Better Opportunity or Extended Sweatshop? —Labor Law and Policy in the Age of Digitalization in Korea—

Sukhwan CHOI

I. Introduction

Dynamic times for all of us. Digital transformation which has been accelerated rapidly is now making unexpected changes in this pandemic age. We are apparently in the course of revolutionary change, but it is not only by digitalization in the work but also with the effect of coronavirus. Each has a huge influence on our lives, but when we face these two components together, they do have a synergic interaction, and now we are on the road.

Is this a better opportunity for the people who want more control over their life? Or is it just another form of sweat shop which takes all the profits produced by workers to the capital side, mainly represented by platform business owners? (Vallas 2019). It is a little too early for us to answer this question. However, we can realize digital transformation around our working environment, and we need to respond to the urgent requests, at least, by policy or law.

First, I would like to take a look at the present situation in Korea about labor regulations, with requests for changes arising therefrom (in Section II). After that I would like to show two recent issues on the debate table. They are issues about labor regulations, reflecting changes caused by digitalization, and new legislation for this area accomplished recently (in Section III). With this, we can check what has been done, what is still unsolved and (or) what is a new hurdle (in Section IV). I expect to get an inspiration for other areas of employment / labor law, especially in the sense that the need for universal rules or additional regulations in employment relations.

In a sense, however, it looks like a repetition of the old question: who should be regarded as an employee? But with the same question, we still can think of a new answer, from the view point of velocity, not the view point of direction. We may direct for the whole different goals, or we may not even specify what the goals are. On the other hand, we may think of the possibility of going not so different way, but we do feel strange because the speed of the changes is not ever experienced.

II. Present situation and requests for changes

1. General surroundings

We are in the midst of the digital transformation, not only in manufacturing industry, but also (and more rapidly) in service industry. Technological background of the digital transformation represented by AI and IoT is getting popular, and digital platform, sharing economy, on-demand service, subscribing economy are all main components stimulated by the digital transformation, and causing changes in working styles such as keeping work and personal time separate, work-life balanced lifestyle, and so on. Changes in perspectives about social value is also advancing. Non-salary value, well-being at work and life satisfaction, enhanced respect for personal value including human rights are key words reflecting these changes.

Changes in employment are represented by separation and decentralization of labor market;[1] rise of insecure or precarious work such as atypical work, indirect employment, subcontract, independent contract, freelancing. These new types of working styles diminish typical standard employment, makes employment relation unstable. Social security system established upon typical employment relation is getting weaker while needs for social security are sprouting. We have major challenges to deal with such as population crisis, inequality, global supply chain and human trafficking, and, consequently, sustainability.

2. Situations in Korea

In Korea, we did pursue rapid improvement in protection for working people as a whole. Labor policies include employment plan for changing atypical workers into regular workers, and attempt to revise labor law to be more harmonized with the international standard. Making atypical workers into regular workers was the manifesto of President Moon Jae-in, and Incheon Airport was the first place he visited in his early period, concerning insecure job issue. He declared, "No atypical workers in public sector," and nearly 5,000 employees have become regular workers in the last 4 years, including 1,900 security workers in Incheon Airport. This is a symbolic movement of recent reformation of employment plan especially in public sector. At the same time, the revision of labor law[2] to make union organizing easier is heading for the ratification of the ILO's three key conventions: Conventions 87 and 98, concerning the freedom of association, and Convention 29, which bans compulsory labor.

Changes in social security policies are also important issues in Korea. Partly as a component of a series of reforms on labor law and social security system, and partly as a response to the recent coronavirus situation and unemployment caused by it, from the unemployment insurance for all (not just for the salaried workers), to the basic income, we put the very hottest debate on the table, and we are thinking of the new logic of social security system from the beginning (MOEL 2020; MOEL 2021). We also are in the speedy changes of work styles; and *untact* society, application-based business, automaton, platform-based business is expanding rapidly. In this situation, employment relations are becoming more precarious.

Working any time anywhere is a new chance for various people. Some make use of it as an opportunity for self-development or preparation for new works. But for some people, it just means extended working time because of reduced income caused by depression. Anyway, this is diverse ways of working, and "work from home" caused by coronavirus is accelerating the tendency.[3]

Will there be enough decent work for everyone? Digital transition could provide more working opportunities, but at the same time it makes situation worse by aggravating conflict between two extremes in the labor market. In addition to this conflict inside the labor market, we do have another issue with digital transition and working force, misclassification. In an attempt to cope with this problem, we are thinking of making a general rule for working people as a whole, which is not limited to "employee" in the classical context.[4] Digitalized society makes the old question of drawing a line between employees and independent contractors very vague, and, consequently, we are confronted with legal issues here.

1. Chang et al. 2019; Schauer 2018.
2. The National Assembly passed the amendment to the Trade Union and Labor Relations Adjustment Act on Dec. 9, 2020. Ratifying ILO fundamental conventions was one of the targets by this amendment, https://www.moel.go.kr/english/poli/poliNewsnews_view.jsp?idx=1587.
3. Reich 2020.
4. Making rules which are aimed at protection for working people as a whole is one of the research themes in Korea. This can be a solution to supplying basic fair rules for people who sell their labor, regardless of their status as an employee in the legal context, as well as can be an answer for regulating platform labor market where employees and independent contractors are working together.

III. Legal responses

1. New work style, old work regulations: Platform workers—employee or not?

We have an old, but still valid question here again. Concerning those who work in digital working environment, are they employees or independent contractors? Replacement driver services, food delivery services, housework services are main areas representing these new environment of digitalization in Korea. Of course, there are totally new types of work based on digital platforms, e.g., "Remember." If you scan business cards via smartphone app "Remember," they will input scanned information to database so that you can use the data on your smartphone at any time. You do not meet an employee who carry out your work in order to give your directions, and you are able to convert all the analog information to digital form. You may think this system is based on highly developed technologies such as artificial intelligence or robotics, but as a matter of fact, they are using many workers who enter every single information manually by hand. We should not get the wrong idea about the backside of the fact here, and as a whole, it would be fair to classify many of these workers as an employee in the traditional context.

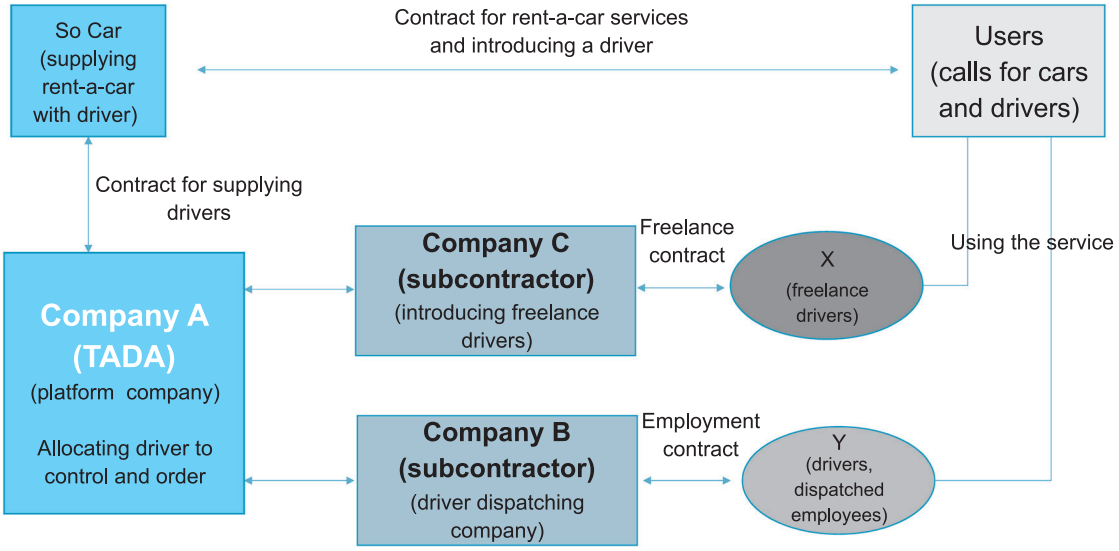
It seems that there are new working styles, where we cannot see any supervisor, nor can we hear a bell rings to indicate working time. In this environment, we feel like lying under the whole new working regulation system. But actually, we do have a just a little different type of direction, which are made possible by digital technologies. From the employer or company side, new technologies satisfy the needs for just-in-time workforce, reducing cost. Naturally, attempt to detour the strict regulation of employment law has long been prevailing, which is not a totally new phenomenon. As an intermediate stage from the traditional employment to the digitalized one, in-house subcontracting operated by MES (Manufacturing Execution System) could be a good example. Invisible control and direction from the employer are given to the employees of the subcontract company through digitalized manuals and automated orders. Is MES system just a standard needed when performing tasks? Or is it practically substitute for direction and order, from the human voice to the thick manual book and MES?

We can see one case study of app-based ride share drivers, TADA case. With an accumulated 1.7 million registered users on the app, the number of outsourced TADA drivers reaches around 12,000, and the freelance drivers requested that they should be regarded as an employee. Here is the outline (Figure 1; Baek 2020).

A was a company supplies services with TADA. If a user requested a share ride via app, then a car with TADA driver was dispatched. B was a subsidiary company affiliated with Company A (Company A owns 100% shares of Company B). Company B made the app, and took the tasks of TADA's services from Company A, the services include advertising for users, payment agency, dealing with costs for services. C was a service operating company introducing drivers. X made a freelance driver's contract with Company C. X checked the allocation table (driving schedule) made by Company C every week, submitted record of date, garage, office hours and provided driving service according to the fixed allocation table. Company C sent a message saying that Company C will no longer give a driving work to some part of freelance drivers including X.

The Seoul Regional Labor Relations Commission (SRLRC) decided that X was not an employee of Company A. The reasons are as follows:[5] SRLRC said that the drivers could select the time and date, garage where they start their work. If the drivers do not want to join the work, there were no way to force them to come. No evidence of direction, control or supervision. Payment for the driving service could not be regarded as a salary.

However, the National Labor Relations Commission (NLRC) said that X was an employee of Company A. It showed that the drivers made a working contract as freelance drivers with Company C, but in practice they were told to perform tasks according to Company A's manuals and materials on the app. They had to wear uniform, follow specific way of responding to passengers, and follow the procedures for driving. If they



Source: Compiled by the Author.

Figure 1. Structure of TADA's services and drivers

violated the orders from the company, then they could get notice, additional education, sometimes would be fired. There were both freelance drivers (X) and employee drivers who were dispatched from other company (Company B). While employee drivers (Y) were regarded as employees, directions and controls from the Company A to their employee drivers were the same as those to the freelance drivers. The freelance drivers had to go to work according to the fixed schedule (allocation time).[6]

With these, NLRC decided that the freelance drivers (X) are employees under the control of Company A. After this, NLRC also made a decision about who is an employer. NLRC said that, Company B is an agency which had a contract for doing the tasks of TADA service operations in place of Company A, and Company C is also not an employer, because Company C was just introducing drivers to Company A, they did not have a right to decide salary, working hours and working conditions, but just followed every single direction from Company A and was not regarded as an independent entity for the HRM (Human Resource Management) tasks. The conclusion was that Company A was an employer.

Actually, there had been some precedent cases for the persons who work via smartphone applications, for the food delivery services. About the question whether they are employees or not, some of the Supreme Court's cases[7] said that they are not employees, because (a) they were free to accept or decline the order and no discipline were imposed even if they refused to take the order, (b) in the specific case, the application didn't have GPS, (c) the company didn't decide working time and working place of the delivery persons, (d) delivery persons could take multiple orders at once, make other person carry out the order he/she took instead, and could take orders from various companies, (e) there were no payment from the company, and delivery fees were paid by restaurants which asked for delivery via the app, (f) there were no contract documents, no earned income tax withholding, etc.

However, this TADA decision by NLRC was a remarkable case, though it has not been decided at the level of the Supreme Court yet. It admitted working persons in the platform via smartphone application as an

5. SRLRC 2020. 1. 21. 2019BUHAE3118.
6. NLRC 2020. 5. 28. 2020BUHAE170.
7. Supreme Court of Korea 2018. 4. 26. 2017DU74719; Supreme Court of Korea 2018. 4. 26. 2016DU49372.

"employee" under the Labor Standards Act. Direction and order by employer have been changing from traditional way into the new way like application on the platform or highly detailed manuals instead of real human voice. Can we take these facts as a ground for categorizing people working there as "employees" in the legal context? In the face of the workers without employment contracts in the rapid-growing digital economy, we need to have a new approach to explore what is a direction and order which make a relation as an employment contract, and the NLRC decision can be one good example.

2. Multi job workers

We have another issue with the digitalization; multi job workers. Actually, this also is not a totally new issue, and there have been debates about multi job work or "moonlighting," concerning fiduciary duty. But development in digital technologies made it easier to participate in the multi job work. For example, thanks to the Covid-19 pandemic, we have far more demand in delivery, but autonomous vehicles and drones are not able to deliver things yet, which means more and more persons working for deliveries would be needed. Many persons are doing this as a secondary job.

Digital technologies make it possible to work anywhere anytime. In a way this means that you can work wherever you are, by using teleworking. It became so vivid especially in this Corona age. At the same time, ubiquitous workplace means that you can find your workplace everywhere, which result in multiple jobs per person. You can make use of your niche time for an optimized job just for that time and in the place where you are right at that time.

Of course, there are legal responses to this relatively new phenomenon. Supreme Court of Korea said that, absence of exclusivity—the fact that you work for more than one employer—does not disturb for the actors/actresses who work for various broadcasting companies to organize and have a collective bargaining.[8] From the view point of regulation, relation-based regulation was created in a traditional way, expecting one employer and one employee, employment contract between them, and for quite a duration. But focus has been slowly moving to create new regulations for employees, regardless of the number of jobs held or stable relation with the employer.

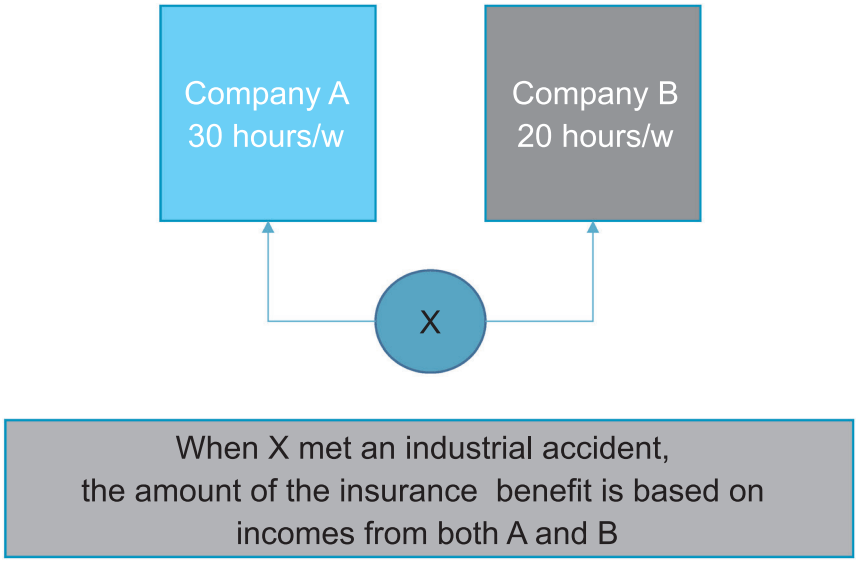
2-1. Insurance benefits for multi job workers

When you have more than one job, and if you are involved in an industrial accident, you have two problems to solve. First, when you had the accident while you were moving from one job to another, can this be regarded as an accident on commuting? IACIA (Industrial Accident Compensation Insurance Act) art. 37 says "any accident that occurs while he/she commutes to or from work using a transportation means provided by his/her business owner or another similar means under the control and management of his/her business owner," and "any accident that occurs while he/she commutes to or from work using other common route and method" is regarded as an industrial accident covered by IACIA.

We have another problem for multi job holder. When you calculate insurance benefits, can you add up the whole income from your jobs? In the perspective that IACIA should cover up the ordinary income level, the income that he/she used to get to run his/her ordinary life, of the employee who had the industrial accident, then it would be better to add all the incomes. This becomes problematic, especially if an employee is holding multi jobs all on part-time basis (Figure 2).

Labor Standards Act art. 18 says "the terms and conditions of employment of part-time workers shall be determined on the basis of relative ratio computed in comparison to those work hours of full-time workers engaged in the same kind of work at the pertinent workplace" (para.1), and "criteria and other necessary

8. Supreme Court of Korea 2018. 10. 12. 2015 DU38092.



Source: Compiled by the Author.

Figure 2. Insurance benefit by IACIA for multi job workers

matters to be considered for the determination of terms and conditions of employment under para.1 shall be prescribed by Presidential Decree." With this, articles including holiday's protection "shall not apply to workers whose contractual working hours per week on an average of four weeks (in cases where their working periods are less than four weeks, such period of working) are less than 15 hours." This is a regulation that makes part-time workers vulnerable.

We had the regulation of IACIA art.36. para.5. which says, "In computing insurance benefits (excluding pneumoconiosis compensation annuities and pneumoconiosis survivor's annuities), where it is deemed inappropriate to apply the average wage to any worker due to his/her unusual type of employment as prescribed by Presidential Decree, an amount computed according to the computation method prescribed by Presidential Decree shall be deemed the average wage for the worker." Also accompanied by the amendment of Enforcement Decree of the IACIA (2016) indicates "Where applying the average wage to a part-time employee … who works for two or more businesses (art. 23), as one example of the "deemed inappropriate to apply the average wage to any worker due to his/her unusual type of employment."

Thanks to this revision, for employees holding more than one part-time work, an amount calculated by dividing the aggregate of the wages that the relevant part-time employee received in the business where the accident occurred during the average wage calculation period and the wages he/she received in other businesses during the same period, by the number of days of the relevant period (art. 24). Though it is only applied for the workers who work as part time, among multi job holders, this is a new attempt to include multi job holder into the legal framework of social security.

2-2. Working time for multi job workers

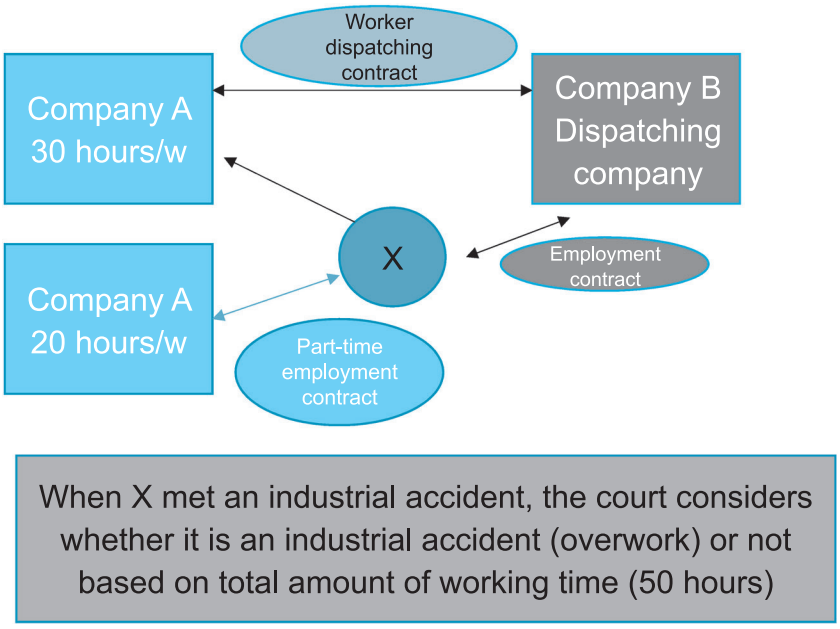
Another issue that can be aroused is about working time regulation of multi job holder. This issue has not been on the table of debate yet, but it does cause a conflicting problem. We have 40- hour ceiling on weekly working hours (LSA art. 50), but do not have any regulation about cases on working for more than one employer and working more than 40 hours a week.

Traditional employment contracts are made between one employer and one employee. Recently, there has

been much debate about plural employers who may have an impact on employment contract, usually discussed as 'joint employers.' However, instead of the debate over joint employers, now we will see about plural employers and an employee who has individual contract with each employer.

We may be confused about protection for employees' health and self-determination, especially when we talk about working time regulation. The rights to decide one's own job and freedom of privacy can collide with employer's managerial process and rights arising there. Working time would be also a unique problem when you have more than two employers, with regard to an upper limit of working hours and time-and-a-half overtime payment. Adding up whole total working hours with multiple employers can be an answer to cope with regulation on the ceiling of working hours by Labor Standards Act. In addition, we do have problems about calculating total hours, which is concerned with privacy and autonomy of employees. This approach can also help to get an inspiration for understanding how to regulate further areas like combined situation of multiple contracts of employment and self-employment (Figure 3).

I would like to introduce a new type of work, which is very popular in Korea, "Coupang Flex." It is delivery service you work as an independent contractor. You can choose the time and place, and the amount of work as you like. Actually, they say "FREE time and place, right now, short period" when they recruit new delivery riders. Many people join the service, just working when they are coming from work to home. With the increase of delivery in the pandemic age, there has been an increase in the number of riders. This is a little different from the classical way of maximum working hours issue, in the sense that the person work there acts partly as an employee (maybe in their original workplace), and partly as an independent contractor (in the relation with an e-commerce company, Coupang). But we still have the challenge to be solved by creating regulations for working hours. Concerning health and safety of workers there, it is necessary to think of new regulations to address the issue of long working hours by both employees and independent contractors. We can take a stance observing the maximum working hours, not just as an employer's duty, but also as a public order which we all should comply to a limited extent with.



Source: Compiled by the Author.

Figure 3. Industrial accident and working hours of multi job workers

IV. More to do

With this new environment in Korea and the changes caused by it, we are making a step by step progress. To some extent, we have dealt with the changes by revision in law. But we still have more to do, advanced by speedy innovation in technologies and application to the real society.

On the one hand, digitalized control could be an authority that does not permit even a little loss between work, optimizing and making full use of labor, leading to a new type of sweat shop. On the other hand, it could be a good chance to make full use of one's life and ability. There apparently are persons who work for the diverse needs. But it is difficult to identify a specific employer among various persons concerned with their work. To whom should the responsibility be assigned? A joint obligation could be one answer. Designating one specific employer in consideration of the importance that each employer takes up could be another answer.

Is this a time that we need an additional rule for a new type of working persons, while maintaining the old labor regulations? Or do we need to make new rules which are more inclusive and comprehensive for all the working persons? Some say that we need a totally different working rule, regulation system, in view of the changed working environment and new technologies that enables it. Of course, there is an argument that we need to maintain basic regulations and add more regulations for non-employees when they are in need, or exemptions when rigid regulations disturb the new situation. In Korea, a new Act bill[9] has just been introduced and is waiting for deliberation at the National Assembly. It mainly contains basic principles about contractual duty by both sides, such as a clear statement of terms and conditions of the contract, equal status in establishing terms and conditions of contract, and it seems to intend to protect new types of working people even if they are not employees. But there also exist concerns about misclassification, and platform workers and unions say that it will categorize marginal employees out of the classical range of the employees, consequently proliferating second-class workers, who do not have full protection of traditional employment law.

We cannot make solutions easily, but what we can and must do at once is creating a basic safety net in this age. Social security system is a primary field where voices asking for reformation is high. Long-term employment for one specific employer which has been a stereotype in Korea is declining, and social security system based on that need to be changed. This is a part of the reasons that Basic Income is such a hot issue recently in Korea. Who is in charge of employers' responsibility? More specifically, who will replace the role that employers have been assigned in the social security system? As the traditional roles of employers in employees' welfare is waning, we should not overlook the government′s initiative in social security, e.g. extending the coverage of unemployment insurance.

Developed technologies and changed working styles say that alliance of the employees could be one answer.[10] New technologies can also be utilized as a means for the new type of working people's organization, such as app-based union or *ad-hoc* bargaining unit. Digital technologies can be a Janus-faced weapon for unions as well as associations of working people. It may make fragmented working environment, enable working people to realize and to individualize their diverse needs and conditions, which looks like a bad sign for traditional solidarity. However, digital technologies also can be used as a way to help far remote persons to organize and share opinions, making united argument to the employee(s). This part of effect should not be overlooked in rule-making and policy-making process.

Are we still trying to utilize the new 'technology for decent work' (ILO 2019; Lyon-Caen 2021)? Or will this whole situation substitute direction of the employer for the technology and artificial intelligence? Fundamentally, it might be time that we can and must think of a new labor regulation. As we examined, MES or new type of direction from the employer side can be interpreted into other ways of direction. We can cope

9. Act on the protection and support for platform workers, introduced on Mar. 18, 2021.
10. López eds., 2019.

with this hurdle by analyzing every single part of the work performed by the person who actually takes order, moves, carries box, and delivers it (Tomassetti 2020). As we can see from the experiences in Korea, invisible directions and orders can be considered as characteristics of employees, and this is a matter of interpretation. As a next step, we may try to find and analyze employers' orders from the system of algorithm (Adams-Prassl 2019; Tomassetti 2021; O'Connor 2016).

But in another perspective, it may be time to think in a different way. Who should be covered by labor law, and who should be protected by compulsory binding law? In other words, it is time to ask again what the concept of the employee is, and what the characteristics of the employee should be. In many countries, we can see similar situations especially about the digitalized environment. Our main concerns are still focused on exploring new way of finding traditional evidence from the new phenomena. Many of the issues have been handled by the traditional labor law. But the concept of the subordination itself, as main basis of the concept of the employee, can be also approached with contemporary views. At the same time, some of the problems can be approached by laws in other fields. Collective action and bargaining by freelancing delivery riders are interesting issues of labor law, but competition law is another way to solve these problems.

Last but not least, recent situation definitely suggests controversial issues between traditional dogmatic of labor law and needs for advanced regulation for a new type of workers. As we can see from the dilemma about the way to regulate working time of multi job holders, this is closely connected with the ideal image of an employee. Self-determination of the workers and protection for them by compulsory, binding law can be contradictable in many situations. Are the workers' needs to be protected, sometimes against their will? If not, should we make them do whatever they want on their own will? Are we giving them enough information for their decisions? Do we get a different answer when they are together, in solidarity? What about the role of collective autonomy? Can a platform be a new chance for the new way of union making? Many of our old issues are still to be debated and explored in more various ways, but we need to think more seriously about the very nature of working people and the role of regulations for them, especially in this age of digitalization.

References

Adams-Prassl, Jeremias. 2019. "What if Your Boss Was an Algorithm? The Rise of Artificial Intelligence at Work." *Comparative Labor Law & Policy Journal* 123. Available at SSRN: https://ssrn.com/abstract=3661151.

Baek, Byung-yeul. 2020. "Tada Forced to End Van-hailing Service in April." *The Korea Times*, accessed June 1, 2021, https://www.koreatimes.co.kr/www/tech/2020/03/133_286018.html.

Chang, Jiyeun et al. 2019. *Comprehensive Labor Market Policy Paradigm for Labor Market Dualization*, Seoul: Korea Labor Institute (in Korean).

ILO. 2019. *Work for a brighter future: Global Commission on the Future of Work*. Geneva, accessed June 1, 2021, https://www.ilo.org/global/topics/future-of-work/WCMS_569528/lang--en/index.htm.

López, Julia López (ed.). 2019. *Collective Bargaining and Collective Action: Labour Agency and Governance in the 21st Century?* Oxford: Hart Publishing.

Lyon-Caen, Antoine. 2021. "Technology and Decent Work: Observations on the Report of the Global Commission on the Future of Work." in Adalberto Perulli and Tiziano Treu (eds.) *The Future of Work. Labour Law and Labour Market Regulation in the Digital Era*, The Netherlands: Kluwer Law International.

Ministry of Employment and Labor (MOEL). 2020. *Responding to COVID-19-Emergency Employment Measures,* accessed June 1, 2021, https://www.moel.go.kr/english/pas/pasDocuments_view.jsp?idx=1561.

———. 2020. *National Assembly passes 10 labor-related amendment bills, including Trade Union and Labour Relation Adjustment Act, Labor Standards Act, Employment Insurance Act, and Industrial Accident Compensation Insurance Act,* accessed June 1, 2021, https://www.moel.go.kr/english/poli/poliNewsnews_view.jsp?idx=1587.

———. 2021. *How MOEL policy will change in 2021,* accessed June 1, 2021, https://www.moel.go.kr/english/pas/pasDocuments_view.jsp?idx=1592.

O'Connor, Sarah. 2016. "When your boss is an algorithm." *FT Magazine*, accessed June 1, 2021, https://www.ft.com/content/88fdc58e-754f-11e6-b60a-de4532d5ea35.

Reich, Robert. 2020. "Covid-19 pandemic shines a light on a new kind of class divide and its inequalities." *The Guardian*, Apr. 26, 2020, accessed June 1, 2021, https://www.theguardian.com/commentisfree/2020/apr/25/covid-19-pandemic-shines-a-light-on-a-new-kind-

of-class-divide-and-its inequalities.
Schauer, Johanna. 2018. *Labor Market Duality in Korea*, IMF Working Paper, WP/18/126. accessed June 1, 2021, https://www.imf.org/en/Publications/WP/Issues/2018/06/01/Labor-Market-Duality-in-Korea-45902.
Tomassetti, Julia. 2020. "Rebalancing Worker Rights and Property Rights in Digitalised Work." in Jo Carby-Hall and Lourdes Mella Méndez (eds.) *Labour Law and the Gig Economy: Challenges Posed by the Digitalisation of Labour Processes*, New York: Routledge.
———. 2021. "Algorithmic Management, Employment, and the Self in Gig Work." in Deepa Das Acevedo (eds.) *Beyond the Algorithm: Qualitative Insights for Gig Work Regulation*, Cambridge: Cambridge University Press.
Vallas, P. Steven. 2019. "Platform Capitalism: What's at Stake for Workers?" *New Labor Forum* 28(1): 48–59.

AUTHOR

Sukhwan CHOI

Assistant Professor, School of Law, Seoul National University.