1.4. The case of "At-will employment"

- At-will employment remains controversial and a central topic of debate in the study of law and economics, especially with regard to the macroeconomic efficiency of allowing employers to summarily and arbitrarily terminate employees.

- At-will employment has been heavily criticized both for being harsh upon employees and also for being predicated upon flawed assumptions about the inherent distribution of power and information in the employee-employer relationship. Despite it, conservative scholars in the field of law and economics credit employment at will as a major factor underlying the strength of the U.S. economy.

Figure 26. Employment protection remains high

Protection of permanent workers against individual dismissal, index scale 0-6 from least to most restrictions, 2013

1. Unweighted averages including Länder. EU covers those countries that are also members of the OECD.
1.4. The case of "At-will employment"

Quote for discussion:

“At-will employment can be identified as one of the reasons for Silicon Valley’s success as an entrepreneur-friendly environment” (Alan Hyde, Working in Silicon Valley: Economic and Legal Analysis of a High-Velocity Labor Market (Amonk, NY: M.E. Sharpe, 2003).
Part One: Overview and Discussion

Discussion.

- Does issuing a legal presumption of employment contract constitute a worthy solution in order to avoid the unlawful use of service contracts?
- Did the recent crisis have any impact in the relevance of this mechanism?
- Is at-will employment relevant to this discussion? Would the facilitation of dismissal prove effective in diminishing the avoidance employment contracts?
- Does a legal presumption of employment contract have any role in answering the challenges posed by “new forms of autonomous work”?

Part One: In conclusion (somewhat)

- Having a clear cut set of elements that attest to the existence of an employment contract is a method that has been tested and proven by Employment Courts. As a method, it most certainly works, solving some of the biggest problems in this exercise of legal qualification.

- Nonetheless, or rather, despite it, the need for such a complex and cumbersome method strongly supports the view that the legal qualification of a contract as an employment contract can be fraught with difficulties.

- In particular, these difficulties are made bigger by two factors presently relevant:
  - The diversification of forms of employment;
  - The attempt, by employers (and sometimes employees), to evade Labour Law, which has become more prevalent over the years.
Part Two: New Forms of Employment

Preface:
The role of the internet in the changing face of labour.
2.1. The role of the internet in the changing face of labour.

- Due to new and improved technologies the nature of the workplace and working practices has changed dramatically over the last few years.

- Staying always connected is now a possibility. For certain occupations, this means that people can now work from different locations or even while moving.

- For those occupations, does it still make sense to talk about "workplaces"?

2.1. The role of the internet in the changing face of labour.

- Implications for the personal life of the worker.

- Tech-based companies have developed upon business models where the relationship between worker and beneficiary goes beyond the limits and traditional frontiers of Labour Law.
Part Two:
2.2. The lack of regulation of crowd sourced work in crowdsourcing platforms

2.1. Crowdsourcing: A terceirização da multidão
2.2. Crowdwork platforms
2.3. Providers of crowdwork
2.4. Crowdwork implications
2.2.1. Crowdsourcing: A terceirização da multidão

- Crowdsourcing: the practice of obtaining information or input into a task or project through the services of a large number of people, either in a paid or unpaid manner.

- The contributions of a group of providers (whose constituents are undefined), either form or add up to the final result, which was commissioned by the requester.

- Crowdsourcing relations are tripartite, requiring the existence of a crowdsourcing platform to aggregate the crowd and allow for work to be requested.

This manner of distributing tasks and work can be applied to any project that does not necessitate an overarching view of the final results. Common examples are:

- Writing short texts;
- Transcribing audio;
- Identifying items in a photograph;
- Data entry;
- Data sorting;

Tasks that somehow require human perception and, for that reason, cannot easily be performed in an automated manner.
2.2.1. Crowdsourcing: A terceirização da multidão

- Technology has made it growingly easier for the requester to keep a hold of the overall organization of what is being produced through this process and it can be applied even if the task is deemed quite complex.

- Due to the flow of information allowed by the internet, crowdsourcing can (and has been) used by a wide range of industries.

- This surge of interaction through the internet, and the appearance of a massive crowd of providers that can pitch pretty much any type of contribution, whereas all of that interaction is assured, sifted and organized in an automated manner by software, explains the growing popularity of crowdsourcing.

Crowdsourcing, in essence, isn’t all that different from public offers for independent contractors or voluntary participants “of old”.

Simply put, technology creates a completely new setting for them to flourish.

The work provided through crowdsourcing is performed and compensated solely through the internet (often anonymously, the information of both requester and provider being known only to the platform that intermediates the performance of the task).
2.2.1. Crowdsourcing: A terceirização da multidão

- The crowd labour market keeps evolving, with an ever growing amount of platforms that provide the connection between requester and provider. Yet it remains devoid of specific regulation.

- Authorities have yet to attempt applying existing employment and labour laws to crowd labour. To this extent, crowd labour is mostly regulated by the participation agreements provided by the crowdwork platforms and entered into by its participants.

2.2.2. Crowdwork platforms

- **Examples:** Amazon's Mechanical Turk, CrowdFlower, Microworkers, Clickworker.
2.2.2. Crowdwork platforms

- **Examples:** Amazon’s Mechanical Turk, CrowdFlower, Microworkers, Clickworker or CloudCrowd.

Platforms may provide a simple task list or further services, for example, actively mediating or automating the interaction of providers and requesters, maintaining a review system for the work of providers or intermediating the payment of completed tasks.

Moreover, crowdsourcing platforms play an active role in mongering users, both requesters and providers. Those activities are directly related to the revenue they accrue, amassed in proportion to the volume of business conducted within the platform.
2.2.2. Crowdwork platforms

- The **terms of service** provided by the platforms vary, but aim only to establish the conditions with which each platform operates, including privacy concerns and conduct requirements. **The conditions for the work itself is usually dependent on the individual task being executed and determined by who is requesting said task.**

- The terms of service tend to either specify that providers are independent contractors or require that workers waive any rights that might flow from the employment relationship. **Obviously, waiving rights in this manner, specifically when the acceptance of these terms of service is forced onto the provider, could (and should) be disputed.**

2.2.2. Crowdwork platforms

- There's a **disparaging difference in bargaining power** between participants and requesters. The latter can set hiring conditions or refuse a completed work if deemed not properly completed (in some platforms, keeping the work for himself and denying the provider's compensation).

- At the same time, the **provider's reputation** (which influences the likelihood he will be hired in the future) is **solely determined by the evaluation given by past requesters.**
2.2.2. Crowdwork platforms

- Providers in countries of reduced economic wealth gain access to requesters that are based in strong economies.

- The decomposition of certain firms’ labour force allowing for certain business models that would otherwise be impossible.

- Crowdwork is characterized by connections of many employers with many workers at different times and with different durations.

2.2.3. Providers of crowdwork

- If left unchecked, digital labour markets could facilitate the exploitation of workers, in detriment of their professional progression (both in terms of their pay and of their education).

- While this inability to progress can be considered normal when speaking of independent contractors, there is space for true work relations to arise within this model.
2.2.3. Providers of crowdwork

- If and when that happens, since this market implies wages fixed by a dynamic calculation of supply and demand, answering the call for ensuring fundamental principles and rights of workers within this reality seems a tall order.

- How do we insure that under age workers are not exploited?

Conversely, workers may find in crowdwork a unique opportunity.

- They are allowed to choose when they want to work and the duration of said work.

- But, due to the global provenance of these providers and the harsh competition observed in establishing the market average pay, compensation can be (and most times is) extremely low.
2.2.3. Providers of crowdwork

- In this context, labour law regulation could constitute an important way of influencing the development of these platforms, by establishing the minimum rules to be observed. The need for this type of intervention seems apparent, as providers of these platforms are already associating online: gathering to provide reviews of platforms and reviews of requesters.

- In summary: in crowdsourcing, the providers are independent contractors for as long as their work cannot be traced to the guidelines upon which the legal system indicates the existence of an employment relationship.

Revised and frequent performance of services between the same parties could give way to the formation of a labour relation, and it begets the question of which level of protection must be afforded to a worker in this situation.

Should regulation attempt to create a new “type of worker”, that of dependent contractor, in order to answer these challenges?
2.2.4. Crowdwork implications

- Crowdwork also raises the question of whether these new forms of employment give way to an **avoidance of employer obligations**.

- For example, the application of Directive 91/533/EC to crowdwork situations is deemed a considerable grey area. What information must an employer give to employees hired on a crowdsourcing basis?

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2.2.4. Crowdwork implications

- It still isn't clear if companies resorting to crowdsourcing **are knowingly and willingly attempting to circumvent labour law and undercut workers’ rights** or if this relationship exists because it allows for a clear and unequivocal **reply to the demands of the present and prevailing labour market**, and, in that regard, represents a necessary part of the system as a whole.

- Despite the benefits brought about by advancements in technology, **those same advancements cannot cause any kind of exploitation or a degradation of the fundamental principles and rights of workers**.
2.2.4. Crowdwork implications

- Crowdsourcing platforms already collect all the relevant data necessary to ascertain if and when employment relationships are formed or terminated.

- There is no reason why this easy access to such an agreeable end, the empowerment of providers and cost reduction for the requester, must also equate to a race to the bottom in compensation, with providers forced to lower their compensation to extremes in order to accompany the shifting tides of offer and demand.

As such, an update in the understanding surrounding these labour markets, as well as careful regulation to ensure the protection of providers in this setting, is needed.
2.3. Labour Law's relevance in the public eye: Uber and its competitors

2.3.1. Who do Uber’s drivers work for?

Uber’s business model is well known:

- Drivers register on the Uber app and provide it their GPS location.
- Users of the Uber app pay Uber for a trip between two set locations, whereas the itinerary is proposed by the app through GPS routing and information on the closest driver.

After the trip is completed, a percentage of the client’s payment is given to the driver by Uber, and the client rates the quality of the service. In some cases, Uber assumes the liability of a price reduction or payment failure, so that the driver is always paid his percentage.
2.3.1. Who do Uber’s drivers work for?

- The quality of the driver’s service is determined by strict dress codes, etiquette and courtesy rules as well as rules relating to the condition of the vehicle’s interior and exterior. The adherence to the rules (to ensure padronized service) is insured by the ratings offered by the clients on the driver’s performance. Through the ratings system, Uber can be aware if its drivers (and which) are offering quality service or not.

- Imposing limits and expected behaviour: For example, activity must be provided during New Year’s Eve against the sanction of being excluded from the platform for two weeks if failing to comply.

2.3.1. Who do Uber’s drivers work for?

- Mr. James Farrar and Mr. Yaseen Aslam, Uber drivers who represented a large group of professionals, brought legal action against the tech-based company on the grounds of the legal subordination that they believed existed between them and Uber.

- On October 28 2016, the Employment Tribunal (United Kingdom) decided that Uber doesn’t act as a neutral electronic platform, going beyond being a mere marketplace for the offer and demand of a service performed by service providers. Instead, the Court found that it acted as an employer, providing that service through a group of workers whose activity is coordinated, directed and disciplined by Uber.

- This recognition, in light of English Labour Law, imposes relevant costs on Uber’s operations, for example paying at least minimum wage to its drivers, paid leave, and the organization of the working time of all drivers respecting applicable law.
2.3.1. Who do Uber’s drivers work for?

- Similar disputes are on-going in the U.S.A., as well as in Europe. For example, in France there is strong political pressure so that Uber is considered an employer, hence contributing to national social security schemes.

- On June 17 2015, California’s Labor Commissioner decided that a certain Uber driver was, in fact, employed by Uber, which, as his employer, was then required to reimburse him of expenses related to his vehicle (insurance and toll costs, totaling over $4000).

- On September 1 2015, a San Francisco (U.S.A.) Federal Judge accepted a judicial action brought to the court by three former Uber drivers, giving it class action status. The suit concerns the qualification of Uber drivers as Uber employees (recognizing the related rights). Said suit is currently still pending and is said to potentially target over 160,000 Uber drivers operating in the San Francisco State. Although Uber reached a proposed settlement with the drivers in August 2016 (under which it would pay up to $100 million and make some significant changes to its policies), the Court decided to refuse the settlement as the recovery of the amounts that would be paid to the State of California if the drivers were to be considered employees wasn’t included in that settlement.

2.3.2. The On Demand model

- The on demand model (included in the so called sharing economy) relates to the economic activity of tech-based companies that address the needs of consumers by providing services through online platforms that they create and manage.

- Platforms that enable the meeting of offer and demand can be used in different economic activities, such as translation, house cleaning services, repairs, shopping, design or any other services.
2.3.2. The On Demand model

GENERAL, the on demand model implies that the tech-based company that owns and operates the platform acts solely as an intermediary (a conduit) between demand and supply that is aggregated on the platform.

In other words, registered consumers and registered service providers can become aware of each other and form a contract through the platform’s services. For this service, provided through the platform, the company charges either a percentage of the payment between consumer and service provider or a fixed amount for each completed contract.

The challenge lies in the legal qualification of the relationship between service providers and the company that runs the platform that connects them with consumers.

If the platform merely aggregates data and allows for this connection, one would simply consider it a service contract. But, as soon as the company has the power to actively manage its platform, evaluating the quality of the services provided and even controlling or directing the services that are provided through that platform (claiming powers of authority to do so or merely by threatening to exclude from the platform any service providers that do not comply), we might be facing a contract that must be qualified as an employment contract.
2.3.2. The On Demand model

- The business model of these companies isn’t always the same. Despite that, in the case of Uber, we can list a few arguments that would support the thesis that there is an employment contract between it and the service providers that use its platform:
  - Uber pays its drivers on a weekly basis, automatically, depending on the services provided, resorting to a previously defined value that the driver has no way of influencing;
  - Uber controls and evaluates the performance of the service providers (through the ratings given by the users of the platform);
  - Service providers are subjected to a set of rules imposed by Uber, which, in a manner, organizes and directs their activity (procedures and rules for interactions with clients, dress code, prohibited conducts);
  - Uber has the ability to temporarily refuse access to the platform by service providers following complaints or low ratings. Is this a form of disciplinary power?

2.3.2. The On Demand model

- In general, other aspects are also relevant:
  - Are service providers expected to provide a certain number of hours per day, week or month? Do they have working hours?
  - Do the instruments used to perform the service belong to the service provider?
  - Are the service providers forbidden from offering services on other platforms? (in our example, are they allowed to provide services to Uber’s competitors?)
2.3.2. The On Demand model

- In Portugal, service providers providing their activity under an on demand model based company probably won’t meet the requirements for the application of the previously mentioned legal presumption, but, as was the case before that presumption was enacted into law, the indicatory method of legal qualification will still be relevant.

- The legal presumption might not be met, but their relationship with the company that owns and operates the platform might be an employment contract.

- In a way, the legal presumption contains elements that are directed to forms of employment that simply weren’t possible a few years ago.

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2.3.2. The On Demand model

- The main criteria then is, as always, that of legal subordination.
  
  If the service provider performs his or hers activity under the authority and supervision of the company that operates the platform or if that company is able to organize the activity provided (i.e. setting working hours), the role of this company goes beyond that of an intermediary.

- If this happens, the relevant elements of each particular case presented to a judge will have to be considered in order to determine if that relationship must be (or not) qualified as an employment contract. Since the legal presumption wouldn’t be applicable, the burden of proof would rest with the service provider and, in case of doubt, the decision would be against the service provider.
2.3.2. The On Demand model

Joana Vasconcelos clearly points one of the main issues in this debate:

If the company operating the platform is offering to consumers a certain expectation of service quality (normally associated with its brand, i.e. Uber), it does so by enforcing clear rules and procedures to ensure that the service that can be offered through its platform conforms to that expectation.

In a way, the difference between their economic activity and that of their "traditional" competitors merely resides in resorting to modern technological solutions to attract and service paying customers, while also resorting to modern technological solutions in order to ensure that the workers needed to service those consumers are available at all times. The question lies, then, in the way those companies enforce their bargaining power upon the service providers that provide their work, through the platform, to the clients of the platform.

Part Two:

2.4. Can Labour Law provide an answer to the challenges posed by New Forms of Employment?
2.4. Can Labour Law provide an answer to the challenges posed by New Forms of Employment?

Discussion.

- Is the notion of legal subordination relevant to an exercise of legal qualification of this new type of relationship between worker and beneficiary?
- Are the elements currently included in the legal presumption still adequate or sufficient?
- What other elements could be considered?

Thank you for your attention.

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Labour Law Topics - Sérgio Coimbra Henriques (24.02.2017)