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Drivers Vs Uber – The limits of the Judicialization: Critical review of London's employment tribunal verdict in the case of Aaslam Y. & Farrar J. against Uber

Rabih Jamil

- 1 On October 28th, 2016, The London employment tribunal recognized Uber's drivers as workers entitled to a national minimum wage (NMW) and other limited benefits the global tension. This unprecedented verdict¹ represented a game changer for the drivers' struggle against their controversial classification as partners/entrepreneurs which is being skeptically viewed as 'evasive entrepreneurship' (Elert N. & Henrekson M., 2014). Accordingly, the class action lawsuit that was initiated by two Uber drivers from London, with the support of GMB, a UK general workers' union, is paving the road to the emergence of a labour jurisprudence on one of the greyest labor zones of the contemporary work transformations.
- 2 It is believed that such adjudgment will affect the work conditions and lives of up to thirty thousand drivers in the UK, as officially declared by Uber in court, and hundreds of thousands elsewhere in the world. More recently, an increasing number of workers, contracted by similar applications based companies, initiated litigation processes to challenge the bogus of self-employment as imposed by enterprises operating within the spectrum of the 'gig-economy'². In such context, 'CitySprint,' a UK based courier and logistics network, lost a class lawsuit³ in January 2017. Meanwhile, the London employment tribunal asked 'Excell', one of CitySprint's affiliated organizations, to recompense one of its' riders for holiday's payment, in March 2017. Similarly, 'Deliveroo,' another British online food delivery company, is going to be investigated, in May 2017, by the central arbitration committee to determine the employment status of their couriers. This judicialization is also on the rise in the U.S. where several

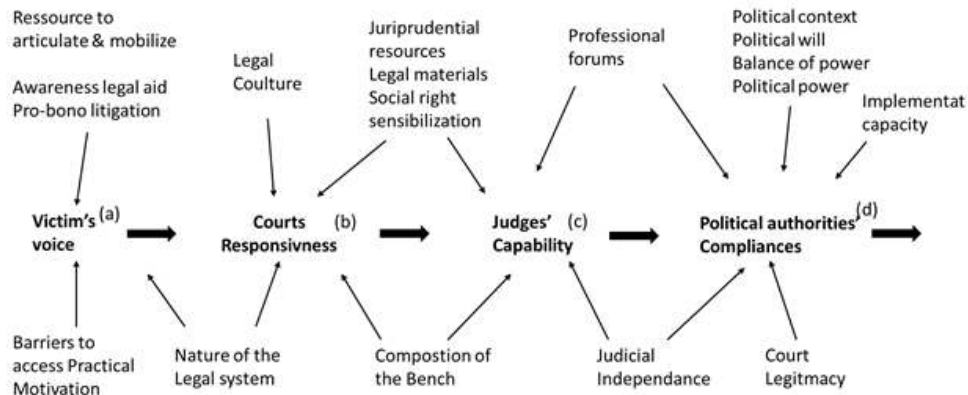
(around fifty) lawsuits in U.S. federal courts were filed against Uber in addition to other litigation processes in several European countries (Gesley, 2016).

- 3 This commentary is committed to provide a critical review of the unprecedented verdict in the case of Aaslam Y. & Farrar J. against Uber, dated October 28, 2016. Firstly, it questions the ability of the judicialization process to address the conflictual relation between Uber and their drivers. Secondly, it underlines the shortfalls of the adjudgment in capturing the mutations within work relations as imposed by Uber's mode of production. Finally, our commentary undertakes a critical review of the worker's status as reasoned throughout the verdict.

1. The Limits of the Judicialization Option

- 4 Workers' trust in the legislative and executive branches of the state apparatus is increasingly deteriorating. This is observed by the fact that they increasingly perceive judicial courts as the main venue to redefine the rightfulness and fairness of sanctioned legislation or to fill in the legal loopholes. This growing judicialization of work-related conflicts pushes us to enquire on the role of courts and their abilities to alter the structural inequalities and power relations. Siri Gloppen (2006) argues that such a role should be questioned through a fourfold examination;
 - **Victims' voice** (a) which assesses the effective and efficient accessibility of marginalized groups and individuals into the judiciary system.
 - The willingness of the judiciary apparatus to acknowledge the raised concerns – **courts' responsiveness** (b) to undertake legal measures that challenge the power balance and **judges' capabilities** (c) to boost social transformations.
 - **The level of compliance** (d) the judicial order garners from the political apparatus in each statehood.
- 5 In the case of Uber drivers, this examination is essential as the accessibility of the judiciary system is a key challenge. In several cities, while the Uber is operating in a legal vacuum, drivers are more likely to be challenged by a hostile trade union environment and/or existing taxi associations. In such context, financing the litigation process remains a major challenge faced by these drivers. This pushes us to question the affordability of such option for Uber drivers, especially when it is not nurtured by operating trade unions. Even when access to the judiciary system is achieved, drivers may be challenged by the inability of judges to interpret the transformations imported by these applications based companies. This is explicitly observed within the different litigation processes which involved Uber; in August 2015, a Barcelona judge referred a lawsuit against Uber to the European Court of Justice (ECJ) for their orientation. Recently, in May 2017, the ECJ ruled that Uber should follow national transportation laws and acquire all necessary licenses⁴. Furthermore, while a California judge rejected a settlement of 100 million USD between Uber and drivers, he was unable to clearly reason an employment relation between both parties⁵. Finally, the nature and structure of power relations between the different branches of the state apparatus and the adherence to the separation of power which drastically differs across countries/cities should not be underestimated whenever drivers prioritize the judicialization process.

Figure 1. Analytical framework to analyze courts' social transformation performance



Source: Gloppen S., 2006, p. 43

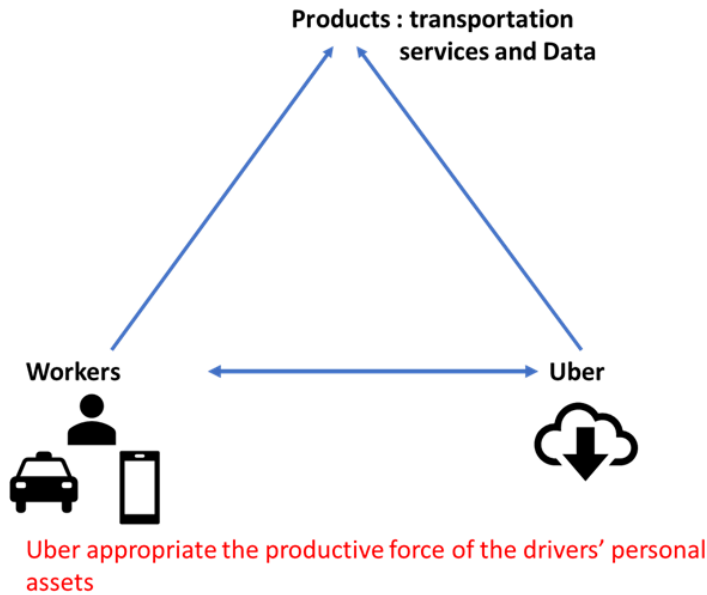
2. Uber Drivers as 'Workers'

- 6 The verdict issued by London's employment tribunal detailed Uber's business cycle; the functioning and the payment modalities (paras 15–27), the type of contractual relations with both passengers and drivers (paras 28–57) and Uber's regulatory system (paras 58–66). Accordingly, and based on 'workers' legislation' and precedents (paras 70–82); the judge reasoned that the claimants (Uber's drivers) were 'employed' as 'workers' by 'Uber London Ltd'. Hence, the drivers' employment status was defined through a contractual relation with no room for an '*overarching umbrella contract*' (para 85). Therefore, the drivers were recognized as 'workers' only if they are satisfying the following conditions; (a) Uber app is 'switched on' (b) drivers are operating within an authorized territory and (c) 'able and willing to accept assignments' (para 86).
- 7 As per the official classifications of employment status in the United Kingdom, a 'worker' does not usually enjoy any kind of protection against unfair dismissal or the right to a minimum period of notice before being dismissed⁶. Similarly, they are not entitled to request flexible working hours nor time off for emergencies which might be, in the case of Uber, the right to decline a trip without being negatively affected or penalized by their employer. This legal reasoning limits the contractual relation to the time slot between the moment a driver opens the application and the moment he/she switches it off. Thus, each time a driver switches off the application their contract is terminated and it must be resumed once their Uber application is switched on. Such a narrowed definition of the work status overlooks the right of drivers to reject assignments while their applications are switched on without being penalized. Moreover, it reinforces Uber's disciplining practices against these drivers and helps maintaining the company's surplus of drivers which is being used to undermine drivers' bargaining power and distort market prices.
- 8 Furthermore, Uber is relieved from any obligation towards their employed 'workers' outside the working hours including the guarantee of job continuity. Similarly, the

verdict does not specify the employers' responsibility for occupational safety and health (OSH), and social security. Meanwhile, the judge acknowledges that Uber controls the overall labour process.

- 9 As 'workers', the adjudgment reasoned that Uber drivers are providing a 'skilled labour' which is being used by Uber to deliver its transportation services and generate profits (para 92). Hence, such reasoning fails at capturing a key mutation of work relations as brought by Uber's mode of production. The company's appropriation of the productive force of drivers' own personal assets (a car, smartphone and internet connection) is a prerequisite for their employability. A driver is not employable by Uber unless he/she offers the company a free access into their own personal assets. In this context, we recall the concept of labour power as elucidated by Karl Marx in 'Das Kapital' (2013) which is limited to the workers' set of physical and mental capabilities that could be freely sold in the market. Accordingly, we believe that the labour power purchased by Uber encompasses the right to exploit drivers' personal assets and transform it into a production input with the mediation of the company's electronic applications. The latter is becoming the instrument of labour used to create the surplus value (cf. fig.2). In this process, Uber is granted the right to exploit the personal assets of the drivers without any cost. We are leaning towards describing such process of as the production of the surplus value by appropriating the productive force of workers' personal assets. This is quite close to David Harvey's (2004) approach on 'accumulation by dispossession' however Uber is practicing this 'dispossession' on the individual level. It does shift an important burden of capital investment to the burden of the drivers. As result, the outcome is a company with a global fleet of one million cars (MKI, 2016, p. 36) available for ride sharing without bearing any cost on investment and maintenance in any single car. It is clear for us that the judge's reasoning on the 'skilled labour' provided by drivers failed at acknowledging such a structural mutation.
- 10 As the rule states in para 92 (points 1–13), the drivers lack control over various aspects of their work process (market information, acceptance of trips, routes, tariffs, the evaluation process). In addition, they, we believe, are expelled from their personal properties (car/smartphone) during the labour process. This mirrors Marx's notion of work alienation (1988); as the power imbalance between the drivers and Uber alienates the former not only from their own labour but also from their personal assets. This explicitly points to the exploitive foundation of Uber's model and the need to go beyond our conventional understanding of work relations to address it.

Figure 2. Relation of production as imposed by Uber



Source 2: Developed based on the initial analysis provided in Fuchs C. and Sandoval M. 2014

- 11 While acknowledging their entitlement to NMW, the court failed at classifying their work within the limits of the three classifications (salaried hours' work, time work, output work) listed in the NMW regulations (2015) (paras 123–126). Thus, the judge reasoned that their work should be automatically listed as 'unmeasured work' (para 127). Here also, the verdict does not clarify if the ruled minimum wage reflects the net remuneration for the skilled labour drivers or it is the gross income that should include the cost of the uses of the workers' own capital in the labour process. This clearly reflects the 'relentless interpretative' (Sahni I., 2009, p. 223) role of the judiciaries and their limited maneuvering of the legal approach to the arising conflicting social relations.
- 12 The rule mentioned the power imbalance between the workers and Uber but failed at fully addressing it; this reflects the constrained nature of courts' involvement in interpreting social transformation where the judge, in the Weberian understanding, is a mediator who interprets the sanctioned legislation with a very limited ability to create new norms. Their enacted 'legal wisdom' is, largely confined by the 'analogies' they steer from 'precedent' rulings which represent a sort of binding 'evidence' (ibid, p. 220, 224).

Concluding Remarks

- 13 The employment tribunal adjudgment, dated on October 28 2016, represents a breakthrough in the struggle of workers to defy and overcome the bogus of self-employment as adopted and imposed by Uber and other companies of the 'gig-economy'. However, the courts' reasoning has failed at transforming its acknowledgement of the power imbalance and dependent work relations into practical protection and empowerment of the drivers. It is of foremost importance to underline

that Uber's mode of production is inducing a structural transformation in the process of the extraction of the surplus value and the work relations. We do not believe that the conventional understanding of work arrangements can capture or interpret it. Therefore, we question the ability of the judicialization process to elucidate such social transformations where judges remain closely confined to *'the discursive nature of the case law, whereby words are tuned around and around interpreted and stretched with the aim of adapting law to the varying needs'* (Weber, 1978).

- 14 Drivers need to react in a manner that help them building their collective agency and reestablish their bargaining power as the main influencing arm over this emerging mode of capitalist production. We assume that shifting the social struggle to the hands of the judiciary professionals and their instruments is an option with high risks and very limited potential gains. These gains, if achieved, are more likely to be at the expense of collective options. Nevertheless, we believe that additional empirical investigations are required to assess the impact of the litigation process of collective action in the context of work relations adopted within the spectrum of the 'gig-economy'.

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NOTES

1. The full text of the verdict could be accessed through the website of the UK Courts and Tribunals Judiciary system by using the following link; <https://www.judiciary.gov.uk/judgments/mr-y-aslam-mr-j-farrar-and-others-v-uber/>, accessed April, 23rd 2017.
2. The term is increasingly being used to describe the electronic marketplaces that bring together the demand and supply of labour, goods and services. Other terms are being used such as the crowdsourcing, sharing economy, on-demand economy and more recently the platform economy (Slee 2016, Donovan et al. 2016, Destephano 2016).
3. The full text of the verdict could be accessed through the following link; accessed April, 23rd 2017, http://www.clydeco.com/uploads/Blogs/employment/Dewhurst_and_CitySprint_1.pdf
4. Court of Justice of the European Union, "Advocate General's Opinion in Case C-434/15", Press release No 50/17, Luxembourg, 11 May 2017, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-05/cp170050en.pdf>
5. All related documents and judicial decisions are accessible through the following link; <http://uberlawsuit.com/>
6. Electronic portal for the governmental services in the UK, the section on employment and contracts, <https://www.gov.uk/employment-status/worker> (accessed, 2/14/2017).

ABSTRACTS

This commentary provides a critical review of the verdict, issued in October 2016 by the London employment tribunals, that classified Uber drivers as 'workers' entitled of the minimum wage. It

argues that the ‘workers’ status, as reasoned by the court, mirrors the precarious work relations and do not provide enough protection and empowerment for the drivers. Moreover, we critically review the court’s ability to capture the social transformation brought about by companies such as Uber.

Ce commentaire propose une analyse critique d’un jugement rendu en octobre 2016 par les tribunaux d’emplois de Londres, en vertu duquel les chauffeurs d’Uber seraient des travailleurs ayant droit au salaire minimum. Il soutient que le statut des travailleurs, tel qu’envisagé par la cour, reflète les relations d’emplois précaires et ne confère pas suffisamment de protection et d’autonomie aux chauffeurs. Par ailleurs, nous examinons de façon critique la capacité de la cour à se saisir de la transformation sociale qu’amènent des entreprises comme Uber.

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Mots-clés: Uber, gig-économie, judiciarisation, travail atypique

Keywords: Uber, gig-economy, judicialization, informal work

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