Nothing, Yet Everything New Under the Sun: Subordination, Authority, and Transformations of the Organization Work in a Labor Law Perspective

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Introduction

There has long been debate about the crisis of subordination as a suitable legal category for identifying those who are recipients of the protections inherent in labor law. Very generally speaking, and without any intention of encompassing the specific features of the single notions of subordination (or of worker) adopted under different jurisdictions, subordination in many civil law systems is the essential legal construct of the contract of employment. More specifically, as a legal category, subordination is employed in order to identify and thus select those who fall within the scope of application of labor law. It usually and mainly relies, in most jurisdictions, on the hierarchical authority exercised by the employer over the worker. In other words, workers are protected under labor law in so far as they are subordinate to an employer.

The crisis of subordination as the legal gateway to accessing labor and social protections is said to have occurred for several reasons, all ultimately traceable to a basic observation: those who are not recipients of the protections of labor law, and thus those who are not subordinate workers, include individuals who live or survive solely based on their personal labor and are in situations of weakness and vulnerability in their contractual relationship with their counterpart, not unlike that of a typical subordinate worker.[1]

Subordination would, therefore, constitute an obsolete, anachronistic category, completely unsuitable for responding to the needs of labor protection today, in the face of the profound transformations in labor markets but especially of labor organizations, from the gig economy to so-called post-Fordistic or liquid or horizontal enterprises.

In light of this debate, this paper intends to support two main theses on subordination.

First, the paper aims to construct a critique of the thesis of the radical unsuitability of subordination for the constitution of a legal category that underpins labor law and its protections. Such a critique is grounded on the observation that subordinate labor constitutes a specific social phenomenon,

1. The literature on this topic is extensive. For some essential readings, *see* Brian Langille, *Labor Law's Theory of Justice*, *in* THE IDEA OF LABOR LAW, 101–19 (Guy Davidov & Brian Langille eds., 2011); Adalberto Perulli, *Social Justice and Reform of Capitalism*, *in* SOCIAL JUSTICE AND THE WORLD OF WORK 23–34 (Brian Langille & Anne Trebilcock eds., 2023).

characterized by the existence of a relationship of authority between the subject who provides labor (i.e. the employee) and the employer. The power dynamic specific of the relationship between a subordinate employee and the employer depends on a number of factors, including the integration of the employee in an organization of the employer, who maintains a full control of the organization. The subsequent subjection of the employee to a number of manifestations of the employer's authority makes subordinate labor worthy of a specific legal response that is the one that traditionally has been provided by labor law by means of the legal notion of subordination, as a gateway to accessing certain protections and rights.

Such a statement, that will be further assessed in the forthcoming paragraphs, does not contrast nor it excludes *per se* the adoption of policy measures meant to address the social vulnerabilities of self-employed workers, or, more generally speaking, those workers who do not fall within the legal notion of subordination, which might vary from system to system. In contrast, this article aims to claim that different social phenomena need different legal responses and that the introduction of protective or supportive measures for non-subordinate workers does not need to go along with the negation of subordination as a legal category that affords some specific protections.

Furthermore, in its second part, that we might define *pars construens*, this article aims to support the thesis that an adjusted and renewed notion of subordination that shall look at the new ways of manifestations of the employer's authority in a working relationship might well cover relations that would not fall under a more traditional notion of subordination, but that are indeed characterized by specific power dynamics between the parties.

In this respect, the paper intends to suggest a new key to interpreting and applying the traditional concept of subordination: that is, a renewed understanding of the concept of authority to which the subordinate worker is subject, and thus of the juridical relevance of the manifestations of that authority and of its transformations in new labor organizations.

Indeed, the final goal of the present paper is to offer a reflection on the legal issues related to new forms of the employer's interference, i.e., their *power and authority* in the worker's sphere of activity and in the organizational context in which the activity is carried out, as well as a reflection on the effects of new forms of the employer's authority on the general notion of subordination.[2]

2. Gali Racabi, *Abolish the Employer Prerogative, Unleash Work Law*, 43 BERKELEY J. OF EMP. & LAB. L. 79, 79–138 (2022).

More specifically, this paper aims to reconsider the legal acknowledgment and relevance of the *authority* in the employment relationship in order to suggest a necessary conceptual shift from a notion of authority that depends exclusively on the existence of a *directive power*, to a broader notion of authority that relies on the existence of an *organizational power*.

In this sense, as it will be further illustrated below, the organizational power shall be intended as the employer's prerogative to organize and command the organizational context in which the working activity is conducted, which can be perfectly compatible with the worker's autonomous organization and performance of her personal working activity, without making her relationship with the employer any less subordinate.

Such a shift in the notion of authority that traditionally, under most jurisdictions, stays at the very core of the legal notion of subordination, determines a consequent enlargement of the notion of subordination itself, without putting into question its actual persistency, its own juridical identity, and the need to provide for a specific legal discipline of subordinate labor.

The Original Rule of Subordination and its Limits

The topic of subordination and the legal criteria for its ascertainment before courts are certainly not new and have been addressed by many scholars repeatedly in the past decades and under different legal systems.

Since at least the 1980s, the reflection on the notion of subordination has been complemented by a vivid debate on the crisis of the notion subordination itself.[3]

The debate about the crisis of subordination is grounded on a more general crisis of labor law (here used to include employment law as well).

Indeed, since the last decade of the last century, economics has progressively gained capacity to influence the choices of lawmakers regarding the regulation of labor-related social phenomena. Compelled by the need to respond to the social impact produced by the acceleration of global competition, lawmakers have found in some policy lines formulated by the emerging neo-classical economic theory the "scientific" justification for enacting reforms that have profoundly affected the *aquis* in the area of social and labor rights. The outcome has been a rebalancing of interests that has marked the

3. As Guy Davidov wrote in the opening of his well-known monograph, "The ingredients of a crisis are arguably an inherent part of labor law." GUY DAVIDOV, A PURPOSIVE APPROACH TO LABOUR LAW 1 (2018). The author also suggests that the main reasons of the crisis of labor law shall be found "in the mismatch between goals and means." *Id.* at 2. *See* Guy Davidov, *The Goals of Regulating Work: Between Universalism and Selectivity*, 64 U. TORONTO L.J. 1, 1–35 (2014); Massimo D'Antona, *Labor Law at the Century's End: an Identity Crisis?*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES 30, 31–49 (Joanne Conaghan, Richard Michael Fischl, & Karl Klare eds., 2000); *see generally* ALAIN SUPIOT, BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE (2001).

erosion of traditional workers' protections in favor of greater spaces of freedom for business and for their economic interests.

The progressive erosion of traditional protections for workers has driven a more expanded instance for protecting also those who, although not legally classifiable as subordinate employees, nevertheless survive only by their own labor and find themselves in situations of weakness and vulnerability in the market and in their relationships with the client or the recipient of their services.

Labor law and subordination, as the gateway to its protections, would thus have failed in their ultimate purpose of protecting those who work to live and of rebalancing the subjective legal positions of the parties between capital and labor.

Indeed, without debating the long-acquired observation that subordination, intended as a social phenomenon, also results from the economic dependence of workers on employers and therefore that the economic dependence is paramount to the power relation and imbalance, scholars have started to question the *raison d'être* of the *legal* notion of subordination as formalized in statutory laws and/or applied by courts.

The acknowledgment of the problem of the lack of protection for vulnerable but nonetheless non-subordinate workers has prompted a number of proposals by scholarship and has also prompted, in different systems and in different ways, some reformatory interventions by lawmakers and some profound updates through case law in the interpretation and application of labor law and its legal categories.[4]

Without claiming to be exhaustive, we can identify four main renewal movements that are profoundly different from each other but united by the same demand to extend labor law protections beyond the typical boundaries of the traditional legal notion of subordination.

First, there are those who have suggested redefining and thus broadening the notion of subordination, and thus of the general and abstract legal category, which would remain, in this perspective, the key to accessing protections. Extending the notion of subordination also allows its addressees to be broadened and to include some or many of those in the gray zone between genuine self-employment and subordination without altering the basic dichotomy between the one and the other.[5]

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4. *See infra* notes 5–11 and accompanying text.

5. Brian Langille, *A Question of Balance in The Legal Construction of Personal Work Relations*, 7 JERUSALEM REV. LEGAL STUD. 99, 99–111 (2013); Antoine Jeammaud, *Il Diritto del Lavoro alla Prova del Cambiamento*, LAVORO E DIRITTO 339, 339–70 (1997); Mark Freedland, *The Segmentation of Workers' Rights and the Legal Analysis of Personal Work Relations: Redefining a Problem*, 36 COMPAR. LAB.

A second proposal, endorsed in several jurisdictions, such as the United Kingdom, Germany, Austria, Spain, and, for a certain period of time, Italy, to name some examples, advocates holding firm to the notion of subordination but introducing, in addition to it, new categories located somewhere between subordinate employment and self-employment status.[6]

In a great many jurisdictions, and in particular in all the member states of the European Union, as under European Union law as well, the distinction between the notions of "subordinate worker" and "self-employed worker" remains essential for identifying those who enjoy the protections provided by labor law. Yet some jurisdictions have long introduced legal disciplines that target workers who do not fall within the definition of an employee. They have become recipients of certain regulations to meet their need for social protection.[7] Some jurisdictions—such as Spain or Germany—have seen economic dependence on the principal fit to be used as a criterion for recognizing these third category parameters.[8] Others, including the Italian legal system, have instead traditionally valued parameters exclusively linked to the functional connection between the work performance and the principal's business organization; technical–legal parameters anchored exclusively to dynamics that are all internal to the contractual relationship between the parties.[9] Ultimately, albeit with different regulatory techniques, some national legislatures have, thus, modulated or extended protections beyond the boundaries of subordination, responding to specific needs and attempting to bridge, at least in part, the gap that otherwise separates the self-employed from subordinate workers. Specific protection is thus reserved for these categories, different from that intended for subordinate workers and reduced in comparison with the full protection for the subordinate worker.

A third approach has proposed that the protection proper to subordination should be used according to the goals the system aims to pursue, even those beyond the ones typically associated with the classical notion of

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L. AND POL'Y J. 241, 241–56 (2015); DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014).

6. Adalberto Perulli, *Un Jobs Act per il Lavoro Autonomo: Verso una Nuova Disciplina della Dipendenza Economica?*, DIRITTO DELLE RELAZIONI INDUSTRIALI 109, 109–39 (2015).

7. For a comparative legal analysis, *see* Robert Rebhahn, *Der Arbeitnehmerbegriff in Vergleichender Perspektive*, 62 RECHT DER ARBEIT 154, 154–74 (2009); Pierluigi Digennaro, *Subordinazione o Dipendenza? Uno Studio Sulla Linea di Demarcazione tra Lavoro Subordinato e Lavoro Autonomo in sei Sistemi Giuridici Europei*, 6 LABOUR & L. ISSUES 1, 1–47 (2020).

8. Adalberto Perulli, *Subordinate, Autonomous and Economically Dependent Work: A Comparative Analysis of Selected European Countries*, *in* THE EMPLOYMENT RELATIONSHIP: A COMPARATIVE OVERVIEW 137, 137–86 (G. Casale ed., 2011).

9. Elena Gramano, *Arbeitnehmer. . .hnliche personen e collaboratori coordinati e continuativi: ai confini della subordinazione. Un confronto tra le tecniche di tutela in Italia e Germania*, 4 ARGOMENTI DI DIRITTO DEL LAVORO 895, 895–914 (2021).

subordination, by means of open-ended standards (in this sense, see Davidov's Purposive approach, according to which protection is applied where "needed," regardless of the defining limits of the category).[10]

Finally, the most radical thesis suggests totally overcoming the very category of subordination, and thus the extension of protections to anyone who renders a service by means of their own personal work.[11]

The End of Subordination: A Critique

The latter thesis is subject of attention in this paper. Whilst other responses to the need for the protection of non-subordinate workers do not question the cornerstone of the system, subordination, and indeed, reaffirm its centrality as a parameter of access and even as a benchmark for measuring protections, the fourth thesis referred to above certainly stands out as the most radical, as it suggests eliminating the very legal category of subordinate work as a gateway to access social protection, in order to provide for protection to all kind of personal work. It marks a sharp break with the entire framework of labor law that we have known so far and that has characterized labor law since its inception. In fact, scholars who support this thesis propose to overcome the dichotomy between subordinate employment and self-employment that has characterized twentieth century labor law, but which in some ways continues to permeate even the most recent regulatory interventions on this matter.[12] This thesis has found different variations, also in the arguments in its support.[13] However, all of these variations to some extents are united by a basic stance, namely the idea of conditioning the legal access to social

10. DAVIDOV, *supra* note 3.

11. MARK FREEDLAND, THE PERSONAL EMPLOYMENT CONTRACT (2003); MARK FREEDLAND & NICOLA COUNTOURIS, THE LEGAL CONSTRUCTION OF PERSONAL WORK RELATIONS (2012); Nicola Countouris, Valerio De Stefano, & Mark Freedland, *Testing the "Personal Work" Relation: New Trade Union Strategies for New Forms of Employment*, 10 EUROPEAN LAB. L.J. 175, 175–78 (2019); Marcello Pedrazzoli, *Dai Lavori Autonomi ai Lavori Subordinati, in* IMPRESA E NUOVI MODI DI ORGANIZZAZIONE DEL LAVORO, ATTI DELLE GIORNATE DI STUDIO DI DIRITTO DEL LAVORO, SALERNO, 22–23 MAGGIO 1998, 95–103 (Giuffrè ed., 1999).
In some cases, the radical critique of subordination as a technical means of access to protection moves, indeed, from pre-legal reasons that cast doubt on the persistent relevance of the ideal type of the subordinate worker that had inspired the legislators of the last century in the construction of a labor law endowed with its own autonomous identity with respect to the common law of contracts. In this respect, *see* Adalberto Perulli, *The Notion of 'Employee' in Need of Redefinition* (The Annual Conference of the European Centre of Expertise (ECE), Working Paper, 2017); Adalberto Perulli, *A New Category within European Union Law: Personal Work*, 15 EUROPEAN LAB. L.J. 184–210 (2024); ADALBERTO PERULLI & TIZIANO TREU, "IN TUTTE LE SUE FORME E APPLICAZIONI. PER UN NUOVO STATUTO DEL LAVORO (Giappichelli ed., 2022).

12. As mentioned above, several jurisdictions have indeed extended, in whole or in part, the scope of application of the protections typical of subordinate labor to new or different categories of workers but have ended up confirming the differences between self-employment and subordination.

13. *See supra* note 11.

protections not to the worker's subjection to the employer's authority but instead to the provision of personal work.

As a consequence, what is critiqued is the very distinguishing feature of labor law in its reference case: subordination as the sole means to access social protection, and therefore as a special and typified power relationship between capital and labor, distinct from other forms of working relations and, in particular, to self-employment.

In fact, the recognition of subordinate labor protections has historically been embedded and explained in a necessitated logic of exchange between protection, on the one hand, and subjection to the employer's authority, on the other hand. Subtracting, therefore, the recognition of the protection from this logic would extend the protection to any person who works personally (i.e. without relying on the work of other workers) and would represent a step that, in fact, has never found full expression, at least in European systems. In other words, in the described perspective, labor should be protected as long as it is personally provided by a human being, without the need to be further classified as subordinate to an employer's authority.

While the rationale behind this thesis (or rather, theses) is certainly agreeable (that is the acknowledgement that human labor shall always be protected, irrespective of its modalities of performance or the context of the relationship in which it is provided), several critical remarks can be made regarding this thesis from a strictly technical viewpoint.

First, on the systematic level, it can be observed that the removal of the legal notion of subordination does not result in the category being overcome *tout court* but in fact ends up suggesting the replacement of the current abstract and general category of subordination with a new one, that of personal labor. This argument relates to the method of construction of the law and its rules, and it concerns the persistent need, despite the complexity of reality, to identify in general and abstract legal categories the instrument for defining the recipients of a certain discipline. Thus, for example, the shift from the category of subordination, as occurring when a worker is subject to the employer's authority, to the category personal work, still introduces a general and abstract category, thus capable of identifying a perimeter between included and excluded subjects.[14]

14. Some authors support the thesis that even genuinely self-employed workers work for others and thus seem to point to "personal work for the benefit of others" as the ultimate criterion to which to anchor the recognition of protections. ADALBERTO PERULLI & TIZIANO TREU, "IN TUTTE LE SUE FORME E APPLICAZIONI. PER UN NUOVO STATUTO DEL LAVORO (Giappichelli ed., 2022). Others refer only to personal work, thus with no or little organization. FREEDLAND, *supra* note 11; FREEDLAND & COUNTOURIS, *supra* note 11.

Second, a possible risk of the extension of protections to personal labor in all its forms and applications feared by some is that of flattening the protections out and thus reducing them for everyone, since not all labor relations are sustainable in terms of economic balance on the terms that the system provides for subordinate employment. Indeed, this second objection is rooted in an observation that is not, or is not necessarily, true. If it is true that the universal extension of protections to all who work could generate the side effect of diminishing levels of protection, this effect would not be a logical consequence of the premise but would at most represent a precise choice of the policy makers in balancing opposing interests when regulating labor.

In my opinion, a different objection could be moved to these theses: while advocating for the extension of the protection provided by labor law beyond the perimeter of subordinate work, the theses ultimately calls for the radical rejection of subordination as a category and therefore as a means to select subjects who deserve a specific protection. The overcome of the category of subordination, for the purpose to protect any kind of personal labor, brings to the logical and inevitable consequence that subordination shall be denied as a legal construction.

It is on this exact point that these theses can be criticized in light of an absorbing argument that pertains to the persistent actuality, and indeed, ontological existence, as a social and therefore also legal phenomenon, of subordination in our societies. Subordination, as a social phenomenon and by virtue of its own identity, requires and necessitates a specific normative response that takes into account the peculiar needs of those who work *subordinately to someone else's authority*.

Does Subordination Still Exist?

The purpose of subordination has been, and still is, to identify the recipients of the protections that labor law offers by drawing the perimeter of the application of that legal discipline, which serves to rebalance the asymmetry in contractual power between the parties, by providing specific protections for the party who works for someone else under an employment relationship.[15]

15. Massimo D'Antona, *La subordinazione e oltre. Una Teoria Giuridica per il Lavoro che Cambia*, *in* LAVORO SUBORDINATO E D'INTORNI, IL MULINO 43–50 (Mario Pedrazzoli ed., 1989), who suggested to observe the concept of subordination not only as the technical means to identify the perimeters of the subjects covered by labor law, i.e., its personal scope of application, but also as the foundation of the conceptual autonomy of labor law and as the foundation of the subsequent distinction between workers protected under labor law and service providers exposed to pure market dynamics, in so far as they are covered by the sole contract law. This perspective is challenged by a different scholarship: SIMON DEAKIN & FRANK WILKINSON, THE LAW OF THE LABOUR MARKET 41–105 (Paul Davies, Keith Ewing, & Mark Freedland eds., 2005).

In this respect, it is undoubtedly true that it is the scholarship's duty to critically assess the suitability of the current dogmatic construction of subordination to identify and thus select who is protected by labor laws and who is not; we might and we shall therefore critically assess the possible loss of resilience of the legal concept of subordination not so much as a logical criterion for distinguishing between subordinate and non-subordinate (i.e. self-employed) work, but as a discriminating criterion between *protected* and *unprotected* labor.

However, the question just described constitutes a logically different passage from the (logically preliminary) issue on the persistence of subordination as a *legal category*, which might or shall not be the sole one any longer, but that still identifies and cover a specific social phenomenon that requires an equally specific normative response.

Indeed, a basic observation might be missing from the debate: subordinate labor has its own precise identity, which makes it deserving of specific legal protection in the system, different, additional, and separate from the protections that the system wants to provide or has already provided for non-subordinate forms of personal labor.

The distinction between subordinate labor and non-subordinate labor is conceptually radical[16]: the varied field of non-subordinate labor lacks a suitable element for the aggregating function that on the other side of the bench is fulfilled by the worker's subjection to the employer's authority, which, in addition to the problem of correcting market dynamics, poses a specific problem in terms of protecting workers *against the power of the employer*.

Indeed, in most legal systems, labor law was born *per differentiam*: labor law came into being because an apparatus of rules was needed to distinguish the employment contract from other contracts. This was an apparatus of rules that broke away from contract law in order to capture the specificity of a relationship that is characterized by two essential elements: the direct involvement of the person who works, hence the strictly personal nature of the working activity, and indeed the authority exercised over her by the employer, who employs such an authority to transform the working activity into an economic utility through the business organization.[17]

16. Luigi Mengoni, *Il Contratto di Lavoro nel Secolo XX*, *in* IL DIRITTO DEL LAVORO ALLA SVOLTA DEL SECOLO 3–22 (Giuffrè ed., 2002).

17. Hugh Collins, Gillian L. Lester, & Virginia Mantouvalou, *Does Labour Law Need Philosophical Foundations?*, *in* PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW 1–30 (Hugh Collins, Gillian L. Lester, & Virginia Mantouvalou eds., 2018); D. M. Betty, *Labour is not a Commodity*, *in* STUDIES IN CONTRACT LAW, 314–55 (Barry J. Reiter & John Swan eds., 1980); Alan Hyde, *What is Labor Law?*, *in* BOUNDARIES AND FRONTIERS OF LABOUR LAW. GOALS AND MEANS IN THE REGULATION OF WORK 35 (Guy Davidov & Brian Langille eds., 2006). See the critical observations of Judy Fudge, *Labour as a 'Fictive*

It is for these reasons and on the basis of this axiological status that the fundamental categories of labor law—starting with subordination—were created, thus distinguishing themselves from the general law of contracts.[18]

The very idea of subordination as a condition of access to labor law arose in response to the spread of modern enterprise and the functionalization of labor to it. Subordination is work that is destined to be transformed into value to the extent that it responds to a complex organization of people and means whose ownership, responsibility and control rest solely with the employer. And it is indeed true, and the scholarship has long pointed this out, that subordination has been and still is functional to the capitalistic system, and it is not by chance that it has found in the enterprise its best terrain of expression: with subordination and the regulation of the employment relationship, the authority of the employer is limited but at the same time recognized, and it finds citizenship in the legal system.[19]

Subordinate labor law arose because modern enterprise presupposes the division of labor and the relationship of subordination to the entrepreneur who is responsible for organizing the work. As Chandler reminds us, the modern enterprise was born at the end of the Second Industrial Revolution because it became clear that, with a network of service providers (or self-employed workers) coordinated by a merchant (the façonists of the putting-out system), the increasing technological complexity could not be addressed. The enterprise overcomes the limitations of the network of autonomous individuals through the two organizational mechanisms of the specialization of complex work, which is divided so that it can be completed, and the authority relationship, which allows coordination and monitoring of the results of the divided work.

It was precisely from the observation of the material substratum of modern enterprise that the lawmaker identified the instance of subordinate labor in which the worker is subject by contract to the authority of the employer. Subordinate labor is thus the main instrument, even today, through which those who do business can organize and bring back *ad unum* the results of others' labor, ultimately in order to produce a product or service to be sold in the market. This is not only for reasons related to transaction costs, according

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Commodity': Radically Reconceptualizing Labour Law, *in* THE IDEA OF LABOUR LAW 120–36 (Guy Davidov & Brian Langille eds., 2011).

18. Harry W. Arthurs, *Labour Law after Labour*, in COMPARATIVE RESEARCH IN LAW & POLITICAL ECONOMY 13– 29 (2011).

19. As an example, it is no coincidence that the Italian Civil Code does not contain a general definition of subordination, preferring to precisely identify the subordinate worker as one who is obligated through remuneration to collaborate in the enterprise, performing intellectual or manual labor in the employ and under the direction of the entrepreneur.

to the Coase theory,[20] but also because, in complex organizations, there is no alternative, given that work is necessarily parceled out and must therefore be organized in order to bring the results of the activities of individuals back to an aggregate value that goes far beyond the mere sum of the individual performances of workers.[21]

In this context, it should not be ignored that, in the last quarter century, a strand of thought has developed that has tried to question the foundations of modern business, starting with denying the hierarchical structure of its organization. As has been observed,[22] a hazardous transposition of reflections on liquid modernity[23] suggested to some that the modernity of the organization has passed from the concept of fluidity or instability of the organization, which would, today, be without boundaries and without hierarchy[24]

In the face of these assertions and, therefore, the possible objection that sees in today's enterprises flat, hierarchy-free, liquid organizations, in which workers end up eventually owning and being responsible for parts of the organization and no longer subject to managerial power, it can be answered that, indeed, even in cognitive, liquid, post-Fordist enterprises, there is an organization: there is someone who owns and controls the organization, and so there is authority and someone who exercises it.[25]

From this perspective, the thesis that argues for the need for the radical overcoming of subordination suffers from a fundamental flaw: subordinate labor still exists; it is still an observed and observable mass social phenomenon that consists of labor subjected to the authority of others.

Even in the most advanced and sophisticated organizations, authority has not disappeared; rather, it has changed modes of manifestation, although not always and not everywhere. Therefore, the change pertains to the mode

20. R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 1–44 (1960).

21. Hugh Collins, *Market Power, Bureaucratic Power, and the Contract of Employment*, 15 INDUS. L.J., 1, 1–15 (1986); Orsola Razzolini, *The Need to Go Beyond the Contract: Economic and Bureaucratic Dependence in Personal Work Relations*, 31 COMPAR. LAB. L. AND POL'Y J. 263–304 (2010).

22. Rossella Cappetta, *Organizzazioni Multi-Responsabili e Multi-Monitorate per Trasformazioni serie*, *in* BUSINESS NEXT, 105–34 (Andrea Beltratti & Alessia Bezzecchi eds., 2018).

23. ZYGMUNT BAUMAN, LIQUID MODERNITY (2000), read in the Italian translation MODERNITÀ LIQUIDA (2nd ed. 2011), according to whom what differentiates modernity from any historical form of human organization is the compulsive and obsessive, continuous, irrepressible, always incomplete modernization, irrepressible and unquenchable thirst for creative destruction.

24. RON ASHKENAS, DAVE ULRICH, TODD JICK, & STEVE KERR, THE BOUNDARYLESS ORGANIZATION (2015); Georg Schreyogg & Jörg Sydow, *Organizing for Fluidity? Dilemmas of New Organizational Forms*, 21 ORG. SCI. 1251, 1251–62 (2010); WILLIAM H. DAVIDOW & MICHAEL S. MALONE, THE VIRTUAL CORPORATION: STRUCTURING AND REVITALIZING THE CORPORATION FOR THE 21ST CENTURY (1992).

From a labor law perspective, *see* Luca Nogler, *Contratto di Lavoro e Organizzazione al Tempo del Post-Fordismo*, 4–5 ARGOMENTI DI DIRITTO DEL LAVORO 884, 884–902 (2014); Riccardo Del Punta, *Modelli Organizzativi D'Impresa e Diritto del Lavoro*, 3 SOCIOLOGIA DEL DIRITTO 113, 113–21 (2011).

25. Alain Supiot, *Les Nouveaux Visages de la Subordination*, DROIT SOCIAL, 131–45 (2000).

of manifestation of the employer's authority and not to its persistence as a social phenomenon that requires a specific normative response. And, indeed, where there is authority, workers need specific protection to counterbalance that authority *inside* the contractual relationship. It is not a mere protection of the working person but a specific protection of the working person being subject to the authority of others established by means of a contract.

Subordination and New Forms of Labor Organization

The above statements need clarification.

Self-evidently, those who argue for the need to radically reject the category of subordination do not claim that the employer's authority has ceased to exist in liquid or horizontal enterprises, but often, in contrast, argue that the power of the principal, in a non-subordinate working relationship, is as intrusive as that of the employer, resulting, for example, in the economic dependence of the non-subordinate worker on the principal.[26]

Considering this, and for the purpose of the thesis we are trying to support, it is necessary to clarify the specific nature of the authority that identifies subordinate labor, and then to investigate how and why the manner of exercise of the typical employer's authority might have changed, and eventually how these changes affect the notion of subordination, in an apparently circular, but indeed logical reasoning.

Despite the relevant differences among legal systems, the fact that one party, namely the employer, is entitled to exercise authority over the other party, the employee, is in most jurisdictions at the core of the concept of subordination. Such authority is regulated and thus limited differently from system to system, but it can go as far as to give orders and directives on how the working obligation shall be fulfilled, which is the very core of the employer's prerogative; to change the content of the employee's obligations (known in civil law systems as *jus variandi*); to monitor and control to some extent the employee's working activity; and to sanction the employee when the orders and directives have not been punctually respected.

The typical authority of the employer is the power she derives from being the owner or rather the controller of the organization for which the work performance is intended. It is, therefore, a power that is expressed and expands, at least in potential, to every aspect of the work performance and the organizational context that is functional to production.

Traditionally, ascertaining the existence of the employer's authority goes through establishing the circumstance whereby the worker has assumed

26. Judy Fudge, *The Legal Boundaries of the Employer, Precarious Workers and Labor Protection*, *in* BOUNDARIES AND FRONTIERS OF LABOUR LAW. GOALS AND MEANS IN THE REGULATION OF WORK 295, 295–315 (Guy Davidov & Brian Langille eds., 2006).

the obligation to be subject to the employer's directive power, even if the power is not exercised in concrete terms or is exercised in a manner or through manifestations other than directive power in the strict sense.

The manifestations of the *exercise* of the typical employer's authority have changed as the organization of labor has changed. We might consider two examples to support this observation: remote work and platform work.

Traditionally, labor law has largely (not exclusively, but still largely) dealt with the need for protection of employees who work inside a certain workplace, usually the employer's premises. Consequently, the notion of subordination was built on an organization of work that was characterized by one aspect: work was performed physically within the employer's premises, inside a place that belonged to the employer, and that, without any legislative or collective intervention, would have been entirely subject to the power and control and management of the employer,[27] who was indeed the owner of the place and the master of the servant.[28] Progressively, workers conquered space and physical and moral protection in the workplace by securing their liberty, freedom, and dignity from the hands of the employer. The employment relationship and the workplace ended up inseparable, even in the vision of complete protection of the weaker party of the contract.[29]

This binomial was somehow, for the first time, broken with the technological evolution of the means of work, the tertiarization of the economy and, in the end, the rise of remote working.

Remote working is work without a place and, as a legal phenomenon, it has substantially extracted from the notion of subordination the dimension of the workplace. This novelty became increasingly important with the Covid pandemic[30] and, more generally, with the major use of technology, and it has challenged an essential paradigm of labor protection: that is, the co-essentiality of the protection of the working person through her protection in the

27. Otto Kahn-Freund, *Servants and Independent Contractors*, 14, MODERN L. REV. 504, 504–09 (1951).

28. DEAKIN & WILKINSON, *supra* note 15, at 41–105. More in general on the topic: Hugh Collins, *Is the Contract of Employment Illiberal?*, *in* PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW, 48–67 (Hugh Collins, Gillian Lester, & Virginia Mantouvalou eds., 2018); Valerio De Stefano, Ilda Durri, Charalampos Stylogiannis, & Mathias Wouters, *Does Labour Law Trust Workers? Questioning Underlying Assumptions Behind Managerial Prerogatives*, 53 INDUS. L.J. 206, 206–38 (2024).

29. In the Italian legal system, for example, this binomial is welded with the Statute of Workers of 1970 (Law No. 300 of 1970), where the contract of employment and the workplace identify the person who works: the employee is the person who works in a certain workplace, and the legal protections pass through the events of the workplace. This is clear if we read, for example, the first title of the statute (entitled on freedom and dignity of employees), which protects workers from the employer's interference with their person at work.

30. David Mangan, Elena Gramano, & Miriam Kullmann, *An Unprecedented Social Solidarity Stress Test*, 11 EUROPEAN LAB. L.J. 247, 247–75 (2020).

workplace, and in particular through her protection against the possible intrusions and interferences of the employer, ultimately against the exercise of the employer's authority in the workplace and on the employee's person.

Such a transformation of the organization of work—from work performed in a physical space to work performed in any space or in a non-space—places us in the need to understand whether and how the axes of protection that have settled over the decades on this assumption, which is the material *substratum* to which the labor law discipline applies, might have changed; it cannot leave us indifferent to an overall rethinking of the very sense of labor law protections while observing the changing of the work organization when work can be fully performed outside a workplace.

Scholars have largely addressed the phenomenon demonstrating that power dynamics are in place even when working activities are performed remotely and are even exacerbated by taking advantage of the blurriness of the line that separates personal life and working time when the working activity is conducted in a non-pre-determined location.[31]

Another relevant example of the transformation of the organization of work and, therefore, of the manifestation of the employer's powers in new organizational contexts, is given by the business model adopted by the platform economy, which ensures that a mass of workers is available to provide a service (i.e., a personal working activity) while not being formally bound by any set working time or even any formal obligation to work. The business model of platforms works on the basis of two fundamental mechanisms that have been deeply analyzed and discussed by scholars and case law, and that I briefly refer to for the sole purpose of addressing the change in the exercise of traditional employers' prerogatives in new organizations, among which we can consider platform work or the gig economy as an example.[32] On the one

31. Antonio Aloisi & Valerio De Stefano, *Essential Jobs, Remote Work and Digital Surveillance: Addressing the COVID-19 Pandemic Panopticon*, 161 INT'L LAB. REV. 289, 289–314 (2022); Antonio Aloisi & Elena Gramano, *Artificial Intelligence Is Watching You at Work. Digital Surveillance, Employee Monitoring, and Regulatory Issues in the EU Context*, 41 COMPAR. LAB. L. AND POL'Y J. 95, 95–121 (2019).

32. The literature on this topic is extremely vast. As essential doctrinal references see at least: Miriam Cherry & Antonio Aloisi, *"Dependent Contractors" in the Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635, 635–89 (2017); JEREMIAS ADAMS-PRASSL, HUMANS AS A SERVICE: THE PROMISE AND PERILS OF WORK IN THE GIG ECONOMY (2018); Valerio De Stefano, *The Rise of The Just-In-Time-Workforce: On-Demand Work, Crowdwork, and Labor Protection in the "Gig-Economy"*, 37 COMPAR. LAB. L. AND POL'Y J. 471, 471–504 (2016). Please allow a reference to Elena Gramano, *Digitalization and Work: Challenges from the Platform-Economy*, 15 CONTEMP. SOC. SCI. 476, 476–88 (2019). More specifically, on the exercise of the employer's prerogatives in platform work, *see* Valerio De Stefano, *'Negotiating the Algorithm': Automation, Artificial Intelligence and Labour Protection*, 41 COMPAR. LAB. L. AND POL'Y J. 15, 15–46 (2019); Valerio De Stefano, *"Masters and Servers": Collective Labour Rights and Private Government in the Contemporary World of Work*, 36 INT'L J. COMP. LAB. L. AND INDUS. RELS. 425, 425–44 (2020); Antonio Aloisi, *Regulating Algorithmic Management at Work in the European*

hand, the platform addresses a vast pool of potential users through immediate connection tools (apps, websites, etc.), allowing easy access to a certain service. On the other hand, the platform undertakes contractual relationships with a large number of workers whose working relationship is often classified as self-employment.

Without going into further detail on this phenomenon and its legal implications, one of the questions it raises is whether we are simply observing situations of economic dependence of a solo self-employed person toward the platform, or something different. We might ask ourselves, from a labor law perspective, whether such a business model, and the organization of work it relies on, pushes for an extension of the traditional reasoning on the employer's authority to these new forms of work organizations, which ultimately drive the worker to provide her working activity in a certain way at a certain time, as if she has been bound by orders, despite not being formally bound by any, but just by being part of a broad organization in which her working activity is included and that indirectly dictates the ways in which the work will be performed.

Moreover, in general, the profound changes undergone by enterprises in their internal organization and assets, the massive use of technologies (including algorithms), and the remotization of work might have altered the traditional manifestation of authority but have not limited or eroded the traditional prerogatives of the employer in managing the workforce.

Remote work and platform work might serve as examples or rather benchmarks for rethinking the approach to understanding the traditional power dynamics of the working relationship to include and detect atypical or new forms of authority in the employment relationship and, consequently, in the legal notion of subordination.

Work Transformation and the Resilience of Subordination: New Forms of Authority and Traditional Yet Unreplaceable Forms of Counterpower

It is now necessary to bring order to the reasoning presented so far to clarify the final thesis that is intended to be argued here.

First, to achieve the goal of protecting those who are in need of protection (the tautology is deliberate) in a contractual relationship involving personal labor, it is not necessary to overcome subordination *tout court* as a legal and dogmatic category intended to identify the recipients of the protections proper to labor law. The protection of genuinely non-subordinate workers can be pursued through different *ad hoc* instruments (e.g., the legal protection of

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Union: Data Protection, Non-Discrimination and Collective Rights, 40 INT'L J. COMP. LAB. L. AND INDUS. RELS. 37, 37–70 (2024).

self-employment,[33] the legal protection of economically dependent but self-employed workers, and so on[34]).

Second, we need to note that, despite new technologies and new ways of organizing work, from the gig economy to remote work to liquid and horizontal enterprises, subordinate work still exists as a social phenomenon because there are workers who work in someone else's organization and, therefore, by definition are subject to someone else's authority.

If we take this perspective and seriously consider the transformation of work as a phenomenon to be observed and explained, if it is true that labor law conforms to the ideal type of work in an external organization, and if it is true that any work can be self-employed or subordinate, and therefore that the classification of the relationship does not depend on the content but on the organization of the work performed, then it is necessary to observe how the organization itself is transformed and therefore how the manifestation of the authority is transformed; the authority is transformed in its manifestations but does not cease to exist.[35]

We observe and study organizational change so that we are able to ascertain the existence of that authority in new ways it is exercised, to grasp its manifestations, even when it is difficult to do so, even when the authority escapes, even when it does not take the form of directives or orders given directly to the worker.

Jurisprudence has always employed the typological method or multifactor tests in ascertaining the existence of a subordinate employment relationship. These methods imply that, for the purpose of ascertaining subordination, it is not strictly necessary to verify that the employer issues specific directives on how the work is to be carried out, but it is sufficient that she decides on everything else (for example, where, and when, with whom the working activity shall be performed); that is, she decides on organizational matters that surround the working activity, which the employee may also perform independently, without this constituting a contradiction with the

33. Luca Ratti, *2020/2030 Self-Employment Matters. The EU's Response to the Lack of Social Protection for Independent Workers*, 3 EUROPEAN EMP. L. CASES 164, 164–67 (2020); Veronica Papa, *The New Working (Poor) Class. Self-Employment and In-work Poverty in the EU: A Supranational Regulatory Strategy*, 14 ITALIAN LAB. L. E-JOURNAL 41, 41–58 (2021); Chiara Garbuio, *The Autonomous Workers and the Needed Responses of Social Protection Systems to Overcome Transitions*, 14 ITALIAN LAB. L. E-JOURNAL 1, 1–16 (2021). Please allow a reference to Elena Gramano, *Self-Employment in the EU and Italian Legal Systems: Recent Trends and Missed Steps*, 38 INT'L J. COMP. LAB. L. AND INDUS. RELS. 453, 453–72 (2022).

34. Felicia Rosioru, *Legal Acknowledgement of the Category of Economically Dependent Workers*, 5 EUROPEAN LAB. L.J. 279, 279–305 (2014).

35. Frank Hendrickx, *Regulating New Ways of Working: From the New 'Wow' to the New 'How,'* 9 EUROPEAN LAB. L.J. 192, 195–205 (2018); Paul Schoukens & Alberto Barrio, *The Changing Concept of Work: When does Typical Work Become Atypical?*, 8 EUROPEAN LAB. L.J. 306, 306–32 (2017).

subordinate nature of the employment relationship. The typological method as the multifactor tests used by case law are nothing more than a method to ascertain the existence of organizational power, and thus distinguish it from the directive power.

That said, the key point that allows us to affirm that subordination still exists, and therefore needs specific protection, even in new organizations where hierarchy seems rarefied and managerial authority is not formally exercised, is the shift from the notion of directive power to that of organizational power as the *legal parameter for ascertaining subordination*.

If we were to draw a conceptual distinction between the employer's directive power and organizational power, such as to identify their content and scope of exercise, we could say that the former affects the content of work performance, while the latter affects the organization within which that performance takes place. More precisely, directive power consists of the employer's authority to determine the manner of the worker's performance, its intrinsic performance, and its concrete content; organizational power, on the other hand, has regard to the context within which the work performance is intended to take place and, specifically, represents the authority to conform the structural structure of the enterprise, the organization of the stages of production and their coordination. In this sense, while the exercise of directive power has regard to the worker as an *actor* to be directed in production, the exercise of organizational power has regard to the *scenic context* in which the actor operates, as well as to the construction of the plot that the actor, by playing her part, helps to enact.

This conceptual shift acknowledges the changes in organizations whereby the manifestation of authority might be less intrusive in the sphere of performance of the employee than in the past. It helps detects authority even when it is not directed at working activities, but at the organizational context in which the activities are supposed to be performed.

Furthermore, and most importantly, it serves the purpose of allowing us to affirm that, for the worker to be classified as subordinate, it is sufficient to verify that workers are subject to organizational power. This is because, in the new labor organizations, authority no longer affects the sole object of the worker's obligation and thus the work performance in the strict sense but is often limited to affecting the organization in which the performance is embedded. This is because the exercise of directive power in the strict sense is no longer or not always necessary for the purpose of organizing subordinate work and its performance. Subordination is also embodied in the sole organizational power, which is the power of the employer, the owner and controller of the organization, manifested outside the strict object of the work

performance and thus the contractual obligation. This is not only in systems such as Italy, where a norm has provided for this case (Article 2, Legislative Decree No. 81 of 2015),[36] or in Germany, where the integration of the working activity into the employer's organization has always been used, among others, as a parameter for ascertaining subordination (as stated above, this is also referred to as the typological method for ascertaining subordination),[37] but more generally (or even universally) because of the recognition that work has changed, the organization of the work has changed, and therefore the way in which the employer's authority is exercised has also changed.

The employer may no longer need to issue precise directives on the content and manner of work performance. Today's employees work according to cycles and objectives or remotely without schedules. Nonetheless, they remain an integral part of an organization that is at the full disposal of the employer alone and thus they remain fully subordinate.

For this reason, there is no contradiction between autonomy in working performance and subordination in the employer's organization.

Indeed, the recognition of the legal relevance of organizational power alone as the distinguishing and thus identifying element of subordination is not the same as stating that hetero-organized work performance is completely autonomous because the authority that is exercised over the organization in which the work performance is embedded, inevitably influences the performance itself and the manner in which it is carried out.

Today's employees are not more autonomous than in the past. It is necessary, on the contrary, to note that we have moved from a traditional notion subordination anchored to a historicized ideal type of worker, to a

36. In Italy, the debate on Article 2, Legislative Decree No. 81 of 2015 is extremely vivacious and still ongoing. For some references to the internal debate, Giuseppe Ferraro, *Collaborazioni Organizzate dal Committente*, 1 RIVISTA ITALIANA DI DIRITTO DEL LAVORO 53, 53 (2016); Marco Marazza, *Collaborazioni Organizzate e Subordinazione: Il Problema del Limite (Qualitativo) di Intensificazione del Potere di Istruzione*, 6 ARGOMENTI DI DIRITTO DEL LAVORO 1170, 1170 (2016); Adalberto Perulli, *Le Collaborazioni Organizzate dal Committente*, *in* TIPOLGIE CONTRATTUALI E DISCIPLINA DELLE MANSIONI. DECRETO LEGISLATIVO 15 GIUGNO 2015, N. 81, 279 (L. Fiorillo, A. Perulli eds., 2015); Orsola Razzolini, *La Nuova Disciplina delle Collaborazioni Organizzate dal Committente. Prime Considerazioni*, *in* COMMENTARIO BREVE ALLA RIFORMA "JOBS ACT" 560 (G. Zilio Grandi, M. Biasi eds., 2016); Mariella Magnani, *Autonomia, Subordinazione, Coordinazione nel d. lgs. n. 81/2015*, WP C.S.D.L.E. "MASSIMO D'ANTONA".IT – 294/2016; Silvia Ciucciovino, *Le «Collaborazioni Organizzate dal Committente» nel Confine tra Autonomia e Subordinazione*, 3 RIVISTA ITALIANA DI DIRITTO DEL LAVORO 321, 321–43 (2016). For an analysis of the reform in English, *see* Maurizio Del Conte & Elena Gramano, *Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors under the Italian Legal System*, 39 COMPAR. LAB. L. AND POL'Y J. 579, 579–605 (2018).

37. Bernd Waas, *The Legal Definition of the Employment Relationship*, 1 EUROPEAN LAB. L.J. 45, 45–57 (2010); Claudia Schubert, *Crowdworker, Arbeitnehmer, Arbeitnehmer. . .hnliche Person Oder Selbst. . .ndiger*, 4 RECHT DER ARBEIT 248, 248–53 (2020).

subordination that remains itself in complex organizations, even where authority does not go as far as to determine the concrete content of working activity.

We are not dealing with a new attenuated subordination but rather with a remodeled subordination, which does not betray the essential elements of subordination which is the authority relationship between worker and employer. The distinguishing feature of subordination is not something less or different than the employer's authority but an evolution of it that, while remaining perfectly consistent with its identity, acts in a different way, but not to a lesser degree.

Authority does not fade but is articulated in a way that is different in its manifestations but not qualitatively or quantitatively inferior.

The manifestations of authority change; the ways in which power is expressed change but this does not make organized labor any less subordinate.

This is the logical and therefore legal step that the organizational transformations of labor require us to make: to take note that organizational transformations do not make the employer's power disappear, but they alter and transform its manifestations.

The organizations change, but subordination remains.

Subordinate work is not surmountable because it has its own identity and dimension, which the legal system is obliged to continue to recognize as a typical social phenomenon through subordination (understood as a factual matter).

In the face of the transformations of labor, the legal system, and in particular case law, shall react by updating the instruments for ascertaining subordination, and by enlarging the same area, the perimeter of subordination, without losing its core identity, which lies in worker's subjection to the organizational authority of others.

This updating takes place exactly in the shift from directive power to organizational power and thus in the operation of conceptual separation between the space of the work performance, which is the object of the employee's obligation, and the space over which the employer's power is extruded, which no longer has, or rather not only has as its object, the working activity, or not necessarily the working activity, but has as its object the organization in which it is embedded and without which it would lose its *raison d'être*.

Final Remarks

Ultimately, the concept of subordination has shown extraordinary resilience to the transformation of work by continuing to express the fundamental traits of the labor relationship in the enterprise.

Such resilience plays a role not only at the individual level but also at the collective level. The persistent centrality of the relationship of subordination and its specific legal regulation recalls the need for collective representation of the interests of workers who share that contractual condition of subjection to the employer's organizational power. Since its origins, the constituency of unions has been subordinate workers. Consequently, union action was born for and has been focused on subordinate work, with the purpose and result of improving the living and working conditions of subordinate workers through an articulated system of collective bargaining with their employer counterparts. In other words, the trade union phenomenon has been substantiated by the representation of two categories of subjects identifiable through their typical bargaining relationships: employers and workers subordinate to them.

Naturally, as the organization of work and, therefore, the *quomodo* of subordination transformed, so did collective bargaining and the instruments of collective representation. The law, grasping the evolution, gradually assigned to the collective agreement the role of specifying and drawing up boundaries to the employer–entrepreneur's organizational power, all the way to the formation of a genuine inter-union order capable of governing labor relations on a large scale.[38] It is no accident that industrial democracy has been spoken of as a form of governance of subordinate labor in enterprise.[39]

The crisis of subordination and the associated decline of the role of trade unions have pushed the legal debate—and with it, in some cases, the lawmakers themselves—to explore new means of protection, even to the point of embracing instances of universalistic protection, with the ambition of guaranteeing the protection of the working person in all forms and expressions, thus overcoming the traditional and narrower scope of the person who performs her activity under the authority of the employer.[40]

Such a perspective, evidently, is not without effects on the labor protection system in its basic structure and, in particular, on its sources of production, starting with the industrial relations system.

In conclusion, such a radical paradigm shift presupposes a move away from (and perhaps the abandonment of) the assumption that has always held labor law and industrial relations together, entailing a redefinition of the protected good itself: no longer the work organized by the employer but, generically, the welfare of the working person. In essence, the sole lawmaker

38. GIUGNI GIUGNI, INTRODUZIONE ALLO STUDIO DELL'AUTONOMIA COLLETTIVA (1960).

39. MARCELLO PEDRAZZOLI, DEMOCRAZIA INDUSTRIALE E SUBORDINAZIONE. POTERI E FATTISPECIE NEL SISTEMA GIURIDICO DEL LAVORO (1985).

would be trusted with the task of reconstructing, on the basis of a different axiological premise, the corpus of labor protections in a nonspecific and universalistic key, which would inevitably tend to be confused with the fundamental rights of the person.

Are we ready for this quantum leap?