of employment and independent contracting[16] (e.g., the Spanish "TRADE" category,[17] the Italian "parasubordinazione" category,[18] or the German "arbeitnehmerähnliche Person" category)[19]. These variations form part of the backdrop for the discussion ahead, as the boundaries of the employment category differ depending on the relative range of any additional categories.

Notwithstanding this caveat, the following short summary of ideas will not concern itself with such differences and will instead focus on the basic common ideas. It will seek to explain the legal debate around digital platform work by describing how employment classification usually works (Section IA) and by showing how it has been applied in the context of digital platform work (Section IB).

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13 Pointedly: *Y Aslam and J Farrar & Others v Uber B.V. & Others* Employment Tribunal London [2016] Case No. 2202550/2015 and others, para. 87; upheld by the Court of Appeal [2018] EWCA Civ 2748 and the Supreme Court [2021] UKSC 5 (n 4); v. Prassl, *Humans as a Service* (n 12).

14 See, for example, Jamie Woodcock and Mark Graham, *The gig economy: A critical introduction* (n 2), 70-92.

15 Luca Nogler, *The concept of "subordination" in European and comparative law* (University of Trento 2009); Robert Rebhahn, 'Der Arbeitnehmerbegriff in vergleichender Perspektive' [2009] 62(3) RdA 154; Freedland and Kountouris (n 11); Guy Davidov, Mark Freedland and Nicola Kountouris, 'The Subjects of Labor law: "Employees" and Other Workers' in Matthew Finkin and Guy Mundlak (eds), *Research Handbook in Comparative Labor Law* (Edward Elgar 2015); Bernd Waas and others (eds), *Crowdwork. A Comparative Law Perspective* (Bund-Verlag 2017).

16 For comparative reports on these categories, see Daniela Pottschmidt, *Arbeitnehmerähnliche Personen in Europa: Die Behandlung wirtschaftlich abhängiger Erwerbstätiger im Europäischen Arbeitsrecht sowie im (Arbeits-)Recht der EU-Mitgliedstaaten* (Nomos 2006); Robert Rebhahn, 'Arbeitnehmerähnliche Personen - Rechtsvergleich und Regelungsperspektive' [2009] RdA 236; Davidov, Freedland and Kountouris (n 15); Nogler, *The concept of "subordination" in European and comparative law* (n 15); Bernd Waas and Guus H van Voos (eds), *Restatement of Labour Law in Europa. Vol. I: The Concept of Employee* (Hart Publishing 2017).

17 "Trabajador autónomo económicamente dependiente" (receiving at least 75% of his/her earnings from a single client) (Real Decreto 197/2009, 23 Febr 2009); Juan-Pablo Landa Zapirain, 'Regulation for Dependent Self-employed Workers in Spain: A Regulatory Framework for Informal Work?' in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds), *Challenging the legal boundaries of work regulation* (Hart Publishing 2012).

18 Matteo Borzaga, 'Wirtschaftlich abhängige Selbständige in Italien und Deutschland: eine rechtsvergleichende Analyse' in Dörte Busch, Kerstin Feldhoff and Katja Nebe (eds), *Übergänge im Arbeitsleben und (Re)Inklusion in den Arbeitsmarkt: Symposium für Wolfhard Kohte* (Nomos 2012); Nogler, *The concept of "subordination" in European and comparative law* (n 15) 88.

19 = employee-like person; see Rebhahn, 'Arbeitnehmerähnliche Personen - Rechtsvergleich und Regelungsperspektive' (n 16).

2.1 The methodology of employment classification

Different jurisdictions describe the employment category in similar ways. The International Labour Organisation's (ILO) Employment Relationship Recommendation No. 198 of 2006 implicitly explains the associated legal methodology and will serve as a valuable tool for this crossnational exercise, as it reflects the diversity of jurisdictions all over the world.[20]

The primacy of facts and the typological method of classification

Determining the existence of an employment relationship is a specific legal operation that differs from other legal operations. ILO Recommendation 198 shows this in Part II, which deals with the "Determination of the Existence of an Employment Relationship". Here, Paragraph 9 establishes the principle of "primacy of facts" over contract, a rule that has also been dubbed the "economic perspective" or "business perspective."[21] The principle of primacy of facts is designed to prevent "creative compliance"[22] with labor law obligations by lessening the leeway available to employers for avoiding or circumventing requirements under labor law. At its core, this approach invites us to look at the business model at stake rather than just read the contract.[23]

The primacy-of-facts principle has given rise to a specific methodology for classifying employment relationships. This "typological method"[24] consists of three steps. In the first step, certain criteria[25] *describe* or *define* the type (often referred to as a "category" in certain legal systems). In the second step, facts that constitute *indicators* of the type are identified. Finally, as a third step, the indicators are *clustered*[26] in an overall assessment.

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20 For more details on background and development, see Freedland and Kountouris (n 11) 23-6; cf. ILO, Annotated Guide to the Recommendation, 2007.

21 Eva Kocher, 'Private Macht im Arbeitsrecht' in Florian Möslein (ed), *Private Macht* (Mohr Siebeck 2015), p. 275; Prassl, *Humans as a Service* (n 12) 96.

22 For more on the notion of "sham contracts," see Freedland and Kountouris (n 11) 296; Guy Davidov, 'Re-Matching Labour Laws with Their Purpose' in Guy Davidov and Brian Langille (eds), *The idea of labour law* (Oxford University Press 2011) 183; on the concept of "creative compliance," see Doreen McBarnet and Christopher Whelan, 'The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control' (1991) 54 MLR 848.

23 For more on the "artificiality" of many of these contracts, see below n 46.

24 These are the words of the German Federal Constitutional Court (BVerfG), 20 May 1996, Case 1 BvR 21/96, para. 7, which has aptly summarized the concept; see Luca Nogler, 'Die typologisch-funktionale Methode am Beispiel des Arbeitnehmerbegriffs' [2009] ZESAR 461.

25 This is called a "test" in the wording of the English legal methodology.

26 Term used by Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (A report prepared for the European Commission. with María Emilia Casas, Jean de Munck, Peter Hanau, Anders L. Johansson, Pamela Meadows, Enzo Mingione, Robert Salais, Paul van der Heijden tr, Oxford University Press 2001) 12.

Definitions of employment in classification tests

Using ILO Recommendation 198 as a generic guide, we can sum up the criteria for classifying work as "employment" as follows:

\ **Subordination**, referring to "the fact that the work is carried out according to the instructions and under the control of another party" (Para. 12). This definition can be roughly identified with tests of "being bound by instructions"[27] or "control."[28]

\ **Integration** "involves the integration of the worker in the organisation of the enterprise" (Para. 13a).

\ **Economic dependence** on the employer. This criterion has to be treated with care in a comparative approach: Jurisdictions that do not rely on a "binary divide"[29] between employment and independent contracting often use economic dependence as the defining element of a third category.[30]

\ **Entrepreneurial opportunities,** sometimes referred to as "business realities" or "economic realities," concerning the worker's opportunities to earn profit and the economic risks to which she is subjected.[31]

\ **Personal performance**, finally, is addressed by the indicator that the work "must be carried out personally by the worker" (Para. 13a).[32]

In some jurisdictions such as Germany, the existence of an obligation to perform (*Leistungspflicht*) is an additional general contractual requirement.[33]

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27 Davidov, Freedland and Kountouris (n 15) 128; Rebhahn, 'Der Arbeitnehmerbegriff in vergleichender Perspektive' (n 15); Nogler, *The concept of "subordination" in European and comparative law* (n 15).

28 Davidov, Freedland and Kountouris (n 15); Bernd Waas, 'Crowdwork in Germany' in Bernd Waas and others (eds), *Crowdwork. A Comparative Law Perspective* (Bund-Verlag 2017) 150.

29 Freedland and Kountouris (n 11) 103.

30 Cf. comparative accounts cited above in n 16.

31 Simon Deakin, 'What Exactly Is Happening to the Contract of Employment: Reflections on Mark Freedland and Nicola Kountouris's Legal Construction of Personal Work Relations' [2013] 7(1) Jerusalem Review of Legal Studies 135; Rolf Wank, *Arbeitnehmer und Selbständige* (C.H. Beck 1988); Rolf Wank, 'Die personelle Reichweite des Arbeitnehmerschutzes aus rechtsdogmatischer und rechtspolitischer Perspektive' [2016] 9(2) EuZA 143.

32 Freedland and Kountouris (n 11) 376.

33 Cf. BAG Case 9 AZR 102/20 (n 4), para. 42-43.

2.2 (How) Does digital platform work equal employment?

According to some of the jurisprudence and scholarly analyses on the classification of digital platform work in a variety of jurisdictions, workers on transportation platforms such as Uber and Lyft or on food-delivery platforms such as Deliveroo and Glovo have already been classified as employees or workers, or, at least, as economically dependent persons.[34]

Looking at the tests, indicators, and the ways they are clustered when classifying these platform workers,[35] we find that the obvious empirical situation — workers are not autonomous — does not easily lend itself to translation into labor law. The French Cour de Cassation in its November 2018 (Take Eat Easy) and March 2020 (Uber) decisions ultimately had to use new indicators[36] for assessing platform work as employment.[37] The same is true for the UK Supreme Court's judgment of February 2021.[38] The Spanish Tribunal Supremo, in its September 2020 ruling (Glovo), explicitly acknowledged the need to adapt criteria to a "new reality."[39] The Italian Corte di Cassazione had already reached a similar conclusion in January 2020 with regard to the food delivery service Foodora.[40] At the same time, and in contrast to these openings, the European Court of Justice, in April 2020, ruled on the Yodel delivery service by a reasoned order[41] instead of a formal judgment; this indicated that it did not consider it useful to think about modifying criteria. Unsurprisingly, this is the decision that did not acknowledge the existence of "employment."[42]

In contrast to transportation and food delivery, crowdwork has hardly ever been deemed employment. With a lack of court cases on the matter, scholars

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34 Ignasi Beltran, 'Employment status of platform workers: national courts decisions overview - Argentina, Australia, Belgium, Brazil, Canada, Chile, France, Germany, Italy, Nederland, Panama, Spain, Switzerland, United Kingdom, United States & Uruguay' (9 December 2018) <https://ignasibeltran.com/2018/12/09/employment-status-of-platform-workers-national-courts-decisions-overview-australia-brazil-chile-france-italy-united-kingdom-united-states-spain/> accessed 28 May 2021; cf. Bernd Waas, 'Zur rechtlichen Qualifizierung von Beschäftigten in der "Gig Economy" - ein Blick in das Ausland' [2018] AuR 548.

35 I have done this in more detail in Kocher, 'Market organization by digital work platforms' (n 9).

36 See below text at n 47 seq.

37 French Cour de Cassation (n 4); Rudolf Buschmann, 'Anmerkung zu Cour de Cassation v. 4.3.2020 no 374 (Uber-Fahrer*innen als Arbeitnehmer*innen)' [2020] AuR 233; Miriam Engler, 'Fahrradkuriere als Arbeitnehmer: Entscheidung der Cour de Cassation vom 28.11.2018 – Take Eat Easy' [2019] ZEuP 504; Isabelle Daugareilh, 'Der Widerstand der französischen Richter gegen die Sirenen der Uberisierung der Wirtschaft' [2020] AuR 352.

38 Uber BV & Others v Aslam & Others [2021] (n 4), para. 96-100.

39 Spanish Tribunal Supremo (n 4); Adrián Todolí-Signes, 'Notes on the Spanish Supreme Court Ruling that Considers Riders to be Employees' [2020] CompLabL&PolicyJ Dispatch No. 30.

40 Italian Corte di Cassazione (n 4).

41 Rules of Procedure of the Court of Justice [2012] *OJ L265/1, art. 99.*

42 Case C-692/19 (n 5); for a critical view, see Martin Risak, 'Arbeitnehmer*innen-Begriff in der Gig-Economy: Anmerkung zu EuGH C-692/19 (Yodel Delivery Network)' [2020] AuR 526; Ricardo Buendia, 'The Court of Justice of the European Union's Order on B v Yodel Delivery Network' [2020] CompLabL&PolicyJ Dispatch No 24; Antonio Aloisi, ''Time Is Running Out'. The Yodel Order and Its Implications for Platform Work in the EU' [2020] 13(2) Italian Labour Law e-Journal 67.

have taken up the issue and usually classified it as independent contracting,[43] or—where this category exists—as industrial homework/piecework (German "*Heimarbeit*")[44] The German Federal Labor Court, in December 2020, seems to have been the first supreme court to rule on crowdworking, and rather surprisingly established status of the plaintiff (a platform worker) as an employee. Here again, an innovative reinterpretation of criteria and indicators for employment was needed in order to achieve this result; rather than looking at "specific instructions," the court focused on the incentives created by the rating system and by the way the platform presents the tasks to the worker.[45]

These decisions are evidence of the difficulties that must be worked around by those wishing to classify digital platform work as employment. First, when a platform construes the legal situation as one of contracting between a customer and worker, this contractual situation must be disregarded on the grounds that it is "artificial and unproductive"[46] in order to classify the arrangement as one of employment. Second, traditional indicators usually focus on substantive questions of subordination, economic dependence, and organizational integration. For this reason, court decisions that have classified digital platform work as employment have had to rely on new and mostly innovative indicators. To date, four characteristics of digital platform work have played a pivotal role here:[47]

\ Obligatory use of platform apps, specific soft- and hardware, or other related tools (i.e., "app-based management"[48]);

\ Rating and feedback mechanisms;[49]

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43 Liebman and Lyubarsky (n 11) 89 (on Upwork); 93 (on Topcoder); 85 (Amazon Mechanical Turk); Martin Risak, 'Kapitel 3 – (Arbeits-)Rechtliche Aspekte der Gig-Economy' in Martin Risak and Doris Lutz (eds), *Arbeit in der Gig-Economy. Rechtsfragen neuer Arbeitsformen in Crowd und Cloud* (ÖGB-Verlag 2017).

44 Richard Giesen and Jens Kersten, *Arbeit 4.0. Arbeitsbeziehungen und Arbeitsrecht in der digitalen Welt* (C.H.Beck 2017), 110; ; Ulrich Preis, 'Heimarbeit, Home-Office, Global-Office - das alte Heimarbeitsrecht als neuer Leitstern für die digitale Arbeitswelt?' [2017] SR 173; Raimund Waltermann, 'Digital statt analog: Zur Zukunftsfähigkeit des Arbeitsrechts' [2019] RdA 94; Waas, 'Crowdwork in Germany' (n 28), 177; Wiebke Brose, 'Von Bismarck zu Crowdwork: Über die Reichweite der Sozialversicherungspflicht in der digitalen Arbeitswelt' [2017] NZS 7, 14; Claudia Schubert, 'Beschäftigung durch Online-Plattformen im Rechtsvergleich' [2019] 118 ZVglRWiss 341, 373 f; Claudia Schubert, 'Neue Beschäftigungsformen in der digitalen Wirtschaft – Rückzug des Arbeitsrechts?' [2018] RdA 200, 205; Prassl, *Humans as a Service* (n 12), 74; Matthew Finkin, 'Beclouded Work, Beclouded Workers in Historical Perspective' [2016] CompLabL&PolicyJ 37.

45 BAG Case 9 AZR 102/20 (n 4), para. 48-51.

46 On Uber: Uber BV and others (Appellants) v Aslam and others (UKSC, n 4); Mark Freedland and Nicola Kountouris, 'Some Reflections on the 'Personal Scope' of Collective Labour Law' [2017] 46(1) Industrial Law Journal 52 68-69; cf. Kocher, 'Die Spinnen im Netz der Verträge' (n 12), with a view on the legal relationship between platform and business clients/consumers; Sandra Fredman and Darcy Du Toit, 'One Small Step Towards Decent Work: Uber v Aslam in the Court of Appeal' [2019] 48 Industrial Law Journal 260 270-1.

47 See references above n 37-40 and 45.

48 Mirela Ivanova and others, 'The App as a Boss? Control and Autonomy in Application-Based Management' (2018) .

49 Cf. Eva Kocher and Isabell Hensel, 'Herausforderungen des Arbeitsrechts durch digitale Plattformen – ein neuer Koordinationsmodus von Erwerbsarbeit' [2017] NZA 984.

\ Qualification requirements and the assignment of tasks to particular workers;

\ The economic positions of platforms and workers (i.e., access to markets, entrepreneurial opportunities).

These indicators refer to forms of control that have in the past not been widely used in employment classification. Instead of looking at direct control, subordination, and organizational mechanisms of direct access to workers' bodies, they focus on the "indirect control" exerted via mechanisms that structure action and create motivation and commitment.[50]

However, although some courts have succeeded in reinterpreting criteria (at least in cases of transport and delivery work), these conceptual challenges have not yet been sufficiently reflected in labor law theory.

3 Deconstructing and reconstructing labor law

This is not at all a new problem, and the gig economy may only be an example of the "fragmentation" of organizations,[51] the "fissuring" of firms,[52] "post-bureaucratic" forms of organization,[53] "fluid organisations,"[54] or the new "digital mode of production".[55] Consequently, there is an intensive debate on how to deconstruct and reconceptualize the categories of labor law in order to capture indirect forms of management and control. The following section will explain the basic conceptual approaches.

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50 For more on this juxtaposition of direct/indirect control, see Christine Gerber, 'Crowdworker*innen zwischen Autonomie und Kontrolle: Die Stabilisierung von Arbeitsteilung durch algorithmisches Management' (2020) 73(182-192) WSI-Mitt; Christine Gerber and Martin Krzywdzinski, 'Brave New Digital Work?: New Forms of Performance Control in Crowdwork' in Steven P Vallas and Anne Kovalainen (eds), *Work and Labor in the Digital Age* (Research in the sociology of work. Emerald Publishing Limited 2019).

51 Hugh Collins, 'Independent contractors and the challenge of vertical disintegration to employment protection laws' [1990] 10 OJLS 353 360; Judy Fudge, 'Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation' [2006] 44(4) Osgoode Hall Law Journal 609.

52 David Weil, *The fissured workplace: Why work became so bad for so many and what can be done to improve it* (Harvard University Press 2014).

53 William G Ouchi, 'A Conceptual Framework for the Design of Organizational Control Mechanisms' [1979] 25 Management Science 833 ("loose coupling").

54 Jörg Sydow and Markus Helfen, '10 - Work and Employment in Fluid Organizational Forms' in Brian J Hoffman, Mindy K Shoss and Lauren A Wegman (eds), *The Cambridge Handbook of the Changing Nature of Work* (Cambridge handbooks in psychology. Cambridge University Press 2020).

55 Katherine V Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge University Press 2004).

3.1 Theoretical approaches to labor law classification

Embedding labor law in human rights approaches

The Supiot Report of 2001 is an influential example of an attempt at deconstructing and reconceptualizing the purposes and general normative ideas of labor law. It was the work of a comparative research group of European labor lawyers lead by Alain Supiot[56] that set out to answer, inter alia, the European Commission's question: "Is there a need for a 'floor of rights' dealing with the working conditions of all workers regardless of the form of their work contract?"[57]

The Supiot Report proposed regulating work (including unpaid work) in four circles: dependent employment in the narrow sense, professional work, non-professional (unpaid) work, and (in the outermost circle) any work activity.[58] Mark Freedland and Nicola Kountouris, in their own reconstruction suggested a mobile system of elements. In order to develop "neutral" or "baggage-free" analytical concepts, they separated two analytical elements, namely the "personal work relation" and "personal work nexus," from contractual analysis,[59] equating their "personal work relation" to the Supiot report's "statut professionel"[60]

These comprehensive concepts are ultimately capable of identifying commonalities shared by any kind of work, i.e., justify universal rights at work. Consequently, they define a basic element, which they link with a human rights approach.[61] Embedding labor in universal human rights[62] is also an objective identified in the claim "labour is not a commodity" or, rather, "labour is a fictive commodity."[63] By emphasizing that work is inseparable from the person performing it,[64] the phrase focuses attention on human dignity while at the same

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56 Supiot (n 26); Alain Supiot and others, 'A European Perspective on the Transformation of Work and the Future of Labor Law' [1999] 20(4) CompLabL&PolicyJ 621.

57 Question 8 in the consultation started by the European Commission's Green Paper "Modernising labour law to meet the challenges of the 21st century", COM(2006) 708 final.

58 Supiot (n 26) 55.

59 Freedland and Kountouris (n 11) 309-15.

60 ibid 24; 341. The original French term and concept of "statut professionel" has proved hard to translate (Supiot (n 26), 24, n 1). For an attempt to transfer it into the German context, see Kerstin Jürgens, Reiner Hoffmann and Christina Schildmann, *Let's Transform Work!: Recommendations and Proposals from the Commission on the Work of the Future* (Hans-Böckler-Stiftung 2018) 26 seq.

61 Freedland and Kountouris (n 11) 200.

62 Harry Arthurs, 'Labour Law After Labour' in Guy Davidov and Brian Langille (eds), *The idea of labour law* (Oxford University Press 2011) 23-24; Supiot (n 26).

63 Judy Fudge, 'Labour as a "Fictive Commodity"' in Guy Davidov and Brian Langille (eds), *The idea of labour law* (Oxford University Press 2011); For more from a historical perspective, see Stein Evju, 'Labour is not a Commodity: Reappraising the origins of the maxim' [2013] 4(3) ELLJ 222.

64 Frank Hendrickx, 'Foundations and Functions of Contemporary Labour Law' (2012) 3(2) European Labour Law Journal 108 110 seq.

time acknowledging the empirical fact that labour law "underpins the creation of labour power as a commodity, and regulates the resulting social and economic relations."[65] This is why Amartya Sen's notion of "capabilities" has been so attractive[66] for this endeavor: It "provides a framework for debating which labour and social rights ought to be considered fundamental".[67]

However, some doubts remain as to what reconstructing labor law by way of human rights can achieve in our context.[68] The specificity of labor law lies exactly in its ability to capture economic realities, power, and market failures and to promote social solidarity.[69] Therefore, the necessary reconnecting of specific rights and obligations (wage, working time, collective organization, etc.) goes beyond identifying universal rights. In order to link the legal character to legal consequences,[70] we will have to look at the specific rationales of labor law.

Power and dependence as the defining rationale for labor law rights and obligations

My own proposal for a reconceptualization of labor law categories builds on an acknowledgment of the function of labor law in controlling "private power." It starts by identifying the different socio-economic sources of power at work—sources and phenomena of power that may, could, and should give rise to specific regulations.[71] These are not limited to market power, but include, as in any long-term relationship, economic lock-in problems of specific investments that create barriers to exit in cases of conflict.[72] Most importantly, however, work in organizations possesses a unique feature that creates specific power for the employer. Hugh Collins, in his 1986 article on the contract of employment, aptly termed this problem as one of the difference between "market power" and "bureaucratic power": "even with reduced inequality of bargaining power, the social dimension of subordination

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65 Deakin (n 31).

66 Simon Deakin and Alain Supiot (eds), *Capacitas: Contract law and the institutional preconditons of a market economy* (Hart Publ. 2009); Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The idea of labour law* (Oxford University Press 2011).

67 Fudge, 'Labour as a "Fictive Commodity"' (n 63) 126-27.

68 For a general account of this debate, see Eva Kocher, 'Solidarität und Menschenrechte – Zwei verschiedene Welten?' in Helena Lindemann and others (eds), *Erzählungen vom Konstitutionalismus: Festschrift für Günter Frankenberg* (Nomos 2012); Christopher McCrudden, 'Labour Law as Human Rights Law: A Critique of the Use of 'Dignity' by Freedland and Kountouris' in Alan Bogg and others (eds), *The Autonomy of Labour Law* (Bloomsbury 2017).

69 Fudge, 'Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation' (n 51) 639-40; Fudge, 'Labour as a "Fictive Commodity"' (n 63) 124-25.

70 Freedland and Kountouris (n 11); this is also the project pursued by Wank, *Arbeitnehmer und Selbständige* (n 31) (see further below at n 74).

71 Kocher, 'Private Macht im Arbeitsrecht' (n 21);.cf. Prassl's focus on the employer's functions: Jeremias Prassl, *The Concept of the Employer* (Oxford University Press 2015).

72 Rebhahn, 'Der Arbeitnehmerbegriff in vergleichender Perspektive' (n 15) 163-64. Cf. Dieter Sadowski and Uschi Backes-Gellner, 'Der Stand der betriebswirtschaftlichen Arbeitsrechtsanalyse' [1997] ZfB-Ergänzungsheft 83, 85.

remains." This managerial power is the result of how work is organized: "An employee normally joins a bureaucratic organisation and will be allocated a particular role, defined by the rules of the institution."[73]

Rolf Wank has advanced a similar idea, first in his 1988 postdoctoral thesis and in numerous articles since.[74] He also starts from the assumption that legal consequences should have to be justified in view of specific problems and states that it is managerial control exerted by an employer over a worker that justifies most of the protection against control and unfair risks afforded by labor law. His basic contribution to labor law theory, however, is his look at market alternatives to legal rights: Wank expressly defines the dependence labor law should react to as the situation of not being able to care for oneself economically because one is bound to work for the benefit of others. We find a similar idea in the second aspect of Davidov's "purposive approach" to labor law: He defines the vulnerabilities at the heart of labor law as subordination (in the sense of democratic deficits) and dependence (in the sense of the inability to spread risks).[75]

3.2 Digital platforms: hierarchy, networks, and market organization

In view of these debates, an approach that entails looking at the ways in which digital labor platforms create dependence, control, and the organizational power that gives rise to the need for specific labor law rights and obligations seems especially promising. Organization theory can help to define this further.

Organization theories

Organization theory aligns with labor law in its attempt to explain how the coordination of goods, services, and work by organizations differs from the coordination by market mechanisms. In other words, organization theory explains and draws a line between "making" a product or service (with employees) versus "buying" it on a market (from an independent contractor).[76] It is thus not a coincidence that Ronald Coase, who developed the theory of the firm for organization theory, used the (then-common) legal criteria for worker classification. He described the "firm in the real world" with "the master's right to control the servant's work, […] of being entitled to tell the servant

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73 Hugh Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' [1986] 15 Industrial Law Journal 1.

74 Wank, *Arbeitnehmer und Selbständige* (n 31); Wank, 'Die personelle Reichweite des Arbeitnehmerschutzes aus rechtsdogmatischer und rechtspolitischer Perspektive' (n 31); a short English-language version of his ideas can be found in Rolf Wank, 'Diversifying Employment Patterns – the Scope of Labor Law and the Notion of Employees', Bulletin of Comparative Labour Relations, vol. 53, Den Haag/New York: Kluwer Law International 2005, 105-21.

75 Guy Davidov, *A Purposive Approach to Labour Law* (Oxford University Press 2016).

76 Cf. Fudge, 'Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation' (n 51); Weil (n 52) 30-37.

when to work (within the hours of service) and when not to work, and what work to do and how to do it […]."[77] The "binary divide"[78] between employment and independent contracting is obviously not something rooted in contract law but is rather a result of an economic and institutional duality.

Since Coase, organization theory has developed significantly. It now describes the coordinating mechanisms used by organizations in more detail, using elements of membership, hierarchy and control, rules, monitoring, and sanctions.[79] The concept of hierarchical organization has, however, also been questioned in organization theory and been criticized for only reflecting "the social reality of the employment relation in advanced industrialised societies."[80]

Digital labor platforms as organizations

There have been various attempts in organization theory to make sense of the developments of "post-bureaucratic" forms of organization summarized above.[81] In relation to digital platforms and the gig economy, the concept of "network"[82] (which replaced the term "clan"[83]) has been particularly influential. It is intended to describe any nonmarket and nonorganisational form of coordinated "inter-organisational value-creation."[84] As such, the network concept is well suited to describing and analyzing the sharing economy and horizontal or cooperative systems.[85] It is less useful, however, when it comes to identifying power structures.

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77 R. H Coase, 'The Nature of the Firm' (1937) 4 Economica 386; Julia Tomassetti, 'Does Uber Redefine the Firm? The Postindustrial Corporation and Advanced Information Technology' [2016] 34 Hofstra Lab & Emp LJ 1 58 has already commented on the issue of Coase's theory being based on legal assumptions and figures.

78 Freedland and Kountouris (n 11) 107.

79 Göran Ahrne and Nils Brunsson, 'Organization outside organizations: the significance of partial organization' [2011] 18(1) Organization 83 84; 86.

80 V. Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (n 73) 10.

81 For example: Ahrne and Brunsson, 'Organization outside organizations: the significance of partial organization' (n 79); Sydow and Helfen (n 54); Göran Ahrne and Nils Brunsson (eds), *Organization outside organization: The Abundance of Partial Organization in Social Life* (Cambridge University Press 2019)

82 Andreas Bücker, 'Arbeitsrecht in der vernetzten Arbeitswelt' [2016] 23(2) IndBez 187.

83 William G Ouchi, 'Markets, Bureaucracies, and Clans' [1980] 25(1) Administrative Science Quarterly 129; Ouchi, 'A Conceptual Framework for the Design of Organizational Control Mechanisms' (n 53); Daniel Schönefeld, 'Kontrollierte Autonomie. Einblick in die Praxis des Crowdworking' in Isabell Hensel and others (eds), *Selbstständige Unselbstständigkeit: Crowdworking zwischen Autonomie und Kontrolle* (Nomos 2019).

84 Sydow and Helfen (n 54).

85 Yochai Benkler, *Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press 2008).

In relation to digital labor platforms, Stefan Kirchner and Elke Schüßler have developed a more promising approach.[86] Kirchner and Schüßler use the term market organizer to describe the specific functions of digital labor platforms for organization theory,[87] in line with the idea of "partial organisations."[88] First, these platforms open up markets that "may lower the costs and risks of setting up as an 'independent expert' and make it easier to access work."[89] Second, they fulfill specific functions of trust-building and quality control within these markets. This is why their feedback and reputation mechanisms are such important features,[90] and this is why they ultimately do need some degree of control over market access[91] and control over their workers.[92]

Delimitation: Conflicting concepts of "market organizers"

If characterized as market organizers, digital labor platforms should be analyzed according to functions like managing transactions, establishing a system of reputational feedback and indirect control, providing additional information to users (such as security or personal identity checks), and processing money exchange, thereby rendering it impossible for their workers to gain independent market access.[93] Understood as "gatekeepers"[94] and "private legislators,"[95] digital platforms would embed the rules for how to participate and act in the competition in their design and architecture.

If "market organization" served as the basis for a new labor law category, these characteristics of indirect management could be used as indicators.[96] This would go well beyond what several Republican-governed US states accomplished in 2018 when they passed laws introducing the category of "market contractor",

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86 Stefan Kirchner and Elke Schüßler, 'The Organization of Digital Marketplaces: Unmasking the Role of Internet Platforms in the Sharing Economy' in Göran Ahrne and Nils Brunsson (eds), *Organization outside organization: The Abundance of Partial Organization in Social Life* (Cambridge University Press 2019); Stefan Kirchner, 'Arbeiten in der Plattformökonomie: Grundlagen und Grenzen von "Cloudwork" und "Gigwork"' [2019] 71(1) KZfSS 3.

87 Kirchner and Schüßler (n 86).

88 Ahrne and Brunsson, 'Organization outside organizations: the significance of partial organization' (n 79) 85.

89 Chris F Wright and others, 'Beyond National Systems, Towards a 'Gig Economy'?: A Research Agenda for International and Comparative Employment Relations' [2017] 29 Employ Respons Rights J 247 253-54.

90 Jochen Koch, 'Crowdworking zwischen Markt und Organisation - Eine steuerungstheoretische Betrachtung' in Isabell Hensel and others (eds), *Selbstständige Unselbstständigkeit: Crowdworking zwischen Autonomie und Kontrolle* (Nomos 2019).

91 For example, by imposing entry-level tests on prospective workers (Schönefeld (n 83)).

92 For example, by giving detailed instructions, using feedback mechanisms to test workers' performance quality and by assigning tasks and activities according to performance levels (ibid).

93 Cf. Deepa Das Acevedo, 'Regulating Employment Relationships in the Sharing Economy' (2016) 20(1) Employee Rights and Employment Policy Journal 1.

94 Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services, [2019] OJ L186/57 (P2B-Regulation); cf. Finkin (n 44)).

95 Heike Schweitzer, 'Digitale Plattformen als private Gesetzgeber: Ein Perspektivwechsel für die europäische "Plattform-Regulierung"' (2019) 27(1) ZEuP 1 7.

96 See, in more detail: Kocher, 'Market organization by digital work platforms' (n 9).

retaining a binary model of employment classification by defining the new category as a nonemployee.[97] Contrary to this approach, introducing the idea of the market organizer would not simply address the formal structure of market mediators but would instead identify those features that form the basis of the specific power imbalances these market organizers create.

4 Dangers and benefits of specific regulation

This theoretical framework could be used for different purposes; in many instances, it could be used by courts or legislators[98] to more systematically advance concepts of employment in the strict sense—if judges continued to innovatively develop this category.[99] This could be useful for transport, delivery, or household services, i.e., for cases of digital platform work that exhibit more than just one feature and indicator of control.

The framework could also serve as the basis for specific definitions in particular sectors[100]—or even for general rules on digital platform work, as is evident in the German Labor Ministry's approach.[101] For these purposes, it makes sense to introduce a new category as starting point for specific regulation.[102] However, such strategies have been heavily disputed.

4.1 Cons: the dangers of deregulation

The main argument against new and intermediate categories is that digital platform work is just a modern form of precarious atypical employment. Based on this assumption, some conclude that the introduction of further forms of contracts and protection is nothing but deregulation.[103] This is an argument that not only favors protecting platform workers but is also concerned with a "level playing field" with respect to both employment and tax law as well as

97 Florida, Kentucky, Indiana, Iowa, Tennessee (legislation of 2018).

98 Thomas C Kohler, 'Jüngste Rechtsentwicklungen in den USA: Rechtliche Prüfung des Arbeitnehmerstatus. Test und Kodifizierung durch AB-5 2019-2020' [2019] AuR 458; see above at n 7-8.

99 See references above n 37-40 and 45.

100 For example, Italian Decreto-legge, 3 Sept 2019, n. 101; cf. Schubert, 'Beschäftigung durch Online-Plattformen im Rechtsvergleich' (n 44) 351.

101 Above n 1.

102 Liebman and Lyubarsky (n 11) 106 seq; Harris and Krueger (n 10).

103 Jeremias Prassl and Martin Risak, 'Uber, Taskrabbit & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork' [2016] 37(3) CompLabL&PolicyJ 619; Valerio de Stefano, 'Crowdsourcing, the Gig-Economy and the Law (Introduction)' [2016] 37(3) CompLabL&PolicyJ 1; for general overviews on this debate, see Davidov, 'Davidov 2011' (n 22), p. 176-7; Langille (n 66) 107 seq; cf. Liebman and Lyubarsky (n 11) 106 seq in her discussion of the Hamilton project.

consumer protection or social security contributions.[104] After all, crowdworking has often been advertised as an alternative to employment[105]—this renders the assumption that the gig economy could be used as an instrument to replace standard employment all the more credible.

Nevertheless, experiences in states that have additional employment categories do at least not give grounds to clearly advise against the strategy proposed here.[106] More importantly, the most persuasive argument against persevering with the existing binary is its ineffectiveness against deregulation. Opportunities for evasion already exist[107]—this is partly in spite of legal regulation and due to the organizational choices opened up by technological developments. The rift between employment law and general contract law tends to drive dynamics of circumvention.[108] This is the idea behind Simon Deakin's statement that the "worker concept preserves the contract of employment only at the expense of diminishing the scope of application of the core model."[109]

4.2 Pro: the benefits of fit-for-purpose rules

Equating gig-economy work and traditional employment may be right and wrong at the same time. On the one hand, work on digital platforms does often entail control, a lack of autonomy, and levels of precarity comparable to low-standard employment. On the other hand, from a legal perspective, it almost as often differs from standard employment in some important respects.

A closer look at the internal dynamics of employment classification suggests that the very insistence on a concept that may not really fit the problem could be backfiring. After all, the effectiveness of labor law classification is based on the methodological principle of the primacy of facts which, in turn, is based on the assumption that there are certain features of work coordination and organization that a firm cannot easily change. It works "by reference to social and economic criteria which reduce as far as possible the influence of

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104 Prassl, *Humans as a Service* (n 12) 119 seq; Harris and Krueger (n 10), 18-21; Brose (n 44) 8; Raimund Waltermann, 'Welche arbeits- und sozialrechtlichen Regelungen empfehlen sich im HInblick auf die Zunahme Kleiner Selbstständigkeit?' [2010] RdA 162 167.

105 Jeff Howe, 'The Rise of Crowdsourcing'' [2006] 14 Wired Magazine 1 .

106 Jeremias Prassl and Martin Risak, 'The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights in the Virtual Realm' in Pamela Meil and Vassil Kirov (eds), *Policy Implications of Virtual Work* (Springer International Publishing 2017); Martin Risak and Doris Lutz, 'Kapitel 14 – Gute Arbeitsbedingungen in der Gig-Economy – was tun?' in Martin Risak and Doris Lutz (eds), *Arbeit in der Gig-Economy. Rechtsfragen neuer Arbeitsformen in Crowd und Cloud* (ÖGB-Verlag 2017).

107 Freedland and Kountouris (n 11), p. 436; Wolfgang Däubler, 'Die offenen Flanken des Arbeitsrechts' [2010] AuR 142.

108 Frankfurt Declaration (n 2) 3.

109 Deakin (n 31).

the employer's choice of form."[110] Consequently, the criteria and indicators used to determine employment classification should accurately reflect digital labor platforms' actual organizational mechanisms. Effective regulation of digital platform work should be designed to address platforms' specific business models and organizational principles as directly as possible.

5 Labor law regulation for market organizers

If lawmakers wish to link categories to legal consequences,[111] they should arguably define market organizers with reference to organization theory, as proposed here, as this can help identify which specific rights and obligations would be adequate. This task goes far beyond what can be done in this article. The following ideas therefore focus on issues of governance and the forms of regulation that could address the specific structures of market organizers. After explaining some of the general ideas on the governance and regulation of digital platforms (5.1), including techniques of organizing accountability (5.2), I highlight issues of collective action as a central concern for labor law (5.3).

5.1 Digital platforms as objects of legal regulation

Digital platforms have come to be seen as the characteristic organizational form of "informational" or "digital" capitalism.[112] The questions of whether and how to regulate these platforms has therefore become one of the primary concerns in legal debates on the digital economy. These concerns have mostly arisen due to the realization that digital platforms are more than just technological instruments or "matchmakers."[113]

Regulators' concerns in relation to digital platforms in general are manifold: From a consumer law background, the EU's "P2B-regulation"[114] addresses the business environment for smaller businesses and traders on online platforms. For competition (antitrust) law, EU lawyers have recently suggested creating

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[110] Collins, 'Independent contractors and the challenge of vertical disintegration to employment protection laws' (n 51) 379; cf. Christiane Brors, 'Schöne, neue Arbeitswelt - ist der Arbeitsvertrag dafür zu "altbacken"?: Zugleich eine Stellungnahme zu Bücker (2016): Arbeitsrecht in der vernetzten Arbeitswelt' [2016] 23(2) IndBez 226; see above at n 22-23.

[111] See above n 70.

[112] Julie E Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press 2019); Amy Kapczynski, 'The Law of Informational Capitalism' [2019/2020] 129(5) Yale Law Journal 1276.

[113] This term is used by Prassl, *Humans as a Service* (n 12) 5; 13 to indicate the passive position.

[114] Regulation (EU) 2019/1150 (n 94); Christoph Busch, 'Mehr Fairness und Transparenz und Transparenz in der Plattformökonomie?: Die P2B-Verordnung im Überblick' [2019] GRUR 788; Christoph Busch and others, 'The Rise of the Platform Economy: A New Challenge for EU Consumer Law' [2016] EuCML 3.

stronger antitrust control of online platforms, given their extreme returns to scale, network externalities and the crucial role of data for developing new services and products.[115] Similar discussions are taking place in the United States.[116] There is also an important human rights discourse: The European Council's 2018 policy recommendations for regulating digital platforms for example, represents a comprehensive attempt to outline digital rights and establish the roles and responsibilities of digital platforms.[117]

Combined with the debates in data protection and property rights law, these have contributed to an emerging digital law discourse.[118] Access to data, facilitation of switching and multi-homing, data portability, and clear rules for ratings are the basic pillars of the digital law framework, along with privacy, data protection, and access to effective remedies.[119]

As a subgroup of digital platforms, digital labor platforms are implicitly implicated in these digital law discourses. The P2B Regulation (EU) 2019/1150, although not designed for these platforms,[120] does offer rules beyond those concerned with transparency that could be applicable to digital labor platforms, such as restrictions with regard to termination of contract or downgrading in rankings.[121] Provisions on complaint management, dispute resolution, and the right of associations to take legal action would also cover trade unions. Overall, however, rules on the transparency of ranking criteria, on access to data, and on the portability of reputational data are rather designed to enable a certain minimum level of entrepreneurial action[122] rather than protecting workers from the inevitable organizational power of platforms.

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115 Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition Policy for the Digital Era: Final Report.' (Brüssel 2019); Schweitzer (n 95); for German law, see GWB-Digitalisierungsgesetz of Jan 2021 (Digitalisation of Competition Law Act), BGBl. 2021 I-2.

116 Harold Feld, 'The Case for the Digital Plattform Act: Market Structure and Regulation of Digital Platforms' (2019); Gene Kimmelman, 'The Right Way to Regulate Digital Platforms' (2019).

117 European Council, Recommendation CM/Rec(2018)2 of the Committee of Ministers to Member States on the Roles and Responsibilities of Internet Intermediaries.

118 For a more detailed account, see Kocher, 'Market organization by digital work platforms' (n 9).

119 Christoph Busch, 'European Model Rules for Online Intermediary Platforms' in Uwe Blaurock, Martin Schmidt-Kessel and Katharina Erler (eds), *Plattformen – Geschäftsmodelle und Verträge* (Nomos 2018); Cohen (n 112); cf. European Council, Recommendation CM/Rec(2018)2 (n 118).

120 Andreja Schneider-Dörr, 'Die neue Richtlinie 2019/1152 und die P2B-VO 2019/1150 – ein Dilemma für Crowd Work' [2020] AuR 358; Kocher, 'Market organization by digital work platforms' (n 9).

121 Christoph Busch, 'Mehr Fairness und Transparenz in der Plattformökonomie? Die neue P2B-Verordnung im Überblick' [2019] GRUR 788.

122 For a more detailed account of this objective, see Isabell Hensel, 'Die horizontale Regulierung des Crowdworking: Wer bestimmt die Regeln?' in Isabell Hensel and others (eds), *Selbstständige Unselbstständigkeit: Crowdworking zwischen Autonomie und Kontrolle* (Nomos 2019).

5.2 Organizing accountability through procedural and reflexive law

Digital law has learned some lessons on a second issue, namely accountability. Since its emergence, debates on regulating digital platforms have been concerned with organizing accountability and legal responsibility for digital platforms. The triangular character of digital labor platforms has likewise been an important issue for labor law. However, specific labor law instruments on triangular relationships such as regulations on temporary work[123] or employment agencies[124] have tended to lead to impasses, because such regulations concern themselves with equal treatment with respect to the hirer and lead the focus away from the agency.[125] They can therefore be at best of marginal interest when it comes to holding digital labor platforms directly accountable.

When it comes to regulating digital labor platforms, looking at specific functions of market organizers could add something to the debate. First, the distinction between "active" and "passive"/"neutral" platforms[126] has been instrumental in ascertaining levels of activity in coordinating work and providing services on digital platforms and using it to allocate legal accountability.[127] Second, specific concepts for sharing responsibilities[128] that propose procedures akin to due diligence procedures have been developed.[129] With regard to platforms that are not hierarchically structured, it may be a good idea to use procedural and reflexive rules to organize accountability for substantial rights, such as the rights to health and safety according to activity, as this would make it possible to hold platforms accountable for organizing compliance with the law.[130]

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123 For more on EU Directive 2008/104 on Temporary Agency Work, see Dominika Biegoń, Wolfgang Kowalsky and Joachim Schuster, 'Schöne neue Arbeitswelt?: Wie eine Antwort der EU auf die Plattformökonomie aussehen könnte' (2017) 9-10; Prassl and Risak, 'The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights in the Virtual Realm' (n 106).

124 On the ILO Convention No. 181 of 1997 on Private Employment Agencies: Valerio de Stefano and Mathias Wouters, 'Should Digital Labour Platforms be Treated as Private Employment Agencies?' (2019).

125 In this respect, the German regulation on (industrial) homework/piecework comes closer to the point (see references in n 44).

126 Case C-324/09 L'Oréal SA and Others v eBay International AG and others [2011] ECR I-6011, paras. 113, 116; Case C-494/15 Tommy Hilfiger Licensing LLC and Others v Delta Center a.s. [2016] ECLI:EU:C:2016:528; Case C-131/12 Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD) [2014] OJ C212/4; on the delimitations of a neutral "information society service": Case C-434/15 Asociación Profesional Elite Taxi v Uber Systems Spain SL [2017], EU:C:2017:98; Case C-62/19 Star Taxi App SRL v Unitatea Administrativ Teritorială Municipiul Bucureşti [2020], ECLI:EU:C:2020:980.

127 Ahrne and Brunsson, 'Organization outside organizations: the significance of partial organization' (n 79) 91; Hensel, 'Soziale Sicherheit für Crowdworker_innen? Zu Regulierungsproblemen am Beispiel der Alterssicherung für Selbstständige' (n 10) 907-79, 911; cf. German Federal Constitutional Court, 8 Apr 1987, cases 2 BvR 909/82 et al ("specific relationship of responsibility").

128 Frankfurt Declaration (n 2); Code of Conduct "Ground Rules for Paid Crowdsourcing/Crowdworking", 2017, <http://crowdsourcing-code.com/> accessed 11 February 2021; Risak and Lutz (n 106); Harris and Krueger (n 10), 15-17.

129 Claudia Schubert and Marc-Thorsten Hütt, 'Economy-on-demand and the fairness of algorithms' [2019] ELLJ.

130 Eva Kocher, 'Unternehmen als Adressaten des Arbeitsrechts: Die Bedeutung der rechtlichen Erzwingbarkeit durch externe Akteurinnen und Akteure' in Dorothea Alewell (ed), *Rechtstatsachen und Rechtswirkungen im Arbeits- und Sozialrecht* (Rainer Hampp Verlag 2013); Weil (n 52) 214-34; Woodcock and Graham, *The Gig Economy. A Critical Introduction* (n 2) 121.

5.3 Collective action and antitrust law

Two key issues arise as central concerns when focusing on organizing accountability: participation and workers' collective representation.[131] Given the lack of specific and effective regulation or litigation to date, collective action by workers is, both theoretically and practically, a powerful instrument for counter-balancing digital platforms' organizing power.

Notwithstanding international law that includes self-employed solo-entrepreneurs in the scope of collective bargaining,[132] collective bargaining practiced by "independent contractors" runs up against obstacles in antitrust law, where the growing number of collective agreements[133] and price regulation[134] for platform services will potentially be deemed illegal.[135] European Union Competition Commissioner Margrethe Vestager has already acknowledged the necessity of "[making] sure that there is nothing in the competition rules to stop those platform workers from forming a union,"[136] and the European Commission's consultation on the Digital Services Act Package has identified collective organization of workers as a central challenge on digital labor platforms.[137]

Lessons from labor law can contribute to identifying the issue: Antitrust law has been based on a binary model of organization versus market that is similar to the one that has proven so complicated in labor law. It draws on similar assumptions to those underpinning traditional labor law classification when it bans rule-setting on "free markets" and allows rule-setting within coordinated

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131 Woodcock and Graham, *The Gig Economy. A Critical Introduction* (n 2) 136; Finkin (n 44); Rüdiger Krause, 'Digitalisierung der Arbeitswelt – Herausforderungen und Regelungsbedarf: Gutachten B' in Deutscher Juristentag (Ständige Deputation) (ed), *Verhandlungen des 71. Deutschen Juristentags Essen 2016* (C.H.Beck 2016); Weil (n 52) 253.

132 For more on the interpretation of Art. 2 of ILO Convention 87 of 1948 on Freedom of Association and the Protection of the Right to Organize by the ILO Committee on Freedom of Association (CFA), see Freedland and Kountouris (n 46) 56; 64; ILO Committee on Freedom of Association [2012] Report No 363, Case 2602, marg. 461; Case 2888, marg. 1087; on Art. 6 of the Revised European Social Charter: European Committee of Social Rights on Complaint No. 123/2016 (Irish Congress of Trade Unions v. Ireland), 12 Sept 2018, marg. 35-40.

133 For example, Liebman and Lyubarsky (n 11) 125-26; Charles F Szymanski, 'Collective Responses to the New Economy in US Labor Law' in Luca Ratti (ed), *Embedding the Principles of Life Time Contracts. A Research Agenda for Contract Law* (eleven international publishing 2018) 194.

134 Frank Bayreuther, 'Entgeltsicherung Selbstständiger' [2017] NJW 357.

135 The collective agreement between the Danish domestic work platform Hilfr.dk and the trade union 3F has been deemed illegal (cf. Nicola Countouris/Valerio de Stefano, Collective-bargaining rights for platform workers, 6 Oct.2020 <https://www.socialeurope.eu/collective-bargaining-rights-for-platform-workers> accessed 11 February 2021. For more on a new Polish law, see Zuzanna Muskat-Gorska, 'Polish Legislative Reform Tests a More Principled Approach to Collective Rights of Self-Employed Workers' [2020] CompLabL&PolicyJ Dispatch No. 22. For US law (antitrust liabilities): Jeffrey M Hirsch and Joseph Seiner, 'A Modern Union for the Modern Economy' (2018) 86(4) Fordham Law Review 1727 177-78; Liebman and Lyubarsky (n 11) 106. For more on a Seattle ordinance authorizing collective-bargaining processes for platforms offering taxi services: Szymanski (n 133) 198.

136 Press release, 24 Oct 2019.

137 Summary Report on the Open Public Consultation on the Digital Services Act Package, 15 Dec 2020, <https://ec.europa.eu/digital-single-market/en/news/summary-report-open-public-consultation-digital-services-act-package> accessed 11 February 2021; the issue has not yet been taken up in the Commission's Proposal for the Digital Services Act, COM(2020)825 final.

organizations ("firm immunity"). Consequently, independent contractors cannot benefit from neither the labor exemptions nor the firm immunities currently provided for in competition law.[138]

Yet, labor lawyers could learn from recent discussions in competition/antitrust law when seeking to identify criteria and indicators that distinguish digital labor platforms and other market organizers from hierarchical organizations.[139] As for EU law, the European Court of Justice's decision in the FNV Kunsten case is an example of such an endeavor: While seemingly sticking to a binary system of employment classification, the ECJ in this case implicitly used criteria developed in competition law like the category of the "independent economic operator" to identify the scope of collective bargaining.[140] The assumption that there are no intermediate categories in European competition law[141] is thus outdated and disproven.[142] Economic actors like self-employed workers who depend on market organizers' control of market access, contractual terms and conditions, and digital working tools should enjoy rights to collective action and immunity from competition rules.[143]

6 Summary and Conclusion

All of these issues require further and more detailed analysis for each jurisdiction. Comprehensive reviews such as the Hamilton project in the United States,[144] the UK's Taylor Review,[145] or the German Labor Ministry's White Book "Arbeiten

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[138] For more on US law, see Sanjukta Paul, 'Antitrust As Allocator of Coordination Rights' [2020] 67 UCLA Law Review 378; cf. Ioannis Lianos, Nicola Countouris and Valerio de Stefano, 'Re-thinking the competition law/labour law interaction: Promoting a fairer labour market' [2019] 10 ELLJ 291; Elizabeth Kennedy, 'Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors"' [2005] 26(1) Berkeley JEmpl&LabL 143. For EU law: Case C-67/96 *Albany International BV* [1999], ECR I-5751; Case C-115-117/97 *Brentjens' Handelsonderneming BV* [1999] ECR I-6025; Case C-219/97 *Maatschappij Drijvende Bokken BV* [1999] ECR I-6121; for more on the FNV decision, see below n 141.

[139] For more on US law in this respect, see Kennedy (n 138) 168-78. For more on European law in this respect, see Frank Bayreuther, 'Selbständige im Tarif- und Koalitionsrecht' [2019] SR 4; Prassl and Risak, 'The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights in the Virtual Realm' (n 106).

[140] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] OJ C46/11.

[141] Konstantina Bourazeri, 'Neue Beschäftigungsformen in der digitalen Wirtschaft am Beispiel soloselbstständiger Crowdworker' [2019] NZA 741; Jochen Mohr, 'Das Verhältnis von Tarifvertragsrecht und Kartellrecht am Beispiel solo-selbständiger Unternehmer' [2018] EuZA 436.

[142] Eva Kocher, *Europäisches Arbeitsrecht* (2nd edn, Nomos Verlag 2020), Ch 7 para 58 seq; Anne Degner and Eva Kocher, 'Arbeitskämpfe in der „Gig-Economy"? Die Protestbewegungen der Foodora- und Deliveroo-„Riders und Rechtsfragen ihrer kollektiven Selbstorganisation' (2018) 51(3) KJ 247; Bayreuther, 'Selbständige im Tarif- und Koalitionsrecht' (n 139) 5; 11.

[143] Cf. further Lina M Khan, 'The Separation of Platforms and Commerce' (2019) 119 Columbia Law Review 973; Schweitzer (n 95) 7; Sanjukta Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and its Implications*, 38 Berkeley Journal of Employment and Labor Law 233 [2017]; Nicholas Passaro, How Meyer v. Uber Could Demonstrate That Uber and the Sharing Economy Fit into Antitrust Law, 7 [2018] Michigan Business & Entrepreneurial L. Rev. 259.

[144] Harris and Krueger (n 10).

[145] Matthew Taylor, 'Good work: the Taylor review of modern working practices' (2017).

4.0"[146] have all proven how much classification of work relationships implicates specific political, economic, and social institutions and contexts. Regardless of jurisdiction, however, the regulation of digital labor platforms must be thought of as part of a broader debate on law and political economy, on a labor constitution for the digital age and informational capitalism,[147] and as a way of re-institutionalizing work by directly tackling the diversity of today's work relationships.[148]

In this vein, the framework proposed here could represent a way out of the impasse that the debate around classification seems to have reached: Even authors who strongly advocate for classifying digital platform work as employment rarely support a comprehensive application of employment law in the strict sense. Consequently, for the most part, relevant policy debates have treated the question of how to classify workers as employees and how to allocate specific rights and obligations for digital platform work as two separate issues.[149] However, a comprehensive conceptual approach would have to address the organizational character of digital labor platforms as market organizers on two levels at once: First, it would have to modify the criteria and indicators for classifying workers, either in the employment category or in a new category, to capture indirect mechanisms of worker control, such as feedback and rating systems. Second, the rights and obligations associated with labor law, as well as the participation and governance structures, would have to be reformulated to address indirect control and the social dynamics of virtual workplaces. It is time to acknowledge the paradigmatic changes for labor law that are underway in the working world.

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146 German Ministry for Labour and Social Affairs (BMAS), Weißbuch Arbeiten 4.0, 2016; cf. BMAS, key issues for the platform economy (n. 1).

147 Ruth Dukes, *The labour constitution: The enduring idea of labour law* (Oxford monographs on labour law, First published in paperback, Oxford University Press 2017); Cohen (n 112); Kapczynski (n 112).

148 Robert Castel, *Die Krise der Arbeit: Neue Unsicherheiten und die Zukunft des Individuums* (Hamburger Edition, HIS 2011) 111.

149 See, for example, Fredman and Du Toit (n 46). Das Acevedo (n 93).