LISBON 2020

XIII European Regional Congress of the International Society for Labour and Social Security Law

# CERTIFICATE OF PRESENTATION

This certificate that

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presented the work

THE EMPLOYEE' POSITION AND ITS LEGAL PROTECTION IN THE AGE OF ARTIFICIAL INTELLIGENCE: REASONING ABOUT THE METHOD

in the Lisbon 2020 – European Congress of the Intenational Society for Labour and Social Security Law, that took place from the 5th to 7th May of 2021.

Maria do Rosário Palma Ramalho

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**Yu Fan Chiu**, School Of Law, National Chiao Tung University, Taiwan (Taiwan)

- GENDER PAY GAP IN DIGITAL WORK

**Title of presentation:**
***The Employee' position and its legal protection in the age of artificial intelligence: reasoning about the method*** [*]

**Abstract:** The presentation kindly deals with the research method problem in identifying a (efficient) legal protection for employment and for the employee in A.I. era. Debating on the method leads to verifying what it seems and what could be on the contrary; it is essential to check if actual given law protection could be still helpful to manage new anthropological challenges in labour law. A selection of main arguments follows the reasoning about method and its resulting guidelines, especially about the employee' position respect to the "new" technological employer and some conclusion with a perspective of re-modulation of labour law's protection ends the issue.

**Key Words:** Labour Law / Employee' Protection / Artificial Intelligence

**It could be linked to: 2nd Plenary session (Sept. 3rd)** (especially – I think - to the presentation of Maria do Rosário Palma Ramalho about Subordination vs Economic Dependency)

## Text of presentation:

### 1. Making a choice about method: a prologue and a (essential) premise

I'll have just few minutes in which I'll can't offer You technical details of social, or legal, protection in employment and for the employee in the age of artificial intelligence (A.I.); so that, I've made a choice presenting You the matter by a problematic point of view concerning the research method. I'd like to offer You reasoning guidelines, then I'll be going to select arguments that could represent a development of method and reasoning both.

There is a prologue making this method-oriented choice: the presentation that I could offer you is inserted in a larger research program which my University is financing me. It is about the theme of the social protection in employment and for the employee in incoming new technologies in the age of A.I.; in June 2019, in Rome, we had a first step, a convention at the Università Europea di Roma (in which our Italian President, Prof. Marina Brollo, takes part as rapporteur) that opened the research works which my presentation will outline the results on the methodological choices. In fact, approaching what seems new or what however is contemporary, I think that the interpretation of the contemporary facts is always the hardest attempt for any researcher because there is no historicization of the impacts of those facts on social relations; that absence of historicization of A.I. facts is even self-evident; in this context the method is always the starting point (and the one that leads the reasoning both).
There is also a premise to do: when the debate on the collocation of the problem, in the juridical system, of the relationship with new technologies involves labour law, the question becomes a bit more complicated because it considers not only works, jobs, or employment but employee mostly, that is to say that it involves the human person; so that it is complicated by the (essential) implication of the person in <u>his</u> job, in his contractual

[*] By Felice Testa, Associate Professor of Labour Law at "Università Europea di Roma"

actions; the complication is that the debate raises "motives for being as opposed to those of having to be"[1].

## 2. *Quaestio* (The Method Question)

Starting with the method question, we've to fix the argumentative method, first of all: about it I've chosen the argumentative method of the *Quaestio*[2] that leads the listener (or the hoped reader) to reason between *videtur quod* and *sed contra*: two ways to explain what seems to happens and what is on the contrary side, until coming across the final answer, *respondeo*.

But, in hindsight, the method of the *Quaestio* is not only an argumentative method, it is really a research method that look at the data and elaborates it to reach its interpretation, that is to say, to reach a theory. So, it is has all the characteristics of the scientific-sperimental method that is really the method that belongs to us.

### a. *Videtur quod* (it seems that) and *Sed contra* (on the contrary)

a. *Videtur quod* A.I. is the "new" way (or the new mood?) to develop relationship, massive or individual both, and it is destined to replace the old way.
   A growing feeling of inadequacy hits the legal system about relationship rules that suddenly seems aged: juridical categories like employer, employee, subordination, are knowing an attack to their borders, the line that divides them is increasingly faded by the A.I. mode to engage the relationship that gives a certain place or time no more. It has as consequence an urgent request of replacing that system.
   *Sed contra* it could be a replacing just to have one and it would be the main solution in several cases in which the urgency is not really ontologically identified but seems coming just from a urgent feeling (or sensation).
b. It also seems (*videtur quod*) that Labour law was built upon "old" organizing schemes, with "old" links to "old" rules, so that is outdated[3]. The main playground of this match between what is old and what is new is the binary scheme for the qualification of the labour relationships that leads the juridical interpret only between subordination and autonomy. That scheme was built to pander a business management model that no longer could stay, a model because of which employee was inserted into the business organization as a main functional part of it, to the point that the contract, and its relationship, depended on that organization; in other words

[1] Those are the words (translated in English) of SANTORO-PASSARELLI F., *Nozioni di diritto del lavoro*, p. 12, XXXV ed., Napoli, 1992, the edition on which who is writing studied labour law for his first time.

[2] The *Quaestio* has developed its potentialities in the commentary genre: certain determinate points of the text, of particular difficulty or doctrinal importance, were examined using a procedure which became ever more rigorously structured to the point of reaching a standardized form in university texts of the second half of the 13th century specially thanks to the Scholastic philosophical current (v. spec. Tommaso d'Aquino, for the Paris' *Schola* and Roger Bacon for the Oxford's one). The topic is presented in the form of a question to which two different contrary responses are possible. The same who presented the *quaestio* then presents the arguments which show the positive response (*videtur quod*) and the negative (*sed contra*); after a careful examination of all the arguments, he comes to the final *determinatio*, or gives an answer that shows his own position on the topic (*respondeo*); and then generally follows the refutation of contrary arguments. (This form of debate, in which it was possible to conduct real philosophic and scientific research on a given topic, was a part of curricular teaching).

[3] Compare to ATMORE, E.C., *Killing the goose that laid the golden egg: outdated employment laws are destroying the gig economy*, in *Minnesota Law Review*, 2017, p. 96.

the labour contract was a like organizing contract[4]. So, where there was that business inserting then there was the subordination as an organizing solution by contract.
Today any employee could be managed by an algorithm that make business' choices learning by big data banks (massive amounts of previous cases) that could be not necessary linked to a certain Company (the "old" employer). Because of that choices even elements like the work time or the work place became unnecessary to the development of the relationship. Then, where is the inserting that we're speaking about before?
On the contrary (*sed contra*), A.I. is just a new technology and we have to notice that the mankind has been considered technologies as "new" for thousands of years, since the fire discovery until today; any new technology is just a mode to help (or not) the mankind and it have to take place for its own role as instrument of living and anything else. Then, in order to those reflections, it may be (superficially) said that the request of regulation about what is (or seems) "new" in technology is (just) to save what is already in place. That binary system that divides subordination ad autonomy is a necessary rule to keep an employee' social model to theorize the separation between social classes.

c. *Videtur quod* (it seems that) what is recognized as "new" is in the "market", what is new is in a market-based reasoning and the market takes its regulating power because of it. Market is organized by the facts and new technologies are the new facts; the rationally calculated propensity about any fact that happens has made the market, that is to say that the propensity of the facts is the market rule[5]. It has as consequence that recognizing that there is something "new" means individuate the propensity of repeating the facts that ha a its own normative strength, it's a rule, then it takes the regulation.
*Sed contra* (on the contrary) even employees are in the market with their employers, this is a fact. The protection of the employee' position in the labour relationship necessary pass through the market's rules because of the role of the employment in the market place. Then *à la recherche* of that protection labour law becomes labour-market law. That is to say that the labour-market law must follow technological changes and support the economic development that grows from this process. There is also another playground where the match between what is given and what is new goes on: it is the field of industrial relationships and collective bargaining. For more of a century we have known their object (and function) ensuring uniform treatments with minimum protection effects for individual labour relationships; but since 2000's first decade we're discovering a new mode of action, a new purpose of Unions which joins the traditional one mentioned above: in according to their collective bargaining, employers and trade unions share, as the objective of their reformed relations, the pursuit of «conditions of competitiveness and productivity such as to strengthen the productive system»[6]; alongside the "classic", so to speak, protection objectives, such as wage and employment strengthening, there is the objective of the company's production efficiency.

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[4] PERSIANI M., *Contratto di lavoro e organizzazione*, Milano, 1966, whom had presented labour contract as an organizing contract.

[5] According to IRTI, N., *Teoria generale del diritto e problema del mercato*, in *Rivista di diritto civile*, 1999, I, p. 1, a market rule comes from the rational computability of repeating the facts and leads to a normative strength to the point that we coul speak about a juridical space of the market.

[6] E.g. those are the words used in the Framework Agreement signed by main trade unions and employers' associations on January 22nd 2009 in Italy that had reformed the purposes about industrial relationships.

**b. Some answers about the method items (*respondeo*)**

a. The urgency to classify new things (in hindsight as the urgency about any other thing or facts) is a mode of the human intellect. It belongs to the acting subject and not to the acted object.
   Then the substitution of what is old with what is new always depends on choices and not on inevitability of the events as it could seems at the first sight.
   There is an ontological sense of urgency that have not to confuse with a just conventional emergency; if we get carried away by an uncritical approach to the relevance of urgency, we run the risk of an improper overlap between the legal level and the real or factual one, and hence the risk of making the methodological mistake starting to wonder if the norm is "right" or "wrongful", or if the norm is "true" or is "false". The norm is just the norm, it is neither right nor wrong.
   A reasoning as above leads to the risk of deresponsibility of the political choice which, instead, should be upstream of any regulation or re-regulation; and when this occurs, perhaps because of the solution to an urgently identified urgency is entrusted, we concretely risk a loss of the anthropological function of law.
b. Regulating that substitution between what is new and what is old is a choice itself: that choice identifies what is new and what is old functionally to the rule and is not selected by the strength of the facts; the facts, once known by the rule, are no longer only facts, but they become elements of that rule. Once known by the law rule the facts left its real (or factual) level to reach the juridical one that is not real but just a representation of the reality; hence, in that rule they are no longer those facts but elements of that rule.
c. Rules of labour law are protection rules (they should lead to the protection of the person who works, of his/her dignity, of his/her deeply being when is working[7]),
   Labour law's rules are not simply rules about the performance of a contractual relationship between its parts. This is the essence of labour law; this is its identity; and we'd know that an essential identity can be neither new nor old identity. The contents of that protection are those which must be adapted or adequated to the context, time by time, to save them as experiences of that identity. But the protection, its identity, remain the same even in front of the strangest new technology: keep the worker free from the need of working[8].

## 3 Reasoning guidelines

I've declared my intentions at the begin of this presentation: I just want to offer suggests for a research method, at the moment. That is to say that I can't affront a so detailed question as the contents of the labour law protection respect of incoming new technologies. So I will just deal with some reasoning guidelines about the matter.

**a.** About the identity issue of protection carried out by labour law, there could be the risk of a mistaken valuation: the universal character of social protection and of the

[7] *Ex plurimis* in this sense, almost recently, has written about labour law's protection in digital era as a "human-right based approach" DE STEFANO, V., *'Negotiating the Algorithm': Automation, Artificial Intelligence and Labour Protection*, in *Comparative Labor Law & Policy Journal*, Vol. 41, No. 1, 2019. Compare also to BROLLO M., *Quali tutele per la professionalità in trasformazione*, in *Argomenti di diritto del lavoro*, 2019, I, p. 495, whom considers necessary re-thinking labour law with new protections for employee' professionality that is changing in digital age.

[8] By a public-law based approach we could treat labour law as an application of the Beveridgian social security idea.

protection of the person, could hide the particular character of the cases; as well as the concrete behaviour of their actors; in other words, a mechanic (or uncritical) subsuming of the particular character in the universal one, exposes it to the risk of not seeing what is particular and not considering its characteristic needs. When it happens, the concept behind the universal rule could not consider its own "possibility", the possibility about itself, and therefore the one about the rule.

A concept that is a discussion of itself and, therefore, which doesn't erase the particular in the universal through a mechanical subsumption, can be the guarantee of understanding past events while maintaining their reciprocal differences, it can be also the guarantee of understanding the "new" that is given in the present and epistemological guarantee of seeing the possible propensities towards the future. It is a real ideality that keeps the form constantly open to the problem of its own possibility: to the new and to the method that finds it[9].

**b.** Labour law moves itself from the concrete behaviour of its relationships[10], but it puts in the centre of its intervention the universal character of the protection of the person who works in the society and for the society[11]; so that labour law is a juridical discipline with a high risk to confuse the particular character in the universal one. The vaccine against this virus lies noticing that moving from concrete facts, having that protection in the centre of reasoning, is a completely different matter compared to the subsuming in general categories because in labour law general categories are led by the universal principle of centrality of the person and of its dignity[12].

**c.** Another guideline could be outlined considering that digital technologies and A.I. are experiences of the human intellect which qualify its essence[13]: those experiences (technologies), are not the opposite compared to the person who works, they don't contrast mankind, but they are elements to connect the essence of man's dignity with the real behaviour of itself.

Technologies, even the A.I., are just technologies: they enrich the universal essence of mankind with the particular side; in that side, new technologies could become elements of mankind's protection and both its vehicle[14].

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[9] That's the philosophical approach to the epistemology of new things by SCARAVELLI, L., *Lettere ad un amico fiorentino*, Pisa, 1983, especially p.71.

[10] "The law does not dominate society but if anything it expresses it" as said CRUET, J., *Le vie du droit et l'impuissance des lois*, Paris, 1908, p. 3 (as cited by SUPIOT, A., *Du bon usage des lois en maitière d'emploi*, in *Droit social*, n. 3, 1997, p. 231), according to whom, it would be interesting to verify the validity of such theory over the Century, there seems to be no doubt about his validity in the subject of labour policy.

[11] It is exemplary to remind about this address of thinking the labour law, the 4th article of Italian Constitution which, after the 1st article has founded the Repubblica upon the employment, by its first comma gives to the citizen the right to have chances in employment system and at the same time by the second comma place the obligation to the citizens to make a choice about job, in according to their possibilities, to contribute both to a "spiritual" and a "material" development of the society.

[12] Compare to NOGLER L., *Metodo tipologico e qualificazione dei rapporti di lavoro*,in *Rivista italiana di diritto del lavoro*, 1990, I, p. 182.

[13] TRAVERSA, G., *L'identità in sé distinta, agere sequitur esse*, Roma, 2012, whom considers that experiencies are not a part of the essence of the human person but they qualify his essence in a distinguished identity.

[14] DE STEFANO, V., *Negotiating the algorithm*, loc. cit.

In other words, universality has not to be a dogma: it's necessary to find a concept, and a method, that doesn't prevent reasoning about itself; a reasoning that considers its possibility in itself and in its declination on the particular side. A concept like this will be able to know (to understand) the past with respect to the present and to recognize what of the present is given in the future, which is its "propensions".

## 4 Arguments selection

As a consequence of the reasoning above, now we can outline the topics of the matter that concerns the relationship between a universal legal protection like the one about dignity of the working person and its concrete possibilities.

It follows just some reasoned titles of selected arguments and not their develop in according to the containment requirements of the text presented by the organizers of this call.

**a.** First of all we could ask ourselves: what is the protection given by labour law today? In this debate, is there still a place for the answer "*the position of employee in the contract's performance/development*"? About this, I just can answer that labour law is a protection law, not simply regulating the relationship between parts of a contract, so that the regulation is the effect of the protection, not its cause. This answer could be the essential concept that we were looking for, a concept that has a form which steadily allows reasoning on itself.

The protection of employee' position is an argument that (essentially) needs reasoning on its possibility, therefore it is continuously updated depending on its possibility.

**b.** We know that the general discipline of employee' subordinated position in labour law is already given; could it be a model? Example giving, about it, we know that, new technologies are both vehicles and modes of actions in those relationships which are generated properly by those actions. So, could new technologies become vehicles of regulation, or they could just be the object of it? In other words, this question is about the method of applying that discipline: the normative typological method is still founding that application? There may be another method that we could name "situational" method: when structure and means of the qualifying process are contextualised through specific cases that are found in accordance to regulating needs so that the model of the discipline can be modulate by cases, regardless of the typological qualification. Could a "situational" method replace the typological one?.

Modulating contents of universal protection is not just a normative technique, it is recognizing the particular protection in the universal one, in fact the model of protection (universal) is applied through specific needs or cases that leads to a specific and modulated protection (particular).

**c.** But the use of new digital technologies (e.g.: digital delivery platforms, with their algorithms for the riders) shows how individuating the protection's contents is not all or is not enough; it is necessary to identify who is responsible for it, who has to allow these contents, in other words who is the true employer[15].

Especially with delivery platforms, the problem of the true employer is topical considering how often the platform is made just by investments of several

[15] About this problem compare to LOFFREDO A., *Di cosa parliamo quando parliamo di lavoro digitale?*, in *Labor*, 2019, vol. 3, p. 253, esp. pp. 264-269.

companies and not from a specific employer. The cases show a plurilateral model that involves platform, partner companies, employee (or worker) and customer where the usefulness of the performances provided by the worker is received by the platform or by the partner companies both increasing difficulties to assign responsibilities in managing labour relationship because of the confusion of employer function.

**d.** The digital age brings to us the problem of disintermediation of intermediate bodies (e.g.: trade unions and other collective associations, even political parties) especially because of the shortcuts created by those new technologies which excite the feeling (maybe only this) to have a really personal direct wire with the counterpart; furthermore digital technologies create a sort of non-physical place for labour relationships that keep each worker independent from the others and functionally self-sufficient. It has as consequence a increased wide risk for collective aggregation and consultation of losing their possibility to be[16].
Does it requires rethinking about juridical schemes built upon the collective interest theory?
This is only an apparent problem: in hindsight the problem concerns the ways of aggregation, not the value of it. Of course the factual dimension of the Union order is under stress that we ever never seen before, but the subsidiarity between law and collective bargaining could still be the best solution to exactly modulate the general protection of labour law.

**e.** Another argument to outline and to be explored is the relationship between digital jobs and the "time": where this word (time) is used in the sense of duration time of the labour relationship or in the one of work-time.
Both senses we could notice that, actually, several jobs (or, maybe the most part of them) are characterised by disposable performances: workers (even employees) are called just time by time to apply their skilled energies on a strictly single part of the company's productive processes; but the time guides and leads the labour relationship, not the skill, no more. Workers or employees are all substitutable (and disposed) in according to the production time's requirements.
So, that is to notice that the relevance of the duration in labour relationships quickly decreases; juridical concepts or institutions that are linked to the time and that we considered with a central importance in qualifying reasoning of employment relationships, as availability, continuity, etc., now are exposed to a sort of "identity crisis" because of the result-oriented reasoning in managing those relationships.

**f.** Leading to the end this short presentation, it also is to outline the main juridical consequence of the platform's dawn on the work organization that we've present above under another point of view: work activities are organized by the the partner company which built the platform but those activities are not directed by the company precisely because of the relationship between the worker and the platform; in fact, it seems that the employee (or worker) has much more autonomy in carrying out his work performances, but he cannot affect quality and quantity of work that he have done because it depends on the direction of activities that is impressed by the platform's algorithm. We know as recently cases concerning

[16] OCCHINO, A., *Nuove soggettività e nuove rappresentanze del lavoro nell'economia digitale*, in *Labor*, 2019, vol. 3, p. 39, whom offers a wide framework of problem and solution about the impact of digital technologies upon the workers' associability.

delivery or drivers platforms are solved by Courts identifying both the company and the platform as employers[17], but this is not enough to take care of the dignity of working person if he cannot express himself through his engagement in (ad for) the civil society.

## 5. Conclusion and perspectives

If, as we believe, the law, and especially the labour one, has an anthropological function, then have to be able to connect this function with the real world in which the employee' position is involved, that such position that labour law wants to regulate.
It will be an ontic challenge for interpreters that it is stressed, about its difficulties, considering that they are exploring the contemporary age, where there's no historicization of the impacts of new digital technologies on personal and labour relationships; in other words there are no specific references and the general ones now appear outdated.
One of the most evident effect of the dawn of the A.I. in employment relationships are the multilateral links between employee and its employer; about this matter reasoning about new anthropological challenges led by digital job underline the crisis of general institutions in labour law as the subordination (of the employee) and reveals, with a different light, its relationship with the topic of the "dependency" (of the contract): dependency by the enterprise's organization is growing with the risk, for the employee, of bearing the heavy load of the missed contractual job performance, so that economic dependency in the labour relationship is growing too as a element that has a key role in seeking labour law protection for the workers.
That protection needs to be re-modulated to apply to different real cases that A.I. organization leads to us. Labour law essence, as we know, moves from universal sense of protection of the personal dignity in all human attempts, but an approach that, moving from universal, builds univocal rules to take care of employee' needs, cannot keep the persons free from their particular needs. The universal erases the particular and suddenly becomes impossible.
It is necessary to distinguish in order to protect.
In order to give some perspectives, then about the subordination: it may be almost useless having a rule to apply the labour law protection statute that works referring to a universal characteristic that don't come across the really needs of protection (e.g. the rule of a straight organization that don't comes from employee but from who pay him that not considers that employee is paid (almost) only by the same company and has no income by others activities). The dependency by the enterprise (economic and existential dependency) could become an essential juridical characteristic around which could revolves all the attempts to modulate the universal model of protection, especially the wage and the social assistance in its large sense.

## Curricular note of the author

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[17] The Unemployment Insurance Appeal Board of New York State, (sent. July 12th 2018) has recognized the Uber's drivers as employed by the platform looking at the entrepreneurial characteristics of the platform and not at the relationships ones; in the same way European Court of Justice C-434/15 Association Professional Elite Taxi vs. Uber System Spain SL, Tribunale di Roma sent. April 7th 2017.

Faculty. He is author of monographs on the issues of the trade union action legal function and worker's holidays; another one about employee' protection in digital age is coming; he's author also of several issues about collective bargaining, worker's participation in enterprise, qualifying in labour relationship, social security institutions and funds,
He is a Lawyer too, with patronage in High Courts of Justice.